Chapter 9
Sustainable Development and Law

Marjan Peeters and Thomas Schomerus

Abstract Since the emergence of the concept of sustainable development, lawyers across the globe are trying to come to grips with its legal status and the potential legal consequences (See Bosselmann, Sustainability law. Ashgate Publishing, 2008; French, Sustainable development. In: Fitzmaurice M, Ong DM, Merkouris P(eds) The research handbook on international environmental law. Edward Elgar, 2010, and Barstow Magraw D. Hawke LD, Sustainable development. In: Bodansky D, Brunnéé J, Hey E (eds) Oxford handbook of international environmental law. Oxford University Press, 2007). Nowadays, the concept of sustainable development is represented in legally binding texts at international, European, and national levels. Taking EU law as an example, both the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) refer to sustainable development in several articles. This clearly means that sustainable development is part of EU law. The real question, however, is whether this reference to sustainable development in binding law has any significant consequence for legal practice. Can, for instance, the Court of Justice of the European Union annul a decision of the European Commission should this decision be qualified as conflicting with sustainable development? Such a far-reaching and dramatic annulment is most unlikely under EU law, while the potential legal consequences of sustainable development will probably be more subtle. This chapter provides insight into the appearance of sustainable development in international and EU law and gives observations on its possible legal effects and the importance of national decision-making in view of sustainable development.

Keywords Sustainable development • EU law • International law

M. Peeters (✉) • T. Schomerus
Leuphana University of Lüneburg, Scharnhorststraße 1, 21335, Lüneburg, Germany
e-mail: marjan.peeters@maastrichtuniversity.nl; schomerus@leuphana.de

© Springer Science+Business Media Dordrecht 2016

H. Heinrichs et al. (eds.), *Sustainability Science*, DOI 10.1007/978-94-017-7242-6_9

1 Exploring Legal Consequences of Sustainable Development

Since the emergence of the concept of sustainable development, lawyers across the globe are trying to come to grips with its legal status and the potential legal consequences.[1] Nowadays, the concept of sustainable development is represented in legally binding texts at international, European, and national levels. Taking EU law as an example, both the *Treaty on the European Union (TEU)* and the *Treaty on the Functioning of the European Union (TFEU)* refer to sustainable development in several articles. This clearly means that sustainable development *is* part of EU law. The real question, however, is whether this reference to sustainable development in binding law has any significant consequence for legal practice. Can, for instance, the Court of Justice of the European Union annul a decision of the European Commission should this decision be qualified as conflicting with sustainable development? Such a far-reaching and dramatic annulment is most unlikely under EU law, while the potential legal consequences of sustainable development will probably be more subtle. This chapter provides insight into the appearance of sustainable development in international and EU law and gives observations on its possible legal effects and the importance of national decision-making in view of sustainable development.

2 Sustainable Development in International Law

2.1 Treaties

International law concerns the law between states. The most extensive legal reference to sustainable development in international law is an explicit mention in a range of treaties, in particular environmental treaties, thereby making it legally binding within the treaties' context. The binding nature of treaties refers only to their parties, which can be states or international organizations. Industries and citizens (private actors) are not bound by treaties, except under very specific circumstances such as the criminal responsibility of individuals before the International Criminal Court.[2] State action influencing private actors might be necessary in order to reach compliance with treaty obligations. As a concrete example: if a country has ratified a treaty containing the obligation to reduce greenhouse gas emissions, it can impose duties on its private actors in order to comply with that international obligation.

A general characteristic of environmental treaties is their often vague terms. For example, the United Nations Framework Convention on Climate Change from 1992 (UNFCCC) hardly contains any binding substantive obligations for the treaty par-

---

[1] See Klaus Bosselmann, Sustainability Law, Ashgate Publishing, 2008; Duncan French, Sustainable Development, in: Maglosia Fitzmaurice, David M. Ong, Panos Merkouris (2010) *The Research Handbook on International Environmental Law,* (Chap 3) Edward Elgar, and Daniel Barstow, Magraw, Lisa D. Hawke, Sustainable Development, in: Daniel Bodansky, Jutta Brunnéé and Ellen Hey (2007), *Oxford Handbook of International Environmental Law,* Oxford University Press.

[2] See http://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.

ties but introduces an institutional framework for further decision-making, to be conducted by so-called Conferences of the Parties (COP). As a guide to such further decision-making, the UNFCCC provides principles, among which the following mentions the right to sustainable development:

> The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and should be integrated with national development programmes, taking into account that economic development is essential for adopting measures to address climate change. (Art. 3(4) UNFCCC)[3]

The above text leaves ample room for interpretation and, consequently, no clear substantive rule can be derived from the reference to sustainable development. It is hence up to the treaty parties to promote interpretation and further policymaking, with the aim to conclude binding commitments such as in the Kyoto Protocol of 1997.

- ***Task**: Describe the direction Article 3(4) gives for national policymaking by the treaty parties. Under what circumstances can differentiated commitments among treaty parties be developed?*

2.2 Soft Law

Since there are huge political barriers to concluding clear commitments within treaties, many international legal texts appear in the form of so-called soft law. These are nonbinding documents with a very different legal status from treaties. For sustainable development, the most important soft law document is the 1992 UN Rio Declaration. Although not much attention is given to the socioeconomic dimension, this declaration is generally seen as the most important and comprehensive international governmental document for sustainable development. The first principle proclaims that:

> Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.

Sustainable development is also emphasized in Principle 8:

> To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

The environmental law literature draws attention to principles possibly deriving from the concept of sustainable development, such as that of intergenerational equity, of the sustainable use of nature, and of integrating environmental considerations into economic and development plans.[4]

---

[3] The text of the UNFCCC can be found at http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

[4] See French, o.c., Philippe Sands, International Environmental Law, third ed. (2012) p. 206–216, the International Law Association (ILA) New Delhi Declaration of Principles of International Law Relating to Sustainable Development, published in *International Environmental Agreements: Politics, Law and Economics* 2: 211–216, 2002, and Resolution No. 7/2012 from the Committee on International Law on Sustainable Development reaffirming the Delhi Declaration (http://www.ila-hq.org/en/committees/index.cfm/cid/1017).

In his article *Losing the Forest for the Trees: Environmental Reductionism in the Law*,[5] Klaus Bosselmann highlights the close connection between environmental and sustainability laws. Favoring a comprehensive legal concept of sustainability, he criticizes the limited approach of environmental law. Bosselmann points out that "environmental laws and policies have saved some 'trees', but the 'forest' is being lost as critical global issues including climate change, biodiversity loss, and our ecological footprint continue to worsen. Existing laws and policies mitigate the ecological damage inflicted by industrial economies and western lifestyles." He proposes "a sustainability approach to law that aims for transformation rather than environmental mitigation."

It would, however, be unbalanced to put sustainable development only into a green perspective: the core aim of sustainable development is to reach intergenerational and intragenerational equity. In the latter case, the aim is to reach equity between the poor and the rich, thereby recognizing that developing countries are in need of economic growth. The real challenge of sustainable development is to find a proper balance between environmental, social, and economic concerns. This is reflected in Principle 3 of the Rio Declaration:

> The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

- ***Task**: Discuss the interrelation between environmental law and sustainability law. Should the protection of the environment be the primary goal of sustainability law?*

2.3 Courts

The question arises whether the International Court of Justice (or other dispute settlement mechanisms such as tribunals) might increase the legal weight of the concept of sustainable development. The limited case law thus far shows that judges are reluctant to fill the gap left by international politicians. It also shows that they refrain from giving an adequately substantive interpretation of sustainable development for it to become a leading standard in case decisions for parties unable to find a resolution. In a dispute between Hungary and Slovakia concerning a major hydraulic project (the Gabčíkovo-Nagymaros Project), which was relevant for *development purposes* (including the generation of hydro energy) but with *environmentally negative consequences*, the International Court of Justice decided in its judgment of 25 September 1997 that sustainable development is only a concept and hence not a binding principle of international law. The court considered:

> This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. (para 139)

[5] Bosselmann, Sustainability 2010, 2, 2424–2448 (free access under http://www.mdpi.com/2071-1050/2/8/2424)

The Court then ruled that it is for:

> (…) the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. (para 140)

As stated by Cesare Romano, the court essentially threw the dispute back into the parties' lap, leaving them to negotiate a solution to their conflict.[6] The concept of sustainable development was clearly not applied by the court as a tool to solve the dispute. The International Court of Justice Vice-President Weeramanty is, however, of the impressive opinion that sustainable development must be seen as *a principle of modern international law androoted in history*.[7] He feels strongly that *pristine and universal values* must be integrated into the "corpus of living law".[8] In his words:

> Sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage.[9]

As a general principle of international law, sustainable development would be applicable even without having been agreed upon in a treaty. According to Judge Weeramantry, the principle of sustainable development primarily means that the court must hold an even balance between environmental and developmental considerations.[10] Nevertheless, the core question remains as to how, in specific cases, this balance can be struck.

The idea that sustainable development should to some extent play a role in judicial decisions has also been expressed by the Appellate Body to the World Trade Organization (WTO). The preamble to the WTO agreement from 1994 contains a mix of economic, social, and environmental values, referring to sustainable development as follows:

> The Parties to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, (…)[11]

In 1995, the WTO's Appellate Body argued in the Shrimp/Turtle case that sustainable development "must add colour, texture and shading to our interpretation."[12]

---

[6] Cesare Romano, *The peaceful settlement of international environmental disputes,* (2000), p. 255–256

[7] The separate opinion can be found at http://www.icj-cij.org/docket/files/92/7383.pdf; see also Bosselmann (2008), p. 12.

[8] See the separate opinion, pp. 105–106 (bottom page number).

[9] See the separate opinion, p. 107 (bottom page number).

[10] See the separate opinion, p. 85 (bottom page number).

[11] Agreement establishing the World Trade Organization, http://www.wto.org/english/docs_e/legal_e/04-wto.pdf

[12] The ruling from 12 October 1998 is published on http://www.wto.org/english/tratop_e/dispu_e/58abr.pdf; see para 153.

While the opinion of Weeramantry and the WTO Appellate Body reasoning favor a more important role for sustainable development in judicial decisions, the real effect of this concept and its precise legal status remain hard to grasp. The concept of sustainable development can be given further texture by more detailed provisions or definitions in treaty texts and also in specific judicial cases which are suitable for a further interpretation and application of that concept. The Committee on International Law formulated its potential development as follows:

> Recourse to the concept of 'sustainable development' in international case law may, over time, reflect a maturing of the concept into a principle of international law, despite a continued and genuine reluctance to formalise a distinctive legal status.[13]

- ***Question****: Can the concept of sustainable development be considered a principle of international law?*

3 Sustainable Development in EU Law

EU law, particularly the TEU and the TFEU, refers to sustainable development. As long ago as 1991, the Treaty of Maastricht mentioned "sustainable and non-inflationary growth respecting the environment" and "the fostering of sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them."[14] The 1998 Treaty of Amsterdam underlined sustainable development as one objective of European integration. Today, sustainable development is specified in Article 3 of the TFEU as follows:

> 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.

Here, the focus lies on the sustainable development of *Europe*. The international and intragenerational relevance of sustainable development are referred to in Article 3(5) of the TEU as follows:

> In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. 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.

---

[13] The Committee on International Law on Sustainable Development reaffirming the Delhi Declaration (http://www.ila-hq.org/en/committees/index.cfm/cid/1017), guiding statement 1

[14] The Maastricht Treaty introduced these references into Article 2 and Article 130u of the European Community Treaty.

This text deals with the "sustainable development of the Earth," apparently focusing on the concept's environmental dimension. The eradication of poverty is mentioned separately. Moreover, in Article 21(d), which provides general principles for EU external relations, eradicating poverty is given as the primary aim.[15] Within the TEU, the three dimensions of sustainable development are incorporated, while, in places where external action by the EU is concerned, the needs of the poor become a priority.

None of the abovementioned TEU statements have great legal relevance. The TEU does not provide a definition for "sustainable development," leaving the precise meaning difficult to determine. It is left to EU institutions to create the necessary clarity in defining sustainable development with legislative and administrative acts.[16] Since the terminology is vague, and given the traditional discretion the courts give to the legislature when decision-making involves political, economic, and social choices or complex assessments and evaluations, it would be exceptional if the courts attached any direct consequences to the mention of sustainable development in the TEU articles.

One legal rule deserves specific attention: the external integration obligation in Article 11 of the TFEU, requiring the integration of environmental protection into all Union policies and activities. Such integration must be done with a view to promoting sustainable development.[17] On the one hand, it is unlikely that EU courts will interfere in governmental decision-making on the grounds that *the promotion of sustainable development* has been insufficient.[18] The courts may, on the other hand, intervene if it is clear that the integration of environmental protection requirements, for instance, into transport measures, has been disregarded or if such environmental integration has completely neglected the promotion of sustainable development. One interpretation of the article is the requirement for the acting institutions to justify their compliance with Article 11 of the TFEU. The effect of Article 11 will be

[15] The article reads: "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: (…) foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty (…)" (Art. 21(2)(d) TEU).

[16] For a discussion of EU policymaking in view of sustainable development, see Ludwig Krämer, EU Environmental Law, 7th edition (2012), Sweet & Maxwell, 9–11.

[17] The full text of Article 11 of TFEU is: "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." An extensive examination of the external integration principle has been given by Nele Dhondt, Integration of Environmental Protection into other EC policies, 2003, Europa Law Publishing. Regarding the incorporation of "sustainable development" into the external integration rule, she argues that it aims at the reconciliation of ecological objectives with socioeconomic ones, which is, in fact, the same as the meaning of sustainable development in international law (p. 72).

[18] Jans and Vedder discuss Article 11 of the TFEU mainly in view of the legitimacy of acts in light of the environmental objectives. They state in line with Nele Dhondt (o.c. p. 183) that only in very exceptional cases will a measure be susceptible to annulment. They do not elaborate specifically whether such an annulment can be foreseen for short falling action in view of promoting sustainable development. Jans, Vedder, European Environmental Law, 4th edition, (2012) Europa Law Publishing, pp. 25–27

that institutions must clarify whether and how they have completed this assessment, thereby offering an opportunity for sustainability science and, particularly, integrated assessments to fulfill a role in supporting EU policy and law.

- ***Task****: Discuss the potential significance of Article 11 of TFEU in view of developing product standards for transport fuels, including biofuels and the role played by sustainability science.*

4 An Illustrative Court Case

This section will highlight a court decision that illustrates how "sustainable development" can become part of case law. The case at hand concerns a so-called preliminary ruling by the European Court of Justice (ECJ).[19] This ruling occurs when a national court of an EU member state is in doubt about the interpretation of the EU law. In order to clarify the issue, the national court submits questions to the ECJ, according to which the court will provide guidance. In the Acheloos River case, a Greek court submitted many questions related to inter alia the Water Framework Directive (WFD) and the Habitats Directive (nature conservation). Conflict emerged between a Greek regional authority and the Greek Minister for the Environment. It concerned measures relating to the partial diversion of upper waters of the river Acheloos to the river Pineios in Thessaly which would have negative consequences for the water status. This diversion was intended to serve other interests, in this case, the drinking water supply, irrigation, and renewable energy (hydropower).

It is important to recognize that sustainable development is explicitly mentioned in the WFD. The directive allows a body of surface water to move from high to good status when this is the result of "new sustainable human development activities" and when, inter alia,

> - the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and
>
> - the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means which are a significantly better environmental option.[20]

The court ruled, inter alia, that the fact that it is impossible for the receiving river basin or river basin district to meet its needs in terms of drinking water, electricity production, or irrigation from its own water resources is not a sine qua non for a diversion to be legal.[21] The EU court made clear that such action would nonetheless only be lawful if it meets the criteria as put out in Article 4 of the directive.[22] The national court must determine whether those criteria have been met. A specific

[19] C-43/10, decision from 11 September 2012. See also Article 267 TFEU.

[20] See Article 4 of the Water Framework Directive, 2000/60.

[21] Para 69

[22] Para 69

aspect in this case was that consent for the river diversion had been given prior to 22 December 2009, the deadline for the adoption of management plans for river basin districts. It is important to understand that obligatory management plans will give further substance to subsequent decision-making regarding the diversion of water ways. In other words: governmental authorities must put forward sufficient evidence for any deterioration of water quality permitted under Article 4 of the WFD. Water management plans will most probably play an important role for courts' assessments of the compatibility of activities causing deterioration of the water quality status with the conditions of the directive. Both governmental planning decisions regarding specific river basins and public participation, obligatory in the development of such plans, are important steps toward determining how sustainable development can support specific activities contributive to developmental purposes but less conducive for environmental protection. This particular case illustrates how environmental protection, specifically water quality protection, may be less important than other interests contributing to sustainable development. For an in-depth understanding of the balance struck by EU governmental authorities between development goals and water protection goals, adopted water management plans and, if available, case law must be examined.

- ***Task**: Discuss the potential role of courts in view of sustainable development promotion. Should courts limit themselves to procedural concerns, such as public participation provisions for water management plans, or should they go further by intervening in substantive decision-making?*

5 Conclusion

Since sustainable development is an integrative concept requiring a balance of environmental, social, and economic interests, its legal consequences are hard to determine. First and foremost, the interpretation of the term "sustainable development" must be made in a political process, such as the ordinary EU legislative procedure as prescribed by the EU treaties. It is hence primarily through *legally designed* governmental processes that concrete policies, legislation, and administrative decisions will be made, allowing the overall idea of sustainable development to materialize in specific situations.

The Water Framework Directive is one example for sustainable development being considered a criterion for allowing deviation from the highest environmental protection goal with regard to the promotion of other interests. Since member states are obliged to adopt water management plans, thereby respecting public participation requirements, it is exactly in this process where a balance can be struck between environmental protection and other concerns. Sustainability science and integrated assessments will be needed in order to support this governmental decision-making. Courts will probably refrain from intervening in governmental authorities' substantive decision-making related to sustainable development issues. The International Court of Justice qualifies sustainable development as a concept, although one judge, the vice president, has provided an alternative view, arguing that sustainable devel-

opment should be seen as a principle of modern international environmental law rooted in history. For the near future, the most likely role for courts is to intervene in (national) governmental decision-making for those either not in compliance with public participation obligations or not having taken interests or goals, as prescribed by directives, into account. At the EU level, courts might even find noncompliance with the obligation of integrating environmental considerations in EU policies with regard to the promotion of sustainable development. In this sense, some "sustainable development case law" might emerge.

The examples of court cases show that the law is challenged by sustainability, whether it is seen as a simple concept or a binding principle of international and European law. Legal science is challenged to examine how to integrate sustainability into the law and, subsequently, how to apply this in specific legal procedures. In line with this, it is necessary to further develop sustainability law as part of the wider field of sustainability sciences.

References

Barstow Magraw D, Hawke LD (2007) Sustainable development. In: Bodansky D, Brunnéé J, Hey E (eds) Oxford handbook of international environmental law, (chapter 26). Oxford University Press, Oxford/New York

Bosselmann K (2008) The principle of sustainability. Ashgate, Farnham

Bosselmann K (2010) Losing the forest for the trees: environmental reductionism in the law, sustainability 2:2424–2448 (free access under http://www.mdpi.com/2071-1050/2/8/2424)

Dhondt N (2003) Integration of environmental protection into other EC policies. Europa Law Publishing, Groningen

French D (2010) Sustainable development. In: Fitzmaurice M, Ong DM, Merkouris P (eds) The research handbook on international environmental law, (chapter 3). Edward Elgar, Cheltenham

Jans JH, Vedder HHB (2012) European environmental law, 4th edn. Europa Law Publishing, Groningen/NL

Krämer L (2012) EU environmental law, 7th edn. Sweet & Maxwell, London

Romano C (2000) The peaceful settlement of international environmental disputes. Kluwer Law International, New York