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CHAPTER 1

The Evolving Concept of Sustainable Development

1 Introductory Remarks

As a starting point, we may agree with Durán and Morgera, when they claim that the definition of sustainable development is primarily a construction of international law.[1] Yet sustainable development is not something artificial, the above statement applies for the definition itself. At the same time we must also mention that the different documents and authors provide many different interpretations of the same. As one Hungarian ecologist indicates, there are many different uses of sustainability or sustainable development, while no one claims to hold the holy grail of the perfect definition.[2] It would be reasonable to start any inquiry regarding sustainable development with some scepticism, considering that many prominent figures of international legal scholarship regard the concept of sustainable development with due pessimism. For example, Fitzmaurice describes sustainable development as an elusive category,[3] while Lowe observes that sustainable development as a legal category is characterized by obscurity and confusion.[4] Therefore, we seek to answer the question whether sustainable development as a concept set out in international treaties obliges the parties to behave in a certain way or much rather serves as a mere source of moral legitimation for such treaties, perhaps it is just a clause reflecting the spirit of its age without any precisely conceivable content.

It is Judge Weeremantry who mentions the oldest historical examples of sustainability[5] in his separate opinion attached the Gabčikovo-Nagymaros judgment,[6] which will be discussed later in detail:

> 'There are some principles of traditional legal systems that can be woven into the fabric of modern environmental law. They are especially pertinent to the concept of sustainable development which was well recognized in those systems. Moreover, several of these systems have particular relevance to this case, in that they relate to the harnessing of streams and rivers and show a concern that these acts of human interference with the course of nature should always be conducted with

[1] DURÁN, Gracia Marin and MORGERA, Elisa: *Environmental Integration in the EU's External Relations*, Hart Publishing, 2012, p. 34-35.

[2] BULLA, Miklós: *A fenntartható fejlődés fogalmi világa* in Vissza vagy hova – Útkeresés a fenntarthatóság felé Magyarországon, Tertia 2002, p. 105.

[3] Sustainable development as the precautionary principle is one of the concepts of international environmental law, the real nature of which is mysterious and intangible in spite of its frequent, or perhaps overly frequent use. See FITZMAURICE, Malgosia: *Contemporary Issues in International Environmental Law*. Cheltenham: Edward Elgar Publishing, 2009, p. 67.

[4] LOWE, Vaughan: *'Sustainable Development and Unsustainable Practices'*. In: BOYLE, Alan E. – FREESTONE, David (eds.): *International Law and Sustainable Development – Past Achievements and Future Challenges*. Oxford: Oxford University Press, 1999, p. 23.

[5] Justice WEEREMANTRY's seperate opinion to the 25 September 1997 judgment of ICJ, http://www.icj-cij.org/docket/files/92/7383.pdf, p. 94-95.

[6] *Case concerning Gabčikovo-Nagymaros* (*Hungary v Slovakia*) 1997 ICJ3 Reprinted in 1998 ILM 168206.

> due regard to the protection of the environment. In the context of environmental wisdom generally, there is much to be derived from ancient civilizations and traditional legal systems in Asia, the Middle East, Africa, Europe, the Americas, the Pacific, and Australia – in fact, the whole world. This is a rich source which modern environmental law has left largely untapped.'

The concept of reconciling the needs of development with the protection of the environment is thus not new. Millennia ago these concerns were noted and their twin demands well reconciled in a manner so meaningful as to carry a message to Our age.' In his opinion, sustainable development is defined as the right to development limited by the need to preserve the environment. It is worth noting that not all authors agree with Judge Weeramantry's position. Many dispute that the right to development is, indeed, a right recognized under international law. For instance, Dire Tladi argues in his book[7] that the right to sustainable development forms part of collective human rights, to which all people are entitled in relation to the long-term maintenance of the environment. Tladi also recalls that Judge Weeramantry referred to the protection of the environment as a *sine qua non* of a number of human rights. Although Tladi acknowledges that some authors – for example Karin Arts[8] – accept that the right to development forms part of international law, yet he claims that the existence of such a right is questionable.[9]

Bosselmann[10] also leads us back to the origins of sustainability, presenting the German engineer and forestry specialist, Hans Carl von Carlowitz,[11] as the inventor of the new definition of 'Nachhaltigkeit'. Based on his studies, in 1754 Wilhelm Gottfried Moser from Württemberg defined the new system of forestry, the first principle of which is the sustainable use of forests.

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7 TLADI, Dire: *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments*. Pretoria: Pretoria University Law Press, 2007,

8 ARTS, Karin: *Integrating Human Rights into Development Cooperation: The Case of the Lome Convention*. Hague: Kluwer Law International, 2000, p. 40-45.

9 TLADI, ibid. p. 65.

10 BOSSELMANN, Klaus: *The Principle of Sustainability* (Transforming Law and Governance), Ashgate, 2008, p. 17-19.

11 His outstanding role is widely recognized: 'The concept of 'sustainability,' or 'Nachhaltigkeit' in German, can be traced back to Hans Carl von Carlowitz (1645-1714), who managed mining on behalf of the Saxon court in Freiberg. Despite the court's forest regulations, the impact of timber shortages on Saxony's silver mining and metallurgy industries was devastating. In his work *Sylvicultura Oeconomica oder Anweisung zur wilden Baum-Zucht* (Sylvicultura Oeconomica or the Instructions for Wild Tree Cultivation), Carlowitz formulated ideas for the 'sustainable use' of the forest. His view that only so much wood should be cut as could be regrown through planned reforestation projects, became an important guiding principle of modern forestry.' http://www.environmentandsociety.org/tools/keywords#/id/1819.

2 The Evolution of the Principle of Sustainable Development

2.1 From Stockholm to UNCED

The first milestone in the evolution of the principle of sustainable development is 1972, when the Stockholm Conference on the Human Environment was organised under the auspices of the UN.[12] As an outcome of the conference, the Stockholm Declaration was adopted.[13] The special responsibility that human beings bear for the conservation of the natural environment is set out in Section 4 of the Declaration. More importantly, in compliance with Principle 14 of the Declaration, a balance shall be struck by the means of reasonable planning between development needs and the imperative of protecting the natural environment. The emergence of the concept of sustainable development dates back to 1990, when it was included in the publication of the International Union for Conservation of Nature (IUCN), in the World Conservation Strategy.

The World Charter for Nature was adopted in 1982 on the 37th session of the UN General Assembly, and also included the concept of sustainable development.[14] The UN General Assembly established the World Commission on Environment and Development,[15] better known as the Brundtland Commission, which drafted the report entitled *'Our Common Future.'*[16] The Commission consisted of altogether 22 members, its chairwoman, Gro Harlem Brundtland was the incumbent Prime Minister of Norway. The Commission also included a Hungarian member: István Láng. The Brundtland Report elaborated the most widely recognized definition of sustainable development.[17] In compliance with the report, 'sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.' The definition set out in the Brundtland Report stipulates the principle of equality among generations as a cornerstone for sustainable development, that is, neither of the generations has the right to destroy the livelihood of future generations by exploiting resources immoderately and unfairly. This reference in the definition reflects the social sensitivity of the authors of the Report, besides also taking into account the needs of the present generations. Accordingly, sustainable development not only requires states to take into consideration the interests of the next generations but also to do their best in satisfying the legitimate needs of the less developed areas of the world.

The Brundtland Report set out the principles of sustainable development, as constitutive elements of the concept. These are the following:

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[12] The United Nations Conference on the Human Environment in Stockholm from 5 to 16 June *1972*.

[13] *Stockholm Declaration*, UN Conference on Environment, 1972.

[14] A/RES/37/7 48th Plenary Meeting 28 October *1982* 37/7. *World Charter for Nature*.

[15] The Commission was set up by the Resolution 38/161 of the UN Assembly.

[16] A/42/427. *Our Common Future*: Report of the World Commission on Environment and Development.

[17] The Brundtland Report was recognised by Resolution 42/187 of the UN Assembly.

a.) Respect for and protection of habitats

In compliance with this principle, the ethnic groups coexisting in this world have to be considerate of each other, that is, development in one country may not threaten the satisfaction of the basic needs of the society of another state.

b.) Improving the quality of human life

The objective of sustainable development must not merely serve economic growth but should contribute to a higher standard of living for everyone on Earth. The development of culture, education and health care belong to the quality of life just as enhancing the quantity and quality of convenience goods and ensuring access to these goods by as many ethnic groups as possible.

c.) Preservation of the viability and the natural diversity of theEarth

On the one hand, preservation of the viability of the Earth includes the preservation of inanimate things such as climate, air, soil or waters in their natural form, on the other hand, it also means the preservation of biological diversity, that is, the conservation of the ecosystem of the Earth.

d.) Radical decrease in using non-renewable resources

In the course of exploiting non-renewable resources, caution should be exercised and the legitimate interests of the next generations must also be taken into account. The use of non-renewable resources such as oil and natural gas should be reduced incrementally and preferably be replaced by other alternative, renewable resources.

e.) Respecting the constraints of growth

Humanity must realize that the resources of the Earth are finite; consequently unrestricted growth is impossible. In this respect, the Brundtland Report points out the risk inherent in the growth of the Earth's population and urges state leaders to facilitate the treatment of this ever so pressing problem by using efficient solutions.

f.) Changing the behaviour of individuals through education and training

No matter the important efforts made by state leaders, these will be unsuccessful in case they are not underpinned by the citizens' will and commitment to preserve the environment. Therefore, the behaviour of mankind must be transformed through education and training so that they seek to preserve the natural values of our world through their responsible behaviour.

g.) The communities' role in self-sufficiency

Smaller groups of human communities may efficiently contribute to the enforcement of sustainable development, since the organisation of self-sufficient groups and their impact on the emergence of other groups play an important

part in implementing the concept of sustainable development and disseminating its practice.

h.) Cooperation at the level of peoples and nations

Natural impacts do not stop at state borders, therefore cooperation between the states is indispensable in the interest of the preservation of biological diversity and natural resources. According to the Brundtland Report, states shall launch national sustainable development programs complete with action plans and the appropriate legal framework, making sure that those using natural resources to a greater extent shall shoulder a greater share of the related burden and those causing damage shall pay compensation so that all players of social life shall equally take responsibility for promoting sustainable development on the national level. Finally, sustainable development has to be integrated and implemented in all policies of the states.

i.) The need for global cooperation

Not only is it necessary to take common action for the preservation of the environment, but it is indispensable that the states bring other states exhibiting passive or negative attitudes onto the path of sustainable development, since in lack of such a global commitment, processes undermining the natural development of the Earth may surface.

The particularly comprehensive concept of sustainable development introduced by the Brundtland Report made the term very popular, indeed, instead of a real commitment to the preservation of environment and nature it has more often than not been used as a political buzzword. The Brundtland concept of sustainable development strikes a sensitive balance between the need for development and the objective of the preservation of the natural environment. While there is a general consensus on the Brundtland concept of sustainable development in legal scholarship, there is still somewhat of a controversy regarding the content, status and role of sustainable development. For example, certain authors stress the relative importance of one value, while others point to the significance of other principles. Furthermore, some authors point to novel state obligations flowing from the principle of sustainable development, while others construe the principle as a possible justification for the restriction of the right to development.

It is worth mentioning the studies published by Pearce and Turner, defining the concept of sustainable development as the maximalisation of the pure advantages of economic development with a view to maintaining the quality of natural resources and the access of the advantagers provided by them. The concept proposed by the authors would ensure that renewable natural resources

are used in an equilibrium ensuring their reproduction, whereas in regard to non-renewable resources, the efficient utilization of these resources is required.[18]

Several authors have elaborated on the complexity of the concept of sustainable development. Suffice to mention Stephen Maxwell Wheeler and Timothy Beatley who defined sustainable development in their essential book entitled *The Sustainable Urban Development Reader* as a process of change in which the exploitation of the natural resources, the direction of the investments and technical development and institutional changes are in harmony with both present and future potentials in order to satisfy human needs and aspirations.[19]

The progress in the interpretation of this overarching legal concept marks a novel phase in unfolding the concept of sustainable development, including a number of new state obligations. For example, in their book entitled *International Law and Sustainable Development: Principles and Practice* Nico Schrijver and Friedl Weiss mention the obligation of cooperation, the principle of integration, the responsible use of natural resources, the prohibition of causing damage and the obligation to conduct environmental impact assessment as principles complying with both the concept of sustainable development and that of '*Environmentally Sound Management*' (ESM) underlined in the Basel Convention.[20][21]

The abovementioned examples prove that the definition set out in the Brundtland Report of 1987 as the accepted concept of sustainable development is more or less generally recognized in international legal doctrine. Consequently, for the purposes of our present study, it is reasonable to use this definition of the concept.

2.2 UNCED 1992

The legal framework of sustainable development had not been clarified in international law even by the 1990s. This is substantiated by Principle 27 of the Declaration adopted in Rio de Janeiro at the UN Conference on Environment and Development, according to which the states shall cooperate 'in the further development of international law in the field of sustainable development.'[22] The Rio Declaration marks considerable progress in regard to the elaboration of the concept of sustainable development.

- Principle 1 is clear in emphasizing that the concept is primarily anthropho-

[18] PEARCE, D. W. – TURNEr, R. K.: *Economics of natural resources and the environment.* London: Harvester Wheatsheaf, 1990, p. 24.

[19] WHEELER, Stephen Maxwell – BEATLEY, Timothy: *The Sustainable Urban Development Reader.* London: Routledge, 2004, p. 57.

[20] The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989.

[21] SCHRIJVER, Nico – WEISS, Friedl: *International Law and Sustainable Development: Principles and Practice.* Leiden: Martinus Nijhoff Publishers, 2004, p. 550.

[22] Rio Declaration, WSSD, June 3-14, Rio de Janeiro. http://www.unep.org/Documents.Multilingual/Default.asp?documentID=78&articleID=1163.

centric: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'
- Principle 2 – focuses on the sovereign right of states to exploit their own resources coupled with their responsibility not to cause damage to the environment of other States or areas beyond their jurisdiction.
- Principle 3 is the primary source for generational equity: 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.'
- Principle 4 stipulates that 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from this.'
- Principle 5 points to a different aspect of sustainable development – eradicating poverty.
- In compliance with Principle 8, 'states should reduce and eliminate unsustainable patterns of consumption and production and promote appropriate demographic policies.' Although the Rio Declaration formulated Principle 8 principally with respect to overpopulated countries, it is worth taking into account that this was the first time that health policy pursued by certain societies was linked to the concept of sustainable development.
- Principle 10 is the theoretical background of public participation.
- Principle 15 covers the precautionary principle.
- Principle 25 warns us that all the above mentioned elements are interrelated: 'Peace, development and environmental protection are interdependent and indivisible.'
- The above-mentioned Principle 27 of the Rio Declaration refers to the international legal role of sustainable development and the commitment of states to further strengthen such role. This may be evidence for the existing interest of the states to fill the legal concept of sustainable development with even more exact legal content.

The Academies of Sciences of the world in 2000 also adopted a statement on sustainability,[23] which is not more than a concise summary of current trends, at the same time it is the most emblematic of the available definitions: 'Sustainability implies meeting current human needs while preserving the environment and natural resources needed by future generations.'

2.3 Report of the UN Expert Group

Following the UNCED in 1992 the content of sustainable development was analyzed in the framework of several forums. One such forum was the Commission on Sustainable Development, which identified the 'Principles

[23] IAP Statement on Transition to Sustainability, 21 May 2000.

of International Law for Sustainable Development'.[24] Although this report could lead to further regulatory improvements, it is nonetheless one of the most complete, universal, or even holistic of documents, trying to fit as much as possible into one single framework.

According to point 12 of the Report, it takes Principle 1 of the Rio Declaration as its point of departure. The other major ideas of the Report are interrelationship and integration set forth in point 15. All of the above principles are presented in a 'comprehensive and holistic way' (point 18). As such, it is a clear mission of the Report to reveal all possible aspects and linkages, incorporating them into the law of sustainable development.

To discuss the individual elements of the Report in detail would be obsolete. However, it should be noted that these elements are organized into the following set of 'principles and concepts':

- Principle of interrelationship and integration (15-18)
- Principles and concepts relating to environment and development (19-74)
- Principles and concepts of international cooperation (75-122)
- Principles and concepts of participation, decision-making and transparency (123 – 139)
- Principles and concepts of dispute avoidance and resolution (140-160)

In our categorization, the different constituting elements directly or indirectly connected with sustainable development may be divided into a special set of classes, answering the key dilemma regarding their contribution to improving the concept of sustainability. This categorization reflects a selection from the elements of the Report with the goal of providing a clear picture of our vision of sustainability.

Firstly, there are certain elements of the Report that exhibit a strong, direct link to sustainable development; as such, these may be considered as specific legal principles and concepts of sustainable development law, and, more precisely: of environmental interests. These are:

- prevention (together with the right to individual or collective self-defense and the duty to cooperate) in a wider meaning
- precautionary principle, as well as the principle covering all the major elements of the concept, that is
- integration, with a specific additional legal element
- the right to environment, and attached to this
- the principle of equity, in this case meaning intergenerational equity, and together with this two closely related elements:
- the common concern of humanity and also

[24] EXPERT GROUP, 1995: Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, Geneva, Switzerland, 26-28 September 1995, Prepared by the Division for Sustainable Development for the Commission on Sustainable Development Fourth Session 18 April – 3 May 1996, New York; http://www.un.org/documents/ecosoc/cn17/1996/background/ecn171996-bp3.htm).

- the common heritage of mankind, both providing a solid basis of a set of regulatory and procedural guarantees,
- public participation with access to information, informed decision-making and access to justice;
- a special instrument, the environmental impact assessment, and,
- rather indirectly, the notion of prior informed consent.

The second group of principles and concepts may also have an impact via the reasonable use of resources, with a stronger focus on material interests:

- right to development,
- sovereignty over natural resources and responsibility not to cause damage to the environment in areas falling under the jurisdiction of other states or lying beyond the national jurisdiction,
- sustainable use of natural resources, as well as a special notion referring to the international equivalent of the same problem, that is the
- equitable and reasonable use of transboundary natural resources. The next concept is the guiding principle for the use of natural resources and the protection of the environment, namely
- the question of common, but differentiated responsibilities, closely connected with
- special treatment of developing countries, particularly small island developing States. We may also mention the special treatment of countries with economies in transition which seems to be gradually losing significance. All of the above should lead to the
- eradication of poverty, a key issue of the Rio process.

Finally, as a third group of principles and concepts, there are some which merely exhibit a loose connection with sustainable development. At the same time, they may be considered part of a general toolbox of international law:

- cooperation in a transboundary context, providing for a conceptual framework for the principles mentioned above as well as the elements listed below,
- notification to and consultation with neighbouring and potentially affected States, furthermore
- peaceful settlement of disputes in the field of environment and sustainable development. Finally, the traditional obligations of
- the national implementation of international commitments, and
- compliance monitoring on the basis of international commitments may also be mentioned.

The Report does not put forward a homogeneous concept, it is much rather a mix of principles, instruments, special sustainable development aspects and general concepts of international cooperation. The individual elements and issues vary as regards their weight and relevance and some notions and concepts

are even repeated in different points of the document. Anyhow, the Report is still the most important source for further legal development, a solid and widely accepted foundation for clarifying sustainable development law.

There are some elements of the Report that are worth highlighting in order to illustrate the progressive character of the document:

Firstly, the Report clearly refers to the necessity of recognizing the right to a healthy environment. In point 31 it reads:

> 'The right to a healthy environment provides a focus to guide the integration of environment and development. Development is sustainable where it advances or realizes the right to a healthy environment.'

The Report is both moderately and reasonably framed when it comes to considering the interests of future generations. The major problem in this regard is best described by Olmsted:[25]

> '...our conversation is one-sided. However, we are the speakers and future generations are the listeners. Just as the past speaks to us with many voices and through many idioms, so too do we now speak to the future. Therefore, the wording of the Report should be very rational, as it is in point 44 it reads: 'It also entitles each generation to diversity comparable to that enjoyed by previous generations.'

Thus, there is a possibility to compare interests and needs, even beyond those of the present generations.

The Report examines this responsibility in a broader context under the heading 'Duty to cooperate in the spirit of global partnership': '80. The principle of cooperation in the spirit of global partnership not only refers to cooperation among States, but should also be extended to non-State entities, ranging from business associations through non-governmental organizations to the academic world.' Within the duty of cooperation priority issues are covered such as common concern and common but differentiated responsibilities, while the notion of common heritage will be covered below.

2.4 ILA Principles on Sustainable Development

Perhaps it was the Rio Declaration that prompted the International Law Association (ILA) to release a declaration on international legal principles regarding sustainable development during its conference held in New-Delhi in April 2002.[26] The International Law Association (ILA) was founded in Brussels in 1873. In compliance with its statutes, the objective of

[25] OLMSTED, James L.: *Representing Nonconcurrent Generations: The Problem of Now,* Journal of Environmental Law & Litigation, Vol. 23, 2008, p. 463.

[26] ILA New Delhi Declaration of Principles of International Law in the Field of Sustainable Development, 2 April 2002.

the organisation is the study of international law, including its clarification and development.[27] The documents elaborated by the International Law Association, naturally, possess no binding force under international law, at the same time, the ILA consists of several thousands of international lawyers, in many cases senior lawyers, furthermore, the Declaration issued by the ILA was preceded by thorough committee work. In light of the above, the contribution of the ILA is of equal significance as the contributions of prominent representatives of international legal scholarship regarding the principles of sustainable development, and the position of the international legal scholarship is considered, in itself, in compliance with the special rules of this area of law, a complementary legal basis of the international law.

The International Law Association thus began to take a closer look at the interpretation of sustainable development law in 2002, adopting the New Delhi Declaration, reinforced 10 years later in Sofia.[28] This Declaration amounts to an attempt of codifying this field of law and may be considered a secondary source of international law.[29] The Sofia decision did not change the original Declaration, but added an implementation guide instead.[30] The Declaration views sustainable development as a common concern of humanity, and places human rights at the centre of sustainable development. Compared with the previous two attempts, this Declaration is more easily accessible and well organized, concentrating on its main subject. As it would not be feasible to invent anything new 10 and 20 years after the UNCED conference, we are all familiar with the principles by now.

The New Delhi Declaration of the ILA distinguishes seven principles that constitute different elements of the concept of sustainable development and which, one by one, oblige the states to act accordingly:

a.) The duty of states to ensure the sustainable use of natural resources

The ILA New-Delhi Declaration intends to impose the obligation of sustainable use of natural resources on the states within their own territory. Following World War II, the right to self-determination, the sovereignty of peoples, as well as the UN principles were principally intended to reinforce the rights of peoples liberated from colonial rule in order to ensure their free disposal over natural resources located on their territory. After the colonial countries became independent, the right of states to exploit their own natural resources for the purposes of the countries' welfare, was recognized as an important and progressive step of international law.

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[27] See Article 3 (1) of the International Law Association's Constitution.

[28] Resolution No. 7/2012, Committee on International Law on Sustainable Development, The 75th Conference of the International Law Association held in Sofia, Bulgaria, 26 to 30 August 2012.

[29] HILDERING, Antoinette: *International Law, Sustainable Development and Water Management*, Eburon, 2004, p. 34-35.

[30] 2012 SOFIA Guiding Statements on the Judicial Elaboration of the 2002 New Delhi Declaration of Principles of International Law Relating to Sustainable Development, annex to Resolution No. 7/2012.

However, the use of natural resources is also restricted by existing international law. It is the duty of states, on the one hand, to use natural resources in a rational, sustainable and safe way, so as to contribute to the development and welfare of the people living in their territory, on the other hand, states must protect the interests of future generations, taking into consideration the requirement of the conservation of the natural environment. Principle 2 of the Rio Declaration on Environment and Development stipulates that 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.'[31]

This line of development of public international law stems from the principle *sic utere tuo ut alienum non laedas*, known from Roman law and referred to in the *Trail Smelter* case.[32] In compliance with this legal principle, the United States could rightfully expect Canada to use or utilise its own territory in a way that no harm is caused in another country's natural environment. International environmental law has just arrived at the point where in case of some transboundary environmental contaminations, at least in principle, the issue of the international legal liability of the state responsible for the harmful emissions may be raised. Next, a period may begin, when states are obliged to constrain themselves in the interest of observing international environmental legal norms. The first principle of the ILA Declaration could play a cardinal role in this development, but it seems that we are still very far from the general acceptance of this concept.

b.) The principle of equity and the eradication of poverty

The principle of equity is a cornerstone of sustainable development. Solidarity among nations and sustainable development presuppose the enforcement of the principle of equity and the eradication of poverty. The more vulnerable groups of humanity living in our present time deserve equitable support from the more affluent communities, since the right to development is not limited to the peoples or countries enjoying a more beneficial situation.

In compliance with Chapter IX of the Charter of the United Nations on International Economic and Social Co-operation and based on the Rio Declaration on Environment and Development, it is the obligation of states to cooperate in the interest of the eradication of poverty. Following from the principle of equity, the duty of the states is to fight against poverty within their own territory; at the same time, they must also demonstrate solidarity with the poorest countries of the world and assist them in their efforts in dealing with the problems arising from poverty. Finally, Chapter 2 of the Plan of Implementation of the Johannes-

[31] Principle 2 of the Rio Declaration on Environment and Development.

[32] Reports of International Arbitral Awards (*Trail Smelter Case*), Vol. III (1938-1941), 1965.

burg World Summit on Sustainable Development[33] concentrates on the eradication of poverty and declares it an indispensable requirement of sustainable development.

c.) The principle of cooperation and the principle of common but differentiated responsibilities

In compliance with principle 7 of the Rio Declaration, States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. The Declaration of the ILA extends the scope of those obliged to cooperate and points out that international organisations are also responsible for participating in the vehicles of international cooperation necessary for the achievement of sustainable development.

Considering that states contributed to environmental degradation to a varying degree, they have common but differentiated responsibilities. According to the Declaration, states largely responsible for the deterioration of the environment are obliged to make increased efforts in line with sustainable development in the interest of the preservation of the natural environment of our world. The principle of differentiated responsibilities places a greater burden of responsibility on the developed countries, taking into account the impact that their societies have on the global environment and considering the extent of their financial resources. The expectation arising from the principle is that developed countries all over the world are obliged to contribute to the dissemination of environment-friendly technologies. Common but differentiated responsibilities play a role not only in soft law, but also in the relationship among the states, for example, the UN Framework Convention on Climate Change also refers to this concept.[34]

d.) The principle of the precautionary approach

Principle 15 of the Rio Declaration has already set out that 'where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' The precautionary principle has since been duly recognized in the law of treaties as well, for example in the Bamako Convention of 1991.[35] The employment of precautionary measures is prescribed by Article 4, in case the release of certain substances into the environment may damage the nature or the health of human beings.[36] There are a number of international agreements that include the precautionary principle. For example, the preamble of the 1992 Convention on Biological Diversity also includes the following clause: 'where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for

[33] Johannesburg Plan of Implementation of the World Summit on Sustainable Development.

[34] See Article 3 (1) of the UN Framework Convention on Climate Change.

[35] Bamako Convention on the Ban of the Import Into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, 30 January 1991.

[36] *Ibid.* Article 4.3 paragraph (f).

postponing measures to avoid or minimize such a threat.' Article 2 paragraph a) of the 1992 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic also obliges the parties to employ the precautionary principle, according to which precautionary measures shall be taken if energy or substances released into the maritime environment results or is likely to result in hazards to human health or the maritime ecosystem.[37]

In spite of all these concrete provisions in the treaties, the precautionary principle can be listed in the category of *lex ferenda*, that is, it can be considered as a principle forming part of a development process, as a result of which it is likely to become international customary law.

High risk activities that may have a seriously damaging impact on human health, natural resources or the ecosystem are to be prevented, even if there is no clear scientific evidence for the fact that the respective interference would unconditionally involve the presumed environmental damage. Interferences must be preceded by environmental impact assessments that must be transparent and include the possibility of independent scientific evaluation. In case there is a risk of long-term and irreversible damage, the burden of proof falls upon those planning the implementation of the respective interference.[38] The evidence should substantiate that the presumed damage to the environment shall not take place, otherwise the respective interference may not be made. In case the interference does result in damage, those responsible must be held accountable, including the liability of the state if relevant.

e.) The principle of public participation and access to information and justice

Ensuring the possibility of public participation is indispensable for the enforcement of sustainable development. The most important requirement of the right to public participation is safeguarding the freedom of expression for the members of society with regard to the investments implemented in a given state. In addition to this, citizens have the right to receive information on investments within reasonable time and if necessary, they may turn to the court against measures prejudicial to sustainable development. Finally, those suffering damage in the course of such interferences may receive proper compensation.

The self-organized groups of society play an important role in the overall social and national management of environmental contamination. International environmental law seeks to promote the enforcement of the norms ensuring that a broad range of social actors learn about the plans on interferences involving consequences prejudicial to the respective community (deterioration of health, environmental damage) as well as relevant news in relation to the development. Strengthening the rights related to public participation enhances social eagerness that may be quintessential in environmental matters. The right to public participation has been recognized in the treaties of international law

[37] Convention for the Protection of the Marine Environment of the North-East Atlantic.

[38] See Section 4 of the ILA New Delhi Declaration.

as well, for example the 1989 Convention concerning Indigenous and Tribal Peoples in Independent Countries.[39] Paragraph (1) of Article 15 of the Convention recognizes the right of indigenous and tribal peoples to participate in the use, utilization and preservation of the natural resources located in their territories. Furthermore, Principle 10 of the Rio Declaration includes that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.' The right to public participation is recognized also in Agenda 21, according to which it is the obligation of states to provide a broader range of public participation possibilities in regard to the initiatives related to sustainable development and to ensure access to information as well as the possibility to turn to the court.[40]

The Aarhus Convention may be considered the most important international convention in relation to public participation. The United Nations Economic Commission for Europe established the Aarhus Convention in order to provide access to information, public participation in decision-making and access to justice in environmental matters.[41] The Convention refers to the principle of sustainable development in its preamble: 'Affirming the need to protect, preserve and improve the state of the environment and to ensure sustainable and environmentally sound development.' By way of this reference, the Convention effectively stipulates public participation, a principle of international environmental law, as forming part of the concept of sustainable development.

f.) The principle of good governance

The Declaration underlines that good governance is essential to the progressive development and codification of international law relating to sustainable development. The principle of good governance commits states to:

- adopt democratic and transparent decision-making procedures and ensure financial accountability;
- take effective measures to combat official or other corruption;
- respect the principle of due process in their procedures and to observe the rule of law and human rights; and
- implement a public procurement approach in line with the WTO Code on Public Procurement.

Based on the above, good governance aims at ensuring financial accountability, combating corruption and guaranteeing proper procedural safeguards in the interest of the rule of law, at the same time, it should also prevent certain

[39] Indigenous and Tribal Peoples Convention,1989 (Convention No. 169).

[40] Agenda 21, paragraphs 8.3 (d), 8.4 (e) and 23.2.

[41] The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), 25 June 1998.

businesses from trying to turn profit from an unscrupulous destruction of the environment.

The Plan of Implementation adopted at the World Summit on Sustainable Development in Johannesburg underlines that good governance within each country and at the international level is essential for sustainable development. At the domestic level, sound environmental, social and economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, gender equality and an enabling environment for investment are all required for ensuring sustainable development.[42]

g.) The principle of integration

The principle of integration is perhaps the most important principle set out in the New Delhi Declaration. The principle points to the significance of the interplay and correlation of economic, financial, environmental and human rights aspects of relevant international legal principles and rules. According to the principle of integration, the imperative of the protection of the environment must be included in all social considerations and policies determining state actions. Environmental protection should not remain at the level of particularity, it should much rather radiate in all actions of the state. The international law of sustainable development cannot be conceived of as an independent subsystem, it is much rather the sum of the respective norms weaving through the entire legal system. Legal rules should therefore be interpreted at the national, regional as well as the global level in a way that their application and interpretation comply with the requirements of sustainable development.

The New Delhi Declaration elaborated by the ILA amounts to the most authentic and most detailed concept of sustainable development. So far however, there was no binding international legal document which elevated these principles to the status of recognized legal obligations forming part of the concept of sustainable development.

While this Declaration is probably the most concise one, there are still some remarks we may make. The 'real' and general sustainability principles are the second, third, fourth and seventh, while the first and third are sustainability principles, more focused on international law, while the sixth is a general principle of the rule of law. In summary, the principles contained in the Declaration are: equity (inter- and intragenerational equity, with references to the concept of the right to environment), precaution, public participation (and again human rights) and integration. Thus, the essence of the three documents discussed above, are almost identical.

As an additional element to the New-Delhi Declaration already mentioned above, the ILA in Sofia also issued a Guidance,[43] with the aim of bringing principles closer to implementation. Here the first and fundamental statement is, that sustainable development is without doubt a principle of international law,

[42] See Chapter 1, Section 4 of the Plan of Implementation.

[43] *Ibid*.

forming a part of *jus cogens*. The most important message is that sustainable development as a principle is not only a principle of international law, but it is indeed on of the most elementary principles – '2) Treaties and rules of customary international law should be interpreted in the light of principles of sustainable development;'.

The Guidance then goes on to summarize the most important principles of sustainable development, again from the rather practical point of view of implementation – in particular, judicial or quasi-judicial implementation – as follows:

- common concern, 'with particular normative precision identifiable with respect to shared and common natural resources';
- equity (intergenerational and intragenerational), together with the eradication of poverty, posing great challenges for judicial and quasi-judicial bodies, which may be assisted by the principles of equity and fairness;
- common but differentiated responsibilities are part of international law, but have a rather political context;
- precautionary principle that 'has significant and increasingly precise legal implications';
- the three pillars of public participation;
- the broad concept of good governance;
- integration and inter-relationship;
- environmental impact assessment.

These clarifications support our opinion already presented above, according to which we should build sustainable development law around the elements of equity (generational), precaution, public participation (as procedural guarantees of the right to environment) and integration.

2.5 IUCN Efforts

Compared to the manifold concept presented by the ILA, the manuscript of the IUCN Academy of Environmental Law of 2005 entitled *The Law of Energy for Sustainable Development* contains a more simple formulation.[44] According to the manuscript, the concept of sustainable development incorporates three elements.[45] The first of these elements is the idea of intragenerational responsibility, according to which all present inhabitants of the Earth are entitled to an equitable share of the natural resources of the world. The concept of sustainable development also includes the principle of intergenerational justice, requiring us to refrain from overconsuming which would threaten the possibility of future generations to benefit from the natural resources of the Earth. The third element of sustainable development according to the book is the equality of

[44] IUCN (International Union for Conservation of Nature and Natural Resources or World Conservation Union).

[45] BRADBROOK, Adrian J. *et al.* (eds.): *The Law of Energy for Sustainable Development*. Cambridge: Cambridge University Press, 2005.

species. According to this concept, other species may not be excluded from the use of natural resources, since other species living on Earth also have the right to life. Natural resources may not be utilized or exploited in a way that would damage the ecosystem of the Earth.

It is apparent from the foregoing that international legal scholarship has contributed substantially to enriching the concept of sustainable development and building it into a comprehensive concept serving as a standard for almost all activities of mankind. In the following, on the basis of the practice of international treaties, we attempt to identify the public international law obligations of the states incorporating the concept of sustainable development into their treaties.

The IUCN as a high-ranking international organ has always been deeply involved in the development of environmental law, and, among others, designed a draft covenant, the first version of which was adopted in 1995, while the fourth version is from 2010.[46] There is no point in reiterating all the elements featured in the Covenant, ranging from equity to precaution, proportionality and the eradication of poverty, etc. There is one additional element in the new Article 9, which is resilience, referring to the adaptive capacity of natural systems and human communities in order to survive and restore their systems.

The best way of summing up the development of international law of sustainable development is with the words of Bosselmann:[47]

> 'The continued existence of the principle of sustainability has two important consequences. The fist is that sustainable development is given meaning and direction. ... The second consequence is that existing treaties, laws and legal principles need to be interpreted in the light of the principle of sustainability.'

2.6 Rio+20

The 1992 Rio principles provide perhaps the most comprehensive and acknowledged definition of sustainable development. However, this concept is still uncertain and did not receive proper recognition which may undermine appropriate implementation.[48] Indeed, it is nearly impossible to define the precise meaning of sustainable development, since there are many competing explanations and all may be questioned.[49]

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[46] The fourth version of the draft: Draft International Covenant on Environment and Development, Fourth Edition: Updated Text, Environmental Policy and Law Paper No. 31 Rev. 3, 2010.

[47] BOSSELMANN, Klaus: *The Principle of Sustainability* (Transforming Law and Governance), Ashgate, 2008, p. 41.

[48] PALASSIS, Stathis M.: *Beyond the Global Summits: Reflecting on the Environmental Principles of Sustainable Development*, Colorado Journal of International Environmental Law and Policy, Vol. 22:1, 2011, p. 58.

[49] LEE, Maria: *Sustainable Development in the EU: The Renewed Sustainable Development Strategy* 2006, 9 Environmental Law Review 41 (2007), p. 41.

Did the Rio+20 process enrich the concept of sustainable development with a new element? Did we come closer to the meaning of the principle? The answer is definitely in the negative, since the Rio+20 Summit mostly repeated what had already been stated before, albeit with one exception: the green economy. If one looks at the official outcome of the Conference – The future we want[50] -, the most characteristic is part II. ('Renewing political commitment'), containing the following simple statement: '15. We reaffirm all the principles of the Rio Declaration on Environment and Development,...'

Green economy is an additional or seemingly new element, but it does not leads us closer to the merits, but rather seeks to invite businesses to work for sustainable development. The declarations in connection with green economy do not add to the original concept. For example: '60. We acknowledge that green economy in the context of sustainable development and poverty eradication will enhance our ability to manage natural resources sustainably and with lower negative environmental impacts, increase resource efficiency and reduce waste.' We do not wish to go into more detail on green economy versus sustainable development, suffice to say that green economy is not a novelty, but much rather a different expression of the same vague concept. According to some, this lack of reforms means the crisis of global management and also a moral crisis, endangering our well-being.[51]

[50] RIO+20, United Nations Rio de Janeiro, Brazil, 20-22 June 2012, http://www.uncsd2012.org/thefuturewewant.html.

[51] ANTYPAS, Alexios: *Rio+20: the future we still have to fight for,* Environmental Liability Review, Vol. 20 Issue 3, 2012, p. 92.

CHAPTER 2

Ethics and Sustainability – A Catholic Vision

1 Ethics and Sustainability – A Catholic Vision

Ethical considerations receive an ever greater attention, even more so in this specific regulatory area, due to all those challenges we are facing. One may read about the significance of intangible assets as 'love' in the revision of the iconic 'Limits to Growth' book.[1] Sustainable development mandates significant changes in the current trends of development, requiring a strict self-control of current generations to meet the needs of future generations, a substantial transformation of consumer society in the direction of energy saving, consumer consciousness, etc. All of the above is coupled with a long-term vision of development – suffice to mention the issue of climate change, with all the painful decisions current societies should make in order to reach the envisaged results 30-50 years from now.

Environmental ethics or the human responsibility towards the natural environment and mankind has always been in the centre of ethics. Again, we may refer to the separate opinion of Justice Weeramantry, attached to the Gabčikovo-Nagymaros judgment of the ICJ, who compares the requirements of international environmental law with Buddhist ethics – which may somehow be taken as an extreme, as compared with our main target, the Catholic morals: 'The notion of not causing harm to others and hence *sic utere tuo ut alienum non laedas* was a central notion of Buddhism. It translated well into environmental attitudes. 'Alienum' in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach.' Thus, ethics may form a part of the concept of sustainable development according to the judge.

Why are ethical considerations so essential? Several authors quote the popular American environmentalist, Wendell Berry: 'Our environmental problems... are not, at root, political; they are cultural... our country is not being destroyed by bad politics; it is being destroyed by a bad way of life.'[2] We must also agree with the delineation of the importance of ethics, describing three branches of legal development and legal systems: first we may take those rules, which are made by the society to control its own life – among others the rules of survival –, second, we have the manifestations of the will of the legislator, and third, we may mention religious rules, which constitute a formal set of ethical requirements.[3]

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[1] MEADOWS. Donella, MEADOWS, Dennis, RANDERS, Jorgen: Limits to Growth, The 30-Year Update, Chelsea Green Publishing, 2004.

[2] Reference from the book 'Spirits and Nature' (ed. by: Rockefeller, Steven C, and John C. Elder, Boston, Beacon Press, 1992, p. 30.

[3] ARMSTRONG, Adrian: Ethics and Justice for the Environment, Routledge 2012, p. 34.

A straightforward option of understanding ethical considerations is to turn towards religions, motivating the great majority of people in the world[4] and which are based on traditions, among others environmental or even sustainable development traditions. The *European Christian Environmental Network* in its 2005 report records[5]:

> 'The Christian tradition is rich in its description of the human role and responsibility in relation to creation. We are called creatures, stewards, servants, prophets, kings, co-workers. We recognise the damage done by some notions of human dominion and domination in the past. We acknowledge God has given all human beings, created in the image and likeness of God (Genesis 1:28), a crucial role and responsibility as priests of creation and partners of God in it. ... In the process of handling natural resources and turning them into human goods and services, we are taking of God's gifts in creation and accepting our responsibility for their transformation.'

From among the many possible sources, we selected the *Roman Catholic* teaching, since on the one hand the authors of the present book are all professors of a Catholic University – as a formal reason –, but even more so, because the ideas of this religion may be relatively easy to introduce, what with its central authority with a capacity to issue binding documents and guidances and employing a systematic approach. One should not forget, that beside the Meadows couple, there are many other scientists – such as example is Ervin László, member of the Club of Rome – who urge the advancement of a planetary ethics, which should be based upon the teachings of all religions.[6] Here, we cannot offer a lengthy and full picture, but will much rather restrict ourselves to present some ideas providing an ethical basics for sustainability. Our perception is that the ethical vision and sustainability overlap to a great extent, albeit with a different emphasis. As we wish to go through the major elements of the doctrine of the Church, we shall primarily use quotes with some short explanations.

If we take a closer look at the Roman Catholic church, it is not an overstatement to say that the more than 120 year old *Rerum Novarum,*[7] considered as the beginning of a new social doctrine of the Church, is among others also

4 The CIA's World Factbook indicates a global population of 7,021,836,029 (July 2012 est.) with a distribution of religions as follows: Christian 31.59% (of which Roman Catholics amount to 18.85%, Protestants 8.15%, Orthodox 4.96%, Anglicans 1.26%), Muslims 23.2%, Hindus 15.0%, Buddhists 7.1%, Sikhs 0.35%, Jewish 0.22%, Baha'i 0.11%, other religions 10.95%, non-religious 9.66%, atheists 2.01%. (2010 est.) http://www.pewforum.org/global-religious-landscape-exec.aspx.

5 The 2005 Assembly meeting in Basel – 'The Churches' Contribution to a Sustainable Europe' (8 May 2005 – A Call of the European Christian Environmental Network Assembly in Basel).

6 LÁSZLÓ, Ervin: Világváltás, Nyitott Könyvműhely, Budapest, 2008, p. 88, in English: WorldShift 2012: Making Green Business New Politics & Higher Consciousness Work Together (McArthur & Company, 2009).

7 Rerum Novarum, Encyclical of Pope Leo XIII on Capital and Labor, 15 May 1891.

the foundation of subsequent environmental teaching – including teachings on material development, social problems, ethical misery, human dignity, the common interest or the common good. Forty years later, *Quadragesimo Anno*[8] added new elements to the original teaching, among others subsidiarity (principium subsidiaritatis) in the common interest or the common good. Of course, at this time neither the concept of environmental protection, nor the idea of sustainable development were at stake, but their foundations were already in place. This was the case at the time of the announcement of *Pacem in Terris,*[9] the legal significance of which lies in its special attention to human rights.

The first clear sign of environmental interests, in parallel with the growing universal attention directed towards the subject emerged in Pope Paul VI's *Gaudium et Spes*[10]:

> '69. God intended the earth with everything contained in it for the use of all human beings and peoples. ... Whatever the forms of property may be, as adapted to the legitimate institutions of peoples, according to diverse and changeable circumstances, attention must always be paid to this universal destination of earthly goods. In using them, therefore, *man should regard the external things* that he legitimately possesses not only as his own but also as common in the sense that they should be able to benefit not only him but also others.'

These ideas have common roots with what is today called sustainable development and remind us of equity. The responsibility of mankind towards the created world, and within this, the environment, becomes more and more apparent as we approach the time of the Stockholm Conference, which also had an effect on the Vatican. In *Populorum Progressio,*[11] the limits of material development and the issue of human responsibility becomes ever so robust: '14. The development We speak of here cannot be restricted to economic growth alone. To be authentic, it must be well rounded; it must foster the development of each man and of the whole man.' As such, Catholic teaching cannot be separated from actual political tendencies.

It was John Paul II, who took the biggest step into the direction of what may be called the concept of sustainable development, for the first time in *Redemptor Hominis*.[12] The title we refer to at this point is telling: '15. What modern man is afraid of', and the message of the title corresponds with the main ideas of contemporary times: the 80s. The answer for the question of the title is simple:

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8 Quadragesimo Anno, Encyclical of Pope Pius XI on Reconstruction of the Social Order, 15 May 1931.

9 Pacem in Terris, Encyclical of Pope John XXIII on Establishing Universal Peace in Truth, Justice, Charity, And Liberty, 11 April 1963.

10 Pastoral Constitution on the Church in the Modern World, Gaudium et Spes, Pope Paul VI, 7 December 1965.

11 Populorum Progressio Encyclical of Pope Paul VI on the Development of Peoples, 26 March 1967.

12 Encyclical Letter Redemptor Hominis At The Beginning Of His Papal Ministry, 4 March 1979, John Paul II.

> 'The man of today seems ever to be under threat from what he produces ... All too soon, and often in an unforeseeable way, what this manifold activity of man yields is not only subjected to 'alienation', in the sense that it is simply taken away from the person who produces it, but rather it turns against man himself, at least in part, through the indirect consequences of its effects returning on himself. ... We seem to be increasingly aware of the fact that the exploitation of the earth, the planet on which we are living, demands rational and honest planning. ... Yet it was the Creator's will that man should communicate with nature as an intelligent and noble 'master' and 'guardian', and not as a heedless 'exploiter' and 'destroyer'.'

And this new era, according to the Pope 'demand[s] a proportional development of morals and ethics.' The ambivalent nature of development becomes ever so clear to all, requiring a growing awareness from the side of society and of mankind at large.

Later, in parallel with the work of the Bruntland Commission, the message of the Vatican was likewise articulated, first of all in *Sollicitudo rei Socialis,*[13] which clearly defined the responsibility towards future generations, together with a special emphasis on human rights.

> '33. ... Today, perhaps more than in the past, the intrinsic contradiction of a development limited only to its economic element is seen more clearly. Such development easily subjects the human person and his deepest needs to the demands of economic planning and selfish profit. ... True development ... implies a lively awareness of the need to respect the right of every individual to the full use of the benefits offered by science and technology. ... Both peoples and individual must enjoy the fundamental equality which is the basis, for example, of the Charter of the United Nations Organization: the equality which is the basis of the right of all to share in the process of full development. ...
>
> 34. ... A true concept of development cannot ignore the use of the elements of nature, the renewability of resources and the consequences of haphazard industrialization – three considerations which alert our consciences to the moral dimension of development.'

Soon after the *Sollicitudo rei Socialis* and before the 1992 Rio summit, John Paul II ideas were summarized in a wonderful message, the title of which is also worth noting: '*Peace with God the Creator, Peace with all of Creation*'.[14]

> '7. The most profound and serious indication of the moral implications underlying the ecological problem is the lack of respect for life evident in many of the patterns of environmental pollution. ... Respect for life, and above all for

[13] Sollicitudo rei Socialis, 30 December 1987, John Paul II.

[14] Message of His Holiness Pope John Paul II for the Celebration of the World Day Of Peace, 1 January 1990: Peace with God the Creator, Peace with all of Creation.

> the dignity of the human person, is the ultimate guiding norm for any sound economic, industrial or scientific progress....
>
> 9. The right to a safe environment is ever more insistently presented today as a right that must be included in an updated Charter of Human Rights. ...
>
> 13. Modern society will find no solution to the ecological problem unless it takes a serious look at its life style....'

The centenary of *Rerum Novarum* is marked with a new encyclical, *Centesimus Annus,*[15] covering all those aspects the roots of which lie in the hundred year old document, but which did not receive appropriate attention and were therefore clearly articulated at the end of the XXth century.

> '37. Equally worrying is the ecological question which accompanies the problem of consumerism and which is closely connected to it. ... At the root of the senseless destruction of the natural environment lies an anthropological error, which unfortunately is widespread in our day... Man thinks that he can make arbitrary use of the earth, subjecting it without restraint to his will, as though it did not have its own requisites and a prior God-given purpose, which man can indeed develop but must not betray. Instead of carrying out his role as a co-operator with God in the work of creation, man sets himself up in place of God and thus ends up provoking a rebellion on the part of nature, which is more tyrannized than governed by him. ... In this regard, humanity today must be conscious of its duties and obligations towards future generations.'

Based on this critical vision, focusing on the general neglect of the environment and future generations by mankind and society, this Encyclical, similarly to the general idea put forward by the Church, reminds us that human beings and human development lie at the heart of Creation, and the need to preserve the natural environment forms part of this central question:

> '38. In addition to the irrational destruction of the natural environment, we must also mention the more serious destruction of the *human environment,* something which is by no means receiving the attention it deserves. Although people are rightly worried — though much less than they should be — about preserving the natural habitats of the various animal species threatened with extinction, because they realize that each of these species makes its particular contribution to the balance of nature in general, too little effort is made to *safeguard the moral conditions for an authentic 'human ecology*'.

This clear focus is reminiscent of the major inspiration of sustainable development, which views the right to development together with the protection of the

[15] John Paul II, « Centesimus Annus » Encyclical Letter on the Hundreth Anniversary of *Rerum Novarum, 1 May 1991.*

environment, the struggle against poverty and the protection of biodiversity from a clear anthropocentric perspective.

The highest responsibility is on the governments, as well as the international community, calling for an undoubtedly active or proactive attitude:

> '40. It is the task of the State to provide for the defence and preservation of common goods such as the natural and human environments, which cannot be safeguarded simply by market forces. ... Here we find a new limit on the market: there are collective and qualitative needs which cannot be satisfied by market mechanisms. There are important human needs which escape its logic. There are goods which by their very nature cannot and must not be bought or sold.'

Instead of going too much into the details of several other documents issued by Pope John Paul II, it suffices to refer to a concise summary of the environmental and also moral problems found in the *Venice Declaration,*[16] reflecting the entire construct of sustainability. It is worth mentioning that the Declaration was adopted in parallel with the Johannesburg summit.

> 'In our own time we are witnessing a growth of an ecological awareness which needs to be encouraged, so that it will lead to practical programmes and initiatives. An awareness of the relationship between God and humankind brings a fuller sense of the importance of the relationship between human beings and the natural environment, which is God's creation and which God entrusted to us to guard with wisdom and love (cf. *Gen* 1:28). ... The problem is not simply economic and technological; it is moral and spiritual. A solution at the economic and technological level can be found only if we undergo, in the most radical way, an inner change of heart, which can lead to a change in lifestyle and of unsustainable patterns of consumption and production. ... A new approach and a new culture are needed, based on the centrality of the human person within creation and inspired by environmentally ethical behaviour...'

Even the concept of common and differentiated responsibility is underlined: 'Everyone has a part to play, but for the demands of justice and charity to be respected the most affluent societies must carry the greater burden, and from them is demanded a sacrifice greater than can be offered by the poor.'

The conceptual line is apparent, and the next pope, Benedict XVI follows on this path, among others in his Encyclical *Caritas in Veritate,*[17] focusing on the questions of development, covering social problems, the financial crisis, globalization, poverty, respect for life and several other conventional issues, as well as the issue of the environmental crisis and its relationship with development. The

[16] Common Declaration of John Paul II and the Ecumenical Patriarch His Holiness Bartholomew I, 10 June 2002.

[17] Encyclical Letter Caritas in Veritate of Benedict XVI on Integral Human Development in Charity and Truth, 29 June 2009.

starting point is the definition of the common good, comparing it with development as such.

> '7. Another important consideration is the common good. ... It is a good that is sought not for its own sake, but for the people who belong to the social community and who can only really and effectively pursue their good within it.' If we compare development with the common good, then material, financial or technological development is far removed from being satisfactory (23)

There is a separate chapter (Chapter Four) on environmental protection, again, beginning with the balance between rights and duties, entailing also the question of solidarity. Furthermore, development has a direct link with human rights, also in the context of a balanced vision:

> '43. ... An overemphasis on rights leads to a disregard for duties. Duties set a limit on rights because they point to the anthropological and ethical framework of which rights are a part, in this way ensuring that they do not become licence. Duties thereby reinforce rights and call for their defence and promotion as a task to be undertaken in the service of the common good.'

Development is moreover directly linked with environmental protection, but in a much wider context, similarly to the whole idea of sustainable development:

> '48. Today the subject of development is also closely related to the duties arising from *our relationship to the natural environment*. The environment is God's gift to everyone, and in our use of it we have a responsibility towards the poor, towards future generations and towards humanity as a whole. When nature, including the human being, is viewed as the result of mere chance or evolutionary determinism, our sense of responsibility wanes. ....'

Environmental protection – as we understand it – must be considered from a human perspective, at the same time, on the basis of the teaching, such a perspective must imply responsible care:

> '48. ... *Nature expresses a design of love and truth*. ... But it should also be stressed that it is contrary to authentic development to view nature as something more important than the human person. ... Human beings interpret and shape the natural environment through culture, which in turn is given direction by the responsible use of freedom, in accordance with the dictates of the moral law. Consequently, projects for integral human development cannot ignore coming generations, but need to be *marked by solidarity and inter-generational justice*, while taking into account a variety of contexts: ecological, juridical, economic, political and cultural.'

Thus, the two sides of generational equity become clear, while the teaching puts human responsibility at the centre of our relationship to the environment:

> '50. ... On this earth there is room for everyone: ... At the same time we must recognize our grave duty to hand the earth on to future generations in such a condition that they too can worthily inhabit it and continue to cultivate it. ... One of the greatest challenges facing the economy is to achieve the most efficient use — not abuse — of natural resources, based on a realization that the notion of 'efficiency' is not value-free.'

From its very beginning, the Encyclical stresses the necessity to focus on human behaviour and morality. The individual states, as well as the international community and other players of the sustainability scenario all have a role to play in achieving true development, however, throughout history, no institutional effort had lead to the aspired result:

> '11 ... In the course of history, it was often maintained that the creation of institutions was sufficient to guarantee the fulfilment of humanity's right to development. Unfortunately, too much confidence was placed in those institutions, as if they were able to deliver the desired objective automatically. In reality, institutions by themselves are not enough, because integral human development is primarily a vocation, and therefore it involves a free assumption of responsibility in solidarity on the part of everyone.'

The message to the *World Day of Peace in 2010* is also imperative, even the title demonstrates its special significance for the environment – 'If You Want to Cultivate Peace, Protect Creation' -, which also proves the continuity of the position of the Church (cf. the message of John Paul II from twenty years earlier). This message may also be taken as a summary of the entire teaching – it requires the revision of our current development model, in order to shift towards a more sustainable model.

> '5. ... Prudence would thus dictate a profound, long-term review of our model of development, one which would take into consideration the meaning of the economy and its goals with an eye to correcting its malfunctions and misapplications. The ecological health of the planet calls for this ... Humanity needs a profound cultural renewal; it needs to rediscover those values which can serve as the solid basis for building a brighter future for all. Our present crises – be they economic, food-related, environmental or social – are ultimately also moral crises, and all of them are interrelated. ...
>
> 7. ...The goods of creation belong to humanity as a whole. Yet the current pace of environmental exploitation is seriously endangering the supply of certain natural resources not only for the present generation, but above all for generations yet to come. It is not hard to see that environmental degradation is often due to the

> lack of far-sighted official policies or to the pursuit of myopic economic interests, which then, tragically, become a serious threat to creation. To combat this phenomenon, economic activity needs to consider the fact that 'every economic decision has a moral consequence' and thus show increased respect for the environment. ... To protect the environment, and to safeguard natural resources and the climate, there is a need to act in accordance with clearly-defined rules, also from the juridical and economic standpoint, while at the same time taking into due account the solidarity we owe to those living in the poorer areas of our world and to future generations.'

Finally, there are two recent documents of significance from the Vatican. The first one stems from Benedict XVI.[18] Albeit only indirectly connected with environment, it nevertheless adequately summarizes the primary vision of the Church:

> '5. In many quarters it is now recognized that a new model of development is needed, as well as a new approach to the economy. Both integral, sustainable development in solidarity and the common interest (mostly referred to as common good – author's note) require a correct scale of goods and values which can be structured with God as the ultimate point of reference.'

The second is a letter from the present Pope, *Francis,*[19] emphasising in general 'as my predecessor Benedict XVI made clear, the present global crisis shows that ethics is not something external to the economy, but is an integral and unavoidable element of economic thought and action.'

In summary, the starting point of the catholic teaching on our stance towards the environment is the definition of the common good, which does not only entail material wealth, but requires the respect for all interests of current and future generations. The development trend has taken a wrong turn, in brief: quantity without quality, and mostly without moral considerations. As a result, the development model must be revised, for which the active commitment of the states and the international community is indispensable, to – among others – protect the right to environment, but also the right to development. In this context, everyone and every institution has a special responsibility: a responsibility towards the environment – towards Creation, with humanity in the centre of our approach towards the living Earth. The teachings feature many well-known elements, such as subsidiarity, generational equity and cooperation. Thus, there is no contradiction between the content of international documents or scholarly proposals (as elaborated below) and the teaching of the Church, it is but the wording that may be different – the essence remains the same.

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[18] Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace, 1 January 2013, 'Blessed Are The Peacemakers'.

[19] Letter of Holy Father Francis to H.E. Mr David Cameron, British Prime Minister on the Occasion of the G8 Meeting (17-18 June 2013), From the Vatican, 15 June 2013.

CHAPTER 3

Sustainable Development in International Law

1 The Concept of Sustainable Development in International Treaties

The concept of sustainable development in international treaties underwent significant transformation which is largely due to the theoretical establishments of international legal scholarship and their infiltration into international diplomacy. A characteristic example for the early use of the concept of sustainable development is the preamble of the UN Framework Convention on Climate Change, which stipulates that developing countries need access to resources in order to ensure sustainable economic and social development.[1] By contrast, the next sentence of the preamble stipulates that the parties to the Convention are determined to protect the climate system of the Earth for present and future generations. The Convention on Climate Change interpreted sustainable development principally as the right of the developing countries to sustainable economic growth.

A similar approach may be discerned from the Convention on Cooperation for the Protection and Sustainable Use of the Danube River, concluded in Sofia on 29 June 1994.[2] The Convention established that in order to ensure sustainable development, the contracting parties, taking into account the urgency of water pollution abatement measures and of rational, sustainable water use, shall harmonize and coordinate measures taken at the domestic and international level with regard to the Danube basin, aiming at sustainable development and environmental protection of the river Danube.[3] Consequently, in the Sofia Convention, sustainable development appears as a mode of utilisation in compliance with the environmental criteria of the river Danube.

Similarly, the concept of sustainable development is set out as the synonym for environment-friendly economic utilization in Article 24 of the UN Convention on the Law of the Non-navigational Uses of International Watercourses, concluded in 1997.[4] Compared with this, significant progress may be inferred from the wording of the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, adopted on 5 April 1995 in Chiang Rai.[5] Every time the Convention makes mention of the concept of sustainable development, it is followed by the expressions of conservation and utilization, thus sustainable development appears as the standard of measurement in the balance between conservation and utilization.

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1 United Nations Framework Convention on Climate Change, UNFCCC. The Convention was adopted in New York, on 9 May 1992.

2 Convention on Cooperation for the Protection and Sustainable Use of the Danube River (Danube River Protection Convention).

3 See Article 2 (3) of the Convention.

4 Convention on the Law of the Non-navigational Uses of International Watercourses (The UN Watercourses Convention).

5 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Mekong River Commission.

A formulation of sustainable development even more focused on the protection of the environment may be found in the Cooperative Agreement for the Conservation of Sea Turtles of the Caribbean Coast of Costa Rica, Nicaragua and Panama.[6] In compliance with the Agreement, sustainable development means the process of gradual change in the quality of human life, which is put at the centre of development and considered the primary objective on the path to economic growth and social equality. These goals should be realized through the transformation of production methods and consumer practices, by way of regional assistance and the maintenance of ecological balance. The process should include the respect for regional, national, local ethnical and cultural diversity. Main goals are the full social participation of the citizens and their peaceful co-existence in harmony with nature, which should also contribute to preserving the livelihood of future generations. Compared with earlier international treaties, the Convention employs a much more eco-conscious approach to the concept of sustainable development, however, it continues to view sustainable development mainly as the perfect balance between economic growth and environmental protection.

The most comprehensive definition of the concept of sustainable development is enshrined in the Convention on Sustainable Management of Lake Tanganyika, concluded on 12 June 2003.[7] The most important objective of the Convention is the conservation of the unique aquatic and other biological diversity of the Lake. Pursuant to Article 5 paragraph 2 of the Convention, '[t]he natural resources of Lake Tanganyika shall be protected, conserved, managed, and used for sustainable development to meet the needs of present and future generations in an equitable manner.' In order to implement this provision, the precautionary principle, the polluter pays principle, the principle of preventive action, the principle of participation and the principle of fair and equitable sharing of benefits are set out in the Agreement.[8] As reflected by the text of the Agreement, the principles of international environmental law developed in regard to sustainable development were included in the Agreement on Lake Tanganyika and we can but hope that a number of conventions will be concluded in the future, applying the concept of sustainable development, taking into account the results of international law scholarship.

In connection with the analysis of the concept of sustainable development in international treaties, it can be stated that the use of the concept of sustainable development in inter-state practice is always supported by the simultaneous appearance of the questions of economy and environmental protection. However, if the objectives of a convention exclusively concern environmental protection, then it is not necessary to use the concept of sustainable development. An example for such treaties could be the Agreement on the International

6 The Cooperative Agreement for the Conservation of Sea Turtles of the Caribbean Coast of Costa Rica, Nicaragua and Panama, 'Tri-Partite Agreement'.

7 The Convention on Sustainable Management of Lake Tanganyika, Dar es Salaam.

8 *Ibid*. Article 5 (2), paragraphs A–F.

Dolphin Conservation Programme, concluded in Washington on 21 May 1998. This Agreement is of paramount significance from the perspective of environmental law, yet it does not make mention of the concept of sustainable development.[9] The reason for this is that, fortunately, dolphins are only exploited to a minimal extent (for example in zoos, dolphinariums), as a consequence of which, using the expression of sustainable development was not justified.

Within the practice of international greaties we may distinguish the following four categories of conventions related to sustainable development:

1.1 Sustainable Development as a Mere 'Fig Leaf'

As is evident in many areas of life, certain concepts become fashionable and are even employed in contexts where the intention of the parties is much rather the opposite. It seems that the concept of sustainable development is included also in those international treaties, which are elaborated for the purposes of an unrestricted exploitation of the environment where the state parties are not inclined to confine their economic activities.

A good example for this type of treaty is the Lisbon Energy Charter Treaty of 17 December 1994,[10] with the main purpose of establishing a legal framework for long-term cooperation between the contracting partners in the field of energy. According to the treaty the parties acknowledge each other's sovereignty over their respective natural resources,[11] which primarily seems to substantiate their right to unrestricted exploitation of natural resources. Such an aspiration stands in clear contrast to the concept of sustainable development. Nevertheless, in Article 19 of the treaty the signatories undertook to take into consideration in the interest of sustainable development those international treaties to which they are party and by way of which they undertook to minimize harmful environmental impacts. As such, the treaty does not introduce any novel obligation of the state parties with respect to sustainable development, it merely stipulates that the Energy Charter shall not annul any obligations of the signatory states which they had undertaken in the framework of different environmental protection treaties.

We must not expect too many eco-friendly measures stemming from the International Agreement on Olive Oil and Table Olives adopted in Switzerland on 29 April 2005, either.[12] The main goal of the agreement is to increase the volume of olive oil production, however, in Article 34 of the agreement the signatory states stipulate that they shall take environmental and ecological aspects into consideration in all phases of olive farming and processing. The agreement does not elaborate on the conduct required from the states in their

[9] Agreement on the International Dolphin Conservation Programme (AIDCP). The agreement came into force on 15 February 1999.

[10] Energy Charter Treaty (ECT), 1994.

[11] *Ibid.* Article 18.

[12] International Agreement on Olive Oil and Table Olives, United Nations.

efforts for achieving sustainable development, moreover, the concept itself is merely referred to in the text of the agreement.

The International Tropical Timber Agreement adopted in Geneva on 27 January 2006 was compiled in order to guarantee the transparency of the international trade in timber.[13] Although one of the aims of the agreement is to promote reforestation, it is the competence of the signatory states to determine the extent and the framework of such efforts. This way, the agreement hardly promotes the preservation of tropical rainforests and as such, it must be deemed completely contrary to the goals of sustainable development.

1.2 Sustainable Development as the Main Goal and Moral Backbone of the Treaty

The best illustrations of international environmental law are international agreements with the main purpose of ensuring the sustainable development of certain regions of the world. Such an agreement is the Statute of the International Renewable Energy Agency (IRENA).[14] The most important goal of the international organization established in Bonn on 26 January 2009 is to promote the increasing utilization and proliferation of renewable energy resources with special consideration to sustainable development. The contracting parties set the aim of transforming the coal intensive economy in a sustainable and safe manner, ensuring the widespread use and diffusion of bioenergy, geothermic energy, hydropower and marine energy as well as solar and wind power.[15] The contracting parties were motivated by their responsibility for the environment and their commitment towards future generations, therefore, sustainable development constitutes a solid point of reference and an ethical basis for the treaty.

The African Convention on the Conservation of Nature and Natural Resources was adopted under the auspices of the African Union in Maputo on 11 July 2003.[16] This Convention is a further example for those agreements, which designate sustainable development as their ethical foundation.

1.3 Environmental Agreements Acknowledging the Right to Economic Development

In a further category of international treaties, the concept of sustainable development opens the door to economic activities in the framework of an environmental agreement. The contracting parties set the goal of protecting the natural environment, certain animal or plant species, at the same time, they cannot remain impassive with respect to the communities living in these

[13] International Tropical Timber Agreement (ITTA, 2006).

[14] Statute of the International Renewable Energy Agency (IRENA).

[15] *Ibid*. Article 2 paragraph (b).

[16] African Convention on the Conservation of Nature and Natural Resources (Maputo Convention).

regions, either. Therefore, the signatory states acknowledge the fact that the needs of the communities living in the affected areas are of vital importance from the point of view of coexistence. This way, a situation can be prevented where communities incapable of satisfying their most basic needs deplete and jeopardize the resources of the natural environment.

A vivid example for such a treaty is the Agreement on the Conservation of Gorillas and their Habitats adopted in Paris on 26 October 2007.[17] Naturally, the main purpose of the agreement is to protect gorillas, however, according to the action plan provided for under Article 8 it is imperative that the parties contribute to the sustainable development of the local communities living in the areas populated by gorillas.[18] Thus, the signatory states cannot be impassive towards the indigenous communities living in the natural habitat of the gorillas, for in case these communities experience severe economic hardship, they may be forced to threaten the last refuge of the gorillas.

A similar approach is followed by the previously mentioned International Agreement for the Conservation of Carribean Sea Turtles. In the meaning of the agreement, in order to preserve the carribean sea turtle and safeguard its habitat from the communities living in the area, it is necessary to provide for the needs of such communities as well. The agreement prescribes the education of affected communities in order to ensure that the people living in the habitat of the carribean sea turtle do not threaten the survival of this special species.

In some instances the international treaties pertaining to this category pursue the preservation of entire regions. One such agreement is the Protocol Concerning the Protection of the Marine Environment from Land-Based Activities in the Red Sea and Gulf of Aden, adopted in Jeddah on 12 December 2005.[19] This Protocol[20] is one of the most important environmental treaties of the Middle East region, with the main purpose of compiling a list of endangered species, establishing special protection zones in mutual agreement, preventing the further invasion of non-indigenous species in the Gulf of Aden and the Persian Gulf, as well as providing for the management of protected areas. The main focus of the Protocol is therefore the protection of the environment, nevertheless, the protocol also makes reference to the concept of sustainable development, which must be understood as a requirement for safeguarding the economic conditions of development. The latter is indispensable for preserving the protected areas as well as safeguarding the indigenous animal and plant species.

Certain agreements seek to ensure that, with due consideration to sustainable development, human economic activity in a certain region – typically the

[17] Agreement on the Conservation of Gorillas and Their Habitats (the Gorilla Agreement).

[18] See Section 1 (6) paragraph (h) of the action plan provided for under Article 8 of the Agreement.

[19] Protocol Concerning the Protection of the Marine Environment from Land-Based Activities in the Red Sea and Gulf of Aden, Jeddah.

[20] The Protocol is attached to the 1982 Jeddah Convention. Convention for the Conservation of the Red Sea and Gulf of Aden Environment (The Jeddah Convention).

catchment area of a lake or a river basin – does not exceed the degree necessary to preserve the environment. The most important example for such a treaty is the Agreement between the Council of Ministers of the Republic of Albania and the Government of the Republic of Macedonia for the Protection and Sustainable Development of Lake Ohrid and its Watershed, signed in Skopje on 17 June 2004.[21] We may also mention the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, adopted in Chiang Rai on 5 April 1995, as well as the Teheran Framework Convention for the Protection of the Marine Environment of the Caspian Sea, signed on 4 November 2003.[22] The common feature of these agreements is that the parties establish a Council, a Conference of the Parties or a similar body with the purpose of deciding whether the individual measures planned by the parties conform to the criteria of sustainable development, since this is the condition for executing the proposed investments. Thus, the legal concept of sustainable development acquires actual and effective legal force in these treaties. It is easy to see, that in case of all three treaties it shall be the state planning the economic investment which will be arguing before the Conference of the Parties or other similar treaty body for the economic reasonableness of the investment. The other parties shall try to achieve the restriction of the volume or the complete prevention of the investment, since from the perspective of the contracting states, the utilization of the common natural resource by one party leads to the depreciation of the value of their own respective natural resource. As a result, these states immediately become the advocates of environmental protection and the conservation of nature, while in case of their own investments, they would argue just as passionately with a completely opposite set of criteria.

In sum, we may say that as regards the sharing of common natural resources the concept of sustainable development may prove signifant in the ambit of international law for reasons of its emerging content. Perhaps even more important are the instruments elaborated by the scholars of international law in connection with the the concept of sustainable development. States may view the economic investments planned by other states as a threat to the natural resources located in their own territory and may be prompted to act as fervent advocates for environmental interests.

1.4 Sustainable Development as an Environmental Constraint for an Economic Agreement

Contracting parties often seek to guarantee the long-term conditions of their economic activities. In such cases the preservation of natural

[21] Agreement between the Council of Ministers of the Republic of Albania and the Government of the Republic of Macedonia for the Protection and Sustainable Development of Lake Ohrid and its Watershed.

[22] Framework Convention for the Protection of the Marine Environment of the Caspian Sea (Tehran Convention).

resources serves the goal of maintaining the natural conditions of economic activity for possibly many generations and that human activity does not deplete respective natural resources completely. The most typical agreements of this category are the ones related to certain fish species or fishing in individual sea areas. Such a treaty is the Agreement for the Establishment of the Indian Ocean Tuna Commission[23] concluded on 25 November 1993, the Protocol on Fisheries,[24] adopted in Blantyre on 14 August 2001, the Agreement Establishing the Caribbean Regional Fisheries Mechanism,[25] signed in Belize on 4 February 2002 and the SIOFA Agreement[26] concluded on 7 July 2006, otherwise known as the South Indian Ocean Fisheries Agreement.

Typically, the political goal of such contractual agreements is for states pursuing more moderate fishing practices to convince the states operating in the same region under a less restrictive fishing policy, to limit the volume of fishing for the benefit of future generations. In this pursuit, sustainable development provides legal arguments for the states advocating for a more moderate utilization of natural resources. Therefore, we may say that that sustainable development opens up a window on the construct of economic development leading to the direction of environmental protection. However, the Conference of the Parties or other similar treaty bodies are typically entrusted with less stringent competences, and the agreement on fishing activities in the affected regions develops only gradually, if at all.

1.5 Summary

The concept of sustainable development underwent significant transformation in recent decades. In the beginning it was interpreted as the manifestation of the peoples' right to development, which may be rightfully restricted by the interests of future generations. As a result, the protection of the environment and nature was not stipulated as a value in itself, but much rather as a means of protecting the interests of future generations. In the international treaties adopted following the nineties – even such significant documents, as the Climate Change Convention of the UN – the concept of sustainable development meant a version of economic development that is restricted by environmental considerations. The UN Climate Change Convetion expressly emphasizes that developing states are particularly entitled to the right of sustainable development. It can be observed, that in the recent decades the concept of sustainable development featured both in agreements on economic cooperation and conventions adopted for the protection of the environment. We may discern an interesting tendency, according to which the concept of sustainable developement opens the door to the enforcement of environmental considerations in economic

[23] Agreement for the Establishment of the Indian Ocean Tuna Commission (IOTC).

[24] Southern African Development Community (SADC) Protocol on Fisheries.

[25] Agreement Establishing the Caribbean Regional Fisheries Mechanism (CRFM).

[26] South Indian Ocean Fisheries Agreement (SIOFA).

agreements, while in the case of environmental treaties, the legal institution of sustainable development guarantees not only the protection of the environment, but also the satisfaction of the basic needs of human communities, the fight against poverty and safeguarding the possibilities for development.

With time, the concept of sustainable development acquired a more extensive meaning and the simple legal definition gave way to a wider, overarching concept that rendered sustainable development to be a basic concept of international environmental law. Although in some instances it may be observed that this concept is merely employed as a fashionable term in international agreements, in an increasing number of cases sustainable development becomes the moral foundation for the cooperation of the states. The concept of sustainable development and its content elaborated by legal scholarship found its way into international documents from the years 2000. International agreements sought to include definitions corresponding to the sustainable development concept elaborated by environmental lawyers, and certain agreements stipulate concepts for their respective scope of application that are in complete accordance with the sustainable development doctrine formulated in handbooks on international environmental law. An example could be the international agreement concluded in relation to Lake Tanganyika, where already the definition of sustainable development refers to the principle of inter-generational justice and deems the principle of precaution, prevention, public participation and the obligation to conduct an environmental impact assessment to be constituent elements of this concept.

Although the concept of sustainable development is included in numerous international agreements, the definition of sustainable development, its content and the legal consequences of the same are highly divergent in the individual agreements. Thus, we are witness to a development of international law, in the course of which the legal content of sustainable development is constantly changing as a result of the efforts of international law scholarship, rendering the concept more and more clear cut.

Finally, in summary we may say that the concept of sustainable development is a truly significant legal tool in international contractual practice that may contribute to preserving the fragile ecosystem of our world.

2 The Practical Efficacy of Agreements Including the Concept of Sustainable Development

2.1 Introduction

In the present volume we are seeking to answer the question whether the concept of sustainable development in public international law is sufficiently substantiated in order to effectively constrain environmentally harmful activities of the states.

It must be noted, that an important category of international treaties including the concept of sustainable development assigns significant legal force to the concept of sustainable development. An important characteristic of these treaties is that they typically refer to the shared use of a natural resource falling under the territorial sovereignty of several states, where the tension between the economic activities of certain states and the commitment towards the perservation of the natural environment must be resolved. In the ambit of the sustainable utilization of transboundary natural resources the concept of sustainable development is an effective tool for restricting the environmentally harmful economic activities proposed by the states. The exploitation of the shared natural resource by one state shall namely be viewed by others as a depreciation of their own respective natural capital, and as a measure infringing their property, which may be countered on the basis of the concept of sustainable development. This also holds true in the case of open seas, which may be utilized as *res communis omnium usus* by every state. Similarly to the case of trans-boundary legal resources, the main purpose of such agreements is the establishment of the conditions of economic utilization and not the protection of the environment. States seek to moderate the behaviour of the greediest, most reckless countries by way of international agreements including the principle of sustainable development, at the same time they intend to ensure the perservation of the ecosystem of the respective region in order to be able to continue with the relevant economic activity, typically fishing, for generations onwards.

2.2 The Examples of the Mekong River and Lake Tanganyika

In the course of analysis of the concept of sustainable development appearing in international agreements, we chose to analyze two conventions with the backdrop of their former social and political environment to demonstrate the power of international environmental law, which is the focus of the present volume.

During the selection process we aimed at analyzing the background of potential agreements, which carry the concept of sustainable development in its strongest forms. The best examples we found were agreements where the concept applied to a common natural resource with exhaustible reserves. In such cases the countries with conflicting interests seek to reconcile their opposing developmental and environmental claims, and to that end, for the purpose of protecting their own environment, the countries are willing to restrict the development plans of other states, while their own investments are constrained by the environmental concerns of others.

Because of their particular environmental and social significance, the international agreement on the Mekong River Delta,[27] and the treaty regarding the

[27] Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, 5 April 1995, Chiang Rai, Thailand.

sustainable use of Lake Tanganyika[28] were chosen, however, these treaties are notable examples also by reason of their eminent solutions in defining sustainability.

2.3 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin

2.3.1 The Mekong River Commission and the Possibility of Enforcing the Concept of Sustainable Development

The Mekong River is the catchment area most diverse in fish species on Earth.[29] One-fourth of non-sea fisheries come from this region.[30] A significant proportion of the more than 60 million people living in the Delta depend on fish for food. For instance, in Cambodia 70% of the consumption of annual animal protein comes from fish caught in the area.[31] The catchment area of the Mekong River is almost 800.000 km2, with more than a hundred ethnical groups living in the region. Although the Mekong Basin is shared by six countries, only four states participated in the agreement on the cooperation for the river's sustainable management in Chiang Rai on the 5th of April, 1995: Laos, Vietnam, Cambodia, and Thailand. Burma, which occupies only an insignificant part of the basin, and China controlling the entire upstream part of the river did not join the agreement. The Mekong River Commission[32] was established on the basis of this agreement to help the cooperating countries through harmonization and background research.

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[28] The Convention on Sustainable Management of Lake Tanganyika, 12 June 2003, Dar es Salaam.

[29] The Mekong Delta is home to a thousand fish species, three times more than the number of fish species endemic in the Amazonas.

[30] The Mekong fishery is the largest freshwater fishery of the world. See International Centre for Environmental Management: *MRC Strategic Environmental Assessment of Hydropower on the Mekong Mainstream*. Mekong River Commission: Hanoi, Viet Nam, 2010, p. 95.

[31] OSBORNE, Milton: *'The Mekong: River Under Threat'*. Lowy Institute Paper 27, Lowy Institute for International Policy, 2009, p. iv.

[32] The mission of the Mekong River Commission is 'to promote and co-ordinate sustainable management and development of water and related resources for the countries' mutual benefit and the people's well-being by implementing strategic programmes and activities and providing scientific information and policy advice.'

Figure 1: Map of dams in Mekong Basin; Source: World Wildlife Fund: The Mekong River at Risk, WWF Brief, 2012 July

The densely populated Mekong Delta has one of the world's fastest growing population and economy, where proliferating industrial production and the growing population need electricity to an ever increasing degree.[33] The upper flow of the river has excellent hydrological potential, therefore, China has started the intensive energy utilization of the area falling under its sovereignty. The government decided to utilize the river's energy potential in the 1980s with a complex of eight power plants called the Lancang Cascade.[34] The total power and water-utilization capacity of the Mekong-Cascade will match China's – and the world's – biggest dam, that of the Three Gorges facility. This amounts to more than 21.000 megawatt capacity using 475 billion m3 of water.[35] Six of the originally planned eight dams are either finished or under construction.[36] With the fulfilment of the complex hydroelectric power plant plant system the Mekong's periodic fluxes and refluxes will be largely adjusted, and its runoff regulated. On the other hand, the periods burdened with the natural occurrence of floods and

[33] GRUMBINE, R. Edward – DORE, John – XU, Jianchu: *'Mekong hydropower: drivers of change and governance challenges'*. Frontiers in Ecology and the Environment (2012) 10, p. 91.

[34] See in detail MAGEE, D.: 'The dragon upstream: China's role in Lancang-Mekong development'. In: OJENDAL, J. – HANSSON, S. – HELLBERG, S. (eds.): *Politics and development in a transboundary watershed: the case of the Lower Mekong Basin*. New York, NY: Springer-Verlag, 2012.

[35] United Nations Development Programme: *Global International Waters Assessment: Mekong River – GIWA Regional assessment 55*. Kalmar, Sweden: University of Kalmar, 2006, pp. 16., 24.

[36] The eight hydroelectric power stations of the Lancang Cascade comprise Gongguoqiao, Xiaowan, Manwan, Dazhaoshan, Nuozhadu, Jinghong, Ganlanba and Mengsong.

droughts shaped the centuries-old agricultural and cultivation practice, which is changing because of the construction of the Chinese dam system.[37] The annual floods of the Mekong River are essential for biodiversity, traditional lifestyle and agricultural production.[38]

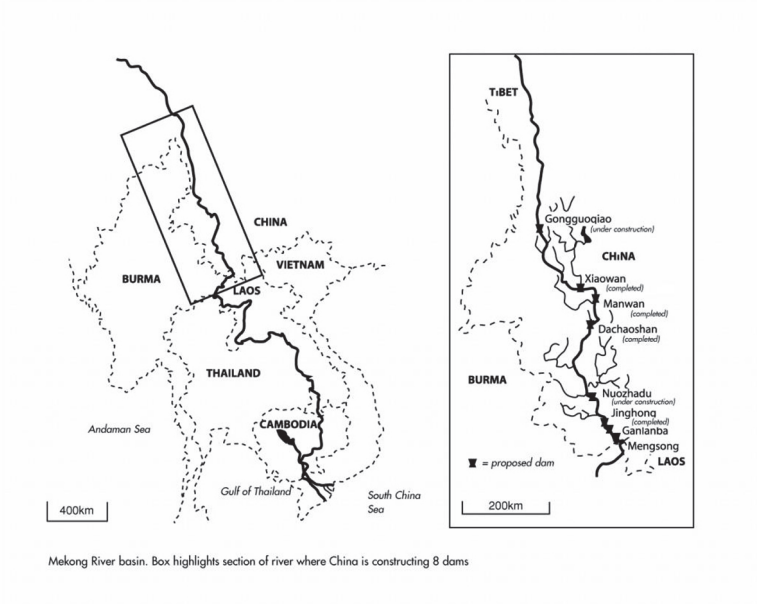

Figure 2: Map of dams in the Lancang River Basin; Source: International Rivers, 2011

Situated on the lower part of the river, Laos became the most committed advocate of dam constructions, and elevated this policy to the level of the government. There are already 16 active hydroelectric power plants producing electricity on the tributaries of the Mekong, and the Laotian authorities want to triple these numbers making their homeland the Kuwait of Southeast Asia.[39] The most controversial construction work planned is the Don Sahong plant, which was introduced to the Mekong River Commission by the Laotian government on the 30th of September in 2013.[40] The dam's capacity is relatively low, some 260 megawatts, but its construction results in many collateral advantages. It is

[37] OSBORNE op. cit. iv-v.

[38] KAMEYAMA, Satoshi *et al.*: *'Hydrological and sediment transport simulation to assess the impact of dam construction of the Mekong River main channel'*. American Journal of Environmental Science 9 (2013) 3, p. 248.

[39] Besides the sixteen working hydroelectric power plants, there are more than twenty dams in the planning stage in Laos, and approximately thirty dams are undergoing feasibility studies at the moment.

[40] On 30 September 2013, the Government of Lao PDR submitted its notification to the Mekong River Commission Secretariat of its decision to proceed with the development of the Don Sahong Hydropower Project. According to the Laotian Government, the construction of the project is set to commence in

for instance able to provide large-volume energy supply in the area of the Khone waterfalls, making it possible to develop a touristic site in the region. Risks and dangers however outweigh the advantages of the realization of the project to a great extent. The dam is located in the worst possible place considering the course of migratory fish, which can only swim upstream on this branch of the divided Mekong's several arms. Although engineers plan to build fishpasses,[41] these did not prove to be an efficient solution in any part of the world. 70% of the Mekong River's fish species are migratory, and in case they cannot pass the facility-system, this will result in serious economic and sustenance problems for the people living in the upper dam region along the Laotian and Cambodian tributary-systems.[42] A group of environmentalists protested against the implementation of the investment at the Mekong River Commission,[43] which, although not publicly, firmly warned Laos.[44] Hun Sen, president of Cambodia also expressed his concerns regarding the constructions.[45] It can be confirmed, however, that there is a remarkable economic interest in bringing the plans of the dam into effect, which is also supported by the cynical argument that the problems of fish migration could be compensated by the propagation of the species in artificial lakes above the hydropower plant.

Another controversial example of the Laotian dam construction plans is the proposal for the Xayaburi dam, the first of the dams planned on the Lower Mekong River, which would caulk the river with a more than 50 meters high and 800 meters long wall, thereby creating a 60 km long reservoir. Regarding the building of the hydroelectric power plant there are only a limited number of environmental impact assessments of poor quality available, and the potential consequences were studied only for a certain section of the basin, extending to merely 10 km from the dam. A trans-boundary impact assessment has never

November 2013 and will be finished by February 2018. The run-of-the-river dam will produce 260 megawatts of electricity with year-round operation.

41 Possible ways to mitigate the blocking of fish migration include fish ladders, fish lifts and alternative fish-passages. See BARAN, Eric – STARR, Peter – KURA, Yumiko: *'Influence of built structures on Tonle Sap fisheries: synthesis report'*. Cambodia National Mekong Committee and the WorldFish Center 2007, 18-31; http://www.worldfishcenter.org/resource_centre/Baran_et_al_2007_Influence_of%20built_structures.pdf.

42 DUGAN, Patrick: *'Mainstream dams as barricades to fish migration: international learning and implications for the Mekong'. Catch and Culture* 14 (2008) 3: 9-15. Mekong River Commission, Vientiane.

43 Australian Mekong Resource Centre, University of Sydney, Open Letter from scientists concerned for the sustainable development of the Mekong River, to the governmental and international agencies responsible for managing and developing the Mekong River, 25 May 2007. Signed by 34 international scientists.

44 OSBORNE op. cit. 33.

45 See Hun Sen's speech at the Second International Symposium on the management of large rivers for fisheries, sustaining livelihoods and biodiversity in the new millennium. Phon Penh, 11 February 2003. http://www.mrcmekong. org/news_events.

been carried out for the project.[46] Basin states have but hope in the promise of the Laotian president, who holds that during the construction work they also want to take into account the fair interests of other countries.[47] This, however, did not reassure the Vietnamese government, who asked for the postponement of the project by ten years. As a consequence thereof, during a side meeting at an ASEAN Summit on 7 May 2011, the Laotian Prime Minister reassured the Vietnamese Prime Minister that Laos would temporarily suspend the project of the Xayaburi Dam. Nevertheless, Laos and the Thai developer, Ch. Karnchang began the preparatory works in late 2010, even before the governments of the MRC met to discuss the project, then on 7 November 2012, the Laotian government held the groundbreaking ceremony for the Xayaburi Dam, also attended by Vietnamese and Cambodian government officials. At that time, both governments had withdrawn their opposition to the project.[48] However, with respect to the failure of the Laotian government to carry out a comprehensive environmental impact assessment for the Xayaburi Dam project, at the annual MRC Council meeting of 17 January 2013, the Vietnamese and Cambodian delegations expressed ongoing concerns regarding the Xayaburi Dam together with the Mekong River Commission's donor governments. The Xayaburi Dam has generated unprecedented public opposition, and numerous NGO forums – inter alia the Rivers Coalition in Cambodia, the Save the Mekong Coalition, the Thai People's Network for the Mekong, and the ASEAN People Representative – made attempts to urge the ASEAN, the donors of the Mekong River Commission and the entire international community, to take action to protect the Mekong River by calling for the cancellation of the construction of the Xayaburi Dam.[49]

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[46] The Thai company TEAM Consulting Engineering and Management Co. Ltd completed a report entitled '*Environmental Impact Assessment for Xayaburi Hydroelecrtric Power Project*' on 10 August 2010 for the Thai dam-developer Ch. Karnchang Public Company Limited. For a comprehensive analysis of the report see TRANDEM, Ame: *'Fatally Flawed Xayaburi EIA Fails to Uphold International Standards: A Preliminary Review of the Environmental Impact Assessment (EIA) Report for the Xayaburi Hydropower Dam on the Mekong River Mainstream in Northern Lao PDR'*. International Rivers, 14 March 2011. http://www.internationalrivers.org/files/attached-files/preliminary_review_of_xayaburi_eia_14.03.11_final.pdf.

[47] HERBERTSON, Kirk: *'Xayaburi Dam: How Laos Violated the 1995 Mekong Agreement'*. International Rivers, January 2013, pp. 19-23. http://www.internationalrivers.org/files/attached-files/intl_rivers_analysis_of_mekong_agreement_january_2013.pdf.

[48] *Ibid.*

[49] See e.g. the Statement of the Rivers Coalition in Cambodia, the Save the Mekong Coalition, and the ASEAN People Representative to the Prime Minister of the Kingdom of Cambodia, the Lao People's Democratic Republic, the Socialist Republic of Vietnam and the Kingdom of Thailand dated 14 November 2012 (http://www.ngoforum.org.kh/docs/statements/HCRP_StatementonXayaburito4_en.pdf), or the letter of the Save the Mekong Coalition of 11 March 2013 to the Prime Ministers of the MRC' governments (http://www.internationalrivers.org/files/attached-files/20130311-letter-to-prime-ministers.pdf).

2.3.2 Assessment of the Potential of the Concept of Sustainable Development in the Mekong Negotiations

The Mekong River Delta is especially vulnerable to incautious human interventions, as it is already severely exposed to the environmental effects of global warming. The most important prediction is that by 2050 water levels will increase by 33 cm at the delta,[50] allowing for seawater to flow in, significantly reducing rice growth in the region.[51]

Country	Hydropower (10^4kw)	Available development (10^4kw)	Developed power (10^4kw)	Development ratio
Cambodia	1000	860	0.86	0.10%
Laos	2660	1800	66.6	3.70%
Thailand	205.48	186.07	58.05	31.20%
Vietnam	3424.66	2168.95	390.4	18%
Burma	3900	3700	74.5	2%

Table 1: Hydropower development in the Mekong river. Source: Guo Jun – Jia Jinsheng: Prospects of the Hydropower Development and Construction in the Southeast Countries, 2006.[52]

Environmental risks concerning the Mekong Delta have become increasingly clear to the civil and scientific circles, and at least some of the resulting consequences have penetrated the political discussion. However, we do not know whether there are serious, substantive disputes in the framework of the Mekong Commission on the dramatic effects that the planned projects will have on the catchment area of the Mekong as a whole. The predictable adverse effects would require adequate precaution, which are still not in place.

Although countries joining the Mekong agreement clearly committed themselves to exclude harmful environmental impacts from their projects that may affect each other, the Mekong Commission did not prove to be an effective forum for reaching an agreement on the different claims of the countries.[53] The

[50] United Nations Development Programme: *Human Development Report 2007/2008: Fighting climate change: human solidarity in a divided world.* New York, NY: Palgrave Macmillan, 2007, p. 100.

[51] Asian Development Bank: *The economics of climate change in Southeast Asia: a regional review.* Manila: ADB, 2009, p. 49.

[52] See JUN, Guo – JINSHENG, Jia: *'Prospects of the Hydropower Development and Construction in the Southeast Countries'.* Water Power 32 (2006) 5.

[53] The representatives of Burma and China do not participate in the MRC, which contributes to a great extent to the inefficiency and the lack of proactivity in the operation of the Commission. See Hirsch,

fact that from all riparian states, the largest and most important country did not become party to the agreement, and that other signatory states demonstrated divergent interests, geographical and economic conditions played a crucial role in the failure of the agreement.[54] China, which is not represented in the Mekong River Commission, does not feel obliged to consult with the poorer and less influential Mekong riparian countries. Neighbouring countries carrying many historical wounds and maintaining fragile relationships with one another only gently touch upon the problems surrounding the Mekong River, and do not consider the mechanism of the agreement strong enough to prevent investments resulting in serious detrimental effects on the environment in an adjacent country.

It is difficult to determine the degree of sufficient grounds for a country with environmental concerns to restrain the right to development of another state. It would be important to prescribe that any state, wishing to realize a project with serious environmental effects be bound to conduct an environmental impact assessment, which is an indispensable requirement of the concept of sustainable development. It should also be prescribed that in case of uncertainties regarding the probable environmental effects, possible risks should result in the cancellation of the project based on the precautionary principle.

2.4 Practical Enforcement of the Convention on the Sustainable Management of Lake Tanganyika

2.4.1 The Background of the Convention

As we have concluded earlier the Convention on Lake Tanganyika is considered to be one of the most developed conventions, putting the concept of sustainable development at the centre of the agreement. The Convention indicates as an obligatory element of sustainable development the principle of preventive action, the principle of participation and also the precautionary principle besides environmental impact assessment.[55]

Philip, JENSEN, MØRCK, Kurt *et al.*: *National Interests and Transboundary Water Governance in the Mekong*. Australian Mekong Resource Centre in collaboration with Danish International Development Assistance, 2006, p. 69.

54 HA, Mai-Lan: *'The Role of Regional Institutions in Sustainable Development: A Review of the Mekong River Commission's First 15 Years'*. Consilience: The Journal of Sustainable Development 5 (2011) 1, p. 130.

55 See Article 5 paragraph (2) of the Convention on Sustainable Management of Lake Tanganyika.

Figure 3: Map of Lake Tanganyika Basin; Source: E. A. Sweke: Fish Diversity and Abundance of Lake Tanganyika, 2013[56]

The average depth of Lake Tanganyika, which is one of the deepest lakes of the world, is more than 500 metres, with its deepest point at 1,500 metres. It lies on the territory of four states: Burundi, Congo, Tanzania and Zaire with a width of 50 km and a length of 650 km. The area of the lake is 32 600 m^2.[57] Lake Tanganyika contains almost one fifth of the world's freshwater resources,[58] therefore, it is a freshwater source of priceless value, however it is situated in an extremely poor and densely populated area of the world. The biodiversity of the lake is very rich, making it a significant area of the world both locally and globally as well. It harbours more than 2000 species of plants and animals, of which approximately 600 are endemic to the Lake Tanganyika basin, and do not occur anywhere else.[59] For instance, the lake is the habitat of the most morphologically and ecologically complex flock of cichlid fish, one of the most diverse of fish families in freshwaters worldwide.[60]

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56 SWEKE, Emmanuel A. – ASSAM, Julius M. – MATSUISHI, Takashi – CHANDE, Abdillahi I.: *'Fish Diversity and Abundance of Lake Tanganyika: Comparison between Protected Area (Mahale Mountains National Park) and Unprotected Areas'*. International Journal of Biodiversity (2013) 2: 1-10.

57 LINDQVIST, O.V. – MÖLSÄ, H. – SOLONEN, K. – SARVALA, J. (eds.): *From Limnology to Fisheries: Lake Tanganyika and Other Large Lakes*. Series: Developments in Hydrobiology, Vol. 141. Dordrecht: Kluwer Academic Publishers, 1999, 213.

58 COULTER, G.W.: *'Lake Tanganyika'*. In: MARTENS, K. – GODDEERIS, B. – COULTER, G. (eds.): *'Speciation in Ancient Lakes'*. Archiv für. Hydrobiologie (1994) 44: 13-18.

59 United Nations Development Programme: *Global International Waters Assessment: East African Rift Valley Lakes – GIWA Regional assessment 47*. Kalmar, Sweeden: University of Kalmar, 2006, 22.

60 TAKAHASHI, R. – WATANABE, K. – NISHIDA, M. – HORI, M.: *'Evolution of feeding specialization in Tanganyikan scale-eating cichlids: a molecular phylogenetic approach'*. BMC Evolutionary Biology 7 (2007) 195.

The political atmosphere of Lake Tanganyika has been shaken by serious crises. Many hundred thousand people fled from Congo and Burundi to the territory of Tanzania. Although the vast majority of the local population is Bantu and their mother tongue is Swahili, the four states situated here are divided by two political cultures and two languages. The Francophone Congo and Burundi constitute one side, while Tanzania and Zambia follow Anglo-Saxon cultural and political traditions.[61] What made it possible for these states to adopt a sustainability convention containing such modern and multi-faceted rules? Among the initiators of the Convention are the FAO and the Global Environmental Facility. The research project called 'Lake Tanganyika Research Project' (LTR)[62] was sponsored under FAO, which was responsible for elaborating the 'Framework Fisheries Management Plan' (FFMP), by means of which it sought to place sustainable fishery on the Lake Tanganyika within definite bounds.[63] Under the auspices of the Global Environmental Facility, another new project was launched, the so-called 'Tanganyika Biodiversity Project' (LTBP),[64] as a result of which a strategic action program was elaborated[65] as well as an agreement plan between the member states, with legally binding power. Both the strategic action plan and the convention were elaborated by senior colleagues of the project who also involved international environmental law experts into the work and it was only the finished documents that were put forward to the representatives of the member states. In the interest of continuity, the so-called Interim Management Authority was set up, financed by the donations of the Global Environmental Facility.[66] The text of the agreement was prepared by 2000 and the document was signed by the member states following some amendments in 2003. Nevertheless, the convention has still not been yet ratified by all four countries, notwithstanding the fact that a full decade had passed.

In practice, however, the work related to the Convention already started, and the Conference of the Ministers, which is the most important body of the convention, examined the possibility of collecting additional resources in recent years. As a result, the Lake Tanganyika Convention Implementation Fund (LTCIF) was established, which collects subsidies from the participant member

[61] WEST, Kelly: *Lake Tanganyika: Results and Experiences of the UNDP/GEF Conservation Initiative* (RAF/92/G32) in Burundi, D.R. Congo, Tanzania, and Zambia, 28 February 2001, 17.

[62] 1992-1998 FAO/FINNIDA: Lake Tanganyika Research Project (LTR). Production and Potential for Optimal Management of Pelagic Fisheries.

[63] LOWE-MCCONNELL, Rosemary: *'Recent Research in the African Great Lakes: Fisheries, Biodiversity and Cichlid Evolution'*. Freshwater Forum 20 (2003) 4-64, p. 12.

[64] 1995-2000 UNDP/GEF: Lake Tanganyika Biodiversity Project (LTBP). Pollution Control and other Measures to Protect Biodiversity.

[65] The Strategic Action Programme for the Sustainable Management of Lake Tanganyika (July 2000), http://www.ltbp.org/FTP/SAPFINE.pdf.

[66] UNDP/GEF: Project Document: Part One UNOPS Components: Partnership Interventions for the Implementation of the Strategic Action Programme for Lake Tanganyika. Governments of Burundi, DRC, Tanzania and Zambia, 2 April 2008, p. 5.

states, while the a Lake Tanganyika Endowment Fund (LTEF) was also set up for collecting money from third state and NGO sponsors. In addition, the Lake Tanganyika Friends Trust Fund was also established for welcoming financial aid from private persons, further strengthening the implementation of common goals by additional financial aid. Although, the Lake Tanganyika Friends Trust Fund was launched in 2008 with the mandate to safeguard the lake and its natural resources, the strategic action plan was not implemented for long. Eventually, the members of the Lake Tanganyika Authority Conference of Ministers signed the updated Strategic Action Programme[67] and committed themselves to the implementation and future evolution of the Programme during the Fifth Ordinary Meeting held on 29 February 2012.

2.4.2 Problems of Enforcing Sustainable Development in the Tanganyika Area

In the past decades, international organisations focusing on Lake Tanganyika and the organisations within the countries have obviously not only been preoccupied with the duties of drafting the convention and establishing its institutions, but have also revealed the fundamental causes that account for the major environmental and developmental problems in connection with the Lake Tanganyika region. The most severe problems are related to overfishing, principally affecting clupeid stocks[68] and ornamental fish, a further source of concern is the pollution of urban and industrial origin, seeping into the water of Lake Tanganyika.[69] Shipping oil products is frequent on Lake Tanganyika, which has the potential for grave accidents.[70] In addition, Lake Tanganyika is surrounded by sloping fields virtually from all sides, allowing for contaminants from agricultural production to flow into the lake. The increase in the population and consequently the necessary increase in agricultural lands account for deforestation, the deterioration of forests, which also has a significant impact on the wildlife of Lake Tanganyika.[71]

The volume of the problems revealed by the scientific organisations and the participant countries is so significant and the financial opportunities of the participant countries of the Lake Tanganyika Convention are so limited

[67] LTA Secretariat: *Strategic Action Programme for the Protection of Biodiversity and Sustainable Management of Natural Resources in Lake Tanganyika and its Basin*. Bujumbura, Burundi: Lake Tanganyika Authority, 2012.

[68] MUNYANDORERO, Joseph: *'The Lake Tanganyika clupeid and latid fishery system: Indicators and problems inherent in assessments and management'*. African Study Monographs 23 (2002) 3: 117-145, p. 121.

[69] Pollution Control and Other Measures to Protect Biodiversity in Lake Tanganyika: Lake Tanganyika – The Transboundary Diagnostic Analysis (TDA), 26-27, p. 43. http://iwlearn.net/iw-projects/1017/reports/transboundary-diagnostic-analysis-en.pdf/view.

[70] *Ibid*. 28-29.

[71] See COHEN, A. S. – BILLS, R. – COCQUYT, C. Z. – CALJON, A. G.: *'The impact of sediment pollution on biodiversity in Lake Tanganyika'*. Conservation Biology 7 (1993) 3: 667-677.

that these countries will not be able to achieve radical change without external resources even with the best of intentions. However, it seems that the potential donor countries and organisations would like to leave the agreement related to Lake Tanganyika on its own after the initial subsidies and they trust that the participant countries will be able to manage the arising difficulties anyway. This hope, however, seems illusory. Although the participant countries should be applauded for concluding the agreement, the causes for the contamination of Lake Tanganyika stem from such severe social and economic difficulties, that cannot be solved by the participant states on the short-run, and this situation determines the fate of Lake Tanganyika.

2.5 Summary

As a result of our assessment of the international treaties including sustainable development we may conclude that there are conventions, in case of which the concept of sustainable development appears merely as the requirement of contemporary times and drafters of the treaty only inserted the provisions on sustainable development into the conventions in order to make a favourable impression before international public opinion.[72] In case of certain agreements, however, we may assume – in particular in case of agreements on the sustainable use of shared resources – that sustainable development provides real binding power to the convention. Our hypothesis could be that sustainable development creates legal possibilities for the states with opposing interests, which – depending on the given situation – assume the role of protecting the environmental values or the role of intending to exploit those values in the interest of the country's development with respect to the same natural resources. This would create a sort of a balance situation with respect to any given natural resource.

The examples examined in practice revealed the circumstances of two conventions that are considered as mature examples, taking into account their provisions. The agreements under scrutiny were related to the Mecong River Delta and Lake Tanganyika. In the course of the examination of the two cases, we came to the conclusion that little result may be expected from the implementation of these environmental agreements purported to be relatively developed.[73] Perhaps the lack of a clear and evidently defined legal standard of measure is the major problem, which could authorize the country intending to protect its environment, to take action of due impact in compliance with international law.[74] As

[72] Examples mentioned for such treaties include: Energy Charter Treaty (ECT, 1994), International Agreement on Olive Oil and Table Olives (2005), International Tropical Timber Agreement (ITTA, 2006).

[73] MAGSIG, Bjørn-Oliver: *'Overcoming State-Centrism in International Water Law: 'Regional Common Concern' as the Normative Foundation of Water Security'*. Goettingen Journal of International Law 3 (2011) 1, p. 340.

[74] KE, Jian – GAO, Qi: 'Only One Mekong: Developing Transboundary EIA Procedures of Mekong River Basin'. Pace Environmental Law Review, 30 (2013) 3, p. 959.

Philip Hirsch and Kurt Jensen observe, the Mekong Agreement 'lacks the legal 'teeth' to enforce its provisions and is therefore unable to bring about the realisation of its aspirations.'[75]

In the following we examine whether the judgments of the International Court of Justice in the Hague (the 'ICJ') fostered the crystallisation of sustainable development principles in the field of public international law.

2.6 Issues of Sustainable Development before the International Court of Justice in the Hague

Although some aspects of sustainable development have emerged in important cases before other international courts, such as the *Iron Rhine case*,[76] it is probably the ICJ that has the greatest impact on the development of global international environmental law. Thus, in the following we analyse the most significant judgments of the ICJ with respect to environment protection.

2.6.1 The Case Concerning the Gabčikovo-Nagymaros Project

The ICJ included the concept of sustainable development in the *Advisory Opinion on Threat or Use of Nuclear Weapons* in 1996, declaring that the principle is part of the body of international law relating to the environment.[77] Nevertheless, the *Gabčikovo-Nagymaros dispute* was the first case to come before the ICJ addressing questions of international environmental law. The ICJ issued its judgment on 25 September 1997 in the *Case Concerning the Gabčikovo-Nagymaros project*.[78] The case related to the agreement concluded between the Hungarian People's Republic and the Czechoslovak People's Republic on 16 September 1977,[79] aiming for the construction of a hydraulic power plant system consisting of two locks on the Hungarian-Czechoslovak section of the Danube.

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75 See HIRSCH, Philip – MØRCK JENSEN, Kurt *et al.*: *National Interests and Transboundary Water Governance in the Mekong* op. cit. 27.

76 Arbitration regarding the Iron Rhine ('Ijzeren Rijn') Railway between The Kingdom of Belgium and The Kingdom of the Netherlands, Award of 24 May 2005, UNRIAA XXVII 35. See in detail Baetens, Freya: 'The Iron Rhine Case: On the Right Track to Sustainable Development?' In: M. C. Cordonier Segger (ed.): *Sustainable Development Principles in the Decisions of International Courts and Tribunals 1992-2012*. Cambridge: Cambridge University Press, 2013. Available at http://ssrn.com/abstract=. 2246844.

77 *Legality of the Use by a State of Nuclear Weapons in an Armed Conflict*, Advisory Opinion, 1996 I.C.J. 67 (July 8), paragraph 29.

78 *Case concerning the Gabčikovo-Nagymaros Project* (Hungary v Slovakia) [1997] ICJ Rep. 7.

79 Treaty between the Hungarian People's Republic and the Czechoslovak People's Republic concerning the construction and operation of the Gabčikovo-Nagymaros System of Locks, 16 September 1977.

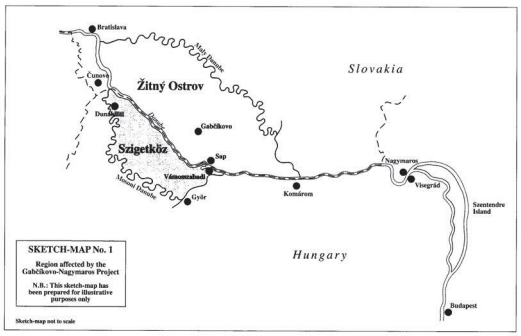

Figure 4: Map of the Original Project of the Gabčikovo-*Nagymaros System of Locks; Source: International Court of Justice, 1997*[80]

The facility was designed to operate in peak power mode, namely a part of the Danube's water quantity would have been regularly held back in the reservoir located in the upper part of Czechoslovak territory above the power plant, and this quantity would have been released through the turbines in a greater volume at various stages during the daily peak energy consumption. In order to compensate the negative environmental impacts of this water fluctuation, the construction of a second power plant was required on Hungarian territory at Nagymaros; this facility would have produced significantly less energy but could have counterbalanced the water level fluctuations resulting from peak energy production. According to the plans of the facility, it was envisaged that a significant part of the Danube's water runoff will be diverted to a side-channel to be constructed on Czechoslovak territory. The side-channel would have provided the water quantity required for rotating the turbines in the Czechoslovak facility, and the water would have returned to the main watercourse of the Danube through the side-channel.

Environmental risks related to the investment already became apparent during the planning phase of the construction. One of the greatest risks was the sedimentation of heavy metals from the reservoir located above the Czechoslovak power plant into the underground aquifer which represents a substantial portion of the water supply of Slovakia and also for Hungary. Furthermore, with the establishment of the locks at Nagymaros on the Hungarian side, the water quantity in the bank filtration wells in the section of the Danube below the locks would dropped to a level which could have endangered the water supply of Budapest.

[80] See the judgment in the *Case concerning the Gabčikovo-Nagymaros Project*, p. 32.

Notwithstanding the fact that as a state belonging to the socialist block, significant pressure was placed on Hungary to construct the facility – serving also military and strategic purposes –, as a consequence of the mass protests immediately prior to the regime change the Hungarian government first decided to suspend the construction of the facility. Later on, when the Czechoslovak government continued the works on the facility situated on the Czechoslovak side, the Hungarian Republic decided to unilaterally terminate the agreement in order to cease the legal basis of Slovakia to continue construction. The purpose of the Hungarian government was to cease the legal basis entitling Slovakia to deflect a major part of the water quantity to the side-channel, consequently to prevent the deflection of the Danube by terminating the agreement. However, the measures of the Hungarian government proved unsuccessful as Czechoslovakia deflected 83% of the Danube's water quantity from the original watercourse of the Danube to the side-channel on 23 October 1992. Moreover, Czechoslovakia unilaterally implemented a technical solution which resulted in a modified and amended execution of the energy production plans on the Czechoslovak side compared to the originally agreed designs.

After losing its sovereignty over the Danube, Hungary submitted a claim to the ICJ which was rejected at first instance, since Slovakia did not assume the position of respondent. Later, thanks to the efforts of the European Union the parties reached a compromise related to the joint submission of the dispute to the ICJ. The purpose of Hungary was to redeem its sovereignty over the Danube as a natural resource. By contrast, the purpose of Slovakia was to legitimise the execution of the investment diverging from the original plans by way of the judgment of the ICJ as a legitimate implementation of the agreement signed in 1977. Slovakia also intended to convince the ICJ to order Hungary to complete the construction of the facilities.

As Section 125 of the ICJ judgment describes, in their complaint the representatives of Hungary referred to the principles of sustainable development. This principle was raised as a standard within the framework of which the parties must perform a joint environmental impact assessment with respect to the facility.[81] Nevertheless, neither the plaintiff nor the defendant applied the concept of sustainable development as a central point of their arguments. This notion may seem surprising at first, since the case concerned a situation where the application of the principle of sustainable development would have been suitable. Indeed, according to the facts, there was a state, namely Slovakia, which considered that it is entitled to serve the purpose of development by the execution of the investment, on the other hand, there was another state, namely Hungary, which held that the facility gives rise to significant risks of environmental damage in its territory, therefore this state intended to prevent the construction of the facility. Nevertheless, a special circumstance of the case must also be taken into account: originally Czechoslovakia and Hungary expected to construct the facility as a joint investment in respect of which

[81] Par. 125 of the judgment in the *Case concerning the Gabčikovo-Nagymaros Project*.

serious environmental issues were raised by the Hungarian side. Therefore, in the Hungarian-Slovak dispute the fulfilment of contractual obligations, the enforcement of *pacta sunt servanda* principle was an important influencing factor for the ICJ, moreover the principle appeared to be the determining aspect for organizing the conceptual elements of the judgment into a coherent system. Therefore, the Hungarian party abandoning the joint investment was not in a fortunate position before the ICJ. The Court affirmed the 'integrity of the rule *pacta sunt servanda*' and implicitly rejected Hungary's contention that 'the previously existing obligation not to cause substantive damage to the territory of another state had...evolved into an *erga omnes* obligation of prevention of damage pursuant to the precautionary principle'.[82] In doing so, the Court denied that environmental law principles could trump treaty law. Therefore, should the Court prescribe a certain conduct for the parties realizing a joint investment on the basis of sustainable development, we could deduce that all the more could be expected from the parties in similar cases where there are no contractual obligations binding the same parties.

Naturally, the arguments of the parties were based on international contractual law and on state liability law. With respect to the latter, Hungary referred to the international legal norms of emergency in the hope of proving the existence of grave and imminent peril threatening the environment, an argument, that may justify derogation from the contractual obligations.[83] During the discussion of this particular issue the ICJ emphasised that while it can accept the argument and is aware of the fact that environmental protection is an important state interest, the ICJ considered that Hungary could not prove the imminent peril of the environment and therefore it cannot refer to the rules of liability in respect of emergency.[84] Finally, the ICJ decided that Hungary unlawfully tried to suspend and later terminate the agreement concluded in 1977, at the same time, circumstances have overridden the performance obligations which the parties had failed to execute by the time of the diversion of the Danube in 1992. Therefore, the parties should attempt to restore the joint operation of the established facility system and thereby fulfil the original purposes of the agreement to the fullest.[85]

The ICJ expressly clarified in its judgment that both current and future generations are seriously endangered in case mankind ignores the environmental impacts of mechanisation, technical and industrial development. Therefore, the ICJ found it important to ensure the proper balance between economic

[82] *Ibid*. paragraph 97.

[83] Memorandum of the Republic of Hungary, 2 May 1994, paragraphs 6.56.-6.69.

[84] '[The Court] has concluded that, with respect to both Nagymaros and Gabčikovo,'the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they'imminent'; and [...] Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted'(paragraph 57. of the judgment).

[85] *Ibid*. paragraph 155.

development and environmental protection under the concept of sustainable development. According to L. Bostain, the court referred specifically and appropriately to this concept,[86] the content of which can be best defined as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'[87] The ICJ in Section 140 of its judgment explains the obligation imposed by the concept of sustainable development on the parties. According to the standpoint of the ICJ the parties shall conduct an environmental impact assessment with respect to the environmental effects of the operation of the Gabčikovo power plant and an adequate solution must be found regarding the water quantity to be discharged into the Old Danube and its side-branches.[88] As it is set forth in the previous subchapters, in paragraph 140 of the judgment, the International Court of Justice described the concept of sustainable development as having customary law status. Legal literature paid scarce attention to this section of the ICJ judgment which imposes definite performance obligations on the parties pursuant to the concept of sustainable development. The ICJ refers expressly in the section to Hungary's most important claim, namely returning adequate water quantity to the Danube's original watercourse, having regard to the fact that most probably this is the most suitable instrument available for the parties in order to protect the environment. Section 140 reveals that the ICJ requires the consideration of current standards in the course of evaluating environmental risks. By mentioning the terms of vigilance and prevention the ICJ indirectly refers to the concepts of precaution and prevention.[89] However, this reference is only of indirect nature and can be only be interpreted into the text with great creativity. Some critics of the judgment expressly emphasise that although Hungary *expressis verbis* referred to the principle of prevention, the statement of the ICJ stressing that precaution and prevention are essential in the field of environmental protection does by no means lead to the conclusion that the judgment canonised the principle of prevention. According to Allan Boyle it is not clear from the judgment why the ICJ did not refer to the principle of prevention.[90] He assumes that the ICJ considered that the principle of prevention does not exhibit sufficient legal substance. According to Ida L. Bostain, the principle of prevention is a rather novel concept, therefore it is not in the least surprising that the ICJ did not refer to this principle.[91] However, this fact is rather disappointing as the principle of prevention could have been suitable for replacing the requirement of immediacy.

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[86] BOSTIAN, Ida L.: 'Flushing the Danube: The World Court's Decision Concerning the Gabčikovo Dam'. Colorado Journal of International Environmental Law and Policy 9 (1998) 401.

[87] World Commission on Environment and Development, Our Common Future 46 (1987) 4.

[88] Par. 140 of the judgment in the *Case concerning the Gabčikovo-Nagymaros Project*.

[89] *Ibid*.

[90] BOYLE, A. E.: *'The Gabčikovo-Nagymaros Case: New Law in Old Bottles'*. Yearbook of International Environmental Law 8 (1997), p. 17.

[91] BOSTIAN op. cit. 425.

However, in the absence of such replacement the ICJ rejected Hungary's arguments with respect to emergency.

Paulo Canelas de Castro, who finds the judgment concerning the Gabčikovo-Nagymaros project to be full of errors and loopholes, points even more markedly to the paradoxical contradictions of the judgment. Pursuant to Castro's opinion the principle of prevention appears in the judgment in a too narrow and a too broad sense at the same time.[92] On the one hand Hungary could not convince the ICJ that real ecological risks existed at the time, thus Hungary's arguments were rejected in the absence of full scientific certainty. The ICJ expressed in its judgment that those perils which were referred by Hungary were unfounded.[93] According to Castro, while the ICJ failed to apply the principle of prevention but at the same time required full certainty, enforcing prudence and precaution are pivotal and indispensable in the preparatory phase of the project.[94] Moreover, in his study Castro elaborates that the restrictive concept of the ICJ arose when it separated preparatory actions, such as the acts related to the construction and execution of the lock, from other acts of the parties and only the latter acts were deemed unlawful. On the other hand, these acts were interpreted too broadly in light of the principle of environmental impact assessment. Had the ICJ taken into account the principle of prevention, then the court could only have arrived at the conclusion that not only the existing violations breach international law but also those preparatory acts which may potentially lead to environmental harm. The ICJ imposed continuous environmental impact assessment obligations on the parties, ignoring that such obligations already existed during the preparation of the plans and the evaluation of the environmental effects in relation to the investment had not yet been completed.[95]

Returning to the logic of the ICJ, the most important obligation stemming from the sustainable development concept is the performance of the environmental impact assessment.[96] In relation to the performance of the environmental impact assessment, the ICJ mentions that the actual environmental standards shall always be taken into account and the purpose of the assessment is to ensure that the parties demonstrate precaution and preventive actions in order to avoid potential environmental damage. It can be said that the ICJ linked the concept of sustainable development with legally binding elements with the result that the concept of sustainable development gave rise to concrete obligations of conduct.

At this point in the final assessment of the case it is worth noting further particularities of the case stressed by other authors, namely, that the entire

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92 CANELAS DE CASTRO, Paulo: *'The judgment in the Case Concerning the Gabčikovo–Nagymaros Project: Positive Signs for the Evolution of International Water Law'*. Yearbook of International Environmental Law 8 (1997), pp. 29-30.

93 Par. 57 of the judgment in the *Case concerning the Gabčikovo-Nagymaros Project*.

94 CANELAS DE CASTRO, p. 28-29.

95 *Ibid*.

96 Paragraph 112 of the judgment in the *Case concerning the Gabčikovo-Nagymaros Project*.

judgment would have turned out differently, had the court taken into account the aspects of prevention and precaution in the course of exploring the historical events and not just with respect to future obligations.[97] As the ICJ declared regarding the Gabčikovo-Nagymaros project both Hungary and Czechoslovakia breached the law and the question of winning or losing the case fundamentally turned on who committed the first violation. This is a natural approach as in international law the application of reprisals is highly accepted, thus the response to the first infringement is considered a lawful counteraction, even if such an act would in itself be unlawful in the absence of the first breach. If we accept that pursuant to the principle of prevention, an investment which contains a serious environmental risk could be suspended until the joint environmental impact assessment is conducted, in particular in case a proper impact assessment has not yet been conducted, then the first action of Hungary deemed unlawful, that is, suspending the construction of the Nagymaros dam, could not have been considered an unlawful action. Consequently, the conduct of Czechoslovakia deviating from the plans pursuant to the original agreement would have fallen into the category of breach of law, particularly the unilateral construction and putting into operation of the facility after the unilateral diversion of the Danube. In response to this, the termination of the agreement could have been a lawful measure establishing an entirely novel situation in the dispute between the parties.

This is why several authors commenting on the judgment expressed disappointment. For instance according to Stephen Stake and Gabriel E. Eckstein, by its judgment the ICJ did not meet the expectations required by the principle of sustainable development.[98] Although the ICJ acknowledged that environmental protection is a fundamental interest, it not only failed to provide priority to this environmental interest but omitted to ensure the balance between this fundamental interest and the benefits of economic development allegedly associated with the enormous investment. To be precise, the ICJ maintained in full force and effect an agreement scheme which is clearly untenable pursuant to the authors, and the ICJ only referred to the principle of sustainable development subsidiarily in order to 'save something from the sinking ship'.[99]

It is worth mentioning the position put forward by Owen McIntyre, one of the authors engaging in the research of sustainable development, according to whom the principle of equitable use is actually the manifestation of the principle

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[97] See e.g. BOSTIAN, Ida L.: op.cit. 401.; BOYLE, A. E.: op.cit. 13-20.; CANELAS DE CASTRO, op.cit. pp. 21- 31.; KOE, Adrianna: *'Damming the Danube: The International Court of Justice and the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)'*. Sydney Law Review 20 (1998) 4: 612-629.; STEC, Stephen – ECKSTEIN, Gabriel E.: *'Of Solemn Oaths and Obligations: The Environmental Impact of the ICJ's Decision in the Case Concerning Gabčíkovo–Nagymaros Project'*. Yearbook of International Environmental Law 8 (1997): 41-50.

[98] STEC– ECKSTEIN: op. cit. 45.

[99] *Ibid* 47.

of sustainable development with respect to international watercourses.[100] Pursuant to the author, negative environmental impacts shall by no means be considered as equitable use of international watercourses.[101]

It is important to discuss the separate opinion of Vice President Weeramantry as well, since this opinion analysed the concept of sustainable development in detail and revealed the aspects of the principle of sustainable development in a broad context. According to the standpoint of Weeramantry, the fundamental principle of sustainable development is more than a mere concept as sustainable development is a principle of normative value, playing a major role in deciding the case.[102] Canelas de Castro speculates that 'Judge Weeramantry, who is after all part of the majority, echoed, perhaps even unveiled, the Court's thinking when he spoke of sustainable development as a principle with normative value'.[103] Pursuant to Weeramantry, both the right to environmental protection and the right to development form part of international law, although these rights may collide and it is for the principle of sustainable development to resolve the conflict.[104] It should be noted that Weeramantry raises the principle of continuing environmental impact assessment[105] and the principle of contemporaneity in the application of environmental norms[106] – notions which the ICJ judgment simply connected to concept of sustainable development – separately from sustainable development.

The arguments of judge Weeramantry failed to convince other authors commenting on the judgment. As a matter of fact, according to the opinion of Adrianna Koe, in his theoretical explication Weeramantry ignored facts and realities.[107] Indeed, which (if any) environmental concerns may be sacrificed in favour of development of the Danube to facilitate power generation? Can the diversion of a river be justified by the criterion of development? According to Adrianna Koe, Weeramantry adopted a utilitarian approach, namely the notion of utmost prosperity and joy. But how do we measure human joy? On the one hand, Koe accepts the theoretical arguments of Weeramantry ensuring the foundation for the concept of sustainable development, on the other hand Koe criticises these arguments as there is an enormous gap between such theoretical arguments and the fact that Hungary and Slovakia shall establish a joint management system for the operation of the hydraulic power plant which may cause harmful environmental impacts.[108]

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[100] MCINTYRE, Owen: *'Environmental Protection of International Rivers: Case Concerning the Gabčikovo–Nagymaros Project (Hungary/Slovakia)'.* Journal of Environmental Law 10 (1998) 1: 79-91., p. 88.

[101] *Ibid*.

[102] Separate Opinion of Vice-President Weeramantry, pp. 88-89.

[103] CANELAS DE CASTRO op. cit. 21., 28.

[104] Separate Opinion of Vice-President Weeramantry, p. 90.

[105] *Ibid* 111-113.

[106] *Ibid* 113-115.

[107] KOE, op.cit. pp. 612-629.

[108] *Ibid*. 622.

2.6.2 Case Concerning Pulp Mills on the River Uruguay

On 20 April 2010, the International Court of Justice delivered its judgment in a subsequent significant environmental dispute between Argentina and Uruguay. The *Case Concerning Pulp Mills on the River Uruguay*[109] provided the Court with the opportunity to contribute to the further evolution of sustainable development. Similarly to the *Gabčikovo-Nagymaros case*, the *Pulp Mills case* is centered around the interpretation of a treaty on the utilization of a shared river, namely the River Uruguay. Both cases involved joint projects with significant environmental implications that led one of the parties to stop the construction of the project. Both cases reveal the complexity of sustainable development and the approach of the Court toward this concept. Since 1997, there have been major developments in international sustainable development law including legal instruments[110] elaborated by international organizations and the civil society as well as decisions[111] of national, regional and international courts and tribunals.[112] Consequently, the ICJ could use a wide range of materials to elaborate the definition and principles underlying sustainable development.

[109] *Case Concerning Pulp Mills on the River Uruguay* (Argentina v Uruguay), ICJ judgment of 20 April 2010.

[110] See e.g. the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilisation to the Convention on Biological Diversity and the International Law Association's New Delhi Declaration on Sustainable Development.

[111] See especially the Arbitration Regarding the Iron Rhine ('Ijzeren Rijn') Railway (Belgium v The Netherlands), Arbitral Award of 24 May 2005 and the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea on matters relating to the Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the Area, Advisory Opinion of 1 February 2011.

[112] TLADI, Dire: *'Principles of Sustainable Development in the Case concerning Pulp Mills on the River Uruguay'*. International Development Law Organization Legal Working Paper, pp. 2-3. Available at http://www.idlo.int/Documents/Rio/01.%20Pulp%20Mills%20on%20the%20River%20Uruguay.pdf.

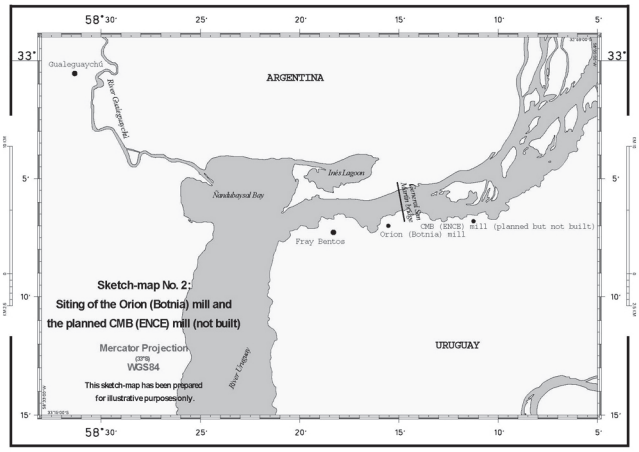

Figure 5: Siting of the Orion (Botnia) Mill and the Planned CMB (ENCE) Mill (Not Built); Source: International Court of Justice, 2010[113]

The River Uruguay constitutes the border between Argentina and Uruguay according to the 1961 bilateral treaty between the two states. Pursuant to the so-called Montevideo Treaty, the parties established a regime for the use of the river. The common regime was regulated by the 1975 Statute of the River Uruguay. In 2003 and 2005 Uruguay unilaterally issued an authorisation for the construction of two pulp mills along the banks of the river, without having fully exhausted the communication process laid down in the 1975 Statute. In its judgment the Court found that Uruguay failed to comply with the procedural obligations to adequately inform Argentina and the Administrative Commission of the River Uruguay (the 'CARU') prior to the initial authorisation for the construction of the project. Nevertheless, the Court found that Uruguay did not violate the substantive obligations under the 1975 Statute relating to the protection of the environment. The Court confirmed the obligation of due diligence,[114] and reaffirmed that this obligation 'is now part of the corpus of international law relating to the environment'.[115] Rejecting the argument of Argentina, the ICJ underlined that due diligence is the obligation of conduct rather than one of result.[116]

[113] See the judgment in the *Case Concerning the Pulp Mills on the River Uruguay*, p. 25.

[114] 'A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.' See paragraph 10 of the judgment in the *Case Concerning the Pulp Mills on the River Uruguay*.

[115] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), p. 242, paragraph. 29.

[116] See paragraph 187 of the judgment in the *Case Concerning the Pulp Mills on the River Uruguay*.

When assessing the relationship between procedural obligations and substantive obligations, the Court underlined the importance of cooperation, which is a crucial element for the proper implementation of the Treaty: 'it is by cooperating that the States can jointly manage the risks of damage to the environment'.[117] In this connection, the Court recalls its judgment in the *Gabčikovo-Nagymaros case* noting that the 'need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development', adding that '[i]t is for the Parties themselves to find agreed solutions that takes account of the objectives of the Treaty'.[118]

In the context of the obligation to inform, the Court refers to the 'principle of prevention' as part of international environmental law. Pursuant to the Court's judgment, the principle of prevention obliges states to 'use all the means at its disposal in order to avoid causing significant damage to the environment of another state'.[119] Uruguay should have submitted the relevant informations to the CARU without delay in order to enable the Commission to assess the possible harm to the environment on the territory of Argentina. Without prompt notification the CARU could not initiate the process to prevent the damage.[120] Nevertheless, the Court failed to address the effects of the preventative principle on the obligations of the parties subsequent to the consultation period, in particular, the role of the preventative principle in interpreting the content of the parties' obligations, as well as the ensuing consequences.[121]

As regards the precautionary principle, Argentina argued that the principle implies a reversal of the burden of proof or the burden applies equally to both parties. The Court held that 'while it may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as reversal of the burden of proof',[122] thus the burden remains on the party asserting the breach of environmental obligations. The Court not only reduces the principle to a simple 'approach' that may be relevant to the case, but fails to explain the exact application of the principle.

At this point, we can draw another parallel between the two decisions of the International Court of Justice. As in the *Gabčikovo-Nagymaros case*, a number of judges elaborated dissenting and separate opinions to the judgment. The most remarkable is that of Judge Cançado Trindade, who focused his thoughts on general principles of law, including the principle of prevention and the

[117] *Ibid*. paragraph 77.

[118] *Ibid*. paragraph 76.

[119] *Ibid*. paragraph 101. The principle is also reflected in, i*nter alia*, the *Corfu Channel Case* (United Kingdom v Albania) ICJ judgment of 9 April 1949 at 22 and the *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of the International Court of Justice of 8 July 1996. See also the *Trail Smelter Case* (US v Canada) (1941) Vol III Reports of International Arbitral Awards pp. 1905-1982 at 1965.

[120] Paragraph 105 of the judgment in the *Case Concerning the Pulp Mills on the River Uruguay*.

[121] TLADI, op.cit. p. 6.

[122] Paragraph 164 of the judgment in the *Case Concerning the Pulp Mills on the River Uruguay*.

precautionary principle. He is critical of the Court's approach regarding these principles and observes that the ICJ did not show the same 'zeal and diligence' in respect of legal principles as it did when it examined the factual and scientific questions.[123] According to him, these principles ought to have guided the Court in the interpretation and application of the 1975 Statute, and should have been taken into account in determining the procedural and substantive obligations of the parties.

The concept of sustainable development is considered by the Court in the context of balancing between economic and environmental interests. This narrow understanding of the concept of sustainable development ignores the fact that social concerns are integral elements of sustainable development and therefore reduces sustainable development to a mere tool of balancing economic development and environmental protection.[124] In his Separate Opinion Judge Cançado Trindade describes sustainable development as 'encompassing the fostering of economic growth, the eradication of poverty and the satisfaction of basic human needs (such as those pertaining to health, nutrition, housing, education).'[125] Nevertheless, the Court recognises that each party has the right to make equitable and reasonable use of the shared watercourse for economic and commercial activities. The Court notes that Article 27 of the Statute embodies the 'interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development',[126] placing the right of equitable use within the framework of sustainable development.[127]

The most significant contribution of the judgment to the development of international environmental law and the principles governing the law of shared watercourses is the recognition of the environmental impact assessment as a practice that has become an obligation under general international law by reason of its wide acceptance among the states:

> '[i]t is the opinion of the Court that in order for the Parties properly to comply with their obligations under...the 1975 Statute, they must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment....In this sense, the obligation to protect and preserve, under ... the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental

[123] Paragraph 4 of the separate opinion of Cançado Trindade in the *Case Concerning Pulp Mills on the River Uruguay*. See also the joint dissenting opinion of Judges Al-Khasawneh and Simma at paragraph 27.

[124] TLADI op.cit. p. 12.

[125] Paragraph 132 of the separate opinion of Cançado Trindade in the *Case Concerning Pulp Mills on the River Uruguay*.

[126] Paragraph 177 of the judgment in the *Case Concerning the Pulp Mills on the River Uruguay*.

[127] BOYLE op. cit. 4.

> impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.'[128]

In order to prevent pollution and preserve the aquatic environment, environmental impact assessments must be performed prior to the implementation of projects that are likely to cause significant environmental harm. After the commencement of implementation, environmental effects must be continuously monitored.[129] As Alan Boyle asserts, it remains an important question as to whether the Court would ever review the adequacy of an environmental impact assessment. It is worth mentioning that the ICJ found nothing unacceptable about the impact assessment of Uruguay except for the late notification. The Court accepted the argument of Uruguay – based on the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities[130] – that the scope and content of an environmental impact assessment must be determined by each party on a case by case basis, as they are not specified by general international law.[131] There is only one surprising element in the evaluation of the environmental impact assessment, and that is the question of public consultation. In paragraph 216 of the judgment the Court held categorically that 'no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.' According to Boyle, if Argentina would have argued properly when the Espoo Convention[132] and the UNEP Principles[133] were invoked, there should have been no difficulty in convincing the ICJ of the

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[128] *'As the Court has observed in the case concerning the Dispute Regarding Navigational and Related Rights, there are situations in which the parties 'intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used ... a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law'* (Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua), judgment, I.C.J. Reports 2009, p. 242, paragraph 64). See paragraph 204 of the judgment in the *Case Concerning Pulp Mills on the River Uruguay.*

[129] Paragraph 205 of the judgment in the *Case Concerning the Pulp Mills on the River Uruguay.*

[130] Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, 2001. Adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as part of the Commission's report covering the work of that session (A/56/10).

[131] BOYLE, Alan: *'Pulp Mills Case: A Commentary'*, pp. 2-3. Available at http://www.biicl.org/files/5167_pulp_mills_case.pdf.

[132] Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991.

[133] United Nations Environmental Programme (UNEP) Goals and Principles of Environmental Impact Assessment, 1987.

general principle that public consultation is a necessary element of the environmental impact assessment process.[134]

2.7 Concluding Remarks

One can agree with the statement of Ida L. Bostian in connection with the *Gabčikovo-Nagymaros case*: 'The Court's decision was not a clear victory for either party.'[135] The Gabčikovo-Nagymaros problem was a particularly sensitive dispute both for Slovakia and Hungary. The International Court of Justice was capable of elaborating a well-balanced, delicate decision, which guarantees that the most fundamental interests of both parties are safeguarded. However, the complexity of the international legal problem – which encompasses significant technical and scientific elements – made it impossible for the Court to provide for a detailed arrangement. The judgment rendered in 1997 may have been perhaps disappointing for many. According to international scholarship, where the additional rights of the parties are determined, the provisions of international environmental law, international water law and the law of treaties must be considered with equal weight. However, the judgment evidently favours the provisions of the law of treaties to the detriment of the other two areas of law. Thus the Court 'missed the opportunity to give further definition to the concept of sustainable development' in the *Gabčikovo-Nagymaros case*.[136] Jan Klabbers finds it decisive that the Court is aware of the fact that certain determinations of the case will 'return and haunt' in other cases as well. Consequently, the Court was facing a difficult problem. 'The Court must have danced like a cat on a hot tin roof.'[137] Although the International Court of Justice recommended the use of the concept of sustainable development, it 'stopped short of declaring or referring to sustainable development as a norm of customary international law.'[138]

Twelve years after the judgment, in the *Pulp Mills case* the ICJ could have resolved the questions of international environmental law and the legal implications of sustainable development that had been left open in the *Gabčikovo-Nagymaros* judgment.[139] Nevertheless, in 2010 the Court was still reluctant to confirm sustainable development as a legal norm. The Court rather referred to sustainable development as an 'objective'.[140] Despite the Court's signifi-

[134] BOYLE, Alan: *'Pulp Mills Case: A Commentary'*, 3.

[135] BOSTIAN op. cit. 414.

[136] KOE op. cit. 612.

[137] KLABBERS, Jan: *'Case Analysis: Cat on a Hot Tin Roof: The World Court, State Succession, and the Gabcíkovo-Nagymaros Case'*. Leiden Journal of International Law (1998) 11: 345-355, p. 355.

[138] TAYLOR, Prue: *'Case concerning the Gabčikovo-Nagymaros Project: A Message from the Hague on Sustainable Development'*. New Zealand Journal of Environmental Law 3 (1999): 109-126, p. 110.

[139] TREVISAN, Lauren: *'The International Court of Justice's Treatment of 'Sustainable Development' and Implications for Argentina v. Uruguay'*. Sustainable Development Law & Policy 10 (2009) 1, p. 40.

[140] See paragraph 177 of the judgment in the *Case Concerning the Pulp Mills on the River Uruguay*.

cant contribution to the law on sustainable development brought about by the recognition of the requirement to conduct environmental impact assessments as forming part of customary international law, the ICJ did not altogether seize the opportunity to develop, clarify and elaborate the scope, application and the legal status of the principles relating to sustainable development. As Dire Tladi observes, '[t]he Court is quite clearly aware of sustainable development and related principles. However, there is clear unwillingness to fully integrate these concepts into the decision it reaches. The Court is content to merely refer to them, almost symbolically, without integrating them into the decision.'[141]

On the basis of the two cases, we may come to the conclusion that the International Court will also be careful in the future with respect to its resolutions concerning international environmental law and it will recognise certain aspects of law only if it is absolutely necessary. Commentators agree that the Court must pay more attention to environmental issues and it should not be 'deterred' from determining the role of the continuously developing norms of international environmental law.[142]

[141] TLADI, Dire: *'Principles of Sustainable Development in the Case concerning Pulp Mills on the River Uruguay'*, p. 13.

[142] KOE op. cit. 629.

CHAPTER 4

The European Integration on Sustainable Development

1 Environmental Policy and Legislation

Parallel with the growing global interest towards environmental protection, the necessary policy framework for environmental action had also been developed under the auspices of the EEC/EC, officially launched in the Paris summit in October 1972:[1]

> '3. Economic expansion which is not an end in itself must as a priority help to attenuate the disparities in living conditions. It must develop with the participation of both sides of industry. It must emerge in an improved. quality as well as an improved standard of life. In the European spirit special attention will be paid to non-material values and wealth and to protection of the environment so that progress shall serve mankind;'.

As is known, European environmental action programs also have their origin in the Paris meeting. The First Environmental Action Programme[2] laid down the foundations of EC environmental policy, while the Second Action Programme of 1977[3], for the period 1977–1981, provided for the gradual introduction of a comprehensive environmental policy. The Third Programme of 1983[4], for the period of 1982–1986, promoted environmental protection as a major objective of the EC, turning towards prevention, and among others urging for the integration of environmental considerations into the planning and improvement of enterprise. Policy integration is generally perceived as the most practical way of implementing sustainability.

The Fourth Action Programme of 1987[5] marks a turning point in the history of the environmental policy of the EC, with the Single European Act[6] providing for a clear legal basis of environmental protection. At this point, sustain-

1 Meetings of the Heads of State or Government Paris 19-21 October 1972, The First Summit Conference of the Enlarged Community, Bulletin of the European Communities, No. 10, Brussels, p. 15-16, http://aei.pitt.edu/1919/2/paris_1972_communique.pdf.

2 Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment, OJ C 112, 20.12.1973.

3 Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting within the Council of 17 May 1977 on the continuation and implementation of a European Community policy and action programme on the environment, OJ C 139, 13.6.77.

4 Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting within the Council of of 7 February 1983 on the continuation and implementation of a European Community policy and action programme on the environment (1982 to 1986) OJ C 46, 17.2.1983.

5 Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992) Official Journal C 328, 07/12/1987 p. 1-44.

6 Single European Act, which entered into force on 1 July 1987, OJ L 169 of 29.6.1987.

able development as a principle had just been officially established, while the principle of policy integration is further underlined as a vital requirement. The Fifth Environmental Action Programme[7] had its basis in the UNCED process on sustainable development – note the title of the Programme: 'Towards Sustainability' – and the Maastricht Treaty.[8] Several new approaches are listed in the Programme, such as the interests of present and future generations; the need to build on shared responsibilities in a way that all sectors of society become involved, ranging from public administration to the private sphere; partnership; the implementation of a broad range of regulatory and other instruments; the further development of integration, etc. The entire process shall be based on subsidiarity in connection with the notion of shared responsibility.

The Programme reached its final stage during its revision in 1998.[9] Its main focus was still the protection of the environment, however, this was linked into the wider context of integration and sustainability, as set forth in the preamble: '(20) Whereas the further integration of environmental protection requirements into other policy areas is regarded as a key means of achieving sustainable development...;'

The implementation of sustainable development became the key concept of the Sixth Environmental Action Programme.[10] The Programme covered material and social issues, linking living standards with sustainable development. The Programme is clear in its definition of the major elements of sustainability:

> '(6) A prudent use of natural resources and the protection of the global ecosystem together with economic prosperity and a balanced social development are a condition for sustainable development....
>
> (13) The Programme should promote the process of integration of environmental concerns into all Community policies and activities in line with Article 6 of the Treaty in order to reduce the pressures on the environment from various sources.'

Par. (6) clearly reflects the essence of sustainability, namely to give priority to environmental protection, further reinforced in paragraph (8) with the practical side of integration in paragraph (13). The practical requirement relates to the special interest of integration, since there are no other direct means to implement sustainability and translate it into the language of regulation.

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7 Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development. Official Journal C. 138, 17.5.93.

8 Treaty on European Union (Maastricht Treaty), which entered into force on 1 November 1993, OJ C 191 of 29.07.1992.

9 Decision No 2179/98/EC of the European Parliament and of the Council of 24 September 1998 on the review of the European Community programme of policy and action in relation to the environment and sustainable development 'Towards sustainability' Official Journal L 275 , 10/10/1998 p. 1-13.

10 Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242, 2002. 09. 10.

If we take a look at Article 2 on principles and overall aims then the close correlation between integration and sustainability becomes even more self-evident. We may arrive at the conclusion that sustainability and integration mark a bidirectional process:

» integrating environmental concerns into all Community policies – paragraph(1);
« environmental measures should be coherent with the material and social dimensions of sustainable development – paragraph (4).

Paragraph (4) clearly states: '... measures proposed and adopted in favour of the environment should be coherent with the objectives of the economic and social dimensions of sustainable development and vice versa.'

The revision of the Programme took place in 2007. Among others, the Program noted that 'the EU is not yet on the path of sustainable environmental development.'[11] As such, there was a need for further integration of environmental policy considerations into EU policies. The SOER report[12] from the end of 2010 is also worth mentioning. From among the 10 key messages of the report, there are several which are directly connected with sustainable development, such as

> 'Implementing environmental policies and strengthening environmental governance will continue to provide benefits'.
> 'Transformation towards a greener European economy will ensure the long-term environmental sustainability...'

Meanwhile, the time was ripe to refurbish EU environmental policy. From a formal perspective, the Sixth Action Programme officially drew to a close in 2012, while it also became necessary to renew policy considerations, due to the new development strategy issued in 2010.[13] At this point we may also point out the outcomes of the Rio+20 process (The Future We Want), which also had to be taken into consideration in the framework of the burgeoning European environmental policy. The proposal for the new, seventh environmental action programme for the period lasting until 2020 was presented at the end of 2012. Certain elements of the new programme will only expire in 2050 ('Living well,

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Mid-term review of the Sixth Community Environment Action Programme, Brussels, 30.4.2007, COM(2007) 225 final, p. 17.

[12] The European Environment State and Outlook 2010 Synthesis, published by the European Environment Agency, published by the European Environment Agency, http://www.eea.europa.eu/soer/synthesis/synthesis,.

[13] See, e.g.: Communication from the Commission Europe 2020, A strategy for smart, sustainable and inclusive growth Brussels, 3.3.2010, COM(2010) 2020 final; Council Recommendation of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union, Official Journal L 191 , 23/07/2010 p. 28-34, European Parliament resolution of 10 March 2010 on EU 2020.

within the limits of our planet').[14] Attached to the proposal are certain accompanying documents, the most important of which are the impact assessment[15] and the preliminary studies and reports,[16] which substantiate the findings of the draft. In light of the antecedents, we should not expect any novelty. The wording of the Final Report for the Assessment of the 6th Environment Action Programme is clear in this respect[17]: 'When assessing the effects of the overall Programme, rather than progress on individual parts of it, one can see the added value of the 6EAP in providing strategic direction and policy orientation and generating support for, and engagement with, EU environmental policy.' Although certain areas have been successfully reformed, there remain others which are still lacking an effective solution, as highlighted by the proposed Programme for Action[18]: '5. However, many environmental trends in the EU remain worrying, not least due to insufficient implementation of existing EU environment legislation.'

To introduce the entire proposal with all its background materials would be obsolete, since at the time of the finalization of the present book the proposal had not yet been adopted. Moreover, the majority of its elements had already been mentioned before, such as:

- smart, sustainable and inclusive economy by 2020,
- absolute decoupling of economic growth and environmental degradation,
- environmental integration is essential,
- transforming the global economy into an inclusive green economy in the context of sustainable development and the reduction of poverty.

We shall also refrain from going into the details of the nine priority objectives listed in the proposal, the details of which are listed in the Annex.[19]

[14] Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', Brussels, 2012.11.29. COM(2012) 710 final, 2012/0337 (COD).

[15] Commission Staff Working Document, Impact Assessment – *Accompanying the document* Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', SWD(2012) 398 final, Brussels, 29.11.2012.

[16] Final Report for the Assessment of the 6th Environment Action Programme, DG ENV.1/SER/2009/0044, Ecologic Institute, Berlin and Brussels in co-operation with Institute for European Environmental Policy, London and Brussels Central European University, Budapest, 21 February 2011. We may also mention studies such as *The role of market-based instruments in achieving a resource efficient economy* Under framework contract: ENV.G.1/FRA/2006/0073 Client: European Commission: DG Environment Rotterdam, October 2011, etc.

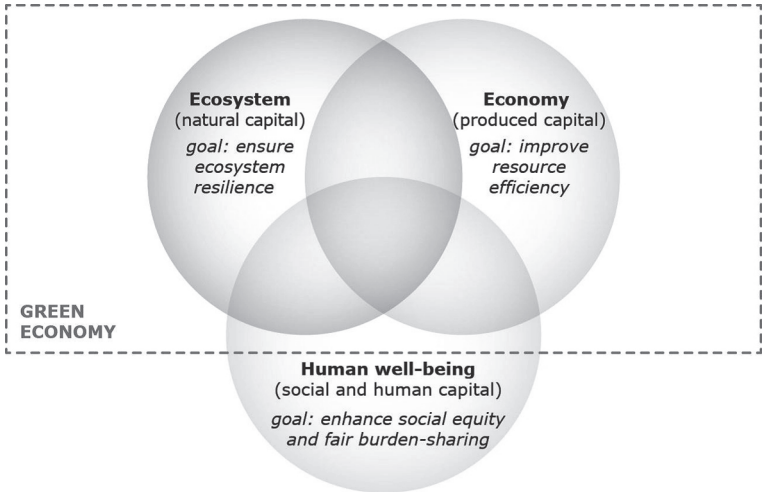
[17] Final Report for the Assessment of the 6th Environment Action Programme, p. xiii.

[18] ANNEX 'Living well, within the limits of our planet' A Programme for Action to 2020.

[19] Art. 2 of the proposal presents the directory of these objectives: to protect, conserve and enhance the Union's natural capital; to turn the Union into a resource-efficient, green and competitive low-carbon business and technology; to safeguard the Union's citizens from environment-related pressures and risks to health and well-being; to maximise the benefits of the Union's environment legislation; to

To illustrate the general stance of the proposal, the fourth priority objective related to environmental legislation may be mentioned. Three of the five items related to environmental legislation are somehow connected to public participation (access to information, citizens' trust in institutions and access to justice). One may get the impression that the drafters have greater confidence in civil institutions and the partnership between such institutions and EU bodies, than in the very implementation systems of the Member States.

One accompanying document from the many issued together with the proposal is particularly noteworthy. Annex 2 of the impact assessment[20] – 'Linkages of environment policy issues' – focuses on green economy, as a specific answer to the debate related to the general problem of weak or strong sustainability. As it has already been presented above, there are three circles representing the major elements of sustainable development – environment, society and economy (or better said: business). The relationship of these elements is decisive. According to Annex 2 green economy means the following: 'The concept of a green economy recognises that ecosystems, the economy[business] and human wellbeing (and the respective types of natural, produced, social and human capital) are intrinsically linked.' Although this statement is evidently true, the main question is still how this link will be presented.



improve the evidence base for environment policy; to secure investment for environment and climate policy and get the prices right; to improve environmental integration and policy coherence; to enhance the sustainability of the Union's cities; to increase the Union's effectiveness in confronting regional and global environmental challenges.

[20] Commission Staff Working Document, Impact Assessment – *Accompanying the document* Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', SWD(2012) 398 final, Brussels, 29.11.2012.

The figure presented above illustrates the general and weaker concept of sustainability with an interesting modification. First, we may notice the three major elements of sustainability with some specific explanations:

- the ecosystem or natural capital must reach resilience (which is usually an immanent quality of the ecosystem);
- the economy must be resource efficient;
- human – originally: social – well-being must aim at equity and fair burden-sharing. This may entail intergenerational and intragenerational equity in its genuine sense.

The above figure is largely based on the concept of weak sustainability, combining it with strong sustainability under the new title of 'green economy'. As far as weak sustainability is concerned, sustainable development is limited to the intersection of the three circles representing the three elements of sustainable development. In the above figure, however, green economy embraces most of the three elements, only a part of human well-being is excluded. To some extent this may be acceptable in light of the fact that there are many elements of human well-being which may not be linked with material development and the financial interest of enterprise. On the other hand, even the non-material items of well-being may be connected with the ecosystem, thus the other side of the same coin is less than satisfactory.

In order to provide a better understanding of the concept of green economy, it is worth referring to the Rio+20 documents:[21]

> '56. ... we consider green economy in the context of sustainable development and poverty eradication as one of the important tools available for achieving sustainable development and that it could provide options for policymaking but should not be a rigid set of rules...'

The wording cited here is somewhat different from the EU proposal. Rio sees green economy as a tool for achieving sustainable development, while the proposal of the Seventh Action Programme suggests that green economy is somehow a substitute of sustainable development. In any case, we are faced with significant terminological change or innovation when it comes to sustainable development.

2 The Study Commissioned by the EC on the Law of Sustainability in 2000

Before entering into the discussion on regulatory approach, we must point out that the problem surrounding the understanding of the concept

[21] The future we want, United Nations A/CONF.216/L.1*, Rio de Janeiro, Brazil 20-22 June 2012, Distr.: Limited, 19 June 2012, Agenda item 10, point 56.

of the law of sustainable development has always been a challenge for all levels of policy- and law-making. No wonder the EC Commission contracted a Greek legal expert to describe the main outline of sustainability law. According to Decleris, the major characteristics of sustainability law[22] are the following:

- the statutes of sustainable development do not exist, they are yet to be created. Furthermore, the sustainable behaviour of the members of society is not given, but should be much rather be brought about;
- the Law of sustainable development consists precisely in the creation of a broader concept of Ethics, which recognises moral obligations towards nature, future generations and the restoration of justice in relations between people and nations;
- another characteristic of sustainability Law will be its full rationalization through the methods of science;
- a further principle of sustainability Law is that it is dynamic and continuously formulated;
- finally, the new Law will be an open system in continuous communication with society.

We do not wish to engage in an all encompassing discussion of the entire document numbering 146 pages, if nothing else because the system created by it is less than consistent. Certain elements of the paper are principles, others are axioms, while some are action programmes. The concept of the paper is similar to that of the UN 1995 expert group report discussed above, that is to create a comprehensive system, placing ecology in its centre. However, this paper may still be considered a landmark endeavour in its attempt at clarifying some basis concepts. There are 12 different 'principles' listed in the study:

- public environmental order – to find the voice of the environment;
- sustainability – as somewhat of a tautology;
- the carrying capacity of the ecosystem – a good example for this problem is the ecological footprint[23]: 'The Ecological Footprint has emerged as the world's premier measure of humanity's demand on nature. This accounting system tracks, on the demand side, how much land and water area a human population uses to provide all it takes from nature... these accounts are able to compare human demand against nature's supply of biocapacity.'
- the mandatory restoration of the disturbed ecosystem – environmental damage may also lead to the worsening of human living conditions;
- biodiversity – according to the CBD Convention:[24] 'Biological diversity' means the variability among living organisms from all sources including,

[22] DECLERIS, Michael: *The Law of Sustainable Development*, Report to the Commission by Michael Decleris, 2000, p. 42-43. Available at http://www.woodlandleague.org/documents/sustainability/sustlaw.pdf.

[23] http://www.footprintnetwork.org/en/index.php/GFN/page/footprint_basics_overview/.

[24] Convention on Biological Diversity, Rio de Janeiro 1992, Art. 2, definitions, http://www.cbd.int/convention/text/.

inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.' Among others, the Sixth Environmental Action Programme of the EU perceives biodiversity as a priority issue.[25]
- common natural heritage – a concept similar to that of the common heritage of mankind, which usually covers cultural heritage which is formulated by the author as a separate question[26];
- restrained development of fragile ecosystems;
- spatial planning, which may be considered much more of an instrument than a principle. Here again, we may refer to the Sixth Action Programme, which, in its Article 3(10) underlines the need for sustainable land use planning and considering the use of regional planning as an instrument for improving environmental protection;
- cultural heritage – usually forming part of the common heritage concept and also mentioned in the Universal Declaration of Human Rights[27] in its Article 27;
- sustainable urban environment – for example, Agenda 21 of the UNCED covers local initiatives and on this basis the 'Local Agenda 21' programme may emerge;[28]
- aesthetic value of nature – a good example is the Landscape Convention, the preamble of which reads: 'Believing that the landscape is a key element of individual and social well-being and that its protection, management and planning entail rights and responsibilities for everyone;'
- environmental awareness – referring to the need to involve society as a whole, in particular, through the processes of environmental democracy as a means of enhancing awareness.

Decleris holds that the major conditions for sustainable development law are[29]:
- A new, minimum system of public values for all the states of the World, a system well-grounded and mandatory, dominated by the values of sustainability, justice and frugality.
- Rapid progress of the new science of sustainable development.
- State control over markets.
- A strong, moral, intelligent and effective State.
- An open, just and effective legal system.

[25] Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242, 2002. 09. 10.

[26] As the concept of the common heritage of mankind has already been discussed above, it is worth taking a look at the details, see e.g. the concise summary in the Max Planck Encyclopaedia of Public International Law, © 2012 Max Planck Institute for Comparagraphtive Public Law and International Law, Heidelberg and Oxford University Press 1, by Rüdiger Wolfrum: *Common Heritage of Mankind*.

[27] Decision No. 217 A (III) of the UN General Assembly, 10 December 1948, http://www.un.org/en/documents/udhr/.

[28] For futher information, consult www.iclei.org.

[29] DECLERIS, op. cit. 37.

All these elements amount to the well-known concept of good governance or better governance,[30] which is again a complex system, usually covering the full respect of human rights, the rule of law, effective participation, multiparty cooperation, political pluralism, transparent processes, efficient and conscious public service, access to education and knowledge, equity, sustainability, solidarity, tolerance, etc. It is worth taking a look at the UN human rights website, which refers to resolution 2000/64 of the Commission on Human Rights and identifies the key attributes of good governance[31]:

- transparency
- responsibility
- accountability
- participation
- responsiveness (to the needs of the people)

In summary, it is clear that the list of principles and other elements of sustainable development law described above either cover similar issues as the previous report – such as common heritage – or mention issues which are self-explanatory – for example biodiversity, awareness -, or may not be considered as principles – for example spatial planning – or may not really withstand proper interpretation – restrained development of fragile ecosystems, etc. As of yet, the law of sustainable development cannot be said to exist.

3 Sustainability and Development Strategies

Sustainability became part of the environmental policy long before an overall strategy had time to evolve. Sooner or later the need for a complex, integrated, uniform strategy became vital. The first step in this direction was the Göteborg strategy, but we shall begin our account with its predecessor, the Cardiff process, which proved to be the launch of a more uniform approach, albeit based on environmental protection, but with the potential of encompassing a wider scope.

3.1 Cardiff – Integration

The 1998 'Cardiff process' did not turn out to be a success story: its basic document[32] did not even feature in the Official Journal. The aim of the process was to implement sustainability in practice, via the integration of

[30] See e.g.: http://ec.europa.eu/internal_market/strategy/docs/governance/20120608-communication-2012-259-2_en.pdf.

[31] http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.

[32] Communication from the Commission to the European Council of 27 May 1998 on a partnership for integration: a strategy for integrating the environment into EU policies (Cardiff- June 1998) [COM(1998) 333 – Not published in the Official Journal].

environmental objectives into the implementation of other EU policies. It was apparent that so far such integration had not taken place. The two major issues of the Cardiff Strategy were the implementation of Agenda 21 of the UNCED and the combat against climate change. One of the tangible results of the process is the development of the strategic environmental assessment (SEA) as a means of implementing the integration principle – considered an obligation – on the Community level.

Accordingly, integration may be understood as a counterpart or even synonym for the principle of sustainable development, in a sense that integration signifies the procedure by way of which the different aspects of the protection of environmental interests are integrated into decision making procedures beyond the scope of environmental protection (external integration). As demonstrated above, integration forms part of Community environmental policy, manifested even in the Treaty provisions (see below). The complex problem of integration was clearly summarized in the mid-term review process of the Sixth Environmental Action Programme,[33] under the heading of '2.3.1. Poor integration of policies'.[34] The Communication[35] in its elaboration on the impact assessment is a bit more to the point: 'However, the integration of environmental concerns into other areas has been less successful. The Cardiff process – which was set up in 1998 in order to in institutionalise this type of integration – has not lived up to expectations.'

3.2 Göteborg and Aftermath – SDS

The next major step was the EU Strategy for Sustainable Development.[36] As it was pointed out: '... the review will confirm the quintessential three-dimensional nature of sustainable development as the cornerstone of the strategy, i.e. a development that can only be achieved if economic growth, social inclusion and environmental protection go hand in hand, both in Europe and in other parts of the world'.[37] The requirement to meet the needs of present genera-

[33] Mid-term review of the Sixth Community Environment Action Programme – Impact Assessment, COM(2007)225 final, {SEC(2007)547}, p. 18-19.

[34] 'Environmental integration was given an institutional boost in 1998 with the launch by the European Council of the 'Cardiff process', requiring different Council formations to develop strategies to this underpin integration.'.

[35] COM(2007) 225 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the mid-term review of the Sixth Community Environment Action Programme, p. 15.

[36] Commission Communication of 15 May 2001 'A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development' (Commission proposal to the Gothenburg European Council) [COM(2001) 264 final – not published in the Official Journal].

[37] Annex 3, The 2005 Review of the EU Sustainable Development Strategy: Initial Stocktaking and Future Orientations, Communication from the Commission to the Council and the European Parliament {Com(2005) 37.

tions without threatening the needs of future generations was also discussed. The Strategy emphasizes the primary role of developing an effective policy, one which must be coherent, where prices correspond with real costs, science and technology are improved, finally, the policy must be coupled with proper communication. The Strategy sought to incorporate several topics, from climate change to the management of natural resources, from poverty to aging society. Although the Strategy covered certain proposals, it nevertheless failed to clarify the most important interrelationships of the relevant elements.

Soon after the adoption of Sustainable Development Strategy (SDS), the concept of 'global partnership'[38] also appeared in EU policy, positioning the EU as an active and leading partner in respective international cooperation. Naturally, the potential positive effects of globalisation were also raised, such as the implementation of Millenium Development Goals in combating poverty. According to this concept, the sustainable management of natural and environmental resources should form an integral part of all policies, while the basic conditions for this are to establish the coherence of EU policies, to improve the implementation of better governance and to ensure financing for all such initiatives.

Soon to follow was the revision of national sustainability programmes by the Commission in 2004,[39] and the delineation of common challenges as follows: '7.1. Common challenges ...

- Getting the process right ...
- Creating a sense of ownership: ...
- International collaboration: ...
- Finding a coherent vision or an agreed path for long-term development: ... Many decisions that are contrary to the aims of NSDS also prevail....
- Prioritisation and concretisation of policies: ... Many objectives lack a concrete understanding of what they actually imply and how they should be reached. ...
- Financial implications of the NSDS ...
- Matching intentions with action...'

The SDS was revised in 2005,[40] emphasizing:

> '... Europeans value quality of life. They want to enjoy prosperity, a clean environment, good health, social protection and equity. ... The challenge is to maintain a momentum that mutually reinforces economic growth, social welfare and environment protection.'

[38] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Rregions – Towards a global partnership for sustainable development, Brussels, 13.2.2002, COM(2002) 82 final.

[39] Commission staff working document – National Sustainable Development Strategies in the European Union A first analysis by the European Commission April 2004.

[40] Communication from the Commission to the Council and the European Parliament: On the review of the Sustainable Development Strategy A platform for action Brussels, 13.12.2005 COM(2005) 658 final.

Very much the same was articulated, albeit with somewhat different wording and in more detail, with a more complex vision in the individual Declaration attached to the review,[41] mentioning among others quality of life on earth of both current and future generations, life diversity, democracy and the rule of law and respect for fundamental rights, solidarity within and between generations and of course dynamic economy, social and territorial cohesion and environmental protection, with due respect for cultural diversity.

The most important principles of SDS were also listed, very similarly to the international interpretations of sustainable development, embracing a wide range of aspects: protection of fundamental rights, inter- and intragenerational equity, open and democratic society, public involvement, involvement of business companies and social partners, coherent policy and governance, policy integration, precautionary principle, polluter pays principle. Finally, in Annex 3, point 5.2 there is also a direct reference to the EU's Better Regulation agenda.

Based on the revision the Council adopted a new SDS in 2006,[42] the major objectives of which are mostly identical with those mentioned in connection with the 2005 revision, covering 7 main and broad challenges with their different operational aims and measures. These are very similar to those mentioned previously: climate change and clean energy, sustainable transport, sustainable production and consumption, conservation and management of natural resources, public health, social inclusion, demography and migration, global poverty and global challenges in connection with sustainable development. Besides this less tangible set of topics, knowledge based society coupled with education, research and the necessary funding were also added. At the same time, it was still unclear, what was to be understood under the term sustainable development and what would be the means of putting this concept into effect.

The new SDS underlined that the Lisbon Strategy and the SDS must be harmonized in a way that the two strategies complement each other. This SDS also emphasizes the role of necessary material development in the process of creating a sustainable society. 'The EU SDS forms the overall framework within which the Lisbon Strategy, with its renewed focus on growth and jobs, provides the motor of a more dynamic economy. These two strategies recognise that economic, social and environmental objectives can reinforce each other and they should therefore advance together.' Hence it is clear that the EU does not wish to depart from growth as such.

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[41] Annex 1 of the Declaration on Guiding Principles for Sustainable Development, Council of the European Union Presidency Conclusions DOC 10255/05 Brussels European Council 16 and 17 June 2005, p.23.

[42] Review of the EU Sustainable Development Strategy (EU SDS) – Renewed Strategy Council of the European Union, Brussels, 26 June 2006 10917/06.

The subsequent revision[43] had the potential to address several areas of the above mentioned seven challenges, however, the conclusion was too vague, encompassing all priority areas. The SDS underlined the importance of the dynamic Lisbon strategy, while the SDS itself was conceived of as a long-term strategy. This reference to the Lisbon strategy notwithstanding, the opportunity of merging the two strategies was meagre, what with the great differences is their respective roles. At the same time, the complementary relationship of the two strategies remained a characteristic attribute of the SDS.

There was a third and most recent revision of the SDS took place in 2009.[44] Focusing on issues of regulation, mention should first be made of point 2 of the document. The part entitled: 'The evolving role of sustainable development in EU policy-making' identifies some major policy tools of the EU:

- the EU Better Regulation agenda,
- the renewed Social Agenda,
- the Employment guidelines,
- Corporate Social Responsibility,
- integrating the SDS agenda into external policies,
- good examples from the Member States.[45]

Point 4 is also worthy of further elaboration. Under the heading 'Taking sustainable development into the future', it requires 'greater synergy' between the strategies, highlights the need to monitor the implementation of SDS and to develop new trends, such as energy security, adaptation to climate change, food security, land use, sustainability of public finances and managing the external dimension of sustainable development. One of the major issues raised was the problem of monitoring and the urgency of developing the indicators of sustainable development, which may facilitate the measuring results. The first steps in this direction were taken in a 2005 semi-official Communication.[46] We do not wish to go into the details of this effort, but restrict ourselves to listing the 10 different topics the Communication dealt with, which clearly reflect the extremely complex and rather inscrutable nature of the problem:

1. Economic (or better said: 'material') development
2. Poverty and social exclusion
3. Ageing society

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43 COM(2007) 642 final Communication from the Commission to the Council and the European Parliament Progress Report on the Sustainable Development Strategy 2007 {SEC(2007)1416}.

44 Brussels, 24.7.2009, COM(2009) 400 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development.

45 Such as 'France 'Grenelle de l'Environnement' brought together the government, business and civil society into a high-level debate on new measures for sustainable development.'

46 Commission of the European Communities, Brussels, 9.2.2005, SEC (2005) 161 final Communication from Mr. Almunia to the members of the Commission.

4. Public health
5. Climate change and energy
6. Production and consumption patterns
7. Management of natural resources
8. Transport
9. Good governance
10. Global partnership

Finally, we should mention a critical exploratory opinion[47] from the year 2010, which set the following priorities: low-carbon production technology, biodiversity, protection of water and other natural resources, improving social inclusion and finally, the development of international cooperation. In its exploratory opinion, the Economic and Social Committee also made some recommendations to fill the gaps of the original proposal. The Committee arrived at fairly general conclusions. The most important elements of the exploratory opinion are the following:

As regards the concept on the whole it states: '1.6. The Committee urges the Council and the Commission to make the EU SDS a meta-strategy for all EU policies.' As for the reasons: '1.10. Explicit responsibility must be assumed by policymakers to ensure that the strategy for sustainable development is implemented.' As such, the Committee emphasizes that it is inexpedient to speak about the complementary nature of different strategies, since one of them must have a univocal priority over the others and this should be the SDS.

The Committee makes several other straightforward critical points regarding the shortcomings of the SDS:

> '3.5. The problem was more a lack of real will (or ability) to start implementing the visions in a concrete action programme...
>
> 4.2. The EESC has identified three factors that together can be said to explain why the effects of the strategies have diverged:
>
> One reason is their different political weight: the Lisbon strategy responds to immediate policy issues, whereas sustainable development addresses the question of long-term priorities. The difference can also be seen as a question of sponsors: whereas Lisbon is backed by the heads of state or government, sustainable development is often managed by the ministers for the environment. ...
>
> Policy instruments and evaluation: the Lisbon strategy has a rigorous system for planning and monitoring, with common standards and calendars, while sustainable development has a looser arrangement which involves adopting common priorities and joint evaluation. As a result, the Lisbon strategy can exert stronger pressure on the Member States, whereas the sustainable development strategy is more about producing general intentions. ...'

47 Opinion of the European Economic and Social Committee on the 'Outlook for the sustainable development strategy' (exploratory opinion) (2010/C 128/04).

And there are also clear references going to the core of the implementation dilemma:

> '5.2. One of the many problems with the strategy in its current form is the large number of priorities: ...
>
> 5.3. Moreover, we can no longer shy away from the fact that, despite the three pillars underpinning sustainable development, not all measures can always be equally beneficial from environmental, social and economic perspectives. Not all situations can be 'win-win-win'. Rather, we need to set priorities, ...'

In summary, we are still far from having an executable strategy, there is still much to be done, first of all '7.2. ... political responsibility [must] be actively taken', and also '7.4. A stronger governance structure is essential for successful implementation of the EU's sustainable development strategy.' So far, none of these main conditions have emerged.

3.3 Lisbon Strategy – Material and Financial Issues, Growth

In 2000 the heads of state and government adopted the Lisbon Strategy:[48]

> 'The Union has today set itself a new strategic goal for the next decade: *to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion*.'

The strategy reflected the vision of an active welfare state, covering many aspects from information society and R&D to structural reforms for competitiveness and innovation, from modernising the European social model to sustaining the healthy economic outlook and favourable growth, from regional cohesion to new coordination methods, but the issues of security and defense and environmental protection were not omitted either. As such, it contained the same set of complex issues as listed above under the SDS.

The original strategy proved to be a far too complex set of ideas, providing for a diffuse system of responsibilities, therefore it was relaunched in 2005. The strategy's primary priority is 'Growth and Jobs', together with a substantial support for the development of infrastructure, social and economic cohesion, as well as research and development. Nevertheless, the major overlap among the different topics required the approximation of the same – the establishment of interrelationships, as already mentioned in connection with the SDS.

[48] Lisbon European Council Presidency conclusions, 23 and 24 March 2000.

The proposal for a new Lisbon Strategy[49] listed ten different areas which were in dire need of susbtantial reform by 2010. Again, the new strategy puts forward a very multifaceted vision:

- a renewed Social Agenda,
- a common policy on immigration,
- a Small Business Act,
- the reduction of EU administrative burdens,
- strengthening the single market,
- making a reality of the fifth freedom (the free movement of knowledge),
- improving the framework conditions for innovation,
- completing the internal market for energy and adopting the climate change package,
- industrial policy geared towards more sustainable production and consumption,
- opening up new opportunities for international trade and investment, and creating a common space of regulatory provisions and standards.

The first implementation report[50] – issued just around the beginning of the global financial crisis – was very optimistic, listing results such as the new package of climate change and energy resources, as well as the action plan of sustainable production and consumption.

3.4 Europa 2020, Sustainable Growth

As a result of the economic crisis a new concept of development had to be elaborated for the 2020 target year. First, a Commission proposal[51] was adopted, followed by the recommendation of the Council.[52] Even the Commission proposal may give rise to concern, since it deviates from the original harmonized idea of sustainability. In the introduction authored by Commission President Barroso,[53] the proposal claims that the future of Europe 2020 is

[49] Brussels, 11.12.2007, COM(2007) 804 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Proposal for a Community Lisbon Programme 2008 – 2010.

[50] Brussels, 16.12.2008 COM(2008) 881 final Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Implementation Report for the Community Lisbon Programme 2008 – 2010.

[51] Brussels, 3.3.2010 COM(2010) 2020 final Communication From The Commission Europe 2020, A strategy for smart, sustainable and inclusive growth.

[52] Council Recommendation of 13 July 2010 on broad guidelines for the economic policies of the Member States and of the Union (2010/410/EU) OJ, L 191 23.7.2010 p. 28-34.

[53] 'To achieve a sustainable future, we must already look beyond the short term. Europe needs to get back on track. Then it must stay on track. That is the purpose of Europe 2020. It's about more jobs and better lives. It shows how Europe has the capability to deliver smart, sustainable and inclusive growth, to find the path to create new jobs and to offer a sense of direction to our societies. European leaders have

'about more jobs and better lives'. What remains today of the ecological pillar of sustainability is climate change and energy. This is a narrower understanding of sustainability, subject to material aspects. The wording itself is also adverse, yet, several elements of the original ecological qualities of sustainable development were maintained:

> 'Europe 2020 puts forward three mutually reinforcing priorities:
> - Smart growth: developing an economy based on knowledge and innovation.
> - Sustainable growth: promoting a more resource efficient, greener and more competitive economy.
> - Inclusive growth: fostering a high-employment economy delivering social and territorial cohesion.
> These targets are interrelated. ... Such an approach will help the EU to prosper in a low-carbon, resource constrained world while preventing environmental degradation, biodiversity loss and unsustainable use of resources. It will also underpin economic, social and territorial cohesion.'

At times even virtually eco-friendly titles may end up in a different direction. A vivid illustration of this is 'Combating climate change' where our estimated carbon capture is not presented as a solution to avert environmental crisis, but is much rather a testament to our inability to handle the problem. Similarly, the point entitled 'strengthen our economies' resilience to climate risks, and our capacity for disaster prevention and response' does not contain a proactive set of measures, but reads as a simple response to the problems without offering a solution on how to accommodate ourselves to the changes lying ahead.

The wording of the Council recommendation – which also clearly demonstrates the relationship with the Lisbon strategy – also departs from the previous trends, speaking about 'sustainable growth', instead of sustainable development, with an additional new phrase: inclusive growth. The preamble mentions most of the major issues, with the additional aspect of green technology, such as greenhouse gas emission, resource efficiency or biodiversity. Inclusive growth is more about anticipating and managing change,[54] which may even mean that in

a common analysis on the lessons to be drawn from the crisis. ... The Commission is proposing five measurable EU targets for 2020 that will steer the process and be translated into national targets: for employment; for research and innovation; for climate change and energy; for education; and for combating poverty. They represent the direction we should take and will mean we can measure our success.'

[54] '(9) ... Sustainable growth means decoupling economic growth from the use of resources, building an energy and resource-efficient, sustainable and competitive economy, a fair distribution of the cost and benefits and exploiting Europe's leadership in the race to develop new processes and technologies, including green technologies. Member States and the Union should implement the necessary reforms to reduce greenhouse gases emissions and use resources efficiently, which will also assist in preventing environmental degradation and biodiversity loss. They should also improve the business environment, stimulate creation of green jobs and help enterprises modernising their industrial base. (10) The policies of the Union, and Member States' reform programmes should finally also aim at 'inclusive growth'.

case we are unable to solve a problem, we should just take the lead and try and turn profit from it.

Within the general concept, specific guidances are set forth, some closer to the traditional concept of sustainability than others. For example 'Guideline 5: Improving resource efficiency and reducing greenhouse gases' reflects the main idea of internalising externalities.[55]

The 2008 crisis did not further the issue of sustainability, but reorganized its structure and priorities instead. The change of wording from development to growth may give rise to serious concerns, as it is not absolutely clear, whether it merely reflects a difference in phrasing or rather an actual change in approach. In terms of different phrasing, we may agree with Jans, who believes that sustainable growth is a much weaker concept than sustainable development.[56]

The Council clarified that the 2020 strategy incorporates the previous strategies, including environmental requirements.[57] Besides the strategy, different, more detailed strategies are also elaborated, such as the one on transport.[58] Under the heading measures, Annex I of this strategy contains several elements, very few of which are truly eco-friendly. Energy 2020[59] is also based on the new sustainable growth concept, within the framework of which the main focus is on the production of energy, putting renewables and energy saving into the centre of attention.

Inclusive growth means building a cohesive society in which people are empowered to anticipate and manage change, thus to actively participate in society and the economy. Member States' reforms should therefore ensure access and opportunities for all throughout the lifecycle, thus reducing poverty and social exclusion, through removing barriers to labour market participation especially for women, older workers, young people, the disabled and legal migrants.'

55 'Member States and the Union should put measures in place to promote the decoupling of economic growth from resource use, turning environmental challenges into growth opportunities and making more efficient use of their natural resources, which also assists in preventing environmental degradation and ensuring biodiversity... Member States should make extensive use of market-based instruments, supporting the principle of internalisation of external costs, ... Member States and the Union should use regulatory, non-regulatory and fiscal instruments, ...'

56 JANS, Jan H.: *Stop the Integration Principle?,* Fordham International Law Journal, Vol 33, 2010, p. 1538.

57 Improving environmental policy instruments – Council conclusions – Environment Council meeting Brussels, 20 December 2010.

58 Brussels, 28.3.2011 COM(2011) 144 final White Paper Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system SEC(2011) 359 final SEC(2011) 358 final SEC(2011) 391 final.

59 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Energy 2020 A strategy for competitive, sustainable and secure energy, SEC(2010) 1346, Brussels, 10.11.2010 COM(2010) 639 final

4 Sustainable Development in Primary Legislation

Prior to the Single European Act[60] there was no express legal basis for environmental regulation, therefore, the legal basis was ensured through the concept of implied powers. Obviously, the concept of sustainable development could not appear in the document of 1986, nevertheless, the SEA established the general legal basis for environmental legislation under Title VII (Articles 130r-130t). It is important to note that subsidiarity – as an essential element of sustainable development – was also included in the environmental title in Article 130r. In order to give a full picture, in addition to the environmental title, the legal basis for the harmonization of law under Article 100a should also be mentioned.

With the 1992 Maastricht Treaty sustainability also found its way into primary law,[61] first in the preamble in recital 7:

> 'DETERMINED to promote economic and social progress for their peoples, within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in other fields.'

Although the preamble did not explicitly mention sustainability, Art B of the Treaty proved to be more concrete:

> 'The Union shall set itself the following objectives: ...
> - to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty; ....'

Interestingly enough, environmental protection was not mentioned along with sustainable development, instead, the focus was on the economic and monetary union, proving that the major interest of the Union lies with business.

The Maastricht Treaty also amended the original Treaty of Rome, covering in the new Article 2[62] everything related to sustainability: environment, solidarity,

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[60] OJ L 169 of 29.06.1987.

[61] Treaty on European Union (Treaty on Maastricht) OJ C 191 of 29.7.1992.

[62] 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

social protection, quality of life, etc. In this article environmental protection is an equally important element of sustainability. Apart from these provisions, it is important to mention the extension of the list of Community actions in the new Article 3, now covering also environmental policy. Subsidiarity became a general concept of Community law, moved from Article 130r to the new Article 3b (5), adding also the requirement of proportionality to the test.[63] Finally, the Maastricht Treaty slightly amended the environmental title as well.

The Amsterdam Treaty[64] did not modify sustainability and the environmental elements of the Treaty to a great extent. The preamble of the Treaty of the Union – in its recital seven[65] – was amended to include in the first place within the objectives of the Union that social, material and business progress shall take into consideration sustainable development and environmental protection. Article B[66] was also amended, and the order of objectives within the article clearly mirrors the essential objectives of the EU. Sustainable development appears here as a stand alone issue.

Article 2[67] of the Treaty of Rome, listing the objectives of the European Community incorporated sustainable development, referring also to the harmonization of economic growth and the high level of environmental protection.

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[63] Article 3b: 'The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.'

[64] Treaty of Amsterdam amending the Treaty on European Union, the treaties establishing the European Communities and related acts Official Journal C 340, 10 November, 1997.

[65] 'DETERMINED to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by paragraphllel progress in other fields,'

[66] 'Article B: The Union shall set itself the following objectives: - to promote economic and social progress and a high level of employment and to achieve balanced and sustainable development, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;'

[67] Article 2: 'The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, equality between men and women, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, a high level of protection and improvement of the quality of the environment, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.'

This latter is an obligation towards every policy area. The location of legal basis of this obligation and sustainability is now in harmony with the system of the Treaty. Finally, the integration of environmental protection requirements was also reinforced and coupled with sustainable development, since the Treaty was completed with the following article: 'Article 3c: Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.'

The 2001 Treaty of Nice[68] did not make any amendments in respect of sustainable development.

The Lisbon Treaty[69] brought about substantial changes in respect of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU). Beginning with the TEU, we must first mention the preamble, within which the previous (Amsterdam) version recital seven left unchanged but was moved to recital nine.

Art. 3 TEU replaced the previous Article 2 on the objectives of the EU, bringing with it substantial changes and providing for a much more elaborate and extensive approach, covering a wider context and interrelationship of sustainability, while the previous elements remained.[70] At the same time Article 3(5) articulated the global role of the EU in promoting sustainable development.[71] As a result, most of the constituents of sustainable development were featured, from the interests of future generations to its relationship with peace, solidarity, human rights, etc. The international commitments were mentioned yet again in Article 21 TEU, first without a direct reference to sustainable development, however, in a way that it implicitly forms part of cooperation.[72] Finally, the commitment towards sustainability within the ambit of international cooperation was also clearly articulated in connection with developing countries. As such, it covered the three pillars of sustainability in connection with environ-

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[68] OJ C 80 of 10.03.2001.

[69] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 OJ 2007/C 306/01, 17 December 2007.

[70] 'Art. 3(3). The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance. It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.'

[71] 5. ... It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

[72] See, for example Art. 21(1), last sentence: 'It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.'

mental protection as a priority, including the sustainable management of global resources.[73]

It is worth noting that the Lisbon Treaty finally 'legalized' the Charter of Fundamental Rights in Article 6 (1) TEU. The Charter also refers to sustainable development, however, Article 37[74] itself may not necessarily be interpreted as giving rise to a right to environment provision. Naturally, jurisprudence may well interpret this article as a veritable human right provision, however, at the moment it much rather seems like a summary of objectives and principles.

The preamble of the TFEU focuses more on financial and material development, without further mentioning the concept of sustainable development. A good illustration of this new approach is the wording in recital 4 and 5 of the preamble.[75] In essence they refer to material, financial expansion and even harmonious development – which may otherwise exhibit some connection with sustainability – but are clearly much rather an issue of regionalism and not sustainability. In any case, this is a relatively significant change as compared with the previous Treaty.

As integration may be taken as a tool of the practical implementation of sustainable development, Article 11 on environmental integration is imperative, even containing a direct reference to sustainable development.[76] Unfortunately, the likely potential of integration was narrowed down, due to the fact that while the principle of environmental integration had been a stand-alone integration principle until 2009, later, the proliferation of integration principles seriously hampered its original effect. The TFEU mentions integration in several provisions:

- Art. 8: equality of men and women,
- Art. 9: social protection, employment,
- Art. 10: all forms of discrimination,
- Art. 12: consumer protection,

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73 Art. 21(2) 'The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (d) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty; ... (f) help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development;'

74 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

75 'RECOGNISING that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,
ANXIOUS to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favoured regions.'

76 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.'

- Art. 13: animal protection,
- Art. 194 energy policy, which also contains some references to the integration principle.

No wonder that certain authors believe that Article 7 TFEU on consistency may be considered the only integration principle, rendering all the other such principles superfluous.[77] Others warn about the consequences: 'The next problem concerns the question of whether the integration principle implies that the Union's environmental policy has been given some measure of priority over other European policy areas.' And the answer is in the negative, this priority is amiss.[78] 'The conclusion must therefore be that there is no hierarchy between the various integration principles...'[79] In consequence, integration as the practical materialization of sustainable development has lost its position in the Lisbon Treaty.

Finally, apart from Article 114 on the harmonization of laws, the environmental title of the TFEU today is Title XX, which is almost identical to the previous versions, only the numbering is different.

In summary, there are no provisions on sustainability with direct legal consequences in the Treaty: no enforceable legal bases or legal requirements are mentioned. At the same time, the original theoretical foundations are in place, even if some regression can be noted – as in the case of the integration principle. Thus, the key to the effective implementation of the principle of sustainable development lies in the institutional and organizational structure of the EU and their willingness to give effect to this principle. It is not a legal obligation and depends largely on political motivation.

If one looks at the respective articles of the Lisbon Treaty, it becomes clear that sustainable development is on the one hand a principle and on the other hand an objective, the content of which has not been defined in the Treaty. The traditional elements of sustainability are present, however, the EU has failed to further develop the concept. The wording lacks both legal clarity and the sense of legal responsibility. The essence of the provisions is that we should 'aim at' or 'take into account' sustainable development, as a sort of general guidance, but it is not possible to consider it an obligation. We cannot even state that the EU shall be obliged to take a specific action or single approach to achieve this objective, rendering sustainability a rather weak political challenge. The main question could therefore be: to what extent may this general expectation be implemented in practice and in exactly which regulatory fields? And finally: in what way can we achieve a level of legal certainty in this respect?

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77 MCINTYRE, Owen: *The integration challange, Integrating environmental concerns into other EU policies* in Suzanne Kingston: (Ed.): European Perspectives on Environmental Law and Governance, Routledge, 2013, p. 137.

78 JANS, Jan H. – VEDDER, Hans H.B.: *European Environmental Law*, Europa Law Publishing, 2012, p. 23.

79 *Ibid.* p. 11.

The EU itself is not obliged to arrive at any direct conclusion or to take any concrete action. The general obligation is to come closer to the realisation of the requirements set forth. As such, the duty of the Union does not amount to a legal obligation, but constitutes a relatively weak political commitment instead. The main challenge at present is to try and identify the particular areas where these general requirements may be specified and implemented in an feasible way.

5 Examples of Sustainability in Secondary Legislation

In introduction, we agree with those commentators[80] who believe that EU secondary legislation describe the principle of sustainable development with different connotations in the various legal regulations. The examples listed below – since we do not claim to provide a full picture – undoubtedly support this view.

5.1 Around 2000

This was the time when the Göteborg strategy and other documents were prepared, as such, it marked a favourable period for relevant legislation as well. Less relevant[81] in this context is the document related to supporting developing countries' efforts in the field of environmental protection. The regulation also included the 'legal' definition of sustainable development. The preamble of the Regulation clearly reflects the double pressure underlying this source of law: on the one hand, the aspiration to provide the necessary support to developing states, and on the other hand, the fear that non-sustainable development tendencies may emerge in the respective countries.[82]

While referring to most of the relevant contemporary international conventions, the preamble also includes an important reference to the concept of integration in paragraph (11). Indeed, the objective of the Regulation itself refers to the need for integration: according to Article 1 paragraph (1) 'The Community shall support developing countries in their efforts to integrate the environmental dimension into their development process.' In its subsequent provisions the

[80] DURÁN, Gracia Marin and MORGERA, Elisa: *Environmental Integration in the EU's External Relations*, Hart Publishing, 2012, p. 36.

[81] Regulation (EC) No 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, Official Journal L 288 , 15/11/2000 p. 1-5.

[82] '(1) Depletion of natural resources and environmental degradation have direct effects on economic development and especially on the livelihoods of local communities, including indigenous peoples, and thus counteract the alleviation of poverty through sustainable development. (2) Current patterns of production and consumption have undeniable transboundary and global consequences, in particular where the atmosphere, the hydrosphere, soil condition and biological diversity are concerned.'

Regulation enumerates all the basic elements of support, its conditions, sources, procedure, monitoring, etc.[83]

The most important innovation of the Regulation is by all means the legal definition of the term sustainable development. Article 2 provides: 'For the purposes of this Regulation: 'sustainable development' means the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations.' As such, it includes a clear reference to the Brundtland terminology, albeit with different words.

The degradation of tropical forests[84] was also a core issue in those times, therefore, the relevant Regulation on tropical forests emphasized the specific role of forests: '(1) Forests have a variety of functions and values for mankind and can contribute to the achievement of Community development and environment objectives such as the campaign against poverty, sustainable economic and social development and the protection of the environment...'. According to Article 1, the goal of the regulation is to promote sustainable forest management.[85] Two sustainability definitions are mentioned, one which corresponds to the term described above (Art.2.4), while the other one featured in Article 2 paragraph 3 is more specific, going to the heart of sustainable forest management.[86] This divergence in the definition of sustainability terms is based on their different functions.

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[83] Some examples of Art.3, referring directly to sustainability: '1. The activities to be carried out under this Regulation shall address in particular:
- sustainable patterns of production and consumption,
- sustainable management and use of natural and environmental resources in all productive sectors such as agriculture, fisheries and industry,
- environmental problems caused by the non-sustainable use of resources due to poverty,
- sustainable production and use of energy and in particular encouragement of the use of renewable energy sources, increased energy efficiency, energy saving and the replacement of especially damaging energy sources by others which are less so,
- sustainable production and use of chemical products, in particular hazardous and toxic substances,
- conservation of biological diversity – especially by protecting ecosystems and habitats and the conservation of species diversity – the sustainable use of its components, ...'

[84] Regulation (EC) No 2494/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the conservation and sustainable management of tropical forests and other forests in developing countries Official Journal L 288 , 15/11/2000 p. 6-10.

[85] 'The Community shall provide financial assistance and appropriate expertise to promote the conservation and sustainable management of tropical forests and other forests in developing countries, so as to meet the economic, social and environmental demands placed on forests at local, national and global levels....'

[86] 'Sustainable forest management' means the management and use of forests and wooded lands in a way, and at a rate, that maintains their biological diversity, productivity, regeneration capacity, vitality and

The fisheries policy of the time also put sustainability in the centre of its focus,[87] again in connection with the sustainable use of this specific natural resource. The preamble is clear in this respect, coupling business and environmental conditions: '(4) The objective of the Common Fisheries Policy should therefore be to provide for sustainable exploitation of living aquatic resources and of aquaculture in the context of sustainable development, taking account of the environmental, economic and social aspects in a balanced manner...' This is more or less repeated under Article 2 on the objectives or regulation, incorporating several basic principles of sustainability, from the general three pillars to precautionary approach and good governance.[88] From among the list of definitions provided by Article 3, the most noteworthy are first, the specific definition of sustainable development adapted to the problem of fisheries,[89] and second, the precautionary approach which follows the general conceptual line.

Sustainable urban development[90] was a new trend, implying also the cooperation with local governments. The preamble refers to the need for good practices between local authorities and awareness raising. According to Article 1 the following good practices shall receive financial and technical support:

- implementation of EU environmental legislation on the local level,
- sustainable urban development,
- local Agenda 21,
- Networking – among local governments or with universities – is another basic concept.

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their potential to fulfil, now and in the future, relevant ecological, economic and social functions, at local, national, and global levels, without causing any damage to other ecosystems.'

87 Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy Official Journal L 358, 31/12/2002 p. 59-80.

88 'Objectives

1. The Common Fisheries Policy shall ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions. For this purpose, the Community shall apply the precautionary approach in taking measures designed to protect and conserve living aquatic resources, to provide for their sustainable exploitation and to minimise the impact of fishing activities on marine eco-systems. It shall aim at a progressive implementation of an eco-system-based approach to fisheries management. ...

2. The Common Fisheries Policy shall be guided by the following principles of good governance:...'

89 '(e) 'sustainable exploitation' means the exploitation of a stock in such a way that the future exploitation of the stock will not be prejudiced and that it does not have a negative impact on the marine ecosystems;'

90 Decision No 1411/2001/EC of the European Parliament and of the Council of 27 June 2001 on a Community Framework for cooperation to promote sustainable urban development Official Journal L 191, 13.7.2001 p. 1-5.

5.2 Financial Funds Since 2005/6

The primary issue of funding was related to agricultural policy. The foundations of the current system were laid down in 2005 .[91] According to the preamble of the fundamental regulation: '1) ... two European agricultural funds should be created, namely the European Agricultural Guarantee Fund (hereinafter 'EAGF'), for the financing of market measures, and the European Agricultural Fund for Rural Development (hereinafter 'EAFRD'), for the financing of rural development programmes.'

From among the two funds, the second – the EAFRD[92] – is the one important for us from the aspect of sustainability. The preamble delineates the essence and the system of policy interrelationships: '1) ... Rural development policy should also take into account the general objectives for economic and social cohesion policy set out in the Treaty and contribute to their achievement, while integrating other major policy priorities as spelled out in the conclusions of the Lisbon and Göteborg European Councils for competitiveness and sustainable development.'

Within the concept of sustainable development, there are different environmental elements that are essential for agriculture, covering mostly environmental services:

> '(11) ... agricultural and forestry competitiveness, land management and environment, quality of life and diversification of activities in those areas, ...
>
> (31) Support for specific methods of land management should contribute to sustainable development by encouraging farmers and forest holders in particular to employ methods of land use compatible with the need to preserve the natural environment and landscape and protect and improve natural resources. ...
>
> (32) ... sustainable management of forests and their multi-functional role...
>
> (35) Agri-environmental payments should continue to play a prominent role in supporting the sustainable development of rural areas and in responding to society's increasing demand for environmental services. '

To shed light on the basic policy interrelationships, it is worth examining Article 3 under the heading 'Missions': 'The EAFRD shall contribute to the promotion of sustainable rural development throughout the Community in a complementary manner to the market and income support policies of the common agricultural policy, to cohesion policy and to the common fisheries policy.' The system of funding within agricultural policy is continuously changing.[93] Its main objec-

[91] Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy OJ L 209, 11.8.2005 p. 1-25.

[92] Council Regulation (EC) No 1698/2005 of 20 September 2005 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD), OJ L 277, 21.10.2005 p. 1-40.

[93] Council Regulation (EC) No 73/2009 of 19 January 2009 establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes

tive is set forth under Article 6.1: 'Member States shall ensure that all agricultural land, especially land which is no longer used for production purposes, is maintained in good agricultural and environmental condition.' Member States shall define 'minimum requirements for good agricultural and environmental condition', which may later serve as a basis for comparison.

Similar to agriculture, the funding of regional development (ERDF) has also taken a turn towards sustainability.[94] There are several different links between regional development and sustainable development, such as

- competitiveness and innovation, creating and safeguarding sustainable jobs, as well as sustainable integrated regional and local economic development and employment (Art. 4);
- European territorial cooperation (Art. 6);[95]
- sustainable urban development (Art. 8).

In 2006 several regulations were adopted in relation to the funds. One such regulation was on the European Social Fund,[96] exhibiting a rather vague connection with sustainability.[97] The Cohesion Fund[98] also belongs to the general system of funding. Article 1 paragraph (1) devotes special attention to sustainable development,[99] furthermore, environmental protection is one of the

for farmers, amending Regulations (EC) No 1290/2005, (EC) No 247/2006, (EC) No 378/2007 and repealing Regulation (EC) No 1782/200 OJ Lap L 030, 31.1.2009 p. 16-99.

94 Regulation (EC) No 1080/2006 of the European Parliament and of The Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/199 Hivatalos Lap L 210, 31/07/2006 p. 1-11.

95 For example paragraph 2.d) sustainable urban development: 'strengthening poly-centric development at transnational, national and regional level, with a clear transnational impact. Actions may include: the creation and improvement of urban networks and urban-rural links; strategies to tackle common urban-rural issues; preservation and promotion of the cultural heritage, and the strategic integration of development zones on a transnational basis.'

96 Regulation (Ec) No 1081/2006 of the European Parliament and of the Council of 5 July 2006 on the European Social Fund and repealing Regulation (EC) No 1784/199 OJ L 210, 31.7.2006 p. 12-18.

97 Article 2.2: 'In carrying out the tasks referred to in paragraph 1, the ESF shall support the priorities of the Community as regards the need to reinforce social cohesion, strengthen productivity and competitiveness, and promote economic growth and sustainable development.'

98 Council Regulation (EC) No 1084/2006 of 11 July 2006 establishing a Cohesion Fund and repealing Regulation (EC) No 1164/94 Official Journal L 210 , 31/07/2006 p. 79-81.

99 'A Cohesion Fund ... is hereby established for the purpose of strengthening the economic and social cohesion of the Community in the interests of promoting sustainable development.'

priority areas mentioned in Article 2.[100] The Fisheries Fund[101] specifically refers to sustainability on several occasions, summarizing the classical three-dimension concept in the preamble.[102] The entire Fund focuses on sustainability, as underlined in Article 1 on the scope.[103] Many specific aspects of sustainability are also included, for example in Article 15 in connection with national strategic planning, forming the basis of operative programmes (Art.19), the principles of which again contain sustainable development, among others the integrated sustainable management of fishing areas.

5.3 Recent Examples

Organic production[104] is one of the most popular examples of linking environment and agriculture, while sustainability is one of its major components. According to the preamble of the Regulation on organic products: '(1) Organic production is an overall system of farm management and food production ... [it] plays a dual societal role, where it on the one hand provides for a specific market responding to a consumer demand for organic products, and on the other hand delivers public goods contributing to the protection of the environment and animal welfare, as well as to rural development.' The most important issue regards the control of production, and the use of a special logo. Sustainability is included in a general reference in Article 1 on the scope and mentioned again in Article 3 as an objective.[105]

[100] '1. Assistance from the Fund shall be given to actions in the following areas, ensuring an appropriate balance, and according to the investment and infrastructure needs specific to each Member State receiving assistance:
(a) trans-European transport networks, in particular priority projects of common interest as identified by Decision No 1692/96/EC;
(b) the environment within the priorities assigned to the Community environmental protection policy under the policy and action programme on the environment. In this context, the Fund may also intervene in areas related to sustainable development which clearly present environmental benefits, namely energy efficiency and renewable energy and, in the transport sector outside the trans-European networks, rail, river and sea transport, intermodal transport systems and their interoperability, management of road, sea and air traffic, clean urban transport and public transport.'

[101] Council Regulation (EC) No 1198/2006 of 27 July 2006 on the European Fisheries Fund Official Journal L 223 , 15.8.2006 p. 1-44.

[102] '(2) The objective of the common fisheries policy should be to provide for sustainable exploitation of living aquatic resources and of aquaculture in the context of sustainable development, taking account of environmental, economic and social aspects in a balanced manner.'

[103] 'This Regulation establishes the European Fisheries Fund (hereinafter EFF) and defines the framework for Community support for the sustainable development of the fisheries sector, fisheries areas and inland fishing.'

[104] Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/9 OJ L 189, 20.7.2007 p. 1-23.

[105] ' (a) establish a sustainable management system for agriculture that: (i) respects nature's systems and cycles and sustains and enhances the health of soil, water, plants and animals and the balance between

Even timber import may have implications for sustainability,[106] first of all due to the possible endangerment of the world's forest stock. Again, the preamble of the relevant regulation provides an excellent summary of the problem: '(1) Forests provide a broad variety of environmental, economic and social benefits including timber and non-timber forest products and environmental services essential for humankind, such as maintaining biodiversity and ecosystem functions and protecting the climate system.'

Plant protection products – pesticides – were the subject of numerous environmental research projects already decades ago, due to the suspected adverse effects of chemicals. In order to define a common legal framework for the sustainable use of pesticides a directive was adopted in 2009.[107] Here again, the preamble is our main point of reference: '(4) Economic instruments can play a crucial role in the achievement of objectives relating to the sustainable use of pesticides.' The new approach is marked by integrated plant protection detailed in Article 14[108] , while Annex III summarizes the general principles of integrated plant protection.

5.4 Renewable Energy – RED Directive

Renewable energy is a cornerstone of sustainability. An important part of the respective legislative framework is the former directive on bio-fuels,[109] repealed by the new and more extensive directive of 2009, which entered into force in 2012.[110] The original bio-fuel directive takes the sustainable development strategy as its basis. The activities prescribed under the directive

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them; (ii) contributes to a high level of biological diversity; (iii) makes responsible use of energy and the natural resources, such as water, soil, organic matter and air; (iv) respects high animal welfare standards and in particular meets animals' species-specific behavioural needs.'

[106] Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance Official Journal L 295 , 12/11/2010 p. 23-34.

[107] Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009 establishing a framework for Community action to achieve the sustainable use of pesticides Text with EEA relevance. Official Journal L 309 , 24/11/2009 p. 71-86.

[108] '(1) Member States shall take all necessary measures to promote low pesticide-input pest management, giving wherever possible priority to non-chemical methods, so that professional users of pesticides switch to practices and products with the lowest risk to human health and the environment among those available for the same pest problem. Low pesticide-input pest management includes integrated pest management as well as organic farming ...'

[109] Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport Official Journal L 123 , 17/05/2003 p. 42-46.

[110] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC Text with EEA relevance Official Journal L 140 , 05/06/2009 p. 16-62.

may be combined with sustainable farming and forestry practices, sustainable rural development, as well as innovative agricultural production.

The effective legislation forms part of sustainable energy policy, reflecting a complex vision, seeking to avoid as far as possible the likely secondary negative consequences in the design of renewables. Not all renewable energy resources may meet the requirements of sustainability. Below we list the major items from the preamble, which all underline the complex vision of the 'RED-directive':

> '(3) ... establishing economic growth through innovation and a sustainable competitive energy policy ...
>
> (6) ... decentralised energy production has many benefits, including the utilisation of local energy sources, increased local security of energy supply, shorter transport distances and reduced energy transmission losses. ...
>
> (9) ... it is essential to develop and fulfil effective sustainability criteria for biofuels and ensure the commercial availability of second-generation biofuels., ...
>
> (12) ... Biogas installations can, as a result of their decentralised nature and the regional investment structure, contribute significantly to sustainable development in rural areas and offer farmers new income opportunities....
>
> (76) Sustainability criteria will be effective only if they lead to changes in the behaviour of market actors.. ...'

Article 1 on the scope of the directive provides a list of its main elements:

- a common framework for the promotion of energy from renewable sources,
- mandatory national targets for the overall share of energy from renewable sources,
- rules relating to statistical transfers,
- joint projects between Member States and with third countries,
- establishing sustainability criteria for biofuels and bioliquids.

We do not wish to go into the details of directive's definitions or activity plans. However, it is worth emphasizing a real innovation of EU law undr Article 17, which develops the sustainability criteria for the relevant energy sources:

> '1. Irrespective of whether the raw materials were cultivated inside or outside the territory of the Community ...'

There are several important novel elements, which all seek to avoid secondary handicaps. A good example of this effort is provided under paragraph 3:

> 'Biofuels and bioliquids taken into account ... shall not be made from raw material obtained from land with high biodiversity value ...'.

The directive also determines the exact meaning of land with high biodiversity value, these are primary forest and other wooded land, areas designated for

nature protection purposes, highly biodiverse grassland. The directive enumerates all necessary details of this classification, while Article 18 covers the control and verification of biofuel sources, even in case these originate from outside the EU.[111]

6 Judicial Practice and Sustainability

The judicial practice of the Court of Justice of the European Union – the Court of Justice and the General Court – is extremely important, providing the necessary points of reference for the possible use of general principles such as integration, precaution, prevention, participation or other elements of sustainable development. It is beyond doubt, that the practice of these courts is decisive for the development of environmental law:

> 'We can safely assert that the European Court of Justice plays a decisive role in the establishment of the practical efficiency of EU environmental law.'[112]

To quote an author perceiving the wider context:

> 'The precedents of the Court's judicial practice are important sources of shaping and interpretation of the law.'[113]

This role of the Courts is even more significant, knowing that 'In reality, the Court has generally interpreted regulations related to environmental protection in a broad way, where possible making decisions at the environment's advantage, and being innovative in the interest of improving current regulations.'[114] There are also other perspectives on judicial practice that we may refer to: 'It is therefore important to view the ECJ's role from a dynamic, rather then static, perspective'[115] In any case, there are several principles and provisions of EU environmental law, which received their present shape as a result of the development in case-law, but unfortunately, sustainable development or sustainability does not belong to this sphere. One thing is however certain: several judgments refer to these terms whithout however providing them with more substance.

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[111] '(4) 4. The Community shall endeavour to conclude bilateral or multilateral agreements with third countries containing provisions on sustainability criteria that correspond to those of this Directive.'

[112] LAVRYSEN, Luc: *The European Court of Justice and the Implementation of Environmental Law*, in Reflections on 30 Years of EU Environmental Law, ed. by: Richard Macrory, Europa Law Publishing, Groningen, 2006, p. 447.

[113] KISS, Alexandre – SHELTON, Dinah: *Manual of European Environmental Law*, Grotius Publications, Cambridge, 1993, p. 22.

[114] KRÄMER, Ludwig: *Casebook on EU Environmental Law*, Hart Publishing, 2002, p.V.

[115] CRAIG, Paul Craig – DE BURCA, Gráinne: *EU Law*, Fourth Edition, Oxford University Press, 2008, p. 73.

6.1 Impact Assessment

Environmental impact assessment[116] is one of the fundamental instruments of EU environmental law. According to the facts of the Commission v Ireland case,[117] domestic law already referred to sustainability, while the Commission found that Ireland infringed EU law for employing vague requisites: '26 According to the Commission, Article 3 of Directive 85/337 is of pivotal importance, since it sets out what constitutes an environmental impact assessment and must therefore be transposed explicitly. The provisions relied upon by Ireland as adequate transposition of Article 3 of the directive are insufficient.'

Ireland claimed that there are some basic concepts which appear in domestic law and which must satisfy the demands of EIA legislation:

> '32 In the alternative, Ireland refers to the concept of 'proper planning and sustainable development' ... It is, in Ireland's submission, the principal criterion which must be taken into consideration by any planning authority when deciding on an application for planning permission.' Using such broad conditions instead of direct legal wording, belongs according to Ireland to the
>
> '(33) ... discretion which a Member State enjoys under Article 249 EC as to the form and methods for transposing a directive.' The respondent also claimed that there is a ' ... body of legislation and case-law built up in Ireland over 45 years surrounding the concepts of 'proper planning' and 'sustainable development'.'

The general attitude of the Court as regards this kind of transposition is clear:

> '46. ... according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner ... the fact remains that, according to equally settled caselaw, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights ...'

The main question now is, whether concepts such as sustainable development satisfy the needs of clarity, precisions and specificity? The answer is in the negative:

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[116] The current version is the codified Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance, OJ L 26, 28.1.2012, p. 1-21.

[117] Case C-50/09. European Commission v Ireland. 3 March 2011, Reports of Cases 2011 I-00873.

'48 As regards the concepts of 'proper planning' and 'sustainable development' to which Ireland also refers, it must be held that, even if those concepts encompass the criteria referred to in Article 3 of Directive 85/337, it is not established that they require that those criteria be taken into account in all cases for which an environmental impact assessment is required..

49 It follows that neither the national case-law nor the concepts of 'proper planning' and 'sustainable development' can be invoked to remedy the failure to transpose into the Irish legal order Article 3 of Directive 85/337.'

The judgment is clear in that sustainable development may not be taken as a solid legal basis for the enforcement of permitting criteria without any further clarification:
'59. ... The concept of 'proper planning and sustainable development', to which the PDA refers, is a very broad one,...'.

6.2 Public Procurement

A case from the year 2010[118] discusses sustainability in connection with pubic procurement.[119] According to the facts of the case, 5% of the conditions for tender related to a proposed framework contract covered environmental sustainability. Although this is the single reference to sustainability in the case, we must mention it, since it proves that sustainability may well be a part of such procedures. At the same time, it must be pointed out that unfortunately no clear conditions were listed besides the general concept.

6.3 Energy (Biofuels)

In the *Plantanol*-case[120] the use of biofuels and their consequences for energy taxation, as well as the general principles of legal certainty and the protection of legitimate expectations played the central important role. The core issue was the withdrawal of tax reductions by the state, which was then challenged by the applicants. Among the different arguments of the plaintiffs, sustainable development was one element:

[118] Case C-406/08. Reference for a preliminary ruling: High Court of Justice (England & Wales), Queen's Bench Division – United Kingdom in case between Uniplex (UK) Ltd v NHS Business Services Authority. 28 January 2010 Reports of Cases 2010 I-817.

[119] Two directives are at the heart of the problem: Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts Official Journal L 209, 24/07/1992 p. 1-24 and Council Directive of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (89/665/EEC) (OJ L 395, 30.12.1989, p. 33).

[120] Case C-201/08, preliminary ruling issued by Hessisches Finanzgericht – Germany in case between Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt, 10 September 2009. Reports of Cases 2009 I-8343.

> '27 ... In addition, the withdrawal of the exemption has not been the subject of any assessment concerning its effect on the criteria for sustainable development. ...'

No further explanation was given about the criteria for sustainability itself, but the verdict is very easy and simple, and again it is clear that a general reference to broad issues such as sustainable development is unsatisfactory, furthermore, there is no right to tax exemption:

> '37 It follows that the provisions of Directive 2003/30 do not require the Member States to introduce, or maintain in force, a tax exemption scheme for biofuels. ... other means may also be envisaged, such as financial assistance for the processing industry and the establishment of a compulsory rate of biofuels for oil companies.'

6.4 Cooperation with Developing Countries, Peace, Security and Rule of Law

A completely different aspect of sustainable development formed the main question in a case from the year 2008[121] – as clear evidence of the complexity of the sustainable development concept. The case related to development aid based on the Cotonou Agreement between EC and the ACP States with sustainable development as its central element:

> '(3) ... in order to promote and expedite the economic, cultural and social development', 'the partnership shall be centred on the objective of reducing and eventually eradicating poverty consistent with the objectives of sustainable development and the gradual integration of the ACP countries into the world economy.'

This form of international cooperation has the integrated approach at its forefront:

> ' taking account at the same time of the political, economic, social, cultural and environmental aspects of development.....'

While the main legal question related to the divison of regulatory and administrative powers, the case serves as a good example of the wider horizon of sustainable development as a principle connecting peace, security, human rights, democracy and sustainability as interrelated elements of a general concept.[122] Paragraph 66 of the judgment is clear in this respect, accepting the finding that:

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[121] C91/05. Commission of the European Communities v Council of the European Union, 20 May 2008. Reports of Cases 2008 I-03651.

[122] '65 Articles 177 EC to 181 EC, which deal with cooperation with developing countries, refer not only to the sustainable economic and social development of those countries, their smooth and gradual

> '...there can be no sustainable development and eradication of poverty without peace and security and that the pursuit of the objectives of the Community's new development policy necessarily proceed via the promotion of democracy and respect for human rights ...'

Finally, a seemingly remote problem is mentioned, which – according to the agreement and the judgment – also forms part of sustainable development. This is 'the excessive and uncontrolled accumulation and spread of small arms and light weapons', considered not only 'a threat to peace and security', but also something that 'reduces the prospects for sustainable development (93), and constituting 'an obstacle to the sustainable development of those countries.' (98)

6.5 Support for Developing Countries

In a judgment from the year 2007[123] the main issue was the division of powers between the different EC institutions. According to the Parliament the Commission went beyond the limits of its powers when implementing a regulation.[124] In this case again one may also find a proof of the wide and complex meaning of sustainable development, without any concrete legal definition of the principle. This time the international cooperation under scrutiny regarded Asia and Latin America – 'the ALA developing countries'. The cooperation included several traditional elements, such as human rights, the process of democratisation, good governance, environmental protection, trade liberalisation and strengthening the cultural dimension, etc. Furthermore, Article 5 of Regulation No 443/92 states that the 'protection of the environment and natural resources, and sustainable development, shall be long-term priorities. ...'

integration into the world economy and the campaign against poverty, but also to the development and consolidation of democracy and the rule of law, as well as to respect for human rights and fundamental freedoms, in compliance also with commitments in the context of the United Nations and other international organisations (C-403/05 *Parliament* v *Commission* [2007] ECR I-0000, paragraph 56).'

[123] C403/05. European Parliament v Commission of the European Communities, 23 October 2007, Reports of Cases 2007 I-09045 .

[124] By its application, the European Parliament seeks annulment of the decision of the Commission of the European Communities approving a project relating to the security of the borders of the Republic of the Philippines to be financed by budget line 19 10 02 in the general budget of the European Communities (Philippines Border Management Project, No ASIA/2004/016-924) (not published in the *Official Journal of the European Union*, 'the contested decision'), adopted in implementation of Council Regulation (EEC) No 443/92 of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America (OJ 1992 L 52, p. 1), as amended by Council Regulation (EC) No 807/2003 of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (unanimity) (OJ 2003 L 122, p. 36; 'Regulation No 443/92'), to the extent that the Commission exceeded the implementing powers conferred upon it by that regulation.

The complexity of the items of cooperation substantiates the special importance of sustainable development within the different aid projects prepared for developing countries. These individual items all represent a different dimension of development.[125] In paragraph 57 the same arguments are listed, as mentioned in paragraph 66 of the above judgment. The Court did not accept the very broad understanding of powers, consequently it is not enough to make a reference to the interrelationship of different aspects of development, a specific authorization is also needed: '68 ... the fight against terrorism and international crime which falls outside the framework of the development cooperation policy pursued by Regulation No 443/92, so that the Commission exceeded the implementing powers conferred by the Council in Article 15 of that regulation.'

6.6 Fisheries

In a 2004 case[126] the dispute centred around two issues: the action in connection with fishery and the conditions of using interim measures, both in relation to the concept of sustainable fishing,[127] or the 'sustainable exploitation of fisheries resources'. At the heart of the case was the classical concept of sustainability, directly linked with environmental protection: '10 Articles 1 and 2 of the Base Regulation respectively provide that the scope of the CFP is to 'cover conservation, management and exploitation of living aquatic resources ...' and that the CFP shall 'ensure exploitation of living aquatic resources that provides sustainable economic, environmental and social conditions'...'

According to the plaintiffs, the actions (the contested regulation) of the Council infringe the 'Base Regulation', among others, because:

> '76. First, the applicant contends that the Contested Regulation is in breach of environmental law, in particular Articles 6 and 174(1) to (3) EC and the Base Regulation by failing to respect important environmental principles which are mandatory in the context of legislation in the field of the CFP, namely the sustainability,

[125] '56. Admittedly, Articles 177 EC to 181 EC, inserted by the EU Treaty and dealing with cooperation with developing countries, refer not only to the sustainable economic and social development of those countries, their smooth and gradual integration into the world economy and the campaign against poverty, but also to the development and consolidation of democracy and the rule of law, as well as to respect for human rights and fundamental freedoms, whilst complying fully with their commitments in the context of the United Nations and other international organisations.'

[126] T37/04. R. Região autónoma dos Açores v Council of the European Union, 1 July 2008. Reports of Cases 2008 II-00103.

[127] '1. The legislative framework relevant to the present demand for interim measures is that pertaining to the Community's Common Fisheries Policy (hereinafter referred to as the 'CFP'), in particular, with regard to a zone within Portuguese jurisdiction of up to 200 nautical miles ('nm') from the baseline of the Azores (hereinafter referred to as 'Azorean waters'), corresponding to the exclusive economic zone of the Azores. The legislative framework is complex with a large number of secondary legislative acts regulating fishing activities in that area....'

> precautionary, preventive action, rectification at source, and polluter pays principles. According to the applicant, all the above principles are infringed because the Contested Regulation will lead to intensification of fishing effort, damage to the marine environment and depletion of fish stocks ...'

The plaintiff seeks the Court to take interim measures, among others due to the infringement of sustainable development principles:

> '87 ... This would alter the delicate environmental balance, which is already close to unsustainable levels, leading to a 'boom and bust' effect and the rapid and irreversible depletion of fish stocks. In this respect, the applicant stresses that the special nature of deep-sea fish (low fecundity rates, late maturity, longevity) makes recovery extremely slow.'

Again, no clear vision of sustainability was presented, therefore, the arguments failed to convince the Court.

6.7 Rivers

In a relatively recent case[128] sustainability is mentioned yet again, without arriving at any direct conclusion. The case is interesting because it covers a complexity of different fundamental environmental directives (water framework directive,[129] environmental impact assessment,[130] strategic assessment,[131] habitat[132]). Unfortunately, sustainability is employed here as a permissive element and not as a constraint:

> '139 Consequently, the answer to the fourteenth question is that Directive 92/43, and in particular the first subparagraph of Article 6(4) thereof, interpreted in the light of the objective of sustainable development, as enshrined in Article 6 EC, permits, in relation to sites which are part of the Natura 2000 network, the conversion of a natural fluvial ecosystem into a largely manmade fluvial and lacus-

[128] C43/10. Reference for a preliminary ruling: Symvoulio tis Epikrateias – Greece, in case between Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v Ypourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others. 11 September 2012. Reports of Cases Not yet published.

[129] Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy OJ L 327, 22.12.2000, p. 1-73.

[130] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC – Statement by the Commission OJ L 156, 25.6.2003, p. 17-25.

[131] Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment OJ L 197, 21.7.2001, p. 30-37.

[132] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora Official Journal L 206 , 22/07/1992 p. 7-50.

trine ecosystem provided that the conditions referred to in that provision of the directive are satisfied.'

6.8 Plant Genetics

Plant genetics is the central question in our next example,[133] which concerns the excessive use of seeds, infringing – according to the plaintiffs of the instant case – several EU[134] and international requirements.[135] As a general rule, international conventions form a vital part of EU law:

'84 It has consistently been held that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions and, consequently, they prevail over acts of the European Union ...'

If one argues that these international requirements are directly applicable, certain conditions have to be met, first of all that the provisions must be '... unconditional and sufficiently precise'.

In this case these conditions were not met, since the wording of the Convention is far from being precise:

'88 In addition, in accordance with Article 6 of the ITPGRFA, the Contracting Parties are to develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture.

89 Thus, under those provisions, the measures to be adopted in any given case are left to the discretion of the Member States. ...

92 Accordingly, that article does not contain an obligation that is sufficiently unconditional and precise to challenge the validity of Directives 2002/55 and 2009/145 either.'

Our conclusion again must be that sustainability as a general obligation may exist, however, it does not satisfy the requirement of necessary legal accuracy.

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[133] C59/11. Reference for a preliminary ruling: Cour d'appel de Nancy – France in case between Association Kokopelli v Graines Baumaux SAS. 12 July 2012. Not yet published in the ECR.

[134] For example: Council Directive 98/95/EC of 14 December 1998 amending, in respect of the consolidation of the internal market, genetically modified plant varieties and plant genetic resources or Council Directive 2002/55/EC of 13 June 2002 on the marketing of vegetable seed (OJ 2002 L 193, p. 33), etc.

[135] '4. According to Article 1 of the ITPGRFA, the objectives of the Treaty are 'the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security'.'

6.9 Cogeneration Plant and Green Certificates

Of course it would be impossible to analyse each and every case that mentions sustainable development, since there are always new examples propping up. Our last case is from September 2013,[136] the facts of which relate to a cogeneration plant, which makes use of the waste deriving primarily from the sawmill for the purpose of ensuring its own energy supply. The application for additional green certificates was refused by the Walloon Government, which stated that the plant 'did not satisfy three of the conditions required by that provision as, first, it used wood for cogeneration, secondly, it did not make use of a particularly innovative process and, thirdly, it did not act with a view to sustainable development.' (25) The CJEU and the Conseil d'État agree that '56 According to recitals 1 and 2 in the preamble to that directive, such promotion of renewable energy sources, which is a high priority for the European Union, is justified in particular because the exploitation of those energy sources contributes to environmental protection and sustainable development, and can also contribute to security and diversification of energy supply and make it possible to meet the Kyoto Protocol targets more quickly.' Notwithstanding these findings, we must conclude that no further elements of sustainable development were laid down.

7 Conclusions

When seeking to determine the legal content of sustainable development, our most important starting point shall be primary law, covering principles and general provisions and providing the legal basis for all further secondary legislation – and via secondary legislation for domestic law – and jurisprudence. The prevalence of the sustainability issue within the realm of international cooperation also plays a role in the development of primary legislation, as demonstrated by the correlation of UNCED and the Maastricht Treaty of 1992. Sustainability, sustainable development may also be considered a trendy buzzword, at the same time, in the framework of European integration, it may also have a crucial role to play in connection with the market or economy at large. This is clear from Article B of the TEU, supplying the impression that the development angle is a bit stronger than sustainability.[137]

Maastricht also amended the EC Treaty. Article 2 TEC reflects the same attitude, mixing development and growth, emphasizing the qualitative aspects – harmonious and balanced development respecting the environment – in connection with economic activities, and as an inverse, in the case of environmental

[136] Case C195/12, preliminary ruling from the Cour constitutionnelle (Belgium), in the proceedings between Industrie du bois de Vielsalm & Cie (IBV) SA and Région wallonne, 26 September 2013, Not yet published in the ECR.

[137] 'To promote economic and social progress which is balanced and sustainable.'

protection it reminds us of the requirements of 'sustainable and non-inflationary growth', which is more of a quantitative character.

The Amsterdam Treaty reinforces the idea of sustainability, featuring the term already in the preamble as a principle coupling economic and social development as an objective together with environmental protection. All further elements of the Treaty are similar in terms of providing a dominant role to economy or the market – balanced and sustainable development, also harmonious development. At the same time, the role of environmental protection is expanding, requiring a high level of protection even in the set of general provisions. Finally, integration – integrating environmental considerations in other policies – should also receive a stronger vision.

Thus, the triad of sustainability is present in primary law: although the economic dimension qualifies as the most important role of the EU, the need to find a balance is also obvious.

The Lisbon Treaty was not drafted in order to further interpret the concept of sustainability. No wonder the basics of sustainability turned out very similar, with a more extensive and broader approach – sustainable development of the Earth, future generations. In the TFEU, goals and values such as peace, solidarity, human rights and the fight against poverty create a complex system, together with sustainable development marking the broader backdrop of activities. The role of EU within international cooperation – primarily in relation to developing countries – is to serve sustainability together with its three components. Integration is a fundamental part in this setting, while environmental integration loses its primary role and importance. Finally, we must mention the Charter of Fundamental Rights, covering sustainable development in its Article 37 on environment.

It is understandable that the principle of sustainable development is partly an objective, partly a principle – the Treaty itself does not wish to specify its exact content. Of course, traditional components of sustainable development are also present, however, no new elements or development can be discerned. The wording is not sufficiently clear for the purposes of legal clarification and does not serve as a basis for any legal obligation either. Its essence is to 'aim at' or 'take into account' sustainability, as such, it may be considered a general guidance, with a limited chance of enforcement. We may not even say that the EU institutions themselves are obliged to take any concrete measure in relation to sustainable development. Their responsibility is merely political, but even on this level, it seems to be weak.

In terms of legislation in general, Better Regulation may have a greater role to play, using measures such as impact assessment, consultations or simplification. Better regulation also requires certainty and stability.[138] As regards sustainability, its implementation should be monitored, and there are also indicators

[138] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Smart Regulation in the European Union Brussels, 8.10.2010 COM(2010) 543 final.

under development for this purpose. Furthermore, better governance is a core issue, covering among others regional and local initiatives.

In the past years, the sustainable development strategy has been focusing on its relationship with the Lisbon strategy, which includes many direct elements and feasible implementation mechanisms than sustainability. Lisbon reflects the main course of the EU – economy, competitiveness, growth, innovation, etc. The establishment of the Lisbon strategy is very similar to the sustainable development strategy, they may proceed side by side, but a more complex, integrated perspective became a must. Currently, we are witnessing some proposals which call for the possible leading role of sustainability in this process.

At the same time there is also an opposite tendency, starting with the economic crisis in 2008, focusing more on economics and market growth. This is also reflected in the new terminology: sustainable growth instead of development. Sustainable growth resembles sustainable development, but it is not the same.[139] Consequently, sustainable economy is included, but as a part of the process and not the replacing entire system. Inclusive growth also diverts the focus from sustainability. From among the complex system of the guidance formulated in relation to the concept of inclusive growth, only one requirement comes close to the concept of sustainable development. Thus, most recently the direction of strategies and policies have been changed and this had an impact on the further conditions of sustainable development. This trend does not seem absolutely positive.

The elements of sustainability, which appear in primary legislation or in the different strategies, do not allow us to speak of an exact legal content. The concept does not give rise to enforceable obligations, neither towards the EU institutions, nor towards Member States, or towards any legal entities or persons. Consequently, sustainability shall be understood also in the future as a principle, less of a legal principle, but rather as a policy principle, the actual content of which is subject to changes. A good example of this is the emergence of the term sustainable growth. Most probably it is only the result of the integration of the components of sustainable development which are feasible in practice, however, the available instruments have yet to be clarified.

Secondary EU law even contains direct provisions on sustainability, but again it is more feasible to use sustainability/sustainable development as a point of reference or a principle and less as a real legally binding term. Moreover, this approach usually accentuates the environmental content of the concept. If one wishes to find more direct references, these are all connected with sustainability implications of special objectives enshrined in the different secondary legal sources.

[139] To recall the broades definition featured in the preamble of the new strategy: '(9) ... Sustainable growth means decoupling economic growth from the use of resources, building an energy and resource-efficient, sustainable and competitive economy, a fair distribution of the cost and benefits and exploiting Europe's leadership in the race to develop new processes and technologies, including green technologies.'

The first piece of secondary legislation was adopted in 2009 which formulates sustainability criteria as enforceable requirements, in connection with renewable energy, more precisely with biofuels. This is a significant innovation, as the complexity of the term may be operationalized, even if in a narrower field, but possibly affecting a much wider context. There is finally a legally perceivable obligation, which is manifested in sustainability criteria. The approach is somewhat negative, defining what is *not* sustainable, and it does not cover the complexity of the relevant issues on the whole, but still it extends to such criteria, which contain environmental, economic and even 'fair-trade' elements.

Sustainability references may also be found in case-law, therefore we can say that it is in the process of becoming a legal requirement. The most important messages of the relevant judgments are – unfortunately not a clear definition, since this is still missing –two important elements

- the mere fact that the principle of sustainable development may appear as a reference in jurisprudence, and
- that this issue may have an impact on a variety of cases, from environmental protection to development aid, from fisheries to public procurement. It is even more important that under the notion of sustainability, issues such as cultural dimensions, peace, security, democracy and rule of law are all considered together in a complex vision.

Summing it up, there is no such thing as a clear legal definition of sustainable development, which may be invoked in legislation or in a legal dispute. Some elements of the terminology and also the principle of sustainable development are nevertheless available, meaning that the concept may not be circumvented, but must form a part of legal reasoning, even if it takes the form of a principle. With the exception of the sustainability criteria laid down in the RED directive, the available legal terms may not be understood as real requirements, however, sustainability, sustainable development has frequently become a point of reference. Sustainability may also be taken as a widely accepted, general concept, broad enough to accomodate different interpretations.

The EU is willing to accept growth, employment, competitiveness as political priorities, but it is not really willing to turn sustainability into a direct legal obligation. This is even more the case after 2008. It is also clear that if we always tailor the content of sustainability to the actual problems, there is a chance to leave, for example, the environmental issues behind.

We may agree with Krämer,[140] who is not very optimistic in connection with the realization of sustainable development within the EU, concluding, that

- there is no manageable definition of sustainable development in EU law, but it is rather used to render programmes and measures 'green';
- any kind of measure and action may be considerd sustainable, as there is no clear legal reference;

[140] KRÄMER, Ludwig: *Sustainable development in EC law in Sustainable Development in International and National Law*, ed. by: BUGGE, Hans Christian and VOIGT, Christina, Europa Law Publishing, 2008, p. 243.

- from the beginning of the 21st century, the political goal is growth and employment and there are no serious attempts to give teeth to the concept of sustainable development.

This also means, according to the same author[141] that if in order to find a political compromise, we wish to collect all contradictory interests of environmental protection and economy into one sustainable development concept as it happened in Article 3 of TEU and Article 11 of TFEU, it must end up in a fiasco. Of course, looking at the simple fact that the content of sustainable development is designed by politicians, tailored to their current needs, there is also a chance for improvement in this matter.

[141] KRÄMER, Ludwig: *Az Európai Unió környezeti joga*, Dialóg Campus Kiadó, 2012, p. 363.

CHAPTER 5

Sustainable Development Law in Legal Scholarship

1 Sustainable Development Law in Legal Scholarship

Above, we sought to summarize the major attempts in international law and European law to come closer to the meaning of sustainable development. Now, we will present the views of legal scholars, in order to have a more complex picture. Before entering into a short discussion of some relevant views in legal literature, we should refer to the actual impact of understanding what sustainable development really means, looking at the international career of this notion.

> 'It is included in over 300 international conventions... References to sustainable development can indeed be found in 112 multilateral treaties, roughly 30 of which are aimed at universal participation. This points to a certain level of consensus among the international community concerning the relevance of sustainable development for international law. ... 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.... Clearly, then, sustainable development has widely penetrated treaty law. ... The wording can be vague and imprecise...'[1]

Consequently, international law is rich with references to sustainability or sustainable development, but the major question remains the same: what is the exact legal content of such references, how is it possible to implement this term in everyday life, in practice. How far can these expectations be considered as guidance, general provisions, or real requirements? With other words: what is the essence of sustainable development for law? We should also be aware of the material content – instruments, means and methods – of the expression. As we already presented some examples provided by internationally recognized expert groups or committees, it is time to get acquainted with the ideas of legal scholars.

One of the most distinguished authors of sustainable development law[2] tries to deliver a balanced interpretation: 'In this way, a principle of sustainable development, in accordance with the Bruntland Report and other global 'soft law' processes, could be argued to have a fundamentally normative character that is binding on State, though is a double-edged sword. It would not forbid development as such. Rather, it would require States not to prevent or frustrate each other from promoting sustainable development, and 'where development may cause significant harm to the environment' would require states to take steps to address a duty 'to prevent, or at least mitigate, such harm'.'[3]

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[1] BARRAL, Virginie: Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm, The European Journal of International Law, Vol. 23. no. 2, 2012, p. 384.

[2] Director of the Centre for International Sustainable Development Law, http://cisdl.org/people.html.

[3] CORDONIER SEGGER, Marie-Claire: Sustainable Development in International Law, in Sustainable Development in Sustainable Development in International and National Law, ed. by: Hans Christian Bugge and Christina Voigt, Europa Law Publishing, 2008, p. 128.

A truly encyclopaedic, but equally legal summary is provided by the Max Planck Encyclopedia of Public International Law:

> '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.'[4]

Of course, not all authors define the components of sustainability along the same lines, but most of the descriptions use similar interpretations: 'It is by now well established that this definition is widely considered to encompass three main strands. These are: (i) economic development; (ii) environmental protection and conservation; and (iii) human equity.'[5] Equity in this respect is connected to social issues, listed usually as the third component of sustainable development.

At the beginning of our short survey we may also mention another important matter that is the distinction between or similarity of the terms sustainability and sustainable development. Many authors underline the major difference[6]: 'sustainability and sustainable development are not the same, but often used without caution as if they are. The former is an ongoing function of the ecosystem or use of a resource, and implies steady demands; the latter implies increasing demands for improving well-being and lifestyles and probably, in the foreseeable future, for a growing population.' Others believe that sustainability is too complex, leading to uncertainty.[7] Most likely the easiest way to begin is with sustainability, that is to provide well-being and ensure the common interest of the present generations, while not exploiting the resources available for next generations. Sustainable development is a method of material development, which may most probably reach the target of sustainability.

The different scholars, based on their respective attitudes and legal background may arrive at different conclusions. Some do not believe that sustainable development may be afforded a legal content, which does not mean at the same time that the problem is underestimated. It is much rather the case that the real nature of sustainable development is revealed:[8]

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4 BEYERLIN, Ulrich: Sustainable Development in Max Planck Encyclopedia of Public International Law www.mpepil.com © 2012 Max Planck Institute for Comparagraphtive Public Law and International Law, Heidelberg and Oxford University Press, point 9.

5 PEDERSEN, Ole W.: Environmental Principles and Environmental Justice, Environmental Law Review, 2010, vol 12, p. 43.

6 BARROW, C.J.: Environmental Management for SD, Routledge, 2006, p. 11.

7 RICHARDSON, Benjanim J, – WOOD Stepan: Environmental Law for Sustainability in Benjanim J. Richardson, Stepan Wood (ed) Environmental Law for Sustainability, Hart Publishing 2006, p. 40.

8 WINTER, Gerd: A Fundament and Two Pillars in International Law, in Sustainable Development in Sustainable Development in International and National Law, ed. by: Hans Christian Bugge and Chris-

> 'Taking this terminology as a basis I believe the proposition of sustainable development can neither be regarded as a principle of international customary law nor as a general principle of law or international law. The most widely accepted definition (the three pillars concept) is just too vague to qualify for legal bindingness.'

The same may also be affirmed in connection with EU law, in light of the legal exactness of the term:

> 'The different provisions in the Treaty on sustainable development and their practical application thus constitute more of a guideline to policy action than any meaningful legal concept...'[9] Neither of the above comments lead to the assumption that the legal substance may vanish, but both authors point to the fact that we should not have high hopes of reading the definition in the different legal documents.

Other authors summarize the views of different scholars, helping us in drawing up a clear picture:

> 'For some, the answer to the question of relationship to the law is straightforward: sustainable development does not belong to law; it may be an important philosophical or political objective, but is in not a legal one.... Others avoid the issue of ascertaining the legal nature of sustainable development by pointing to its lack of relevance... A variant of this approach is to consider sustainable development, not as a legal principle, but as a new branch of international law altogether.'[10]

Thus, there is a wide margin of perspectives, from the legally unfathomable to the individual new field or branch of law. What kind of conclusions may we draw? The straightforward conclusion is to accept that nothing is clear yet, the concept is less mature, the quality and the content of the definition is far from constant. What's more: even with the passing of 25 or 100 years, the answers may still vary.

Lawyers of international environmental law have sought to confer as soon as possible concrete legal content on the concept of sustainable development. It may be said that currently the international legal society and therefore also the theory of international law are to a certain degree divided on the international legal status of sustainable development. As an early and general assessment we may wrap up that some international lawyers consider sustainable development as a binding norm of international law: for example Beyerlin, Malanczuk, Pinto and Redclift[11] belong to the group of international lawyers who argue in favour

tina Voigt, Europa Law Publishing, 2008, p. 40.

9 KRÄMER, Ludwig: EC Environmental Law, Sixth Edition, Sweet and Maxwell, London 2007., pp. 9. and 12.

10 BARRAL, Virginia: Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm, The European Journal of International Law, Vol. 23. no. 2, 2012, p. 378.

11 See REDCLIFT, M. R.: *Sustainable Development: Exploring the Condradictions*. London: Routledge, 1987.

of its binding nature. Meanwhile, others, e. g. Schrijver[12] and Philippe Sands[13] described the concept of sustainable development as a concept of public international law, stating that the international legal status of sustainable development is debatable.

A number of authors find that the uncertainty surrounding the concept of sustainable development is the major obstacle for recognizing its binding nature under international law.[14] Lowe, for instance writes that the concept of sustainable development is rooted in 'obscurity and turmoil.'[15] Nevertheless, Lowe acknowledges that the concept of sustainable development has some legal relevance, since it may be a tool in the judges' hands to achieve certain amendments and it may play a prominent role in interstate negotiations when diverging interests and principles must be brought into balance. Dire Tladi assessed the consequences of the Gabčikovo-Nagymaros judgment of the International Court of Justice in Hague. According to Tladi, the fact that the Court defined sustainable development as a concept, can only mean, at best, that the Court is not committed to the legal significance of sustainable development, at worst, it suggests that the in the opinion of the Court, sustainable development does not

[12] SCHRIJVER, Nico J.: Development – the Neglected Dimension in the Evolution of the International Law of Sustainable Development. Paper Presented at International Seminar: *International Law and Sustainable Development: Principle and Practice*, Amsterdam, Nov. 29.–Dec.1, 2001.

[13] SANDS, Philippe: *'International Law in the Field of Sustainable Development'. British Yearbook of International Law*, 1994/65, 379.

[14] See *inter alia* BEYERLIN, Ulrich: 'The Concept of Sustainable Development'. In: WOLFRUM, R. (ed.): *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* Berlin: Springer, 1996, p. 640.; MALANCZUK, P.: 'Sustainable Development: Some Critical Thoughts in the Light of the Rio Conference, Sustainable Development and Good Governance'. In: GINTHER, Konrad *et al.* (eds.): *Sustainable Development and Good Governance*. Dordrecht: Martinus Nijhoff Publishers, 1992; PALLAMAERTS, M.: 'International Environmental Law in the Age of Sustainable Development*: A* Critical Assessment of the UNCED Process', 15 *J.L. & CoM*. (1996), pp. 623, 653; PINTO, M.C.W.: 'Reflections on the Term Sustainable Development and its Institutional Implications'. In: GINTHER, Konrad *et al.* (eds.): *Sustainable Development and Good Governance*. Dordrecht: Martinus Nijhoff Publishers, 1992; PINTO, M.C.W.: 'The Legal Context: Concept, Principles, Standards and Institutions'. In WEISS, F. – DENTERs, E. – DE WAART, P. (eds.): *International Economic Law with a Human Face*. The Hague: Kluwer Law International, 1998; PORRAS, Ileana: 'The Rio Declaration: A New Basis for International Cooperation'. In: Sands, Philippe (ed.): *Greening International Law.* London: Earthscan Publications, 1993; REDCLIFT, M. R.: *Sustainable Development: Exploring the Condratictions.* London: Routledge, 1987; RIEU-CLARKE, Alistair: 'International Law and Sustainable Development: Lessons from the Law of International Water Courses'. *International Water Association Publishing (IWA Publishing)*,1 November 2005. LOWE, Vaughan: 'Sustainable Development and Unsustainable Practices', In: BOYLE, Alan E. – FREESTONE, David (eds), *International Law and Sustainable Development – Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999), p. 19-23.

[15] LOWE, Vaughan: 'Sustainable Development and Unsustainable Practices'. In: BOYLE, Alan E. – FREESTONE, David (eds.): *International Law and Sustainable Development – Past Achievements and Future Challenges*. Oxford: Oxford University Press, 1999, p. 23.

have a legal status at all.[16] Dire Tladi notes that the peoples' right to self-determination is, undoubtedly, one of the most important principles of international law in spite of the fact that its exact content and the rights and obligations arising from it are usually disputed in the concrete cases.[17] According to Alistair Rieu-Clarke, the authors who accept the normative nature of the international legal status of sustainable development represent a minority position. On the basis of the majority view, the concept of sustainable development is merely considered *lex lata*, as a consequence of which international scholarship does not consider sustainable development a consolidated international legal principle capable of conveying legal obligations.[18]

By contrast, authors such as Schrijver are of the view that sustainable development has a certain international legal status as a concept of public international law and as an objective of the international community.[19] One of the most prominent scholars of international environmental law, Philippe Sands, holds that the concept of sustainable development has become widely recognized in international law, even if its exact meaning is yet uncertain, since sustainable development is a legal term concerning processes, principles and objectives referred to under various international environmental conventions.[20]

Professor Alexander (Sándor) Kiss, the greatest Hungarian scholar of international environmental law, elaborated the details of the concept of sustainable development to its fullest.[21] Kiss describes sustainable development as a legal concept, similar to the constitutional concept of a state. The constitution of a state describes the basic principles related to the operation of a state; thereby it ensures the legal framework for state operation. The concept of the state set out in the constitution is, in itself, not binding; only the principles that constitute part of the concept of the state are binding. Likewise, the concept of sustainable development is a legal concept that includes the prevailing principles of international environmental law. Without this concept, the international legal means are not available, either, which would impose legal obligations on the state in the interest of preserving the natural condition of our Earth.

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16 TLADI, Dire: *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments*, op. cit. 96.

17 *Ibid.* 101.

18 RIEU-CLARKE, Alistair: 'International Law and Sustainable Development: Lessons from the Law of International Water Courses'. *International Water Association Publishing (IWA Publishing)*, 1 November 2005.

19 SCHRIJVER, Nico J.: 'Development – the Neglected Dimension in the Evolution of the International Law of Sustainable Development'. Paper Presented at International Seminar: International Law and Sustainable Development: Principle and Practice, Amsterdam, Nov. 29. –Dec.1, 2001.

20 SANDS, P. : 'International Law in the Field of Sustainable Development', *BYIL LXV* (1994), pp. 303, 379.

21 See e.g. KISS, Alexandre – SHELTON, Dinah: *Guide to International Environmental Law*. Leiden/Boston: Martinus Nijhoff Publishers, 2007; KISS, Alexandre – SHELTON, Dinah: *International Environmental Law*. Ardseley, N.Y.: Transnational Publishers, 1999.

We may also agree with the observation, which has difficulties with accepting the legal nature of sustainability, but does not exclude it at the same time, so it is as ambivalent as the term itself:

> 'The legal challenge for sustainable development is enormous: a legal framework is needed in which environmental and social considerations are integrated into developmental processes along with economic analyses so that decision making reflects the 'real' values and services that nature provides. Despite incorporation of sustainable development into treaties, and domestic environmental and planning legislation, the concept largely remains one of rhetoric and policy without clear legal parameters. Much discussion has occurred but little international law has emerged.'[22]

Law should also be sincere when looking at its own system, if it wishes to comprehend the concept of sustainability.

> 'The international law, and also EC law, is clearly insufficient for securing environmental sustainability. This conclusion might seen upsetting, even theoretically, because the larger the controlling system, the more it can control. The reason is at least partly because these two legal systems are – as already mentioned – internally inconsistent. None of them is sustainable. For one thing, they reflect conflicting goals, nor is sustainable development among the highest priorities. For another, they are simply too inflexible to adapt to whatever occurs in the environmental anywhere within the Union for the purpose of controlling the environment for ecological sustainability.'[23]

As a consequence, law is not necessarily a proper device to manage sustainability or any other problem that is equally emerging and in constant flux. On the one hand, the scheme we wish to adapt is far from homogeneous, and on the other hand, the legal technique is not really capable of controlling flexible, moving targets (finding harmony with legal certainty, with the limitation of discretion, the difficulties of definitional ambiguities, just to mention a few of the practical problems).

If we wish to have a clear picture why it is so difficult to take hold of sustainable development, there are several arguments:

> 'Sustainability is about visions, but the law as applied is not. The law is about how we can resolve specific disputes in specific circumstances. Because sustainability

[22] PALASSIS, Stathis M.: Beyond the Global Summits: Reflecting on the Environmental Principles of Sustainable Development, Colorado Journal of International Environmental Law and Policy, Vol. 22:1, 2011, p. 42.

[23] WESTERLUND Staffan: Theory for Sustainable Development in Sustainable Development SD in International and National Law, ed. by: BUGGE, Hans Christian and VOIGT, Christina, Europa Law Publishing, 2008, p. 63.

> is about creating places and communities, and thus primarily about purpose and implementing visions, specific-resource-focused legal regimes are too narrow--or more appropriately, operate on the wrong scale-to effectuate any comprehensive vision of a sustainable community.'[24]

Thus the key of the enigma of the law of sustainable development is to determine how far and with whatever methods we wish to legally manage the subject or whether is it really necessary to do so? This is equally important in law, public and economic/financial administration or virtually any field of management.

It would be impossible today to meet the general requirements towards a clear definition as required among others by the case law of ECJ/CJEU[25] on clear conceptual basis. The case cited here regards environmental impact assessment, but is of much greater importance, referring to the need for an unambiguous and clear wording, serving as a basis for laying down obligations for national legislation:

> '43 The need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question (Case 327/82 *Ekro* v *Produktschap voor Vee en Vlees* [1984] E.C.R. 107, paragraph 11).'

In any case, we should come closer to a clear definition, as the Spanish author underlined: 'However, terminological precision is not only important for the legal community, it is *vital*, for the Law is a science of words.'[26]

A good practical example of why we need clear-cut definitions in European environmental law may be the issue of 'significant effect', which emerges in environmental areas in a number of provisions. The most illustrative cases are connected with environmental impact assessment, the essence of which is to clarify the significant environmental impact, or likely environmental impact,

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[24] LONG, Jerrold A.: Realizing the abstraction: using today's law to reach tomorrow's sustainability, Idaho Law Review 2010, vol. 46, p. 348.

[25] Case C-287/98, preliminary ruling submitted by the Tribunal d'Arrondissement de Luxembourg in the legal dispute between the Grand Duchy of Luxemburg and the Berthe Linster, Aloyse Linster, Yvonne Linster, September 19, 2000. Reports of Cases 2000 I-06917.

[26] Angel-Manuel Moreno: EC Environmental Law and National Administrative Law; A Reciprocal Influence with Problematic Implications, in Recht un Um-Welt (Essays in Honour of Prof. Dr. Gerd Winter) ed. by: Ludwig Krämer, Europa Law Publishing, Groningen 2003, p. 334.

to be assessed before any decision is made. There are many examples in this context, such as the Kraaijeveld case[27] or the Irish bogs[28] and many others.

The Irish bogs case is a good example for the difficulty of establishing an exact content for the term significant effect, as is clear from the judgment:

> '64 As far as the objection to thresholds is concerned, although the second subparagraph of Article 4(2) of the Directive confers on Member States a measure of discretion to specify certain types of projects which are to be subject to an assessment or to establish the criteria or thresholds applicable, the limits of that discretion lie in the obligation set out in Article 2(1) that projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (*Kraaijeveld*, cited above, paragraph 50)
>
> 65 Thus, a Member State which established criteria or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive.
>
> 66 Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the Directive, such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.
>
> 67 Similarly, a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size.'

A number of other examples may be mentioned in to demonstrate the implication of the definition, but here we restrict ourselves to only one more case. In relation to the construction of a motorway, the Italian regional legislature committed the mistake of excluding projects from the environmental impact assessment without providing for an opportunity to get acquainted with its substantial issues.[29] The ECJ emphasized also in this case:

> '44 Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive screening, be regarded as not being likely to have such effects (WWF, paragraph 45).'

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[27] Case C- 27/95, preliminary ruling in proceedings between the Aannemersbedrijf P.K. Kraaijeveld BV e.a. from the Dutch State Council vs. Gedeputeerde Staten van Zuid-Holland, October 24, 1996. (ECR 1996, page I-05403).

[28] Case C- 392/96, Commission vs. Ireland, September 21, 1999. Reports of Cases 1999 I-05901.

[29] Case C- 87/02, EC Commission vs. Republic of Italy, June 10, 2004, Reports of Cases 2004 I-05975.

Finally, it can be stated that the content of the term 'significant effect' had not actually been circumscribed by the judicial practice, the real requirement was much rather to come as close as possible to the notion. Thus the lesson is that we may not always achieve absolute sharpness in terms, if the underlying conditions are not clear enough. But the idiom 'significant effect' is much less complex and much easier to handle than sustainable development, since it is more closely connected with the objective of the respective legal requirement. In case of sustainable development, even the objective is ambiguous. In any case, the legally tangible requirement is that we should move in a given direction, we should aim at a given objective.

In light of the problem of sustainable development, the challenge to legislation may be defined as follows:

> 'But as we move away from the natural rights of individuals, we find that the law is nothing more than the formalization of our particular preferences at a particular point in time. We create laws to achieve or maintain particular economic conditions, to manage and allocate risk, to create a specific aesthetic, or to protect, preserve, or restore particular natural resources that otherwise possess no inherent rights ... my position is that we protect these landscapes, plants, animals, and ecological systems because we *choose* to do so, not because they are granted rights under our 'rule of law.''[30]

Let us now turn back to the major question: how to define the legal content of sustainable development? At this point it is worth presenting some views of distinguished authors:

> 'As such, it is difficult, at present, to describe sustainable development as a binding international principle at the traditional sense ... Rather, sustainable development, in international law, can be understood through a combination of two complementary approaches. First, it can be seen as an emerging area of international law in its own right. ... a corpus of international legal principles and treaties which address the areas of intersection between international economic law, international environmental law and international social law aiming toward development that can last. Procedural and substantive norms and instrument, which help to balance or reconcile these fields, form a part of this body of international law and play a role in its implementation. And secondly, sustainable development may also serve as a different type of norm in its own rights, one that facilitates and requires a balance and reconciliation between conflicting legal norms relating to environmental protection, social justice and economic growth.'[31]

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[30] LONG, Jerrold A.: Realizing the abstraction: using today's law to reach tomorrow's sustainability, Idaho Law Review 2010, vol. 46, p. 349-350.

[31] CORDONNIER SEGGER, Marie-Claire and KHAFLAN, Ashfaq: Sustainable Development Law – Principles, practices and prospects, Oxford Univ. Press 2004, p. 46-47.

Thus, the potential regulatory area of sustainable development law is ever so complex, its borderlines are indefinite, and if we wish to find some legal clarity, then our best choice must be environmental law. It is not very likely that we may get a clear and uniform answer on the question of what we mean under sustainable development law. European environmental law specialists aim for the recognition of the concept:[32]

> 'Being perhaps more a guideline to political action than a normative-legal concept, the political importance of the concept 'sustainable development' cannot be underestimated....'

Thus we are not able – and most probably we should not try – to give a concrete legal definition of sustainable development, instead we may try to come closer, even with serious limitations. As a consequence, sustainable development is somewhat a guidance, an objective, a theoretical fundament, we should strive for,[33] and less a legal requisite. Of course, there are many possible legal consequences, in case politics is willing to implement such requirements. The major problem here is that we cannot really discern the respective political will, therefore the enigmatic phrasing is still capable of covering the legally binding obligations in a penumbra of mystery. If there is in fact any legal requirement, it is still too vague, and may only be implemented indirectly, via a more concrete, direct set of targets. This is finding is substantiated by the examples presented in our title on EU legislation and the seemingly legal definition of sustainable development.[34]

The complexity of the concept of sustainable development – as evidenced by our excursions into international law and European integration – including factors of development, poverty, social security, public health, indigenous people, natural resources, environmental protection, water, etc. makes it impossible to set up a consistent system.

> 'Sustainable development is not a static concept ... hence inherently varies *ratione temporis*... The contents of sustainable development thus vary *ratione personae*. They also vary *ratione materiae*.'[35]

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[32] JANS, Jan H. – VEDDER, Hans H.B.: European Environmental Law, After Lisbon, 4th Edition, Europa Law Publishing, 2012, p. 8.

[33] Similarly to the wording enshrined in international law, see for example: 'Striving at a lasting improvement and protection of Danube River and of the waters within its catchment area' – Convention on Cooperation for the Protection and Sustainable Use of the Danube River (Danube River Protection Convention), Sofia, 1994 www.icpdr.org.

[34] See Article 2 of Regulation (EC) No 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, Official Journal L 288 , 15/11/2000 p. 1-5.

[35] BARRAL. Virginie: Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm, The European Journal of International Law, Vol. 23. no. 2, 2012, p. 382.

Indeed, there are several variations, based on the above mentioned three factors. As regards the variations over time, the best approach is to look at the changes in wording in EU policies in response to the 2008 crisis, replacing sustainable development with the notion of sustainable growth. As far as the personal factor is concerned, the lawyer or the economist, the sociologist or the engineer may have completely different vision of the same concept. Moreover, environmental and development texts do not necessarily use the same language.

We may also add that besides the different factors listed above, at least two further elements must be identified, namely the variations according to geographical area (*ratione territorii*) or the variations related to the level of development (*ratione progressionis*). As regards these two variations it is safe to say that the understanding of developing and developed countries is usually different. Contextual changes and the variations of the extent, scope or coverage of the problem are constant, and this may also be considered the *differentia specifica* of the subject.

Embarking upon the assessment of the content of the term, several authors share a similar understanding, claiming[36] that there are four elements of sustainable development: environmental integration, intergenerational and intragenerational equity and sustainable use – although the latter is much rather a tautology than a particular element. Cordonnier-Segger and Khaflan in their foundational work on sustainability law[37] discuss the main principles of international legal documents related to sustainable development in separate chapter, as follows:

- the principle of integration, as well as the correlation, coherence of social, material and environmental objectives;
- the sustainable use of natural resources as the obligation of the state;
- common heritage of mankind;
- equity and eradication of poverty;
- common, but differentiated responsibility;
- precautionary principle;
- public participation;
- good governance.

Thus, the vision of legal science and the picture presented by international documents is very similar with some minor variations. At the end of this chapter, we provide a summary of lessons learnt.

Consequently, it is expedient to return to the concurrent meanings of sustainability and sustainable development, summarized by Bosselmann in a simple and clear form, which comes closest to our perception of the concept:

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[36] DURÁN, Gracia Marin and MORGERA, Elisa: Environmental Integration in the EU's External Relations, Hart Publishing, 2012, p. 41-41.

[37] CORDONNIER SEGGER, Marie-Claire and KHAFLAN, Ashfaq: Sustainable Development Law – Principles, practices and prospects, Oxford Univ. Press 2004, p. 103-166.

> 'The concept of sustainable development owes its meaning and legal status to the principle of sustainability... This characterization has three important implications for the sustainability discourse. The first is that sustainability is separate from sustainable development. Both terms are often used interchangeably, but needs to be kept separated from each other. The second implication ... the former is grounder in the latter.... The third implication is that sustainability is the most fundamental of environmental principles...
>
> The conceptual argument is that the principle of sustainability has been in existence for centuries with never any other object than the natural resource base. ... This core of sustainability cannot be different from 'sustainable' in the context of 'development'. The fact that social and material aspects are included in the concept of 'sustainable development' does, therefore, not require any deviation from the ecological core. On the contrary, only because of this core is it possible to relate the social and business components of sustainable development to a central point of reference. As a consequence, the entire concept becomes operable: development is sustainable if it tends to preserve the integrity and continued existence of ecological systems; it is unsustainable if it tends to do otherwise.'[38]

This approach relativizes the entire sustainable development-sustainability dilemma, stating that there is no reason to differentiate the two terms, since they are nothing more than the two sides of the same problem from two interrelated perspectives. Furthermore, the most important lesson learnt is that ecology or environment is the core element of the concept of sustainable development. As a result, we must consider environmental law as the core element of sustainable development legislation.

The essence of sustainable development may be summarized in simple way (which we shall use in order to provide a solid basis for the relevant discussion):

> 'A synthesis of these core documents show 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. ... Development will be sustainable only when both intergenerational (environmental protection) and intragenerational (fair economic and social development) equity are granted, and this is to be achieved through their integration.'[39]

The same author has a formula for the equation:

> *Sustainable development = (Intergenerational Equity + Intragenerational Equity) x Integration*

[38] BOSSELMANN, Klaus: The Principle of Sustainability (Transfomring Law and Governance), Ashgate, 2008, see first p. 62, then p. 53.

[39] BARRAL, Virginie: Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm, The European Journal of International Law, Vol. 23. no. 2, 2012, p. 380.

We must not forget that overemphasizing the economic side (stressing rules of materialistic profit-seeking, as is the case today) leads to a dead-end, and may easily leave sustainability behind. A Jesuit economist from Leuven Catholic University underlined[40] that the creator of the current business order is neither an 'invisible hand', nor the price-mechanism of the market, but man. Business is not governed by blind mechanisms, but by man. That is the reason why – so Muzslay – while the laws of the physical world mean absolute force, the laws of business are only relative. Consequently, the laws of business may be transformed to accommodate a more sustainable direction, if the necessary motivation is available within all levels of governance.[41]

Existing misunderstandings, divergent interpretations, covert contexts – most of which are intentional or at least knowingly developed – may lead to a change of emphasis in the use of words by the iconic figure of sustainable development. Meadows claims:[42]

> 'In my opinion this (sustainable development – the authors) is an oxymoron, a term with nonsense meaning. To many people, 'development' seems to imply that we can simply keep going as we have for the last 100 years, depleting resources on a large scale and polluting heavily. And adding some kind of 'sustainability' makes the detrimental effects of our model of development go away. I am more interested in the term 'resilience.' This concept is about how to structure a company or a city or a country so that it can continue to function quite well even in the face of major shocks. Implementing policies that give you resilience tends to make the system more sustainable.'

Does this mean that the era of sustainable development has come to an end before it could really begin? We do not think so, and we shall come back to this below to present our view of this process of transformation.

In summary, it is worth taking a look at the language of regulation. Is there any piece of legislation willing to determine the meaning of sustainable develop-

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[40] Muzslay István: Gazdaság és erkölcs, http://www.ppek.hu/k120.htm, In Belgium he works under the name István Muselay.

[41] Muzslay employs the terms 'economy', 'economic', but in the present book we will use the terms 'business' or 'material' development instead, since these terms give rise to misunderstings between economists and other social scientists. In modern economics, the demarcation between'economy' and'society' is very problematic. In the terminology of economics, the economy is not a sphere of the social structure. Every social interaction ('economic' or 'other') may have economical aspects, in case the parties make rational decisions, if they see consider their relationships as an exchange – they transfer something and they receive something else in exchange. These rational exchanges do not always exhibit material, financial or business aspects – the way other branches of science would implicitly require from economics.

[42] MEADOWS, Denis: http://www.siemens.com/innovation/apps/pof_microsite/_pof-spring-2010/_html_en/prof-dennis-meadows.html.

ment, and does it provide us with a better solution? For example, an EU legal definition from 2000[43] presented above reads:

> 'Article 2
> For the purposes of this Regulation:
> 'sustainable development' means the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations.'

Although this seems to be a legal definition, in practice this wording does not provide us with the necessary basis for arriving at direct regulatory or implementative conclusions, to give flesh to the bones of the concept. One thing is certain: sustainable development may be defined by law and this definition puts ecology in its centre. Thus, our conclusion can be that it is closely related to environmental law. Furthermore, the Regulation presents a clear picture, covering standard of living and welfare as the economic element, present and future generations as the social component, requiring that these aspects also accommodate the capacity of the ecosystem. We cannot expect anything more from legislation.

2 Resilience?

One of the main protagonists of the Club of Rome, an author of The Limits to Growth, Denis Meadows spoke about resilience in several recent meetings, claiming: 'This concept is about how to structure a company or a city or a country so that it can continue to function quite well even in the face of major shocks.'[44]

The IUCN Draft Covenant in its Article 9 also covers resilience. Actually, this article is relatively new in the Draft Covenant, inserted only in the fourth edition in 2010 – while the third edition in 2004 did not contain this expression, but at this time Article 9 enshrined 'eradication of poverty' –, stating: 'The capacity of natural systems and human communities to withstand and recover from environmental disturbances and stresses is limited, and shall be sustained or restored as fully as possible.' Turning to the commentaries on the IUCN Draft,[45] we do not learn much more, at least there is no mention made of any

[43] Regulation (EC) No 2493/2000 of the European Parliament and of the Council of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, Official Journal L 288 , 15/11/2000 p. 1-5.

[44] http://www.siemens.com/innovation/apps/pof_microsite/_pof-spring-2010/_html_en/prof-dennis-meadows.html.

[45] 'Nonlinear (accelerating or abrupt) changes have been previously identified by a number of individual studies of ecosystems. The Millennium Assessment concluded that ecosystem changes are increas-

legal conditions or consequences. Article 9 and the commentaries attached to it both refer to a phenomenon, an attribute of natural or social systems. Meadows, by contrast, considers resilience a management tool, something worth using. If resilience is so important, that even the IUCN added resilience as a fundamental principle to its environment and development draft; if it is as important as prevention, precaution, proportionality, eradication of poverty, then we also have to consider this principle (?), concept (?), tool (?), method (?) a bit more carefully.

Again, our major question here, besides the content of the concept itself, is whether any legal consequences may flow from resilience. And even more importantly: what is the relationship between resilience and sustainability? Does it mean that sustainability is not workable, has it been overused in too many aspects by too many actors – sustainable banking, sustainable financing etc. -, without achieving any result, and thus it is time to change the wording to something similar but new? Shall we solve the problem by rebooting the system as in the case of computer programs, when they do not work properly? Of course, we should first try to define the concept, in order to understand its purpose.

In its introductory paper, the Resilience Center of the Stockholm University[46] states:

> 'Resilience is the capacity of a system, be it an individual, a forest, a city or an economy, to deal with change and continue to develop. It is about the capacity to use shocks and disturbances like a financial crisis or climate change to spur renewal and innovative thinking. Resilience thinking embraces learning, diversity and above all the belief that humans and nature are strongly coupled to the point that they should be conceived of as one social-ecological system.'

The original definition is thus imported from ecology.

The 'mother' of resilience in social sciences is the Nobel-prize winner economist, Elinor Ostrom, who – together with her husband, Vincent – in their oeuvre[47] focus on sustainability of socio-ecological systems (SES). This science aims at the integrated study of ecological, technological, social, economic and political factors including with their interrelationship, with the objective of understanding whether the users of resources invest enough time and energy into their adaptation to changing circumstances, what is generally called 'the tragedy of commons'. According to the researchers, the interaction between indi-

ing the likelihood of nonlinear changes in ecosystems. Examples of such changes include disease emergence, abrupt alterations in water quality, the creation of 'dead zones' in coastal waters, the collapse of fisheries, and shifts in regional climate. Because of the danger of irreversible, sudden changes, the resilience of natural systems and the human communities that depend upon them must be a priority.'.

46 What is resilience? An introduction to social-ecological research, see: http://www.stockholmresilience.org/download/18.5ea7abe0139d0dada521ac/resilience_summary_lowX.pdf.

47 This opus has been discussed by many authors, e.g.: TOONEN, Theo: Resilience in Public Administration: The Work of Elinor and Vincent Ostrom from a Public Administration Perspective, Public Administration Review, Volume 70, Issue 2, March/April 2010, pp. 193-202.

viduals and their environment shall determine whether we safeguard or exploit our natural resources. The SES system is also a manifestation of polycentricism, since the governance system is formulated as the network of government and non-governmental organs, their associations and companionships.

Ostrom and others write:[48]

> 'What is a SES? A SES is an ecological system intricately linked with and affected by one or more social systems. An ecological system can loosely be defined as an interdependent system of organisms or biological units. ... Broadly speaking, social systems can be thought of as interdependent systems of organisms. Thus, both social and ecological systems contain units that interact interdependently and each may contain interactive subsystems as well. We use the term 'SES' to refer to the subset of social systems in which some of the interdependent relationships among humans are mediated through interactions with biophysical and non-human biological units. A simple example is when one fisher's activities change the outcomes of another fisher's activities *through* the interacting biophysical and non-human biological units that constitute the dynamic, living fish stock. ... When social and ecological systems are so linked, the overall SES is a complex, adaptive system involving multiple subsystems, as well as being embedded in multiple larger systems.'

There is a whole new field of science emerging in connection with the social responses to the clear signals of unsustainability. One major characteristic of these scientific reactions is polycentrism, which supports strengthening the adaptive capacity of the different systems. Ostrom provides the complete picture[49]:

> 'Many of the capabilities of a parallel adaptive system are retained in a polycentric governance system while obtaining some of the protections of a larger system. By polycentric, I mean a system where citizens are able to organize not just one but multiple governing authorities at differing scales (see V Ostrom et al 1961; V Ostrom 1987, 1991, 1997). Each unit may exercise considerable independence to make and enforce rules within a circumscribed scope of authority for a specified geographical area. In a polycentric system, some units are general-purpose governments, whereas others may be highly specialized (McGinnis 1999a,b,c). Self-organized resource governance systems, in such a system, may be special districts, private associations, or parts of a local government. These are nested in several levels of general-purpose governments that also provide civil equity as well as criminal courts. ...

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48 ANDERIES, John M., JANSSEN, Marco A., and OSTROM, Elinor: A Framework to Analyze the Robustness of Social-ecological Systems from an Institutional Perspective, Ecology and Society, 2004, vol. 9 no. 1, Article 18 http://www.ecologyandsociety.org/vol9/iss1/art18.

49 OSTROM, Elinor: Coping with tragedies of the commons, Annual Review of Political Science 1999. vol. 2, available at www.annualreviews.org, p. 528.

> In a polycentric system, the users of each common-pool resource would have authority to make at least some of the rules related to the use of that particular resource. ...
>
> Polycentric systems are themselves complex adaptive systems without one dominating central authority.'

Resilience and polycentric systems or the SES system mean more or less similar things. See, for example again on resilience[50]:

> 'The ability of a system and its component parts to anticipate, absorb, accommodate, or recover from the effects of a hazardous event in a timely and efficient manner, including through ensuring the preservation, restoration, or improvement of its essential basic structures and functions.'

Resilience is futher elaborated in this recent comprehensive study:[51]

> 'Resilience, a concept fundamentally concerned with how a system, community, or individual can deal with disturbance and surprise, ... Resilience perspectives can be used as an approach for understanding the dynamics of human environmental systems and how they respond to a range of different perturbations ... For social-ecological systems (examined as a set of interactions between people and the ecosystems they depend on), resilience involves three properties: the amount of change a system can undergo and retain the same structure and functions; the degree to which it can reorganize; and the degree to which it can build capacity to learn and adapt (Folke, 2006). Resilience can also be considered a dynamic process linked to human agency, as expressed in the ability to deal with hazards or disturbance, to engage with uncertainty and future changes, to adapt, cope, learn, and innovate, and to develop leadership capacity (Bohle et al., 2009; Obrist et al., 2010). Resilience approaches offer four key contributions for living with extremes: first, in providing a holistic framework to evaluate hazards in coupled social-ecological systems; second, in putting emphasis on the capacities to deal with hazard or disturbance; third, in helping to explore options for dealing with uncertainty and future changes; and fourth, in identifying enabling factors to create proactive responses (Berkes, 2007; Obrist et al., 2010)....
>
> Recent work on resilience and governance has focused on communication of science between actors and depth of inclusiveness in decision-making as key determinants of the character of resilience. In support of these approaches it is

[50] O'BRIEN, Karen (Norway), PELLING, Mark (UK), PATWARDHAN, Anand (India): Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation Special Report of the Intergovernmental Panel on Climate Change, 8. Toward a Sustainable and Resilient Future, Coordinating Lead Authors: Karen O'Brien (Norway), Mark Pelling (UK), Anand Patwardhan (India): Cambridge University Press Information on this title: www.cambridge.org/9781107607804 © Intergovernmental Panel on Climate Change 2012, p. 563.

[51] *Ibid.* p. 453.

> argued that inclusive governance facilitates better flexibility and provides additional benefit from the decentralization of power. ...'

Of course, there are several other papers on this topic. Most of them were issued recently, since this area of research is relatively new – at least in the field of social sciences. The best and easisest synopsis would be to state in summary, that the essence of resilience is the ability to adapt ourselves to different crisis situations, or the ability to react in a flexible way. This general definition covers several components, such as the system approach, precaution, risk management, adaptation, flexibility, cooperation, involvement of the public, subsidiarity, integration, complexity, adaptation, adaptation, adaptation ... New concepts also feature in the notion of resilience, such as polycentrism, meaning diversity in the given context. These are all familiar terms, yet the major novelty is that they appear in a certain context and relationship, acquiring a slightly different character in the process.

Is resilience different from sustainability? Do they have opposite meanings or even parallel issues, probably supplementary elements? Or is resilience an instrument of sustainability? Or is it perhaps that case that we are simply replacing the definition of sustainable development with a new, less commonplace concept? There is no simple answer. Sustainable development, as an objective – with primarily ecology at its heart instead of material development or economic growth – may well be used, but we are far from achieving it. Resilience, for its part, may be considered an implementation method or variety of sustainable development, probably the most important from the set of instruments, since its objective is something we tend to forget or disregard. Namely, to be prepared for the unexpected, rendering resilience to be the science or art of managing such situations.

A fine example for such situations is climate change. We can no longer avoid facing the issues of climate change, however, due to the lack of global agreement and also the physical conditions of the atmosphere, the most viable variation today is to accommodate ourselves to the actual situation and develop the ability and modality of adaptation. The EU has an entire website[52] dedicated to this topic. There is 'An EU strategy on adaptation to climate change – Council Conclusions',[53] mentioning in point

> '1. RECALLS that the EU objective of keeping the global mean surface temperature increase below 2°C compared with pre-industrial levels requires urgent and ambitious mitigation action by the global community; UNDERLINES that adaptation is a necessary and unavoidable complement to mitigation;',
> taking the followings as facts:
> '6. EMPHASISES the need for increased action across all levels and by all relevant actors in order to address adaptation to climate change in the most effective

[52] http://ec.europa.eu/clima/policies/adaptation/documentation_en.htm.

[53] Council of the European Union, Brussels, 18 June 2013 11151/13.

> way; UNDERLINES that the impacts of climate change such as floods, droughts, heat waves, sea level rise and erosion, can vary considerably between territories and localities across Europe and that therefore most adaptation measures would need to be taken at national, regional and local level, as well as at cross-border level, and should be based on the best available knowledge and practices and the specific circumstances of the Member States;'

Therefore, the best solution is to set up adaptation strategies. Accordingly, such strategies shall not hinge on either sustainable development or resilience, but much rather: both sustainable development and resilience.

There are several legal principles, and instruments which may well be included in the toolbox of resilience, for the complex adaptive system requires complex institutional system as well. These instruments and principles are not much different from the set of tools of sustainable development, it is only their emphasis that may be different.

The Hungarian economist, Sándor Kerekes, described the characteristics of a resilient society.[54] 'The resilient, adaptive, and therefore sustainable socio-economic system may be characterized by the following:

- maintaining and safeguarding diversity (biological, landscape, economics and social diversity),
- the limitation of the man-made 'control' over ecological diversity,
- the honour of modularity (communicating systems may better tolerate shocks),
- learning, and the recognition of and emphasis on the importance of social networks and locally designed rules.'

In some way or another, all of the above elements appear in the variety of views on this subject. This renders our endeavours towards finding a proper solution extremely difficult, since in the framework of the current socio-economic reality the majority of social and business regulatory systems do not tend in this direction. Thus, while we argue for decentralization, centralization is the reality; while we argue for the interests of diversity, in many aspects uniformity is the answer; while the activity of social networks is essential, they have less and less support, etc.

We may agree with van Rijswick that it is indispensable to put the emphasis on environmental legislation:[55]

> 'Achieving a sustainable society also assumes a resilient society that can cope with new environmental problems and risks and is able to adapt to new circumstances. A changing environment, changing political conceptions with respect to or relating

[54] KEREKES Sándor: Fenntarthatóság és társadalmi felelősség – A globalizálódó világ megoldatlan problémái, Magyar Bioetikai Szemle, 2011. 1. p. 10.

[55] RIJSWICK van, Helena F.M.W.: The Road to Sustainability: How Environmental Law Can Deal with Complexity and Flexibility, Utrecht Law Review, Volume 8, Issue 3 (November) 2012, point 7.

> to administrative expenses and regulatory pressure, or new scientific discoveries which highlight the deficiencies of older instruments and principles, all call for the adjustment and modernization of organizational forms, instruments and principles which are central to environmental law.
>
> 'Resilience' is concerned with the capacity of the legal system and society to adapt to changing circumstances and the way in which uncertainties are dealt with. This ability to adapt is especially important in environmental law since the use of the environment and its natural resources requires long-term policies. In environmental law it is therefore necessary to take into account any uncertainties regarding future developments such as those related to the effects of climate change. In turn, this requires flexibility on the part of the legal system and in standard setting. However, this immediately raises the question of how such a requirement of flexibility can be reconciled with the requirements of legitimacy and legality. The aim is to achieve a balance between flexibility and legal certainty in order to facilitate adaptive governance that safeguards legitimacy. Furthermore, the question arises how to cope with complexity in legal and societal issues.'

Below, as an illustration, we provide a 'shopping list' of those legal instruments, which may serve resilience or polycentrism in a wider context. In short, these elements best fit the idea of the SES:

A) principles and fundamental concepts:

- integration,
- subsidiarity,
- precaution,
- cooperation,
- planning,
- human rights and pubic participation (which may both be treated as basic postulates of the system);

B) questions of public order

- decentralization, self-governance,
- consultation,
- transparency,
- forming associations, and
- other forms of cooperation,
- diversity of civil society;

C) legal instruments

- different forms of environmental assessment (EIA, SEA),
- risk assessment and management,
- proper discretion,
- cooperative instruments (such as contractual relations),
- incentives (not restricted to market incentives),
- control – monitoring – feed-back,

- extensive and constant supervision of the implementation of decisions, with the need for adjusting the same,
- complex, multi-polar systems.

3 Some Conclusions

In the previous chapters we covered several aspects of international and European law, including ethical considerations. In the present short survey we presented the most important sources of and ideas on sustainable development with all their possible implications – all in a nutshell. We arrived at the conclusion that sustainable development law cannot be considered a self-evident concept, with a definite meaning and clear-cut instruments. It is much rather a general concept, which can and should exert an influence on different policy fields. Not only is it impossible to provide a legal definition of the concept, references to sustainable development also lack direct legal consequences. Indeed, even the wording of the concept is in flux – sustainable growth, green economy, etc. Moreover, the components of the theory may also be presented in different variations, covering several issues ranging from the environment to poverty, from peace to development, from solidarity to security. None of these characteristics serve legal certainty or legality, but all components have some normative nature with a diverse set of respective enforcement means and methods.

It would be impossible to have several equally important priorities from among the major components of sustainable development. Thus, it is best to focus on the original source of the idea of sustainability – that is the environmental, ecological aspect. We are convinced that there is no such thing as 'neutral' sustainability. It is not necessarily a manifestation of the so called 'strong sustainability'[56] vision, but it is important to define it as a priority.

Finally, we try to provide a selection of those components, which may actually have legal consequences and at the same time also serve sustainable development (for example, peaceful settlement of disputes – mentioned by the UN expert group in our previous chapters – is an important element of sustainable development, but it does not particularly characterize the subject, but belongs rather to the general toolbox of international law). These elements are not special to international issues (although, admittedly, the concept of 'common but differentiated responsibilities' is a sustainable development instrument of international law, but it was construed for the interests of international coopera-

[56] For a simple explanation it is best to go online, where we may find complex and simple answers, such as: 'To remain and grow, natural capital needs to be maintained, as the functions it performs can not be duplicated by manufactured capital. In the Strong sustainability model, the environment and natural resources form the all-embracing foundation for society and its institutions, with the economy as one subset of society.' Available at http://www.swedesd.se/what-we-do/education-for-strong-sustainability-and-agency-essa/strong-sustainability.

tion). We shall now turn to those instruments and components, which are indispensable for sustainable development, and – as a consequence of our previous choice of focus – also have environmental protection as their central attribute. In the following we present an outline of the basic components – or a strict minimum – of all sustainable development schemes. As such, these elements constitute the immanent essentials of the concept.

Rights of future generations

The *rights of future generations* or intergenerational equity. According to current trends, this concept does not have a special set of institutions of its own. Therefore, it would be expedient to attach to it *the right to environment* or in other words to translate this equity into the language of environmental human rights. This relationship has already been mentioned in several documents, both in the field of equity and environmental rights. A recent example is an – unfortunately unsuccessful – commission proposal within the Council of Europe:[57]

> 'A. Draft recommendation ... 9. Bearing in mind that society as a whole and each individual in particular must pass on a healthy and viable environment to future generations, in accordance with the principle of solidarity between generations, the Assembly invites the governments of member states to:..'

Intragenerational equity

This is coupled with *intragenerational equity,* i.e. the rights of current generations, with a clear link to the right to environment issue. At this point it is worth introducing an important cornerstone of the international legal development of the concept of sustainable development. The International Court of Justice rendered its judgment in the Gabčikovo-Nagymaros Project (*Hungary/Slovakia*) case on 25 September 1997[58] and discussed the concept of sustainable development in paragraph 140 of the judgment. Judge Weeramantry's opinion attached to the judgment is even more widely known than the judgment itself. Herein he describes sustainable development as the right of people to the furtherance of their happiness and welfare, which is, at the same time, counterbalanced by the right to the protection and preservation of the environment. According to Judge Weeramantry, the balance between the two opposing principles is created by sustainable development.[59] The recognition of this concept is also apparent from the literature following the judgment. For example, in the work of Patricia Birnie, Alan Boyle and Catherine Redgwell entitled *International Law and the*

[57] Doc. 12003 Parliamentary Assembly, 11 September 2009, Drafting an additional protocol to the European Convention on Human Rights concerning the right to a healthy environment, Report Doc. 11729, Reference 3497 of 28 November 2008, Draft recommendation adopted unanimously by the committee on 4 September 2009.

[58] Case concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia). judgment, I.C.J. Reports 1997, pp. 7-84.

[59] See the Separate Opinion of Vice-President Weeramantry, p. 92.

Environment, the authors claim that the right to sustainable development creates the balance in the conflict of the human right concerning environmental protection and the right to economic development.[60]

Public participation

Public participation is also fundamental, together with all of its three major pillars (access to information, participation in decision-making and access to justice). Stemming from the idea of environmental democracy, this principle also covers environmental justice and provides a better chance for the implementation of generational equity. Article 1 of the Aarhus Convention[61] reads:

> 'Objective – In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.'[62]

Cooperation

Cooperation or cooperative instruments play a primary role in all levels, either in the form of international cooperation or stakeholder cooperation, etc., constituting an additional element of public participation. Cooperation forms part of the general provisions of all international conventions related to sustainable development or environmental protection. The IUCN Draft[63] has a full Part – Part VIII. – dedicated to implementation and cooperation. Indeed, most obligations related to the achievement of sustainable development necessitate cooperation – suffice to mention the common heritage of mankind, shared natural resources, common and differentiated responsibilities, eradicating poverty, etc.

Integration

Integration is a summary and the institutionalization of sustainability, providing a simplified or handy version of the major contents of sustainable development. Its main objective is to manage social, material, financial and environmental interests in one system, instead of considering them as separate issues. In its Gabčikovo-Nagymaros judgment,[64] the ICJ emphasized:

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[60] Birnie, Patricia – Boyle, Alan – Redgwell, Catherine: *International Law and the Environment*. Oxford: Oxford University Press, 2009, p. 115.

[61] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 1998, available at http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

[62] The concept of environmental democracy was discussed in detail in 'Environmental Democracy' (ed. by: BÁNDI, Gyula), Europa Law Publishing, 2014.

[63] Draft International Covenant on Environment and Development Fourth Edition: Updated Text, 2010 IUCN.

[64] ICJ 25 September, 1997, Official citation: Gabčikovo-Nagymaros Project (Hungary-Slovakia), Judgment, 1.C. J. Reports 1997, p.7, available at http://www.icj-cij.org/docket/files/92/7375.pdf.

> '140. ... Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.'

There are many well-know instruments serving integration, among others the environmental impact assessment, strategic environmental assessment, or the work of the different sustainable development councils or committees operating in most countries.

Integration and sustainable development are the two sides of the same coin. Usually three basic elements are identified which must cooperate but which are still separate from each other – environment, society and business. However, it is essential for these dimensions to serve a common strategy or action in light of their interrelatedness. The essence of integration is to ensure the necessary representation for the environment, so that it has some chance in the reconciliation process. From the point of view of sustainable development, integration is a real challenge for legislation, as clearly stated in the above judgment and in related assessments.[65] Integration may be considered a practical path to implement sustainable development.

The precautionary principle

The precautionary principle covers among others prevention and risk assessment. It has a substantial moral content, covering an extended responsibility for different conducts. Principle 15 of the Rio Declaration[66] covers possible practical solutions, and provides the principle with a global character: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' The CJEU

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[65] See, for example Sands, who underlines that the central element of sustainable development is integration SANDS, Philippe: The 'Greening' of International Law: Emerging Principles and Rules, Indiana Journal of Global Legal Studies: Vol. 1: Issue 2, 1994, pp. 302-303. Available at: http://www.repository.law.indiana.edu/ijgls/vol1/iss2/2.

[66] UNCED conference, 3-14 June, 1992. Rio de Janeiró, http://www.nfft.hu/dynamic/Rio_Decl_m.pdf.

(ECJ) rendered several important judgments[67] in order to clarify the content of the principle, among others introducing the concept of 'scientific uncertainty'.

Subsidiarity

Finally, we must mention *subsidiarity*, which covers not only the effective distribution of competences and duties, but also the involvement of different institutional systems – state and local governments, social organs, NGOs, businesses, churches, small communities, etc. 'Subsidiarity is therefore a somewhat paradoxical principle. It limits the state, yet empowers and justifies it. It limits intervention, yet requires it. It expresses both a positive and a negative vision of the role of the state with respect to society and the individual.'[68] The same author later provides the following summary: 'It is not limited to the market and to maximizing the sphere of rational economic self-interest; nor is it directed merely to fostering individual self-realization through a rich and diverse 'civil society'; nor yet can it be exhausted by application to legislative or democratic processes in the political sphere. It comprehends all of these, as separate aspects of a common good, the sum total of the conditions necessary for individual human flourishing. In this way subsidiarity can be regarded as a principle of distribution of the diverse social functions that together make up the common good.'[69]

[67] Case N. 180/96, United Kingdom vs. Commission, which was also supported by the Council, May 5, 1998, Reports of Cases 1998 I-02265 or First Instance Court, T-13/99, Pfizer Animal Health SA vs. The Commission (2002), *E.C.R.* II-3305, September 11, 2001, or First Instance Court, joint cases T-74,76, 83-85,132,137 & 141/00, Artegodan GmbH and others vs. The Commission, November 26, 2002. E.C.R. II-4945., etc.

[68] CAROZZA, Paolo G.: *Subsidiarity as a Structural Principle of International Human Rights Law*, The American Journal of International Law, vol. 97, 2003, p. 44.

[69] CAROZZA op. cit. 45-46.

CHAPTER 6

Why Do Nations Comply?

Law and Economics of Enforcement in International Environmental Law

1 Introductory Remarks

The present and the following chapter examine compliance and obedience issues: in what way do we expect the principle of sustainable development to affect the actions of the nations (more precisely of their governments)? In the previous chapters of the book we demonstrated that the principle of sustainable development appears in international law not as a binding legal term but only as an 'objective', a 'goal'. On the other hand, there are clear examples when international treaties, agreements between nations define the meaning of the different elements of the definition of sustainability. This is in particular the case in the field of international environmental law or for example in the case of public participation (Aarhus Convention).[1] But even in these 'hard law cases' the classical critics of international law voice their concerns: international law lacks the legal 'teeth' to enforce its provisions[2]; it is not really law, because its rules are not enforced by sovereign coercion. Under such conditions, compliance even with clear requirements is expected to be sporadic. These are the well-known arguments of the realist (Machiavellian, Austinian) view of international law.[3] According to this perspective, nations only follow international law because it serves their self-interest, or there exists some form of external enforcement mechanism – for example reprisals. At the same time the opposing radical view, the so-called optimistic theory claims that enforcement is not a real problem. As Henkin's famous statement goes: 'it is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.[4] This school of thought denies the fact that realistic view has a clear and strong empirical basis. The general dominance of non-compliance can be simply a selection bias: the cases when nations violate the international law receive more publicity and consequently they seem to outnumber the cases of compliance.[5] Contrary to these two classical theories,

[1] FRENCH, Duncan: Sustainable Development. in: Malgosia Fitzmaurice – David M. Ong – Panos Merkouris (eds.): Research Handbook on International Environmental Law. Cheltenham: Edward Elgar, 2010, p. 56.

[2] See HIRSCH, Philip – MØRCK JENSEN, Kurt *et al.*: *National Interests and Transboundary Water Governance in the Mekong* op. cit. 27.

[3] Machivelli argued that 'a prudent ruler cannot keep his word, nor should he, where such fidelity would damage him, and when the reasons that made him promise are no longer relevant.' MACHIAVELLI, Niccolo*: The Prince* (Quentin Skinner and Russell Price, eds) Cambridge: Cambridge University Press, 1988, p. 61-62. For Austin's theory see: AUSTIN. John: *Lectures on Jurisprudence or the Philosophy of Positive Law*. Vol. I. Fifth edition. London: John Murray, 1873.

[4] HENKIN, Louis: *How Nations Behave: Law and Foreign Policy*, New York : Published for the Council on Foreign Relations by Columbia University Press, (1979) 2d ed. p. 47.

[5] An interesting counter-argument to Henkin's general compliance theory concentrates on the 'shallowness' of rules. Raustalia and Slaughter term the difference between a requirement defined in a rule and the actual conduct as deepness or shallowness of a rule. The deeper the regime, the greater the required change. The critics argue that 'much of the evidence of high compliance with international law is merely

the present and the next chapters attempt to demonstrate that international law, as such, does not induce compliance, but the lack of sovereign does not induce breaches in every case where the nations' short term interest would speak for breaching the law, the international treaties. The models presented here attempt demonstrate the difference between the effects of the particular rules under international law, answering the question: why do nations comply under some circumstances and violate rules in other cases?

We begin with the traditional law and economics analysis which analyses the problem of the nation's choice in the international context. The decision makers in these models are the nations (more precisely the government) and the main effects influencing their behaviour originate from other nations, transnational politics, members of the 'international society').

According to the traditional law and economics view of enforcement, premised on Becker's path-breaking article, compliance is influenced by three factors: (i) the compliance cost or the parties' respective national benefit from the project, (ii) the probability of the sanction in case of breach, and (iii) the extent of the sanction. Imagine a nation planning a project which pollutes the environment, causing environmental losses. It will compare the national benefit resulting from the project with the probability and extent of ensuing sanctions. The national benefit, the compliance cost is the difference between the national cost and benefit resulting from the project if the project remains unsanctioned. If the national benefit is reduced or in case either the probability or the extent of the sanction rises, then the chance of accepting the project will decrease. (For the sake of simplicity, the term of compliance cost will be applied. The cost is the opportunity cost: a cost of foregoing the project equals the benefit which it would have yielded.)

In his famous work, Ellickson distinguishes among three types of control or enforcement mechanisms: first-, second- and third party control. (See Table 1.) The actor imposing sanctions on himself in case of violating the rules is the first party controller. The self-control system arises from a person's moral values rather than from external forces. As Ellickson emphasises, 'the overall system of social control must depend vitally on achieving cooperation through self-enforcement.'[6] The typical form of second party control is the self-help, or the promisee-enforced contract. The partner conducts rewards and punishments. Third party control may take the form of spontaneous social forces, hierarchical organizations – non-governmental institutions, courts or the government.

indicative of the 'shallowness' of many international agreements and should not be generalized to more demanding cases' RAUSTIALA, Kal and SLAUGHTER, Anne-Marie: International Law, International Relations and Compliance,' in CARLSNAES, Walter – RISSE, Thomas and SIMMONS, Beth A. (eds.), *Handbook of International Relations*. London: Sage Publications, Ltd., 2002, p. 543.

6 ELICKSOn, Robert: *Order Without Law*. Cambridge: Harvard University Press, 1991, 126.

Controller	Rules	Sanction	Combined System
1. *First party Control*			
Actor	personal ethics	self-sanction	self-control
2. *Second party Control*			
Person Acted Upon	contracts	personal self-help	promisee enforced contracts
3. *Third party Control*			
Social Forces	norms	vicarious self-help	informal control
Organization	organization rules	organization enforcement	organization control
Government	law	state enforcement	legal system

Table 1. Elements of a Comprehensive System of Social Control; Ellickson, Order Without Law 131

In the language of the traditional enforcement model, second and third party enforcements provide a range of potential sanctions against a norm-breaching action. First party enforcement reduces the compliance cost. According to this concept, the preferences of the actor will change, the national cost of the project (even where there is no sanction) increases, since the self-image of the actor as a norm-abiding entity is corrupted.

The first three subchapters analyse these enforcement mechanisms in the framework of international and European law. They present a model where international law is capable of changing the behaviour of nations, notwithstanding the fact that the traditional form of (domestic third party) enforcement – through court – is far from effective in the international context.

The fourth subchapter concentrates on the *ex ante* choice made by nations: why do they accept the restrictions set forth under international law? It is worth recalling that the sustainability principle originates from two sources of international law: from treaties and from customary international law. The latter is independent from the nations' acceptance; the nations are unable to avoid the consequences, sanctions ensuing from the breach of such norms. But treaties are contracts – nations are free to refuse participating in them.

As demonstrated in the previous chapters, the sustainability principle is an extremely open term comprising several (in some cases, conflicting) unclear elements. It is, at best, a very soft law term – even if there is recent jurisprudence clarifying some of its elements. The fifth subchapter deals with the problems of vagueness: why do the parties incorporate very vague standards into the treaties instead of employing clear rules?

1 First Party Enforcement

The first subchapter concentrates on the case of first party enforcement. Prior to embarking upon the analysis however, it is worth stressing that the three forms of enforcement presented by Ellickson are ideal types. In reality, hybrid systems exist; the different controllers can work together in countless ways. The models presented in this subchapter (the subchapter consists of four main theories of obedience: Franck's legitimacy theory; Chayes and Chayes' managerial theory; Koh's transnational legal process theory; and the so-called liberal theory – see for example Moravcsik, Slaughter) share the view that international law influences the behaviour of the nations through modifying their preferences, i.e. their view about their national interests. As mentioned in the first paragraphs of the chapter, this is the typical case of first party control: the rule changes the benefit drawn from an action. Nations comply because an action provides more benefit, even if external enforcement is very weak. The subchapter will not provide a full description of the models – this is available in the relevant literature. The main goal is much rather to present a law and economics view of these models. As will be presented, the models identify many factors behind the preference change that are consistent with the economic models: change in expectations, change in available information, cost-effectiveness of obedience (ethical internalisation of the rules).

1.1 Legitimacy Theory

Thomas Franck explicitly adapts[7] the theory and terminology of Immanuel Kant, Ronald Dworkin and John Rawls to find the theoretical basis of the compliance effect of the international law: 'in a community organized around rules, compliance is secured – to whatever degree it is – at least in part by the perception of a rule as legitimate by those to whom it is addressed'.[8] One of his main questions is why a country with great economic and military power (i.e. without any real threat of punishment) should choose to 'play by the rules' even if it is detrimental to its short-term or strategic interests.

Franck recognises that rules exert more or less a *compliance pull*. Such a pull does not mean that the rule will be always followed – other pulls also have effect on the nations' conduct. However, compliance pull results in discomfort in case of noncompliance. Compliance pulls appear when the nations attempt to argue that their conduct is not against the rules, or when they try to find a morally acceptable reasoning for their noncompliance.

Franck identifies the basis of this compliance pull in the rule-making processes, the quality of the rules. In short: compliance pull results not from

7 See for example: FRANCk, Thomas M.: Legitimacy in the International System, *American Journal of International Law*, 82 (1988) 705-59. FRANCK, Thomas M.: The Power of Legitimacy Among Nations. New York: Oxford University Press, 1990.

8 FRANK op. cit. (1988) 706.

rational calculation over the cost and benefits of compliance, as presented in the introduction to the chapter, however, as regards the *legitimacy of the rules*, legitimacy exerts a pull to compliance which is powered by the quality of the rule.[9]

This legitimacy stems from four elements – these elements strengthen the legitimacy of the rules (either in the international or the domestic context): (i) determinacy – which relates to the clarity of the rule or norm; (ii) symbolic validation – which is based on procedural practices or rituals; (iii) coherence – which refers to the possibility of the 'generalisation' of the main principles underlying the rule; and (iv) adherence – which refers to the connection between the particular primary rule and the secondary rules about the enactment and interpretation of such primary rules.

1.2 Managerial Theory

Similarly to Henkin and the optimistic view, Abram Chayes and Antonia Handler Chayes[10] start with the statement that the sense of obligation is empirically self-evident in state behaviour. Their main thesis is that this compliance is not the result of an explicit calculation of costs and benefits in case of every decision. Nations avoid explicit calculations because rational calculation is in itself costly. In law and economics literature, it is well-known that in complicated situations, when cost-benefit calculations are impossible or too costly, the players use simple 'heuristic'. According to the Chayeses, the main heuristic move in international relations is the compliance pull.

From the law and economics point of view, they provide two main reasons why compliance and not another rule of heuristic will be used. First of all, treaties are consensual. If the parties join a treaty, they demonstrate that it serves their interests. As law and economics would argue, because of this calculation at the time of joining, the recalculation is relatively unlikely to lead to an opposite conclusion, to the net benefit of noncompliance.

Secondly, the ratification of a treaty generally creates a domestic bureaucracy with a vested interest in compliance – they are against any form of questioning the rationality of compliance. Naturally, the bureaucracy is not monolithic, containing not only supporters of the treaties but opponents of compliance as well – when the mechanical compliance to a treaty requires the violation of other domestic or international rules unquestionably supported by other members of the same bureaucracy. Because of this conflict, even if rational calculation is missing from the decision about compliance, incomplete compliance is a general phenomena in international law.

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9 FRANK op. cit. (1990) 49.

10 See for example: CHAYES, Abram and CHAYES, Antonia Handler: ‚On Compliance', *International Organization, 47* (1993), pp. 175-205. CHAYES, Abram and CHAYES, Antonia Handler: *The New Sovereignty: Compliance with International Regulatory Agreements*. Cambridge, MA: Harvard University Press. 1995.

The lack of rational calculation is a very strong assumption in their theory. In consequence, they suggest that the instances of non-compliance are generally inadvertent. They offer a 'management' model, where they suggest that nations' compliance should be promoted not through coercion but, rather, through a cooperative model of compliance, which seeks to induce compliance through interactive processes of justification, discourse and persuasion.

In light of the following models on second- and third party control, it is worth recalling Koh's critique: the main force for compliance in Chayes and Chayes' model is external. Koh stresses that this is the fear of the loss of reputation. While Chayes and Chayes start their model from the viewpoint of negating economic calculation behind compliance decisions and try focusing on the shift in national interest – they finally arrive at an external, third party control system.

1.3 Transnational Legal Process Theory

In Koh's transnational process theory,[11] compliance equals 'bringing international law home', in other words, it is the incorporation of international obligations into domestic legal processes. The core of this theory is the method of the internalisation of transnational legal norms into national law by domestic institutions. The model assumes that the nations comply with international rules because these are integrated into domestic law. Koh distinguishes between three types of internalization: social, political and legal internalization. In his view, legal internalization is the key issue.

In his view the transnational legal process has three sequential components facilitating incorporation: (i) interaction among the transnational actors, (ii) their interpretation of international law, and (iii) internalization. The transnational legal process is a mechanism whereby an international law rule is interpreted through the interaction of transnational actors, and then internalized into a nation's domestic law. In his view the repeated transactions among the nations generate novel interpretations of legal rules. When an international rule is incorporated into the domestic system, the concomitant new interpretation will also become part of the domestic system. Consequently, participation in this transnational legal process is highly important. However, participation also enhances the pressure of incorporating the new international rules into domestic law, due to the interactions among the participants. While many critics of this model focus on the domestic pressure (the criticism most often formulated against this approach is that it focuses only on Western liberal countries), Koh argues that internalization basically depends not on the domestic system, but on the participation in the transnational process. Turning towards environmental issues, his model suggests that the most effective method for increasing the

[11] KOH, Harold H: Transnational Legal Process, *Nebraska Law Review*, 75 (1996), pp. 181-207. KOH, Harold H: Why Do Nations Obey International Law?, *Yale Law Journal* (1997), pp. 2598-2659. KOH, Harold H: Bringing International Law Home, *Houston Law Review*, 35 (1998), pp. 623-82.

level of environmental regulation by far is to empower more environmentalist groups to participate in transnational legal processes. If they can participate in this process they can affect the interpretation of international law and increase the pressure for incorporating international environmental law into domestic legal systems.

The most important feature of this transnational legal process approach is the shift in focus. The former two approaches, particularly the legitimacy theory (but also Henkin's optimistic theory and the realist school) personify the nations. They treat nations as unitary actors with their own preferences and interests (national interests). In this model, nations as unique decision-makers disappear (temporally), and several other players enter the process: governments, multinational corporations, non-governmental organizations, international organizations, private individuals. They participate in the transnational legal process and exert pressure on the legal system to incorporate international norms. But at this point the model stops. Incorporation is the end of the road. If the rule is incorporated into the domestic legal system, the rule is presumed to reflect the preference of the nations.

1.4 Liberal Theory

While subnational actors appear in the managerial and the transnational legal process theory, these actors are the very focus of liberal theory. Protagonist is typically the judiciary, but the role of the legislatures and the administrative agencies are also under scrutiny. The leading theorists of this approach, Andrew Moravcsik and Anne-Marie Slaughter, argue that the nations' compliance depends mostly on the domestic structure.[12]

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[12] MORAVCSIK, Andrew: Taking Preferences Seriously: A Liberal Theory of International Politics. *International Organization*, 51 (1997), pp. 513-53. MORAVCSIK, Andrew: The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, *International Organization*, 54 (2000), pp. 217-52. MORAVCSIK, Andrew: In Defense of the 'Democratic Deficit': Reassessing Legitimacy in the European Union, Journal of Common Market Studies, 40 (2002), pp. 603-24. Andrew Moravcsik: Is There a 'Democratic Deficit' in World Politics? A Framework for Analysis, Government and Opposition, 39 (2004), pp. 336-63. MORAVCSIK, Andrew: Liberal Theories of International Law. in: Jeffrey L. Dunoff, Mark A. Pollack (eds.): *Interdisciplinary Perspectives on International Law and International Relations*. Cambridge: Cambridge University Press, 2012, pp. 83-118. RAUSTIALA, Kal: The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, Virginia Journal of International Law, 43 (2002), pp. 1-92. RAUSTIALA, Kal: and SLAUGHTER, Anne-Marie: International Law, International Relations and Compliance,' in CARLSNAES, Walter, RISSE, Thomas and SIMMONS, Beth A. (eds.), *Handbook of International Relations*. London: Sage Publications, Ltd., 2002, pp. 538-57. SLAUGHTER, Anne-Marie:: Judicial Globalization,' Virginia Journal of International Law, Vol. 40, (2000), pp. 1103-1124. SLAUGHTER, Anne-Marie:: *A New World Order*. Princeton, NJ: Princeton University Press, 2004. SLAUGHTER, Anne-Marie:, and BURKE-WHITE, William: The Future of International Law Is Domestic (or, The European Way of Law), *Harvard International Law*

The key assumption is that national interest is not given – it results from preferences of different groups in society. For example, the model stresses that policy makers usually attempt to design domestic institutions so as to change future social pressure on policy-makers in a direction consistent with their favoured views. Moravcsik argues that national politicians use legalized agreements to tie the hands of their successors and to tie their own hands in dealing with domestic interest groups (asserting that international law restricts them from fulfilling certain demands) (Moravcsik, 1997: 225-9).

According to this view, international law is not 'state-bidding' but much rather 'other-bidding'. The most important rules do not concentrate on the signatory states, instead, international regimes seek to alter the performance and the relative influence of non-state actors. At the same time they attempt to strengthen the actors, creating new domestic and international coalitions supporting compliance. Their aim is to create a lock-in situation where compliance is the best choice for decision-makers.

Moravcsik stresses three mechanisms of this vertical pressure. The simplest mechanism of vertical enforcement is *a change to domestic and transnational representative institutions* through which the supporters receive more mandates. The second mechanism is *to transform the interests of domestic and transnational social groups*. This means some form of shift in pressure groups preferences – i.e. internalization of norms. The third mechanism is *to encourage enforcement by embedding new collective objectives*.[13] The most important mechanism is the independent judiciary – for example through modifying the rules the court must apply (this is similar to the view of transnational legal process approach) and ensuring the independence of the judiciary, empowering the courts to use, and allowing the litigants to refer to international law as relevant law in lawsuits.

As a conclusion of the first subchapter, it is worth stressing that while the above-mentioned models (for example the legitimacy and the managerial theory) typically reject the realistic view and attempt to identify preference-generating effects (i.e. compliance pull) of international norms, they implicitly assume that the external forces of international law (peer pressure in legitimacy theory, compliance mechanism in managerial approach) are of significance. Koh and the liberal theories seem more successful in building compliance theories because they discard the realistic 'national interest' view which treats nations as single players with externally determined national interests (changing as a result of legitimate rules or compliance mechanisms under international law), concentrating on interactions among subnational or supranational actors. However, they are unable to provide a complex account of the changes in national interests as a result of interactions among these actors. The next chapter will make an attempt to provide a more complex view of the political process determining the actual policy of the nations.

Journal, 47 (2006), pp. 327-352. SLAUGHTER, Anne-Marie:: New Directions in Legal Research on the European Community, *Journal of Common Market Studies*, 31, (1993), pp. 391-400.

[13] MORAVCSIK op. cit. (2012), 99.

2 Second Party Enforcement

As demonstrated in the beginning of the chapter, according to the law and economics theory of enforcement the effect of the law depends on three elements: the cost of compliance (benefit stemming from non-compliance), the probability of punishment in case the actor violates the rule and the extent of such punishment. The first subchapter presented the models focusing on the cost of compliance – the first party enforcement models attempt to demonstrate the effect of international law on the preferences of the nations. By contrast, the present and the following subchapters will assume that the nations' preferences (nations' interests) are given, therefore, the only way to modify the nations' conduct is to refine the expected punishment in case of violation. This is the so-called rationalist school of international law theory: involving a unitary rational actor optimizing utilities distributed along its preferences.[14]

Such models do not assume that international law always enforces changes in the behaviour of the nations. They merely assume that the law always enforces changes in the cost of non-compliance. The most important form of sanctions are the three Rs of Compliance in Guzman's words: reciprocity, retaliation, and reputation.[15] The focus of the subchapter is on reciprocity and retaliation. The reputation and other forms of third party enforcement (international courts and compliance mechanisms in international regimes) will be the subject of the next subchapter.

2.1 Retaliation and Reciprocity

Historically, the most commonly used forms of direct second party self-help sanctions were the hostage and bond systems: the offended nation would nationalise (part of) the assets of the violating nations located within their territory, or they would keep the citizens or officials of the other state hostage unless the violating activities were ceased or sufficient damages were paid. More recently, reciprocity and retaliation play a similar role. In case of reciprocity the offended nation stops performing his duties toward the offender. By contrast, retaliation includes other sanctions besides non-performance. This form of self-help is a very important method when the partners have several interactions with each other.

According to the law and economics theory,[16] reciprocity and retaliation have a similar incentive effect: they impose a relevant cost on the offender. Reciprocity is effective in case performance is valuable to the (potential) offender. However, in some cases, this incentive is not enough. Assume a contract

[14] It is worth stressing that according to this realistic view, the preferences affecting the decisions are not always in the public interest – such preferences may be those of the political leaders.

[15] GUZMAN, Andrew T.: How International Law Works. Oxford: Oxford University Press, 2008. pp. 33-49.

[16] For detailed (but short) account see: GUZMAN, Andrew T.: A Compliance-Based Theory of International Law. *California Law Review* 90 (2002), pp. 1823-87.

between two neighbouring countries about cleaning a shared lake or preventing over-consumption, exploitation of some transboundary natural resources (a forest for example). Both parties commit themselves to participate in the project. But after some time, Nation A recognises that the project costs for them exceed their benefit with 100. If Nation A breaches the contract, Nation B suffers 150 loss – for example its costs increase with 150. However, if in the name of reciprocity Nation B ceases its own part it results in 80 loss (or extra cost) for Nation A. In this case the reciprocity is obviously not enough to prevent Nation A from offending.

At this point it is worth recalling that the law and economics theory does not say that all offenses must be prevented. Efficient breach also exists: an offense is efficient if the compliance cost of the offending nation exceeds the losses the offense causes to others. For this reason (i.e. the basic rationale behind the requirement of proportionality between the sanction and the harms caused), in the example Nation A should face a sanction with 150 loss in case of offence. Such an effective (and efficient) sanction would require an additional sanction which is worth 70 besides the reciprocity.[17]

But these self-help methods are not unflawed. First of all, it is difficult to set appropriate sanctions. If the sanction is inappropriately gentle, too much damage will be caused. However, if the sanction is too harsh then efficient actions will not be undertaken. Secondly, the sanction (especially the retaliation) imposes costs on the sanctioning nations as well. This cost may render the threat of such sanctions implausible. Assume that the service of Nation B in the mentioned contract is its own part of the same environment project. If it does not perform it causes losses not only for Nation A, but for Nation B, too.

In order to set efficient sanctions, the first necessary condition of sanctioning the breach is observability. It is a general view that some activities are non-observable. For example the offended nations are unlikely to detect an environmental damage with long-term consequences.[18] Secondly, even if the loss is observable, the offender and offending nations must disagree about whether the actions leading to the damage are consistent with the law. All in all, the self-help responses are typically triggered by activities which the offended nation considers an offense. The partner will rarely concede its non-compliance. In case of retaliation or reciprocity, Nation A will argue the non-compliance of the sanctioning nation. For example in the Gabčikovo-Nagymaros Case, both parties argued that they only took unavoidable mitigating actions – i.e. self-help actions.

[17] Naturally, this example could be resolved through renegotiation: Nation B can offer more than 20 extra service (payment). The sum of this extra (minimum) 20 and the agreement service worth 80 is enough to induce compliance. But this renegotiation is not always possible; according to law and economics theory the transaction cost may be too high.

[18] See for example KLEIN, Natalie: Settlement of International environmental law disputes. in: FITZMAURICE, Malgosia – ONG, David M. –MERKOURIS, Panos (eds.): *Research Handbook on International Environmental Law*. Cheltenham: Edward Elgar, 2010. p. 381.

Besides observability, the other main requirement for efficient retaliation or the threat of reciprocity is credibility. Assume a one-shot game: Nation A caused (or will certainly cause) losses to Nation B. Nation B must bear additional costs if it sanctions Nation A, but it must cover only its losses in case it fails to introduce sanctions. Nation B is not interested in increasing its own costs through imposing sanctions against Nation A. The threat of Nation B is not credible – therefore, this threat will not affect the compliance of Nation A *ex ante*. Nation A could calculate that sanctions will not be applied in case of losses incurred.

In order to be credible, the sanction must yield some benefit in the future. For example, if nations repeatedly interact over time, it may be worthwhile for states to sanction the breach immediately. It thereby develops its reputation as a hard nation which sanctions offenders. This is the so-called *repeated game model*. Naturally, two neighbouring nations play such repeated games, since they must interact in the future. According to game theory, this threat of sanctions will be more credible if (i) the cost of the sanction is lower; (ii) the future benefit of Nation B from the compliance of Nation A is higher, and (iii) Nation B has relatively low discount rates. The *discount rate* measures the relative importance of the future cost and benefit compared to the current cost and benefit.[19] Naturally these conditions, especially the condition of great future benefit from cooperation are met primarily in relations of countries conducting many interactions, this is in particular the case with neighbouring countries. It is also worth recalling that several famous environmental pollution disputes in international law (for example Trail Smelter and the Gut Dam Arbitration between Canada and the US, Lac Lanoux Arbitration between France and Spain, Gabčikovo-Nagymaros case between Hungary and Slovakia, Iron Rhine Railway Arbitration between Belgium and the Netherlands, Pulp Mill case between Argentina and Uruguay) originate from conflicts between neighbours.

However, it should be pointed out that in case of the repeated game an opposite effect also occurs. Self-help imposes higher costs on the sanctioning nation. In these repeated games, amicable relations among the nations bear great value. Retaliation, especially if the sanctioning nation errs – for the offense does not result from intentional breach but from an accident (which cannot be avoided with due care) – imposes very high future costs on the sanctioning nation in a repeated or continuous relationship.

[19] The discount rate is the extent to which a player values benefits today over benefits accruing a year later. Let it be represented by *r*. If someone receives 10 in the next year, its present value is 10/(1+r). If someone receives 10 each year, its present value is 10 + 10/(1+r) + 10(1+r)2 + ... = 10(1+r)/r.

2.2 Problems of Second Party-Enforcement: Multilateral Issues

The above mentioned model of credibility is built on the assumption that there is an offending and an offended nation. However, in case of global environmental issues there is no one single offended nation.[20]

The problem of multilaterality appers in the context of self-help as free riding. If self-help imposes costs on the sanctioning nations, then all nations will have an incentive to leave the sanctions to others. If a single nation retaliates, all nations will benefit from the reduction of the damage caused, but they will not bear cost of the sanction. This so-called collective action (or public goods) problem is typically assumed to result in general free-riding: no or only a suboptimal sanction will be imposed against the offending nations. (The next chapter will present some solutions for this problem: fortunately, universal free-riding is not always the consequence of collective actions or public goods problems.)

3 Third Party Enforcement

It is worth distinguishing between two main forms of third party enforcement: the informal and formal control. The informal method concerns reputation: the sanction results in the loss of 'reputational capital'. *Reputation capital* is indispensable if a nation wishes to cooperate with others, as such, reputational loss reduces the chance of beneficial cooperation. Naturally, reputational theory is closely linked to the 'international community or club of nations' view which is the key factor inducing compliance both in the legitimacy and the managerial theory of compliance. Franck claims that 'obligation derives not from consent to the treaty, or its text, but from membership in a community that endows the parties to the agreement with status, including the capacity to enter into treaties.'[21] Chayes and Chayes suggest that the ultimate impulse for compliance is not the fear of direct sanctions, but of loss of reputation.[22]

The most important formal enforcement mechanisms are the (international or domestic) courts and international organisations. They play similar roles, they employ similar mechanisms: (direct) enforcement and (indirect) compliance. Enforcement mechanisms use sanctions against offenders. Compliance mechanisms typically offer help (in many cases financial assistance) in reaching the required level of compliance or remunerate the achievement of goals.

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[20] FRANCK op. cit. (1998) 756.

[21] FRANCK op. cit. (1998) 756.

[22] CHAYES and CHAYES op. cit. (1995) 120.

3.1 Reputation

For the sake of simplicity, let us analyse reputational effects in a very simple model. Assume that (i) the nation loses its reputation entirely if it violates any rules of international environmental law, and (ii) a nation with zero reputation is unable to cooperate (contract, start joint project, etc.) with any other nation in the future. Suppose that the nation's net payoff from cooperation is $ß - C$ in each year; where ß is the benefit from the cooperation and C is the compliance cost. This payoff is assumed to be certain in case of compliance. In case of offense, the payoff is $ß$ in the first year because it saves the cost of compliance; but 0 in the consecutive years because it lost any chance for cooperation. Thus, $ß$ is lost.

The nation will compare the payoffs for the scenarios of compliance ($ß - C$ in every year) and that of non-compliance (B in the first year and 0 in the subsequent years.) As seen, in case of retaliation, the future benefits must be discounted in order to compare them with the present ones. It can be substantiated[23] that compliance is more likely if (i) the cooperative benefit, $ß$ is greater and/or (ii) the cost of compliance, C is lower and/or (iii) the discount rate is lower.

Law and economics models are often criticised because the exact values of these parameters are unknown. This is true, but the main goal of such models is not to determine whether a given nation will follow a given set of rules – the model much rather attempts to determine the factors affecting the *likelihood* of compliance. Firstly, the nations' reputational incentives depend on its involvement in international cooperation – this is likely to increase the benefit, ß. For example, in case of neighbouring countries this benefit is greater, so contractual and informal rules between them are less likely to be violated. Secondly, rules requiring higher compliance costs are less likely to be followed. Thirdly, nations with high discount rates are less likely to comply. As Goldsmith and Posner claim, 'rogue states', controlled by irrational or impulsive leaders, or 'unstable states' with shorter time horizons and, consequently, higher discount rates, are more likely to deviate than others.[24]

As already mentioned, this model is oversimplified. First of all, the assumption of the immediate and total loss of reputation is unrealistic: reputational effect occurs only if other nations, potential future partners know about the offense. Even if the offended nations disclose such information, the offending parties can deny the accusations, and fabricate evidence to prove that they observed the rules. The problem is similar to the problem presented in the case of self-help. Albeit similar, it is not the same. While in the case of second party

[23] If the nation complies, its payoff (in present value) is $(ß - C)(1+r)/r$. If the nation does not comply, its payoff (in present value) is ß. Consequently, compliance is the better alternative if $(ß - C)(1+r)/r > ß$. After some rearrangement: $ß > C(1+r)$.

[24] GOLDSMITH, Jack L. and POSNER, Eric A.: A Theory of Customary International Law. *The University of Chicago Law Review*, 66 (1999), p. 1127.

control the problem resulted from the observability of the offense, in this case, verifiability is the key. Verifiability requires not only that the partners recognise the deviation (i.e. observability), but that they are able to convince third-parties about the offense – when the offender tries to defend itself.

The second implicit assumption of the model is the inevitably negative effect of the offense. But reputational capital can be reconstructed even after a serious violation of an international rule. For example a change in leadership typically rehabilitates nations, rebuilds the trust. An opportunistic nation can exploit with this option – for example, before an almost certain change in government they will be less careful and more prone to violate (intentionally or simply negligently) international rules.

Thirdly, it is worth recalling that reputation loss will not be the same in case of all breaches, unlike the model assumes. For example, reputational loss can depend on the severity of the violation, the extent of the damage caused, etc.

3.2 Direct Enforcement

The traditional law and economics model of enforcement focuses on direct enforcement. The key parameters, as seen in the first paragraphs of the chapter, are the magnitude and the probability of sanctions in case of offense. International law differs in both parameters from national legal systems.

International law is typically criticised for its too 'soft' sanctions. The tribunals in many cases refrain from issuing special orders, instead they call upon the parties to continue the negotiations and the verdict only sets some cornerstones of this negotiation. For example this was the final decision of the tribunal in the Gabčikovo-Nagymaros Case. In Pheobe Okowa's opinion this cautiousness is a consequence of the lack of enforceability behind the courts' verdict. The tribunals recognise the weakness of the international community in enforcing the decisions, and they defend their own authority by avoiding 'hard' but unenforceable decisions.[25] As the case of European Court of Justice demonstrates, if the court is supported by a strong administration, the decisions tend to have teeth.

On the other hand, this traditional view of international enforcement mechanisms must be modified in the light of widespread internalisation of international rules into domestic law, or in the light of the European legal order where *acquis communautaire* (or, more recently: *union acquis*) automatically forms part of national law. These changes introduce new players, new types of courts into the system: domestic courts which are less reluctant to take tough sanctions against offenders. Naturally, if the defendant is their own government, this cautiousness sneaks back but to a lower extent.

[25] OKOWA, Phoebe: Responsibility for environmental damage. in: FITZMAURICE, Malgosia – ONG, David M. –MERKOURIS, Panos (eds.): *Research Handbook on International Environmental Law*. Cheltenham: Edward Elgar, 2010. p. 311.

The second relevant feature of the international legal process concerns both the magnitude and the probability of direct sanctions: according to the classical rule, only states can be parties to this process. The individual victims and offenders are 'represented' by their states. Such representation could result in conflict of interests. For example according to one of the classical analysis of *Trail Smelter* case (in which industry in British Columbia polluted and caused losses to the farmers in the US near the border) this conflict appears in the too soft strategy of the United States. The US government is assumed to fight less fiercely than the individual victims would do, because it must consider the interests of similar companies near the borders of the US. The government must calculate not only the uncompensated loss suffered by the farmers in a given case, but the potential future damages payable by the polluters in case Canada prevails and the case will be referred to as precedent in other cases.[26]

However, the exclusive right of states to litigate seems to be diminishing, as of late. While there are some courts which accept actions only from states (for example the ICJ, the WTO Dispute Settlement Body), others have made it possible for individuals to litigate. The most important supranational tribunal where the enforcement of private rights is possible is the European Court of Justice (ECJ). Moreover, as international law and *acquis communautaire* (*union acquis*) are incorporated directly into national law or if the environmental rights appear as human rights, this movement toward private enforcement of international law is expected to accelerate.

However, the private enforcement of law also has a weakness: the private interests of the litigants almost always differ from the public interest. This difference can result in either sub- or supraoptimal litigations. It is well-documented in law and economics literature that private enforcement is suboptimal if the litigants cannot capture a significant portion of the social surplus or if the cost of litigation is too high compared to their assets.[27] Public enforcement is typically assumed to be a better alternative if the government has an advantage in collecting evidence, or if the verdict can be used as an argument in other cases – which is a benefit not considered by the private actor – or if the litigation cost is so high that it makes private litigation unaffordable for individuals. On the other hand private enforcement could result in supra-optimal litigation as well, when the social benefit from the case is minimal while the personal stake (the amount of damages) is large.[28]

Besides these general issues concerning the direct enforcement in international law, environmental regimes have two additional characteristics which reduce the likelihood of sanctions: (i) scientific debates on the magnitude of the losses or on the issue of causation and (ii) the global context of many environmental damage. The necessary condition of a verdict against a polluter state

[26] OKOWA op. cit. 307.

[27] For a detailed account, see: BEBCHUK, Lucian A. and KLEMENT, Alon: Negative-expected-value suits. in: SANCHIRICO, Chris W. (ed): *Procedural Law and Economics*. Cheltenham: Edward Elgar, p. 2012.

[28] See STEPHAN, Paul B.: Privatizing International Law. *Virginia Law Review* 97 (2011), pp. 1606-1617.

is that the claimants demonstrate a casual link between the offense and their material losses. For example even Australia, the claimant in the *French Nuclear Test Cases* admitted that the claimant 'has no cause of complaint unless it suffers more than nominal harm or loss.'[29] And France argued against New Zealand in 1995 in the Second French Nuclear Test Case similarly: claimants should base their case on solid grounds, 'something other than worst-case scenarios'.[30] The tribunals are typically very conservative in accepting evidence or in measuring the damage.

Hitherto, all cases in which international tribunals referred to sustainability were bilateral cases. In the current structure of international litigation, the procedure for dealing with multiple claimant states is missing. In national systems these problems are mitigated with class actions, collective litigations or *actio popularis*. But the international process has no similar method. Even if there seems to be *erga omnes* rights and obligations involved under in international environmental law, or in cases related to other aspects of the sustainability the basic procedure of international tribunals is that all claimants can sue only for their own scientifically proved losses.[31] As the crucial environmental problems are global ones, the direct enforcement mechanism is unable to deal with the most important issues. It is worth recalling that this weakness of private enforcement appears not only in international but in domestic context as well: the plaintiff of a tort law case must prove his or her own damage and casual link between the activity of the defendant and this loss. The environmental loss is rarely the personal loss of somebody – nobody will have standing to bring suit for damages. In most environmental cases injunction can be achieved in private enforcement mechanism.

International environmental regimes cope with this failure of the tribunal systems through own enforcement mechanisms. Several treaties and environmental regimes formed international organisations to help the compliance. But these organisations only exceptionally received rights to sanction non-compliance. The most important exception is the Kyoto protocol establishing the Enforcement Branch. This branch can deduct the nations' assigned amount for the next period and suspend their eligibility to make transfers if the nation exceeds the emission limit.[32] But very few examples of direct sanctioning (for example the withdrawal of some rights or privileges from the nations) can be found in international environmental regimes – perhaps because sanctioning would conflict with the main objectives of these organisations: partnership and assistance in compliance.

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[29] OKOWA op. cit. 311.

[30] The Franch counsel, M. Perrin Brichambaut – cited by: Okowa op. cit. 312.

[31] See for example: KLEIN op. cit. 388. OKOWA op. cit. 307 (claiming that in case of damage to biodiversity and greenhouse emissions, a direct casual nexus of the kind present in Trail Smelter is impossible to establish), 309 (for an analysis of Gabčikovo-Nagymaros case).

[32] Kyoto Procedure: Art XV, paragraph 5.

3.3 Compliance Mechanism

Compliance mechanisms can be defined as procedures with the main goal of encouraging 'a non-complying state to return to compliance without accusing it of wrongdoing, or holding it accountable for the consequences that entail from wrongdoing.[33]

Article 8 of Montreal Protocol is one of the first occurrences of the non-compliance procedure. According to this mechanism, if parties fail to provide the required data to the Secretariat

> 'The Parties, at their first meeting, shall consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance.'

The Montreal Protocol was also the first treaty under which some parties, i.e. the developing countries can receive significant financial assistance to mitigate their compliance costs.[34] Since then several international environmental regimes have created compliance mechanisms. The consequences of non-compliance in these systems typically consist of advice, technical assistance from the international organisations.[35]

It is apparent that these compliance mechanisms are closely related to Chayes and Chayes' managerial theory of obedience. One of the general elements of the compliance mechanism in these regimes is the phenomenon of *implementation and compliance review institutions*. Their non-confrontational and forward-looking approaches are typically presumed to facilitate the performance of countries through the processes of continuous cooperation.

Some regime use *aid conditionality* as well. As seen, Chayes and Chayes assume that non-compliance results primarily from capacity problems not from intentional, opportunistic deviation. According to this optimistic view, even such capacity problems can be mitigated if nations are compensated for their compliance cost. However, as for example Chang (1995) demonstrates with respect to global environmental issues, this method is highly inefficient and dangerous if international organisations are imperfectly informed about the potential recipients' optima in the absence of assistance. If this assistance is available, the nations will be interested in sending false signals about their low

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[33] FITZMAURICE, Malgosia and ELIAS, Okufemi A.: *Contemporary Issues in the Law of Treaties*. Utrecht: Eleven International Publishing, 2005, p. 291.

[34] Chayes and Chayes also refer to the Montreal Protocol as a typical method of the international regime to cope with the lack of capacity. CHAYES and CHAYES op. cit. (1993) 194.

[35] For a detailed analysis of compliance procedures in international environmental law, see: LOIBL, Gerhard: Copliance rocedures and mechanisms in: FITZMAURICE, Malgosia – ONG, David M. – MERKOURIS, Panos (eds.): Research Handbook on International Environmental Law. Cheltenham: Edward Elgar, 2010.

capacity, because if they are able to mislead the funding organisation, they can draw additional financial assistance.[36]

4 Why do Nations Contract?

The realist view rejects any compliance effect of international law. According to this view the nations behave lawfully simply because their interests coincide with the law: the actions required by law are ideal for the nations. In this case, the compliance cost is negative, lawful actions do not generate costs but maximise the benefits of the nation even without any international legal sanction or reward.

Even if realists also admit that some effectiveness of the international law (i.e. international rules sometimes modify the nations' behaviours) but they calls the attention to another open question: why nations contract. It is clear that they do not terminate international contracts or exit those treaties that are no longer in their interest because of reciprocity, retaliation, reputational or other cost. But why do they tie their own hands, why do they take upon themselves the threat of these sanctions for case of following their pure national interests? The answer is similar to the logic of private contracting: they want to ensure cooperation and coordination. The main difference between the two problems is that while the *cooperation problem* occurs when – in lack of a contract – the parties fail to create joint benefits, the *coordination problem* can typically be solved without sanction (communication between the parties is enough). However, the nations must face a new difficulty in case of coordination problem: the distributional issue.

4.1 Cooperation

Goldsmith and Posner note that '[s]tates refrain from violating treaties (when they do) because they fear retaliation from the treaty partner(s), or because they fear a failure of coordination.'[37] Failure of cooperation results in a joint loss of cooperative benefit due to the common free-riding strategy.

A simple example helps explain this problem. Table 2 presents a simple choice of two parties. Both parties have two alternatives: to comply or to deviate. Four scenarios are possible: when both parties comply, when both deviate, when only Nation A complies and when only Nation B complies. The table indicates the payoffs of the parties in each case. In each cell, the first payoffs (X, Y, Z, W) belongs to nation A, while the second set (x, z, y, w) to Nation B. In order to exclude irrelevant cases when the cooperation is not worthwhile, the model

[36] CHANG, Howard F.: An Economic Analysis of Trade Measures to Protect the Global Environment, *Georgetown Law Journal* 83 (1995), pp. 2131-2213.

[37] GOLDSMITH and POSNER op. cit. 1171.

presumes that the payoffs of both nations in case of mutual compliance (in case of cooperation) exceed those resulting from mutual deviation: X > W, and x > w.

First, for the sake of comparison consider the case when international law is irrelevant, because compliance is the best choice for both nations even in the absence of sanctions. This is the case when X > Z, Y > W, x > z and y > w. This corresponds to the aforementioned case of environmental treaty: even if the partner violates and, for example, pollutes the shared lake, exploited some transboundary natural resources, the best choice remains to avoid additional pollution. And in case of no pollution from the side of the other nation, the national interest will be compliance.

		Nation B	
		Comply	Deviate
Nation A	Comply	X,x	Y,z
	Deviate	Z,y	W,w

Table 2: Basic structure of cooperation and coordination games

Compare this optimistic case with the Prisoners' dilemma which is the classical presentation of the *cooperation problem*. Suppose the exactly opposite case: independently of the action of the partner the nation's best choice is to deviate. This is if Z > X, W > Y, z > x, and w > y. Imagine a case where one of the two nations suffices to solve a problem – for example to monitor the illegal hunting in the border zone. But the cost of this project exceeds a nation's benefits. Neither of them will fight against the hunters alone, it is better for them to tolerate the illegal hunting (W > Y and w > y). Naturally, the elimination of illegal hunting yields benefits for both countries (Z > W and z > w). Finally, if both nations participate, they should bear only half of the total cost, and this amount shall be less than their own benefits: a joint project, cooperation provides net benefit compared to mutual deviation (X > W and x > w). It can be demonstrated that in this case both parties will free-ride, free-riding will be the dominant strategy (deviation is always a better choice than compliance) – both will wait for the other, consequently, the parties will end up in mutual deviation.

How do international treaties solve this problem? Suppose that the treaty defines sanctions which reduce the payoffs in case of deviation (reducing Z, z, W, and w). If these reductions are high enough (i.e. it reverses the relations among the payoffs of deviations and compliance: Z < X, W < Y, z < x, and w < y) then the parties will cooperate with each other, and they will join the program.

Naturally this method of sanctioning, of adopting treaties has its own problems. As seen in the previous subchapters the observability and verifiability problems can hinder the effectiveness of these sanctions. And, the magnitude of the efficient sanctions should be calculated as well. Moreover, the cost of negotiation about the exact forms and extent of the sanctions must be covered.

Fortunately, in some cases the problem can be solved without transactions between the parties. This is the already mentioned case of the repeated game. Two solutions are worth highlighting: the reputation and the tit-for-tat strategy. In case of the *reputation strategy*, the parties comply in the first period, keeping it up unless their partner deviates. But after the first instance of deviation they refuse to cooperate in any future time. The *tit-for-tat strategy* also commences with cooperation, and in each phase the players do what their partner did in the previous period; deviation results in deviation as response, cooperation induces cooperation. If the discount rate is not extremely low, both strategies result in cooperation. This tit-for-tat strategy is typically presumed to be the best strategy in a repeated game.[38]

Both strategies can ensure cooperation because the parties fear the consequences of their deviation. But two problems must be solved: the problem of the last game and the case where there are more than two players. The mentioned strategies result in cooperation only if the game has no fixed ending. If the parties know which period will be the last one, deviation will become the dominant strategy in the last period. But if it is certain that the parties will deviate in the last period then they will lose their incentive to cooperate in the former one: independently of their action the partners will deviate in the next (last) period; there is no reward for cooperating in the penultimate period. But if they deviate in that period, the incentives to cooperate disappear in the former period as well, and so on. Both strategies will result in cooperation if the parties do not know which period will be the last one; or more precisely: if the likelihood of termination (the probability that the game will terminate not in this or the next period) is sufficiently low.

The issue of multilaterality reappears. The strategies are clearly unworkable when there are several partners, because of the problem analysed in case of self-help methods: the sanction causes collective action problem, and all nations will tend to wait for the others to take the sanctions (and to bear its costs). The paradox is: sanctioning the free-riding strategy causes the free-riding problem itself.

Notwithstanding these problems, Goldsmith and Posner's argument is worth keeping in mind as a conclusion: 'the value-maximizing equilibrium in the bilateral prisoner's dilemma is not as robust as that in the coincidence of interest case. But it is not banal.'

4.2 Coordination

Let us suppose a bilateral program which fails if only a single nation works on it. But if Nation A participates, it reduces the cost of Nation B to such an extent, that Nation B becomes interested in joining. This is a coordination problem. Contrary to the prisoner's dilemma in this case, deviation is not

[38] The main flaw of the reputation strategy is that if the deviation is caused by any exogenous or random effect (or in case it is not a real deviation, but the other party makes a mistake in assessing the lawfulness of the action) the cooperation will never be resurrected.

a dominant strategy. In case of the prisoner's dilemma if one of the nations has committed itself to comply, its partner will continue to deviate. But in this case, such a commitment induces the partner to also comply. (In Table 2 X >Z, W > Y, x > z, and w > y.) Two equilibriums can occur: both nations comply or neither do.

Coordination comes into the picture because, as already mentioned, mutual compliance provides higher benefits for both nations than mutual deviation does. In this case if Nation A (or Nation B) commits itself to participate in the project, the other will participate as well. Once such commitments are made, neither nation has an incentive to deviate, because this brings higher payoffs than unilateral or mutual deviation.

At first sight, the threat of sanction seems unnecessary. But in a more realistic context, treaties are necessary because the coordination game needs some form of sanctions.

First, consider the case when nations do not know the other's payoffs. For example Nation A mistakenly believes that the deviation is the dominant strategy for Nations B. (Nation A believes that z > x, and w > y). In this case, Nation A will not comply. If Nation B has similar mistaken beliefs, it is certain that the game will lead to mutual deviation, similarly to the case of the prisoner's dilemma. In this case, as in the case of the prisoner's dilemma, the nations are interested in a treaty which incorporates some forms of sanctions. Similarly, the sanction will be necessary in case the parties' knowledge is not false, since they are only uncertain about the other's payoffs and consequently about its expected strategy. In this case the sanction against the deviation plays the role of insurance.

The second complication occurs due to the fact that payoffs can change over time. Suppose that both parties know that the circumstances can change and they know that after such change, one of the nations will lose its incentive to participate. For example, it is possible that deviation will be the dominant strategy for Nation B (z > x, and w > y) after some time. If the circumstances change, Nation B will violate the treaty. If Nation B recognises this possibility it will refuse any sanctions – it will cooperate when this coincides with its national interest, but it will deviate when the changes occur. Why would Nation B accept a contract? The threat of deviation would be mutual. It can be demonstrated that if neither party knows which nation will be interested in deviation, *ex ante* both are better off with a sanction, i.e. with a credible commitment.

Up to this point, cooperation was mutually beneficial for the parties. But in the coordination game, distributional issues can also cause additional difficulties. Let us suppose a special form of coordination game: the *chicken game*. In this case if one party commits to work on the project, the other is interested in deviation (Y > W, y > w), and both parties are better off if the partner complies and it can deviate (Z > Y z>y). In this case the core issue of coordination is not to reach the situation of mutual compliance instead of mutual deviation, but to

respond to the question which party must comply (and consequently bear the costs) and which can be the free-rider.

Finally, it is worth recalling that in contrast to the cooperation problem, in this case the equilibrium is not sensitive to the number (or end) of the game and multilaterality. Here, once a particular standard is established, none of the states gain anything from deviating from it.

5 Puzzle of Soft Law

The previous subchapter explained the emergence of international treaties with the help of the law and economics models of contracting. But international law, international environmental law in particular, differs from simple contracts. The treaties contain far less clear rules – as the previous chapters demonstrated, the sustainability principle is perhaps the most prominent example for this indeterminacy.

Naturally, soft law is not peculiar to international environmental law; they occur in other areas of law as well. Institutions of non-binding soft law also appear in private law – for example companies often sign non-binding agreements, so-called 'letters of intent.' Legislation often issues declarations – for example condemnation of the military activities or policies in other countries. According to the law and economics analysis of soft law[39] these instruments are used to communicate the intent of the issuer(s). Soft law, as any other form of law can be considered as a form of information about the probabilistic outcomes in the future. While hard law conveys information about the expected sanctions or rewards,[40] soft law conveys information about the expected changes in hard law in the future.

But there are significant differences between the case of companies, the case of declarations and the case of international environmental law. Firms rarely maintain the agreement in such soft form – they typically either prepare well-designed contracts or terminate the bargain. Even if in politics, the next move, i.e. the formulation of hard law is often left out, this can be purposeful. If the addressees adjust their behaviour in anticipation of hard law, the enactment (and the cost of enactment) of hard law is rationally skipped. However, it is worth pointing out that for example the principle of sustainability in international

[39] See for example: GERSEN, Jacob and POSNER, Eric A.: Soft Law: Lessons from Congressional Practice, *Stanford Law Review* 61 (2008), pp. 573-628 or GUZMAN, Andrew T. and MEYER, Timothy L. International Soft Law. *Journal of Legal Analysis*, 2 (2010), pp. 171-225. POSNER, Eric A., and SYKES, Alan O. : *Economic Foundations of International Law*. Harvard University Press. 2013, pp. 76-79.

[40] Gersen and Posner argue that the consequences of hard law can be predicted only as a probabilistic expectation – there is no certainty because of the potential mistakes made by administration, those enforcing law or because of the intentional rejection of employing the rules (for example due to a real or perceived conflict between the specific rule and the constitutional rules). GERSEN and POSNER, op. cit. 599-602.

environmental law continues to retain its very soft form – it appears almost exclusively in preambles or in introductory articles defining the broad general aims of the treaties.[41]

The two most frequently mentioned features of the soft law are the vagueness and the lack of sanction. The next two points will discuss that the first one (vagueness) can be efficient strategy while the second argument (lack of sanctions) is false.

5.1 Vagueness

Clarity or *determinacy* is crucial in legitimacy theory, soft law and customary law are less defined. Franck who claims that t*extual determinacy* (i.e. the clarity and transparency of the commitment defined by the rule) is a necessary condition of the legitimacy admits that absolutely clear rules does not exist, all rules have several plausible meanings. The violator is always able to manipulate the definitions in order to justify conduct.

The high level of indeterminacy in international environmental law can be justified with the help of three theories: reducing bargaining costs, reducing the risk of the unforeseen consequences of strict agreements (contracts), and delegating the right of amendment to third parties.

The role of *high bargaining cost* is obvious. International law is typically formed and can be amended in the course of a very complicated, multi-player bargaining process. This process and its cost can be cut if the parties enact a looser, more general engagement containing only the intents without clear definitions. Environmentalist particularly often criticised the treaties, international legal documents for the reason that they reflect a very low least-common-denominator basis. The negotiators typically consider these low and vague standards as the greatest good compared to the option of the failure of negotiation.

Naturally, not all negotiations involve the same costs. The complexity of bargaining depends on the parties' *expectations*. Wise drafters recognise that there will be a considerable time lag between the acceptance of the treaty and compliance. During this time many contingencies can change. If the own future, expected compliance cost and the reactions of the others is foreseeable, negotiating costs will be low. But nations have to 'expect the unexpected', they must consider the possibility that at some point in the future the conditions can alter in such a way that they will be interested in violating the rule. If they think that many unforeseen contingencies may materialize, increasing the high compliance cost enormously, they will be more reluctant to accept a very clear, binding agreement. If they think that the likelihood of unforeseen contingencies occurring is very low and they can give rise to a very limited cost increase they will prefer continuing the negotiation in order to reach clear binding agreements.[42]

[41] FRENCH op. cit. 57.

[42] It is worth emphasizing that this argument does not claim that the risk of cost increase could result in a vague standard. There is a very important difference between foreseeable but risky contingencies and

However, these low and vague standards have disadvantages as well. As it saves the countries from an increase in their own compliance cost, it increases the risk of noncompliance of others. Indeterminate standards make it harder to predict the others' actions, because indeterminacy makes it easier to justify non-compliance.

The third reason for accepting indeterminate international rules comes from the so-called *delegation theory*. When a legal system – such as international environmental law – is dominated by standards rather than rules, it often entails that the drafters of such standards delegate the specification of the content and consequences of the legal norms to downstream decision-makers. In many cases, treaties including vague standards establish international organisations in order to monitor the compliance of the parties. But the same institutions often receive the right to interpret or amend the standard. The states preferring more stringent rules often accept vague and shallow standards in exchange for establishing organisations with jurisdiction for dispute resolution. Even if the decisions of this body will not be binding, it will interpret the standards and reshape the expectation of the nations. In most cases, these interpretations gradually increase the level of regulation.[43]

This delegation has an additional advantage related to the previous argument about unforeseeable contingencies. These delegations will provide an additional option between the strict standards with unforeseeable consequences and the shallow standards coupled with the high risk of others' non-compliance. This new option is *ex post* decision-making. If the unforeseen contingencies or non-compliance materializes, the dispute resolution system provides a solution. Naturally, such delegation is risky *ex ante*, because these decisions will not be controlled (or only indirectly controlled) by the nations. At the same time, the postponement of the decisions to the time when the circumstances will be known reduces the uncertainty. Delegation is efficient if this second risk-reducing effect dominates.[44]

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unforeseeable ones. Albeit the foreseeable but risky changes result in risk, this increase in risk is irrelevant for risk-neutral decision makers. Even if many law and economics models argue that low levels and vague standards result from the risk-aversion of states (more exactly from their wish to limit the potential increase in compliance costs) this model assumes that the states are risk-neutral. As Guzman argues: 'it is more appropriate to model states as risk-neutral with respect to international legal commitments. At any given moment states have a large number of legal commitments – perhaps thousands – and these commitments are in a wide range of subject areas. In this sense they are 'diversified' in their legal commitments.' GUZMAN, Andrew T.: How international law works: Introduction. *International Theory,* 1 (2009), p. 290. (Diversification in this context means that the risks from different treaties are not in close correlation.)

43 STEPHAN op. cit. 1593-1606.

44 With one meagre exception (Shrimp-Turtle I decision), no court or tribunal has ever made a serious attempt to clarify or define sustainability more closely. FRENCH op. cit. 64.

5.2 Lack of Sanctions: A False Argument

Soft law is often considered a law without an enforcement mechanism, but this is a clearly false accusation. It may be true that soft law has no direct third party enforcement. In other fields of international law, tribunals are also very reluctant to take harsh sanctions even in case of a violation of a well-defined, hard rule. On the other hand, second party and other third party sanctions (reputation and compliance mechanism) typically work.

Moreover, soft law seems to be the ideal solution for the aforementioned coordination problem, when clear sanctions are unnecessary. As demonstrated, if Nation A plausibly commits to participate in a project, this may induce others to join. Promises are self-enforcing. In this case, soft law, a pure declaration is far cheaper than enacting a new, fully binding treaty with sanctions.

6 Conclusion

The chapter presented the classical law and economics analysis of international law enforcement. Both the realistic and the optimistic view of international law accept that the traditional enforcement mechanisms, i.e. courts and sovereign power over the parties are weak in international law (or even in the European law) context. Even if some kind of authority exists, their main goal is to settle, to find a peaceful solution for international conflicts – not to enforce rules or to sanction the violator. Due to this weakness of traditional enforcement mechanisms, other aspects must ensure compliance. The chapter presented that the first and second party or non-traditional third party enforcement methods (i.e. reputation, compliance mechanism) are able to ensure that international rules will be followed, because they are capable of sanctioning the breaching nations even if formal international law sanctions are missing.

These non-conventional enforcement mechanisms render the question of contracting highly interesting. If sanctions are missing absolutely, the contracting would not mean any binding. But if the international community enforces the rules (even if through weaker mechanisms) the nations must consider joining a new treaty or signing a new international agreement, etc. As seen, the coordination and cooperation problem provide two different answers to the question: why are the parties interested in creating binding international rules?

Therefore, the distinctive characteristic of sustainability law (or international environmental law) is not the lack of formal enforcement but the very vague definition of the principles. According to many legal scholars, the principle has not yet reached the 'strictness or clarity' of soft law principles – according to the view of many scholars' it is only a political slogan. This vagueness increases the cost of enforcement, but it does not render it absolutely impossible – and in many cases (especially when the ex ante negotiation is very difficult) it can reduce the working (negotiation and enforcement) costs of international law.

This chapter was based on the traditional assumption of international law and economics literature: it assumes that the decision makers are the states, the nations as such. As seen, almost all theories about first party enforcement (in particular, Koh's transnational legal process model and the liberal theory) emphasize that states are not unitary decision-makers: their choices are influenced by domestic political debates and domestic institutions. The next chapter will present some models to assess the effects of international law on these domestic circumstances – and through these channels on the policies of the given nation.

CHAPTER 7

Why Do Governments Comply?

Public Choice of Enforcement in International and European Law

1 Introductory Remarks

The previous chapter made an attempt to answer the question of why nations modify their policies in response to such a vague standard such as the principle of sustainable development using the traditional enforcement model of law and economics literature. Now the focus shift from nations or states as unitary rational actors to the individual decision-maker, or the group of decision-makers. The basic assumptions of this model result from the public choice theory: the decision-maker is assumed to be the politician or the bureaucrat who has the last word, or veto power over the policies. This analysis also supposes that the decision about compliance depends on the personal benefit and cost resulting from the projects.

As Andrew T. Guzman argues when criticizing the liberal theory and public choice approach: although the 'advantage of a public-choice approach is its ability to provide a positive account of government activity that is difficult to explain through more traditional models of government behaviour', the problems ensuing from it are perhaps even more important: 'the outcome of interest-group politics is very difficult to predict'.[1] This chapter attempts to provide a model on interactions among domestic political actors which is able to generate predictions about the change of national politics in response to the changes in international or European sustainability law.

The model does not aim to predict the exact outcomes in the domestic political market, since the model is unable to determine which environmental or other project will be implemented and which one will be rejected. In this sense, Guzman's claim about the complexity of interest group politics remains valid. But this is not the main goal. The model demonstrates that comparative statics is able to predict some consequences of the changes occuring in international and European law. Comparative statics is an economic method comparing the outcomes before and after a change in some underlying exogenous parameter – in this case the results before and after a new international treaty referring to the sustainability principle is adopted.

The first (more lengthy) part of the chapter presents a very simple model of the political market: the basic characteristics of the actors (voters, politicians, lobbies, bureaucrats) and the interactions among them. This subchapter presents how the domestic policies are chosen and which are the effects influencing the decisions (and how). Table 1 summarizes these characteristics and interactions. The second subchapter examines how these effects change in response to international and European law. These external changes can modify the behaviour of domestic interest groups and constituents and their modified behaviour affects the actions of politicians even if the preferences of the politicians remain unchanged.

[1] GUZMAN, Andrew T: A Compliance-Based Theory of International Law. *California Law Review* 90 (2002), p. 1841.

1 Equilibrium in the Political Market

The simple public choice model assumes that the political arena can be analysed as a market where several actors interact with one another. The actors are politicians, voters, interest groups and bureaucrats – as it will be presented, the model treats the court as a special form of bureaucracy. The main forms of interaction among the actors are elections, lobbying, direct participation in policy-making and the implementation process.

From		To			
actor	features	Politicians	Voters	Interest group	Bureaucrats
Politicians	- vote-maximisation - public interest, altruism - (future) personal gain	*Competition*	- policy	- policy	- budget, etc. of the institution - personal gain (work, income, etc.) supporing the issue (aka. public interests)
Voters	- rational ignorance - benefit maximisation (Buchanan model)	- vote - peace, acceptance	n.a.	- support (material, other) - vote	- bribe
Interest group	- collective action - rent seeking - principal-agent problem (against members, voters)	- vote - information - support for vote-maximization (material, other) - (future) personal gain (corruption, future career)	- information - influence on policy-making	*Competitive/ substitute relation*	- information - support in the fight for the protection of their institution (regulatory capture) - (future) personal gain (corruption, future career)
Bureaucrats	- public interest, altruism - seeking future personal gain (outside the current institution) - budget, size, functions, etc. of the institution - principal-agent problem	- information - administration - assistance in policy-making	- administration - influence on policy-making	- administration - influence on policy-making	*Competitive/ substitute relation*

Table: 1 Political actors and their interactions in the political market

1.1 Actors in the Political Market

The simple public choice model assumes that each actor is a *homo oeconomicus*. They are expected to pursue their own goals. However, the model is not so 'thick' as to restrict the factors influencing the individual behaviour of legislators and other actors in the political market to material interests. It is capable of also incorporating 'altruistic' preferences, personal ethics, ideological views which focus not on the personal well-being of the decision-maker, but are sensitive to the well-being of others. This broader view of preferences includes also the personal views about a good society, the public interest and the common good. But the basic assumption of individual rationality remains valid: the individual decision maker seeks the best choice to achieve his own goals, including his ethical, altruistic or political preferences as well.

In order to build a model which capable of saying more than the meaningless phrase: 'everybody tries to maximise his or her own benefits', the first step is to recognize some basic characteristics of the actors which will significantly influence their behaviour, i.e. their responses to the change in circumstances. The first part of the subchapter refers to these characteristics.

Politicians

The traditional public choice theory was built on the assumption that 'parties formulate policies in order to win elections, rather than win elections in order to formulate policies'.[2] The main goal of parties and politicians is to maximise their winning chance. They make promises, take positions in political debates and make policies if they are on government according to which one maximises their wining chances. According to the simplest form of the model, politicians attempt to maximise the expected number of their votes.

This simple vote-maximisation view of politicians and parties must be extended for at least two reasons. First, not all politicians are concerned with the next election. Naturally, those who plan to retire are not interested in maximising expected votes, instead, they are interested in maximising their future benefit from other sources. They may attempt to increase their own personal human, social and financial capital. For example they may build close personal relationships with business or international organisations where they are likely to start a new career after leaving politics. Or they may try to increase the value of their own capital investments – accruing capital gains in the future.

Second, the simple vote-maximising view neglects the non-personal, non-material interests of politicians. They may be unwilling to pass up on their own view about the public interest even if another political platform seems more popular and guarantees more votes. These public-interest-oriented politicians are willing to accept certain defeats in consecutive elections if they can express their own views about a better society or a better political system.

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[2] DOWNS, Anthony: *An Economic Theory of Democracy* New York: Harper, 1957, p. 28.

Voters

When voters make decisions on participation, gather information and select a party to vote for, they make rational decisions: they compare the expected benefits to be derived from the alternatives. But in case of elections the expected net benefit differs from the expected benefit from a simple consumption or investment decision. The vote provides no benefit if it has no impact, if the same party wins the elections independently both with and without the voters' votes. The vote is decisive only if (i) other votes are evenly split between the candidates, or (ii) the first best candidates lose only by one vote without the vote of the voters. Naturally, this chance will be immeasurably small if there is very large number of voters. Since Burrhus Skinner's utopian novel,[3] the probability of the decisiveness is typically is assumed to be similar or lower than the probability of a car accident going to or returning from the election office. If the consequence of the accident is worse than the loss of the preferred candidate then the rational voter will not vote. This is *rational abstention*. But a large portion of the population votes – this is the voting paradox. The public choice theory presents several models to explain the actual turnouts: taste for voting,[4] cat and mouse model,[5] minimax-regret strategy,[6] expressive voter hypothesis,[7] and ethical voter hypothesis.[8]

Rational ignorance refers to decisions not on participation in elections but on gathering political information about the candidates. The benefit from gathering information is identical to the benefit from voting. It also depends (i) on the difference between the candidates' positions and (ii) the probability that the voter's vote will be decisive. His wrong choice because of the lack of information would

3 SKINNER, Burrhus F.: Walden II. New York: Macmillan, 1948. Cited for example by: MUELLER, Denis C.: *Public Choice III*. Cambridge: Cambridge University Press, 2003, p. 305.

4 See TULLOCK, Gordon: Tward a Mathematics of Politics. Ann Arbour: University of Michigan Press, 1967, 110.], RIKER, William H. – ORDERSHOOK, Peter C.: A Theory of the Calculus of Voting. *American Political Science Review* 62 (1968), p. 25-42.

5 If each voter expects that all other voters are rational and as a consequence they (or most of them) will not vote then rational voter must vote becuase they seem to be the only decisive voters. See MUELLER op. cit. 306-307.

6 The voters calculate not the expected benefit and costs from voting, but compare the loss from voting if the vote has no impact and loss from non-voting if the vote was decisive. I.e. this model assumes that the voters fail to calculate the probabilities of the two state-of-worlds, they see them as equally probable. In this case, voting is rational if the benefit from the victory of the preferred candidate is higher than the double of the cost of voting. See FEREJOHN, John A. – FIORINA, Morris P.: The Paradox of Non-Voting *American Political Science Review* 68 (1974), pp. 525-536.

7 This is a non-instumental way of voting: the main reason for voting is not to increase the winning chance of the preferred candidate, but to express support: if a candidate promises a very appealing policy-mix, the voters express their support for this programme through voting for the respective candidate. See FIORINA, Morris P. The Voting Decision: Instrumental and Expressive Aspects. *Journal of Politics* 38 (1976), pp. 390-415, MUELLER op. cit. 320-322., CULLIS, John – JONES, Philip: *Public Finance and Public Choice*. Oxford: Oxford University Press 2nd edition 1998, pp. 73-74.

8 CULLIS – JONES op. cit. 75.

cause the victory of the 'wrong candidate' only if the vote was decisive. The cost of information exceeds almost certainly the very low expected benefit from the 'right' vote – even if the political system reduces the cost of information through information provision via the media or the parties.

It is worth stressing that the incentives to be informed in the market (private choice) and in political life (collective choice) differ. In his famous article, Buchanan discusses six main differences: (i) the degree of certainty, (ii) the degree of social participation, (iii) the degree of responsibility, (iv) the nature of the alternatives presented, (v) the degree of coercion, and (vi) the power relations among individuals.

- *The degree of certainty*. While in the case of private choice, the individual is able to predict the result of his action with absolute certainty, he can never predict which alternatives will be chosen in the elections. This uncertainty exacerbates the effect of the above mentioned rational ignorance: while consumers will always seek the most desirable alternative in private choice, the voters will not 'necessarily, or perhaps even probably'[9] make the choice which seems to maximize their personal utility.
- *The degree of social participation*. In the market, individuals typically assume that their choice will not affect the outcome of social interactions. Consequently, they do not care about the social consequences of their actions; they concentrate solely on their own benefit. But in collective choice, they take the social effects of their actions into account. Buchanan assumes that they act according to different preferences in the two cases.
- *The degree of responsibility*. While individuals must bear full responsibility for their private choices, responsibility in collective choice is shared. As Wolf argues, while the cost of private choice must be borne by the decision-maker, in case of political choice, cost and benefit are separated. The cost-bearer and the beneficiary groups are different: the costs are typically borne by other groups.[10]
- *The nature of the alternatives presented*. Alternatives in private choice contradict each other only from the aspect that in case we want to increase the amount of certain commodities or goods, the degree of consumption of another must be reduced. Private choice is a 'more or less' decision. By contrast, collective choice is an 'either–or' decision. In case of private choice, the individuals are able to divide their 'votes' between several options.
- *The degree of coercion*. In private choice, all 'votes' cast by the individuals are effective: individuals receive the chosen commodities. Their choices are not overruled. In collective choice, voters may be compelled to accept an undesired alternative. This kind of coercion also reduces the incentive to gather

9 BUCHANAN, James M.: Individual Choice in Voting and the Market. *The Journal of Political Economy* 62 (1954), pp. 334-343.

10 WOLF, Charles Jr.: A Theory of Nonmarket Failure: Framework for Implementation Analysis, *Journal of Law and Economics*, 22 (1979) 107-139. WOLF, Charles Jr.: *Markets Or Governments: Choosing between Imperfect Alternatives*, MIT Press, 2003, pp. 41-45.

information about the alternatives – even if an individual spends much time gathering the full scope of information about the alternatives and becomes fully informed, other uninformed voters can force him or her to consume the worse alternative.

- *The power relations among individuals*. The market choice is a one-dollar-one-vote process. In case income is unequally distributed among the individuals, this inequality will affect the market outcome. At the same time, collective choice tends to create, 'at least ideally'[11] the conditions of equality. But the desirability of equality in collective choice may be debated. It can be demonstrated, that the one-man-one-vote rule can result in the tyranny of the majority: the majority has power over the minority even if the result is extremely undesired for the minority.

As the list indicates, the structure of collective choice typically weakens the impact of selfish material motivations, but at the same time, it also reduces the incentives to make judicious, informed decisions.

Interest groups

According to the simplest form of the public choice approach, all groups, all institutions (domestic or international) behave as an interest group. They all aspire to influence policies. Typically, they offer resources in exchange – resources that the decision-makers (politicians or bureaucrats) may use to achieve their own goals.

The public choice theory focuses primarily on the birth, i.e. the formation of these groups. Perhaps the most successful model of interest group politics is presented by Mancur Olson.[12] According to this approach, the interest groups fighting for the adoption of policies provide public goods to their members and society, that is, they are available to all members (and to non-members as well) independently of their contribution.

At first sight, rational, self-interested individuals will free-ride: they attempt to avoid contributing because they know that the benefit from the public goods, if produced, will be available to them. But if this free-riding strategy is virtually all-encompassing, the interest group will not be formed, i.e. the shared interests or value will not be represented in the political market.

The main advantage of Olson's model is the recognition that free-riding is not the dominant strategy in all cases, some groups are more likely to be formed, in consequence, some interests will easily appear in the political market. Olson identifies some conditions which increase the chance of establishing an interest group, increasing the chance that individuals engage in collective action.

First of all, some groups do not need this engagement to achieve their goals: if a single member of the group has enough at stake, he will fight for the policies individually, regardless of the others' free-riding. Secondly, small groups with

[11] BUCHANAN op. cit. 340.

[12] OLSON, Mancur: *The Logic of Collective Action*. Cambridge: Harvard University Press, 1965.

more concentrated benefits are in a better position to induce collective actions than larger ones. In small groups, individuals must take into account that their decision influences other's decisions: if someone communicates his conditional contribution (for example 'if others join, I will participate') the rest of the group should provide *significantly* less effort to achieve the common goal. Rational actors are *more likely* to take action (in this case: to join a collective action) if his or her personal cost is significantly lower – consequently, such conditional commitments increase the chance that others will join and the public goods will be produced, the desired policies will be received. In a large group this reduction caused by the commitment is very small, and it is very unlikely that it will change the others' decisions regarding the participation in a collective action.

Olson does not claim that a large group is unable to act collectively. But in their case the production of public goods is not enough to induce collective action; such groups have to work out incentives for the potential members to join. These are the so-called 'selective incentives'. The typical forms of such selective incentives are services, information, allowances, personal relations with like-minded people, etc. which are available only for members.

While Olson's model is the most influential in public choice literature, other social scientists demonstrate that several other conditions also help in coping with the multi-person prisoners' dilemma. For example, the 2009 economic sciences Nobel Prize laureate Elinor Ostrom lists conditions which raise the chance of cooperation among the potential beneficiaries[13]:

- Accurate information about the nature of the public goods and expected flow of benefits and costs is available at low cost to the participants.
- Participants share a common understanding about the potential benefits and risks associated with the *status quo* as compared to changes in norms and rules they could feasibly adopt.
- Participants share generalized norms of reciprocity and trust that can be used as initial social capital.
- The group using the resource is relatively stable.
- Participants do not heavily discount the future.
- Participants use group decision-making methods that fall between the extremes of unanimity or control by a few (or even bare majority) and, thus, avoid high transaction or high deprivation costs.
- Participants can develop relatively accurate and low-cost monitoring and sanctioning arrangements.

[13] Daniel H. COLE – OSTROM, Elinor: The Variety of Property Systems and Rights in Natural Resources. in: Daniel H. COLE – OSTROM, Elinor (ed.): *Property in Land and Other Resources*. Lincoln Institute, 2012. Elinor OSTROM – HESS, Charlotte: Private and Common Property Rights. in: Boudewijn Bouckaert (ed), Property law and economics. Cheltenham: Edward Elgar, 2010. SCHLAGER, Edella – OSTROM, Elinor: Property Rights Regimes and Natural Resources: A conceptual analysis, *Land Economics* 68 (1992), pp. 249-262.

Similarly, Allan J. Cigler and Burdett A. Loomis demonstrate that collective action problems, i.e. free-riding may be mitigated if the individuals have preferences going beyond their material interests. This finding is especially important in the case of environmentalist (and civil rights) groups: the feeling of solidarity among the group members and the so-called expressive benefit (i.e. the feeling of standing up for an important issue is similar to the expressive voter hypothesis mentioned earlier) increase the chance of participation to a great extent.[14]

Besides the chance of formation, the other crucial issue of interest groups is the common goal to be pursued. According to public choice theory, the main goal of interest groups is to obtain transfer, economic rent[15] from others; the interest groups are *rent-seekers*. They are on the demand side of policy-formulation; they attempt to manipulate the policy-maker to attain the desired political decisions. Naturally, they publicly argue that the policy creates public wealth. The public choice approach does not neglect this effect, but instead it focuses on the personal (but, as demonstrated, not always material) benefits these actors draw from the policy.

It is worth recalling that the lobbies sensitive to sustainable development policies are not always large groups. Public choice theory, in particular, the so-called Chicago School[16] since George Stigler, claims that the main demand for regulation comes from the regulated industry.[17] For example, the incidence of environmental regulation, emission standards and quotas can be explained

[14] CIGLER, Allan J. – LOOMIS, Burdett A: *Interest Group Politics*. Washington: CQ Press. 2006. pp. 9-10. Mark Lubel stresses the role of trust towards the others and among the group members. Naturally, this is not new requirement: the necessary condition of collective action within a small group is that the promise of 'I will contribute if others do the same' must be credible. The members must trust each other. LUBELL, Mark: Environmental Activism as Collective Action, Environment and Behavior 80 (2002), pp. 431-454.

[15] In a narrow sense, economic rent is the income for an activity which exceeds the minimum income necessary to keep the inputs in that activity. This minimum income is the opportunity cost (i.e. the economic cost): the income that would be earned if the inputs were used for the second best activity. In a broader sense, all transfers from one social group to other are considered rent.

[16] For example: STIGLER, George – FRIEDLAND, Claire: What Can Regulators Regulate? The Case of Electricity. *Journal of Law and Economics* 5 (1962), pp. 1-16. DEMSETZ, Harold: Why Regulate Utilities? *Journal of Law and Economics* 8 (1968), pp. 55-65. STIGLER, George: The Theory of Economic Regulation. *Bell Journal of Economics and Management Science* 2 (1971), pp. 3-21. STIGLER, George: Economic Competition and Political Competition. *Public Choice* 13 (1972), pp. 91-106. BARRO, Robert: The Control of Politicians: An Economic Model. *Public Choice* 14 (1973), pp. 19-42. STIGLER, George: Free Riders and Collective Action. *Bell Journal of Economics and Management Science* 5 (1974), pp. 359-365. PELTZMAN, Sam: Toward a More General Theory of Regulation. *Journal of Law and Economics* 19 (1976), pp. 211-240. DEMSETZ, Harold: *Economic, Legal, and Political Dimensions of Competition*. Amsterdam: North-Holland, 1982, BECKER, Gary S.: A Theory of Competition among Pressure Groups for Political Influence. *Quarterly Journal of Economics*, 98 (1983), pp. 371-399. BECKER, Gary S.: Public Policies, Pressure Groups, and Dead Weight Costs. *Journal of Public Economics*, 28 (1985), pp. 330-347.

[17] STIGLER op. cit. (1971).

by the demand coming from the industry. The incumbent firms typically prefer direct regulation of emissions to taxes, because such regulations create barriers to entry. (It would be irrational to limit the incumbents' emission and then allow new firms enter, increasing the total amount of emission.) Because of the limited entry and the indirect quotas on production (if the technology is given, the emission quota indirectly limits production as well) the competition within the industry will become less fierce. The price will increase and the incumbent firms will turn more profit. Small, concentrated industries are interested in regulation if it leads to entry barriers.

The other well-known example when a small concentrated interest group is lobbying for environmental regulation is the case when a concentrated industry wants to shut down 'polluting' competitors. Zywicki (2002) demonstrates the key role of waste disposal firms in environmental regulation.[18]

Paul B. Stephan III[19] explains the Tuna-Dolphin case in a similar way. This GATT dispute involved the USA prohibition on the import of tuna from countries that use purse seine fishing methods resulting in a high number of collateral dolphin kills. The first case was brought by Mexico. In Stephan's opinion the regulation was demanded by (i) the coalition of American fisheries industry the competitors of which were forced out of the US. market (or forced to employ a high-cost technique and, in consequence, to increase their prices) and (ii) the US-based producers of the mandated technology:

> 'it seems plausible to believe that the United States fleet might find it less expensive to purchase the new technologies necessary to produce a dolphin-safe catch than would some of their developing country competitors. The producers of these new technologies might be located in the United States, creating yet another obvious interest group favoring rules mandating the technologies' use. By contrast, those consumers of tuna who might prefer lower prices to reassurance about the safety of dolphins are undoubtedly a diffuse and unorganized group, unable to discipline effectively lawmakers who might act against their preferences.'

Up to this point the models, both the collective action and the rent-seeking theories assume that interest groups attempt to achieve the common goal of the members, of the group. However, as politicians are not certain to follow the public interest, the decision-makers in the groups, the leaders may also have their own personal interests which contradict the interests of the group members. This is a *principal–agent problem*.

The principal-agent problem occurs in many instances. But in the case of interest groups, this problem has an additional, special feature – many principals are faced with a single agent (or small groups of agents). All potential

[18] ZYWICKI, Todd J.: Baptists? The Political Economy of Political Environmental Interest Groups, *George Mason University Law & Economics Working Paper*, No 02-23. (2002).

[19] STEPHAN, Paul B ': Barbarians Inside the Gate: Public Choice Theory and International Economic Law.'. *American University International Law Review* 10, no. 2 (1995), pp. 745-767.

beneficiaries of the policy, all stakeholders or members of the groups may be considered principals. This results in a collective action problem: the effective monitoring and controlling of the agent is in itself a public good where free-riding can be the dominant strategy of each principal. All in all, the interest group does not with all certainty act in the interest of the group, the leaders may be corrupted – they accept policies which are not in the best interest of the members if they receive personal gains in exchange.

Bureaucracy

The fourth key actor in the political market is the bureaucracy. As Table 1 indicates the main characteristics of bureaucrats are very similar to the features of politicians. They pursue their own selfish material interests; they are motivated by their personal values or their ideological of philosophical view about the public interest. The main difference between the motivations of the two groups comes from the fact that the office of politicians depends on the results of the elections, while the bureaucrats are appointed and not elected officials. Consequently, while politicians in a democracy attempt to meet the voters' demand, bureaucrats can be considered the agents of politicians.

The principal-agent relationship resurfaces: the self-interested decision-makers (in this case: the bureaucrats) must make decisions which do not maximise the benefit of the principals (in this case: the politicians). This opportunity of deviation appears because the agent has an information advantage over the principal. Even if the principals (politicians) may easily monitor the outcome, the success of the implementation of policies, they will not know how this outcome is influenced by the actions of the agents (bureaucrats) and by random, external effects. The outcome can be high even if the agents are lazy but the external effects are advantageous; and *vice versa*.

While the information asymmetry in the case of the bureaucracy is similar to the asymmetry within a corporation where the agents are the managers and the principals are the shareholders, the incentive systems are very different. While in corporations this incentive system is monetized (for example with bonuses linked to the profit or to the price of shares, direct profit-sharing mechanisms, stock options), the monetized incentive is very weak in public office. The lack of strong monetized incentives appreciates other forms of incentives and control mechanisms. For example, in public bureaus procedural rules play a more important role. Procedural rules are negative incentives: the principals, the politicians define very detailed rules, and deviating bureaucrats must bear some negative consequences – a reduction in their income, the stop or delay in their career, or even their dismissal.

An effective incentive system ensures that agents are more likely to achieve their own personal goals if they advance the principal's benefit. Effective positive incentives can be employed only if the goals of the agent are known. If they are known, the incentive system should concentrate on these goals, and it must ensure that these goals are more likely to be achieved when the bureaucracy

works hard, focusing on maximising the principals' benefits. But these goals are difficult to identify. Even within a corporation – for example, profit sharing or stock options are not strong enough incentives to induce profit-maximising decisions. The managers' personal benefit does not originate solely from these monetized incentives; they have many other options to create personal advantages in their position: on-the-job consumption, excess staff and capital of the office, tunnelling the income of the corporation to their own firm (for example through business with their own firms). As William Baumol points out, the non-pecuniary goals of the managers correlate with the size and growth of the corporation.[20] This finding is widely accepted in the case of public bureaus, as well. Since William A. Niskanen's bureaucracy model, the simplest form of public choice approach assumes that the most important goal of bureaucrats is to maximise the size and the budget of their office.[21]

An effective negative or positive incentive system can only work if the principals have room to motivate the agents. The relationship between politicians and bureaucrats is typically considered as an employment relationship – but with very rigid rules. Principals can only fire bureaucrats or reduce their salaries with great difficulty even if they violate procedural rules or if they are corrupted. But the bureaucracy is not homogenous. There are ministries, agencies with more or less independence. As independence increases, the staff's security of employment also increases and punishment becomes more difficult. This security is related not only to the personal employment of bureaucrats, but also to the budget of the institution. While the classical 'public interest approach' within political and legal sciences argues for independence as a necessary condition for pursuing the public interest even against the pressure coming from politicians, public choice theory basically focuses on the consequences of independence on creating effective incentives.

Before finishing off the presentation of the basic characteristics of bureaucracy, the role of the judiciary within this simple public choice model must be defined. The judiciary may be considered a part of bureaucracy because

[20] BAUMOL, William J.: *Business Behaviour, Value and Growth*. New York: Macmillan, 1959.

[21] In his frequently cited book, Niskanen lists some of their very likely goals: 'salary, prerequisite of the office, public reputation, power, patronage, outputs of the bureau, ease of making changes, and ease in managing the bureau'. (NISKANEN, William A.: *Bureaucracy and Representative Government* Chicago – New York: Aldine- Atherton, 1971, p. 38.) As Denis Mueller puts it: 'all but the last two are positively and monotonically related to the size of the budget.' (MUELLER op. cit. 363.) However there are alternative explanations. For example, some models are built onto the assumption that the bureaucrats are interested not only in the size of the budget, but in the discretionary budget – if the budget increases, but the cost of required activities increases at a higher rate, this increase will reduce the benefit of the bureaucrats. They are interested in a budget increase with relatively small (or no) increase of activities. If the budget exceeds the minimal cost required by the activities, this X-inefficiency or 'slack' is the 'profit' of the bureau. While monetary gain cannot be directly drawn by the public bureau, this extra revenue will be drawn by the office through similar ways as the managers tunnel the corporations' income: on-the-job-consumption, self-dealing, etc.

courts also implement policies and laws enacted by the legislature (the politicians). Similarly to other forms of bureaucracy they apply the policies, the laws to particular cases. However, contrary to public bureaus, the judiciary plays a minimal role (or no role at all) in policy-making. Typically, public bureaus make proposals, assist in codification, etc. In most political systems the judiciary is unable to influence the legislation positively, however, it is able to cast a veto. The Constitutional Court or the Supreme Court – and in some instances the general courts as well – may annul laws or decrees if they find that a policy is inconsistent with the Constitution or with some higher level laws.

Democracy vs. dictatorship. The public choice model is frequently criticized because it is assumed to be relevant only in liberal democracies where the politicians depend on the elections. Naturally, the main characteristics of the politicians are different in a dictatorship, in a single-party system where the elections play a minimal role. In such systems, the main goal of the politicians is not to maximise their votes but (i) to maximise their support within the party (if there is competition for the office within the party) or (ii) to ensure the trust of the party leaders. The first motive is identical to the basic vote-maximising incentive in democracy; the only difference being that the vote does not come from the population but from the party members. The effects of the second change can be analysed as a shift in the role of the individual – in such systems several 'politicians' play the role of the appointed bureaucracy. Their characteristics resemble those of the bureaucracy; large groups of 'politicians' are basically 'bureaucrats' in such systems.

But the politicians are not entirely independent from the actions of the voters even in a single-party system. In a dictatorship, the constituents express their views not through regular elections, but through occasional riots. The public choice theory claims that in a dictatorship the basic method of expressing the views of constituents is 'voting with feet' – the constituents may exit, emigrate.

1.2 Interactions, Exchanges Among the Actors

After defining the main characteristics of the actors, let us now focus on the main interactions among them. First, elections will be analysed where voters cast their votes in exchange for the promises made by the politicians. The politicians and parties compete for the votes – this competition and this exchange among politicians and voters determine the result of the elections. Then the interest groups' interactions will be presented. They are involved in the exchange with the voters and the politicians. Just as politicians compete for votes, interest groups fight for access to, and influence on the policy-makers. Finally, the relationships of bureaucrats will be analysed: their principal-agent relationship with the politicians, as well as the so-called regulatory captures with lobby groups.

Elections: interaction among voters and politicians

In order to predict the result of an election, the voters' choice must be understood. According to the simplest assumption in the public choice approach, the voter's choice between the candidates is determined by proximity: they will vote for the closest party, i.e. the party whose position is more similar to their preferences.

The simplest models assume that the political differences among candidates can be represented in a one-dimensional left-right spectrum. Each voter and each party has its own position in this scale. The closer the party is to the position of a single voter, the more desirable its victory is for said voter. The voter will vote for the closest party. It is easy to prove that in a two-party competition the winning party in this one-dimensional political space will be determined by the *median voter rule*: the party offering the policy preferred by the median voter will prevail.[22]

If the distribution of the preferences of voters is multidimensional – if a single left-right scale is unable to predict the votes – defining the winning strategy is more difficult.[23] In this case, instability (cyclical voting) appears. It is easy to demonstrate that there is no position that cannot be beaten: if a party takes a position, its opponent will always be able to find a policy mix which will be preferable for the majority of voters.[24]

Hereinafter only one model of the voters' choice in a two-dimensional space shall be presented: probabilistic voting. The *probabilistic voting model* assumes

[22] If a party positions itself at the most preferred position of the median voter, then the other party is forced to be situated on either the right or the left side of the spectrum. The party in the median will get all votes from the 'empty' side of the spectrum. This secures 50%+1 of votes, i.e. the votes from 50% of the voters from the empty side and from the median voters. (And the party will receive all votes from the median to the halfway point between the positions of the parties.) This simple model of the median voter rule is built on two simple implicit assumptions: (i) there is no entry or exit in party competition and (ii) the important political issues can be represented in a single dimension. The simple models draw these predictions from some unrealistic assumptions: the preference distribution of the voters is unimodal and symmetric. All voters vote, even if the closest partey is far from their preferred position: the extreme right or the extreme left voter will vote for the party at the median if the other alternative is on the other side – they do not abstain if there is no candidate close to them. Mueller demonstrates that the parties' winning strategy remains to move to the median even if not all individuals vote; or if the distribution is not symmetric (but unimodal, and full participation is expected); or if the distribution is multimodal (but symmetric, and all voters participate). See MUELLER op. cit. 232-233.

[23] It is widely accepted in political science that the debated issues in elections can be summarized into maximum two or three dimensions. The preferences in different issues are correlated – e.g. the opinions on closing a nuclear power station and supporting aid programmes for the third world are correlated. The two issues (and others correlated significantly with them) may be integrated into a single factor. The two-factor space can predict the voters' vote with relatively high explanatory power. See CULLIS – JONES op. cit. 79-80.

[24] And if the first party can move after the second party took the position as an answer to the first party's choice, it can change his policy to attract enough votes from the second party to achieve majority.

that proximity does not determine political choice, however, it increases the probability that the voter will vote for a given candidate. Even the party positioned exactly at the preferred position of a voter cannot be certain that the voter will vote for them, for example because of the voter's ignorance: the voter can mistakenly believe that the party is situated far from their own ideal position. (This argument demonstrates that the probabilistic voting model is able to handle the consequences of the voters' ignorance.) In this model, if a party wishes to maximize its expected votes, an optimal position must be determined in a two-, or multi-dimensional political space – i.e. the problem of cyclical votes disappears.

Representation and information: exchange between lobbies and voters

The important role of interest groups in the political market can only be understood in case the assumption of rational abstention and rational ignorance of voters is accepted. Voters are assumed not to participate in elections and not to gather information about politics. But they are assumed to know that policies significantly affect their well-being. In this case, the voters seek 'representation' in policy-making. They want to influence policy-makers; they want to convince politicians to implement policies that are most beneficial for them. But their vote is unlikely to be decisive. Interest groups are the obvious choice for this kind of representation.

Moreover, voters knowing about the significant effect of politics will have a demand for cheap information or watchdog institutions continuously monitoring the activities of politicians and public bureaus, sending the very simple message: 'you should vote for Candidate X'. Interest groups offer the most obvious solution: they continuously monitor the politicians and the bureaucracy because they are able to influence policy-making only in case they are informed. Information, which is very valuable to the voters, emerges as the by-product of the normal activity of the interest groups.

In exchange for these services, the interest group will require that the voters join the group, support (financially and in some cases personally) the interest group. This is the aforementioned collective action problem: the interest group should ensure the participation of the voters in their activities. Moreover, in many cases, the most precious commodity in the possession of the interest groups is their influence on the votes of their members and stakeholders. However, interest groups must be credible when they offer this influence in exchange for the required policies – they must have real influence. They may bluff, but the politicians can easily test their real influence. For example, if the politicians inform the group about a (real or fabricated) proposal of a policy hurting the group, the interest group must be able to demonstrate its influence over those suffering the consequences of such a policy through organising strikes, boycotts or public actions.

Regulatory capture: interactions of the interests groups with politicians and bureaucrats

Regulatory capture is the clearest form of governmental failure: policy-makers do not pursue the public interest, instead they adopt policies desired by the lobbies, the distributional coalition, as Mancur Olson calls them. The most frequently mentioned reason for regulatory capture is the direct material interest of the policy-makers: they are corrupted; they receive bribes from the lobby. For example, in their cross-sectional analysis on the ratification of Kyoto protocol, Per G. Fredriksson, Eric Neumayer and Gergely Ujhelyi claim that the influence of the lobbies on the probability of ratification is stronger if the degree of corruption increases.[25]

The distributional coalitions offer 'campaign contribution, votes, implicit promises of future favors, and sometimes outright bribes'[26] in exchange for the desired policies. One of the most important non-pecuniary resources politicians expect from these groups is information. Don't forget, politicians do not have information about the preferences of the voters. In case of selfish politicians, they want to, but do not know how voters will react if they adopt a policy – they would like to know how the policies affect their winning chances. Public-interest-motivated politicians should know how the policies are implemented, how they affect the well-being of the actual constituents and the opportunities of the next generations.

But there is no need for a bribe or corruption for such capture. The interests of the sectorial bureaucrats and the ministries must coincide with the interest of the regulated group. The already mentioned choice between the regulation of emission and the taxation provides a well-known example for both the material and immaterial motives. First, environmental standards can increase profit. If only a part of this extra-profit is used to finance legal or illegal services for decision-makers in exchange for this lucrative policy then the politicians and bureaucrats have a material interest in imposing regulation instead of taxation.[27] Bureaucrats (and leaders of the regulators, the ministries) also have other incentives: direct regulation typically requires a larger administrative staff, a larger budget – involving new argument for increasing the size of their office.

In many cases the convergence of the interests of a regulated sector and of the regulator is manifest: all wish to increase the available resources for the industry. They are natural allies in the distributional contest. Environmental-

[25] FREDRIKSSON, Per G. – NEUMAYER, Eric – UJHELYI, Gergely: Kyoto Protocol Cooperation: Does Government Corruption Facilitate Environmental Lobbying? *Public Choice* 133 (2007), pp. 231-251.

[26] LANDES, William M. –POSNER, Richard A.: The Independent Judiciary in an Interest-Group Perspective. *Journal of Law and Economics* 18 (1975), pp. 875-901.

[27] According to the classical critique: the taxation is income for the budget which the government can distribute among the voters in order to increase the probability of voting for the incumbent parties. In consequence, the politicians should prefer taxation to regulation. But if the assumption of rational ignorance holds, this extra support for the individuals will influence their motivation only slightly. See CULLIS – JONES op. cit. 40-42.

ist groups often join the coalition of the regulated industry, the politicians and the bureaucrats. They also prefer more resources. And they often prefer regulation to taxes, too, because they are against taxation for philosophical or ethical reasons. Tax is considered an unacceptable precedent of the 'license to pollute' approach.

Finally, perhaps the most important, but less frequently mentioned source of regulatory capture is the information advantage of the regulated industry. The regulators typically have very few and very unreliable sources of external information. The regulated industry itself seems to be the most plausible source. However, the regulated actors are interested in manipulating information. Even if the regulators recognise the opportunity of this manipulation they are unable to filter out the fabricated evidence. Regulation will be biased because of such false data.

Competition among lobbies

As demonstrated in the previous point, interest groups are assumed to fight for their own benefit, i.e. redistribution, transfer from other groups. This rent, this extra benefit is not always of material nature; the benefit of an environmentalist group comes from the good quality of the environment, from biodiversity, etc. However, all benefits of the 'winning coalition' will be produced from taxes borne by other groups. According to the simplest model, the political market tends to redistribute from the group which is less able to resist, channeling benefits towards the well-organised interest groups.

However, this competition is far removed from a contest between groups with equal opportunities: the chance of interest groups to be formed is not equal, as Mancur Olson claims. Smaller groups with more concentrated benefits are more likely to be organized. At the same time, they represent only a small fraction of society, and the cost of their preferred projects are spread among many other groups; such distributional coalitions bear only a minimal fraction of the cost. They are more likely to fight for inefficient and injust policies.

Olson and other public choice theorists[28] argue that when larger interest groups are formed also fighting for rents and providing information to politicians about the expected consequences of their actions, the one-sidedness of the information disappears. Each interest group must face those groups from which the transfer would come. The group lobbying for nuclear power must face the group which is against nuclear energy– both groups will attempt to convince the decision-makers.

There are two main theories about the expected results of this lobby contest: the 'size' and the 'efficiency' view. According to the 'size theory', even if all groups were formed, the difference between the small and the large groups remains. First of all, the principal-agent problem is more important in case of large groups, therefore, *ceteris paribus* these groups are less likely to achieve

[28] See MICHELL, William C. – MUNGER, Michael.: Economic Models of Interest Groups: An Introductory Survey. *American Journal of Political Science* 35 (1991), pp. 512-546.

their goals. Secondly, they typically offer different resources in their exchange with the politicians. Small groups tend to offer campaign contribution, career opportunities after leaving politics or direct bribes. The main currency of large groups is the vote.[29] But because the promise of the vote is less reliable, small groups are typically expected to be more successful even if large groups are organised. But this is an oversimplification of the issue. As Arthur Denzau and Michael Munger demonstrate, if voters are informed, interest groups which can supply campaign resources but only a limited number of votes will not influence policy.[30] James T. Hamilton stresses that small groups are more effective in influencing the less visible actions – for example determining the exact contents of a policy through modifying, amending the bills in Parliament. At the same time, large groups have a greater effect on the more visible actions of politicians, such as final voting for or against the bill.[31]

The most famous and most important proponent of the 'efficiency view' is Gary Becker.[32] His model is built on the simple assumption that the pressures coming from the groups are approximately proportional to their benefit or cost resulting from the policy. If there are two groups, one for and one against the proposal the group with a larger stake will devote more resources to convince the policy-makers. If politicians make decisions according to the strength of the lobbying of the two groups then those policies will be implemented which produce more benefits than costs. Becker recognises the collective action problems presented by Mancur Olson, but he claims that if the organization cost is zero, only efficient policies will be implemented.

Both the size and efficient contest views are built on an implicit assumption: the groups compete with each other. A policy is assumed to be implemented if the supporting group prevails. The Virginian School[33] of public choice theory

[29] If the politicians are only interested in maximising their votes then, as Peltzman indicated, the regulator will compare the change of the expected number of votes – increase in votes comes from the winning group or the vote can be 'bought' from the resources offered by that group and the decrease in votes on the other side.

[30] DENZAU, Arthur – MUNGER, Michael: Legislators and Interest Groups: How Unorganized Interests Get Represented, *American Political Science Review* 80 (1986), pp. 89-106.

[31] HAMILTON, James T.: Taxes, Torts and Toxics Release Inventory: Congressional Voting on Instruments to Control Pollution, *Economic Inquiry* 35 (1997), pp. 745-762.

[32] BECKER op. cit. (1983, 1985).

[33] For example: BUCHANAN, James M. – TOLLISON, Robert: *The Calculus of Consent*. Ann Arbour: University of Michigan Press, 1962. TULLOCK, Gordon: The Welfare Costs of Tariffs, Monopolies, and Theft. *Western Economic Journal* 5 (1967), pp. 224-232. TULLOCK, Gordon: More on the Cost of Transfers. *Kyklos* 27 (1974), pp. 378-381. KRUEGER, Ann: The Political Economy of the Rent-seeking Society. *American Economic Review* 64 (1974), pp. 291-303. CRAIN, Mark – TOLLISON, Robert: Campaign Expenditures and Political Competition. *Journal of Law and Economics* 19 (1976), pp. 177-88. CRAIN, Mark: Cost and Output in the Legislative Firm. *Journal of Legal Studies* 8 (1979), pp. 607-621. BUCHANAN, James M – TOLLISON, Robert – TULLOCK, Gordon (ed.): *Toward a Theory of the Rent-seeking Society*. College Station, Texas A&M Press, 1980. CRAIN, Mark – TOLLISON, Robert: The Sizes

fiercely criticized this assumption. First, this assumption of competition seems to forget the information problem: inefficient policies may be invisible even for well-organised interest groups. If the cost, the wasteful consequences of a policy cannot be observed, the opposition will not fight against it. Their second and more important argument is: the model explicitly supposes that the contest is a zero-sum game. The transfer to the winning group must come from another distributional coalition. In other words, the budget is balanced; deficit is not accepted. If deficit is a lawful option, it creates options to shift the burden of actual policies to the next generation. The rent of the winning coalition is financed by the next generation. In this case, the interest groups are not forced to fight each other; they must recognise that the easiest way to finish bargaining is a mix of (i) the policy required by the beneficiary group, and (ii) some kind of compensation (or over-compensation) for the opposing groups. Naturally, this agreement also creates a transfer, but now, the resources will be taken (generally through invisible channels) from a group which cannot participate in the bargaining process: from the future generations.

Monitoring bureaucracy: interaction between bureaucrats and politicians (and interest groups)

While corporations use monetary incentives (profit-sharing, stock options, bonuses), bureaucrats are typically motivated through a combination of procedural rules and punishment threats. The typical procedural rules consist of a very detailed description of prescribed procedures. But this elaboration risks rigidity; the bureaucrats will be unable to change processes even if under changed circumstances the public interest would require modification.

Besides rigidity, the other shortcoming of this negative incentive method results from the difficulty of discovering the deviation. Because of the principal-agent relationship, the bureaucrats are always capable of concealing their real costs, mask their real actions. The politicians typically react to this problem with the establishment of monitoring agencies. Such agencies can be public bureaus or political bodies – for example a committee of the legislation comprising politicians with a strong interest in the field. Politicians often make attempts to use watchdog organisations directly or indirectly. For example, if the procedural rules require that the offices hold public hearings regularly, or announce their proposals in advance, these requirements provide an opportunity for watchdog organisations to present their opinions about the office or their arguments for or

of Majorities. *Southern Economic Journal* 46 (1980), pp. 726-734. McCORMICK, Robert E. – TOLLISON, Robert: Politicians, Legislators, and the Economy. Boston: Martinus-Nijhoff, 1981. TOLLISON, Robert – McCORMICK, Robert E.: Rent-Seeking: A Survey. *Kyklos*, 35 (1982), pp. 575-602. COLLANDER, David (ed.): *Neoclassical Political Economy: The Analysis of Rent-seeking and DUP Activities*. Cambridge: Ballinger.1984 SHUGHART, William F. – TOLLISON, Robert: On the Growth of Government and the Political Economy of Legislation. *Journal of Law and Economics* 19 (1986), pp. 111-127. ROWLEY, Charles – TOLLISON, Robert – TULLOCK, Gordon: *The Political Economy of Rent-seeking*. Boston: Kluwer Academic Publishers, 1988.

against the proposals. However, as seen in the previous paragraphs, this opportunity of the interest groups also enhances the chance of regulatory capture – such methods provide options not only for interest groups focusing on the public interest, but for lobbies furthering their own self-interest. The latter will be able to adopt effective strategies against welfare-enhancing policies.

An alternative mechanism for monitoring is the competition between the bureaus through so-called direct or indirect benchmark competition. In case of direct competition, the sponsor is able to terminate funding the office because alternative solutions of the problem are available. In case of benchmark competition, the funding is not under threat, but the size of the budget or the required outcomes are determined after comparing the results of the bureau with the data of similar offices.

Policy-making: role of veto-groups (bureaucracy and politicians)

The interest groups are able to increase or reduce the chance of adopting a new policy or terminating an actual one. But the politicians and bureaucrats have veto rights in policy-making. If they do not accept the proposal, then the policy will not be implemented. This veto right is clear in the case of legislation, but similar rights are in the hands of the bureaucracy. Implementing a new policy typically requires active contribution from the side of the bureaucracy. Moreover, the bill typically cannot be prepared without their work, because they have absolute advantage in codification. The implementation of the policy depends almost entirely on the bureaucracy.

Let us commence with the issue of proposals. Suppose the bureaucracy prepares a proposal for a policy change. Typically, the proposals are presented in a take-it-or-leave-it form. The politicians have a very limited opportunity to modify the proposal – because of the complexity of a bill they often need the help of the bureaucracy for a modification. They almost always face an all or nothing choice: either they accept the proposal of the bureaucracy or the *status quo* remains. In this case the bureaucrats tend to make proposals which are only just acceptable for politicians, only just a little bit better for them as the *status quo*, but the best scenario for the bureaucracy of the options that the politicians will not veto.

Figure 1 presents a simple model for this 'legislative game' between the bureaucracy and the government. There is a two-dimensional political space. The optimal platform of the bureaucracy and of the governing parties is *B* and *G*. The *status quo* is S – this is the current policy; it will be followed if no changes are accepted. Bureaucrats know that legislation will not accept any policy that is farther from G than the *status quo* – U1 depicts this constraint, these are the policies that are just as preferable for the governing party politicians as the *status quo*. The optimal choice for the bureaucrats is the proposal at point 1. This is the closest point of U1 to their optimal point, B.

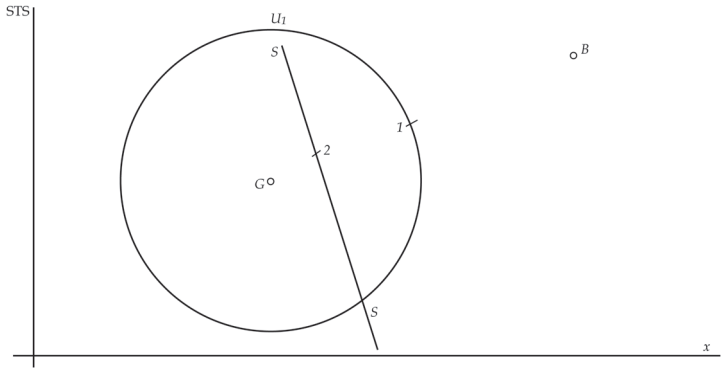

Figure 1: Change in the equilibrium of the veto policy following the change of the preferences of bureaucracy

If the politicians rationally foresee that the proposal coming from the bureaucracy will provide no or only minimal extra benefit for them, they can extort better proposals as well. For example, they commit themselves to refuse any proposal if their surplus is insufficient. The commitment must be credible: the bureaucrats must believe that they will refuse an insufficient proposal even if it provides more benefit for the governing parties compared to the *status quo*.[34] The dominant strategy of the bureaucrats remains the same: they have to elaborate the proposal which is the best for the bureaucracy from among the options what the politicians will not veto. But now, the constraint shifts: more politician-friendly proposals will not be vetoed.

Suppose the legislature declares that it will not accept any policy above or the left of line *SS* in Figure 1. Now, the best proposal of the bureaucracy is point *2*.

Implementation: the role of independence within the relationship of bureaucracy and politicians

When the bureaucracy implements a law, applies it for particular cases, there is a room for discretion. The problem is similar in the case of implementation: the bureaucracy will choose the option maximising its benefit within the options in its discretion. Now the 'politicians' participation constraint' is not defined by the acceptable (for example better-than-status-quo) policy, but by the limits of discretion. In a very simple model this room, this constraint is set in the aforementioned procedural rules – if the protocol is violated, the bureaucrats will be punished.

The chance and the form of punishment depend significantly on the independence of the bureau. Suppose the politicians want to sanction the bureaucracy because, in their opinion, the bureaucrats make decisions inconsistent

[34] The commitment is credible because politicians and bureaucrats repeatedly play a similar game within the framework of an election cycle.

with this constraint. Stronger independence means that this punishment is more costly. The model assumes that independence does not prevent such sanctions, for example firing, replacing the staff – independence dependent on the cost of sanctions. The option for sanctioning the most independent institutions, for example the judiciary, is always available, but its costs are extremely high: if a government starts a war against the judiciary, the politicians' reputation, their chance of being re-elected will decrease. This high cost of sanctioning results in the high discretionary power of independent institutions.

This definition of independence plays a key role in public choice theory. Since William M. Landes and Richard A. Posner[35] the theory explained the independence of the judiciary as a method to ensure that the actual laws will be implemented after the next election. The judiciary will make decisions according to the law independently from the preference of the actual government.[36] This argument can be applied for the case of other independent institutions and for the general bureaucracy as well: even if the incumbent parties lose the next election, their policies will be implemented unless the law is modified. If the staff of the public office may be easily fired, the new government will replace it with new staff less committed to implement the former governments' policies. The politicians do not have to change the law, they can (more) easily ignore them. The laws and independent institutions tie the hands of other bureaus and their successors: if they want to abandon the policy, they must bear a higher cost – they have to modify the law or must start a war against these individual institutions.

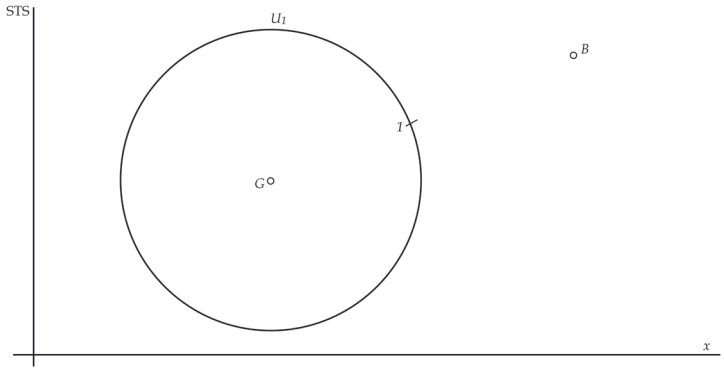

Figure 2: Implementation in case of conflict among the politicians and the administration

[35] LANDES – POSNER op. cit.

[36] This independence is beneficial also for governments, because it ensures that the law they enact will be implemented even after elections. This certainty increases the value of the policy both in their own eyes (e.g. the policy will serve the public interest for many years) and from the perspective of the lobbies – they will devote much effort to 'buy a policy'. Because of this higher demand, the independence can be profitable for politicians as well. See LANDES – POSNER op. cit.

Figure 2 presents a simple example for this tied-hand effect. (The political space in Figure 2 is identical to the one presented in Figure 1. The policy platform of the current government is *B*, the next government is expected to take position *G*.[37] First, consider the case where there are no independent institutions – lack of independence in this model means that the bureau can be restructured or terminated, the staff can be replaced without any negative consequence. In this case the policy after the next election will be close to *G*.[38]

What changes if a law is enacted and this is enforced by an independent judiciary even against the will of the new government? What changes if a new independent agency or bureau with independent staff is established? For the sake of simplicity, assume that a 'demarcation line' can be clearly determined: if the position of the bureaucracy and the ensuing implementation of the policy is farther from the level of difference accepted by the government, the government shall wage a war against the independent institutions, or the law will be modified. In Figure 2, this acceptable difference is represented by *U1*. If the implemented policies, the administrative decisions in the particular cases, the verdicts in lawsuits are inside the circle, the legislature tolerates the independence, but in case the decisions fall outside *U1* (i.e. they are farther from *G* than the radius of the circle), the government start the war. If the bureaucracy is interested in avoiding the sanctions, the optimal choice of the bureaucracy is policy 1 – this is the no-war point closest to *B*. Independence shifts the implemented policy after the election from *G* to 1.

Within governments: relationship between (current and future) politicians and among the bureaus

The earliest public choice models were criticized because they often treated governments as monolithic rather than structurally complex entities. These were entirely demand-side models attempting to explain policy-making as a consequence of a fight between distributional coalitions, or a result of vote-maximising political actions.

However, the government is not monolithic, it consists of several bureaus with different material or immaterial interest. Their preferences may be contradictory: if a bureau achieves its goal it would reduce another's benefit. For example, if the ministry responsible for environmental issues achieves that the legislature issues a declaration against another country because of its high

[37] The model supposes that 'government', 'bureaucracy' and 'judiciary' may be modelled similar to an individual. For example the 'choice of the government represents the choice of the person who has influence over the majority of the legislature – the median voter of the legislation, the leader of the majority, etc.

[38] It will be located close to, but not necessarily at *G*, because the policy position of a single government may also change. The result of the contest within the government is not stationary. From time to time, other groups prevail causing a slight shift of *G*. Because replacing the staff is never entirely without cost, the ideal position of the actual bureaucracy and the government will not always coincide. Small differences will be tolerated.

level of pollution, this declaration can be harmful for the bureaus responsible for the good political and economic relationship with the given country. In other cases the conflict is less direct – for example if the same ministry succeeded in increasing its budget, then the residual budget available to others is reduced. This budgetary bargaining is identical to the aforementioned interest group contest.

2 Comparative Statics

After the static analysis of the characteristics of the actors and the interactions among them, the expected results of international and European environmental law can be assessed. This chapter will focus on the expected effects of the change in international or European law, in particular, the codification of the vague sustainability principle: what happens if the principle is incorporated into a new treaty, directive, recommendation, or if they add a new element to the list presented in the previous chapters (as it happens when the principles incorporates new elements besides intergenerational equity), or if they change some element[39]? These changes will modify the equilibrium of domestic politics and therefore, the policy of the government. For the sake of simplicity, the model will analyse only three main transmitting mechanisms: (i) change in the preferences of voters, (ii) shift in the personal interest of the politicians and bureaucrats, and (iii) increase in the power of environmentalists in the framework of the interest group contest. But before we embark upon the analysis of these changes, it must be recalled that one of the most important effects of these changes in international or European law was assessed formerly. The ratification of these documents (or automatic incorporation into domestic law) results in the tied-hand effect.

2.1 Changes in Preferences of Voters

As demonstrated, even in the case of *probabilistic voting*, parties try to find the platform which maximises their expected votes. The appearance or change of the sustainability principle in the international or European law context affects the policy through changing the winning platform. Comparative statics analyzes how this point moves in response to an external change. Figure 3 represents the change in the result of the elections (more exactly: the expected shift in the position of winning party).

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[39] For example Duncan French argues that when the New Delhi Declaration defined the states' duty to manage their natural resources in a sustainable and safe way, it moved beyond Principle 2 of the Rio Declaration which is based on the traditional principle of the 'sovereign right to exploit'. FRENCH, Duncan: Sustainable Development. in: FITZMAURICE, Malgosia – ONG, David M. –MERKOURIS, Panos (eds.): *Research Handbook on International Environmental Law*. Cheltenham: Edward Elgar, 2010, pp. 62-63.

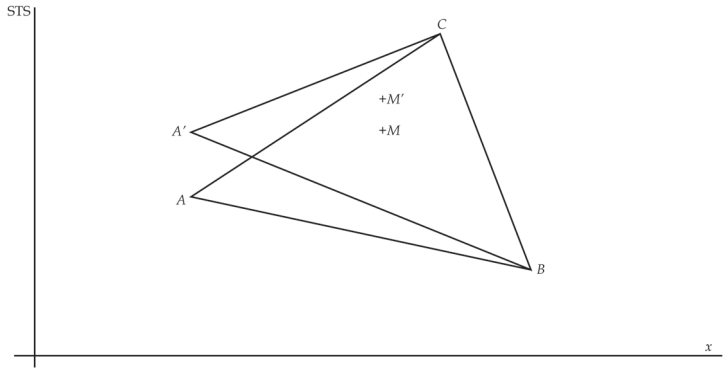

Figure 3: Effect of an environmentalist shift of single group of voters on the result of elections

The model supposes that the appearance of the principle, the public discussion about related problems renders voters more sensitive to the issue. Figure 3 presents the simplest (weakest) change: only group A alters its preferences and becomes more sensitive to sustainability (the other two groups' preference remain unchanged). This change induces a shift of point A to A'. This single, small change causes a shift in the optimal platform of the parties. The winning strategy will most certainly move toward a more environmentalist position. The equilibrium moves from M to M'.[40]

It is worth recalling another important effect of the international and European environmental regimes on the domestic elections. As demonstrated, rational ignorance is assumed to be the main characteristic of voters, because of the relatively high cost of information (or relatively low expected benefit accrued from the informed vote). However, even if international and European law adopts a very vague definition of sustainability, it typically incorporates a compliance mechanism: institutions monitoring the nations' policies. Such institutions will provide more accurate information about the consequences of the policy option. Let us analyze the simplest case: only one group accesses this new source of information; these voters will assess the parties' positions with less bias. *Ceteris paribus,* the equilibrium of party competition will move towards the preferred position of this group. It seems plausible to suppose that this group is the greenest group, C – they are more interested in this issue. If group

[40] Mathematically, this effect can be presented as a change in eq. (N.1) and eq(N.2). If the ideal position of group A shifts from Ay to Ay + E where E >0, then the winning strategy of the parties will move towards a more environmentalist policy. The extent of this shift depends the sensitivity of the vote of voters in group A to the distance between their ideal position and the parties' platform, and the number of voters in group A. The shift in ideal position as a consequence of the appearance of the sustainability principle in political debates does not change the factors in this model. If the principle affects the preferences of two or all groups of voters, then the expected shift in the winning party's position will be greater.

C becomes more important in the view of politicians, M will move to M', the new equilibrium platform will be more sensitive to environmental challenges, will focus more on the opportunity of the next generations.

2.2 Changes in the Personal Optimum of Politicians and Bureaucrats: External Sticks and Carrots

After analyzing the tied-hand effect in legislation and the establishment of new independent agencies, it is worth considering the effects of the shift in the preferences of these independent institutions. Subsequently, two main interactions will be analysed: the shifts in the preferences of the independent agencies affect the equilibrium (i) in policy-making and (ii) in implementation.

Suppose that after a change in international and European environmental law the independent institutions or the government (the politicians) become more sensitive to sustainability problems. This extra sensitivity can be based on the same reasons why the voter's preference can change: the new international regime or the media coverage of the international debate can draw their attention to the importance of the issues. They receive more information about the expected negative consequences of current policies, economic or social practices. Officials engaged in international negotiation start obeying the common values which their negotiating partners share, the rules elaborated as an outcome of the negotiation. In case the bureaucracy or some politicians in domestic political debates stand up for the specific values or rules, this can bring them international reputation, international support. The reputation and support can be personal or institutional. Institutional reputation can be a very useful weapon in national politics – for example they can be used in the 'war of independence' of the bureaucracy or in the distributional contest, in budgetary processes when the politicians fight for a higher share for the given issue. Personal reputation, similarly to the support of the lobbies can be transformed into social capital (personal network), future career, social capital, etc. These can help if the employee exits the current office. A special form of this preference modification is the aforementioned shift in the optimal platforms of the parties because of the changes in voters' preferences.

Because of the limited space, this point will only refer to the effects of the change in the position of the bureaucracy (judiciary). Readers will easily construe similar effects of the shift in the platform of the parties.

First, focus on the previous model of implementation with independent institutions. After the occurrence of a new, but vague category of sustainable development in the international regime, the platforms of the agencies and the judiciary are assumed to be more future-sensitive. Figure 4 shows that their optimal platform shifts from *B* to *B'*. Even if the optimal point of the government remains *G* (i.e. the preference of the politicians remains unchanged), the expected result of implementation is also expected to be more sensitive to the

well-being of future generations. The equilibrium of the implementation is the shift from *1* to *1'*. Furthermore, if the politicians foresee that the proposal of the bureaucracy will provide no or only minimal benefit for them over the *status quo*, and they make commitments[41] to refuse any proposal without the required surplus (i.e. if they define SS' as the constraint for accepting the proposal), the shift in the bureau's preference caused by the international environmental regime results in a move of the equilibrium from 2 to 2'.

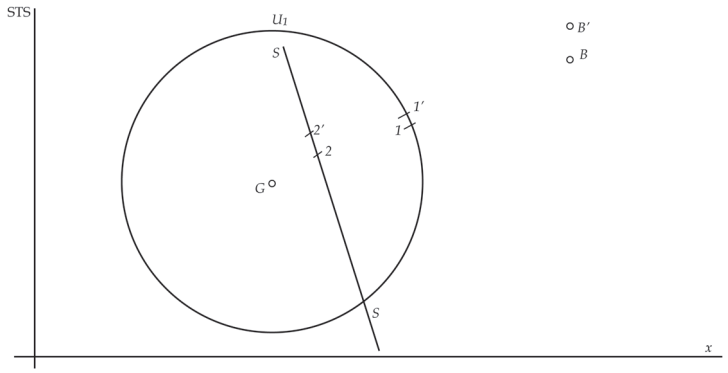

Figure 4: Change in equilibrium of the veto policy after the change in the preferences of the bureaucracy

2.3 Interest Group: Domestic Dynamics

It is well documented, that if environmentalist lobbies are organised the domestic environmental policy is strengthened. For example, Seth Binder and Eric Neumayer demonstrate that the strength of environmentalist NGOs in the different countries have statistically significant impacts on the regulation regarding the emission of sulfur dioxide, smoke and heavy particulates.[42] James T. Hamilton and Kip W. Viscusi claim 'that the likelihood that residents will engage in collective action does cause [that the senators in the US Senate tend] to adopt more stringent cleanup standards and spend more to avert cancer cases.'[43] In their cross-sectional analysis on the ratification of Kyoto protocol, Per G. Fredriksson and Gergely Ujhelyi find that intensive environmental lobby group activity rendered ratification more probable.[44] At the same time, the

[41] The commitment is credible becuase the politicians and the bureaucrats play the similar game repetedly within the framework of an election cycle.

[42] BINDER, Seth –NEUMAYER, Eric: Eric Environmental pressure group strength and air pollution: an empirical analysis, *Ecological Economics* 55 (2005), pp. 527-538.

[43] HAMILTON, James T. – VISCUSI, Kip W.: Calculating Risks? The Spatial and Political Dimensions of Hazardous Waste Policy, Boston: Massachusetts Institute of Technology, 1999, pp. 154.

[44] FREDRIKSSON, Per G. –UJHELYI, Gergely: *Political Institutions, Interest Groups, and the Ratification of International Environmental Agreements*. mimeo, 2006.

research presented above is very context-dependent, and consequently, does not provide a solid basis for generalisation.

As demonstrated above, the first problem of interest group policy results from the unequal opportunity to become organised. At the same time, international environmental regimes help in the formation of domestic and international environmental lobbies. In essence, these face the free-riding problem: except for small groups with concentrated benefits they need personal benefit, selective incentive: for example personal material benefits, useful information or other personal services unavailable for non-members, relationship with others, reputation, etc.[45] International organisations typically provide some of these private goods: members can participate in an international network (nexus with foreign people, information, and foreign stipends; trips abroad, etc.). The (potential) organisers also receive material assistance and information (know-how) from this network – and this makes the organisation of the domestic lobby easier.

However, as the size theory of the interest group contest claims, the mere existence of an environmental group does not cause a shift in policy. Smaller groups will always have a higher influence on policy-making, especially in the less upfront issues – for example the details of a regulation. There are many anecdotes that industries interested in weakening the emission standards typically do not lobby against the regulation, they accept its necessity *en masse* (especially, if, as demonstrated, the regulation ensures extra-profit for them) but they focus on some less visible details which may cause a relevant increase or reduction to their profit. However, the international regime may help in the fight against these less visible pitfalls in case the domestic interest groups in the international network share the information about the practice the polluting industries typically employ.

Moreover, this network can help in coping with the principal-agent problem within the interest group as well. One of the most obvious methods for controlling the agents' actions is comparison: the group members can compare their benefits with the results of other similar groups. But since information is costly, and the collective action problem occurs, on the personal level, ignorance may be rational – the information necessary for the comparison will be missing. However, if the international organisations gather and publicize information about the policies of the member countries, this problem can be mitigated. The members, the interested groups can easily (but not without cost) assess the efficiency and effectiveness of the group leaders; they can compare the domestic achievements with the results attained in other countries.

On the other hand, we saw that the role of small concentrated lobbies supporting some regulation inspired by sustainable development must not be underestimated. The green industry with very concentrated benefits is also a

45 Naturally, similarly to the motivations of voters, the group members can also be motivated by the 'expressive action': the benefit from the feeling of integrity, expressed through standing up for something important.

natural ally of the large environmentalist groups. And policy typically provides benefits as compared to the taxation, custom, or other payment. However, the producers of close substitute goods must draw benefits from the production constraints of the given industry – for example limiting the use of nuclear power plants or coal fired power plants creates great advantages for firms engaged in alternative energy production. For example, Urs Steiner Brandt and Gert Tinggaard Svendsen explain the EU's commitment to Kyoto as a consequence of the wind energy lobby.[46]

Finally, the institutional circumstances of the interest group contest can significantly affect the equilibrium. As demonstrated, if the contest is left 'unregulated' then the lobbies will tend to allocate the cost of the policies not to each other but to the next generation. If the political systems employ some rules (for example budgetary constraints on the annual budgetary debt or the overall public debt), they limit the opportunity to burden the current costs onto the next years. However, the weakness of these financial methods is that they concentrate only on the annual cash flow and financial assets (debt, asset). For example the depreciated value of physical capital (for example due to the delayed renovation of the roads or buildings) or human capital (ineffective education system or health care) is left unassessed by such measures. Similarly, the so-called implicit deficit (for example the obligation not burdening the explicit creditor but the next generation – primarily the future pensioners) is omitted from this calculation.

Because all forms of 'leave the problem to the future' policy cannot be defined in financial rules, several countries establish institutions with the explicit responsibility of fighting against programs decreasing the opportunities of future generations – for example ombudsmen or other similar institutions. However, the inherent weakness of these institutional mechanisms results from the fact that while interest groups have several forms of 'currencies' (information, material and immaterial support, vote, etc.) in exchange for the desired policy, ombudsmen only have two limited possibilities. First of all, they may inform the public and they may call attention to an unsustainable policy. Additionally, in some countries, where the court may not be accessed by the public (for example they do not have standing to sue if they incurred no direct harm as a result of the policy), these offices can bring lawsuits in order to achieve the annulment of a certain unsustainable regulation. (In countries where the access to justice is less constrained, these offices possess a cost-advantage.) At the same time, these offices often misunderstand their role: for example they consider themselves 'green ombudsmen' and narrow their focus to environmental issues (in some cases they also focus on certain public finance issues). Briefly, they may neglect the other aspects of sustainability. In the terminology of weak sustainability, they concentrate solely on the environmental capital and forget

[46] BRANDT, Urs Steiner – SVENDSEN, Gert Tinggaard: Fighting Windmills: The Coalition of Industrialists and Environmentalists in the Climate Change Issue', *International Environmental Agreements: Politics, Law and Economics* 4 (2004), pp. 327-337.

other forms of capital (social and financial capital) and the potential substitution between them.[47]

3 Conclusion

The principle of sustainable development is frequently criticized because it is only a political slogan; it does not amount to soft law yet.[48] This chapter demonstrated that such a vague term is also capable of influencing policies – even without the second or third party sanctions presented in the previous chapter. This public choice model focused on the key decision-makers (veto groups): politicians and bureaucrats. Their sensitivity to sustainability issues can result from pressure or incentives coming from abroad (through their personal relationships with people in international or European institutions, or people working for foreign governments) or from the domestic political market. Changes in international or European law can modify the behaviour of voters, it can reinforce the position of domestic lobbies interested in the given field (or in our case, the lobbies sensitive to sustainability issues or interested in green economy), and these changes in domestic politics may render compliance with the vague standards of international and European law more rewarding.

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47 This is the original terminology of weak sustainability (used in environmental economics). See SOLOW, Robert M.: On the intergenerational allocation of natural resources. *Scandinavian Journal of Economics* 88 (1986), pp. 141-9. Solow Robert M.: An almost practical step towards sustainability'. *Resources Policy* 16 (1993), pp. 162-72.

48 LOWE, Vaughan: Sustainable Development and Unsustainable Arguments in BOYLE, Alan –FREESTONE, David (eds.): *International Law and Sustainable Development: Past Achievements and Future Challanges*. Oxford: Oxford University Press 1999, pp. 19-37.