

# Inspiration for Integration: Interpreting International Trade and Investment Accords for Sustainable Development

Marie-Claire Cordonier Segger\*

*This article considers whether States have obligations, in international law, to proactively integrate environmental and social considerations into economic decision-making for sustainable development. In an era of international cooperation shaped inter-actionally by several decades of global debate, culminating in the adoption of universal Sustainable Development Goals (SDGs) at the United Nations, the article considers opportunities to support sustainable development through the interpretation and implementation of international economic treaty law and practice. In particular, the article comparatively discusses a new generation of trade and investment treaties that explicitly mention sustainable development as part of the object and purpose, examining approaches which can define and characterise the Parties' commitments. The article briefly offers considerations for a regulator, arbitrator or jurist seeking to interpret, in accordance with the Vienna Convention on the Law of Treaties<sup>1</sup> ("VCLT"), a diverse range of environmental and social development provisions that are increasingly being integrated into international economic agreements.*

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\* Professor Marie-Claire Cordonier Segger, DPhil (Oxon), MEM (Yale), LLB & BCL (McGill) is Senior Director, Centre for International Sustainable Development Law (CISDL); Full Professor of Law, Faculty of Environment, University of Waterloo; Lauterpacht Centre for International Law (LCIL) and Centre for Environment, Energy and Natural Resource Governance (C-EENRG) Fellow, University of Cambridge; Executive Secretary, Climate Law and Governance Initiative (CLGI); Rapporteur, International Law Association Committee on Sustainable Resources Management, and author/ editor of 21 books and 140 papers on law and sustainable development. (mccs2@cam.ac.uk). Thanks are due especially to Dr Alexandra Harrington, Dr Markus Gehring, Prof Andrew Newcombe, and Dr Sebastien Jodoin for their assistance and insights, and to Prof Stephen Toope for his inspiration on inter-actional theories of legitimacy in international law.

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1. 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) [VCLT].

- I. POLICY AND “SOFT LAW” RATIONALES FOR ADDRESSING SOCIAL AND ENVIRONMENTAL CONCERNS IN ECONOMIC TREATIES
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We assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels.<sup>2</sup>

When States commit to promote sustainable development in a trade or investment treaty, or agree to conduct their economic relations in accordance with a principle of sustainable development, the implications of this commitment are not obvious in international law or policy.

In recent decades, there has been extensive international treaty-making on the protection of the environment. Many multilateral environmental accords (“MEAs”) contain provisions to secure sustainable development

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2. *Johannesburg Declaration on Sustainable Development*, UNWSSD (4 September 2002) UN Doc A/CONF.199/20 1 at para 5 [*Johannesburg Declaration*].

in different ways, across diverse fields.<sup>3</sup> Parallel to these MEAs, international economic treaties are being negotiated and adopted. While it is less documented, a growing number of these accords also address sustainable development, including in the World Trade Organisation<sup>4</sup> (“WTO”) and an increasing range of Regional Trade Agreements<sup>5</sup>. As the WTO Appellate Body noted in the 1998 US-Shrimp Dispute:<sup>6</sup>

[t]he preamble of the *WTO Agreement* — which informs not only the GATT 1994, but also the other covered agreements — explicitly acknowledges “the objective of *sustainable development*”.<sup>7</sup>

The WTO also recognised in the corresponding footnote that “[t]his concept has been generally accepted as integrating economic and social

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3. Alexandre Kiss & Dinah Shelton, *International Environmental Law* (Leiden, The Netherlands: Koninklijke Brill NV, 2004); Patricia Birnie, Alan Boyle & Catherine Redgwell, *International Law & the Environment* (Oxford: Oxford University Press, 2009) at 106-14; Philippe Sands, *Principles of International Environmental Law* (Cambridge: Cambridge University Press, 2003) at 252-66 [Sands, *Principles of International Environmental Law*]; Sumudu A Atapattu, *Emerging Principles of International Environmental Law* (Ardsley, NY: Transnational Publishers, 2006) at 140-45; David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* (New York: Foundation Press, 2002) at 19, 923.
  4. Gary P Sampson, *The WTO and Sustainable Development* (Tokyo: United Nations University Press, 2005); Markus W Gehring & Marie-Claire Cordonier Segger, eds, *Sustainable Development in World Trade Law* (The Hague: Kluwer Law International, 2005) at 129-52; *Agreement Establishing the World Trade Organization*, 15 April 1994 1867, UNTS 154 (entered into force 1 January 15) [*WTO Agreement*].
  5. Marie-Claire Cordonier Segger, “Sustainable Development in Regional Trade Agreements” in Lorand Bartels & Federico Ortino, eds, *Regional Trade Agreements and the WTO Legal System* (Oxford: Oxford University Press 2006) at 313-40.
  6. WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products — Report of the Panel*, WTO Doc WT/DS58/R (1998); WTO, *United States: Import Prohibition of Certain Shrimp and Shrimp Products — Report of the Appellate Body*, WTO Doc WT/DS58/AB/R (1998) [*Shrimp Products*, Appellate Body]; collectively [*US-Shrimp*].
  7. *Shrimp Products*, Appellate Body *ibid* at n 107.

development and environmental protection”.<sup>8</sup>

There may be sound policy reasons for this economic law trend. As will be discussed below, the principle that environmental priorities must be integrated in economic development decision-making is gaining traction,<sup>9</sup> and international trade and investment law and policy is part of economic decision-making. The need to take both environmental and social priorities into account in efforts to achieve sustainable economic development is also increasingly recognised, as reflected in the consensus of the United Nations in the 2015 Declaration on *Transforming our World: The 2030 Agenda for Sustainable Development*, with its 17 universal Sustainable Development Goals (“SDGs”), in the 2012 Declaration on *The Future We Want* from the UN Conference on Sustainable Development, in the 2002 outcomes of World Summit on Sustainable Development (“WSSD”), and other inter-actional international discussions.<sup>10</sup> However, there remains comparatively little legal scholarship or analysis on how trade and investment rules can affect a State’s potential for sustainable development, and how trade and investment treaties might be interpreted to foster rather than frustrate

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8. *Ibid* at para 129.

9. *Award in the Arbitration Regarding the Iron Rhine (Ijzeren Rijn) Railway (Kingdom of Belgium v Kingdom of the Netherlands)* (2005), 2007 Permanent Court of Arbitration Award Series at paras 58-59 (Permanent Court of Arbitration) [*Iron Rhine*].

10. *Johannesburg Declaration*, *supra* note 2; *The Future We Want* (27 July 2012) UN Doc A/RES/66/288; *Transforming our World: The 2030 Agenda for Sustainable Development* (25 September 2015) UN Doc A/RES/70/1 [*Transforming our World*].

sustainable development.<sup>11</sup>

Do States have binding hard, customary or soft law obligations, in international law, to proactively integrate environmental and social considerations into economic decision-making for sustainable development? If sustainable development commitments are taken seriously, what does this mean for international economic treaty law and practice? This article analyses a new generation of trade and investment treaties relating to sustainable development, examining approaches which can define and characterise Parties' commitments to sustainable development. The article briefly discusses options for a regulator, arbitrator or jurist seeking to interpret, in accordance with the *VCCLT*, an increasingly diverse range of environmental and social development provisions found today in economic agreements.

## I. Policy and “Soft Law” Rationales for Addressing Social and Environmental Concerns in Economic Treaties

Commitments to sustainable development are increasingly found, not just as provisions of environmental agreements, but also in accords related mainly to human rights and social concerns, and in treaties focused on economic development.<sup>12</sup> This should not be surprising. Taken together, the range of trade and investment treaty impact assessments

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11. See Alan Boyle & David Freestone, *International Law and Sustainable Development* (Oxford: Oxford University Press, 1999) at 10 in which trade is identified as an area where scope for integration or conflict remains and Hans Christian Bugge & Christina Voigt, eds, *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2009) at 271-95 which calls for new research on sustainable development in economic law. See also Birnie, Boyle & Redgwell, *supra* note 3 at 117 identifying international trade as an area with “significant scope for improvement” for integration of environmental considerations, and Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2009) at 4 [Lowe, *International Law*].
  12. See *e.g.* Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practice and Prospects* (Oxford: Oxford University Press, 2004).

commissioned by States over recent decades raises concerns about the potential effects of new global and regional economic agreements.<sup>13</sup> Assessment findings suggest that trade and investment liberalisation agreements can lead to environmental and social impacts. Potential and actual impacts may depend on the specifics of each accord, which are often shaped by pre-existing economic relationships of the trading partners, the types of industries and sectors that are stimulated by the treaty, the perceived effectiveness of existing measures to protect or improve environmental protection and social development in relation to trade and investment led economic growth within the territory of the Parties to the accord, and other factors.

One response to concerns regarding impacts of trade treaties, advocated by neo-liberal economic and legal scholars, may be to simply let burdens fall where they may.<sup>14</sup> From this view, sovereign States negotiate trade treaties, and are surely in the best position to decide what

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13. See e.g. Gehring & Cordonier Segger, *Sustainable Development in World Trade Law*, *supra* note 5; Marie-Claire Cordonier Segger, Markus W Gehring & Andrew Newcombe, eds, *Sustainable Development in World Investment Law* (The Netherlands: Kluwer Law International, 2011). See also online compilations of EU Sustainability Impact Assessments of Trade Agreements, US Environmental Reviews of Trade Agreements, US Labour Reviews of Trade Agreements, Canadian Environmental Assessments of Trade Agreements, etc.
  14. See Milton Friedman, *Capitalism as Freedom* (Chicago: University of Chicago Press, 1962) at 57-58; Robert A Lawson, "Economic Freedom and the Well-Being of Nations" in Emily Chamlee-Wright, ed, *The Annual Proceedings of the Wealth and Well-Being of Nations* (Beloit: Beloit College Press, 2010) 65 at 67-69; Jennifer Schultz, "The Demise of 'Green' Protectionism: The WTO Decision on the US Gasoline Rule" (1996) 25 *Denver Journal of International Law and Policy* 1 at 3-5; Simon J Evenett & John Whalley, "Resist green protectionism – or pay the price at Copenhagen" in Richard Baldwin & Simon J Evenett, eds, *The Collapse of Global Trade, Murky Protectionism and the Crisis: Recommendations for the G20* (London: VoxEU.org and Center for Economic and Policy Research, 2009) 93.

risks and impacts are most acceptable to their national interests.<sup>15</sup> Just as the benefits of trade agreements will accrue to those States most astute in securing them, so should the costs fall upon the governments and citizens of those less wary.<sup>16</sup> Higher social and environmental standards may even be inappropriate to the special circumstances of certain States, limiting the comparative advantages of developing countries in trade.<sup>17</sup> Attempts to address or integrate social and environmental concerns into trade negotiations, from such perspectives, would be simply “disguised protectionism”, to be rejected or at least addressed separately from “pure” economic law.<sup>18</sup> From this view, the only purpose of a trade or investment agreement is to accelerate economic growth by exploiting comparative advantage, and any other “non-trade” issue should be regarded with extreme caution.<sup>19</sup> For many, however, this position is no longer realistic, due to both policy and emerging inter-actional legal reasons.

Recent decades of trade and investment treaty-making take place against a backdrop of broader international policy debates in which States have not been silent on linkages with environmental, human rights, and sustainable development considerations. Legal literature covers trade

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15. See Thomas Cottier & Krista Nadakavukaren Schefer, “The Relationship between World Trade Organization Law, National and Regional Law” (1998) 1 *Journal of International Economic Law* 83 at 84-86 on *pacta sunt servanda* in the WTO.
  16. *Ibid* at 120-22.
  17. Friedman, *supra* note 14 at 56-58 and Evenett & Whalley, *supra* note 14 at 93-96.
  18. US National Foreign Trade Council, “*Enlightened? Environmentalism or Disguised Protectionism? Assessing the Impact of EU Precautionary-Based Standards on Developing Countries*” (Washington: National Foreign Trade Council, 2004) at iv-vii.
  19. Richard N Cooper, *Environment and Resource Policies for the World Economy* (Washington: Brookings Institution, 1994); letter from Jagdish N Bhagwati (1999) on “Third World Intellectuals and NGOs Statement Against Linkage” (drafted by Bhagwati and signed by several dozen academics, copy on file with author).

and investment linkages with human rights,<sup>20</sup> as canvassed in the 1995 Copenhagen United Nations Conference on Social Development,<sup>21</sup> the 2002 Monterrey International Conference on Financing for Development,<sup>22</sup> and later events. Environmental aspects of these global policy debates are also documented in the leading international environmental law texts.<sup>23</sup> International debates on globalisation are also analysed in studies of international law in the field of sustainable development.<sup>24</sup> On sustainable development, international discussions began before the 1972 United Nations Conference on the Human Environment<sup>25</sup> (“UNCHE”) and were informed by the 1987 World Commission on Environment and Development (“WCED”) mandate<sup>26</sup>

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20. See Rumu Sarkar, *International Development Law: Rule of Law, Human Rights and Global Finance* (Oxford: Oxford University Press, 2009) 257-331 (for human rights in the context of global finance); see also Olivier De de Schutter, “Transnational Corporations as Instruments of Human Development” in Philip Alston and Mary Robinson, *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005) 403.
  21. *World Summit for Social Development* (6-12 March 1995) Copenhagen, Denmark, online: <[www.un.org/esa/socdev/wssd/text-version/](http://www.un.org/esa/socdev/wssd/text-version/)>.
  22. *International Conference on Financing for Development* (18-22 March 2002), Monterrey, Nuevo León, Mexico, online: <[www.un.org/esa/ffd/ffdconf/](http://www.un.org/esa/ffd/ffdconf/)>.
  23. Sands, *Principles of International Environmental Law*, *supra* note 3 at 25-69; Birnie, Boyle & Redgwell, *supra* note 3 at 106-208; Kiss & Shelton, *supra* note 3 at 67, 51; Hunter, Salzman & Zaelke, *International Environmental Law and Policy*, *supra* note 3 at 210; Birnie, Boyle & Redgwell, *ibid* at 106-14; Atapattu, *supra* note 3 at 140-45.
  24. Sands, *Principles of International Environmental Law*, *ibid* at 231; Hans Christian Bugge “1987-2007: Our Common Future Revisited” in Hans Christian Bugge & Christina Voigt, eds, *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2008) at 271-95.
  25. (5-16 June 1972), Stockholm, Sweden, online: <[sustainabledevelopment.un.org/milestones/humanenvironment](http://sustainabledevelopment.un.org/milestones/humanenvironment)>.
  26. *Process of preparation of the Environmental Perspective to the Year 2000 and Beyond*, GA Res 16, UNGAOR, 38th Sess, UN Doc A/RES/38/16 (1983) [UNGA, *Process of preparation*].

and Report.<sup>27</sup> Through the 1992 Rio Conference on Environment and Development<sup>28</sup> (“UNCED”), a series of regional sustainable development summits such as the 1996 Summit of the Americas on Sustainable Development,<sup>29</sup> the 1997 United Nations General Assembly Special Session on Sustainable Development,<sup>30</sup> and the 2002 WSSD, a certain consensus on the challenges began to emerge. In an attempt to address these challenges constructively, in the 2012 United Nations Conference on Sustainable Development,<sup>31</sup> States called for a “green economy in the context of sustainable development and poverty eradication”.<sup>32</sup>

Through the ‘soft law’ consensus declarations emerging from these

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27. World Commission on Environment and Development, *Report of the World Commission on Environment and Development: Our Common Future*, 1987, UN Doc A/42/427 [WCED, *Our Common Future*].
  28. *Rio Declaration on Environment and Development*, UNCED (3-14 June 1992) A/CONF.151/26 Vol 1, online: <sustainabledevelopment.un.org/milestones/unced> [*Rio Declaration*].
  29. *Declaration of Santa Cruz de la Sierra Summit of the Americas on Sustainable Development* (7-8 December 1996) Santa Cruz de la Sierra, Bolivia, online: <www.summit-americas.org/summit\_sd.html>.
  30. *Programme for the Further Implementation of Agenda 21: Report of the Special Session of the General Assembly to Review and Appraise the Implementation of Agenda 21 23-28 June 1997* (19 September 1997) UN Doc A/RES/S-19/2, New York, online: <www.un.org/esa/earthsummit/> [UNGASS, *Programme for Further Implementation*].
  31. *The Future We Want*, *supra* note 10.
  32. See *Report of the Second Committee (Economic and Financial)*, UNGAOR, 64th Sess, UN Doc A/64/420/Add.1 (2009) (on Implementation of Agenda 21, the Programme for the Further Implementation of Agenda 21, and Outcomes of the World Summit on Sustainable Development). See also Commission on Sustainable Development, *Fifth Committee Report*, UNCSDOR, 1997, UN Doc A/64/600.

events,<sup>33</sup> it is possible to trace a growing clarification of the relationship between trade and investment law, and sustainable development. These debates reveal sound policy justifications for the proposal that negative social and environmental impacts of trade liberalisation should *not* simply be left to “fall where they may” onto the most vulnerable groups in developing State Parties to economic agreements, or kept completely separate from trade and investment policy.

The 1972 *Declaration of the United Nations Conference on the Human Environment*<sup>34</sup> (“*Stockholm Declaration*”), by focusing on the need for

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33. “Soft law” describes high level declarations of intent, consensus declarations agreed by States, technical standards, codes of conduct and guidelines that are not aligned with the classical sources of law defined in the United Nations, *Statute of the International Court of Justice*, 18 April 1946, TS 993, 39 AJIL Supp 215 art 38 [SICJ]. One nuanced understanding of “soft law” suggests that in certain circumstances, such declarations can still give rise to legitimate expectations among States. For discussion see Gerry Simpson, “The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power” (2000) 11:2 *European Journal of International Law* 439; Joseph HH Weiler & Andreas L Paulus, “The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?” (1997) 8 *European Journal of International Law* 545; Ulrich Fastenrath, “Relative Normativity in International Law” (1993) 4 *European Journal of International Law* 305; Tadensz Grnchalla-Wesierski, “A Framework for Understanding Soft Law” (1984) 30 *McGill Law Journal* 37; Michael Bothe, “Legal and Non-Legal Norms – A Meaningful Distinction in International Relations?” (1980) 11 *Netherlands Yearbook of International Law* 65; Ignaz Seidl-Hohenveldern, “International Economic Soft Law” (1980) 163 *Collected Courses of the Hague Academy of International Law* 164; Joseph Gold, “Strengthening the Soft International Law of Exchange Arrangements” (1983) 77:3 *American Journal of International Law* 443. But see Christine Chinkin, “The Challenge of Soft Law: Development and Change in International Law” (1989) 38:4 *International and Comparative Law Quarterly* 850 and Hartmut Hillgenberg, “A Fresh Look at Soft Law” (1999) 10:3 *European Journal of International Law* 499.
34. *Declaration of the United Nations Conference on the Human Environment*, UNGAOR, 1972, UN Doc A/Conf.48/14/Rev.1 3 [*Stockholm Declaration*].

financial assistance and economic stability, in Principles 9 and 10 located “the debate on the environment clearly in the context of the international economy”.<sup>35</sup> States also recognised in Principle 8, that “economic and social development is essential ... for the improvement of the quality of life”,<sup>36</sup> and agreed in Principle 14 on the need for rational planning to reconcile conflicts “between the needs of development and the need to protect and improve the environment”.<sup>37</sup> The UNCHE also increased the impetus for certain MEAs that use specific trade obligations as incentives to secure compliance, such as the Montreal Protocol.<sup>38</sup>

After Stockholm, the 1983 WCED was given a mandate to discuss trade matters.<sup>39</sup> In its seminal 1987 Report, *Our Common Future*,<sup>40</sup> the WCED called for a “sustainable world economy”.<sup>41</sup> At that time, the WCED also found that:

... these issues have not been taken up systematically by intergovernmental organizations. The mandates of ... GATT and UNCTAD — should include sustainable development. Their activities should reflect concern with the impacts of trading patterns on the environment and the need for more effective instruments to integrate environment and development concerns into

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35. Lowe, *International Law*, *supra* note 11 at 253.  
 36. *Ibid* at 8.  
 37. *Ibid* at 14.  
 38. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975); Duncan Brack, ed, *Trade and Environment: Conflict or Compatibility?* (London: Earthscan, 1998) at 323; Duncan Brack, *International Trade and the Montreal Protocol* (London: RIIA and Earthscan, 1996); *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 UNTS 3 arts 2, 4 (entered into force 1 January 1989); *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*, 22 March 1989, 1673 UNTS 57 arts 3-6, 8-9 (entered into force 5 May 1992); United Nations Environment Programme & International Institute for Sustainable Development, *Environment and Trade: A Handbook*, 2d (Winnipeg: UNEP and IISD, 2005) [UNEP & IISD, *Environment and Trade*].  
 39. UNGA, *Process of preparation*, *supra* note 26.  
 40. WCED, *Our Common Future*, *supra* note 27.  
 41. *Ibid* at para 41.

international trading arrangements ...<sup>42</sup>

Agreed by consensus in the 1992 UNCED, the 1992 *Rio Declaration on Environment and Development*<sup>43</sup> (“*Rio Declaration*”) and Agenda 21<sup>44</sup> further elaborated the links between economic law and sustainable development.<sup>45</sup> At Principle 2, States recognised both their sovereign rights to exploit their own resources pursuant to their own environmental and developmental policies, and their responsibility to ensure they do not cause damage to others.<sup>46</sup> Principle 27 calls for “the further development of international law in the field of sustainable development”, and Principle 12 focuses on international trade, calling for a “supportive and open international economic system that would lead to economic growth and sustainable development”.<sup>47</sup> In Principle 4, States declared 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 it”.<sup>48</sup> The *Rio Declaration* also highlighted the need for procedural innovations such as impact assessment and public participation mechanisms. Agenda 21 called for further efforts to codify and develop “international law on sustainable development”,<sup>49</sup> and recognises the need to bring international economic law into accordance with the rest of this international law.<sup>50</sup> Although a section on “making

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42. *Ibid* at paras 55-56.

43. *Rio Declaration*, *supra* note 28.

44. *Agenda 21*, UNGAOR, 46th Sess 21, UN Doc A/Conf.151/26 (1992) [*Agenda 21*].

45. *Rio Declaration*, *supra* note 28. See also Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development* (London: Martinus Nijhoff, 1987) which was a key input to the 1992 *Rio Declaration*.

46. *Rio Declaration*, *ibid*.

47. *Ibid*.

48. *Ibid*. See especially analysis in Birnie, Boyle & Redgwell, *supra* note 3 at 116-23.

49. *Agenda 21*, *supra* note 44 at para 39.1(a).

50. *Ibid* at paras 39.1-39.10

trade and the environment mutually supportive” is mainly cited,<sup>51</sup> policy guidance on trade, investment and sustainable development for States is actually found throughout Agenda 21 in diverse sections on social and economic dimensions,<sup>52</sup> conservation and management of resources for development,<sup>53</sup> strengthening the role of major groups,<sup>54</sup> and various means of implementation.<sup>55</sup>

By 1992, through consensus, States had affirmed the need for an open, rule-based, non-discriminatory, equitable, secure and transparent multilateral trading system. They reaffirmed the 1972 *Stockholm Declaration* principle that certain social and environmental standards may not be appropriate in all countries. But there is no indication that States intended for developing countries to bear significant risks from negative social and environmental impacts related to trade and investment liberalisation. Indeed, the opposite is constantly repeated. Global agendas called for the international economy to “provide a supportive international climate for achieving environment and development goals” through four principal sets of policies: (a) promoting sustainable development through trade; (b) making trade and environment mutually supportive; (c) providing adequate financial resources to developing countries; and (d) encouraging

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51. Hunter, Salzman & Zaelke, *supra* note 3 at 151; Sands, *Principles of International Environmental Law*, *supra* note 3 at 940.
  52. *International co-operation to accelerate sustainable development in developing countries*, poverty, consumption patterns, demographic dynamics, human health, human settlements, and *integrating environment and development in decision-making*.
  53. Atmosphere, land resources, deforestation, desertification and drought, mountain ecosystems, sustainable agriculture and rural development, biological diversity, biotechnology, oceans and seas, fresh waters, toxic chemicals, hazardous wastes, solid and sewage wastes, and radioactive wastes.
  54. Roles of women, children and youth, indigenous people, non-governmental organisations, local authorities, workers and trade unions, business and industry, science and technology, and farmers.
  55. Financing mechanisms, technology transfers, science, education, capacity building in developing countries, *international institutional arrangements*, *international legal instruments*, and information for decision-making.

economic policies conducive to environment and development.<sup>56</sup> They highlighted the need for global efforts to build consensus on the intersections of environment, trade and development issues, both through existing international forums and in the domestic policy of each country.<sup>57</sup> Indeed, UNCED led to the signing of three international treaties which each aimed to achieve sustainable development in different ways, with distinct linkages to international economic policy and law: the 1992 *UN Framework Convention on Climate Change*<sup>58</sup> (“UNFCCC”), the 1992 *UN Convention on Biological Diversity*<sup>59</sup> (“UNCBD”) and the 1994 *UN Convention to Combat Desertification*<sup>60</sup>.

UNCED created a United Nations Commission for Sustainable

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56. *Agenda 21*, *supra* note 44 at paras 2.3, 2.43-2.5.

57. *Ibid* at para 2.4.

58. 4 June 1992, 1771 UNTS 107 (entered into force 21 March 1994). See *e.g.* *Climate and Trade Policies in a Post-2012 World*, UNEP (2000) at 22. See also Gary Sampson, “WTO Rules and Climate Change: The Need for Policy Coherence” in W Bradnee Chambers, ed, *InterLinkages: The Kyoto Protocol and the International Trade and Investment Regimes*, UNU Policy Perspectives No. 5 (2001) 75 where the author notes, *infra*, Kyoto Protocol provisions on measures to enhance energy efficiency, enhance sinks and reservoirs, increase use of new and renewable forms of energy, phase out fiscal incentives in GHG-emitting sectors, and promote the application of market instruments.

59. 5 June 1992, 1760 UNTS 79 art 143 (entered into force 29 December 1993). See also *e.g.* Philippe G LePrestre, ed, *Governing Global Biodiversity: The Evolution and Implementation of the Convention on Biological Diversity* (Burlington, Vermont: Routledge, 2002); Ian Walden, “Intellectual Property Rights and Biodiversity” in Catherine Redgwell & Michael Bowman, eds, *International Law and the Conservation of Biological Diversity* (London: Kluwer Law International, 1995) 171 at 172, 178.

60. 14 October 1994, 1954 UNTS preamble and arts 1, 11, 14 (entered into force 26 December 1996); see also *e.g.* Karel Mayrand, “Integrated Assessment of Trade-Related Policies: Agricultural Trade Liberalisation and the Convention to Combat Desertification” (2006) 24:4 Impact Assessment and Project Appraisal 311.

Development<sup>61</sup> (“UNCSD”), which served for two decades as a forum for consensus-building. In its discussions, the UNCSD expressed concerns about failure to adequately address economic and sustainable development links, including in the UNCSD Third Session,<sup>62</sup> and UNCSD Eighth Session.<sup>63</sup> In the 1997 United Nations General Assembly Special Session on Sustainable Development (Earth Summit+5) (“UNGASS”) Programme for the Further Implementation of Agenda 21,<sup>64</sup> States laid out a further agenda for trade to support sustainable development, also highlighting the need to “further strengthen and codify international law related to sustainable development”.<sup>65</sup> States agreed that:

[i]n order to accelerate economic growth, poverty eradication and environmental protection, particularly in developing countries, there is a need to establish ... instruments and structures enabling all countries, in particular developing countries, to benefit from globalization ... There should be a balanced and integrated approach to trade and sustainable development, based on a combination of trade liberalization, economic development and environmental protection.<sup>66</sup>

In the 1997 UNGASS Programme, both procedural and substantive guidance can be found for this “integrated approach”. States noted

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61. See *Establishment of the Commission on Sustainable Development*, UNSCOR, 1993, UN Doc E/1993/207; *Institutional Arrangements to Follow Up the United Nations Conference on Environment and Development*, GA Res 191, UNGAOR, 47th Sess, UN Doc A/RES/47/191 (1993) at 3-5; Michael McCoy & Patrick McCully, *The Road from Rio: An NGO Action Guide to Environment and Development* (Amsterdam: Utrecht International Books, 1993) at 45.
  62. Commission on Sustainable Development, *Report on the Third Session*, UNCSDOR, 1995, Supp No 12, UN Doc E/1995/32 at paras 37-40, online: <[www.un.org/ga/search/view\\_doc.asp?symbol=E/CN.17/1995/36&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.17/1995/36&Lang=E)>.
  63. Commission on Sustainable Development, *Report on the Eighth Session*, UNCSDOR, 1999-2000, Supp No 9, UN Doc E/2000/29 at paras 28-34, online: <[www.un.org/ga/search/view\\_doc.asp?symbol=E/CN.17/2000/20&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=E/CN.17/2000/20&Lang=E)>.
  64. UNGASS, *Programme for the Further Implementation of Agenda 21*, *supra* note 30.
  65. *Ibid* at paras 109-10.
  66. *Ibid* at para 29.

that further liberalisation of trade should take effects on sustainable development into account, urging national governments to make every effort to ensure policy coordination on trade, environment and development in support of sustainable development. They identified the need for renewed system-wide efforts to ensure greater responsiveness to sustainable development objectives, recommending strengthened cooperation and support for capacity-building in trade, environment and development at both international and national levels, for international cooperation to ensure mutual supportiveness among economic and environmental agreements, and for trade liberalisation to be accompanied by new policies for more efficient allocation and use of resources.<sup>67</sup> The GA also warned that “any future agreements on investments should take into account the objectives of sustainable development and, when developing countries are Parties to these agreements, special attention should be given to their needs for investment”.<sup>68</sup>

Responses were uneven, however, and in a ten-year review at the 2002 WSSD,<sup>69</sup> States re-focused on means to better *implement* sustainable development commitments. In the 2002 *Johannesburg Plan of Implementation*<sup>70</sup> (“*JPOI*”), States established a broadened institutional architecture for sustainable development,<sup>71</sup> to further implement Agenda 21 and the WSSD outcomes, and to meet emerging sustainable

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67. *Ibid.*

68. *Ibid* at para 29(g).

69. *Ten-year Review of Progress Achieved in the Implementation of the Outcome of the United Nations Conference on Environment and Development*, GA Res 191, UNGAOR, 55th Sess, UN Doc A/RES/55/199 (2000) [UNGA, *Ten-year Review*].

70. *Johannesburg Plan of Implementation*, UNWSSD, 2002, UN Doc A/CONF.199/20 7 [*JPOI*].

71. UNGA, *Ten-year Review*, *supra* note 69; *Report of the World Summit for Sustainable Development*, UNWSSD, 2002, UN Doc A/CONF.199/20 at paras 140-70 [*Report of the WSSD*]; Marie-Claire Cordonier Segger & Maria Ivanova, “Sustainable Development Governance: Take Two” (2003) Concept Paper for South African Chair of UNCSD (on file with author).

development challenges.<sup>72</sup> In *JPOI* Chapter XI, economic institutions such as the WTO and regional trade bodies were tasked to enhance their work to realise sustainable development objectives.<sup>73</sup> Rather than repeating the UNCED and UNGASS texts, the guidance on trade and sustainable development is brief, with a change in tone that strongly focuses the agenda on the social development dimensions of trade and investment policy. States noted that “[g]lobalization offers opportunities and challenges for sustainable development”<sup>74</sup> and emphasised the special difficulties faced by developing countries, calling for globalisation to become fully inclusive and equitable. In addition to calls for WTO trade negotiations to take development concerns into account, the need to strengthen “regional trade and cooperation agreements... with a view to achieving the objectives of sustainable development” was highlighted.<sup>75</sup> At X, as a means of implementing sustainable development, an agenda for integrating social development and environmental priorities into global and regional trade negotiations was set forth.<sup>76</sup> States, *inter alia*, called for “efforts to promote cooperation on trade, environment and development”; “the voluntary use of environmental impact assessments as an important national-level tool to better identify trade, environment and development inter-linkages ...”; and “further action ... to enhance the benefits, in particular for developing countries ... of trade liberalization” and to “establish and strengthen existing trade and cooperation agreements ... with a view to achieving sustainable development”.<sup>77</sup> While WSSD outcomes may be hortatory, this clear consensus was made available to guide and influence future treaty-making.

This approach was emphasized in the 2015 Declaration *Transforming*

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72. Report of the Secretary General, *Follow-up to Johannesburg and the Future Role of the CSD – The Implementation Track*, UNESCOR, 2003, UN Doc E/CN.17/2003/2.

73. *JPOI*, *supra* note 70 at paras 47-48, 51, 151, 154-55, 158-61.

74. *Ibid* at paras 47-52.

75. *Ibid* paras 90-100.

76. *Ibid* at paras 81-136.

77. *Ibid* at paras 90-100.

*Our World: The 2030 Agenda for Sustainable Development*.<sup>78</sup> At paragraph 2, States committed by consensus to achieve “sustainable development in its three dimensions – economic, social and environmental – in a balanced and integrated manner” and at paragraph 3, they resolved to create conditions for sustainable, inclusive and sustained economic growth. At paragraph 18, States reaffirmed their commitment to international law, and at paragraph 30 urged each other to refrain from “any unilateral economic, financial or trade measures not in accordance with international law ... that impede the full achievement of economic and social development” particularly for developing countries. Annexed, in the SDGs, trade and investment were characterised as a means of implementation for sustainable development. SDG 8 commits to “promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”, including by, *inter alia*, increasing aid for trade support. SDG 9 commits to “build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation”. At SDG 17.5, States agreed to “adopt and implement investment promotion regimes for least developed countries” and at SDG 17.11 they called to significantly increase the exports of developing countries. At the same time, at SDG 10.a, States also committed to “implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with [WTO] agreements”. The trade and investment being promoted is expected to be coherent, integrated, pro-poor – sustainable. For instance, at SDG 17.13-14, States highlighted the need to enhance global macroeconomic stability through policy coordination and policy coherence for sustainable development, while at SDG 17.15 they agreed to respect “each country’s policy space and leadership to establish and implement policies for poverty eradication and sustainable development”. Indeed, at paragraph 68, States explicitly underscore that “international trade is an engine for inclusive economic growth and poverty reduction”, but one which “contributes to the promotion of

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78. *Transforming our World*, *supra* note 10.

sustainable development”.<sup>79</sup>

In all, there is scant indication from the global consensus statements of the 1972 UNCHE, the 1992 UNCED, the UNCSD deliberations, the 1997 UNGASS, the 2002 WSSD, the 2012 UNCSD, or the 2015 SDGs, that the risks and burdens of trade-led economic growth should be left to fall upon the most vulnerable in developing country trading partners, or that social and environmental decision-making should be kept separate from trade law. Indeed, the opposite is prioritised, though much remains to be done.

The 1992 *Rio Declaration* and other documents are not hard, binding international law: indeed, they are often cited as the quintessential examples of soft law.<sup>80</sup> However, soft law can be relevant to the future development of international law, in a more nuanced manner than the hard law found in treaties, established customary rules, or other formal sources recognised in Article 38 of the 1946 *Statute of the International Court of Justice*.<sup>81</sup> Soft law norms and standards can evolve into binding obligations upon States through subsequent negotiation of international treaties or eventual recognition as international customary rules.<sup>82</sup> In an inter-actional manner, the initial phases of development of new international treaty regimes, including recognition of relevant legal principles, can be shaped by the inter-State debates and consensus

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79. *Ibid.*

80. See *supra* note 33 for the nuances of soft law.

81. *SICJ*, *supra* note 33, art 38.

82. See Alan Boyle, “Soft Law in International Law-Making” in Malcom D Evans, ed, *International Law* (Oxford: Oxford University Press, 2010) 122 at 141-58 which suggests the 1992 *Rio Declaration* is an instrument which both codifies existing international law and seeks to develop new law at 145; Simpson, *supra* note 33; Weiler & Paulus, *supra* note 33; Fastenrath, *supra* note 33. For earlier discussions, see Grnchalla-Wesierski, *supra* note 33 and Jonathan Charney, “Compliance with International Soft Law” in Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000) 115 at 115-18.

building that characterises these processes.<sup>83</sup> Indeed, taking into account the doctrine of good faith in international law, very widely-supported soft law may generate *legitimate expectations* among other States.<sup>84</sup> Such expectations may not be decisive, as they can be rebutted, for instance through explicit statements that a particular ‘soft law’ standard, principle or policy consensus is not applicable in the circumstances,<sup>85</sup> but in this case the preponderance of unanimous guidance is convincing. Certain conclusions can be drawn with respect to State intentions for the trade and sustainable development relationship.

First, economic policies and agreements are *not* intended to constrain the adoption and enforcement of legitimate new environment and social development measures, nor to make it more inherently difficult to implement specific obligations from international treaties. Rather, the consensus declarations and instruments on these topics are replete with calls for trade policies to mutually support environment and development priorities in a balanced and integrated way for sustainable development,<sup>86</sup>

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83. Jutta Brunnée & Stephen J Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010) at 5-9 [Brunnée & Toope, *Legitimacy and Legality in International Law*].

84. Philip Allott, “The Concept of International Law” (1999) 10:1 *European Journal of International Law* 31; Nico Krisch, “International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order” (2005) 16:3 *European Journal of International Law* 369; Martti Koskeniemi, “The Politics of International Law” (1990) 1 *European Journal of International Law* 4; Nico Krisch, “The Pluralism of Global Administrative Law” (2006) 17:1 *European Journal of International Law* 247.

85. Charney, *supra* note 82 at 115-18. But see Pierre-Marie Dupuy, “Soft Law and the International Law of the Environment” (1991) 12 *Michigan Journal of International Law* 420 at 428 and Christine Chinkin, “The Challenge of Soft Law” (1989) 38:4 *The International and Comparative Law Quarterly* 850 at 859.

86. UNGASS, *Programme for the Further Implementation*, *supra* note 30, in which States agreed at para 29 that “[t]here should be a balanced and integrated approach to trade and sustainable development, based on a combination of trade liberalization, economic development and environmental protection”.

to strengthen sustainable natural resources management,<sup>87</sup> to strengthen and encourage environmental regulations and standards,<sup>88</sup> and to support poverty eradication, including through the realisation of human rights.<sup>89</sup>

Second, trade and investment policies and agreements are *not* expected to create incentives for trade-led economic growth that will add to serious environmental and social problems which already exist at domestic levels, and curtail the enforcement of laws intended to support sustainable development, especially in developing countries. Rather, the detailed action plans and other “soft law” instruments on these topics emphasise and re-emphasise an urgent need for accompanying cooperative measures to increase social and environmental regulatory capacity and provide technical assistance,<sup>90</sup> and for cooperative measures to generate new and additional financial, human and other resources to address environmental or developmental challenges associated with trade

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87. *Ibid*, “[t]rade liberalization should be accompanied by environmental and resource management policies in order to realize its full potential contribution to improve environmental protection and the promotion of sustainable development through the more efficient allocation and use of resources”.
88. Commission on Sustainable Development, *Report on the Fourth Session*, UNCSDOR, Supp No 8, UN Doc E/1996/28 (1996) (“[s]tresses that it would be inappropriate to relax environmental laws, regulations and standards or their enforcement in order to encourage foreign direct investment or to promote exports” Decision 4/1, 4(c)) [UNCSD, *Fourth Session Report*].
89. *JPOI*, *supra* note 70 at paras 7-13.
90. UNCSD, *Fourth Session Report*, *supra* note 88 “[r]ecognizes that positive measures, such as improved market access, capacity-building, improved access to finance, and access to and transfer of technology, taking into account the relationship between trade-related agreements and technology, are effective instruments for assisting developing countries in meeting multilaterally agreed targets in keeping with the principle of common but differentiated responsibilities” Decision 4/1, 3(b).

and investment treaties.<sup>91</sup>

Third, and perhaps most challenging, trade and investment policies and treaties need not serve to encourage *unsustainable growth* in obsolete technologies, goods or economic sectors, or to stimulate, through pollution havens, subsidies and other means, the growth of these sectors. Soft law declarations continue to firmly call for the phase-out of such measures.<sup>92</sup> States have not committed to support the imposition of social or environmental standards that are not appropriate for developing countries. However, in internationally negotiated treaties, resolutions, standards and guidelines, States are calling for measures to encourage *increased* trade and investment in more sustainable low-carbon technologies,<sup>93</sup> the sustainable use of genetic resources,<sup>94</sup> more sustainably

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91. UNGASS, *Programme for Further Implementation*, *supra* note 30 notes “[t]he multilateral trading system should have the capacity to further integrate environmental considerations and enhance its contribution to sustainable development, without undermining its open, equitable and non-discriminatory character. The special and differential treatment for developing countries, especially the least developed countries, and the other commitments of the Uruguay Round of multilateral trade negotiations 18 should be fully implemented in order to enable those countries to benefit from the international trading system, while conserving the environment” at para 29.
  92. *The Future We Want*, *supra* note 10 reaffirms calls for phase out of subsidies that impede the transition to sustainable development, including those on fossil fuels, unsustainable agriculture and fisheries, at para 126.
  93. *Report of the WSSD*, *supra* note 71 at paras 20, 59; Commission on Sustainable Development, *Report on the Seventeenth Session Session*, UNCSDOR, 2009, UN Doc E/2009/29, s 12(g)(i); *Report of the Conference of the Parties on its Seventh Session*, UNFCCC, 2002, UN Doc FCCC/CP/2001/13/Add.1.
  94. *Decisions Adopted by the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting* (Nagoya, Japan, 18-29 October 2010) Decision X/1; UNEP & IISD, *Environment and Trade*, *supra* note 38 at 55-56; Mary Seely et al, “Creative Problem Solving in Support of Biodiversity Conservation” (2003) 54:1 *Journal of Arid Environments* 155.

produced or harvested goods,<sup>95</sup> environmental goods and services,<sup>96</sup> and pesticide-free products.<sup>97</sup>

In summary, there is a convincing international policy rationale for States to undertake measures to prevent, or at least mitigate, the environment and social development impacts of trade and investment agreements, addressing the main tensions identified between trade and sustainability. States have repeatedly committed, in consensus declarations of principles,<sup>98</sup> detailed action plans,<sup>99</sup> UN conference debates,<sup>100</sup> solemn resolutions,<sup>101</sup> and international guidelines and

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95. UNGASS, *Programme for Further Implementation*, *supra* note 30 in which States find, “[t]rade obstacles should be removed with a view to contributing to the achieving of more efficient use of the earth’s natural resources in both economic and environmental terms” at para 29.
96. OECD, Public Affairs Division, Public Affairs and Communications Directorate, *Opening Markets for Environmental Goods and Services*, Policy Brief (2005), online: <[www.oecd.org/dataoecd/63/15/35415839.pdf](http://www.oecd.org/dataoecd/63/15/35415839.pdf)>; WTO, *Ministerial Declaration* (20 November 2001, Doha, Qatar), WTO Doc WT/MIN(01)/DEC/1 at paras 31-33, online: <[www.wto.org/english/thewto\\_e/minist\\_e/min01\\_e/mindecl\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm)>; Zhong Xiang Zhang, “Liberalizing Climate-Friendly Goods and Technologies in the WTO: Product Coverage, Modalities, Challenges and the Way Forward” (2009) 1 UNCTAD Trade and Environment Review 1.
97. *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, 10 September 1998, 2244 UNTS 337 preamble (entered into force 4 February 2004); *Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, 2256 UNTS 119 preamble (entered into force 17 May 2004); Gavin Fridell, “Free Trade, Fair Trade and the State” (2010) 15:3 *New Political Economy* 457 at 457-58.
98. See *e.g.* *United Nations Declaration on the Rights of Indigenous Peoples*, UNGAOR, 2007, UN Doc Res 69-295; *Report of the Secretary-General on Trade, Environment and Sustainable Development*, UNCSD, 1996, UN Doc E/CN.17/1996/8.
99. *Agenda 21*, *supra* note 44; *Report of the WSSD*, *supra* note 71.
100. See *e.g.* IISD Reporting Services, “Summary of the First Prepcom for the UN Conference on Sustainable Development” (21 May 2010) Winnipeg: IISD, 2010.
101. UNGASS, *Programme for Further Implementation of Agenda 21*, *supra* note 30.

standards,<sup>102</sup> to make increased efforts to ensure that trade can support sustainable development, especially in developing countries. It can be argued that States are justified in forming legitimate expectations about sustainable development in trade negotiations.<sup>103</sup> In this context, it is not credible to maintain that negative social and environmental effects of economic agreements should be simply left to roll downhill onto the weakest Parties. Rather, it can be suggested, States agree in practice that where possible in economic agreements, measures can and should be taken. Absent explicit instructions to the contrary, both developed and developing country Parties to such negotiations should be able to rely on these expectations.

## **II. International Legal Reasons for Countries to Address Environmental and Social Impacts of Trade and Investment Agreements**

There are important international policy and soft law reasons that the impacts of trade and investment liberalisation should not simply be left to “fall where they may” onto the fragile ecosystems and vulnerable populations of developing country trading partners. Are there also international hard law considerations?

States could also be legally bound to address the sustainability impacts of economic liberalisation – not just to prevent harm, but to actually integrate environmental and social development considerations in order to strengthen and enhance the contribution of trade to sustainable development. To determine whether it is the case, an examination of customary and interstitial norms can be carried out. Noting the relevance of *pacta sunt servanda*, it remains to be considered whether international law requires States to integrate significant environmental and social considerations into economic development plans, including into the negotiations of new trade and investment agreements.

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102. See e.g. EC, Commission, *Impact Assessment Guidelines* (Brussels: EC, 2005).

103. Phillip Allot, *The Health of Nations: Society and Law beyond the State* (Cambridge: Cambridge University Press, 2002).

## A. Sustainable Development as an Interstitial Norm

Beyond soft law policy rationales, are there any legal obligations for States to promote sustainable development through trade and investment? The legal status of State commitments to sustainable development has been debated in academic literature for two decades.<sup>104</sup> Certain States, scholars and NGOs argued that the obligation to develop sustainably is a new customary principle of international law, binding upon all but a few persistently objecting States.<sup>105</sup> However, as Gunter Handl argued in 1990, “[n]ormative uncertainty, coupled with the absence of justiciable standards for review, strongly suggest that there is as yet no international legal obligation that development must be sustainable”,<sup>106</sup> and that as such “decisions on what constitutes sustainability rest primarily with individual

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104. See updated legal scholarship in Birnie, Boyle & Redgwell, *supra* note 3 at 116-18. See also Philippe Sands, “International Law in the Field of Sustainable Development: Emerging Legal Principles” in Wilfred Lang, ed, *Sustainable Development and International Law* (London: Martinus Nijhoff, 1995); Konrad Ginther, Erik Denters & Paul JIM De Waart, eds, *Sustainable Development and Good Governance* (Boston: Dordrecht Kluwer Academic Publishers, 1995); “Sustainable Development: The Challenge to International Law: Report of a Consultation held at Windsor 27 to 29 April 1993” (1993) 2:4 *Review of European, Comparative & International Environmental Law* 1; Phillipe Sands, “International Law in the Field of Sustainable Development” (1994) 65:1 *British Yearbook of International Law* 1 at 303.
105. Hunter, Zaelke and Salzman, *supra* note 3 at 210; Kiss & Shelton, *supra* note 3 at 51; Sands, *Principles of International Environmental Law*, *supra* note 3 at 231; Lang, *ibid*; Atapattu, *supra* note 3; Bugge, *supra* note 24 at 20. But see Boyle & Freestone, *supra* note 11 at 6 and Birnie, Boyle & Redgwell, *ibid* at 116-18, 126-27.
106. See Günther Handl, “Environmental Security and Global Change: The Challenge to International Law” (1990) 1:1 *Yearbook of International Environmental Law* 3 (rejects the possibility that sustainable development is a peremptory norm of international law); see also Günther Handl, “The Legal Mandate of Multilateral Development Banks as Agents for Change towards Sustainable Development” (1998) 92:4 *American Journal of International Law* 642.

governments”.<sup>107</sup> As Vaughan Lowe notes wryly, “the argument that sustainable development is a norm of customary international law, binding on and directing the conduct of states, and which can be applied by tribunals, is not sustainable”.<sup>108</sup> It is not novel to conclude that States have not yet accepted a customary legal obligation to always develop sustainably.<sup>109</sup> Indeed, a search for one agreed customary norm that development must be sustainable might actually steer one in the wrong direction.

As observed by the revered late Judge Weeramantry in his extraordinary Separate Opinion in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*<sup>110</sup> (“*Gabčíkovo-Nagymaros Case*”), there is “wide and general acceptance by the global community”<sup>111</sup> of sustainable development. The concept has become legally relevant, informing tribunals and treaties, particularly in its procedural dimensions.<sup>112</sup> As Lowe has further argued, State commitments to sustainable development might engage a certain interstitial normativity, acting “upon other legal

107. Boyle & Freestone, *supra* note 11 at 16.
108. Vaughan Lowe, “Sustainable Development and Unsustainable Arguments” in Alan Boyle & David Freestone, eds, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: Oxford University Press, 1999) 19 at 30 [Lowe, “Sustainable Development”].
109. See Birnie, Boyle & Redgwell, *supra* note 3 at 125-27 and Marie-Claire Cordonier Segger, “Sustainable Development in International Law” in David Armstrong, ed, *Routledge Handbook of International Law* (New York: Routledge, 2009) 355 at 359-71.
110. Separate Opinion of Vice-President Weeramantry, [1997] ICJ Rep 7 [*Gabčíkovo-Nagymaros Case*].
111. *Ibid* at 95.
112. Esther Kentin, “Sustainable Development in International Investment Dispute Settlement: The ICSID and NAFTA Experience” in Nico Schrijver & Friedl Weiss, eds, *International Law and Sustainable Development: Principles and Practice* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2004) 309; Marie-Claire Cordonier Segger, “Sustainability, Global Justice, and the Law: Contributions of the Hon. Justice Charles Doherty Gonthier” (2010) 55:2 McGill Law Journal 337. See also Marie-Claire Cordonier Segger & Judge CG Weeramantry, eds, *Sustainable Development in International Courts and Tribunals* (New York: Routledge, 2017).

rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other”.<sup>113</sup> There is:

an immense gravitational pull exerted by concepts such as sustainable development, regardless of their standing as rules or principles of *lex lata*. That is plain when they are used by judges as modifiers; but it is also true when they are used in the same way by states as they negotiate (either with other states, or within their own governmental apparatus) on ways of reconciling conflicting principles.<sup>114</sup>

As an interstitial norm which can play a role in importing a “group of congruent norms”,<sup>115</sup> the broadly held commitment to promote sustainable development may push or pull States to use and apply certain international practices *and even other emerging customary principles*, to guide the future development and implementation of treaty regimes. From an inter-actional perspective, sustainable development commitments can be argued to be shaping the initial phases of development of new international treaty regimes, including relevant legal principles.<sup>116</sup> Taking this inter-actional account seriously, global commitments to sustainable development can engender further normative consequences for States’ economic development planning, including in their negotiations of trade and investment agreements. Such further principles *for* sustainable development may become recognised as customary rules, binding on all

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113. Lowe, “Sustainable Development”, *supra* note 108 at 31; Vaughan Lowe, “The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?” in Michael Byers, ed, *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2001) 207 at 214-15.

114. Lowe, “Sustainable Development”, *ibid* at 35.

115. *Ibid* at 26.

116. Brunnée & Toope, *Legitimacy and Legality in International Law*, *supra* note 83.

States that have not persistently objected.<sup>117</sup> From this perspective, it is important to consider which, of such principles, could be most relevant to economic treaty negotiation and interpretation.

## **B. Integration as an International Customary Norm of Relevance to Trade and Sustainable Development**

The process of crystallising principles of international law related to sustainable development has been complex, and is not yet complete. The most important undertakings emerged from the global debates. In the 1987 Annex on Legal Principles to the Brundtland Report, the WCED called for the international adoption of legal principles to promote sustainable development. The Commission provided a considered legal analysis, commentary and clear normative proposals for a series of 22 legal principles.<sup>118</sup> In Article 7, the experts recommended recognition of the principle that the conservation of natural resources and the environment shall be treated as an integral part of the planning and implementation of development activities.<sup>119</sup> The 1992 *Rio Declaration* echoed many of the Principles recommended by the Brundtland Report, and was followed by the Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development, commissioned by the United Nations Division for Sustainable Development in accordance with a request of States at the UCSD Second Session in 1994.<sup>120</sup> This Report identified 19 principles and concepts of international law for

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117. Cordonier Segger & Khalfan, *supra* note 12 at 47-50 (wide-spread adoption of such principles in the 1992 Rio Treaties, might even support a contention that certain principles are already gaining this level of recognition. The practical implications of such recognitions, given that the nearly universal membership of these treaties, might be minimal. But it does not discount the value of examining these principles themselves, particularly if they could also be relevant to trade law and policy).

118. WCED, *Our Common Future*, *supra* note 27 at 65.

119. *Ibid.*

120. Commission on Sustainable Development, *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development*, UNCSD, 4th Sess (1996) online: <[www.un.org/documents/ecosoc/cn17/1996/background/ecn171996-bp3.htm](http://www.un.org/documents/ecosoc/cn17/1996/background/ecn171996-bp3.htm)>).

sustainable development in the context of international legal instruments of that time, though it was not exhaustive. In 1997, in light of the recommendations of the Report, States noted in the Programme for Further Implementation of Agenda 21<sup>121</sup> that: “[w]hile some progress has been made in implementing United Nations Conference on Environment and Development commitments through a variety of international legal instruments, much remains to be done to embody the Rio principles more firmly in law and practice”.<sup>122</sup>

Building on these processes, in 2002 at its 70th Conference in New Delhi,<sup>123</sup> the International Law Association’s Committee on the Legal Aspects of Sustainable Development released a *Declaration of Principles of International Law Relating to Sustainable Development*<sup>124</sup> (“*New Delhi Declaration*”). As noted in the *Declaration*, it was found that “sustainable development is now widely accepted as a global objective and that the concept has been amply recognised in various international and national legal instruments, including treaty law and jurisprudence at international and national levels ...”<sup>125</sup> and that seven principles of international

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121. UNGASS, *Programme for Further Implementation*, *supra* note 30.

122. *Ibid* at para 14 (the General Assembly also noted that “[p]rogress has been made in incorporating the principles contained in the Rio Declaration on Environment and Development – including the principle of common but differentiated responsibilities, which embodies the important concept of and basis for international partnership; the precautionary principle; the polluter pays principle; and the environmental impact assessment principle – in a variety of international and national legal instruments”, *ibid*).

123. (2-6 April 2002), New Delhi, India.

124. International Law Association, “Declaration of Principles of International Law Relating to Sustainable Development” in *International Environmental Agreements: Politics, Law and Economics 2* (Netherlands: Kluwer Academic Publishers, 2002) [*New Delhi Declaration*]; International Law Association, *Report of the Sixty-Second Conference* (Seoul: International Law Association, 1987) 1-11, 409-87; Nico Schrijver & Friedl Weiss, “Editorial Introduction” (2002) 2 *International Environmental Agreements* 105.

125. *New Delhi Declaration*, *ibid* at 211.

law on sustainable development could be outlined.<sup>126</sup> Analysis of each principle in the *New Delhi Declaration*, documenting both relevance and doubts as to international legal status, is available elsewhere.<sup>127</sup> However, among these seven principles identified in the *New Delhi Declaration* reappeared a duty to integrate environmental and social considerations into economic decision-making.<sup>128</sup> This built on Principle 4 of the *Rio Declaration*, which stated that: “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”.<sup>129</sup>

If one customary international rule *named* a “sustainable development principle” were to be recognised, given its first six words Principle 4 of the *Rio Declaration* seems a likely candidate. However, as found in the *New Delhi Declaration*, this norm could also simply called the “integration principle”. The *New Delhi Declaration* emphasises recent developments in soft law, such as the need to recognise the social and human rights pillar of sustainable development, essentially advocating an integration principle which requires States to take social and human rights, as well

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126. *Ibid* at 213-16.

127. *Ibid* at 1-152, 699-706; Duncan French, “Treaty Interpretation and the Incorporation of Extraneous Legal Rules” (2006) 55:2 International and Comparative Law Quarterly 281; see also Cordonier Segger & Khalfan, *supra* note 12 at 95-191; Marie-Claire Cordonier Segger, “International Law on Sustainable Development” in Hans Christian Bugge & Christina Voigt, eds, *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2009) 87; Marie-Claire Cordonier Segger, “Sustainable Development in International Law” in David Armstrong, ed, *Routledge Handbook of International Law* (London: Routledge, 2009). See also publications on <[www.cisd.org](http://www.cisd.org)> for notes on how each principle has been reflected in international treaty law on sustainable development over several decades.

128. *Ibid*.

129. *Rio Declaration*, *supra* note 28, Principle 4.

as environmental protection, into account in the development process.<sup>130</sup> Such an integration principle could be considered an emerging customary norm.

As noted in the 1903 *Gentini Case (Italy v Venezuela)*,<sup>131</sup> a principle “expresses a general truth, which guides our action, serves as a theoretical basis for the various acts of our life, and the application of which to reality produces a given consequence”.<sup>132</sup> As argued by Professor Martii Koskenniemi more recently, when “States enter an agreement, or when some behaviour is understood to turn from habit into custom, the assumption is that something that was loose and disputed crystallises into something that is fixed and no longer negotiable”.<sup>133</sup> Customary principles, if recognised, can establish obligations for all States except those which have persistently objected to a practice and its legal consequences.<sup>134</sup>

According to Article 38(1)(b) of the *SICJ*: “[t]he Court, whose

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130. *Ibid* at 102-09. See *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 79 art 6 (entered into force 29 December 1993); *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 2226 UNTS 208 preamble and art 2.4-2.5 (entered into force 11 September 2003); *International Treaty on Plant Genetic Resources for Food and Agriculture*, 3 November 2001, 33 ILM 81 preamble and art 5.1 (entered into force 29 June 2004) [*FAO Seed Treaty*]. See also *North American Free Trade Agreement*, 17 December 1992, Can TS 1994 No 2 arts 103-104.1, 1114, 2101 (entered into force 1 January 1994). See also Sebastien Jodoin, *The Principle of Integration and Interrelationship in International Sustainable Development Law*, in A Usha, ed, *Environmental Law: Principles and Governance* (Hyderabad, India: ICFAI University Press, 2008) at 83-121.
131. (1903), 10 RIAA 551 (Mixed Claims Commission).
132. *Ibid* at 556 as cited in Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 2006) at 24 and in Sands, *Principles of International Environmental Law*, *supra* note 3 at 233.
133. Martti Koskenniemi, “What is International Law For?” in Malcolm Evans, ed, *International Law*, 4d (Oxford: Oxford University Press, 2014) at 69.
134. Malcolm Shaw, *International Law*, 6d (Cambridge: Cambridge University Press, 2008) at 68-88.

function is to decide in accordance with international law such disputes as are submitted to it, shall apply ... international custom, as evidence of a general practice accepted as law”.<sup>135</sup> These rules of international custom can be derived from the consistent conduct of States acting in the belief that international law requires them to so act, and jurists, to prove an international customary principle, must show State practice by demonstrating the widespread repetition by States of similar international acts over time.<sup>136</sup> Such acts must be taken by a significant number of States, and not be rejected by too many others with an interest in the matter.<sup>137</sup> The International Court of Justice (“ICJ”) has stated that “it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interest were specifically affected”.<sup>138</sup> The bar to rapidly transform a broadly practiced principle into one accepted as customary law, as set by the ICJ in the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*<sup>139</sup> (“*North Sea Continental Shelf Cases*”), is relatively high:

an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in

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135. *SICJ*, *supra* note 33, art 38(1)(b); *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 (entered into force 24 October 1945); see also Shaw, *supra* note 134.
136. Hugh Thirlway, *The Sources of International Law* in Malcolm Evans, ed, *International Law*, 4d (Oxford: Oxford University Press, 2014) 95 at 121-27.
137. Anthony D’Amato, *The Concept of Custom in International Law* (Ithaca: Cornell University Press, 1971); Michael Akehurst, “Custom as a Source of International Law” (1976) 47:1 *British Yearbook of International Law* 1 at 1-53; Maurice Mendelson, “The Formation of Customary International Law” (1999) 272 *Recueil des Cours de l’Académie de Droit International* 9 at 155.
138. *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* (Judgement) [1969] ICJ Rep 3 at para 73 [*North Sea Continental Shelf Cases*].
139. *Ibid.*

the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.<sup>140</sup>

The ICJ has also found that it is sufficient that the conduct of States should, in general, be consistent with a customary principle, and that instances of inconsistent conduct have been generally treated as breaches of the rule rather than indications of a new rule having emerged.<sup>141</sup> If a norm has been accepted as a principle of customary international law, the international acts that follow the rule should occur out of sense of legal obligation. As noted by the ICJ, in the *North Sea Continental Shelf Cases*, “[t]he need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitates*”.<sup>142</sup> Further, if a norm that is enshrined in a treaty is still followed in the practices of non-Parties, it can, provided that there is *opinio juris*, lead to the evolution of a customary rule which will be applicable between states that are not Party to the treaty and between Parties and non-Parties, even before the treaty has entered into force.<sup>143</sup> However, as was demonstrated in the *Fisheries Case (United Kingdom v Norway)*<sup>144</sup> at the ICJ, a State can avoid being bound by a customary rule if it persistently objects to that rule.<sup>145</sup>

Before a discussion of general State practice and *opinio juris*, a further potential “precondition” should also be addressed. To prove the existence of a norm of customary law, there is a need to show that State practice and *opinio juris* has been extensive and virtually uniform *in the sense of the provision invoked*. This element relates to the requirement that a principle have the “fundamentally norm-creating character such as could be regarded as forming the basis of a general rule”.<sup>146</sup> Several

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140. *Ibid* at para 74.

141. *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Judgement) General List No 70, [1986] ICJ Rep 14 at para 186.

142. Shaw, *supra* note 134 at 44.

143. Hugh Thirlway, “The Law and Procedure of the International Court of Justice” (1990) 60:1 *British Yearbook of International Law* 4 at 87.

144. [1951] ICJ Rep 116 [*Fisheries Case*].

145. *Ibid* at 138-39.

146. *North Sea Continental Shelf Cases*, *supra* note 138 at para 63.

legal scholars have been critical of whether such a precondition is needed at all in the context of treaties and custom.<sup>147</sup> However as others such as Hans Kelsen have noted, an international legal norm, whether derived from an international treaty or international customary law, should be understood in reference to its function.<sup>148</sup> In international law, as Kelsen explains, most norms have one of four functions. Either they impose an obligation on States to do something, as a command (prescriptive norms); or they impose an obligation on States not to do something, as a prohibition (prohibitive norms).<sup>149</sup> They can also grant a right to a State not to do something, as an exemption (exempting norms), or grant a right to a state to do something, as a form of permission (permissive norms).<sup>150</sup>

Indeed, if “integration” were proposed as a principle of customary law, there would need to be some clarity as to what the commitment actually prescribes, prohibits, exempts or permits States to do. Like a prohibition against armed attack, or a permission of each State to control an exclusive economic zone 200 miles from their coast, a commitment to integrate would normatively require or permit States to take (or not take) certain actions. A customary principle should be specific – or at least normative enough to form the basis of a claim against a State.<sup>151</sup>

Could a requirement to “integrate social and environmental considerations into economic decision-making” be emerging as a customary rule? Certain guidance can be found in the decision of the ICJ

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147. See Richard Baxter, “Treaties and Custom” (1970) 129 *Recueil des Cours* 44 (Professor Baxter argues that the notion of norm-creating rules was redundant: “if a rule does pass into international law, it is norm-creating...” at 62). See also Mark Villiger, *Customary International Law and Treaties* (Leiden: Martinus Nijhoff, 1985) at 190-202. But see Robert Jennings, “What is International Law and How Do We Tell It When We See It?” (1981) 37 *Schweizerisches Jahrbuch für Internationales Recht* 59 at 59-88.

148. Hans Kelsen, *Theorie Generale des Normes* (Paris: Presses Universitaires de France, 1996) at 1.

149. *Ibid.*

150. *Ibid.*

151. Lowe, “Sustainable Development”, *supra* note 108.

in the *Gabčíkovo-Nagymaros* case. In that case, faced with the question as to whether one Party could compel another to continue building a dam in accordance with a treaty, in spite of concerns about the impacts of the project, the majority stated that:

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. For the purposes of the present case, this means that *the Parties together should look afresh at the effects on the environment* of the operation of the Gabčíkovo power plant. In particular they *must find a satisfactory solution* for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.<sup>152</sup>

Perhaps only procedural requirements were imposed on the Parties, where they are required to “look afresh” at the effects.<sup>153</sup> Indeed, it has been argued that the word “concept” was carefully chosen by the majority to defer recognition of custom.<sup>154</sup> However, it can also be proposed that the Court ordered the Parties to integrate environmental protection into their development project by requiring them, after their assessment, to also “find a satisfactory solution”. From this view, the Court applied a nascent *principle of integration*, a requirement to reconcile economic development with the protection of the environment, *in order to achieve an objective of sustainable development*.

Review of the 2005 award of the Arbitral Tribunal in the *Arbitration Regarding the Iron Rhine (Ijzeren Rijn) Railway (Kingdom of Belgium v*

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152. *Gabčíkovo-Nagymaros Case*, *supra* note 110 at paras 140-41 [emphasis added].

153. Philippe Sands, “International Courts and the Concept of Sustainable Development” (1999) 3 United Nations Year Book 390 at 391-94.

154. Lowe, “Sustainable Development”, *supra* note 108.

*Kingdom of the Netherlands*)<sup>155</sup> (“*Iron Rhine*”) struck under the auspices of the Permanent Court of Arbitration lends support to this view. The Tribunal found that there is “considerable debate as to what ... constitutes “rules” or “principles”; what is “soft law”; and which environmental treaty law or principles have contributed to the development of customary international law”.<sup>156</sup> It further states that: “... [t]he emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations...”.<sup>157</sup> As the Tribunal then explains:

[t]oday, both international and EC law require *the integration of appropriate environmental measures in the design and implementation of economic development activities*. Principle 4 of the Rio Declaration on Environment and Development, adopted in 1992 which reflects this trend, provides that ‘*environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it*.’ Importantly, *these emerging principles now integrate environmental protection into the development process*. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, *or at least mitigate*, such harm .... This duty, in the opinion of the Tribunal, has now become a principle of general international law.<sup>158</sup>

It may be that the Court only meant that the “duty to prevent ... such harm” is an accepted principle. But it can be equally argued that an emerging principle to *integrate environmental protection into the development process* was further recognised by the Court. As explained: “[t]his principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties”.<sup>159</sup> And as further noted: “[t]he reactivation of the Iron Rhine railway cannot be viewed in isolation from the environmental protection measures necessitated by the intended use of the railway line. These measures *are to be fully integrated* into the project and its costs”.<sup>160</sup>

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155. *Iron Rhine*, *supra* note 9.

156. *Ibid* at paras 58-59.

157. *Ibid*.

158. *Ibid* at para 59 [emphasis added].

159. *Ibid*.

160. *Ibid* at para 223 [emphasis added].

This suggests that the “duty to integrate appropriate environmental measures in the design and implementation of economic development activities”, as recognised by the Tribunal, could be recognised as a principle of customary law. Such a duty is normative. It is both corollary *and an extension* of the established duty that “where development may cause significant harm to the environment, there is a duty to prevent, or at least mitigate, such harm”.<sup>161</sup> This customary principle of integration, as highlighted in the 1972 *Stockholm Declaration* at Principles 12 and 13, analysed in the 1987 Brundtland Report’s Legal Experts Group Recommendations at Article 7 on planning and implementation of development activities,<sup>162</sup> and further recognised in Principle 4 of the *Rio Declaration*, can be characterised as *lex ferenda*, an emerging customary norm.

For economic treaties, the principle is relevant to cases where the economic development activities involve measures to stimulate increases in trade and investment flows, particularly State initiatives undertaken in implementation of specific trade and investment treaties. While the international application of a customary principle may suggest that the rule is only relevant in a transboundary context, it is becoming rapidly recognised that ecological systems themselves are globally and regionally inter-related in complex ways that science and technology have only begun to discover.<sup>163</sup> Many environmental challenges have transboundary scope, from biodiversity and migratory species at risk, to transboundary watercourses, to oceans, to climate change and the global atmosphere.

The integration principle also has limits: “constituting an integral part” is not the same as “becoming a trump card”. Indeed, another ICJ case suggests outer boundaries for application of the emerging norm, also linked directly to sustainable development. Positive claims based on a State’s “sovereign right to implement sustainable economic development

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161. Birnie, Boyle & Redgwell, *supra* note 3 at 137-52; Sands, *Principles of International Environmental Law*, *supra* note 3 at 241-46, 117.

162. *Stockholm Declaration*, *supra* note 34 at 12-13; WCED, *Our Common Future*, *supra* note 27 at 65.

163. Pushpam Kumar, ed, *The Economics of Ecosystems and Biodiversity: Ecological and Economic Foundations* (London: Routledge, 2012).

projects”<sup>164</sup> were used by States in the 2006 *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*.<sup>165</sup> The ICJ notes that in pleadings on Provisional Measures in this case, Uruguay maintained that “the provisional measures sought by Argentina would ... therefore irreparably prejudice Uruguay’s sovereign right to implement sustainable economic development projects in its own territory”.<sup>166</sup> Concern for this right appears in the ICJ’s reasoning in its initial Order with Regards to Provisional Measures, where the Court found that:

the present case highlights the importance of *the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development* ... it is in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development ... from this point of view account must be taken of the need to safeguard *the continued conservation of the river environment and the rights of economic development* of the riparian States;<sup>167</sup>

In the ICJ’s final Judgement for this case, this perspective is reinforced:

... regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also *the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development* ... The Court wishes to add that such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account. Consequently, it is the opinion of the Court that Article 27 embodies this *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*.<sup>168</sup>

Principle 21 of the 1972 *Stockholm Declaration*, which was re-affirmed in Principle 2 of the *Rio Declaration*, recognises 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

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164. *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Order of 13 July 2006, [2006] ICJ Rep 113 at para 48.

165. *Ibid* and *Case concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgement, [2010] ICJ Rep 14.

166. *Ibid*.

167. *Ibid* at para 80 [emphasis added].

168. *Ibid* at para 177 [emphasis added].

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.<sup>169</sup>

As noted by Schrijver and others, this principle of sovereignty over natural resources is well recognised in international law.<sup>170</sup> Indeed, a right to sustainable use of natural resources, held by indigenous peoples against their own countries, and by States against other States, appears to be gaining further recognition in, for instance, recent decisions of regional human rights tribunals.<sup>171</sup> This right to sustainable development, based on the principle of sovereignty and the duty to prevent activities within their control from causing damage outside their jurisdiction, provides the outer boundaries of the integration principle. It also obliquely addresses the social development dimension of sustainable development, as emphasized in the 2002 *JPOI*, if overlaps or conflicts occur.<sup>172</sup>

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169. *Stockholm Declaration*, *supra* note 34, Principle 21.

170. *Permanent Sovereignty over Natural Resources*, GA Res 3016 (XXVII), UNGAOR, 27th Sess, UN Doc A/Res/3016 (1972) 1. See Nico Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge: Cambridge University Press, 1997). See also *Case Concerning East Timor (Portugal v Australia)*, Judgment, Dissenting Opinion of Judge Weeramantry, [1995] ICJ Rep 90 at 197-200; *Case Concerning the Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v Iceland)*, Merits, Dissenting Opinion of Judge Petren, [1974] ICJ Rep 3 at 161; *Case Concerning the Barcelona Traction, Light and Power Company, Limited – New Application: 1962 (Belgium v Spain)*, Second Phase, Separate Opinion of Judge Jessup, [1970] ICJ Rep 3 at 165-67.

171. See *Case of the Sawhoyamaya Community (Paraguay)* (2006), Inter-Am Ct HR (Ser C) at paras 137-41; *Rights Case of the Saramaka Peoples (Suriname)* (2007), Inter-Am Ct HR (Ser C) at paras 93-95, 122, 129-32; *Case of the Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*, [2002] 155/96 as published in (2002) 96 American Journal of International Law 937.

172. Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge: Cambridge University Press, 2003) at 137-43. But see Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary Law* (Oxford: Oxford University Press, 1994) at 145-47.

An emerging customary “integration” principle does not provide a panacea for the process of treaty-making.<sup>173</sup> States can deliberately elect to deviate from customary norms in their treaties, in accordance with the maxim *pacta sunt servanda*, in all but a few instances.<sup>174</sup> It also remains disputed, in international law, whether the emergence of a new customary rule would lead to the revision of an earlier treaty which contradicts the norm.<sup>175</sup> But under the *VCIT*, a customary norm of integration does become directly relevant for the *interpretation* of trade and investment treaties by tribunals. Or, as is more common in this field, it can become relevant for interpretation of an economic agreement by a sustainable development regulator seeking to understand the limits of their discretion. As noted in Article 31(3)(c) of the *VCIT*, a treaty shall be interpreted in good faith, in accordance with the ordinary meaning to be given to its terms in their context, and in the light of its object and purpose, and there shall be taken into account, together with the context, “any relevant rules

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173. Birnie, Boyle & Redgwell, *supra* note 3 at 118; *Agenda 21*, *supra* note 44, ch 39; French, *supra* note 127.

174. For instance, a treaty that deviates from *jus cogens* preremptory norms is invalid. See Hugh Thirlway, *The Structure of International Legal Obligation*, in Malcolm Evans, ed, *International Law*, 4d (Oxford: Oxford University Press, 2014) 117 at 137-38; Tim Hillier, *Sourcebook on Public International Law* (London: Cavendish Publishing, 1998) at 74. See also *Fisheries Case*, *supra* note 143.

175. Hillier, *ibid.*, “[c]ustomary law and treaty have equal authority. However if there is a conflict between the two it is the treaty that prevails” at 65. See also *Wimbledon Case* (1923), PCIJ (Ser A) No 1.

of international law applicable in the relations between the Parties”.<sup>176</sup> While the integration rule may not trump a clear obligation to ignore all environmental and social consequences, such a provision might be hard to secure presently, given the inter-actional dynamics and consensus policy context discussed above. In its absence, the regulator or treaty interpreter could appeal to the integration principle in order to interpret obligations that might, if understood in particular sense, risk causing or exacerbating trade and investment-led social and environmental damage.

### III. International Trade and Investment Agreements in Light of the Integration Principle

As highlighted by the Tribunal in the *Iron Rhine* award, Principle 4 of the 1992 *Rio Declaration* provides that “environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it”.<sup>177</sup> Just as States negotiate to secure access to foreign markets through a trade accord, States may also be seeking to negotiate to ensure economic agreements do not lead to negative environmental and social consequences. This article concludes with a brief discussion of how the principle might assist in guiding the negotiation and

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176. *VCLT*, *supra* note 1, art 31(3)(c); See Pauwelyn, *supra* note 172 at 241; Jacques-Michel Grossen, *Les Presomptions en Droit International Public* (Neuchatel & Paris: Delachaux & Niestle, 1954) at 114-17 (where it is argued that customary norms are included among relevant rules of international law applicable in the relations between the Parties). See also Ian Sinclair, *The Vienna Convention on the Law of Treaties* (Manchester: Manchester University Press, 1984) at 119 (who suggests art 32(3)(c) may be taken to include not only the general rules of international law but also treaty obligations existing for the Parties, as followed in *Al-Adsani v United Kingdom*, No 35763/97, [2001] XI ECHR 761 [*Al-Adsani*]). And see Philippe Sands, “Treaty, Custom and Cross-fertilization of International Law” (1998) 1:1 *Yale Human Rights and Development Law Journal* 85 at 102-03 (who notes that while these norms are relevant, the treaty being interpreted retains a primary role and “there can be no question of the customary norm displacing the treaty norm, either partly or wholly” at 103).

177. *Rio Declaration*, *supra* note 28.

later interpretation of the provisions of trade and investment agreements, for the consideration of those developing new economic accords which make explicit commitments to sustainable development.

### A. Addressing Sustainable Development Tensions in Trade and Investment Agreements through Integration

First, if sustainable development, as a policy objective, is explicitly recognised as part of the “object and purpose” of a trade agreement, might this recognition assist in treaty implementation? In international law, the object and purpose is important for interpretation. Article 31 of the *VCLT*, as a general rule of interpretation, provides at Article 31(1) that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. And at Article 31(2), the *Convention* further states that: “[t]he context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes ...”.<sup>178</sup> In essence, the ordinary meaning of the terms of a treaty, in their context and taking into account the treaty’s stated *object and purpose*, are taken together to guide a lawyer in understanding the

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178. *VCLT*, *supra* note 1, art 2 (note also the relevance of “... (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; ... A special meaning shall be given to a term if it is established that the parties so intended”). Also, art 32 permits recourse to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion. These reflect pre-existing customary international law, applying to treaties concluded before the *VCLT* and also to non-Parties: *Case Concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, [1994] ICJ Rep 6; *Kasikili/Sedudu Island (Botswana/Namibia)*, [1999] ICJ Rep 1045; *Case Concerning Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)*, [2002] ICJ Rep 625 at paras 37-38).

intentions of the Parties, as the prevailing elements for interpretation.<sup>179</sup> As explained by Professor Richard Gardiner, the “object and purpose function as a means of shedding light on the ordinary meaning” of a treaty.<sup>180</sup>

This solution is not quite so simple, however. The precise nature and role of the “object and purpose” of a treaty remains something of an enigma in the law of treaties.<sup>181</sup> The combining of “object” and “purpose” in the *VCILT* has been ascribed in part to an ILC members’ suggestion in relation to the draft Article on *pacta sunt servanda*, that “the English word ‘objects’ be better rendered in French by the expression ‘l’objet et la fin’... for the object of an obligation was one thing and its purpose was another”.<sup>182</sup> In French public law, as Buffard and Zemanek explain, a distinction has developed between “l’objet” of a legal instrument, which refers to the means chosen by the Parties to create a set of rights and obligations, and “le but” which refers to the reason(s) for establishing “l’objet” of the accord.<sup>183</sup> The term “object” indicates thus the substantial content of the norm, the provisions, rights and obligations created by the norm. The object of a treaty is the instrument for the achievement of the treaty’s purpose, and this purpose is, in turn, the general goal or result which the [P]arties want to achieve by the treaty”.<sup>184</sup> As Gardiner notes, while the Preamble provides guidance to discern the object and purpose

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179. Paul Reuter, *Introduction to the Law of Treaties* (London: Kegan Paul International, 1995); Ravi Aryal, *Interpretation of Treaties: Law and Practice* (New Delhi: Deep & Deep, 2003).

180. Richard Gardiner, *Treaty Interpretation* (Oxford: Oxford University Press, 2008) at 190.

181. Isabelle Buffard & Karl Zemanek, “The Object and Purpose of a Treaty: An Enigma?” (1998) 3 *Austrian Review of International and European Law* 311; Anthony Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000).

182. “Summary Records of the Sixteenth Session” (UN Doc A/CN.4/SER.A/1964) in *Yearbook of the International Law Commission*, vol 1 (New York: UN, 1965) at 26 (UNDOC. A/CN4/SER.A/1965); Gardiner, *supra* note 180 at 191. See also *Reservations to the Genocide Convention Case*, [1951] ICJ Rep 15 at 23, which actually uses “l’objet et le but”.

183. Buffard & Zemanek, *supra* note 181 at 325-28, Gardiner, *ibid* at 192.

184. Buffard & Zemanek, *ibid* at 326.

of a treaty, the whole treaty text and associated matter listed in Article 31(2) should be taken into account as well. An object and purpose can also be discerned by comparing a treaty to others of its type, as the ICJ did in the *Oil Platforms* case by comparing the provisions of the 1955 *Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Iran*,<sup>185</sup> with others of treaties of friendship.<sup>186</sup> This said, as the Appellate Body of the WTO has clarified, “most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes ... This is certainly true of the WTO Agreement”.<sup>187</sup> Of importance for the instant discussion, the object and purpose of the treaty can be discerned, they are legally relevant for interpretation, and there may be more than one.

The object and purpose of a treaty is raised multiple times in the *VCLT*, serving, for instance, as a means to determine the incompatibility of a reservation at Article 19(c), as a possible characteristic of a multilateral treaty to which reservations require the consent of all Parties at Article 20(2), as a way to characterise the material breach of a treaty at Article 60(3)(b), and as part of general guidance for interpretation at Article 31(1).<sup>188</sup> This last point is especially important, as it guides the implementation of the agreements, arguably including the further evolution of the treaty regimes themselves.<sup>189</sup>

Taking the guidance of Gardiner, Buffet and Zemanek into account, it can be noted that sustainable development is reflected as a “purpose” for over thirty treaties which explicitly commit to achieve it across a range of very diverse sectors and ways – particularly those highlighted by States as delivery mechanisms for the 2002 *JPOI*, and the 2015 SDGs.<sup>190</sup> As just

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185. 15 August 1955, 284 UNTS 93 (entered into force 16 June 1957).

186. *Oil Platforms (Iran v USA)*, [1996] ICJ Rep 803 at para 27.

187. *WTO Agreement*, *supra* note 4 at 17.

188. Buffet & Zemanek, *supra* note 181 at 320.

189. *Ibid* at 333; Gardiner, *supra* note 180 at 190–200.

190. Cordonier Segger & Khalfan, *supra* note 12 at 45–50 lists the treaties explicitly highlighted as international law in the field of sustainable development in the 2002 WSSD *JPOI*, including those which contain key provisions on sustainable development in addition to other environment, economic or social purposes.

one example, in the *FAO Seed Treaty*, the Parties establish a Multilateral System for Access and Benefit-Sharing that is meant to provide an efficient, effective and transparent framework to facilitate access to plant genetic resources for food and agriculture, and to share the benefits in a fair and equitable way.<sup>191</sup> In Objectives at Article 1.1, States agree that the “objectives of this 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*”.<sup>192</sup> Sustainable use of plant genetic resources for food and agriculture is an “object” of this international treaty, and overall sustainable agriculture is set as one of two ultimate purposes.<sup>193</sup> Further, the Parties include provisions in Article 6 to define what is meant by sustainable use, committing to develop and maintain legal measures in this respect. At Article 6.1, the Contracting Parties accept a duty to “develop and maintain appropriate policy and legal measures that promote the sustainable use of plant genetic resources for food and agriculture”.<sup>194</sup> In Article 6.2, the Parties offer specific guidance what constitute these measures, for their treaty regime.<sup>195</sup> Through careful debate in the treaty negotiations,<sup>196</sup> further clarifications through the regime’s multi-lateral Conferences of the

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191. *FAO Seed Treaty*, *supra* note 130. The Multilateral System applies to over 64 major crops and forages. Resources may be obtained from the Multilateral System for utilization and conservation in research, breeding and training. When a commercial product is developed using these resources, equitable contributions are made to the System. The Governing Body sets out conditions for access and benefit-sharing in a “Material Transfer Agreement”.
192. *FAO Seed Treaty*, *ibid*, art 6 [emphasis added].
193. Muriel Lightbourne, “The FAO Multilateral System for Plant Genetic Resources for Food and Agriculture: Better than Bilateralism?” (2009) 30 *Washington University Journal of Law and Policy* 465 at 507.
194. *FAO Seed Treaty*, *supra* note 130, art 6.
195. *Ibid*.
196. Stewart Coupe & Robert Lewins, *Negotiating the Seed Treaty* (Warwickshire: Practical Action Publishing, 2007).

Parties,<sup>197</sup> guided by scholarly legal analysis, the regime has clarified their commitment to sustainable development.<sup>198</sup> In this specific treaty sector, the Parties pinpointed the meaning of sustainable use of plant genetic resources for food and agriculture, and operationalised their commitment in the treaty by agreeing on a set of legal measures for implementation. Although sustainable development may be recognised in Preambles as part of the purpose of many trade and investment agreements,<sup>199</sup> such legal clarity has only begun to be sought in the context of economic treaty law.<sup>200</sup>

## B. Interpreting Sustainable Development Provisions in Economic Accords

While a joint intention of the Parties to promote sustainable development may be found in a trade or investment treaty Preamble, and may be considered part of the “object and purpose” of the accord in question, this recognition has limits. As Gardiner explains, according to the *VCLT*, though such recognition can shed light on the meaning of a provision within the context of the treaty itself, a broader or different “object and purpose” does not provide a valid means of challenging a clear operational term.<sup>201</sup> Essentially, if a regulator from the EU or another Party sought to demonstrate that a clear obligation in a trade accord should be interpreted to accommodate the tensions identified above, in order to integrate environmental and social considerations, reference to a Preambular

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197. Report of the Third Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (Tunis, Tunisia, 1-5 June 2009) IT/GB-3/09/Report, online: Food and Agriculture Organization of the United Nations <[www.fao.org/3/a-be138e.pdf](http://www.fao.org/3/a-be138e.pdf)>.

198. Lightbourne, *supra* note 193.

199. Gehring & Cordonier Segger, *supra* note 4; Schrijver & Weiss, *supra* note 112; Boyle & Freestone, *supra* note 11.

200. Birnie, Boyle & Redgwell, *supra* note 3 at 123-27; Sampson, *supra* note 4 at 78-109.

201. See Gardiner, *supra* note 180 at 74.

commitment alone may not provide the strongest guidance.<sup>202</sup>

The *VCLT*, as noted earlier, enshrines customary rules of treaty interpretation. Article 30 governs the application of successive treaties relating to the same subject-matter, and may assist in the interpretation of treaty obligations which appear to differ, from sustainability commitments that are enshrined in other accords.<sup>203</sup> Indeed, the tensions noted above do invoke certain types of conflicts among treaties. For instance, there may be a conflict where trade liberalisation obligations could constrain effective implementation of other treaty obligations which govern the same subject matter related to sustainable development.

However, in international law, there is a generally accepted presumption against conflicts. As Pauwelyn explains, in theory every new treaty norm is created within the context of pre-existing international law, and the presumption is that this new norm builds upon the existing laws.<sup>204</sup> Not only would an explicit conflict of norms need to be found in treaty text and proven by the claimant to limit an environmental or social measure, but if faced with two possible interpretations, one of which harmonises the meaning of the norms in question, the treaty will be “interpreted as producing and as intended to produce effects in

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202. See also, *ibid*; *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, [1991] 1CJ Rep 53 at 67-72; *Land, Island and Maritime Frontier Dispute (El Salvador v Honduras)*, [1992] ICJ Rep 351 at paras 375-76, the ICJ was unwilling to expand its jurisdiction beyond the very specific limits set out in the arbitration agreements, even to accommodate the express object and purpose of the accord it had identified; for cases where the WTO Appellate Body simply interpreted treaty provisions in the context of object and purpose; *US-Shrimp*, *supra* note 6 at 12-17; *EC-Measures Concerning Meat and Meat Products (Hormones)* (1998), WTO Doc WT/DS26/AB/R at 70; *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Complaint by Argentina)* (2002), WTO Doc WT/DS207/AB/R at 196-97 (Appellate Body Report); and *EC-Measures Affecting the Approval and Marketing of Biotech Products* (2006), WTO Doc WT/DS291/R at 4.162.

203. *VCLT*, *supra* note 1, art 30; see also Pauwelyn, *supra* note 172 at 361-85.

204. See Pauwelyn, *ibid* at 241; Grossen, *supra* note 176.

accordance with existing law and not in violation of it”.<sup>205</sup>

For a trade tribunal, or as is more likely in this field, for a regulator charged with interpreting a new trade obligation and how it will apply to efforts to secure more sustainable development in their sector of economic law and policy, it is therefore important under *VCLT* Article 31 to look first to other provisions in the trade treaty in question, to see if there is further guidance provided in their ordinary meaning, in the context of the treaty, in light of its object and purpose, that can assist in interpreting the scope and application of problematic obligations. If little guidance appears in the text itself, an analysis might also be conducted under the *lex posteriori* and other rules of the *VCLT* at Article 30. But before applying formal rules, a careful analysis of the other provisions of the economic treaty in question is important, particularly as Parties may have included other provisions that are part of the treaty context and specifically address the issue being raised, or have made explicit references to further *lex specialis*, such as environmental or human rights treaties which govern the same subject matter.<sup>206</sup> A careful search by the regulator may reveal textual solutions (or relevant ambiguities) in the trade or investment treaty itself. Certain types of provisions that could be present, particularly given Parties’ tendency to innovate in regional or bilateral trade and investment agreements, may be used to address a concern, avoiding a *prima facie* conflict of obligations.

From this textual interpretation viewpoint, other provisions in the treaty are therefore doubly important. In the examination of the terms of a trade or investment treaty, the interpretive rules of the *VCLT* will be relevant. The customary principle of integration can be taken into

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205. *Right of Passage over Indian Territory (Portugal v India)* (Preliminary Objections), [1957] ICJ Rep 3 at 142.

206. *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] ICJ Rep 226; see also Martti Koskenniemi, International Law Commission Study Group on Fragmentation, *Study on the function and scope of the lex specialist rule and the question of self-contained regimes* (Geneva: International Law Commission, 2003) at 160, online: International Law Commission <[legal.un.org/ilc/sessions/55/pdfs/fragmentation\\_outline.pdf](http://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf)>; Gardiner, *supra* note 180 at 260.

account in the interpretation of the terms of the trade and investment agreement itself.<sup>207</sup> A great deal turns on the specific mechanisms agreed by the Parties to the trade or investment accord, and whether these measures include ways to integrate social and environmental priorities in order to prevent or at least mitigate the impacts in question.<sup>208</sup>

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207. *VCLT*, *supra* note 1, art 31(3)(c); French, *supra* note 127; Gardiner, *supra* note 180 at 288-91 (“[t]hat article 31(3)(c) may have a useful role in handling such potential conflicts has been considered in academic study, in the work of the ILC and in some instances ... invoked in ... rulings of courts and tribunals ... A particular issue in the realm of treaty implementation is what account is to be taken of developments in international law, particularly the striking emergence of new specialist fields such as environmental law and human rights law ... the Court did give a clear indication that developments in environmental law were to be taken into account, and did so quite clearly in a context of treaty interpretation” at 331). See also *Al-Adsani*, *supra* note 176 (“[t]he Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part ...” at para 55); *Gabčíkovo-Nagymaros Case*, *supra* note 110; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, [1971] ICJ Rep 16 at 31 (“[a]n international instruments has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation” at para 53); *Iron Rhine*, *supra* note 9 at 58 (“[a]n evolutive interpretation, which would ensure an application of the treaty that would be effective in terms of its object and purpose will be preferred to a strict application of the intertemporal rule” at para 80). See also International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UNGAOR, 58th Sess, A/CN.4/L.682 (2006) at 206-44.
208. *VCLT*, *ibid*, art 31(3)(c) (the *VCLT* at art 31 permits interpretation to take into account, in addition to context and in light of the object and purpose, at art 31(3)(c) any relevant rules of international law applicable in the relations between the Parties); see also Pauwelyn, *supra* note 172 at 251-56; Sinclair, *supra* note 176 (who suggests art 32(3)(c) may be taken to include not only the general rules of international law but also treaty obligations existing for the Parties, and customary law at 119); Sands, *supra* note 176 at 103 (who notes that in the sense of art 31(3)(c), the treaty being interpreted retains a primary role).

In this respect, concerns raised by impact assessments and reviews become opportunities for the principle of integration to be taken into account in interpreting the treaty. First, the regulator can examine the economic treaty in question for provisions that would prevent the trade or investment disciplines from constraining the regulatory flexibility of the Parties for social and environmental purposes in the field of sustainable development. In the terms of Kelsen, there may be provisions in the economic treaty which grant a series of permissions, providing the Parties with exceptions to certain disciplines, where it can be shown that the disciplines might unduly constrain measures necessary to achieve other legitimate policy objectives. Should the overall treaty follow overwhelmingly along economic liberalisation in its context and structure, this could influence interpretation away from the preferred “integrated” outcome. However, general and specific exceptions, if found in the operational texts of the treaty, may provide clear exemptions that permit the sustainable development measures to be adopted. Similarly, provisions in a trade treaty itself or its preamble might set out an order of precedence between the accord and other treaties. If these provisions seem clear, the regulator would simply look, in good faith, to the context and the treaty object and purpose to confirm their ordinary meaning.<sup>209</sup> The context will include the treaty text, with its preamble and annexes, along with any agreement relating to the treaty, and also any instrument made by one or more Parties.<sup>210</sup> If notes appear in an annex to the accord, clarifying that the treaty will not apply for certain economic sectors, such notes would be considered part of the treaty context, in addition

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209. See Gardiner, *supra* note 180; see also *Aguas del Tunari v Bolivia* (2005), ARB/02/3 (International Centre for Settlement of Investment Disputes) at para 21 (which notes the *Vienna Convention* does not privilege any of these three aspects of the interpretation method) and Humphrey Waldock, “Third Report” (UN Doc A/CN.4/167) in *Yearbook of the International Law Commission 1964*, vol 1 (New York: UN, 1965) at 20 (UNDOC. A/CN.4/SER.A/1964) (which noted the need to interpret the treaty as a whole in good faith).

210. *VCIT*, *supra* note 1, art 31.2.

to any further agreements provided in the annexes.<sup>211</sup> There is also the possibility to take into account any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions, and this might include a subsequent joint statement between the Parties clarifying how the trade and investment rules should be interpreted to take customs into account.<sup>212</sup>

Second, the regulator may find that there are provisions in the trade or investment agreement to secure environmental and social cooperation, or that such provisions run alongside the trade agreement in a separate accord. In Kelsen's terms, these accords might include permissions or prescriptions to cooperate on key environmental and social problems, as well as mechanisms to investigate situations in which laws appear to be weakened or not enforced, and even in some cases, permissions to provide resources, capacity-building and other support for programs to address trade-related environmental and social concerns. Again, *VCLT* rules will be relevant to interpretation. There may be clearly operational terms of the treaty committing to ensure cooperation on environment, labour or sustainable development matters, and the regulator can consider these in context, and in light of any provisions showing a sustainable development object and purpose. Annexes that are provided can be taken into account as part of this context, as will side agreements which were made between all the Parties in connection with the conclusion of the treaty, and there may also be separate memoranda of agreement which, if they were accepted as related to the trade and investment treaty by the other Parties, can be considered authentic means for interpretation.<sup>213</sup>

Third, integrated substantive trade or investment liberalisation rules

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211. *Ibid*; in connection with the conclusion of the treaty that is accepted by the other Parties as an instrument related to the treaty, see art 31.2(b); if made by all the Parties in connection with the conclusion of the treaty, see art 31.2(a).
212. *Ibid*, art 31.3(a); see also "Reports of the Commission to the General Assembly" (UN Doc A/6309/Rev.1) in *Yearbook of the International Law Commission 1966*, vol 2 (New York: United Nations, 1967) at para 15 (UNDOC. A/CN4/SER.A/1966/Add.1).
213. *VCLT*, *ibid*, arts 31.2, 31.2(a), 31.2(b); Gardiner, *supra* note 180 at 265-75.

may be included in the economic treaty itself, delivering sustainable development benefits through increases in liberalisation in targeted sustainable sectors of the economies, or for certain types of goods or services that meet an internationally agreed Sustainable Development Goal. Essentially, in Kelsen's terms, the States would need to include prescriptive provisions that oblige the Parties to liberalise trade or investment in specific economic sectors that they agree will contribute to sustainable development. Again, the regulator might seek integral provisions which agree to promote trade in sustainable goods and services, or to develop new markets, together with annexes, side agreements, or separate memoranda of agreement.<sup>214</sup> Such provisions, if the regulator finds them included in the text of the treaty, can assist in avoiding conflicts, and may have greater weight than turning to documents exchanged during treaty negotiations as *travaux préparatoires* as supplementary means of interpretation.<sup>215</sup> From the textual viewpoint, therefore, it is important to consider the further provisions of a new economic treaty, particularly inasmuch as they might avoid conflicts of obligations.

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214. *VCLT, ibid*, art 31(3)(a) (which includes any subsequent agreements between the Parties as to interpretation or application of its provisions. Art 31(3)(b) also includes any subsequent practices in the application of the treaty which establish agreement of Parties regarding its interpretation. Gardiner stated, "an agreement as to the interpretation of a provision reached after the conclusion of the treat represents an authentic interpretation by the parties which must be read into the treaty for the purposes of its interpretation", Gardiner, *ibid* at 34, 216-25). "Reports of the Commission to the General Assembly" (UN Doc A/6309/Rev.1) in *Yearbook of the International Law Commission 1966*, vol 2 (New York: United Nations, 1967) at para 14 (UNDOC. A/CN4/SER.A/1966/Add.1); see also *Kasikili/Sedudu Island (Botswana v Namibia)*, [1999] ICJ Rep 1045 at para 49.
215. *VCLT, ibid*, art 32 (provides for supplementary means of interpretation to which recourse is often had, but which are used to confirm the meaning resulting from the application of art 31, or to determine meaning if the ordinary meaning in context and in light of the object and purpose is either left ambiguous or obscure, as per art 32(a) or leads to a result which is manifestly absurd or unreasonable, art 32(b)). See Gardiner, *ibid* at 316-19.

As mentioned above, a further dimension of analysis is also important, informed by advances in international relations theory. Few international treaties today are simply textual contracts among States. As John Ruggie and Stephen Krasner have suggested, to understand the norms found in international treaties and how they are implemented, it is important to analyse the implicit understandings between a broad range of actors in a treaty regime, not only the formal views of States.<sup>216</sup> A regime is an institution that might coalesce or be structured around certain legal rules and certain formal organisations, but goes well beyond them, and develops iteratively.<sup>217</sup> Such regimes, as posited by John Vogler, can be defined as “sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations”.<sup>218</sup> Principles, norms, rules and decision-making procedures are all necessary parts of an international treaty regime, which exists to achieve the common object and purpose of States and other international actors.<sup>219</sup>

Regimes, in international relations theory, therefore, can be

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216. John Ruggie, “International Responses to Technology: Ideas and Trends” (1975) 29 *International Organization* 557 at 557-83 [Ruggie, “International Responses”]. See also John Ruggie, “Reconstituting the Global Public Domain-Issues, Actors, and Practices” (2004) 10 *European Journal of International Relations* 499 at 499-531 [“Ruggie, “Reconstituting the Global Public Domain”].
217. Ruggie, “International Responses”, *ibid* at 557-83; Ruggie, “Reconstituting the Global Public Domain”, *ibid* at 499-531.
218. John Vogler, ed, *The Global Commons: Environmental and Technological Governance*, 2d (Chichester: John Wiley and Sons, 2000) at 20-43.
219. See especially John Ruggie, “International Regimes, Transactions and Change: Embedded Liberalism in the Postwar Economic Order” in Stephen Krasner, ed, *International Regimes* (Ithaca: Cornell University Press, 1983). See also Stephen Haggard & Beth Simmons, “Theories of International Regimes” (1987) 41 *International Organization* 491; Olav Stokke, “Regimes as Governance Systems” in Oran Young, ed, *Global Governance: Drawing Insights from the Environmental Experience* (Boston: MIT Press, 1997) at 27-64.

described as governing specific issue areas in an interactive way.<sup>220</sup> This distinguishes them from broader international orders which imply an authority superintending over a wide range of institutions and issues.<sup>221</sup> As such, regimes are more “specialised arrangements that pertain to well defined activities, resources or geographical areas and often involve only some subset of the members of international society”.<sup>222</sup> As Vogler observes, the boundaries of a regime are thus determined partly by perceptions of the extent and linkage between issues. A regime analysis of trade and investment treaties calls attention to the way that principles, rules and decision-making procedures develop, interact and evolve in one “sub-system”, focusing on the converging expectations of a group of international actors. As noted by Stephen Toope and Jutta Brunnée, regime analysis can serve the study of international law, drawing on the “inter-actional” behaviours of legal subjects and rules originally observed by Lon L Fuller.<sup>223</sup> Inter-actional regimes, as they note, coalesce around international treaty commitments, which evolve and deepen over time through interactions between states and non-state actors, shaping and being shaped by the norms and rules, knowledge and networks generated by the regime.<sup>224</sup>

From this perspective, both the “hard” and “soft” law between Parties to a treaty (or a series of treaties) evolves with the regime, engagement

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220. Oran Young, *International Cooperation: Building Regimes for Natural Resources and The Environment* (Ithaca: Cornell University Press, 1989) as cited in Vogler, *supra* note 218 at 23.

221. Vogler, *ibid* at 20-43.

222. Young, *supra* note 220 at 23.

223. See Jutta Brunnée & Stephen Toope, “International Law and Constructivism: Elements of an Interactional Theory of International Law” (2000) 39:1 *Columbia Journal of Transnational Law* 19 at 19-74 [Brunnée & Toope, “International Law and Constructivism”]; see also Jutta Brunnée & Stephen Toope, “The Changing Nile Basin Regime: Does Law Matter?” (2002) 43 *Harvard International Law Journal* 105 at 105-59.

224. See Brunnée & Toope, “International Law and Constructivism”, *ibid* at 19-74; see also Jutta Brunnée & Stephen Toope, “Persuasion and Enforcement: Explaining Compliance with International Law” (2002) *XIII Finnish Yearbook of International Law* 1 at 1-23.

a broader spectrum of actors than the States in its implementation.<sup>225</sup> A regime may start with a legally binding agreement with broad participation but shallow substantive commitments, then deepen in substantive content and engagement of more and better informed actors, leading to greater compliance over time. As such, the emergence, evolution and effects of normative systems can coalesce around a particular object and purpose in international law, reinforced by “epistemic communities” which share scientific information and data.<sup>226</sup> In certain circumstances, it may be undesirable to negotiate seemingly strong international treaties without first going through a careful, incremental process of regime-building. Without it, formal legal commitments are unlikely to be meaningful; States may simply assent with no intention of complying, or no capacity to comply.<sup>227</sup> As Brunnée and Toope suggest, once a contextual agreement (such as a framework convention) initiates the development of self-reinforcing norms and institutions, regimes can then evolve in the direction of deeper substantive legal commitments. A steady building process, focused on the object and purpose of the treaty, may yield increasingly complex and sophisticated regimes of nearly universal application.<sup>228</sup> For other treaties on sustainable development, such as the 1992 *UNCBD*<sup>229</sup> and the 1992 *UNFCCC*,<sup>230</sup> it has been convincingly argued that States established framework agreements which commit to certain common objects and purposes, and a process by which further more detailed and specific protocols are negotiated.<sup>231</sup> In emerging trade and investment regimes, from this perspective, it is possible that while agreed provisions appear likely to generate the tensions discussed above,

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225. Dinah Shelton, *International Law and Relative Normativity* in Malcolm Evans, ed, *International Law*, 4d (Oxford: Oxford University Press, 2014) at 159-63. See also Birnie, Boyle & Redgwell, *supra* note 3.

226. Shelton, *ibid*; See also Jutta Brunnée, “COPing with Consent: Lawmaking under Multilateral Environmental Agreements” (2002) 15:1 *Leiden Journal of International Law* 1 at 1-52.

227. Brunnée, *ibid* at 5-6.

228. *Ibid* at 33-37.

229. *Ibid*.

230. *Ibid*.

231. *Ibid* at 37-38.

as the regime continues to evolve, new purposes can be accepted by the Parties, and new operational instruments negotiated to take evolving customary law into account. For instance, even if the WTO Agreements did not originally include sustainable development as part of the purpose, and even if there were WTO Members that had persistently objected to a principle of integration in customary law, the WTO may still be able to evolve as a regime for an eventual acceptance of this objective, taking into account an integration principle in certain areas of its work, and in that context, new obligations may be negotiated within the regime framework.

Whether one departs from a purposive, a textual or a regime perspective, if it is desirable to integrate social and environmental concerns into trade treaties for sustainable development, *either* for sound international policy reasons, *or* out of respect for an emerging customary principle of integration, *or* simply to achieve a common textual sustainable development goal that is set as an “object and purpose” of the trade and investment treaty instrument itself (either in a new accord, or as a new commitment while a treaty and investment regime evolves), the question remains as to which provisions might best be interpreted as doing so effectively. More research is necessary to identify and understand the types of obligations that might be included, in a manner similar to the *FAO Seed Treaty* Article 6, to add clarity to a commitment for sustainable development in an international trade and investment treaty.<sup>232</sup>

#### IV. Conclusions

In international debates on trade and investment, the environment and human rights, there have been significant concerns about the sustainability of entering into economic agreements which might lead to serious environmental and social impacts. In light of two decades of global and regional “soft law” commitments to sustainable development

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232. See Marie-Claire Cordonier Segger, *Athena's Treaties: Crafting Integrated Trade and Investment Accords for Sustainable Development* (forthcoming, 2018).

through trade and investment, States may have legitimate expectations that these concerns will be addressed. Given the extensive global consensus on the importance of sustainable development, particularly if sustainable development has been included by Parties as part of the “object and purpose” of trade and investment treaties, or has an interstitial influence on the process of economic treaty negotiations, certain customary norms may be useful to address the tensions. The principle of integration, as defined in Principle 4 of the *Rio Declaration* and supplemented by social considerations from the 2002 *JPOI*, can be considered particularly relevant for trade, investment and other economic policy-making. Notwithstanding its potential interpretive weight as part of the object and purpose of a treaty, a preambular reference alone in a trade or investment treaty may not provide a comprehensive response to the tensions that are being identified in assessments and current political debates. By applying greater creativity and craftsmanship in treaty drafting, increasingly adopting additional measures that address actual environmental or human rights tensions and concerns, States can convert trade and investment law tensions to opportunities for sustainable development. As tribunals and regulators take up these accords for implementation and enforcement, such mechanisms can and should be interpreted in light of the emerging integration principle, supporting the achievement of global Sustainable Development Goals.