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(p. 285) Chapter 17 Sustainable Development

I. Introduction

Sustainable development is the main concept underpinning our policy response to the environmental crisis the world faces. As such, it is pervasive in all sorts of documents, writings, and discourse, including legal ones and, within the latter, international legal instruments.[1] Its ubiquitous character is only matched by its vagueness; and its vagueness is a deliberate choice driven by its function, which is to rally rather than to divide.[2]

This chapter examines the concept of sustainable development specifically from the perspective of international law. It investigates three main aspects: (1) the conceptual history of sustainable development; (2) the legal meaning attached to this concept; and, on the basis of these two aspects, also (3) the nature, functions, and practical operation of sustainable development in international legal practice. The emphasis is placed on (2) and (3) because (1) is examined in detail elsewhere in this volume.[3]

One major challenge that must be overcome when writing about sustainable development is the conceptual fog coating a large part of the work in this area. This is partly due to the deliberate vagueness of the concept, which lends itself to far too many (mis-)interpretations. To navigate this difficulty, one must strike a balance amongst three competing considerations, namely the conceptual aspects of sustainable development (which sometimes misrepresent its legal use), the actual practice in the use of this concept (which is sometimes incoherent and difficult to conceptualize clearly), and (p. 286) its inherent ethical dimension (which requires a view of what sustainable development 'should' be). I cannot claim that this chapter solves this set of equations, but they have been specifically taken into account. The balance struck in this chapter prioritizes actual practice, with the normative dimension and the conceptual clarity coming in the second and third place, respectively. This will become clearer as the discussion unfolds.

II. The Concept of Sustainable Development in Historical Perspective

Historically, the concept of 'sustainable development' is a newcomer. Although it was in use already in 1980,[4] it was only brought to the centre stage of global environmental governance much later, between 1987 and 1992. This period saw the transformation of sustainable development from a policy proposal made in the influential report of the Brundtland Commission, 'Our Common Future',[5] into the conceptual epicentre of global environmental governance, at the 1992 Rio Conference. The Rio Conference and, particularly, the Rio Declaration,[6] brought the concept of sustainable development to the forefront, as the embodiment of a compromise between two—still—competing considerations: development (whether economic or social) and environmental protection.

Before 1992, the tension between these two considerations had received less consensual articulations. The first such attempt was made at a meeting held in Founex, one year before the 1972 Stockholm Conference. At Founex, a fragile conceptual truce was reached between development and environment, whereby the primary environmental responsibility of developing and newly independent countries was deemed to be development.[7] As Indira Gandhi, then India's Prime Minister, put it in her address at Stockholm: '[a]re not poverty and need the greatest polluters? … The environment cannot be improved in conditions of poverty'.[8]

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The Founex approach was not the only solution to the environment-development equation considered in the early years of global environmental governance. Other concepts were proposed, each representing a deeper strand of thought, including the (p. 287) concepts of ‘de-growth’,[9] ‘eco-development’,[10] and even the ‘green economy’, which was first launched in the 1980s[11] and made a comeback after the 2008 economic crisis. These concepts and their associated programmes can be organized along a spectrum ranging from de-growth, which questioned the very idea of growth and development, to the green economy, which essentially presented environmental policy as the best industrial policy approach to achieve prosperity. Concepts such as eco-development, which came to represent the Founex approach, and sustainable development, were somewhere between the two poles of the spectrum. Thus, from the standpoint of conceptual history, sustainable development was but one contender among several others until the Brundtland Commission selected it and the Rio Conference ‘crowned’ it.

As a conceptual synthesis, sustainable development offered two major advantages. First, it was less associated with a specific stance or country group than ‘eco-development’ or the ‘green economy’. Secondly, the very vagueness of the concept made it malleable enough to rally all countries to the cause right after the end of the Cold War, in what appeared to be a unique window for global normative re-organization. A quarter of a century after the 1992 Rio Conference, one can better appreciate the merits and the shortcomings of such a conceptual bet. The bet indeed paid off as far as normative development is concerned. Since the 1990s, virtually all countries have rallied behind the concept of sustainable development and that, in turn, has facilitated the adoption of several treaty regimes bringing together developed and developing countries. Yet, that convening power was premised on the ‘original sin’ of sustainable development: its deliberate vagueness. Such vagueness has become a major obstacle in attempts to go beyond the mere adoption of new law and into its effective implementation.

The conceptual evolution of global environmental governance, and the place of sustainable development within it, are summarized graphically in Figure 17.1.[12] This graphic representation draws a line that starts with a view of nature as a ‘natural resource’ to be exploited for the benefit of each state, epitomized by UN General Assembly Resolution 1803(XVII) on ‘Permanent Sovereignty over Natural Resources’,[13] and ends with our current horizon, the sustainable development goals (SDGs) adopted in 2015 as the core of the 2030 Agenda for Sustainable Development.[14] The integrated and participative (p. 288) nature of the SDGs must certainly be praised. ‘Development’ no longer refers to the situation of ‘developing’ countries but, as presently understood, it also encompasses ‘growth’ and it is hence applicable also to developed countries. In other words, ‘development’ now means prosperity. The SDGs provide a momentous and, in practice, influential guide for action for all countries. But at no point in the entire strategy is environmental protection clearly and unambiguously prioritized over economic and social development. This is the broad context in which international environmental law must operate and where the legal concept of sustainable development ‘should’ be understood.

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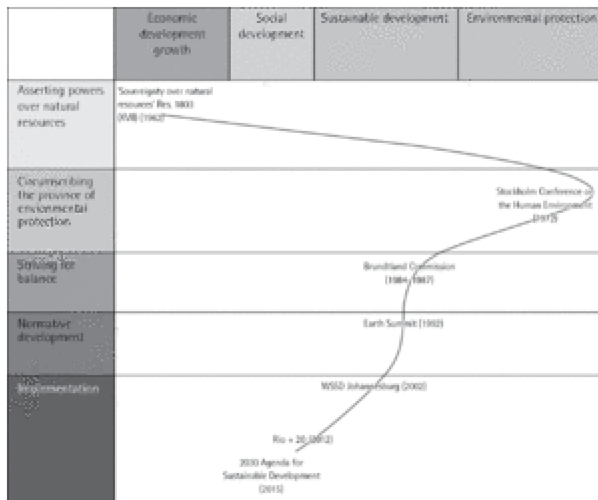

Figure 17.1 The conceptual evolution of sustainable development

III. 'Sustainable' Development From a Legal Standpoint

The determination of the legal content of the concept of sustainable development presupposes two premises, which, in turn, can only be derived from an analysis of (p. 289) practice. The first premise is that sustainable development is not only a concept but also a 'norm' and, more specifically, a norm of international law. The second is that the legal content of such a norm can be sufficiently ascertained.

The first premise can be derived from a simple observation, namely that the concept of sustainable development has been referred to in legal practice, not only in policy instruments[15] but also in treaties[16] and judicial decisions.[17] Such references are not merely descriptive, as could be the reference to a certain fact or set of facts (eg development disparities or an emergency situation); they refer to sustainable development as a norm, understood as a prescriptive or permissive proposition which entails legal effects (prescribes or permits the operation of other interlocked norms).[18] I will investigate the nature, identity (across legal sources), and operation of such a norm in Section IV. For now, it is sufficient to observe that sustainable development is not merely a concept, such as de-growth, eco-development, or the green economy, but a normative concept.

The second premise assumes the first but goes a step further. It holds that, as a norm, sustainable development has distinctive or identifiable content. The ascertainment of this content involves two separate inquiries. First, one must determine the content of this norm in a discursive context where there are competing accounts of it. Secondly, and most importantly, one must identify the process or method followed to determine the content of the norm. Different processes are likely to lead not only to different (p. 290) contents but also to different normative implications. For this reason, the second inquiry is more fundamental than the first and, as noted earlier, I shall prioritize actual practice over both moral preference and conceptual clarity. Thus characterized, the second inquiry consists of reviewing actual practice to determine the content of 'sustainable development' as a norm and, first and foremost, the 'practice' on the basis of which one can assert that sustainable development is not a mere concept, but a norm. To remove any major ambiguities, I will rely primarily on treaties in force and, above all, the case law explicitly referring to 'sustainable development'.

Relying on such a body of practice, 'sustainable' development means: (i) development which, as a necessary procedural step, 'takes into account' environmental protection (integration); and (ii) which does so in a way that is consistent with the environmental treaty obligations undertaken by a country or, at the very least, with the core content of customary international environmental law applicable to all countries (ie the prevention

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principle, integrating the duty of due diligence in the context of environmental protection, as further expressed in procedural form by the duty to co-operate and the duty to conduct an environmental impact assessment (EIA)).[19] This understanding is suggested by the first judicial recognition, in explicit terms, of the 'concept of sustainable development' by the International Court of Justice (ICJ) in the case concerning the *Gabčíkovo-Nagymaros Project*.[20]

The procedural step of 'tak[ing] into consideration' new environmental norms is often called 'integration'. There is ample support for integration in the case law[21] and this requirement is seen as a step towards the achievement of sustainable development.[22] But this step is not sufficient to determine the content of 'sustainable' development as such. For development to be 'sustainable': 'new norms and standards … set forth in a great number of instruments' have to be given 'proper weight'.[23] Those norms and standards encompass both treaties and a range of other instruments codifying general international law. The relevant treaties involve many multilateral environmental treaties (MEAs) with almost universal participation but also regional and bilateral treaties.[24] But the minimal core content of the concept is the one recognized in general international (p. 291) law. To determine such content, a finer-grained analysis is necessary to distill from other judicial decisions what the inquiries conducted by different international courts and tribunals regarding this issue converge on.

A close examination of the relatively limited set of decisions that makes explicit and unambiguous reference to 'sustainable development' supports the proposition that 'sustainable' development means development in accordance with customary international environmental law. In the case concerning the *Iron Rhine Railway*, the tribunal specifically discussed the *Gabčíkovo-Nagymaros* case and concluded that 'where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm (see paragraph 222). This duty, in the opinion of the Tribunal, has now become a principle of general international law'.[25] Paragraph 222 of the award explicitly refers to the prevention principle, recognized as a customary norm in the ICJ's *Advisory Opinion on the Legality of Nuclear Weapons*.[26] In the *Pulp Mills* case, the ICJ reasoned that the need to integrate economic and environmental considerations embodied in the concept of sustainable development was achieved *in casu* 'through the performance of both the procedural and the substantive obligations laid down by the [applicable river treaty]'.[27] In turn, these obligations were presented as specific treaty applications of core customary norms.[28] Such understanding has been subsequently confirmed in at least three other cases decided in different fora.[29]

The evidence discussed so far demonstrates that sustainable development is indeed a norm and that its content must be determined by reference to the evolving treaty and customary law of environmental protection. This conclusion has three important implications. First, despite the contribution of some earlier studies to the conceptual clarification of sustainable development,[30] they do not represent accurate statements of the content of sustainable development in positive international law. Their contribution, and perhaps their fundamental purpose, lies in an attempt at formulating what sustainable development 'should' be (moral preference) and at clarifying how it inter-relates (p. 292) with a range of other principles (conceptual clarity). Secondly, treaty and customary law do evolve and, over time, that evolution will place increasingly stringent conditions for development to be genuinely 'sustainable'. Thirdly, as discussed next, sustainable development is a peculiar type of norm, a 'normative concept', which cannot perform some functions unless it is decomposed into more specific norms.

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IV. The Operation of Sustainable Development in Legal Practice

A. The Nature of Sustainable Development as a Norm

When the ICJ first recognized the 'concept' of sustainable development, Judge Weeramantry appended a Separate Opinion dissenting with the majority on this point and calling for its recognition as a 'principle'.[31] This dissension epitomizes a broader debate in the scholarship as to the nature of 'sustainable development'.[32]

Here again, my focus will be on actual practice rather than on normative stances or attempts at conceptual clarification. For present purposes, it will suffice to make three observations. First, from the perspective of general international law, particular weight must be given to the position of the majority of the ICJ, which has confirmed the characterization of 'sustainable development' as a 'concept' in a subsequent decision.[33] Secondly, the reservations expressed by Judge Weeramantry must be situated in their historical context. What he seemed to fear was a characterization that would deprive 'sustainable development' of 'normative value'. Yet, with the benefit of hindsight, such 'normative value' has indeed been ascribed to the concept. As noted earlier, unlike 'eco-development', the 'green economy' or 'de-growth', 'sustainable development' is not a mere concept, but a normative concept. Thirdly, as discussed in more detail in the next section, using different terms such as a 'concept' or a 'principle' to characterize 'sustainable development' is only relevant if such characterization carries different legal consequences.

The third observation raises an additional point. It assumes an analytical cartography of consequences or functions. These cartographies can be built in such a way as to reach a pre-determined conclusion driven by an end purpose (reflecting practice, asserting a moral preference, or enhancing conceptual clarity). That may well be an unavoidable feature of any account, but at the very least one must state explicitly the approach selected. My priority in this chapter is accuracy from a practitioner's perspective. The approach followed in the next section thus endeavours to provide an accurate (p. 293) reflection of legal practice. It relies on an analytical cartography under which whether a norm is a 'concept' or a 'principle' depends upon the function it performs in practice. In this account, the main difference between 'concepts' and 'principles' is that, unlike the former, the latter can perform a 'decision-making' function, that is, operate as a primary rule of obligation governing the conduct of states and on the basis of which a case can be decided. From this perspective, 'sustainable development' is a concept. This will become clearer in the following discussion.

B. Functions of Sustainable Development as a Norm

1. Analytical distinctions

In order to map the operation of sustainable development in legal practice, it is necessary to follow a clear methodology that sets both the reach and the limits of the inquiry. In this section, I rely on a methodology that I developed in some of my earlier work.[34]

This methodology is based on a distinction between three main functions. First, a norm may perform an 'architectural function' in that it may shape, at least partly, a treaty (or a section thereof), a legally-linked set of treaties or, more generally, a policy instrument (eg an agenda). I will call 'normative impact' the extent to which the concept of sustainable development has performed an architectural function. Given the nature of sustainable development, the normative impact can be expected to be vast. But, in my discussion, I will only include a sub-set of instruments selected on the basis of their importance (only major instruments, both binding and non-binding) and their representative character (only instruments adopted in or after the 1992 Rio Conference). Secondly, a norm may perform an 'interpretive function' in that it is relied upon to clarify another norm, or to update its content (a peculiar form of clarification involving an intertemporal element), or to reconcile competing norms or the values underpinning them (another peculiar type of clarification

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seeking to harmonize different legally protected interests). Thirdly, a norm may perform a 'decision-making function' when it can be relied upon, as such and without reference to related but more specific norms, as a primary rule of obligation defining a conduct to decide a case. I will call 'jurisprudential relevance' the extent to which a norm can perform interpretive and decision-making functions.

As I shall endeavour to show, the concept of sustainable development performs only architectural and interpretive functions. So far, it has not performed a decision-making function in international adjudication and that is possibly an inherent rather than a merely practical limitation. Indeed, to the extent that the 'sustainable' component is defined by reference to treaty norms, it is not the concept of sustainable development as (p. 294) such which is used to decide the case but the relevant treaty norm. As for cases where the 'sustainable' component is defined by reference to customary norms, so far in all relevant cases the controlling norm was one of the expressions of the concept of sustainable development (ie the prevention principle, the duty to cooperate, and the duty to conduct an environmental impact assessment). Even if other possible expressions of the concept of sustainable development are considered, such as the procedural requirement to 'take into account' environmental protection or to interpret existing norms in the light of environmental standards, the decision-making function would be performed by a stand-alone principle (eg the principle of integration or, more likely, a specific application of systemic integration or intertemporal law) or the function itself would be different (an 'interpretive' rather than a 'decision-making' function).

2. Normative impact

The normative impact of the concept of sustainable development can be assessed at different degrees of specificity. At a rather general level, references to 'sustainable development' appear in a number of important instruments, including non-binding policy instruments,[35] environmental agreements,[36] and even agreements focusing on other matters.[37] Of particular note, at this first level, are the references to 'sustainable development' in the 1992 Rio Declaration,[38] the 1995 Marrakesh Agreement establishing the World Trade Organization (WTO), the 1992 UNFCCC (United Nations Framework Convention on Climate Change), and, more recently, the 2030 Agenda for Sustainable Development and 2015 Paris Agreement. Yet, this level is too general to ascertain whether the concept of sustainable development has indeed played an 'architectural function'.

At a second and more specific level, it appears that the concept of sustainable development has indeed performed an architectural function in the design of some important action plans, particularly Agenda 21 (1992), the 2002 Johannesburg Plan of Implementation, the 2012 Outcome document of the Rio+20 Summit and, above all, the 2030 Agenda for Sustainable Development (2015). The latter is noteworthy for its attempt at integrating the economic, social, and environmental dimensions of development.[39] Yet, the integrative dimension is only one aspect of the legal concept of (p. 295) sustainable development. The other aspects, whether formulated in treaty or customary norms, are less present in the SDGs. Very few agreements and legal norms are explicitly referred to in the SDGs, in relation to economic development (eg the WTO, particularly the TRIPs Agreement[40]), social development (eg human rights[41] or the WHO Framework Convention on Tobacco Control[42]) and environmental protection (eg the UNFCCC,[43] UNCLOS,[44] and international agreements of public access to information[45]). But this may be explained by the fact that neither the SDGs nor the wider 2030 Agenda are intended to be legal instruments or to emphasize legal standards.

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To find a clearer influence on the shaping of legal instruments, one must look beyond these policy instruments and track specific sections or even provisions of certain agreements. This third level of inquiry is much more specific and, within the limits of this chapter, it can only be illustrated. I will take two examples. The first concerns the 'sustainable development' provisions and chapters included in a growing number of bilateral and regional trade agreements concluded by the European Union (EU) since 2007,[46] following the mandate given in the 2006 Global Europe Communication[47] and the 2006 Renewed Sustainable Development Strategy (SDS).[48] Such provisions/chapters have been included in the EU economic partnership agreements with CARIFORUM states,[49] South Korea, Central America, Colombia, and Peru. As a general matter, they contain a reference to sustainable development as part of the 'context and objectives', which is then fleshed out by provisions on the right to regulate, the role of MEAs, the obligation not to lower environmental regulation to attract trade and investment, the promotion of green trade and investment, cooperation and implementation mechanisms, among others.[50] The second illustration is provided by the shaping of two specific 'market mechanisms', (p. 296) respectively in Article 12 of the Kyoto Protocol (the 'Clean Development Mechanism') and in Article 6.4 of the Paris Agreement (often called 'Sustainable Development Mechanism'). In both cases, the purpose of the mechanism is to conduct, in more efficient terms, mitigation projects while at the same time contributing to the development of the country hosting the project. The CDM operated for several years, raising problems such as the concentration of projects in some emerging economies, the perverse incentives to maintain certain sectors only to profit from the carbon credits (technically 'certified emission reductions') resulting from them or, more generally, matters of environmental integrity. Thus, one should not overstate its achievements. Whether these challenges are inherent to the vagueness of the concept of sustainable development is unclear. The failure so far[51] to reach agreement on the specifics of the SDM suggests that the ability of the concept of sustainable development to genuinely perform an architectural function and shape a legal mechanism is limited by its vagueness.

3. Jurisprudential relevance

The legal concept of sustainable development has played a significant role in international adjudication, but only from the perspective of its 'interpretive function'. As noted earlier, a norm may perform such a function when it is used to clarify or update another norm or to conciliate competing norms or the values underpinning them. The concept of sustainable development has explicitly performed this function in a number of cases. In what follows, I provide some illustrations relying on those cases where 'sustainable development' is expressly mentioned as part of the legal reasoning of an international court or tribunal. I must note, however, that the legal 'concept', 'objective', or 'notion' relied upon is, in some cases, enshrined in a treaty rather than directly derived from customary international law.

The basis for the analysis is provided by the aforementioned excerpt of the ICJ judgement in the *Gabčíkovo-Nagymaros* case, where the court noted, by reference to environmental norms, that they had 'to be taken into consideration, and … given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past'.[52] *In casu*, there was an explicit provision in the applicable treaty allowing for the application of new norms. In order to fully understand the reach of this statement, it is therefore useful to see its operation in some other cases. In some cases, the 'objective' of sustainable development expressly mentioned in the preamble of the 1995 Marrakesh Agreement establishing the WTO has been relied upon to interpret certain terms in a legally-linked treaty, namely the 1994 GATT and, more specifically, its Article XX. Thus, in *Shrimp/Turtle*, the WTO Appellate Body reasoned that the terms 'exhaustible natural resources' in Article XX(g) of the GATT had to 'be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment'[53] and, in this light, (p. 297) they included not only mineral but also living resources, such as turtles. Similarly, in *China—Raw Materials*, after referring to the

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‘objective of sustainable development’ the Appellate Body stated that it understood ‘the WTO Agreement, as a whole, to reflect the balance struck by WTO Members between trade and non-trade-related concerns’[54] but then concluded that such considerations could not change the content of China’s Accession Protocol. A more detailed discussion of this question was provided in *China—Rare Earths*, where the Panel made an explicit reference to the ‘principle’ of sustainable development as embodied in Principles 2 (prevention) and 4 (integration) of the Rio Declaration.[55] The reference to the Rio Declaration to support reasoning under the WTO Agreement is noteworthy.

Other adjudicative bodies have made reference to sustainable development or, at least, to integration, even in the absence of a specific treaty basis. In *S.D. Myers v Canada*, an investment arbitration tribunal operating under Chapter 11 of the 1992 NAFTA (North American Free Trade Agreement) relied on the Rio Declaration to consider, as part of the principles relevant to interpret Article 1102 of the NAFTA (non-discrimination), the idea that ‘environmental protection and economic development can and should be mutually supportive’.[56] In *Hatton v UK*, a dissenting opinion signed by five judges relied on two non-binding instruments, Principle 1 of the 1972 Stockholm Declaration and Article 37 of the European Union’s Charter of Fundamental Rights (which expressly refers to sustainable development), to conclude that Article 8 of the 1950 European Convention on Human Rights should have been interpreted to accord more protection to the environment.[57] Although less clear, the role of sustainable development in the *Ogoni* case before the African Commission also deserves mention. The Commission reasoned that Article 24 of the 1981 African Charter on Human and Peoples’ Rights (the collective right to a generally satisfactory environment) required Nigeria ‘to take reasonable and other measures … to secure an ecologically sustainable development and use of natural resources’.[58]

But these decisions do not provide a concrete and clear basis to understand the type of interpretive function performed by the concept of sustainable development. In order to reach that higher level of specificity, one must rely on three other decisions[59] where (i) the concept of sustainable development was specifically referred to, (ii) without any express basis in the applicable treaty, and (iii) with a sufficiently elaborate reasoning to understand the implications of interpreting a norm in the light of this concept.

In the *Iron Rhine* case, the arbitral tribunal had to consider whether to take into account environmental protection considerations in interpreting a treaty between Belgium and the Netherlands dating back to 1839. The tribunal expressly framed its (p. 298) analysis as a matter of ‘inter-temporality in the interpretation of treaty provisions’.[60] Its reasoning sheds light on the three questions identified above. Indeed, it expressly relies on ‘the concept of sustainable development’ (by reference to the ICJ) as it arises from general international law and, importantly, it does so with two specific consequences. First, sustainable development is used to interpret and, more specifically, to update a treaty that makes no mention of sustainable development and, given its date of conclusion, could not possibly imply any such consideration. Secondly, the specific consequence of interpreting this treaty in the light of the concept of sustainable development is the applicability of the prevention principle, which is mentioned in the first sentence and further specified in paragraph 222 of the award. Thus, the concept of sustainable development is not only a matter of systemic integration (as in the *Shrimp/Turtle* case) but also, explicitly, one of intertemporal law. This conclusion is confirmed by the reasoning of the tribunal in the *Indus Water Kishenganga* case.[61]

In both hypotheses (systemic integration and intertemporal law), the specific result is the need to interpret the relevant norm (eg a treaty) in the light *not of the concept of sustainable development as such* but of the more specific norms that embody the ‘sustainable’ aspect of sustainable development. In the *Iron Rhine* case, the tribunal made this point explicitly.[62] Similarly, in the *Indus Water Kishenganga* case, the arbitral tribunal noted that what it called (relying however on the ICJ) the ‘principle’ of sustainable

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development 'translate[d]' into the duties to conduct an EIA and, more generally, to prevent environmental harm.[63] The same conclusion can be reached by reference to the *Advisory Opinion of the ICtHR on the relations between environmental protection and human rights*. The court noted indeed that '[a]s a consequence of the close connection between environmental protection, sustainable development and human rights', which it also characterized as the 'interdependence and indivisibility between human rights and environmental protection', the court could 'make use of the principles, rights and obligations of international environmental law, which as part of the international *corpus juris* contribute in a decisive manner to set the scope of the obligations arising from the American Convention in this area'.[64]

The latter point is also relevant to the assessment of the 'decision-making function' of the concept of sustainable development. I noted earlier that, so far, the concept has not performed a decision-making function and it is doubtful that it could do so. In the cases reviewed, the concept of sustainable development is relevant but somewhat removed from the primary norm governing the conduct of the state. The specific operation of the concept is to require a certain approach to interpretation (whether in the form of systemic integration or intertemporal law) and thereby to render applicable, for (p. 299) interpretation purposes, the specific primary rules of obligation (prevention, cooperation, EIA) defining the 'sustainable' aspect of sustainable development.

Such norms can perform an interpretive function but also, quite clearly, a decision-making function. Several examples of the latter, both old and new, can be identified such as the *Trail Smelter* arbitration,[65] the *Costa Rica/Nicaragua* case,[66] or the *South China Sea* arbitration.[67] Even when the concept of sustainable development may appear to have a permissive effect, as suggested by a passage of the Panel Report in *China—Rare Earths*, it does not operate as a standalone primary norm. It is, in fact, the underlying primary rule (interpreted in the light of a norm such as the prevention principle) which remains controlling.[68] For these reasons, following my previous observations in Section IV.A, sustainable development must be considered a normative 'concept', rather than a 'principle'.

V. 'Sustainable' vs 'Development'

The analysis of the history and legal expression of the concept of sustainable development conducted in this chapter shows that over the last half of a century, there has been a deliberate effort to reconcile, conceptually and legally, the terms of the environment-development equation. As noted earlier, the very concept of the sustainable development was selected to draw a veil over these differences and rally all countries to the cause. But this approach has not solved the equation. The tension between these two competing terms remains.

From the first Founex meeting in June 1971, we have certainly made progress in understanding the scale and seriousness of the problem we face. Certain concepts, such as those of 'Planetary boundaries'[69] or the 'Anthropocene',[70] have been developed to convey the unprecedented magnitude of the crisis. However, the crisis is not being successfully tackled. The reason is that we are still not ready to prioritize the environment over prosperity. This problem is not merely expressed but indeed embodied in the concept of 'sustainable development'.

This conclusion emerges from the reliance on the economic theory of externalities. An externality is the effect of a transaction on those not participating in it (third parties). If such effects are harmful, we speak of 'negative externalities'. Environmental (p. 300) degradation, even on the scale of climate change, massive species extinction, or, all together, the Anthropocene epoch where humans are the defining geological force, are still seen as mere negative externalities of a transaction or, more specifically, a body of transactions that today is called 'development'. International law, much like law in general,

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first organizes the legal aspects of the transaction (eg through sovereign prerogatives, investment law, trade law, etc) and only then places an additional layer of regulation dealing with the negative environmental externalities. What we call international environmental law is, with rare exceptions (eg the moratorium of commercial whaling), the law of externalities, and it is becoming even more so due to the excessive reliance on market mechanisms. This external layer is only allowed to interfere with the underlying transaction up to a certain point beyond which the legal organization of the transaction prevails. The *India—Solar Cells* case epitomizes this problem.[71] The local content requirements introduced by India were certainly illegal under international trade law. Yet, if we are realistic about tackling climate change, India must move massively into renewable energy, and we cannot politically expect that the massive transfer of public resources involved in a feed-in-tariff scheme will be operated with no economic benefit for the local industry.

The illegality of India's scheme is but one illustration of a much wider and deeper phenomenon. International law and, as I have written elsewhere,[72] law in general are built upon an asymmetry whereby productive transactions are first organized and only later is an additional layer of law introduced to tackle the externality, within clearly defined limits. We have grown so used to this asymmetry that we no longer see it. It is at the heart of all instruments that call for 'development' (organization of the transaction) to be 'sustainable' (additional layer to tackle the 'externality'). At the margin, 'sustainable' will no longer be able to accommodate 'development' and, under the current thinking, development is organized so as to prevail.

There have been a few rare occasions in history when the outrage arising from certain transactions of massive economic importance led to their outright banning. The banning of slavery was one such example. In an attempt to keep the legal recognition of the transaction, there were efforts to improve the lives of slaves (tackling merely the 'externality'), while keeping them legally subjected. In the absence of such wide-ranging prohibition (eg a legally mandated phase-out of fossil-fuels), another possibility may be that, in a display of Schumpeterian creative destruction, some new technological choices may diffuse in time to render our current pathways to development uncompetitive and obsolete.[73] This appears to be the hope of political decision-makers today. It is a bet, based on the egoism and lack of courage of the political class but also of all of us who timidly exercise our political rights; and the stakes have never been higher.

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Footnotes:

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[16] See Section IV.B.2.

[17] See in chronological order *The Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgement) [1997] ICJ Rep 7 (Gabčíkovo-Nagymaros case) [140]; *United States—Import Prohibition of Certain Shrimp and Shrimp Products* (Appellate Body Report) [12 October 1998] WTO Doc WT/DS58/AB/R (Shrimp/Turtle case) [131], [153]; *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v Nigeria*, African Commission on Human Rights and Peoples’ Rights (2001) Communication no 155/96 (Ogoni case) [52]; *Hatton v UK* (Judgement) Grand Chamber ECtHR (8 July 2003) Application no 36022/97; *Hatton v UK* (Joint Dissenting Opinion of Judges Costa, Ress, Turmen, Zupancic, and Steiner) [1]; *Award in the Arbitration regarding the Iron Rhine*

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('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands (2005) 27 RIAA 35 (Iron Rhine Railway case) [57]–[59]; *Pulp Mills on the River Uruguay (Argentina/Uruguay)* (Provisional Measures, Order of 13 July 2006) [2006] ICJ Rep 133 [80]; *Pulp Mills on the River Uruguay (Argentina/Uruguay)* (Judgement) [2010] ICJ Rep 14 (Pulp Mills case) [75]–[77], [177]; *Award in the Arbitration regarding the Indus Waters Kishenganga between Pakistan and India* (Partial Award of 18 February 2013) 31 RIAA 1 (Indus Waters Kishenganga case) [448]–[452]; *China—Measures Related to the Exportation of Various Raw Materials* (Appellate Body Report) [30 January 2012] WTO Doc WT/DS394/AB/R (China—Raw Materials case) [306]; *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum* (Panel Report) [26 March 2014] WTO Doc WT/DS431-3/R (China—Rare Earths case) [7.263]; *State Obligations in Relation to the Environment* (Advisory Opinion) IACtHR (2017) OC-23/17 (State Obligations case) [52]–[55].

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22 See Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' *European Journal of International Law*, 23/2 (2012): 377, 381; Pierre-Marie Dupuy, 'Où en est le droit international de l'environnement à la fin du siècle?' *Revue générale de droit international public*, 101/4 (1997): 873, 891.

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26 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 [29].

27 Pulp Mills case (n 17) [75]–[77].

28 Ibid [101] (referring to the prevention principle), [204] (recognizing for the first time the customary requirement to conduct an environmental impact assessment), and [77], [102], [144]–[146] (referring to the duty of cooperation).

29 Indus Waters Kishenganga case (n 17) [450] (expressly stating that 'sustainable development' is translated through the duty to conduct an environmental impact assessment and the duty of vigilance and prevention); China—Rare Earths case (n 17) [7.110]–[7.111], [7.260]–[7.265] (referring to the principle of sustainable development as requiring prevention of environmental harm); State Obligations case (n 17) [55] (stating that, as a result of the interconnection between sustainable development and human rights, the principles of general international environmental law can be relied upon to determine the scope of the human rights guaranteed by the ACHR).

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[35] See policy instruments detailed in n 15.

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[38] See Rio Declaration (n 6) principles 4, 8.

[39] 2030 Agenda (n 14) para 55.

[40] Ibid, SDG 3, target 3(b), referring to the 1994 Agreement on Trade-Related Aspects of Intellectual Property Trade.

[41] Ibid, SDG 4, target 4.7, referring to human rights indistinctly.

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[60] Iron Rhine Railway case (n 17) [57]–[59].

[61] Indus Waters Kishenganga case (n 17) [452].

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