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Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm

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Abstract

The wide dissemination of sustainable development in international law has generated considerable academic interest. However, because of the evasive and flexible content of what has been termed by the ICJ a concept in the Gabčíkovo-Nagymaros *case, and more recently an objective in the* Pulp Mills *case, academic commentary has often struggled to ascertain sustainable development's legal nature, which has proved a notion defying legal classification. One attractive thesis has been Lowe's analysis of sustainable development as an interstitial or modifying norm which exerts its normative influence as an interpretative tool in the hands of judges. Its interpretative function is certainly very significant. Judicial bodies have used it to legitimize recourse to evolutive treaty interpretation, as a rule of conflict resolution, and even to redefine conventional obligations. However, beyond this convenient hermeneutical function, by laying down an objective to strive for in hundreds of treaties, sustainable development primarily purports to regulate state conduct. As an objective, it lays down not an absolute but a relative obligation to achieve sustainable development. Such obligations are known as obligations of means or of best efforts. Legal subjects are thus ultimately under an obligation to promote sustainable development.*

Sustainable development has become an unavoidable paradigm that should, as commonly accepted, underpin most, if not all, human action(s). It pervades the environmental, social, political, economic, and cultural discourses from the local through to the 'global' level by both the public and private sectors. Sustainable development has also widely penetrated the legal domain. This emblematic 'concept'[1] has found

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1 See *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment* ICJ Reports (1997) 7, at para. 140.

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its way into an ever increasing number of international legal instruments. Promoted by the United Nations, it is central to a vast number of Resolutions, Declarations, Conventions, and international judicial decisions. Sustainable development unsurprisingly interests international lawyers, but the uncertainty surrounding its nature also sparks their perplexity. Its most cited definition is that of the World Commission on Environment and Development (WCED), known as the Brundtland Commission, in its landmark report for the dissemination of the concept, which posits it as development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'.[2] Though symbolic, this definition remains relatively unhelpful when it comes to providing clues for the legal characterization of the notion. Coupled with its multifaceted nature – its texture will inevitably vary according to who makes use of it and for what purpose – academic commentators have dealt with the legal nature of sustainable development with either scepticism or suspicion.

For some, the answer to the question of its relationship to the law is straightforward: sustainable development does not belong to law; it may be an important philosophical or political objective, but it is not a legal one.[3] Its connection with the law is restricted to the fact that it may contribute to law formation. As a political objective, it will exert an impact on international negotiations, and as such may influence the content of the law while remaining separate from it. Others avoid the issue of ascertaining the legal nature of sustainable development by pointing to its lack of relevance. Beyond its potential characterization as an international legal norm, these commentators argue that a more relevant and fruitful approach is to concentrate, not on the legal nature of sustainable development itself, but on the various principles essential to its realization which aggregate themselves around this 'conceptual matrix'.[4] A variant of this approach is to consider sustainable development, not as a legal principle, but as a new branch of international law altogether.[5] A last trend that has received considerable support is Lowe's analysis of sustainable development as an interstitial norm, whereby the concept's legal relevance is to be found in the pull it exerts on the judicial reasoning process.[6]

This study aims to revisit sustainable development's normativity. The pull it exerts on the judicial reasoning process, and in the interpretative process generally, is indeed significant and will be explored (4), but above and beyond its interpretive functions it is argued that sustainable development, in its current shape, does fit within traditional categories of normativity, and this contribution seeks to show how it operates as a

[2] Report of the WCED, *Our Common Future* (1987), at 51.

[3] See Fievet, 'Réflexions sur le concept de développement durable: prétentions économiques, principes stratégiques et protection des droits fondamentaux', *RBDI* (2001) 128, at 143.

[4] Expression coined by Dupuy in 'Où en est le droit international de l'environnement à la fin du siècle?', 101 *RGDIP* (1997) 873, at 886. For a focus on the principles essential to sustainable development see Sands, 'International Law in the Field of Sustainable Development', 64 *BYBIL* (1994) 303, at 338–348.

[5] See, e.g., Schrijver, 'The Evolution of Sustainable Development in International law', 329 *Recueil des Cours* (2007) 217.

[6] See Lowe, 'Sustainable Development and Unsustainable Arguments', in A. Boyle and D. Freestone (eds), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999), at 19.

legal norm. Before ascertaining its legal nature (2), as well as its object and material effect as a legal norm (3), a fresh look will be cast at its conceptual content (1).

1 The Conceptual Content of Sustainable Development

A *Genesis*

Early origins of an intimate connexion between nature preservation (or wise management) and economic development – which is at the heart of sustainable development – can be traced back to the 19th and 18th centuries.[7] But the modern understanding of the concept, and its recognition at the International Community level, is largely the result of a vast UN-led promotion operation. This operation officially started in 1972 with the Stockholm Conference on the Human Environment. Although 'sustainable development' was not yet mentioned, the link between environmental protection and economic development was clearly established in the Stockholm Declaration of Principles.[8] It was some 15 years later that the expression 'sustainable development' was formulated, and a first version of its meaning articulated, by the WCED, another UN creation.[9] The most fundamental landmark in sustainable development's history is, however, certainly the 1992 Rio Conference on Environment and Development and its famous Declaration of Principles which brings sustainable development within the legal sphere. Although non-binding, the principles of the Rio Declaration are formulated in strong legal terms.[10] It is also undeniably a Declaration of legal principles *about* sustainable development, as the expression appears in no fewer than 12 different principles. Consequently, it is viewed as the keystone of the conceptual articulation of sustainable development. At Rio, sustainable development, officially endorsed by the world community, also became the unavoidable paradigm of environment/development relations. But it was not until 1997 and Rio + 5 that the social (and third) pillar of sustainable development was added into the equation when the UN General Assembly affirmed that environmental protection, economic development, and social development were three interdependent dimensions of sustainable development.[11] Such rebalancing of the notion was later confirmed and generalized at the Johannesburg Summit for Sustainable Development in 2002, which, together with a strong emphasis on implementation, is the core added value of a summit which

[7] See Sands, *supra* note 4, at 306, referring to the *Pacific Fur Seal Arbitration* of 1893 and Sand, 'Sustainable Development – Of Forests, Ships and Law', 37 *Environmental Policy and L* (2007) 2, referring to German Forestry Academies of the 18th century.

[8] Stockholm Declaration on the Human Environment, A/CONF.14/48/Rev. 1. See particularly principles 4, 13, 15–20.

[9] Although the term 'sustainable development' is fully articulated and disseminated by the Brundtland Report, the expression was borrowed from the 1980 World Conservation Strategy (a joint IUCN/WWF/UNEP document).

[10] Rio Declaration on Environment and Development, 1992, A/CONF.151/26 (vol. I). See principles 2–7, 10, 11, 13, 15, 17–19.

[11] See GA Res S-19/2, 28 June 1997.

otherwise failed to replicate the Rio success. It can be doubted whether more will be added, at least conceptually, by the Rio + 20 Conference on Sustainable Development scheduled for June 2012.[12] If anything, the lack of emphasis in its agenda on the conceptual content of sustainable development underlines that the International Community and the UN consider the matter more or less settled.

The conception, articulation, and dissemination of sustainable development on the international plane are thus the result of 20 to 30 years of intense UN-led activity, which, in international law terms, is a relatively short time. This is testimony to the International Community's wide support for sustainable development, which, beyond the texts already mentioned, also found its way into a plethora of Declarations of States, Resolutions of International Organizations, and, crucially, international Treaties.[13] It is these founding texts, and particularly the Rio Declaration, that lay out the core conceptual content of sustainable development.

B *Sustainable Development = (Intergenerational Equity + Intragenerational Equity) × Integration*

A synthesis of these core documents shows that the meaning of 'sustainable development' can be reduced to the combination of two principles that can be seen as axiomatic to understanding sustainable development: intergenerational and intragenerational equity. Intergenerational equity[14] refers to the first dimension of the proposition and relates to the adjective 'sustainable'. This principle is at the core of the Brundtland Report's definition and is also included in principle 3 of the Rio Declaration. It posits that in their development choices states must preserve the environmental capital they hold in trust for future generations and ensure that it is transmitted in conditions equivalent to those in which it was received. In other words, environmental preservation is necessary to ensure equity between generations; without it, the 'sustainability' of development cannot be ensured. Intragenerational equity[15] refers for its part to the second dimension of the expression, the 'development' part, and requires equity in the distribution of the outcomes of development within one generation as much internally (within one national society) as internationally (between developed and developing states). However, it is only when they are read together that these two principles confer on the expression 'sustainable development' its specificity. Development will be sustainable only when both intergenerational (environmental protection) and intragenerational (fair economic and social development) equity are guaranteed, and this is to be achieved through their integration. This requirement is particularly well illustrated in principle 4 of the Rio Declaration which

[12] See www.uncsd2012.org/rio20/index.php?menu=61 (accessed on 8 July 2011).

[13] See *infra* sect. 2.

[14] See, e.g., Brown Weiss, 'Implementing Intergenerational Equity', in M. Fitzmaurice *et al.* (eds), *Research Handbook on International Environmental Law* (2010), at 100.

[15] See, e.g., French, 'International Environmental Law and the Achievement of Intragenerational Equity', 31 *Environmental L Reporter* (2001) 469.

provides, '[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'. Reconciliation of environmental protection and economic and social development, through their integration, is commonly seen as the core philosophy underlying the concept.[16] For some, integration is neither more nor less than sustainable development itself.[17] However, to equate sustainable development with the principle of integration would be unduly restrictive. Sustainable development is an objective that the International Community must strive to achieve, whereas the integration of environmental protection and economic and social development is not. Rather, it is the means by which sustainable development will be achieved. Hence, rather than *being* sustainable development, the principle of integration is the key technique for its realization.

C *Connected Standards and Principles*

Beyond these essential components of sustainable development, a vast array of legal standards and principles is further closely connected to its realization. When implemented, these participate in the integration of environmental protection and economic and social development, and thus help to achieve sustainable development. Some derive from the principle of intergenerational equity, and others from intragenerational equity. Important standards for the achievement of sustainable development inspired by intragenerational equity include the principle of common but differentiated responsibilities, according to which, in view of their particular contribution to the degradation of the environment, developed countries have a shared but heavier responsibility in working towards sustainable development.[18] This concretely translates into differential treatments and differentiated legal commitments, with developed countries endorsing heavier sustainable development commitments than developing countries. Developed countries are also to carry out technology and financial transfers in favour of developing countries to support their sustainable development efforts. Such measures find expression in the Rio Declaration,[19] as well as in various sustainable development treaty regimes. For example, the 1992 Framework Convention on Climate Change (UNFCCC) fully endorses the principle of common but differentiated responsibilities.[20] The treaty regime it sets up is wholly based on a duality of norms according to the Contracting Parties' development level, and developed parties specifically commit to financial and technology transfers in favour of developing parties.[21] Intergenerational equity for its part informs the principles of the sustainable use of

[16] See Boyle and Freestone, 'Introduction', in Boyle and Freestone, *supra* note 6, at 10–12.

[17] Fitzmaurice, 'International Protection of the Environment', 293 *Recueil des Cours* (2001) 9, at 52; ILA, Toronto Conference (2006), entitled *International Law on Sustainable Development*, at 2.

[18] Embodied in Principle 7 of the Rio Declaration, *supra* note 10.

[19] See *supra* note 10, Principles 7, 9, 11, 5, and 6.

[20] See UNFCCC Arts 3(1) and 4(1), New York 1992, 1771 UNTS 107. See also Art. 7 of the Kyoto Protocol, Kyoto, 1997, 2303 UNTS 148.

[21] See UNFCCC, *supra* note 20, Art. 4(3) and Art. 11(2)(b) of the Kyoto Protocol, *supra* note 20.

natural resources, of prevention and precaution, of environmental impact assessment, and of access to information and participation in the decision-making process. These are all reflected in the Rio Declaration,[22] but also find expression in various treaty regimes closely connected with sustainable development, such as the 1992 Convention on Biological Diversity, the 1998 Aarhus Convention, and the 1991 Espoo Convention. However, any list of principles and standards that needs to be respected in order to achieve sustainable development cannot be exhaustive. This is because of the concept's intrinsically evolutive nature.

D *Intrinsically Evolutive Nature*

Sustainable development is not a static concept, and what needs to be done to achieve it evolves according to circumstances, and in particular according to the time, the area, or the subjects concerned. What is sustainable development will vary in time, as sustainable development is not immune to social, environmental, or scientific evolutions. The range of standards and principles that need to be respected in order to achieve sustainable development depends on these evolutions and needs to adapt accordingly. Such temporal variability of the content of sustainable development is also an implicit requirement of the principle of intergenerational equity, which by its nature demands the adoption of a long-term perspective. Sustainable development hence inherently varies *ratione temporis.* What it requires will also depend on the characteristics of the state concerned, and particularly its financial and technological capabilities. As noted earlier, intragenerational equity implies common but differentiated responsibilities in the pursuit of sustainable development, as well as a modulation of commitments based on states' capabilities and levels of development. The standards that need to be respected in the pursuit of sustainable development will thus vary according to to whom they apply, and the same level of commitment as that of a developed state will not be required of a developing one. Accordingly, some principles informing the content of sustainable development may be applicable only in certain contexts and to certain subjects. For example, it might be inappropriate to expect a developing country to abide by the precautionary principle to the same extent as a developed state, or to commit to financial and technology transfers. The contents of sustainable development thus vary *ratione personae*. They also vary *ratione materiae*. Whereas forest or fisheries management will primarily require respect for the principle of sustainable use of natural resources, a railway development project will call for an environmental impact assessment, respect for the principle of prevention, as well as the information and participation of the public in the decision-making process. Depending on the area or type of activity concerned, some standards seen as necessary to achieve sustainable development will thus apply in priority, where others will have only a secondary impact. This variability of the standards making up sustainable development means that variability is inherent in the concept itself. Because it is intrinsically evolutive

[22] See *supra* note 10, Principles 2, 10, 15, and 17.

its contents are difficult, if not impossible, to identify strictly. Such malleability has understandably generated criticism. The vagueness of the concept and the impossibility of precisely defining it or clearly identifying its component parts have led some to conclude that it is empty of substance or incapable of legal classification. However, it is argued that the evolutive nature of sustainable development, rather than being a weakness, represents the strength of the concept. To be able to function, the contents of sustainable development must evolve, the specificities of each situation and each set of circumstances must be taken into account, and this inherent malleability is not an obstacle to sustainable development's legal classification.

2 The Legal Nature of Sustainable Development

Sustainable development's legal nature is dependent upon two preconditions: its legal scope and its penetration into one of the recognized sources of international law. There is little disagreement that a proposition can be of a legal nature only if it is formulated so as to have legal effects or, in other words, that it is legal in scope. For Virally, a proposition will have legal scope when it is formulated 'with the intention to modify . . . elements of the existing legal order, or . . . that its implementation effectively achieves this result'.[23] From this standpoint, sustainable development as a proposition is clearly legal in scope. The Rio Declaration – the structuring reference for sustainable development – is formulated in terms of rights and obligations and uses prescriptive language throughout. This also applies to a large proportion of binding and non-binding documents which include a proposition relating to sustainable development.[24] Such propositions are mostly formulated with the intention of producing legal effects within the international legal order. However, the legal scope of a proposition, in and of itself, is not sufficient to make it law. The proposition must also be recognized as binding, it must be a valid rule of law, and, traditionally, a rule will be recognized as valid only if it emanates from one of the sources of international law, notably conventions, custom, and general principles of law.[25] Only then will it be recognized as a positive norm of international law. So the question that needs to be answered is whether propositions relating to sustainable development have penetrated these sources of international law and have given rise to valid rules of law.

A *Sustainable Development and Written International Law*

Sustainable development has, over the last 30 years, received wide support in a vast array of non-binding international legal documents. It finds expression in countless

[23] Virally, 'Le rôle des "principes" dans le développement du droit international', in Faculté de droit de l'Université de Genève, Institut universitaire des hautes études internationales, *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968), at 531, 535 (author's translation).

[24] See *infra* this sect. A.

[25] As listed in Art. 38(1) of the ICJ Statute.

Declarations of states, resolutions of international organizations, programmes of action, and codes of conduct.[26] To the extent that these various instruments are not recognized as among the formal sources of international law, they are incapable, in and of themselves, of giving rise to a valid legal rule relating to sustainable development, irrespective of the legal strength of their formulation.[27] But sustainable development also finds expression in a far from negligible number of international treaties. It is included in over 300 conventions, and a brief survey of these is revealing from the point of view of the categories of conventions at stake, the location of the proposition relating to sustainable development, and the function attributed to it. References to sustainable development can indeed be found in 112 multilateral treaties, roughly 30 of which are aimed at universal participation.[28] This points to a certain level of consensus among the international community concerning the relevance of sustainable development for international law. But what is particularly significant about the inclusion of sustainable development in conventional law is the location of this inclusion. A common impression among international lawyers is that even though sustainable development receives recognition in a great number of treaties, this recognition is of little legal significance since such references are mainly confined to the preamble, which is not binding. However an empirical analysis shows that 207 of these references are to be found in the operative part of the conventions which is technically binding on the parties. Closer study further reveals that for the most part sustainable development is referred to as an objective that contracting parties must strive to achieve, occasionally with an indication of the types of measures to be undertaken to that effect.[29]

Clearly, then, sustainable development has widely penetrated treaty law. However, unlike in non-binding instruments such as the Rio Declaration, the formulation of provisions relating to sustainable development in formally binding international treaties can be rather flexible. The wording can be vague and imprecise, characterized by the use of the conditional, and the provisions are often closer to setting out an incentive than purporting to be strictly constraining. For some, because of their softness, such provisions would be incapable of giving rise to valid rules of international law.[30] However the softness of the obligation set out in a treaty provision should not be an obstacle to its validity and binding legal nature. For Weil the '*caractère imprécis ou peu contraignant de certaines dispositions insérées dans des traités … n'a rien à voir avec celle de leur caractère juridique*'.[31] He also argues that the many conventional provisions that set out an incentive, such as those where parties commit to 'strive to' or 'promote', are

[26] For an overview see V. Barral, 'Le développement durable en droit international: Essai sur les incidences juridiques d'un concept évolutif' (PhD thesis on file at the EUI, Florence).

[27] Although they may still contribute to the formation of custom.

[28] Data set on file with the author.

[29] See *infra* sect. 3A.

[30] See, e.g., Baxter, 'International Law "In Her Infinite Variety"', 29 *ICLQ* (1980) 549, at 554.

[31] Weil, 'Observations de M. Prosper Weil', Annexe: Observations des membres de la Commission sur le rapport provisoire, 60-1 *AIDI* (1983) 366, at 370.

in and of themselves perfect legal rules; they are valid norms of international law.[32] Following this line of thought, the softness of the provisions relating to sustainable development does not bar them from being valid normative propositions; rather, it just increases the margin of appreciation of the contracting parties in the execution of their obligations.[33] Certainly, in most cases conventional provisions relating to sustainable development are too soft to impose an obligation on states to develop sustainably.[34] But they may still impose an obligation on states to 'strive to achieve' or 'promote' sustainable development. Such an obligation, an obligation of means,[35] far from being deprived of normative character, is just a norm with a different object: not one that requests a result to be achieved, but only means to be put in place to try to achieve that result. Such conventional provisions can clearly grant sustainable development its normativity. The relative effect of treaties however means that any conventional provision relating to sustainable development will, in principle, be binding only on the parties to that agreement. In order to ascertain whether sustainable development benefits from a general normative reach, it must find reflection in customary international law.

B *Sustainable Development and Customary International Law*

Academic objection to the existence of a general rule of customary international law relating to sustainable development has been fierce, and is based on a variety of arguments. If some see enough evidence of *opinio juris* and state practice to prove the existence of a customary rule, be it a very abstract and general one that requires case by case concretization,[36] others avoid this difficult question by emphasizing that the relevance of sustainable development is to be found elsewhere than in its legal nature,[37] and notably in the influence it exerts on international law as a new branch of that discipline.[38] Yet another stream of commentary denies that sustainable development has reached the stage of being a customary norm, or is even capable of that.[39] The most powerful objection to sustainable development's customary status has been articulated by Lowe, for whom 'there is, in the catalogue of treaty provisions, declarations and so on that use the term "sustainable development", a lack of clear evidence that the authors regarded the concept as having the force of a rule or principle of customary international law'.[40] And that is because 'the concept of sustainable development

[32] See Weil, 'Vers une normativité relative en droit international?', 82 *RGDIP* (1982) 5, at 8.

[33] See Virally, 'La distinction entre textes internationaux ayant une portée juridique dans les relations mutuelles entre leurs auteurs et textes qui en sont dépourvus', 60 *AIDI* (1983) 328, at 331–336.

[34] As argued by Lowe, *supra* note 6, at 24–25.

[35] See *infra* sect. 3B.

[36] See Dupuy, *supra* note 5, at 886; Maljean-Dubois and Mehdi, 'Environnement et développement, Les Nations Unies à la recherche d'un nouveau paradigme', in S. Maljean-Dubois and R. Mehdi (eds), *Les Nations Unies et la protection de l'environnement: La promotion d'un développement durable* (2000), at 9, 21.

[37] See Fitzmaurice, *supra* note 17, at 60.

[38] See *supra* note 5.

[39] See Boyle and Freestone, *supra* note 16, at 7.

[40] Lowe, *supra* note 6, at 24.

is inherently incapable of having the status . . . of a rule of law addressed to States and purporting to constrain their conduct'.[41] Lowe reaches this conclusion because treaty and other provisions relating to sustainable development lack fundamentally norm-creating character and cannot, as such, form the basis of a general rule of international law. In his view only a formula such as 'states must develop sustainably' would have this character.[42] It is apparent from the foregoing that when commentators assess sustainable development's customary nature they look for an answer to the question: Is there a general obligation to develop sustainably? And certainly the answer is no. The flexible formulations relating to sustainable development mean that evidence of *opinio juris* and state practice of an obligation to develop sustainably is impossible to ascertain. However, to conclude that there is no such general obligation does not mean that sustainable development does not find reflection in custom. Such customary character can indeed flow from a positive answer to a different question: is there an obligation to implement measures aimed at achieving sustainable development? Or is there a general obligation to promote sustainable development? A positive answer to these questions would affect only the normative category (obligations of means rather than of result) sustainable development belongs to, not its normative nature.

The international lawyer searching for the customary nature of a legal proposition naturally turns to case law for support, as judicial assertions, in ensuring the law's foreseeability, offer a degree of security for legal subjects. Judicial assertions thus radiate well beyond the parties to the case,[43] and because the existence of custom is so difficult to prove, the authority of judicial decisions is even more pronounced with respect to customary international law.[44] But because of the special authority given to their assertions, international judges are also careful not to acknowledge the existence of custom too readily. For them to maintain their authority, their decisions must remain acceptable to the states. This caution exercised by international judges applies equally for sustainable development's potentially customary nature. Although the relevance for international law of sustainable development has been acknowledged by judicial or arbitral decisions, judges and arbitrators have not gone so far as to clearly recognize its customary nature, although they came close to it on one occasion. In the *Shrimp – Turtle* case the WTO's Appellate Body recognized the relevance of sustainable development for solving the dispute, and even drew specific legal consequences from it, but fell short of a customary recognition.[45] The legal implications of sustainable development were drawn in a strictly conventional capacity, because of the inclusion of that objective in the WTO Agreement's preamble. Crucially, the ICJ recognized the significance of sustainable development independently of its inclusion in a treaty. It did so for the

[41] *Ibid.*, at 23.

[42] *Ibid.*, at 25.

[43] As confirmed by Art. 38(1)(d) of the ICJ Statute.

[44] See Jennings, 'What is International Law and How Do We Tell It When We See It?' 37 *Annuaire suisse de droit international* (1981) 58, at 74.

[45] See *United States – Import Prohibition of certain Shrimp and Shrimp Products*, WT/DS58/AV/R, 1998, at paras. 127–131 and *infra* sect. 4B.

first time in the *Gabčíkovo-Nagymaros* case, where it decided that since the economic treaty between Hungary and Slovakia was still in force, it had to be implemented. But current norms of international environmental law had to be taken into consideration by the parties in doing so, because of the need to reconcile economic development with environmental protection, which the Court thought was 'aptly expressed in the concept of sustainable development'.[46] In the *Pulp Mills* case[47] the Court made some limited but interesting comments on the legal implications of sustainable development. It recalled its earlier findings in the *Gabčíkovo-Nagymaros* case,[48] and went a step further by ascertaining that the object of Article 27 of the Statute of the River Uruguay (which Argentina claimed Uruguay had breached) was 'consistent with the objective of sustainable development'.[49] Although this fell short of granting it customary nature, sustainable development is now more than just a concept; it is an objective, and an objective with which specific state conduct (that defined in Article 27) must be consistent. Unsurprisingly, it is an arbitral tribunal rather than the ICJ that has taken the boldest step towards the recognition of a customary status for sustainable development. In the *Iron Rhine* case the tribunal was of the view that international law today 'require[s] the integration of appropriate environmental measures in the design and implementation of economic development activities', and that this integration requirement means that 'where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm', which 'has now become a principle of general international law'.[50] By recalling paragraph 140 of the *Gabčíkovo-Nagymaros* case, the arbitral tribunal also leaves a strong impression that sustainable development and integration of environmental measures in economic development projects are two facets of the same coin, which would also suggest that, on this occasion, the arbitral tribunal did indeed accept the customary nature of sustainable development.

In the absence of clear judicial recognition of its customary nature, one can still test whether sustainable development meets customary requirements which, according to Article 38(1)(b) of the ICJ Statute, are the existence of a general practice (state practice), accepted as law (*opinio juris*). Whereas traditionally customs come to be formed because the constancy of the conduct of states results in their belief that such conduct has become obligatory, as far as sustainable development is concerned, as well as most modern international environmental law, states first come to believe in the necessity to create the rule, rather than in its existence. For René-Jean Dupuy the creation of a 'wild custom'[51] can result from the will of legal subjects to create a new rule.

[46] *Supra* note 1, at para. 140 *in fine*.

[47] *Case Concerning Pulp Mills on the River Uruguay*, ICJ, Judgment, 20 April 2010, available at: www.icj-cij.org/docket/files/135/15877.pdf.

[48] *Ibid.*, at para 76.

[49] *Ibid.*, at para 177.

[50] *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, at para. 59.

[51] Dupuy, 'Coutume sage et coutume sauvage', in *Mélanges offerts à Charles Rousseau: La communauté internationale* (1974), at 75. For this author a wild custom is one that is the result of legal politics rather than belief, but also one that can crystallize over a much shorter period of time.

Negotiation and the adoption and re-adoption of similar rules will eventually lead to the 'impregnation of legal mentalities',[52] and the practice of states thus follows rather than precedes the formation of *opinio juris*. States' *opinio juris* on the binding nature of sustainable development can thus result from the wealth of resolutions, declarations, gentlemen's agreements, programmes of action, international and national judicial decisions, national legislation, and conventional provisions referring to it, at least in so far as these formulations are in the form of sufficiently similar legal rules. Clearly provisions relating to sustainable development vary sometimes greatly from one instrument to another. However, there is still an overarching coherence between them as sustainable development is almost always defined as an objective to aspire to. These many legal acts also constitute useful precedents in the formation of a general practice relating to this *opinio juris*, to the extent that states' conduct is in line with them. States do constantly and generally[53] adopt national sustainable development strategies, report to the Commission on Sustainable Development, design development projects that take into account environmental considerations, and implement environmental impact assessments with a view to achieving sustainable development. Obviously these actions lack uniformity, which is an essential requirement in order for precedents to form meaningful state practice.[54] However, sustainable development itself requires various types of conduct to be adopted, because it is an objective, because it is intrinsically evolutive, and because as an obligation of means it requires a series of different types of effort towards the fulfilment of the objective it lays down. Hence, conduct aimed at achieving sustainable development, even if lacking uniformity, can still form valid precedents constituting evidence of the existence of a general practice of states. Despite clear judicial confirmation, it can thus be concluded that sustainable development, as an objective, already constitutes a principle of customary law, even if this principle is a very general one, with a high degree of abstraction and which requires case by case substantiation.

3 The Substantive Operation of Sustainable Development as an International Legal Norm

A *Sustainable Development as an Interstitial Norm?*

In a thought-provoking contribution reacting to arguments that it was a customary principle, Lowe offered an analysis of sustainable development's normative character, according to which it cannot be a primary rule but can claim normative status as an

[52] See P.-M. Dupuy, 'Théorie des sources et coutume en droit international contemporain' in E. Jiménez de Aréchaga, and M. Rama-Montaldo, *Le droit international dans un monde en mutation* (1994), at 51, 65 (author's translation).

[53] Constancy and generality being two essential conditions for precedents to contribute to the formation of state practice.

[54] See *The Case of the SS 'Lotus'*, 1927 PCIJ Series A, No. 10, at 21.

element of the judicial reasoning process. For Lowe it is 'a meta-principle, acting upon other legal rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other'.[55] Lowe's interstitial norms operate as modifying norms which 'do not seek to regulate the conduct of legal persons directly',[56] but rather establish the relationship between primary norms (those which regulate conduct). Examples of such norms, alongside sustainable development, include the rule of reason, the balancing of interest, and the reasonable man test, which are 'aspects of the primary rules upon which they are parasitic' but which have 'a vitality beyond any specific primary rule. They are free agents, which may in principle be combined with any other rule, modifying that rule.'[57] As a modifying or interstitial norm, sustainable development may be employed as a standard against which conduct will be measured, and it is as a tool in the hands of judges that it acquires its normativity. It is capable of affecting the outcome of cases by 'colouring the understanding of the norms that it modifies'.[58] On this analysis, sustainable development would be a purely hermeneutical judicial tool, empty of any binding content purporting to regulate legal subjects' conduct.

There is little doubt that sustainable development is perceived as an objective for the international community. It has been qualified as such by the ICJ in the *Pulp Mills* case, and by the vast majority of treaties referring to it. In many of these sustainable development is directly defined as an objective;[59] in others it is one because states parties undertake to 'promote', 'achieve' or 'reach', 'ensure', 'contribute to', 'favour', or 'work towards' sustainable development.[60] Specific conduct must be adopted in order to reach an objective and certain measures must be put in place. There is indeed little disagreement that sustainable development requires intra- and intergenerational equity as well as the integration of environmental considerations in economic development projects. Consequently, on the one hand, despite sustainable development's flexible and variable content, some core elements remain irrespective of the situation it purports to apply to. As a result, its indeterminate character will be very clearly less than the indeterminate character of what is 'reasonable' (one example of Lowe's interstitial norms). Indeed, the material implications of what is reasonable in the assessment of a delay spent in bringing a claim will bear no relationship to its application for the assessment of measures for the protection of aliens. On the other hand, as

[55] Lowe, *supra* note 6, at 31.

[56] *Ibid.*, at 33.

[57] *Ibid.*

[58] *Ibid.*, at 34.

[59] Examples include the UNFCCC; the Barcelona Convention for the Protection of the Mediterranean; the Danube River Protection Convention; the ACP-CE Cotonou Agreement; the MERCOSUR; the WTO Agreement; and the Energy Charter Treaty.

[60] See respectively the Convention on Biological Diversity Art. 8(e), Rio de Janeiro, 1992, 1760 UNTS 79; the Convention to Combat Drought and Desertification Art. 2(b), Paris, 1994, 1954 UNTS 3; The Kyoto Protocol, *supra* note 20, Art. 2(1); the European Landscape Convention, preamble para. 2, Florence, 2000, available at: www.conventins.coe.int/Treaty/en/Treaties/Html/176.htm; the International Tropical Timber Agreement Art. 1(c), Geneva, 2006, Doc/TD/TIMBER.3/12.

an objective, sustainable development aims to regulate conduct. Its primary object is not to regulate the relationship between primary norms; it may have this function, but only as a corollary to its main function. Its primary object is to set an objective to legal subjects, and thus to regulate their conduct. Whether the necessary conduct has been adopted in order to reach this objective can also be tested against the core constitutive elements of sustainable development. Because it is an objective which has a flexible but identifiable material content, at least to some extent, it cannot be a simple accessory to primary rules having a strictly procedural or hermeneutical function. On the contrary, it is capable of regulating and purports to directly regulate conduct and has properly material and direct legal implications. It is a primary norm of international law.

B *Sustainable Development as an Obligation of Means*

Rules that tend to regulate conduct (Hart's primary rules[61]) may be of several types. Obligations of means are a familiar category of norms for legal systems derived from Roman law. Unlike obligations of result, which require the achievement of the result defined by the obligation, obligations of means require only the deployment of all possible means to achieve the result, without promising to achieve it.[62] An obligation of means will consequently be breached only when the promised efforts have not been accomplished, since 'what defines the object of the obligation is the tension towards the objective, and not its achievement'.[63] If the subject needs only to endeavour to achieve the result, rather than be under an absolute obligation to reach it, it is because, in the case of obligations of means, the achievement of this result is more unpredictable, and not fully under the subject's control. The obligation thus contains only a duty to employ best efforts,[64] a category of obligations known to international law as 'due diligence' obligations.[65]

Both in treaty law and in general international law, sustainable development is understood as an objective that legal subjects must strive to achieve, and the object of an obligation of means is precisely to try to achieve an objective. This objective, which is the result hoped for, works for Combacau as a teleological reference permitting the evaluation of whether the means deployed adequately fulfil the obligation.[66] Accordingly, in relation to the objective of sustainable development, states are under

[61] See H.L.A. Hart, *The Concept of Law* (2nd edn, 1994), at ch.V.

[62] See, e.g., Ph. Mallaurie and L. Aynès, *Droit civil, les obligations* (2005), at 492.

[63] Combacau, 'Obligations de résultat et obligations de comportement. Quelques questions et pas de réponse', in D. Bardonnet, *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité* (1981), at 181, 194 (author's translation).

[64] See Pisillo-Mazzeschi, *'Due diligence' e responsabilità internazionale degli Stati* (1989), at 286 and 354–382; the ILC's 'Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries', *ILC Yrbk* (2001), ii, pt 2, at 153; and the ILC's 'Draft Articles on the Law of Transboundary Aquifers, with commentaries', *ILC Yrbk* (2008), ii, pt 2, comments to Art. 6.

[65] See Reuter, 'Principes de droit international public', 103 *Recueil des Cours* (1961) 425, at 472 and 598.

[66] Combacau, *supra* note 63, at 194.

an obligation to strive or do their best to achieve it. States are thus under a relative rather than absolute obligation to achieve sustainable development; they are not bound to achieve it, but are bound to try to, they are bound to promote sustainable development. There is some indication in case law and codification works that sustainable development should be understood as a relative obligation. In the *Ogoni People* case the African Commission on Human and Peoples' Rights found that in relation to Article 24 of the Charter states had to adopt reasonable measures *inter alia* to ensure ecologically sustainable development.[67] The reference to reasonable measures suggests that the obligation is a relative one. This reading is confirmed by the ILA, which explained that:

> Sustainability is not an absolute obligation. The varied circumstances of human need and water availability are too complex to allow one to declare an absolute obligation of sustainability. Moreover, in too many situations whether a particular use is sustainable will be highly debatable. Rather than attempt to lay down a theoretically absolute obligation that often will be breached in practice, this Rule identifies an obligation to take appropriate measures to assure sustainability – a due diligence obligation to which States can be expected to conform.[68]

Arguably, however, the obligation to promote sustainable development does not fully conform to the structure of a 'due diligence' obligation in terms of the nature of the objective to be achieved. Due diligence obligations are essentially negative obligations, obligations to prevent something from happening, such as damage to aliens' rights or to the environment. Conversely, the obligation to promote sustainable development is intrinsically positive. Legal subjects must adopt measures which facilitate a change to happen; they must create the necessary conditions for a new situation to arise, a situation of sustainable development. The obligation of means to promote sustainable development is accordingly much closer to that of the doctor towards a patient. The doctor must strive to cure the patient, without being able to promise to succeed. He/she must, however, still create the necessary conditions for a new situation to occur: that the patient be cured.

If the object of the norm relating to sustainable development is not to achieve it but to strive for it, then legal subjects are required to adopt conduct promoting sustainable development. As Boyle and Freestone put it, 'although international law may not require development to be sustainable, it does require development decisions to be the outcome of a process which promotes sustainable development'.[69] As an objective, sustainable development must thus influence the decision-making process of legal subjects; they will notably have to try to achieve a balanced decision, taking into account environmental, economic, and social considerations. A number of tools will also help to measure the adequacy of the conduct states adopt in the light of their promotion obligation.

[67] *Social and Economic Rights Action Center, Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Communication 155/96 (2001), at para. 52, available at: www1.umn.edu/humanrts/africa/comcases/155-96.html.

[68] ILA, *The Berlin Rules on Water Resources* (2004), comments to rule 7 at 16.

[69] Boyle and Freestone, *supra* note 16, at 17.

C *Measuring Tools*

Whether the requirements of an obligation of means are met is generally assessed *in abstracto* via comparison of the state's conduct to a 'standard conduct' itself meeting those requirements. In international law, this standard conduct is that which is expected from a good government. The specific circumstances of each case will also be taken into consideration, including the level of development of the state.[70] This will be particularly relevant for evaluating the fulfilment of states' sustainable development obligations, the level of effort expected being in accordance with each state's own capacities. Beyond these general assessment criteria some are specific to the obligation to promote sustainable development. Despite its flexible nature, at a minimum it requires intra- and intergenerational equity as well as the integration of environmental considerations into economic development projects. This means that an identifiable list of measures will normally be expected from states in the fulfilment of their obligation to promote sustainable development; such list will include *inter alia* precaution, prevention, sustainable use, inclusive decision making, financial and technology transfers, and poverty eradication. But because of sustainable development's variable and intrinsically evolutive nature, this list of measures will vary according to time and circumstances; it will vary and adapt *ratione materiae, temporis, personae,* and *loci.*

Although this implies an indeterminate list of measures that must be adhered to, some of those have already been singled out by international judges. The *Iron Rhine* arbitral tribunal closely associated sustainable development with the principle of integration, and added that this principle required the prevention and mitigation of environmental damage when undertaking an economic development project, thus suggesting that to ensure sustainable development a state will have to prevent and mitigate damage to the environment.[71] The ICJ also suggested in the *Pulp Mills* case that sustainable development implies the cooperation of the parties in the prevention of environmental damage. After stating that the use of the river should 'allow for sustainable development' it then read the *Gabčíkovo-Nagymaros* judgment as if the duty of the parties to find an agreed solution was connected to sustainable development, and added that 'it is by cooperating that the states concerned can jointly manage the risks of damage to the environment'.[72] Ultimately, this indicated that beyond the duty to prevent environmental damage, sustainable development also includes a duty to cooperate.

The range of measures that states must conform to in order to fulfil their obligation to promote sustainable development may also be more circumscribed in treaty law, i.e., when it is the object of a conventional obligation. This is because the parties to the treaty may choose to reduce the indeterminate nature of the types of conduct expected by specifying a range of standards to be conformed to. The Kyoto Protocol thus provides in its Article 2(1)(a) that in order to promote sustainable development

[70] See ILC's 'Draft Articles on Prevention,' *supra* note 64, at 154–155 which interestingly bases itself on principles 11 and 23 of the Rio Declaration to justify such differentiation.

[71] See *supra* sect. 2B.

[72] *Supra* note 47, at paras 75–77.

the contracting parties listed in annex I shall '[i]mplement and/or further elaborate policies and measures in accordance with its national circumstances, such as' *inter alia* the enhancement of energy efficiency, the promotion of sustainable forms of agriculture, or the use of new and renewable forms of energy. Another example is the Barcelona Convention for the Protection of the Mediterranean, which in its Article 4(3) provides that in order to protect the environment and contribute to sustainable development the parties shall according to their capabilities apply the precautionary principle; the polluter pays principle; undertake environmental impact assessments; promote cooperation; and promote the integrated management of coastal zones.

Sustainable development thus imposes an obligation of means on legal subjects, an obligation to strive to achieve or promote it. The measuring tools for evaluating the fulfilment of this obligation will vary according to the circumstances of each case, but the essential conceptual content of sustainable development requires that, at a minimum, states will have to integrate environmental considerations into economic development projects, prevent damage to the environment, and cooperate in doing so. Additionally, conventional obligations relating to sustainable development may constrain state conduct further by specifying the measures that will need to be adopted in fulfilment of their obligation. Finally, sustainable development may also exert its influence upon the interpretative process.

4 The Interpretative Function of Sustainable Development

The objective of sustainable development as a primary rule of law may be referred to by the judge in the interpretation of other customary or conventional rules. It is well recognized that judges in interpreting a rule may rely upon other rules so long as they are relevant.[73] Sustainable development may thus have a hermeneutical function whether as a customary principle or as a conventional rule, and its characteristics make it a particularly useful interpretative tool. The more flexible and vague the content of the rule used as a hermeneutical reference, the wider the margin of appreciation for the judge in determining the sense of the rule interpreted. Because sustainable development is a notion the content of which varies, its elasticity grants the judge an appreciable degree of liberty, authorizing value, or circumstantial choices to be made. It is therefore a valuable hermeneutical tool weighing upon the interpretation of other rules.

A *Sustainable Development as an External Hermeneutical Reference*

Beyond sustainable development's natural interpretative function when it is included in either the preamble or the material provisions of the treaty to be interpreted,[74] even

[73] See Vienna Convention on the Law of Treaties, Art. 31(3)(c) and *Georges Pinson (France) v. United Mexican States*, 5 RIAA (1928) 327, at 422.

[74] On this point see Barral, 'Le rayonnement intra-systémique du concept de développement durable' in H.Ruiz Fabri and L. Gradoni (eds), *La circulation des concepts juridiques: Le droit international de l'environnement entre mondialisation et fragmentation* (2009), at 371, 373–379.

absent a conventional reference it may still inform treaty interpretation, since, according to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, 'any relevant rules of international law applicable in the relations between the parties' must be taken into account in the interpretative process. Accordingly, as a principle of customary international law or as an extraneous conventional rule, sustainable development can influence the interpretation of treaty provisions as long as it is relevant for such interpretation and applicable in the relations between the parties.[75] The impact of an interpretative reference to sustainable development via Article 31(3)(c) remains however unclear. Sands, commenting in the WTO context, is of the view that it means that a conventional provision 'is to be interpreted consistently with general international law, and . . . the customary rule is to apply unless it can be shown that such application would undermine the object and purpose of the WTO system'.[76] The conclusions of the ILC's Study Group on the fragmentation of international law remain however much more elusive, perhaps to preserve the judge's margin of appreciation.[77] Lastly, the usefulness of Article 31(3)(c) in allowing sustainable development to play a role in treaty interpretation may be further limited by the principle of 'contemporaneity', according to which a treaty must be interpreted in the context of the law applicable at the time of its conclusion.[78] That is unless the parties agree otherwise and decide to allow the interpretation of the treaty to follow modern legal developments.[79]

B *Sustainable Development and Evolutive Interpretation*

The parties to a convention may choose to include 'evolutive' terms in the treaty. By doing so they open the treaty to a dynamic or 'evolutive' interpretation, i.e., to an interpretation in the light of the law in force at the time of the dispute, in the light of current norms of international law, and not just of the law in force at the time of the conclusion of the treaty.[80] The opening up of the agreement by the inclusion of evolutive terms will allow the judge, through a 'mobile reference',[81] to determine the sense of conventional provisions consistently with current norms of international law that did not necessarily exist at the time of its conclusion, and may go as far as allowing the incorporation of such norms into the treaty.[82] By its very nature sustainable development is an evolutive proposition. As an objective it implies constant and

[75] See McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', 54 *ICLQ* (2005) 279, at 314–315.

[76] Sands, 'Sustainable Development: Treaty, Custom and the Cross-Fertilization of International Law', in Boyle and Freestone (eds), *supra* note 6, at 59.

[77] See *Report of the Study Group on the Fragmentation of International Law, finalized by Martti Koskenniemi*, 2006, Doc. A/CN.4/L.682, at 361–362, para. 474.

[78] See *Island of Palmas* case *(Netherlands, USA)*, II RIAA (1928) 829, at 845 and 839.

[79] See ILC Commentaries to the Draft Articles on the Law of Treaties, *ILC Yrbk* (1966) 187, at 242, para. 16.

[80] See Georgopoulos, 'Le droit intertemporel et les dispositions conventionnelles évolutives. Quelle thérapie contre la vieillesse des traités?', 108 *RGDIP* (2004) 123, at 130.

[81] Expression borrowed from the Separate Opinion of Judge Bedjaoui to the *Gabčíkovo-Nagymaros* case, ICJ Reports (1997) 120, at 122.

[82] See *supra* note 1, at para. 112.

continuous efforts; at the same time, what is seen as sustainable will change over time, and according to physical, social, environmental, economic, scientific, or other evolutions. The inclusion of sustainable development in a treaty thus necessarily opens that agreement up to its potential evolutive interpretation.

The *Shrimp–Turtle* case is an excellent example of the Appellate Body using sustainable development as a legitimizing factor for evolutive treaty interpretation. The drafting history of Article XX(g) GATT indicated that the term 'exhaustible' natural resources was associated with non-living resources,[83] thus *a priori* excluding sea turtles from its protection. However, for the Appellate Body, the words of Article XX(g) 'must 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'.[84] And that is because the WTO Agreement preamble showed that its signatories 'were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy' as this preamble 'explicitly acknowledges "the objective of *sustainable development*"'.[85] Sustainable development thus justifies exhaustible natural resources being interpreted in the light of contemporary environmental concerns and modern scientific knowledge, especially as it was 'the perspective embodied in the preamble' that led the Appellate Body to conclude that 'the generic term "natural resources" in Article X(g) is not "static" in its content or reference but is rather "by definition, evolutionary"'.[86] Ultimately, current rules of international environmental law and modern biology indicated that the term exhaustible natural resources could not be restricted to non-living resources and had to be read as including sea turtles. Because of its evolutive nature sustainable development thus authorized the evolutive interpretation of Article XX(g).

C *Sustainable Development and Conflict of Norms*

Since at a minimum sustainable development requires the integration of environmental considerations into economic and social development projects it will also be a useful tool for judges to resolve disputes where such considerations and related legal norms are in tension. In these circumstances, reference to sustainable development will allow a balancing exercise to be carried out, and it will work as a criterion for solving a conflict of norms, a rule of conflict resolution. It is this role that the ICJ attributes to sustainable development in *Gabčíkovo-Nagymaros*. In that dispute Hungary was mainly motivated by environmental concerns (the impact of the construction of the dams), whereas Slovakia wanted to carry out a project fuelling economic development. For the Court, since sustainable development 'aptly expresses' the need to reconcile economic development with protection of the environment, the parties had to find an agreed solution to give effect to the Treaty. In doing so they needed to 'look afresh

[83] See *supra* note 45, at para. 127.
[84] *Ibid.*, at para. 129.
[85] *Ibid.*
[86] *Ibid.*, at para. 130.

at the effects on the environment of the operation of the Gabčíkovo power plant'[87] and 'in order to evaluate the environmental risks, current standards must be taken into consideration'.[88] Sustainable development here requires a balancing of opposite considerations, a balancing of environmental considerations against the duty to give effect to a treaty in force requiring the construction of the dams, according to the *pacta sunt servanda* rule. For Vice President Weeramantry, this balancing function was the essential role of sustainable development,[89] and the Court used it as a mechanism for 'bridging two views without necessarily having to provide close reasoning as to method or outcome'.[90]

Sustainable development is again used as a rule of conflict resolution in the *Iron Rhine* case, where it was used to moderate the harsh effects of a strict application of the terms of an old treaty. According to an 1839 Treaty of Separation, Belgium maintained a right of transit through Dutch territory and on the basis of this requested the reactivation of the Iron Rhine railway line. The Netherlands argued that such reactivation had to be subject to a range of environmental protection measures not envisaged by the Treaty. Despite the treaty's silence, the tribunal concluded that, since sustainable development and the principle of integration require the prevention and mitigation of environmental damage in carrying out economic development projects, Dutch environmental protection measures were legitimate and had to be integrated into the project,[91] thus balancing opposing interests in favour of environmental considerations. But the tribunal used sustainable development again to mitigate the effect of its own conclusions. Under Article XII of the Treaty the costs of a new line were to be borne by Belgium. For the tribunal, although the programmed works did not amount to the building of a new line, their particularly large scale meant that they should still come under Article XII.[92] In principle then the burden of the costs, including the costs of environmental protection measures, fell upon Belgium. But the need to reconcile economic and environmental considerations expressed by sustainable development and embodied by the principle of integration is used again to mitigate these harsh financial consequences.[93] Because both parties pursue legitimate interests, 'the costs are not to be borne solely by Belgium as if it were a new road; but neither are they to be borne solely by the Netherlands. The financial obligations of the Parties must therefore be subjected to careful balancing.'[94] Sustainable development thus legitimizes the balancing and rebalancing of both parties' interests and mitigates their effect on the law.

[87] *Supra* note 1, at para. 141.

[88] *Ibid.*, at para. 140.

[89] See Separate Opinion of Vice-President Weeramantry to the *Gabčíkovo-Nagymaros* case, ICJ Reports (1997) 88, at 88–90.

[90] Sands, 'International Courts and the Application of the Concept of "Sustainable Development"', 3 *Max Planck Yrbk UN L* (1999) 389, at 396.

[91] See *supra* note 50, at paras 59, 222, and 223.

[92] *Ibid.*, at 84.

[93] *Ibid.*, at para. 221.

[94] *Ibid.*, at para. 220.

D *Sustainable Development and the Redefinition of Conventional Obligations*

Sustainable development can finally be used in the interpretative process to assist in the redefinition of conventional obligations. This is arguably its most controversial hermeneutical function as it may lead to treaty revision. When this is the result of a decision by the parties to the agreement it is perfectly legitimate, but it is less so when this decision is made by the judge. In the *Gabčíkovo-Nagymaros* case, the need to reconcile economic development and environmental protection expressed by sustainable development meant that the scope of old treaty provisions had to be renegotiated by the parties to make them compatible with current standards.[95] The Court decided that conventional obligations had to be redefined, yet this conclusion was acceptable as it remained the parties' responsibility. In the *Pulp Mills* case the ICJ also went as far as to redefine the terms of Article 27 of the Statute of the River on the basis of sustainable development, although this did not lead to immediate legal consequences. Article 27 provides that 'the right of each Party to use the waters of the river . . . shall be exercised without prejudice to the application of the procedure laid down in articles 7 to 12 when the use is liable to affect the régime of the river or the quality of its waters'. Unsurprisingly for a treaty concluded in 1975, this provision makes no mention of sustainable development, yet for the Court it is this objective that it conveys. Indeed, in the Court's view, Article 27 'reflects . . . the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development' and adds that it 'embodies this interconnectedness between economic development and environmental protection that is the essence of sustainable development'.[96] Thus not only does the Court read sustainable development into Article 27 but it also redefines the meaning of this provision the implementation of which must now be consistent with this objective; thus in effect revising the Treaty. However, the Court fell short of deciding, despite Argentina's arguments, whether Article 27 had been breached. The *Iron Rhine* tribunal went a step further and arguably relied on sustainable development to 'revise' the treaty, and this time with very substantial legal consequences. By deciding that the reactivation works fell under Article XII, the arbitrators should have concluded that the costs were to be borne by Belgium. Yet, it is on the basis of the need for integration of environmental and economic concerns, as embodied by sustainable development, that the tribunal decided to set aside the terms of Article XII and redefine it to mean that the costs should be shared between the parties. It thus went through extensive interpretative circumvolutions to conclude that Article XII was applicable only to then revise the consequences clearly attached to the Article, and apply its own solution to the repartition of costs.

[95] *Supra* note 1, at 83, finding 2B.
[96] *Supra* note 47, at para. 177.

5 Conclusion

Sustainable development is undeniably a very powerful hermeneutical tool in the hands of judges, as it can be used to weigh on the interpretation of existing norms. Having resort to sustainable development in the interpretation process may not only legitimize a dynamic interpretation of treaty rules, but in certain circumstances lead the judge to go as far as to revise the treaty. These outcomes are the result of the integration of, generally, environmental norms into a treaty that did not necessarily take them into account, as well as of the balancing exercise between conflicting norms and interests that sustainable development requires. Sustainable development's interpretative function is thus particularly significant for the power and degree of liberty it grants judges. However, it is only rarely that disputes are brought before the judge, and however powerful the interpretative function may be, sustainable development cannot be limited to that function only. So to limit it would be to ignore its formalization as a primary rule of law aimed at regulating conduct in hundreds of treaties. As attractive as the judicial function may be, its quantitative role in the implementation of international law remains minimal. The primary enforcers of international norms remain the states themselves, and although sustainable development may be used by judges, it is not addressed to them. It is addressed to legal subjects, i.e., states. States are under an obligation to pursue sustainable development; they are bound by an obligation of means, and by implementing these countless treaties they contribute, day after day, to progressively making sustainable development requirements real.

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