

Sustainable Development Law

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Introduction

The notion of sustainable development law can be described as the intersection, or arguably, the integration of international economic, environmental and social law. Sustainable development law is an emerging substantive body of legal instruments, norms and treaties, which are supported by distinctive procedural elements.

It is now common for sustainable development to be an agreed objective of many international treaties. Contributing to this developing area of law are examples such as the 2015 United Nations' Agenda, *Transforming Our World: The 2030 Agenda for Sustainable Development*.¹

However, defining what sustainable development law encompasses – what is specifically being referred to when it is discussed – can be unwieldy. Fundamental to an understanding of sustainable development law is the necessity of conceptually understanding the legal principle of sustainable development that underpins sustainable development law. In order to achieve this, the main focus of this chapter is to trace the development, evolution and application of the term sustainable development, and further, identify the implications its two divergent definitions will have on sustainable development law.

This chapter begins by canvassing the origin of the concept of sustainable development, particularly its articulation in the Brundtland Report in 1987, through its evolution and development – notably at the United Nations Conference on Environment and Development ('Rio Earth Summit') in 1992. The two predominant interpretations of sustainable development are then explored: the anthropocentric or 'weak' form is contrasted against the ecocentric or 'strong' form of sustainable development, and how it has been conceptualised historically and developed over time in the broader area of international environmental law is discussed. Finally, the emergence of sustainable development as a fundamental overriding

¹ *Transforming Our World: The 2030 Agenda for Sustainable Development* (A/RES/70/1, United Nations General Assembly 2015).

guiding legal principle through international jurisprudence and international legal documents is outlined. The chapter aims to show that the common ‘weak’ form of sustainable development has dominated the emergence of sustainable development law, and while this is so, the essence of sustainable development has not been captured.

Looking to the future of sustainable development law, if this definition continues to dominate the emerging body of sustainable development law, not only will the core meaning of the legal principle of sustainable development remain missing-in-action, but the actual practical application of this law will be ineffective. Thus it is clear that the challenge of adopting and securing the strong definition – ecological sustainability – is fundamental to both the theoretical underpinnings and practical application of sustainable development law.

Origin and Evolution of the Concept of Sustainable Development

The origin of the concept of sustainable development cannot be exactly pinpointed. Some argue for its use by ancient civilizations wherever there was an attempt at reconciling the needs of development with the protection of the environment.

However, in international and national laws, the idea of sustainable development is a recent development. It was the WCED report that brought it to wider public attention as an overarching objective for the world community to strive for.²

The 1987 Brundtland Report is commonly recognised as having created the term sustainable development.³ The report was the outcome of the work of the United Nations World Commission on Environment and Development (WCED), established in 1983 by a resolution of the General Assembly of the United Nations.⁴ The WCED was established against the

² Hans Christian Bugge and Christina Voigt, ‘Introduction’ in Hans Christian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law: What did the Brundtland Report do to Legal Thinking and Legal Development, and Where Can We Go From Here?* (Europa Law Publishing 2008) vii.

³ Tuula Kolari, ‘The Principle of Common but Differentiated Responsibilities as Contributing to Sustainable Development through Multilateral Environmental Agreements’ in Hans Christian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law: What did the Brundtland Report do to Legal Thinking and Legal Development, and Where Can We Go From Here?* (Europa Law Publishing 2008) 256; Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edn, Cambridge University Press 2018) 252; Philippe Sands, ‘International Law in the Field of Sustainable Development: Emerging Legal Principles’ in Winfried Lang (ed), *Sustainable Development and International Law* (Graham & Trotman 1995); Christina Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff Publishers 2009).

⁴ Hans Christian Bugge, ‘1987–2007: “Our Common Future” Revisited’ in Hans Christian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law: What did the Brundtland Report do to Legal Thinking and Legal Development, and Where Can We Go From Here?* (Europa Law Publishing 2008) 1; *Process of Preparation of the Environmental Perspective to the Year 2000 and Beyond* (GA Res 38/161, A/Res/38/161, United Nations General Assembly 1983) <www.undocs.org/pdf?symbol=en/A/RES/38/161> accessed 24 November 2019.

background of two emerging global themes.⁵ The first theme being that development is not a uniform process benefiting all people and nations, but is divided between developed and developing countries. The second emerging global theme was the observation that the planet's resources are finite, requiring careful management.⁶

The origins of the concept of sustainable development go back to the 1970s, notably the release of the Club of Rome report 'Limits to Growth'⁷ and the 1972 United Nations Conference on the Human Environment, which resulted in the Stockholm Declaration on the Human Environment.⁸ The Club of Rome report forecast that unless countries learned to recognise and respect absolute limits to growth, especially population growth, there would be widespread economic, social and environmental collapse.⁹ In a similar vein, Principle 13 of the Stockholm Declaration urged States to 'adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population' and Principle 14 promoted rational planning as 'an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.'¹⁰ However, there was a key difference between the Club of Rome report and the Stockholm Declaration. The Club of Rome report saw economic growth on a collision course with ecological sustainability, while the Stockholm Declaration aimed to reconcile the two.¹¹

The term sustainable development had arisen prior to the Brundtland Report, appearing in the World Conservation Strategy,¹² which was prepared by some of the world's leading non-governmental organisations (NGOs) in 1980.¹³ The World Conservation Strategy was

⁵ Klaus Bosselmann, 'The Concept of Sustainable Development' in Klaus Bosselmann, David Grinlinton and Prue Taylor (eds), *Environmental Law for a Sustainable Society* (2nd edn, New Zealand Centre for Environmental Law Monograph Series: Vol. 1 2013) 97.

⁶ Ibid.

⁷ Marie-Claire Cordonier Segger, 'Sustainable Development in International Law' in Hans Christian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law: What did the Brundtland Report do to Legal Thinking and Legal Development, and Where Can We Go From Here?* (Europa Law Publishing 2008) 93.

⁸ *Stockholm Declaration on the Human Environment* (A/Conf/48/14/Rev.I, United Nations 1972) <www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofMARPOL/Documents/A%20CONF.48%2014%20Rev.1.pdf> accessed 24 November 2019.

⁹ Cordonier Segger (n 7) 93.

¹⁰ Stockholm Declaration (n 8).

¹¹ Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2nd edn, Routledge 2017) 25.

¹² International Union for Conservation of Nature and Natural Resources, *World Conservation Strategy: Living Resource Conservation for Sustainable Development* (IUCN-UNEP-WWF 1980).

¹³ Bosselmann (n 5) 97.

commissioned by the United Nations Environment Programme, which also provided financial assistance and contributed to the formulation of the basic themes of the Strategy, together with the World Wildlife Fund.¹⁴ The aim of the Strategy was:¹⁵

... to help advance the achievement of sustainable development through the conservation of living resources. The Strategy is intended to stimulate a more focussed approach to living resource conservation and to provide policy guidance on how this can be carried out.

Two years later, in 1982, the United Nations General Assembly adopted the World Charter for Nature.¹⁶ While the World Charter for Nature does not expressly refer to sustainable development, it provides that nature conservation is a prerequisite for all forms of resource use and development.¹⁷ Further, it acknowledges that ‘mankind is part of nature and life depends on the uninterrupted functions of natural systems which ensure the supply of energy and nutrients.’¹⁸ Like the World Conservation Strategy, the World Charter for Nature emphasised the non-anthropocentric nature of sustainability, as is reflected in the first four general principles of the World Charter for Nature:¹⁹

1. Nature shall be respected and its essential processes shall not be impaired.
2. The genetic viability on earth shall not be compromised; the population levels of all life forms, wild and domesticated, must be at least sufficient for their survival, and to this end necessary habitats shall be safeguarded.
3. All areas of the earth, both land and sea, shall be subject to these principles of conservation; special protection shall be given to unique areas, to representative samples of all different types of ecosystems and to the habitats of rare or endangered species.
4. Ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilised by man, shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they coexist.

¹⁴ IUCN (n 122) ii.

¹⁵ Ibid iv.

¹⁶ *World Charter for Nature* (GA Res 37/7, A/Res/37/7, United Nations General Assembly 1982).

¹⁷ Bosselmann (n 5) 97.

¹⁸ *World Charter for Nature* (n 16) preamble.

¹⁹ Ibid articles 1–4.

The Brundtland Report definition of sustainable development therefore arose out of a background of increasing awareness of the disparities between developed and developing countries and the need to resolve these equity issues in an ecologically sustainable manner.²⁰ It has both social and ecological aspects – social aspects being demonstrated by the recognition that development should meet basic human needs (particularly of the poor) and ecological aspects by providing that human activity (state of technology and social organisation) must occur within environmental limitations.²¹

Hans Christian Bugge has summarised the Brundtland Report in similar but slightly different terms.²² In his view, the term sustainable development comprises four core elements:²³

1. Social equity and justice – meeting basic needs for all;
2. Integration of environmental considerations into all aspects of economic and social development;
3. An absolute prohibition on destroying the environment and natural resources on which future generations' life and welfare depends;
4. A long-term view in decision making.

In the same vein, Christina Voigt has expressed the view that even though the Brundtland Report has been criticised for not going far enough and diluting the focus of protection of the environment by including economic and social interests into account, its value cannot be underestimated.²⁴ It has both shaped a new perception of the earth and the crisis it faces, and has created momentum, at a global level, to embrace the concept of sustainable development.²⁵

Since its expression in the Brundtland Report in 1987, the concept of sustainable development has had far reaching implications on a global scale: forming the subject of three

²⁰ Bosselmann (n 111) 27.

²¹ Ibid 28.

²² In 1986–87, Hans Christian Bugge served as personal advisor to Prime Minister Gro Harlem Brundtland in her capacity as chair of the WCED and as State Secretary in Norway's Ministry for Development Cooperation.

²³ Bugge (n 4) 20.

²⁴ Bugge and Voigt (n 2) 16.

²⁵ Ibid.

Earth Summits (1992, 2002, 2012), being incorporated into a multitude of (hard and soft law) international agreements and being given weight in international and national jurisprudence.²⁶

As a direct response to the Brundtland Report, the United Nations convened a conference in Rio de Janeiro – the United Nations Conference on Environment and Development (Rio Earth Summit)²⁷ – with the aim of addressing the ‘urgent problems of environmental protection and socio-economic development.’²⁸ By this time, public awareness of the environmental issues the world was facing had reached an extremely high level, and it was becoming clear that the use of traditional strategies for development was not providing adequate results for developing countries.²⁹ The Rio Earth Summit was attended by 172 Governments, 2,400 representatives of NGOs, with 17,000 people attending the parallel NGO forum.³⁰ It is therefore not surprising that the Summit has been described as a ‘scene of high tensions, vigorous debates and extremely active participation from civil society, scientists, business leaders and many others.’³¹

The Rio Declaration did not define the concept of sustainable development. Instead it laid out a series of principles relevant to achieving sustainable development.³² Principle 2, for example, provides for development to meet the needs of present and future generations.³³ Principle 4 provides for the integration of environmental considerations into all aspects of development, stating that ‘in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’.³⁴ Notably, Principle 7 stipulates the duty of states to co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem’.³⁵ The duty of states to co-operate to protect and restore the integrity of the Earth’s ecosystem has since been repeated in more than 25 international

²⁶ Bugge (n 4) vii, viii.

²⁷ Cordonier Segger (n 7) 98.

²⁸ United Nations, ‘Earth Summit+5’ <www.un.org/esa/earthsummit> accessed 24 November 2019.

²⁹ Cordonier Segger (n 7) 98.

³⁰ United Nations, ‘Earth Summit’ <www.un.org/geninfo/bp/enviro.html>.

³¹ Cordonier Segger (n 7) 98.

³² Cordonier Segger (n 7) 99.

³³ *Report of The United Nations Conference on Environment and Development: Annex 1 Rio Declaration on Environment and Development* (A/CONF/151.26, Vol 1, United Nations General Assembly 1992), principle 2.

³⁴ *Ibid* principle 4.

³⁵ *Ibid* principle 7.

environmental agreements including, for example, the 2015 Paris Agreement.³⁶ Such steering towards Earth's ecological integrity signals a shift away from Western anthropocentric, utilitarian perceptions and can be interpreted as an overarching objective or *grundnorm* underpinning international environmental law.³⁷ The Rio Declaration itself, however, offers little guidance for the core meaning of sustainable development. The general legacy of the Rio Earth Summit was one of 'unfinished business'³⁸ which has not been completed as yet.

The Various Interpretations of Sustainable Development

Since [sustainable development] has come to pervade environmental policy discourse, it is not surprising that its meaning and significance are highly contested. Like the general environmental debate, the debate on [sustainable development] reflects a wide spectrum of political views.³⁹

The debate about the interpretation of the term sustainable development can generally be summarised as the divide between the anthropocentric or 'weak' form of sustainability and the non-anthropocentric/ ecocentric or 'strong' form of sustainable development.⁴⁰ The divide can be traced to a 'paradigmatic difference': the environment is either everything, that is, the biosphere as a whole including humankind, or alternatively, the environment is the physical surroundings of humans.⁴¹

In the weak form of sustainable development, the social, economic and environmental/ ecological elements of the concept are of equal importance and sustainable development is the common ground where the three elements intersect.⁴² Implicit in the weak form of sustainable development is the need for compromise – namely trade-offs in one element to allow improvements in another.⁴³ The weak form of sustainable development is the prevalent view on the concept, as demonstrated in the soft law documentation arising out of the Rio Earth Summit and Johannesburg Summit.

³⁶ Klaus Bosselmann, 'The Ever-Increasing Importance of Ecological Integrity in International and National Law', in Laura Westra, Klaus Bosselmann, Janice Gray and Kathryn Gwiadzon (eds), *Ecological Integrity, Law and Governance* (Routledge 2018) 225–232.

³⁷ Rakhyun Kim and Klaus Bosselmann, 'Operationalizing Sustainable Development: Ecological Integrity as a *Grundnorm* in International Law' (2015) 24 RECIEL 194; Klaus Bosselmann, *Earth Governance: Trusteeship for the Global Commons* (Edward Elgar 2015) 250–251.

³⁸ Bosselmann (n 5) 34.

³⁹ Cordonier Segger (n 7) 100.

⁴⁰ Ibid 102.

⁴¹ Ibid.

⁴² Ibid 103.

⁴³ Ibid 104.

The strong form of sustainable development sees ecology or the environment as the overriding system within which society forms part, and the economy falling within both the ecological and societal systems.⁴⁴ In short, the strong approach to sustainable development encourages economic and social development within the parameters of the biosphere.⁴⁵ The strong view of sustainable development was envisaged by the Brundtland Report; it anticipated that the concept of sustainable development did ‘imply limits – not absolute limits but limitations imposed by the present state of technology and social organization on environmental resources and by the ability of the biosphere to absorb the effects of human activities.’⁴⁶

Nonetheless, regardless of the difference in view as to the weighting to be given to the social, economic and ecological elements, both the strong and weak interpretations of sustainable development involve the integration of these three elements.⁴⁷ Further, it is generally accepted that the dual goal of intra-generational (between the rich and poor) and intergenerational (between the present and the future) equity forms part of the concept of sustainable development.⁴⁸

There have been many efforts to break the concept down into more manageable principles and policy goals. Here are a few examples:

In 2002, the International Law Association produced the New Delhi Declaration of Principles of International Law Relating to Sustainable Development suggesting that there was:⁴⁹

[a] need to further develop international law in the field of sustainable development, with a view to according due weight to both the developmental and environmental concerns, in order to achieve a balanced and comprehensive international law on sustainable development, as called for in Principle 27 of the Rio Declaration and Chapter 39 of Agenda 21 of the UN

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Bugge and Voigt (n 2) 8.

⁴⁷ Bosselmann (n 5) 104.

⁴⁸ Ibid 108.

⁴⁹ International Law Association, *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* (ILA Resolution 3/2002), annexed to *Letter Dated 6 August 2002 from the Permanent Representative of Bangladesh to the United Nations and the Chargé d'affaires a.i. of the Permanent Mission of the Netherlands to the United Nations Addressed to the Secretary-General of the United Nations* (UN Doc. A/57/329, United Nations General Assembly 2002).

Conference on Environment and Development as well as in the various resolutions on legal aspects of sustainable development of the International Law Association.

The New Delhi Declaration identifies seven principles, for which it states ‘the application and, where relevant, consolidation and further development of [these] principles ... would be instrumental in pursuing the objective of sustainable development in an effective way’.⁵⁰ The seven principles identified are:⁵¹

1. The duty of States to ensure sustainable use of natural resources.⁵²
2. The principle of equity and the eradication of poverty.⁵³
3. The principle of common but differentiated responsibilities.⁵⁴
4. The principle of the precautionary approach to human health, natural resources and ecosystems.⁵⁵
5. The principle of public participation and access to information and justice.⁵⁶
6. The principle of good governance.⁵⁷
7. The principle of integration and interrelationship, in particular in relation to human rights and social, economic and environment objectives.⁵⁸

Philippe Sands has in turn identified ‘four elements [that] can be considered to provide the core legal elements of “sustainable development” as used in the Brundtland Report’.⁵⁹ These four core elements were identified as:

1. The principle of intergenerational equity;

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² States are under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples, to the conservation and sustainable use of natural resources and the protection of the environment.

⁵³ This principle relates to both intergenerational and intra-generational equity – namely the right of all people (both present and future generations) of fair access and entitlement to the Earth’s natural resources.

⁵⁴ All States are under a duty to cooperate in the achievement of global sustainable development and the protection of the environment, however the special needs and interests of developing countries and their ability to respond must be recognised.

⁵⁵ A precautionary approach needs to be taken in light of scientific uncertainty, particularly where activities may cause serious long-term or irreversible harm.

⁵⁶ Public participation in decision making and a right to appropriate, comprehensible and timely information.

⁵⁷ Responsive, transparent and accountable governments are seen as essential to sustainable development.

⁵⁸ The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind.

⁵⁹ Philippe Sands (n 3) 58.

2. The principle of sustainable use;
3. The principle of equitable use; and
4. The principle of integration.⁶⁰

Philippe Sands then goes on to outline seven principles ‘having particular relevance in the field of sustainable development’,⁶¹ namely:⁶²

1. Sovereignty over natural resources and the responsibility not to cause environmental damage;⁶³
2. The principle of good neighbourliness and international cooperation;⁶⁴
3. The principle of common but differentiated responsibility;⁶⁵
4. The principle of good governance, including participatory democracy;⁶⁶
5. The principle of preventive action;⁶⁷
6. The precautionary principle;⁶⁸ and
7. The polluter pays principle.⁶⁹

Others have also suggested a range of concepts and principles of international law for sustainable development.⁷⁰ However the principles of the law of sustainable development do not give an overall direction; they are more like tools in the sustainable development toolbox.

⁶⁰ Ibid 58–61.

⁶¹ Ibid 62.

⁶² Ibid 62–66.

⁶³ That States have sovereign rights over their natural resources, but also the obligation not to cause damage to the environment.

⁶⁴ Namely the obligation to cooperate, captured in Article 74 of the Charter of the United Nations in relation to social, economic and commercial matters.

⁶⁵ This principle has two aspects. The first is the common responsibility of States for the protection of the environment. The second is the need to take into account the differing economic, social and other circumstances particularly as they relate to each State’s contribution to the creation of the particular problem and its ability to respond to, prevent, reduce and control that problem.

⁶⁶ Reflecting that citizens are entitled to participate in decision making, including access to information and access to remedy and redress.

⁶⁷ The obligation to protect the environment (or minimise environmental damage), as an end in itself. The principle requires action to be taken at an early stage, and if possible, before any damage has occurred.

⁶⁸ The need to take steps to protect the environment in the face of scientific uncertainty.

⁶⁹ The costs of pollution should be borne by the person or persons responsible for causing the pollution, including the consequential costs.

⁷⁰ For example, *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26–28 September 1995* (United Nations 1996). It identifies 19 principles and concepts of international law for sustainable development in the context of the Rio Declaration, Agenda 21, international treaties and other legal instruments at that time. See also Cordonier Segger (n 7) 165.

To this end, it is necessary to turn to the United Nations' Sustainable Development Goals of Importance ('SDGs'). Emerging from the 2012 Rio+20 Summit and adopted in 2015, they provide States with a framework for law and policy development.⁷¹ The 17 goals, while mostly relevant and succinct are, however, not without flaws. They are not legally binding, not well-connected, partially self-contradicting and without a unifying purpose. All this makes them vulnerable to political maneuvering, manipulation and deviation. Essentially, there is no mutual understanding on how to achieve the goals and, crucially, sustainable development.

One way to make the SDGs more operable is to distinguish between ecological, social and economic goals and organise them in a hierarchical, nested-egg manner: SDGs protecting the biosphere (6, 13, 14, 15) form the basis for achieving social goals (1, 2, 3, 4, 5, 7, 11, 16) to give direction for achieving economic goals (8, 9, 10, 12). The means to guide this process are addressed in SDG 17 (Partnerships for Goals).⁷² Even more direction could be provided if the SDGs are viewed as a nested system of goals, targets and indicators with an overarching objective to preserve and restore the integrity of the Earth system.⁷³ Such advanced concepts of the SDGs would meet the widely expressed criticism that by 2030 a number of the SDGs may have been achieved, yet the world has become even more unsustainable than today.⁷⁴

The essence of sustainable development must be the concern for ecological integrity. As expressed by Christina Voigt:⁷⁵

In establishing the core of sustainable development, ecological thresholds cannot be ignored without rendering the result unsustainable. They provide the nucleus around which clearer meaning and content of sustainable development evolves.

⁷¹ United Nations, 'Sustainable Development Goals: Knowledge Platform' <www.sustainabledevelopment.un.org> accessed 29 November 2019.

⁷² David Griggs, Mark Stafford Smith, Johan Rockström, Marcus Öhman, Owen Gaffney, Gisbert Glaser, Norichika Kanie, Ian Noble, Will Steffen, Priya Shyamsundar, 'An Integrated Framework for Sustainable Development Goals' (2014) 19(4) *Ecology and Society* 49.

⁷³ Bosselmann (n 11) 20; Rakhyun Kim, Klaus Bosselmann and Volker Mauerhofer, *Planetary Boundaries in Post-2015 Sustainable Development Goals: Safeguarding Ecological Integrity as a Priority Goal and a Grundnorm of International Law* (Planetary Boundaries Initiative 2013) <www.planetaryboundariesinitiative.org/wp-content/uploads/2013/07/The-Kim-Report-September-2013.pdf> accessed 29 November 2019.

⁷⁴ Jorgen Randers, Johan Rockström, Per Stoknes, Ulrich Goluke, David Collste and Sarah Cornell, *Achieving the 17 Sustainable Development Goals Within 9 Planetary Boundaries* (EarthArXiv 2018) <www.eartharxiv.org/xwevb/> accessed 29 November 2019.

⁷⁵ Bugge and Voigt (n 2) 5.

Without this recognition, the implementation of sustainable development will be ineffective.⁷⁶

... ‘sustainable development’, as formally characterized, invites an overly anthropocentric and instrumentalist interpretation which in the long run is apt to thwart the very pursuit of those goals that ‘sustainability’ is said to embody.

This meaning of of sustainable development becomes even more apparent when one traces the principle back in history – ‘[a]lthough the term “sustainable development” has been used only since the 1980s, the underlying idea is probably as old as humanity’s struggle with the forces of nature.’⁷⁷ The history of sustainable development was also highlighted in the separate opinion of Vice-President Weeramantry in the *Gabčíkovo–Nagymaros Project* case.⁷⁸

Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.

When the history of sustainable development is traced, it becomes apparent that the legal principle of (ecological) sustainability creates the meaning and essence of sustainable development.⁷⁹

The term ‘sustainable development’ was first documented in laws governing forest industry management practices in Europe toward the end of the 18th century.⁸⁰ The laws permitted harvesting of only as much of the forest as would grow again each year, so that the forest as a whole would be maintained.⁸¹ However, others have traced sustainability concepts back as early as around 1350 when continental Europe suffered a major ecological crisis.⁸² At that

⁷⁶ Günther Handl, ‘Sustainable Development: General Rules versus Specific Obligations’ in Winfried Lang (ed), *Sustainable Development and International Law* (Graham & Trotman Ltd 1995) 38.

⁷⁷ Bosselmann (n 5) 95.

⁷⁸ *Gabčíkovo–Nagymaros Project (Hungry v Slovakia)* [1997] ICJ Rep 7 [107]–[108].

⁷⁹ Bosselmann (n 111) 5.

⁸⁰ Cordonier Segger (n 7) 92.

⁸¹ *Ibid.*

⁸² Bosselmann (n 111) 12.

time, townships and local principalities undertook large-scale reforestation and enacted laws based on sustainability – the idea was to only harvest as much wood as would grow again, and to plant trees for the benefit of future generations.⁸³ This all was reversed with the industrial revolution, bringing with it a resource-intensive and short-term orientation, and changes to legislation to mirror this shift in focus.⁸⁴

The constant theme throughout history in relation to sustainable practices was to live from the yield and not from the substance of the resource.⁸⁵ In essence, development and use of resources was to take place without jeopardising ecological integrity.

⁸³ Ibid.

⁸⁴ Ibid 20.

⁸⁵ Ibid.

The Status Of Sustainable Development In International Law

A helpful approach to [sustainable development] is to liken it to the idea of justice. We accept justice as a fundamental principle of society and, although we may not have an agreed definition, we know when it is not there or when we are moving towards it. The same is true for sustainability. The ethical impetus behind both is widely accepted as central for building a just, sustainable society.⁸⁶

Not only is the core meaning of sustainable development the subject of much debate, so too is its legal status in international law. Some argue that sustainable development is a new customary principle of international law, which is in the process of being established as binding on all but a few persistently objecting states. Others suggest that it is a general principle of international law,⁸⁷ and others consider that given its broad and vague nature it has no status at all.⁸⁸

Sustainable development has been recognised in international jurisprudence. Examples of this include the *Gabčíkovo–Nagymaros Project*⁸⁹ and the *Pulp Mills* case⁹⁰ – both decisions of the International Court of Justice – and the award of the Permanent Court of Arbitration in the *Iron Rhine (Belgium v The Netherlands)* case.⁹¹

The decision of the International Court of Justice in *Gabčíkovo–Nagymaros Project* was the first time sustainable development was given express recognition in international jurisprudence.⁹² The case involved a dispute over the construction of a number of dams along the Danube River. Hungary and Czechoslovakia had entered into a treaty agreeing to build and jointly operate these dams, however, after a short period of construction, Hungary suspended work on the project in 1989. Hungary did so on the basis of the potential for significant environmental harm to the ecological river system and its biological diversity and to the water supply for Budapest. Nonetheless Czechoslovakia, and, after 1993, Slovakia,

⁸⁶ Bosselmann (n 5) 96.

⁸⁷ Voigt (n 3) ch 6.

⁸⁸ Gerd Winter, 'A Fundament and Two Pillars: The Concept of Sustainable Development 20 Years After the Brundtland Report' in Hans Christian Bugge and Christina Voigt (eds), *Sustainable Development in International and National Law: What did the Brundtland Report do to Legal Thinking and Legal Development, and Where Can We Go From Here?* (Europa Law Publishing 2008); Michael McCloskey, 'The Emperor Has No Clothes: The Conundrum of Sustainable Development' (1999) 9 *Duke Envtl L & Pol'y F* 153.

⁸⁹ *Gabčíkovo–Nagymaros Project* (n 78).

⁹⁰ *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14.

⁹¹ *Iron Rhine (Belgium v The Netherlands)* 24 May 2005 <<https://pca-cpa.org/en/cases/1>> accessed 25 November 2019.

⁹² Voigt (n 3) 172.

proceeded with constructing one of the dams (the Gabčíkovo power plant), which required the diversion of approximately 80 per cent of the shared water into a bypass canal on Slovak territory. In 1992 Hungary purported to terminate the 1977 treaty. When Slovakia disagreed, the matter was referred to the International Court of Justice.⁹³

While the Court did not address whether the project was sustainable or not, the Court did require the parties to look afresh at the environmental consequences of the project and to find a satisfactory solution that took account of the objectives of the 1977 Treaty, as well as the norms of international environmental law and the principles of the law of international watercourses.⁹⁴

In terms of sustainable development, the majority decision commented:⁹⁵

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions of unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities, but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

While the majority decision did not go so far as to acknowledge sustainable development as a legal principle, Vice-President Weeramantry was prepared take the matter of the status of sustainable development further. In his separately issued opinion, he stated that sustainable development was ‘more than a mere concept ... a principle with normative value which is crucial to the determination of this case.’⁹⁶

In the *Iron Rhine* case,⁹⁷ the Permanent Court of Arbitration also acknowledged the status of sustainable development as an emerging principle in international law. The dispute concerned

⁹³ Summary of the facts provided in Voigt (n 3) 173.

⁹⁴ *Gabčíkovo–Nagymaros Project* (n 78) [140]–[141].

⁹⁵ *Ibid* [140].

⁹⁶ *Ibid* [85] (Vice-President Weeramantry).

⁹⁷ *Iron Rhine* (n 91).

the reactivation of the historic Iron Rhine railway that ran from Belgium to Germany, crossing the territory of the Netherlands. Rights of transit through the Netherlands had been conferred to Belgium in the 1939 Treaty of Separation. The route had effectively been out of use during the 1990s and the Netherlands had in the meantime designated a number of nature reserves on either side of the route. In 2001, Belgium undertook an Environmental Impact Assessment, intending the temporary use of the route with the prospect of full reactivation. Belgium and the Netherlands however disagreed on the use of the route and the allocation of costs for the environmental measures required by the Netherlands.⁹⁸

At paragraph 59 of the award, the Tribunal commented:⁹⁹

Importantly, these emerging principles [making reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations] now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm ... This duty, in the opinion of the Tribunal, has now become a principle of general international law.

The Tribunal referred to the decision of the International Court of Justice in the *Gabčíkovo–Nagymaros Project* case and came to the same opinion that sustainable development was as relevant in determining the application of the Treaty in the present case, as it was in *Gabčíkovo–Nagymaros Project*.

In *Pulp Mills*, a decision of the International Court of Justice, there was a recognisable progression in the terminology surrounding sustainable development from *Gabčíkovo–Nagymaros Project*. In this case, Argentina argued that Uruguay had violated the Statute of the River Uruguay in constructing two pulp mills on the banks of the river which had caused damage to both the environment of the river and its coastal zone.¹⁰⁰ In a separate opinion, Judge Cançado Trindade stated that sustainable development evolved to a ‘general principle

⁹⁸ Summary of the facts provided in Voigt (n 3) 175.

⁹⁹ *Iron Rhine* (n 91) [59].

¹⁰⁰ *Pulp Mills* (n 90).

of International Environmental Law'.¹⁰¹ While not going this far, the majority did use terminology beyond that of the majority in *Gabčíkovo–Nagymaros Project*.¹⁰² Here, the majority stated that the object of Article 27 of the Statute of the River Uruguay, which is what Argentina claimed Uruguay had breached, was 'consistent with the objective of sustainable development'.¹⁰³ Further, the court read sustainable development into the meaning of Article 27, meaning its implementation must be consistent with this objective.¹⁰⁴ Sustainable development in *Pulp Mills* was recognised as more than a concept, it was considered an objective that state conduct, here as defined by Article 27, had to be consistent with.¹⁰⁵

Sustainable Development has been referred to in many key treaties, including United Nations Framework Convention on Climate Change,¹⁰⁶ the United Nations Convention on Biological Diversity,¹⁰⁷ and the United Nations Convention to Combat Desertification¹⁰⁸. In these and other state-negotiated agreements sustainable development still lacks a clear direction needed for its operationality and in this context it is helpful to consider the Earth Charter which was drafted in direct response to the 1992 Earth Summit failing to reach consensus on a sustainable development treaty.

The Earth Charter, adopted in 2000, had no input from states. Rather, numerous civil society groups created it as a global, cross-cultural, cross-religious ethical framework for achieving sustainable development.¹⁰⁹ It adopted an ecocentric approach to sustainable development based on 'respect and care for the community of life' (main principle 1). Its second main principle defines ecological integrity as the core of sustainability. For example, sub-principle 5 provides for the 'protect[ion] and [restoration of] the integrity of Earth's ecological systems, with special concern for biological diversity and the natural processes that sustain life'. And sub-principle 7, in turn, provides for the '[adoption of] patterns of production,

¹⁰¹ Ibid [177].

¹⁰² Bosselmann (n 11) 86.

¹⁰³ *Pulp Mills* (n 90) [177].

¹⁰⁴ Bosselmann (n 11) 86.

¹⁰⁵ Ibid.

¹⁰⁶ *United Nations Framework Convention on Climate Change* (FCCC/INFORMAL/84, United Nations 1992).

¹⁰⁷ *United Nations Convention on Biological Diversity* (No. 30619, United Nations 1993).

¹⁰⁸ *United Nations Convention to Combat Desertification* (A/AC.241/27, United Nations 1994).

¹⁰⁹ Earth Charter Initiative, 'What is the Earth Charter?' <www.earthcharter.org/discover/what-is-the-earth-charter> accessed 25 November 2019.

consumption, and reproduction that safeguard Earth's regenerative capacities, human rights, and community wellbeing.¹¹⁰

Conclusion

Sustainable development law is an emerging body of substantive law at the intersection of international economic, environmental and social law. Key to understanding what sustainable development law encompasses is the conceptual understanding of sustainable development, which underpins this body of law. In order to achieve this, the main focus of this chapter has been to trace the development, evolution and application of the term sustainable development in international environmental law and jurisprudence.

It is clear that sustainable development is an emerging fundamental legal principle of increasing importance. Starting with the definition of the term in the 1987 Brundtland Report, the term has received increasing acceptance. However, the generally accepted interpretation of the term, at least at State-level, is the weak and more politically palatable form of sustainable development – according equal weight to the social, economic and environmental/ ecological elements of the concept.

While there has been much debate over the content or core of sustainable development, when tracing back through the history of the concept, the core essence of sustainable development becomes clear: ecological sustainability. Without this core meaning, and without the biosphere forming the parameter within which social and economic development must take place, sustainable development will be ineffective.

The challenge posed by the adoption of a strong form of sustainable development is not insubstantial and will require changes to how we live and operate. However the choice of whether to adopt the strong form of sustainability will undoubtedly be soon out of our hands. As the authors of the Brundtland Report pointed out more than 30 years ago:¹¹¹

¹¹⁰ Earth Charter Initiative, 'The Earth Charter' <www.earthcharter.org/discover/the-earth-charter> accessed 25 November 2019.

¹¹¹ Bugge and Voigt (n 2) 1–2.

We are not forecasting the future; we are serving a notice – urgent notice based on the latest and best scientific evidence – that the time has come to take the decision needed to secure the resources to sustain this and coming generations.

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