

# Sustainable development and integration

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## I. Overview

The principle of sustainable development is undeniably a cornerstone of international environmental law that has shaped the field since at least the 1980's. Its most accepted definition is that of development that "meets the needs of the present without compromising the ability of future generations to meet their own needs".<sup>1</sup> Rooted in anthropocentrism, the notion originally stems from the realisation that environmental degradation and economic development are intimately linked and interdependent. It stems from the recognition that a sound environmental base is paramount for sustainable economic development (including the acknowledgment that environmental degradation fuels poverty) and that conversely patterns of development based principally on economic growth are no longer sustainable in view of the impairment of the sound environmental base they lead to. Despite legitimate criticism that the definition offered by the Brundtland Commission is too vague to ascertain sustainable development's conceptual or legal content, it is generally accepted that sustainable development, following Rio+5 and the World Summit for Sustainable development,<sup>2</sup> must be understood in terms of the reconciliation and mutual support between three interdependent pillars: economic development, environmental protection and social development. Crucially, such reconciliation and mutual support is to be achieved through a process of integration of these concerns. The principle of integration, formulated at principle 4 of the *Rio Declaration* which posits 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",<sup>3</sup> thus represent the main means by which sustainable development is to be achieved.

## II. Historical development

Whilst the modern understanding of the concept of sustainable development has been fashioned mainly over the course of two decades (the 1980s and the 1990s), the roots of the idea of sustainability can be traced to the 19<sup>th</sup> century both at the domestic and international levels.<sup>4</sup> Crucially however, it is towards the end of the 20<sup>th</sup> century that its global and inescapable dimension starts to take hold. In 1972, at the Stockholm Conference on the Human Environment, the international community acknowledged the intimate connection between environmental degradation and economic development and already advocated for an integrated approach in the management of resources.<sup>5</sup> In the following years, various initiatives within and outside of the United Nations worked on deepening this link to promote a renewed conception of the relationship between environmental protection and

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<sup>1</sup> Report of the WCED (Brundtland Commission), *Our Common Future* (1987), 51.

<sup>2</sup> See GA Res S-19/2, 28 June 1997 and A/CONF.199/200, 2002.

<sup>3</sup> *Rio Declaration on Environment and Development*, 1992, A/CONF.151/26 (vol. I).

<sup>4</sup> See German forestry principles discussed in Sand, 'Sustainable Development – Of Forests, Ships and Law', 37 *Environmental Policy and L* (2007) 2, and *Pacific Fur Seal Arbitration* of 1893 RIAA, VOLUME XXVIII pp. 263-276.

<sup>5</sup> On the integrated approach see for example principle 13, *Stockholm Declaration on the Human Environment*, A/CONF.14/48/Rev. 1.

economic development, and offer a new conception of development altogether.<sup>6</sup> The phrase “sustainable development” is coined first in the *World Conservation Strategy*,<sup>7</sup> but it is the Brundtland Commission in its report that proposes it is adopted as a new societal model. These contributions were significant as their call for a renewed model of economic and social development was one that would break free from traditional economic growth paradigms and would instead integrate environmental concerns into development choices. And it is to this renewed societal model that the international community pledges to commit to at Rio in 1992 with the adoption of the *Rio Declaration on Environment and Development*, a legally precise, yet non-binding document, laying out the legal contours of a path to sustainable development.<sup>8</sup> If the *Rio Declaration* remains the reference point for a legal evaluation of the meaning of sustainable development, it is five years later, at Rio+5 that the social pillar was added into the equation. This now settled conception that environmental protection, economic development and social development constitute the three interdependent dimensions of sustainable development was later confirmed and generalised at the World Summit for Sustainable Development in 2002.<sup>9</sup> This follow-up summit, together with Rio+20 in 2012<sup>10</sup> and the 2030 Agenda for sustainable development of 2015 which sealed the adoption of the 15 Sustainable Development Goals,<sup>11</sup> all focused mainly on moving from pledges to action and on developing the means for making sustainable development a reality. They thus do not upset, beyond the rebalancing of the notion to include its social dimension, the otherwise carefully weighted balance obtained at Rio in 1992. That the Rio Conference was a turning point for sustainable development and its integration principle is also attested to by the fact that it has paved the way to the principle’s dissemination in binding international instruments. The principle of sustainable development indeed finds expression in more than 300 treaties and on more than 200 occasions its inclusion features in the operative part of the convention. It is also noteworthy that in the vast majority of cases, sustainable development is viewed as an objective to be achieved.<sup>12</sup>

### III. Main formulations in international instruments

Considering that sustainable development features in an extremely wide number of international instruments, the focus will be on its formulations that are either most useful or most significant. In terms of international treaties, sustainable development and integration have been catered for in all three conventional regimes that have derived from the Rio process. They thus appear at article 8(e) of the *Convention on Biological Diversity* which states that “each contracting party shall, as far as possible and as appropriate: (e) Promote environmentally sound and sustainable development in areas adjacent to protected areas with a view to furthering protection of these areas” whilst article 6(2) requires parties to “integrate, as far as possible and as appropriate, the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans, programmes and policies”. Equally, the *Convention on Drought and Desertification* insists on the relevance of

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<sup>6</sup> World Charter for Nature (UN Doc. AG/RES/37/7 1982); World Conservation Strategy (IUCN 1980); World Commission on Environment and Development (Montreal 1987).

<sup>7</sup> See supra.

<sup>8</sup> For a commentary see J. Viñuales (eds), *The Rio Declaration on Environment and Development: A Commentary*, OUP, 2015.

<sup>9</sup> See supra.

<sup>10</sup> United Nations Conference on Sustainable Development (UN Doc. A/CONF.216/L.1 2012).

<sup>11</sup> Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1.

<sup>12</sup> This is the case in no less than 265 treaties. See Barral, *Le développement durable en droit international. Essai sur les incidences juridiques d’une norme évolutive*, Bruylant, 2015, 215-233.

integration and its article 1 states that “The objective of the Convention is to combat desertification and mitigate the effects of drought ... in the framework of an integrated approach ... with a view to contributing to the achievement of sustainable development in the affected areas.” But the prominence of sustainable development is particularly salient in the climate change regime. Viewed as an objective that the parties have the right to and should promote in article 3(4) of the *UNFCCC*, that same provision insists that policies and measures to protect the climate system against human induced change should be “integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change”. The *Kyoto Protocol* lists a number of policies that parties shall adopt in order to promote sustainable development.<sup>13</sup> And sustainable development informs most provisions of the *Paris Agreement* where the measures to be adopted by parties must be taken either in the context of sustainable development<sup>14</sup> or in order to promote or foster it.<sup>15</sup> These are certainly the most significant agreements in which sustainable development and integration have been incorporated not only because of their emblematic nature in international environmental law but also because of their global scope and the non-reciprocal nature of the obligations they lay out.

A couple of formulations included in treaties of more modest scope also deserve to be noted for their precision in either defining sustainable development or providing guidelines regarding its legal operation. The first is article 3(1)(a) of the 2002 *Antigua Convention for Cooperation in the Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific* which provides:

“‘Sustainable development’ means the process of progressive change in the quality of life of human beings, which places it as the centre and primordial subject of development, by means of economic growth with social equity and the transformation of methods of production and consumption patterns, and which is sustained in the ecological balance and vital support of the region. This process implies respect for regional, national and local ethnic and cultural diversity, and the full participation of people in peaceful coexistence and in harmony with nature, without prejudice to and ensuring the quality of life of future generations.”

This is undeniably a complete definition, reflecting the anthropocentric nature of the notion, its evolving character and the interests of future generations, the integration of its three pillars and an added recognition of the importance of cultural diversity and participation. The second formulation of note is to be found in article 4 of the *Barcelona Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean* which lays out the general obligations of the parties. Its third paragraph enjoins the parties to protect the environment and contribute to the sustainable development of the Mediterranean Sea Area and lists the measures and principles that parties must adopt and respect to that effect. Alongside the precautionary principle, the polluter pays principle, the duty to undertake environmental impact assessments and the promotion of cooperation the States must also “commit themselves to promote the integrated management of the coastal zones, taking into account the protection of areas of ecological and landscape interest and the rational use of natural resources.” This integrative approach is also particularly frequent in treaties governing areas where both socio-economic as well as environmental considerations naturally arise, such as the management of international watercourses, lakes, regional seas, or mountain areas. These will indeed necessarily involve a balancing between the economic uses of these areas and the preservation of their often fragile ecosystem. An example is the *Protocol on the Integrated Coastal Zone Management in the Mediterranean* which dwells upon the necessary elements to an integrated management approach (Part II) and defines the necessary instruments for its achievement (Part III).<sup>16</sup>

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<sup>13</sup> Kyoto Protocol article 2(1).

<sup>14</sup> See articles 2(1), 4, 6(8).

<sup>15</sup> See *ibid*, articles 6(1), 6(2), 6(4), 6(9), 7, 8, 10(5).

<sup>16</sup> 21 January 2008, (2009) OJ 434/19, arts 19 and 21.

Sustainable development and integration in addition find expression in a range of influential non-binding instruments. Whereas the *Rio Declaration* remains the reference point for the legal characterisation of sustainable development where it appears more than 12 times,<sup>17</sup> Agenda 21 indicates that States should: “improve the processes of decision-making so as to achieve the progressive integration of economic, social and environmental issues in the pursuit of development that is economically efficient, socially equitable and responsible and environmentally sound.”<sup>18</sup> Prominent texts also include, beyond the *Global Pact White Paper*, the *IUCN Draft International Covenant on Environment and Development* of 2015 whose article 17, according to the draft’s commentary, provides substantive and procedural guidance for giving effect to the concept of sustainable development.<sup>19</sup> It states that:

“(1) Parties shall pursue integrated policies aimed at eradicating poverty, encouraging sustainable consumption and production patterns and conserving biological diversity and the natural resource base as overarching objectives of, and essential requirements for, sustainable development. (2) Parties shall, at all stages and at all levels, integrate environmental conservation into the planning and implementation of their policies and activities giving full and equal consideration to environmental, economic, social and cultural factors.”

It is worth finally noting the contribution of the International Law Commission. Its article 7 (general obligation to cooperate) of the 2008 *Draft Articles on the Law of Transboundary Aquifers* counts sustainable development amongst the general principles on the basis of which parties shall pursue cooperation, alongside sovereign equality, territorial integrity or good faith, thus underlining its fundamental character.

#### IV. Open questions

If sustainable development is rarely associated with the term rule it is frequently referred to as a concept, a principle, and sometimes as a new branch of international law altogether.<sup>20</sup> Whether sustainable development falls into one category or another is not without significance. The core distinction between rules, principles and concepts lies in their degree of abstraction and generality,<sup>21</sup> rather than in their capacity to express legal values and to inform conduct. Yet sustainable development seems to straddle these various classifications, at least in academic discourse.<sup>22</sup> Its most frequent academic formulation however remains that of a concept or a principle. In judicial practice, whereas the International Court of Justice has initially seen in it a concept in the *Gabčíkovo-Nagymaros Project case*<sup>23</sup> and more recently an objective in the *Pulp Mills on the River Uruguay case*,<sup>24</sup> a new milestone was reached when the arbitral Tribunal, in the *Indus Waters Kishenganga case*, referred to it as a principle.<sup>25</sup> Ultimately, even expressed as a concept, sustainable development can be characterised as a legal principle, although it may well represent the most abstract formulation of

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<sup>17</sup> See principles 2–7, 10, 11, 13, 15, 17–19.

<sup>18</sup> Report of the United Nations Conference on Environment and Development, A/CONF.151/26/Rev.1 (Vol. I), Agenda 21, 9–480 (‘Agenda 21’), 96, para 8.4.

<sup>19</sup> See *Draft International Covenant*, IUCN Environmental Policy and Law Paper No. 31 Rev. 4, p. 72.

<sup>20</sup> Sands and Peel, *Principles of International Environmental Law*, CUP, 2012 at 10; Cordonier Segger and Weeramantry (eds), *Sustainable Justice: Reconciling Economic, Social and Environmental Law*, Nijhoff, 2005, ix.

<sup>21</sup> Dupuy and Viñuales, *International Environmental Law*, 2<sup>nd</sup> ed., CUP 2018, 59. These authors further consider concepts as guiding norms that are implemented by principles, which, in turn, are realised by rules.

<sup>22</sup> For example Dupuy and Viñuales label it a concept see supra at 91, Sands and Peel a principle, see supra at 217.

<sup>23</sup> *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, ICJ Reports (1997) 7, para 140.

<sup>24</sup> *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, ICJ Reports (2010) 14, para 177.

<sup>25</sup> *Indus Waters Kishenganga (Pakistan v India)*, Partial award, February 2013, para 450, available at <https://www.pcacases.com/web/view/20>.

such legal principles. Integration for its part more naturally falls into the category of principles, especially as it is classed as such in the *Rio Declaration*. It is equally how it is viewed by the arbitral tribunal in the *Iron Rhine Railway case* which also advanced that integration is now required by international law.<sup>26</sup> Interestingly the tribunal in the *Indus Waters Kishenganga case* also concluded that reconciling economic development with the protection of the environment is a requirement under customary international law.<sup>27</sup> Despite academic prudence, there is thus reasonably firm indications from case-law that sustainable development and integration now reflect customary international law principles.

Whilst there is little disagreement that sustainable development operates as an objective to be achieved through the integration of economic, environmental and social concerns, what the process of integration of these concerns entails is still the subject of debate. Some argue that the principle of integration lays down primarily procedural duties, the obligation to take account of these concerns in the process of decision-making, without however necessarily having an impact on the outcome.<sup>28</sup> However, arguably, a purely formal process of integration whereby environmental considerations are simply 'taken into account' within the development decision-making process with no actual impact on the decision outcome may well fall short of being considered a sufficient effort in striving to achieve sustainable development. If the principle of integration were to have solely a procedural content, the *status quo* may be forever perpetuated and progress towards sustainable development never be achieved. On the contrary an overview of key instruments reveals that the process of integration of economic, environmental and social concerns is meant to lead to their reconciliation and mutual support, in order to pursue sustainable development. This is acknowledged by the tribunal in the *Iron Rhine Railway case* which posits that: "emerging principle[s] 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."<sup>29</sup>

## V. Recommendations

In line with the conclusion that there are strong indicators that sustainable development and integration reflect principles of customary international law, as well as with the Global Pact project's choices relating to the conciseness of the instrument and proposing a formulation emphasising its enduring character, we would recommend a formulation of sustainable development and integration that reflects their general applicability as well as their internal relationship: the principle of integration representing the main process by which the objective of sustainable development is to be pursued. This would require referring first to sustainable development as the core objective and then laying out the duty of integration as the means to achieve the objective. We would also recommend removing the reference to climate change, the protection of the oceans and the maintenance of biodiversity as this would restrict the general applicability of the article and it remains unclear what global environmental challenges are yet to emerge. We would additionally recommend removing the reference to public support policies and patterns of production and consumptions. This is because the

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<sup>26</sup> *Award in the Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, 27 RIAA (2005) 35, para 59.

<sup>27</sup> *Indus Waters Kishenganga (Pakistan v India)*, Final award, December 2013, para 87, available at: see supra.

<sup>28</sup> See eg Boyle, A. and Freestone, D., 'Introduction', in Boyle, A. and Freestone, D. (eds), *International Law and Sustainable Development. Past Achievements and Future challenges* (Oxford University Press 1999), 1–18, 10–11, 17.

<sup>29</sup> See supra para 59.

first element does not sufficiently reflect current debates on sustainable development and integration and the second element gives undue weight to one of the multiple facets of the requirements of sustainable development. As indicated in the section on main formulations, the *Rio Declaration* connects sustainable development to 12 of its principles beyond integration and patterns of production and consumption. A formulation in line with the above recommendations could thus read as follows:

**Sustainable development and integration**

**Parties shall pursue sustainable development. To this end they shall integrate economic, social and environmental concerns with a view to ensure their reconciliation and mutual support into the planning and implementation of their policies as well as domestic and international activities.**