Sustainable Development
Ulrich Beyerlin

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A. Introduction

1 In its famous report *Our Common Future* of 1987, the World Commission on Environment and Development, the so-called Brundtland Commission, understood ‘sustainable development’ (‘SD’) as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’ (ibid 43). Since that time, SD has proven particularly vexing for the international environmental law community. Although its meaning and scope are still far from clear, SD, at least since the 1992 UN Conference on Environment and Development in Rio de Janeiro, has left significant traces in a broad number of international instruments, both of a legal and non-legal nature. The notion of ‘sustainable development’ and a variety of sub-notions that are derived from it, such as ‘sustainable use’, ‘sustainable utilization’, ‘maximum sustainable yield’, or ‘sustainable management’, have been included in almost all important post-Rio instruments. This diversification of SD has resulted in confusion rather than clarity as regards its meaning and regulatory effect. Notwithstanding the question of whether over the years this concept has gained normativity in the sense of entailing certain political or legally binding rules of State behaviour, it has developed at the international, regional, and national level into a crucial political precept that governs virtually every sphere of activity aimed at embracing and balancing ecology and economy, conservation, and utilization.

B. Historical Evolution of Sustainable Development

2 The roots of the concept of sustainable development go back to the early 1970s when the UN General Assembly in its Resolution 2626 (XXV) proclaimed the Second UN Development Decade and the Founex Report ‘Development and Environment’ of 1971 pointed to the linkage of long-term development goals and environmental protection. In 1972, the UN Stockholm Declaration on the Human Environment (‘Stockholm Declaration’), particularly in its Principles 9, 10, and 11, first emphasized that environmental protection and economic development must be understood as compatible and mutually reinforcing goals (→ *Stockholm Declaration [1972]* and *Rio Declaration [1992]*). Particularly telling in this respect is Principle 11 Stockholm Declaration which states that

[*the environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.*

3 A first clear commitment by States to SD can be found in the UN General Assembly’s Resolution 35/56 of 5 December 1980. It contained an International Development Strategy for the Third UN Development Decade, stressing, inter alia, that

[*accelerated development in the developing countries could enhance their capacity to improve their environment. The environment implications of poverty and under-development and the interrelationships between development, environment, population and resources must be taken into account in the process of development. It is essential to avoid environmental degradation and give future generations the benefit of a sound environment...* (para. 41).

4 The World Conservation Strategy, developed jointly by the International Union for Conservation of Nature (‘IUCN’), the → United Nations Environment Programme (UNEP), and the World Wide Fund for Nature (‘WWF’) in 1980, as well as the UN World Charter for Nature of 1982 transformed the still very abstract concept of SD into more specified...
programmes of action. In December 1987 the UN General Assembly, in its Resolution 42/187, endorsed the Brundtland Report and concurred with the Commission that

the critical objectives for environment and development policies which follow from the need for sustainable development must include preserving peace, reviving growth and changing its quality, remedying the problems of poverty and satisfying of human needs, addressing the problems of population growth and of conserving and enhancing the resource base, reorienting technology and managing risk, and merging environment and economics in decision-making (para. 5).

5 Taken together, all these documents already contain the key elements of the concept of SD as it was later employed in the run-up to the 1992 United Nations Conference on Environment and Development (‘UNCED’) in Rio de Janeiro, during the negotiations at Rio, as well as in the Rio outcome documents, namely the Rio Declaration on Environment and Development (‘Rio Declaration’) and the → Agenda 21. The latter set in motion an almost universal process ultimately aimed at establishing ‘a new global partnership for sustainable development’ (preamble para. 1.6). Agenda 21 did not try to transmute SD into a set of specific behaviour patterns, but developed its broad catalogue of recommendations without any further specification of the concept of sustainable development. Agenda 21 promoted SD also in institutional respects by proposing the establishment of the → Commission on Sustainable Development (CSD). Pursuant to ECOSOC Resolution 1993/207 ([12 February 1993] [1993] Supp 1, 94), this commission was indeed set up in early 1993. Designated

‘to ensure the effective follow-up of the [Rio] Conference, as well as to enhance international cooperation and rationalize the intergovernmental decision-making capacity for the integration of environment and development issues ...’ (Agenda 21 Chapter 38.11),

the CSD developed into a high-level policy information and discussion centre for environmental protection and development.

6 In the post-Rio era numerous international environmental agreements, such as the 1994 Convention to Combat Desertification (‘UNCCD’) and the 1995 UN Fish Stocks Agreement, expressly referred to SD or sustainable use without defining these terms. In September 2000 the UN General Assembly stipulated in its Millennium Declaration eight millennium development goals (‘MDGs’), with the inclusion of environmental sustainability (MDG 7). In 2002 the International Law Association (‘ILA’) adopted the New Delhi Declaration which encompasses a conglomeration of legally non-binding Principles of International Law Relating to Sustainable Development, but abstains from clarifying what SD in itself legally means.

7 As indicated by its name, the World Summit on Sustainable Development, especially in its Plan of Implementation, was highly inspired by SD. It ‘developed a wide range of strategies for implementing existing instruments on sustainable development’. Paying particular attention to the social dimension of SD, it ‘covers a very broad spectrum of sustainability-related issues, including sustainable development in a globalising world; health and sustainable development; sustainable development in small island states; sustainable development in Africa; and the institutional framework for sustainable development’ (Beyerlin and Marauhn 76). In October 2005 the UN General Assembly adopted in its Resolution 60/1 the ‘2005 World Summit Outcome’, which, inter alia, reaffirmed SD as ‘a key element of UN activities’ (ibid).
In June 2012 more than 190 heads of State and government convened for the Conference Rio+20 that was aimed at catalyzing pathways towards a more sustainable 21st century. As its final outcome (‘The Future We Want’) reveals, Rio+20 called for the taking of policies for ‘green economy in the context of sustainable development and poverty eradication as one of the important tools available for achieving sustainable development’. The Conference emphasized that these policies ‘should be guided by and in accordance with all the Rio Principles, Agenda 21 and the Johannesburg Plan of Implementation and contribute towards achieving relevant internationally agreed development goals, including the Millennium Development Goals (paras 56, 57). Furthermore, Rio+20 underscored ‘the need for an improved and more effective institutional framework for sustainable development’ (para. 79). In this context the participants decided to establish a ‘universal intergovernmental high-level political forum’ that builds on the strengths and experiences of the CSD, and subsequently replaces the latter (para. 84). In addition, they committed themselves to ‘strengthening the role of the United Nations Environment Programme (UNEP) as the leading global environmental authority’ and invited the UN General Assembly to adopt ‘a resolution strengthening and upgrading UNEP, inter alia, by establishing ‘universal membership in the Governing Council of UNEP’; assuring UNEP of having ‘secure, stable, adequate and increased financial resources’; and ‘[e]nhanc[ing] the voice of UNEP and its ability to fulfil its coordination mandate within the United Nations system’ (para. 88).

C. Meaning of Sustainable Development

At first glance, the composite term ‘sustainable development’ describes a political value that deserves respect in today’s international environmental and developmental relations. As indicated by the term ‘development’, it does not set a clear target to be finally achieved but instead points at a process of interaction that should be set in motion. As to the impact of the environment on development and vice versa, the 1992 Rio Declaration, particularly in its Principle 4, clearly stresses the interdependence between both: ‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it’.

While there is continuing uncertainty among States in regard to the exact meaning and scope of SD, it is widely accepted that the concept of SD entails two temporal dimensions which Principle 3 Rio Declaration addresses by stating that ‘[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’. Thus, SD necessarily implies the inter- and intra-generational responsibility of States (→ Intergenerational Equity).

Today, SD is broadly understood as a concept that is characterized by (1) the close linkage between the policy goals of economic and social development and environmental protection; (2) the qualification of environmental protection as an integral part of any developmental measure, and vice versa; and (3) the long-term perspective of both policy goals, that is the States’ inter-generational responsibility.

D. Criteria for Balancing Development and Environment

Unfortunately, the Rio Declaration of 1992 and the subsequent Political Declaration adopted at the Johannesburg World Summit on Sustainable Development in 2002 (Report 1) are silent with regard to the question of how exactly development and environmental protection should be balanced. At best, the statement of Principle 3 Rio Declaration that ‘[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’ may suggest that striking an equitable balance between the competing interests of development and environmental protection presupposes their equivalence in substance. This conclusion appears to be all the more convincing since there is no evidence for assuming that development prevails over
environmental protection, or vice versa. Developing countries which internally face economic deficiencies and social disruption are tempted to give preference to developmental needs over environmental ones, while industrialized States are inclined to take the opposite view. However, the concept of SD ultimately does not lend support to either of the positions. Thus, in any individual case a fair, or equitable, compromise between both the developmental and environmental needs has to be reached.

E. Ethical Foundation of Sustainable Development

13 As shown above, SD is concerned with relationships both among members of the present generation, and between the present and future generations. In both dimensions, its primary concern is ‘sustained human development’. This reading is in line with Principle 1 Rio Declaration, which states: ‘Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature’. Accordingly, from the perspective of ethics, SD is mostly understood as an anthropocentric concept; it embodies what Bosselmann calls ‘weak sustainability’ (‘The Concept of Sustainable Development’ [2002] 84; → Environmental Ethics). Bosselmann conceives SD as ‘ecologically sustainable development’ (ibid). In his view, it is ‘a new, extended form of justice’ that ‘expands our traditional concept of justice in terms of space and time’ by including ‘the entire global community and future generations’, comprising both ‘people and the nonhuman world’ (ibid 96); it calls for ‘strong sustainability based on ecocentrism’ (ibid).

14 Accordingly, States should feel prompted to leave the earth’s ecosystem to the generations to come in as sound a condition as possible. They should take all efforts to conserve the ‘diversity of the natural and cultural resource base’ and maintain ‘the quality of the planet’ (Brown Weiss 38), including the non-human nature (→ Biological Diversity, International Protection). Thus, much speaks in favour of conceiving the inter-generational component of sustainable development in ecocentric terms. Since inter-generational equity is inseparably intertwined with intra-generational equity, the concept of sustainable development in its entirety must be perceived as both anthropocentric and ecocentric in nature. While the proponents of an anthropocentric environmental ethic, with several variations, regard ‘humanity as the centre of existence’ (Gillespie (1997) 4), thereby allocating to nature ‘an instrumental value for humans’ (ibid), the common feature agreed by the theorists adhering to an ecocentric or eco-philosophical thinking is ‘that environmental protection must be based upon the inherent (or intrinsic) value of non-human Nature’ (ibid 2).

F. Normative Content and Status of Sustainable Development

15 There is an on-going controversial discussion in international legal writings about the normative content and status of SD. Some scholars suggest that the concept of SD possesses normative quality and has already gained the status of a principle of → customary international law, or is at least going to become such a principle. Thus, for instance, Sands has stated that ‘[t]here can be little doubt that the concept of ‘sustainable development’ has entered the corpus of international customary law’ (Sands Principles [2003] 254). A majority of legal writers deliberately keep silent on this question. Others explicitly allocate SD to the sphere of mere political ideals, or do not yet attribute SD to the realm of legally binding norms.
More than 15 years ago, SD first attracted the attention of the International Court of Justice (ICJ). In its judgment in the 1997 → Gabčíkovo-Nagymaros Case (Hungary/Slovakia), the ICJ expressly invoked the ‘concept of sustainable development’ as an apt expression of the ‘need to reconcile economic development with protection of the environment’ (Gabčíkovo-Nagymaros Case para. 140). In the view of the ICJ, as a consequence of this concept, the parties ‘together should look afresh at the effects on the environment of the Gabčíkovo power plant’ (ibid). However, the Court did not address the question whether this concept is of legal or non-legal quality. In this respect, Judge Weeramantry, in his separate opinion, was less reserved. He considered sustainable development to be ‘a principle with normative value’ rather than ‘a mere concept’ (ibid 88). In his view, this principle ‘is a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community’ (ibid 95). In Sands’s understanding, it follows already from the ICJ’s majority judgment in the Gabčíkovo-Nagymaros Case that sustainable development ‘has a legal function’ (Sands Principles [2003] 255). In his view, there is ‘little doubt’ that it ‘has entered the corpus of international customary law, requiring different streams of international law to be treated in an integrated manner’ (ibid 254). Nine years later Sands states that ‘[i]nternational law recognises a principle [or concept] of “sustainable development”’ (Sands Principles [2012] 217).

Lowe qualifies these arguments as ‘not sustainable’ (Lowe 30). In his view, sustainable development ‘is itself not a norm; it can be no more than a name for a set of norms. Indeed, it may not even be that’. He rightly points out that ‘[n]ormativity, by definition, must express itself in normative terms: it must be possible to phrase a norm in normative language’ (ibid 26). Later on in his study, he characterizes sustainable development as a ‘meta-principle’, 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’ (ibid 31). Lowe assigns sustainable development to a category of ‘modifying norms’-this term is tantamount to that of ‘interstitial norms’ (ibid 33) designed to establish the relationships between other primary norms. If employed by judges, a norm of such type gains normative force. According to Lowe, ‘it will colour the understanding of the norms that it modifies. It is in these senses that the concept of sustainable development has real normative force’ (at 34). Lowe’s thesis, irrespective of its validity, reflects the extreme difficulties in determining what SD means in legal terms. Be it part of an international treaty or not, it is not an action-oriented rule but rather a principle that guides States in their decision-making. However, the borderline between legal principles and political ideals is very blurred (see Beyerlin (2007) 425-48).

The 2005 arbitral award in Iron Rhine Railways (Belgium/The Netherlands) and the ICJ’s 2010 judgment in Pulp Mills on the Uruguay River (Argentina/Uruguay) both addressed SD, but did not expedite the international debate on the normative quality and status of this concept. While the Arbitral Tribunal refrained from stating more than that ‘[e]nvironmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts’ (Iron Rhine paras 58–60), the ICJ’s statement in Pulp Mills that Art. 27 Statute of the River Uruguay was ‘consistent with the objective of sustainable development’ hardly allows the conclusion that the Court counts SD among the concepts that have legal status. In the author’s view SD ‘remains below the threshold of normative quality that is an indispensable prerequisite for ascribing the quality of a (legal) principle to it … [SD] stipulates a political aim to be reached, or alternatively, constitutes a political ideal to be pursued’ (Beyerlin and Marauhn [2011] 81). By contrast, Barral suggests that ‘sustainable development is an objective which has a flexible but identifiable material content, at least to some extent’. This is why, in her view, SD ‘purports to directly regulate
conduct and has properly material and direct legal implications. It is a primary norm of international law’ (Barral [2012] 390).

19 As shown, SD is still highly susceptible to varied explanations. Its ‘normative language’ is ambiguous to such an extent that it cannot deploy any appreciable steering effect on States’ environmental behaviour. For these reasons, much speaks in favour of the assumption that SD remains below the threshold of normative quality that is an indispensable prerequisite for ascribing the quality of a ‘legal’ principle to it. Thus, it is a political ideal rather than a legal principle. However, if Lowe’s statement that sustainable development ‘lacks … a fundamentally norm-creating character’ (Lowe 30) implies that this concept can never be a source from which subsequent legal norms can flow, this perception is hardly persuasive. First, it somewhat contradicts Lowe’s understanding that SD may modify a primary norm because, if doing so, it would possibly generate a new, modified norm. Moreover, it neglects the experience that political or moral ideals, although lacking normativity of their own, can be catalysts in the process of further developing international law. Thus, Sands attempt to deduce from the ‘principle of sustainable development’ some self-contained norms—for example, inter-generational equity, sustainable use, equitable use, or intra-generational equity, and integration (see Sands [2003] 253)—is entirely appropriate, irrespective of the current nature of the ‘principle’ itself.

G. Sustainable Use: A Special Emanation of Sustainable Development

20 SD proves to be a source from which subordinate norms may be derived, one of which is definitely ‘sustainable use’ in so far as it relates to natural resources. This precept calls upon States owning valuable natural resources on their territories, as well as third States seeking access to these resources for exploitation, to use these resources in a sustainable manner, thereby ensuring their continuance. Both groups of States should act as co-equal members of a community committed to the preservation of biological diversity as a goal of common welfare. Thus, sustainable use of natural resources does not only reflect the idea of distributive justice, but also that of international solidarity (→ Solidarity, Principle of; → Solidarity Rights [Development, Peace, Environment, Humanitarian Assistance]). It helps preserve the earth’s ecosystem—for the sake of present and future generations.

21 ‘Sustainable use’ appears to be a special emanation of SD. As such it may have become a self-contained norm in international law. However, it only gains normative quality if linked with a defined object of use. For example, the 1992 Convention on Biological Diversity (‘CBD’) combines sustainable use with components of biological diversity, such as flora and fauna, and other natural resources. Furthermore, Art. 2 CBD defines ‘sustainable use’ as the use of these components ‘in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations’. Thus, there is little doubt that ‘sustainable use’, as specified by Art. 10 (b) CBD, calls upon the contracting parties to take measures directed to ensure the sustainable use of natural resources. Notwithstanding its indeterminateness, sustainable use is a legal rule in this context. Due to the fact that it has been integrated in a large number of international environmental agreements, it may even have gained customary legal status. However, this conclusion would require a closer examination of relevant → State practice and opinio iuris.
H. Sustainable Development in the North-South Context

22 The 1992 Rio Declaration, in its Principles 5 and 6, assigns to the concept of SD an important role in the process of bridging the lasting North-South divide in international environmental and developmental relations between industrialized States and developing countries. There is much in favour of arguing that SD can be construed as a concept that directs States to preserve and protect the earth’s ecosystem without compromising the interests and needs of the developing world’s poor peoples. SD provides for a very close interdependence between the competing policy goals of development and environmental protection. Thus, it pursues what Sands has called an ‘integration approach’ (Principles [2003] 263): economic and social development must be an integral part of environmental protection, and vice versa.

23 Perceived as a concept pursuing a combined anthropocentric and ecocentric approach, SD cannot be suspected of being ‘a force of ideological imperialism’ featuring ‘the idea of nature as separate from man’ (Geisinger [1999] 45). It rather gives meaningful direction to the process of bridging the North-South divide by reminding all actors in international environmental and developmental relations, coming both from the industrialized or developing world, to administer and conserve the earth’s ecosystem as an indispensable natural resource basis for any good life of present and future humans. It hinders the taking of actions that give intra-generational needs undue predominance over the inter-generational ones, as well as actions that are designed to meet human needs at the expense of non-human natural goods.

24 In both its intra-generational and inter-generational dimension, the concept of SD reflects the idea of distributive justice. It transposes this idea into a concept that gives important impulses to all actors involved in the endeavour to converge the conflicting interests, and needs of the North and South, although there are doubts whether it is able to deploy immediate steering effects on States’ behaviour. To date, it has hardly gained the status of a principle of customary international law, but it is a catalyst in the process of further development of international law.

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