

# What is Sustainable Development Law?

A CISDL Concept Paper<sup>1</sup>  
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What is sustainable development, and what, in particular, is ‘international law on sustainable development’ (or in short, ‘sustainable development law’)? Certain international processes have provided guidance, and commonly accepted elements of answers, to these questions.

Sustainable development is most commonly defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>2</sup> In short tautology, it means ‘development that is sustainable.’ Development can be defined as a collective process of change toward improvements in quality of life for human beings and their communities, and sustainability can be seen to refer to the need for development to be integrated, socially, economically and environmentally sound, oriented to the long-term, and hence, able to last. For the CISDL, the concept of sustainable development, in international law, requires accommodation, reconciliation and integration between economic growth, social justice (including human rights) and environmental protection objectives, towards participatory improvement in collective quality of life for the benefit of both present and future generations.<sup>3</sup> The term ‘sustainable development law’ describes an emerging corpus of international legal principles and instruments which address the intersections between international economic, environmental and social law (including human rights law), towards development that can last for the benefit of present and future generations.

## Sustainable Development in International Policy

*Our Common Future*, the influential 1987 *Brundtland Report*, sought for solutions to parallel problems of global environmental degradation and global lack of social and economic development, by asking for these challenges to be addressed in an integrated way, for the interests of present and future generations. In the *Brundtland Report*, as mentioned above, sustainable development was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>4</sup>

At the United Nations Conference on Environment and Development, in the 1992 *Rio Declaration*, States committed to “the further development of international law in the field of sustainable development” (Principle 27). In the 1992 *Agenda 21* States elaborated that this involved the “further development of international law on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns” (1.a).

In the 1997 *Programme of Action for Further Implementation of Agenda 21*, States further agreed that “it is necessary to continue the progressive development and, as and when appropriate, codification of international law related to sustainable development. Relevant bodies in which such tasks are being undertaken should cooperate and coordinate in this regard.” (para. 109).

The 2002 World Summit on Sustainable Development *Johannesburg Declaration* specifically commits to “assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental

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<sup>1</sup> This paper is based on legal research published in M.C. Cordonier Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices & Prospects* (Oxford: Oxford University Press, 2004); M.C. Cordonier Segger & C. G. Weeramantry, eds., *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Leiden: Martinus Nijhoff, 2004) and M. Gehring & M.C. Cordonier Segger, eds., *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005), and should be cited to these books, as appropriate.

<sup>2</sup> World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987). This definition focuses, according to the Report, on the concept of needs, in particular the essential needs of the world's poor, to which overriding priority should be given, and the concept of limitations (imposed by the state of technology and social organisation) on the ability of the environment to meet present and future needs.

<sup>3</sup> M.C. Cordonier Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices & Prospects* (Oxford: Oxford University Press, 2004). See also M.C. Cordonier Segger & C. G. Weeramantry, eds, *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Leiden: Martinus Nijhoff, 2004).

<sup>4</sup> *Supra* note 2. The Report states: “The members of the World Commission on Environment and Development came from 21 very different nations. [...] We are unanimous in our conviction that the security, well-being, and very survival of the planet depend on such changes, now.”

protection - at the local, national, regional and global levels” (para. 5). The *Johannesburg Plan of Implementation* mandated the UN Commission on Sustainable Development to “(e) Take into account significant legal developments in the field of sustainable development, with due regard to the role of relevant intergovernmental bodies in promoting the implementation of Agenda 21 relating to international legal instruments and mechanisms.” (para 148 at e)

## Sustainable Development in International Law

In international law, the concept of sustainable development has gained some definition over the course of the past two decades. It is not clear that sustainable development has, as yet, the character of a customary norm of international law.<sup>5</sup> But neither is it void of all meaning or normative value in international law. Rather, it can be argued that the concept of sustainable development has a dual nature in international law. It can be considered an interstitial norm, which serves to reconcile other conflicting norms related to the environment, the economy and social development (including human rights),<sup>6</sup> and also simply the object and purpose of many international treaties and legal instruments.

In the recent decisions of international courts and tribunals, the concept of sustainable development facilitates the reconciliation and integration of other norms concerning socio-economic development and protection of the environment. It appears to have played such a role in *Gabcikovo – Nagymaros Case* at the International Court of Justice:

“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 at an 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.*”<sup>7</sup> (Emphasis added).

The Permanent Court of Arbitration reaffirmed this reasoning in its *Arbitral Award for the Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands)* (May 24, 2005). In this case, The Netherlands, which had created nature reserves along the path of the historic ‘Iron Rhine’ railway line, sought to prevent its reactivation. Belgium argued that the upgrading of the Iron Rhine Railway was part of a shift from road to rail transportation, assisting in the reduction of greenhouse gases, in order to contribute to sustainable development. The Tribunal balanced environmental protection against socio-economic development, finding that the application of environmental measures by the Netherlands could not amount to a denial of Belgium’s transit right, nor could these measures render the exercise of such a right unreasonably difficult. In its reasoning, the Tribunal refers to the “notion[ ]... of sustainable development”, and at para. 59, states that:

“[e]nvironmental 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. This principle

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<sup>5</sup> See V. Lowe, “Sustainable Development and Unsustainable Arguments” in A. Boyle and D. Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) at 36. See also A. Boyle and D. Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) at 16 - 18.

<sup>6</sup> While ‘sustainable development’ as such, may not be a customary principle of international law, it has been suggested that one of the principles of international law related to sustainable development includes a ‘principle of integration’, as described in the 2002 *International Law Association New Delhi Declaration on Principles of International Law Related to Sustainable Development* (New Delhi: ILA, 2002), see “ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development” in Kluwer Academic Publishers *International Environmental Agreements: Politics, Law and Economics* (2002) 2:2 at 209-216, available online: <<http://www.kluweronline.com/issn/1567-9764/current>>. See also M.C. Cordonier Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004) at 45 - 50. And see D. French, *International Law and Policy of Sustainable Development* (Manchester: Manchester University Press, 2005) at 51.

<sup>7</sup> *Case Concerning the Gabcikovo-Nagymaros Dam* (25 September 1997) (*Hungary v Slovakia*) I.C.J. Rep., 37 I.L.M. (1998) 162.

applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties.”<sup>8</sup>

The implications of these cases for the meaning of the sustainable development in general international law are clear. In instances where trade liberalization rules, as economic development norms, intersect with environmental norms, the concept of sustainable development may play a normative role in guiding a balanced, mutually supportive, integrated outcome. It may also, as is touched upon below, play such a role when social development norms are involved.

In international treaty law, sustainable development is an agreed objective of many international trade treaties, both at the global and regional levels.<sup>9</sup> As such, sustainable development can be considered part of the ‘object and purpose’ of a growing number of treaties, and therefore directly relevant in the interpretation of their provisions.<sup>10</sup> The concept appears, often as an objective or preambular reference, in most international statements and declarations related to environmental, social and economic issues since the 1992 Rio de Janeiro Earth Summit. It has also featured as an object and purpose of many international economic, social and environmental treaties involving developed and developing countries,<sup>11</sup> as a concept which guides the decisions of international courts and tribunals,<sup>12</sup> and the holdings of judges in national courts around the world.<sup>13</sup>

In particular, the concept of sustainable development can be considered part of the object and purpose of many international treaties, including the 1992 *UN Convention on Biological Diversity* and its 2000 *Cartagena Protocol*, the 1992 *UN Framework Convention on Climate Change* and its 1997 *Kyoto Protocol*, the 1994 *UN Convention to Combat Desertification and Drought*, the 1994 *North American Free Trade Agreement*, the 1995 *Straddling Fish Stocks Agreement* of the 1982 *UN Convention on the Law of the Sea*, the 2000 *Cotonou Partnership Agreement* between the European Union and the African Caribbean and Pacific countries, the 2001 *International Treaty on Plant Genetic Resources for Food and Agriculture*, and many others. In each treaty, the sustainable development objective is worded slightly differently, and also operationalised differently.

To date only the 2002 *Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific* provides a definition for ‘sustainable development’. At article 3(1)(a), the parties adopted the following statement:

“...[S]ustainable development means the process of progressive change in the quality of life of human beings, which places them as the centre and primary subjects of development, by means of economic growth with social equity and transformation of production methods and consumption patterns, sustained by the ecological balance and life support systems of the region. This process implies respect for regional, national and local ethnic and cultural diversity, and full public participation, peaceful coexistence in harmony with nature, without prejudice to and ensuring the quality of life of future generations.”<sup>14</sup>

According to international treaties and tribunals, the concept of sustainable development is clearly relevant to international law related to the environment and to natural resources. But it is also directly relevant for economic and trade law, and has been further defined in these contexts. The 1994 *Marrakesh Agreement*

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<sup>8</sup> *Permanent Court of Arbitration: In the Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway, between the Kingdom of Belgium and the Kingdom of the Netherlands* (May 24, 2005) at 59, 114, Award of the Arbitral Tribunal, online: Permanent Court of Arbitration <<http://www.pca-cpa.org/ENGLISH/RPC/BENL/BE-NL%20Award%20240505.pdf>>.

<sup>9</sup> See M.C. Cordonier Segger and A. Khalfan, *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004) at 281 - 294. See also D. French, *International Law and Policy of Sustainable Development* (Manchester: Manchester University Press, 2005) at 168 - 211.

<sup>10</sup> This Treaty is widely recognized as reflecting the customary international law norms of treaty interpretation, and states that a “treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” *Vienna Convention on Law of Treaties*, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969) at Article 31(1).

<sup>11</sup> The 1992 *Johannesburg Plan of Implementation* highlights over 300 international social, economic and environmental legal instruments, and identifies many more ‘soft law’ declarations, guidelines and General Assembly Resolutions. See M.C. Cordonier Segger & A. Khalfan, *Sustainable Development Law: Principles, Practices & Prospects* (Oxford: Oxford University Press, 2004) at 31-33.

<sup>12</sup> See, in particular, *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997), I.C.J. Rep., 37 I.L.M. (1998) 162 at 140; *United States-Import Prohibition of Certain Shrimp and Shrimp Products* (20 September 1999), WTO. Doc. WT/DS58/AB/R (Appellate Body Report) and *Permanent Court of Arbitration: In the Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway, between the Kingdom of Belgium and the Kingdom of the Netherlands* (May 24, 2005) at 59, 114, Award of the Arbitral Tribunal.

<sup>13</sup> National cases applying the concept of sustainable development include: *Vellore Citizens Welfare Forum v. Union of India* (1996, Supreme Court of India), *Bulankulame v. Secretary, Ministry of Industrial Development and Others* (the Eppawela Case) (2000, Supreme Court of Sri Lanka), and *Rajendra Parajuli and Others v. Shree Distillery Pnt. Ltd. & Others* (Writ No. 3259, 1996, Supreme Court of Nepal).

<sup>14</sup> The 2002 *Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific* 18 February 2002, City of Antigua, Guatemala. (CISDL Translation). Available online: [http://www.cep.unep.org/services/nepregseas/Convention\\_English\\_NEP.doc](http://www.cep.unep.org/services/nepregseas/Convention_English_NEP.doc)

*Establishing the World Trade Organisation* recognises sustainable development among its objectives.<sup>15</sup> This is confirmed in the 2001 *Doha Declaration* declares: “We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement.”<sup>16</sup> And several Reports of the WTO Panel and Appellate Body directly address the concept of sustainable development in world trade law. In particular, WTO Appellate Body found, at note 107 in the *US – Shrimp Case*, that “[t]his concept has been generally accepted as integrating economic and social development and environmental protection.”<sup>17</sup> Further, the WTO Panel found, at note 202 in the *US – Shrimp Case, Recourse to Article 21.5 by Malaysia*,<sup>18</sup> that “the concept is elaborated... so as to put in place development that is sustainable... that ‘meets the needs of the present generation without compromising the ability of future generations to meet their own needs.’” Four implications of these definitions for world trade law are particularly noteworthy. First, the WTO Appellate Body and Panel adopted the most commonly accepted definition<sup>19</sup> of sustainable development, which refers to the needs of both present and future generations. Second, they described sustainable development as a concept, rather than as a customary principle of environmental law. Third, they recognized that the concept involves ‘integration’. Fourth, they explicitly recognized ‘social development’ as an element to be integrated, along with economic development and environmental protection.

This social element was later also highlighted in the outcomes of the 2002 World Summit for Sustainable Development, which concluded, in the *Johannesburg Plan of Implementation*, at para. 140 (c), that there was a need to “promote the full integration of sustainable development objectives into programmes and policies of bodies that have a primary focus on social issues” noting that, “[i]n particular, the social dimension of sustainable development should be strengthened...”<sup>20</sup>

Sustainable development law and policy has only begun to be addressed by existing institutions, and not in an adequately integrated way. In public international law, the overarching concept of sustainable development vitiates fragmentation. It inspires cooperation, coherence and innovative governance systems. The CISDL is undertaking research on the necessary principles, rules and policies, in order to make a valuable contribution to the development of this field, assisting scholars, countries and international institutions to formulate international law in a more integrated, principled manner, to address intersections between different international legal regimes and to implement the myriad new international treaties and instruments in the field of sustainable development.

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<sup>15</sup> Since 1994, sustainable development has been a specific objective of the WTO. The 1994 *Marrakesh Agreement Establishing the World Trade Organisation* states, at the Preamble: “Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development...” (Emphasis added).” See *Marrakesh Agreement Establishing the World Trade Organization*, Apr. 15, 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994), online: WTO [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm](http://www.wto.org/english/docs_e/legal_e/legal_e.htm)

<sup>16</sup> See *Ministerial Declaration, Ministerial Conference - Fourth Session, Doha, Qatar (14 November 2001)*, WTO Doc. WT/MIN(01)/DEC/W/1, at para. 6. In the Dworkinian sense, such an ‘objective’ can also be called a ‘policy’. R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 22, where he argues that a policy is “that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change).”

<sup>17</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products* (6 November 1998), WTO Doc. WT/DS58/AB/R at note 107.

<sup>18</sup> *United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 by Malaysia* (15 June 2001), WTO Doc. WT/DS58/RW at note 202.

<sup>19</sup> See World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) [hereinafter *the Brundtland Report*].

<sup>20</sup> See 2002 *Johannesburg Declaration, and 2002 Johannesburg Plan of Implementation, Report of the World Summit on Sustainable Development*, Johannesburg (South Africa) (4 Sept. 2002) UN Doc. A/CONF.199/20 at 140 (c), online: WSSD <[http://www.un.org/esa/sustdev/documents/WSSD\\_POI\\_PD/English/POIToc.htm](http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POIToc.htm)>.