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Chapter 1

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Part A

The Future of Money and Finance: Sustainability and Climate Transition

Chapter 1

Sustainable Development within the International Legal System

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This section of the Platform discusses Sustainable Development within the international legal system. After introducing the concept, the 50-year-long evolutionary path is analyzed by evidencing the most important international initiatives, legal instruments, and case law; on this basis, the legal nature of Sustainable Development is investigated by referring to the most significant theoretical understandings proposed in the literature while legally reconstructing Sustainable Development as a concept, as an objective as well as a principle of international law, including a plurality of more specific objectives, principles, and norms.

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1. General overview

- 1.1 **Sustainable development may be legally conceived as a *concept*, an *objective*, as well as a *principle* of international law – including a plurality of more specific principles and norms – which emerged, evolved, and progressively consolidated within the international legal system to solve the environmental and socio-economic problems affecting the international society as a whole**, such as climate change, environmental degradation, biodiversity loss, the progressive exhaustion of natural resources, hunger, extreme poverty, and the deprivation of fundamental human rights for a significant part of the world population.

The exasperation of those common concerns of international significance (above all climate change) is indeed strictly connected to the very functioning of the global economic system, as a result of the negative environmental and socio-economic externalities caused by global growth: as such, it constitutes a serious menace to the future and prosperity of all humankind. Therefore, on behalf of future generations, there is a **need for a structural change of the current global development model** – which is strongly based on economic growth as the real source of development despite not considering the relevant externalities (see *infra* § 2.1) – to be driven by international action and coordinated initiatives.

The concept of **Sustainable Development** – as a **model of development based on the integration of economic growth with climate and environmental protection and overall social development** – is theoretically grounded on this need to ensure the future and prosperity of humankind; to this end, it supports the progressive transformation of the global economic system by reconciling, rebalancing and mutually integrating the economic, environmental, and social dimensions of development, i.e. the three interdependent and mutually reinforcing pillars of Sustainable Development, resulting from the intersection of three areas of international law: international economic law, international environmental law, and international human rights law.

- 1.2 Sustainable Development was first theorized as a *concept* in the **1987 Brundtland Report** (see *infra* § 2.3), which defined it as the “*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*” as well as “*a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs*”. The Brundtland’s conceptualization of Sustainable Development and its endorsement by the UN General Assembly in 1987 represented a historical turning point in international cooperation on climate, environmental, and social issues by giving the international society a common vision and a common direction on the future to pursue together.
- 1.3 In the following years, the concept has been more precisely declined by States in specific environmental and socio-economic principles, such as those expressed in the **1992 Rio Declaration** (see *infra* § 2.4) and the **2002 Johannesburg Declaration** (see *infra* § 2.5)

respectively. In particular, the Rio Declaration marked the very birth of international environmental law as a branch of public international law, which until then was lacking specific principles and rules, by enunciating new principles for international environmental protection and cooperation; the Johannesburg Declaration, instead, detailed the States' objectives and commitments regarding the social dimension of Sustainable Development, with a specific focus on less developed countries.

- 1.4 Over the years, Sustainable Development has been more and more widely recognized by States as an overall objective of the international society, including a plurality of climate, environmental, and social goals, which are relevant to international law. In this regard, the approval in 2015 of the **UN 2030 Agenda for Sustainable Development** was paramount (see *infra* § 2.6), as it detailed the 17 SDGs (Sustainable Development Goals) integrating the overall objective of Sustainable Development while setting a universal agenda for “transforming our world” as “a shared blueprint for peace and prosperity for people and the planet, now and into the future” implying a “global call for action” to make the ecological and sustainability transition happen.

In the same year, the signature of the **Paris Agreement** (see *infra* § 2.6) intensified international action against climate change, as an autonomous field of international cooperation within the broader context of Sustainable Development; namely, the treaty established internationally binding objectives concerning climate mitigation and adaptation as well as finance for the climate transition.

- 1.5 Nowadays, Sustainable Development is recognized in many international and domestic legal instruments, international jurisprudence and domestic case law, and international legal literature as a principle of international law. However, its **legal nature as an international legal principle is still uncertain and highly debated** among international legal scholars (see § 3); namely, the debate is about the collocation of the principle within the international legal system as a soft law instrument or as a principle of general international law with binding effects for States and the other subject of law.

Beyond the many different theoretical understandings and opinions about its actual legal status, there is little doubt that Sustainable Development has become an **essential reference point for contemporary international law** as an instrument that is capable: on the one hand, of conditioning the formation and operation of heterogeneous international principles and rules, by adapting them to the needs of present and especially future generations; on the other, of normatively orienting and influencing the conduct of States, International Organizations and other actors within the global economy and society, while also incentivizing and legitimizing initiatives in support of the climate and sustainability transition.

2. Origin and evolution of Sustainable Development

2.1 The debate about the need for a **structural transformation of the global development model was incepted by a sort of “collective awareness” about its longer-term un-sustainability, as a result of massive industrialization and the exponential growth of world population.** The global development model, indeed, while relying on global economic growth as the real source of development, does not consider the negative externalities caused by global production and consumption, with the result of *de facto* tolerating their worldwide accumulation and exacerbation.

Namely, this awareness started to rise within the economic and scientific debate around late '60 and '70: in those years, indeed, different studies and research – such as: “The Economics of the Coming Spaceship Earth” (1966) by Kenneth E. Boulding; “The Tragedy of the Commons” (1968) by Garret Hardin; “Limits to Growth” also known as the “Meadows Report on the Limits to Growth” (1972) by Donella H. Meadows et al. – pointed out how, in the absence of appropriate countermeasures, global economic growth would inevitably and rapidly lead to the **irreversible exhaustion of natural resources and disrepair of global commons and public goods, with disastrous consequences for all the humankind.**

This deeply sensitized the worldwide public opinion as well as governments and institutions, including the United Nations, to take action to make the global economic system more sustainable from climate, environmental, and socio-economic perspectives.

⇒ [Kenneth E. Boulding, “The Economics of the Coming Spaceship Earth” \(1966\)](#)

⇒ [Garret Hardin, “The Tragedy of the Commons” \(1968\)](#)

⇒ [Donella H. Meadows et al., “Limits to Growth” also known as the “Meadows Report on the Limits to Growth” \(1972\)](#)

2.2 As a result of growing concerns about the longer-term un-sustainability of the current global development model, in 1968 the first international conference on the topic was convoked by the UN General Assembly. The United Nations Conference on the Human Environment or the “**Stockholm Conference**”, as it was held in Stockholm between the 5th and 16th of June 1972, was indeed **the first forum where States started to discuss the environmental and socio-economic “problems of the human environment” affecting the future and prosperity of humankind.**

The Conference, attended by 112 States and many UN agencies and international organizations, concluded with the adoption of three non-binding acts:

(i) The “**Declaration of the United Nations Conference on the Human Environment**” or the “**Stockholm Declaration**” is a Declaration containing 26 Principles as an expression “*of a common vision and common principles to inspire and guide the people of the world in the conservation and enhancement of the human environment*”; those Principles concern specific environmental and social issues – such as: the protection and promotion of fundamental human rights (Principle 1); the management of natural resources and the problem of environmental pollution (Principles 2-7); the correlation

between economic development and environmental protection (Principles 8-12); the planning of demographic, environmental and development policies (Principles 13-17); the diffusion of scientific knowledge, technology and education throughout the world and in particular in developing countries (Principles 18-20); the obligation for States to prevent and compensate for environmental damages caused in other countries, to cooperate to resolve them and to promote environmental protection at an international level (Principles 21-25); nuclear disarmament (Principle 26) – thereby, those principles represent the forerunner of the principles related to Sustainable Development, which has been conceptualized later on, in the 1987 Brundtland Report;

- (ii) The “Action Plan for the Human Environment” contains 109 recommendations on how to address environmental problems at the national and international levels; it is the precursor of the 1992 Rio Conference’s Agenda 21;
- (iii) The “Resolution on the Institutional and Financial Arrangements” recommended the establishment of a “Governing Council for Environmental Programmes” within the United Nations, which led to the **creation of the “United Nations Environmental Program” (UNEP)**, the institutional body of the United Nations with specific competence on the issues of environmental protection, sustainable use of natural resources and sustainable development.

⇒ [UNITED NATIONS GENERAL ASSEMBLY, Resolution No. 2398 \(XXIII\) of 3 December 1968 “Problems of the human environment”, UN Doc. A/RES/2398\(XXIII\)](#)

⇒ [UNITED NATIONS, Report of the United Nations Conference on the Human Environment, 1972, UN Doc. A/CONF.48/14/Rev.1](#)

⇒ [Declaration of the United Nations Conference on the Human Environment](#)

2.3 In 1987, **the concept of Sustainable Development was theorized and defined for the first time by the World Commission on Environment and Development, also known as the “Brundtland Commission”** (as it was chaired by the former Prime Minister of Norway Gro Harlem Brundtland) which was established by the UN General Assembly Resolution No.38/161 of 19 December 1983 with the mandate of proposing *“long-term environmental strategies to achieving sustainable development to the year 2000 and beyond”* as well as *“a long-term agenda for action during the coming decades, and aspirational goals for the world community”* to be based on greater co-operation among states and leading to the *“achievement of common and mutually supportive objectives that take account of the interrelationships between people, resources, environment, and development”*.

The final report of the World Commission on Environment and Development, entitled “Our Common Future”, better known as the **“Brundtland Report”**, was published in October 1987.

The Brundtland Report is based on analytical scrutiny of the main socio-economic problems of humankind showing how they are so interdependent and interconnected that a sectoral approach would prove completely useless; indeed, according to the Commission, the many different crises that the world was experiencing those years, such as the environmental,

energy, agriculture, and trade crises, where all “interlocking crises” as a part of a **unique, all-embracing systemic crisis concerning the very foundations of the global development model**. Consequently, the Commission proposed a holistic approach to the common problems of the International Community based on an alternative model of development integrating the economy, the environment, and the society, to achieve progressively through international cooperation and appropriate institutional reforms.

The proposal met with great success all over the world, inspiring a new and unprecedented phase of international cooperation on environmental, climate, and social issues.

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In the Brundtland Report, **Sustainable Development was defined** as:

- a) *“the development that meets the needs of the present without compromising the ability of future generations to meet their own needs”* (cf. Brundtland Report, Chapter II, point 1); as well as
- b) *“a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are made consistent with future needs as well as those of the present”* (cf. Brundtland Report, Chapter II, point 15).

These inseparable and complementary definitions constitute the theoretical foundation of the concept of Sustainable Development, which stands at the same time as an alternative, ideal model of development to aspire to, and the consequent process of change and reform involving the International Community as a whole.

According to the Report, the definition sub a) – **“the development that meets the needs of the present without compromising the ability of future generations to meet their own needs”** – contains *“two key concepts: the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs”* (cf. Chapter II, point 1). Therefore, the concept of Sustainable Development as an alternative global model of development aims at reconciling the economy with:

- on the one hand, the limitations imposed by Nature to the exploitation of resources, which must not threaten the ability of future generations to meet their own needs – this is the climate and environmental dimension of Sustainable Development, responding to the so-called **principle of inter-generational equity**;
- on the other hand, the basic needs of every person on Earth (such as food, water, healthcare, and job), that global economic growth must satisfy – this is the social dimension of Sustainable Development, responding to the so-called **principle of intra-generational equity**.

But, the definition sub b) – **“a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are made consistent with future needs as well as those of the present”** – imposes to conceive Sustainable Development not as a utopistic, ideal model of development or *“a fixed state of harmony”*, but a continuous, progressive process of change

and reform involving the entire International Community, i.e. States and International organizations, but also all the other actors of the global economic system.

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The Brundtland Report was adopted by the United Nations General Assembly with [Resolution No. 42/187 of 1987 “Our Common Future”](#), which was an act of capital importance that radically influenced the evolution of international politics and law in the following years. In the Resolution, moreover, the General Assembly expressed important considerations relating to the concept of Sustainable Development proposed by the Commission: it recognized **“the imperative need for making the transition towards sustainable development”**; it expressly acknowledged that **Sustainable Development “should become a central guiding principle of the United Nations, Governments and private institutions, organizations and enterprises”**; it encouraged all individuals and actors aiming to contribute to the transition *“to make full use in this regard of the report of the Commission”* (Cf. A/RES/42/187).

⇒ [UNITED NATIONS GENERAL ASSEMBLY, Resolution No. 42/187 of 11 December 1987, UN Doc. A/RES/42/187](#)

⇒ [WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, Our Common Future. Report of the World Commission on Environment and Development, UN Doc. UNEP/GC/14/13](#)

2.4 In 1992, the United Nations Conference on Environment and Development, also known as the “Rio de Janeiro Earth Summit” or “[Rio Conference](#)”) was held in Rio de Janeiro to discuss **climate change and international environmental and socio-economic issues**. The Conference was convened by the UN General Assembly in 1989 (cf. Resolution no. 44/228 (XXIII) of 22 December 1989), at the end of the Cold War, in order to *“develop strategies and measures to halt and reverse the effects of environmental degradation in the context of increased national and international efforts to promote sustainable and environmentally friendly development”* (cf. point I.3).

The Conference was held between 3 and 14 June 1992 with the participation of 172 States and a very large number of international organizations, agencies, and NGOs. It was an unprecedented global event, not just for the enormous participation of civil society and media impact across the globe, but, above all, for the international political choices that were made on that occasion.

The Conference concluded, in particular, with the signature of two international treaties:

- (i) the **“United Nations Framework Convention on Climate Change”** (UNFCCC), aimed at contrasting climate change;
- (ii) the **“Convention on Biological Diversity”** aimed at the conservation of biological diversity, the sustainable use of its components, and the fair and equitable division of the benefits deriving from the use of genetic resources.

Moreover, three non-binding acts were adopted:

- (iii) the **“Rio Declaration on Environment and Development”** is a Declaration containing 27 Principles related to Sustainable Development; in particular, Principles 3, 4, and 5

represent the core principles of Sustainable Development, such as, respectively, the principle of intergenerational equity (“*The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations*”), the principle of integration of environmental protection (“*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*”), and the principle of intragenerational equity (“*All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world*”); the other Principles include the principles of special priority for developing countries (Principle 6) and common but differentiated responsibilities (Principle 7), the reduction and elimination of unsustainable production and consumption models (Principle 8), cooperation in the scientific and technological fields and in environmental matters (Principles 9 and 12), and other principles relating to international environmental law (Principles 10, 11, 13 – 19), to socio-economic cooperation and the maintenance of peace (Principles 20 – 26), and, lastly, the principle of cooperation “*in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development*” (Principle 27);

- (iv) “Agenda 21” is an international economic policy agenda including a broad and detailed action program to promote and achieve a “*global partnership for sustainable development*”;
- (v) the “Forest Principles” (“Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests”), relating to the sustainable exploitation of forests.

- ⇒ [UNITED NATIONS GENERAL ASSEMBLY, Resolution No. 44/228 \(XXIII\) of 22 December 1989, UN Doc. A/RES/44/228](#)
- ⇒ [UNITED NATIONS, Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26\(Vol.I\)](#)
- ⇒ [UNITED NATIONS, UNCED: Earth Summit, Rio de Janeiro, 1992, UN Doc. UNA/CONF.151\(063.1\)/R4](#)
- ⇒ [Rio Declaration on Environment and Development](#)
- ⇒ [United Nations Framework Convention on Climate Change](#)
- ⇒ [Convention on Biological Diversity](#)
- ⇒ [Forest Principles](#)
- ⇒ [Agenda 21](#)

2.5 In 2002, the World Summit on Sustainable Development (also known as “Earth Summit 2002” or the “**Johannesburg Conference**”) was held in Johannesburg from 26 August to 4 September 2002, with the aim of giving new policy inputs to international cooperation for sustainable development, environmental protection and poverty reduction. 180 States

participated in the Conference, which concluded, in particular, with the adoption of two non-binding acts:

- (i) the “**Johannesburg Declaration on Sustainable Development**”, where States reaffirmed their commitments to Sustainable Development, focusing in particular on socio-economic concerns, such as hunger, poverty, health, and social inequalities in less developed countries;
- (ii) the “Plan of Implementation of the World Summit on Sustainable Development” containing guidelines and recommendations on how to address the aforementioned social sustainability problems at the international level.

⇒ [UNITED NATIONS, Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August-4 September 2002, UN Doc. A/CONF.199/20](#)

⇒ [Johannesburg Declaration on Sustainable Development](#)

2.6 The year 2015 represented a historical turning point in the history of Sustainable Development, thanks to the approval of the UN 2030 Agenda (25th September) and the Paris Agreement (12th December).

The **2030 Agenda for Sustainable Development**, that is the UN General Assembly Resolution No. 70/1 of 25 September 2015 “Transforming our world: the 2030 Agenda for Sustainable Development”, was adopted unanimously by the plenary session of the General Assembly during the United Nations Sustainable Development Summit held in New York. The Summit was convened by the United Nations General Assembly to negotiate, develop, and approve a new programmatic agenda for Sustainable Development, as requested by the Resolution “The future we want” approved at the 2012 Conference on Sustainable Development (Resolution No. 64/236 of 11 September 2012).

The 2030 Agenda represents “**a historic decision on a comprehensive, far-reaching and people-centred set of universal and transformative Goals and targets**” (cf. UN 2030 Agenda, point 2): these are the **17 Sustainable Development Goals (SDGs)** integrating the overall objective of Sustainable Development and articulated in 169 targets. The Agenda is “*of unprecedented scope and significance. It is **accepted by all countries and is applicable to all**, taking into account different national realities, capacities and levels of development and respecting national policies and priorities. These are universal goals and targets which involve the entire world, developed and developing countries alike. They are integrated and indivisible and balance the three dimensions of sustainable development*” (cf. UN 2030 Agenda, point 5). With the 2030 Agenda, States committed to “**making substantial changes to the way in which our society produces and consumes goods and services**. Governments, international organizations, the business sector and other non-state actors and individuals must contribute to changing unsustainable consumption and production patterns, including through the mobilization, from all sources, of financial and technical assistance to strengthen developing countries’ scientific, technological and innovative capacities to move towards more sustainable patterns of consumption and production” (cf. UN 2030 Agenda, point 28). To this end, it “*will facilitate an intensive global*

*engagement in support of the implementation of all the Goals and targets, **bringing together Governments, the private sector, civil society, the United Nations system and other actors and mobilizing all available resources***" (cf. UN 2030 Agenda, point 39).

As such, the UN 2030 Agenda constitutes a fundamental act of international policymaking that has specified the goals and targets of Sustainable Development aiming at "*transforming our world*", while asking for the cooperation of any actor to reach this objective, that is to say not just States and international organizations, but also the private business and non-business sector, civil society, and other actors such as the academia and scientific communities. Therefore, a **proper global call for action**. The Agenda also provides specific means of implementation, as specified in the Addis Ababa Action Agenda, which is an integral part of the 2030 Agenda, and appropriate review processes.

Hence, **the 2030 Agenda and the SDGs represent a strategic framework** within the complex reform process undertaken by the United Nations concerning international cooperation and long-term political planning in support of Sustainable Development; although having a political or at least a soft-law nature, the SDGs can act as the universal normative basis for every initiative in the field of Sustainable Development.

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The **Paris Agreement** is an international treaty on climate change stipulated between 196 member states of the United Nations Framework Convention on Climate Change (UNFCCC) at COP21 on 12 December 2015. The treaty has established specific obligations on climate change mitigation, adaptation, and finance, superseding the Kyoto Protocol as the principal regulatory instrument governing the global response to climate change.

In particular, pursuant to Art. 2.1, "*This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1,5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; (b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and (c) **Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development***". With the Paris Agreement, therefore, States have set international climate change objectives concerning the increase of global average temperature, while specifically undertaking to reform finance in order to support the transition towards low greenhouse gas emissions and climate-resilient development (on this aspect, see Chapter 2 of the Platform).

- ⇒ [UNITED NATIONS GENERAL ASSEMBLY, Resolution No. 64/236 of 11 September 2012 "The future we want", UN Doc. A/RES/66/288](#)
- ⇒ [UNITED NATIONS GENERAL ASSEMBLY, Resolution No. 70/1 of 25 September 2015 "Transforming our world: the 2030 Agenda for Sustainable Development", UN Doc. A/RES/70/1](#)
- ⇒ [Paris Agreement](#)

3. Legal nature and effects

3.1 Within the international legal system, it is undeniable that Sustainable Development has been consolidating as an **international legal concept as well as an overall objective of the International Community**, as defined and specified in numerous international acts, the most important of which have been mentioned above.

In this respect, the **INTERNATIONAL COURT OF JUSTICE**, in two international leading cases on Sustainable Development, has qualified it:

- a. in the **1997 Gabčíkovo-Nagymaros dispute**, as a “*concept*” expressing the need “*to reconcile economic development with protection of the environment*” (cf. ICJ, Case Concerning the Gabčíkovo-Nagymaros Project, Judgment of 25 September 1997, par. 141);
- b. in the **2010 Pulp-Mills case**, as an “*objective*” to which a specific treaty provision expressing “*the need to strike a balance between the use of the waters [i.e. the economic exploitation of the Uruguay River] and the protection of the river [i.e. the environmental protection of river]*” was deemed consistent by the Court (cf. ICJ, Case Concerning Pulp Mills on the River Uruguay, Judgment of 20 April 2010, par. 177).

Also, the **APPELLATE BODY OF THE WORLD TRADE ORGANIZATION** recognized Sustainable Development as an objective in the **1999 Shrimp-Turtle case**, expressing the view that “*the optimal use of the world's resources should be made in accordance with the objective of sustainable development*” (cf. WTO, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report of 20 September 1999, par. 153).

Those international judicial recognitions of Sustainable Development were paramount, as they have officially introduced it in international legal and judicial reasoning; moreover, on the occasion of the ICJ disputes mentioned above, two Judges of the Court – JUDGE WEERAMANTRY in Gabčíkovo-Nagymaros and JUDGE TRINIDADE in Pulp-Mills – have formulated **separate opinions** supporting the different qualification of Sustainable Development as a legal principle of International Law (see *infra* § 3.6).

- ⇒ [INTERNATIONAL COURT OF JUSTICE, *Case Concerning the Gabčíkovo-Nagymaros Project \(Hungary/Slovakia\)*, Judgment of 25 September 1997](#)
- ⇒ [INTERNATIONAL COURT OF JUSTICE, *Case Concerning Pulp Mills on the River Uruguay \(Argentina/Uruguay\)*, Judgment of 20 April 2010](#)
- ⇒ [WORLD TRADE ORGANIZATION, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report of 20 September 1999](#)
- ⇒ [INTERNATIONAL COURT OF JUSTICE, *Case Concerning the Gabčíkovo-Nagymaros Project, Separate Opinion of Vice-President Weeramantry*](#)
- ⇒ [INTERNATIONAL COURT OF JUSTICE, *Case Concerning the Pulp Mills on the River Uruguay, Separate Opinion of Judge Cançado Trindade*](#)

3.2 It is also undeniable that Sustainable Development, as a concept-objective, **includes a plurality of international legal principles and norms** on environmental protection and socio-economic cooperation having different legal nature, content, and effectiveness:

indeed, while many specific principles and norms related to Sustainable Development have been initially affirmed by States in international non-binding acts, such as the 1992 Rio Declaration on Environment and Development, some of them have been subsequently translated into multilateral treaty norms or have been rooting in international practice as customary law, thereby acquiring hard law effectiveness within the international legal system (cf. INTERNATIONAL LAW ASSOCIATION, *New Dehli Declaration of principles of international law relating to sustainable development*, Resolution n. 3/2002, and INTERNATIONAL LAW ASSOCIATION, *Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, Resolution n. 7/2012).

However, the legal nature, content, and effectiveness of **Sustainable Development as a legal principle of international law** – that is to say, **a principle of law integrating an autonomous legal prescription within the international legal system**, and not just as a synthesis concept encompassing a plurality of sector-specific principles and norms – is **highly debated and controversial** among international legal scholars. Indeed, while it is broadly recognized that the principle of Sustainable Development is relevant to international law, it is mostly considered just a soft-law principle with no general binding effects.

This is due to the difficulty in interpreting and collocating Sustainable development within the framework of public international law as a consequence, *inter alia*, of the more than 50-year-long evolutionary path, the endemic vagueness of the formulations used to define it in the many international acts and documents approved, and its transformative and evolutionary nature as a continuous “process of change” within the international legal system.

⇒ [INTERNATIONAL LAW ASSOCIATION, *New Dehli Declaration of principles of international law relating to sustainable development*, Resolution n. 3/2002](#)

⇒ [INTERNATIONAL LAW ASSOCIATION, *Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, Resolution n. 7/2012](#)

3.3 According to some Authors, the principle of Sustainable Development is **nothing more than a political concept**, with no normative relevance. This is not just because it is contained in non-binding documents, but also because the formulations used are so vague, ambiguous, and generic, that no specific legal effect can arise therefrom. Moreover, the concept includes a plethora of universal ethical and justice considerations, which at most can inspire, but not prescribe, behaviors to the subjects of international law.

The majority of the literature, however, agrees with the conceptualization of Sustainable Development as **a legal principle of international law**, whose content is generally reconstructed as the duty of States to rebalance and mutually integrate economic, environmental, and social considerations in policy-making; nonetheless, there is a **very wide diversity of interpretations concerning the legal effectiveness of the principle**, i.e. its systematic collocation within the international legal system as a part of international soft-

law or general international law. In particular, there are essentially three different currents of thought, according to which:

- (i) Sustainable Development constitutes a **hermeneutic principle** or interpretative tool;
- (ii) Sustainable Development is a **soft-law** principle which however proves capable of orienting the conduct of States in certain specific areas of international cooperation;
- (iii) Sustainable development is a principle of **general international law** with binding effects for States.

3.4 The first approach (i) is expressed in particular by **LOWE** (cf. **LOWE V.**, *Sustainable Development and Unsustainable Arguments*, in **BOYLE A.**, **FREESTONE D.** (eds.), *International Law and Sustainable Development. Past Achievements and Future Challenges*, Oxford, 1999) who qualifies Sustainable Development not as a primary norm governing the conduct of States, but as a **“meta-principle” or “interstitial norm” with the function of resolving conflicts between primary norms belonging to different areas of international law**, broadening or narrowing their scope according to circumstances. In **LOWE**’s opinion, therefore, the principle of Sustainable Development has emerged within the international legal system as a hermeneutical tool that judges can use, in the concrete case, to resolve normative conflicts and balance opposing interests. This interpretation is based, in particular, on the aforementioned **Gabčíkovo-Nagymaros** and **Pulp Mills** jurisprudence of the International Court of Justice and the **WTO Shrimp-Turtle** case as well as on the rules relating to the interpretation of treaties, in particular art. 31, par. 3, letter. b) of the Vienna Convention on the Law of Treaties.

⇒ **LOWE V.**, *Sustainable Development and Unsustainable Arguments*, in **BOYLE A.**, **FREESTONE D.** (eds.), *International Law and Sustainable Development. Past Achievements and Future Challenges*, Oxford, 1999

3.5 The second approach (ii) considers Sustainable Development as an **international soft-law principle**. In this regard, it recognizes the existence of a general practice of States related to this emerging principle but does not conclude that the principle has gained the status of an international norm under Art. 38 of the Statute of the International Court of Justice; therefore, it is not a customary principle nor a general principle of law. Accordingly, **it has no general binding effects on States**, except for some specific principles and norms that have autonomously consolidated in international environmental law, such as the obligation not to cause significant harm to the environment or the precautionary principle.

In international case law, this view was agreed by the **PERMANENT COURT OF ARBITRATION** in the **Iron-Rhine** case, which, by referring to Sustainable Development, has stated that *“environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment, there is a duty to prevent, or at least mitigate such harm. (...) This duty, in the opinion of the Tribunal, has now become a principle of general international law”*

(cf. PERMANENT COURT OF ARBITRATION, *Iron Rhine Arbitration (Belgium/Netherlands)*, Arbitration of 24 May 2005, par. 55).

As declared by the **INTERNATIONAL LAW ASSOCIATION** in the 2012 Sofia Guidelines reported above, “*the recourse to the concept of 'sustainable development' in international case-law may, over time, justify a hardening of the concept itself into a principle of international law, despite a continued and genuine reluctance to formalize a distinctive legal status*”; in this respect, the hardening of the principle is, according to this understanding of Sustainable Development, still an ongoing process.

- ⇒ [PERMANENT COURT OF ARBITRATION, *Iron Rhine Arbitration \(Belgium/Netherlands\)*, Arbitration of 24 May 2005](#)
- ⇒ [INTERNATIONAL LAW ASSOCIATION, *New Delhi Declaration of principles of international law relating to sustainable development*, Resolution n. 3/2002](#)
- ⇒ [INTERNATIONAL LAW ASSOCIATION, *Sofia Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, Resolution n. 7/2012](#)

3.6 The third approach (iii) qualifies **Sustainable Development as a customary principle or a general principle of international law under Art. 38 of the Statute of the International Court of Justice lett. b) and c)**¹. Those legal-theoretical understandings have the consequence of recognizing general binding effects for States arising from the principle of Sustainable Development such as the obligation to reconcile economic development with environmental protection and overall social development.

In particular, the interpretation of Sustainable Development as a general principle of law is formulated in the aforementioned Separate Opinions of **JUDGE WEERAMANTRY**² (cf. INTERNATIONAL COURT OF JUSTICE, Case Concerning the Gabčíkovo-Nagymaros Project, *Separate Opinion of Vice-President Weeramantry*, pp. 85 and 95: “*I consider it to be more than a mere concept, but as a principle with normative value which is crucial to the determination of this case*” and “*The principle of sustainable development is thus 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*) and **JUDGE TRINIDADE** (cf. INTERNATIONAL COURT OF JUSTICE, Case Concerning the Pulp Mills on the River Uruguay, *Separate Opinion of Judge Cançado Trindade*, p. 215: “*General principles of law constitute an autonomous formal “source” of international law, and orient the evolution of customary and conventional international law*”, including “*the principles of prevention, of precaution, and of sustainable development with its temporal dimension, together with the long-term*

¹ Despite differences, these alternative understandings of the principle of Sustainable Development – as a customary norm or as a general principle of law – have the same effect of considering it as a legal principle of international law with binding effects. Indeed, according to the INTERNATIONAL LAW COMMISSION, there is no hierarchy between customs and general principles of law, and norms with the same content but different sources can coexist while having different applicability rules according to the relevant source (cf. INTERNATIONAL LAW COMMISSION, *Third report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, 2022, UN Doc. A/CN.4/753).

² However, it is not clear if JUDGE WEERAMANTRY considers Sustainable Development as a custom or as a general principle of law (cf. for instance p. 95: “*The principle of sustainable development is thus 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*”).

temporal dimension underlying inter-generational equity”) and, amongst the others, in the works of **VOIGT** (cf. VOIGT C., *Rule of Law for Nature. New Dimensions and Ideas in Environmental Law*, Cambridge, 2013, p. 154: “*sustainable development (..) is a general principle of law. Its normative force, broad scope and support in the international community are indicative of its principled character and make it difficult to argue otherwise. Sustainable development has a normative content that is defined by the reconciliation of present and future economic, social and environmental interests within the limits set by certain essential ecological functions (..) The classification of sustainable development as a general principle of law according to Article 38.1(c) of the Statute of the International Court of Justice is thus legitimized by its widespread use in many national legal systems and in international law - signifying a common conscience - and the jurisprudence of international courts and tribunals, as well as by its moral necessity*”; see also VOIGT C., *Sustainable Development as a General Principle of Law. Resolving Conflicts between Climate Measures and WTO Law*, Leiden, 2009).

The qualification of Sustainable Development as a customary principle or norm is expressed, amongst the others, in the works of **SANDS** (cf. SANDS P., PEEL J., FABRA A., MACKENZIE R., *Principles of International Environmental Law*, IV ed., Cambridge, 2018, p. 197: “[T]here can be little doubt that the concept of ‘sustainable development’ has entered the corpus of international customary law”, among the “*foundational principles and rules of international environmental law*”, as an “*overarching principle requiring states to reconcile economic development with the protection of the environment*”) and **BARRAL** (cf. BARRAL V., *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *The European Journal of International Law* 23(2), 2012, pp. 9-10: “*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 (..) Despite clear judicial confirmation, it can thus be concluded that sustainable development, as an objective, already constitutes a principle of customary law (..) as an objective, sustainable development aims to regulate conduct. (..) Its primary object is to set an objective to legal subjects, and thus to regulate their conduct. (..) It is a primary norm of international law*”).

As far as the binding content of the principle is concerned, it is important the analyses of BARRAL, according to which **the principle entails an obligation of means with respect to the objective(s) of Sustainable Development**, that is the obligation for States (which must be fulfilled in a differentiated form based on the different levels of development) to promote, achieve or employ best efforts to achieve Sustainable development by implementing decision-making processes in which the economic, environmental, and social considerations are equally balanced and weighted (cf. BARRAL V., *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, cit., pp. 11-12: “*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. (..) Accordingly, in relation to the objective of sustainable development, states are under an obligation to strive or do their best to achieve it. (..) 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 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”).

- ⇒ [INTERNATIONAL COURT OF JUSTICE, Case Concerning the Gabčíkovo-Nagymaros Project, Separate Opinion of Vice-President Weeramantry](#)
- ⇒ [INTERNATIONAL COURT OF JUSTICE, Case Concerning the Pulp Mills on the River Uruguay, Separate Opinion of Judge Cançado Trindade](#)
- ⇒ VOIGT C., *Rule of Law for Nature. New Dimensions and Ideas in Environmental Law*, Cambridge, 2013
- ⇒ VOIGT C., *Sustainable Development as a General Principle of Law. Resolving Conflicts between Climate Measures and WTO Law*, Leiden, 2009
- ⇒ SANDS P., PEEL J., FABRA A., MACKENZIE R., *Principles of International Environmental Law*, IV ed., Cambridge, 2018
- ⇒ BARRAL V., *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *The European Journal of International Law* 23(2), 2012
- ⇒ BARRAL V., *The Principle of Sustainable Development*, in KRAMER L., ORLANDO E. (eds.), *Principles of Environmental Law*, Cheltenham, 2018

3.7 In any case, regardless of the different possible reconstruction of Sustainable Development within the international legal system, there is no doubt that, nowadays, Sustainable Development is well rooted within the international legal, political, and economic reality as an essential reference standard that is capable of orienting the conduct of States and International Organizations, that is the subjects of international law, and other public, private, and hybrid actors as well as influencing the evolution and interpretation of international law itself, by favoring the rebalancing between economic interests and environmental and social considerations in many areas of the legal system. Also, Sustainable Development provides international legitimation to reform initiatives across the globe, to support the structural transformation of the economy, that is the global climate and sustainability transition, to achieve a global development model that “*meets the needs of the present without compromising the ability of future generations to meet their own needs*”.