

## SUSTAINABILITY IN INTERNATIONAL LAW

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## Summary

The idea of “sustainability” has been expressed in three relatively distinct ways in modern international law.

1. *Sustainability as Optimal Living Resource Exploitation.* Until around 1970 sustainability had a narrow connotation in international law as a technical objective for fisheries management. In this sense, sustainability means ensuring maximum harvests year after year by exploiting a resource as heavily as possible without exceeding its biological regenerative capacity (*i.e.*, obtaining the *maximum sustainable yield* (MSY)). Although subject to controversy, particularly regarding the role of social and economic considerations in determining harvest levels, MSY has been the predominant management objective of international fisheries agreements since the mid twentieth century.

2. *Sustainability as Respect for Ecological Limits.* Around 1970 sustainability came to be associated in international law with the broader idea that Earth’s ecological systems impose inherent limits upon human activity and economic growth that must be respected if human society is to persist and flourish. Sustainability in this sense typically involves the propositions that human society and ecological systems are fundamentally interconnected; that ecological systems impose inherent and unavoidable limits on human activity; that historical and current patterns of economic development flout these ecological limits; and that human activity must be brought into line with ecological limits if human societies are to survive and flourish. This vision of sustainability is reflected in numerous international declarations such as the 1972 Stockholm Declaration and the 1982 World Charter for Nature, and in emerging international law principles such as the ecosystem approach. It is, however, highly controversial and has never achieved the prominence or widespread endorsement enjoyed by the other two themes of sustainability in international law.

3. *Sustainability as Sustainable Development.* The theme of sustainable development entered the mainstream of international law in the 1980s and has dominated thinking about sustainability in international law since at least the 1992 Earth Summit. It has brought environmental concerns into the political and legal mainstream to an unprecedented degree. It has pervaded all fields of international law and diplomacy. It has been endorsed in hundreds of international treaties and declarations and by international institutions ranging from the World Bank to the UN Commission for Sustainable Development. Nonetheless it is controversial and ill-defined. It represents a compromise between the industrial democracies of the “North” and the developing countries of the “South,” and between the advocates of environmental protection and economic growth everywhere. While its meaning is highly contested, sustainable development represents a subtle shift from the idea

of respecting unavoidable *limits*, found in earlier formulations of sustainability, to one of *balancing* a set of environmental, social and economic priorities each of which has an equal claim to validity. Faced with the tensions and ambiguity in the concept, international lawyers have attempted to flesh out its meaning by turning to numerous co-evolving principles of international law such as the precautionary principle, the polluter pays principle, and so on. Whether these efforts will succeed in resolving the debates surrounding the idea of sustainable development remains to be seen.

At the opening of the twenty-first century these three visions of sustainability face formidable obstacles. The majority of marine and freshwater fish stocks are being harvested at or beyond levels that can be sustained biologically and numerous major fisheries have collapsed. The idea of respect for ecological limits is as controversial today as it was in the 1970s. The bright promise of sustainable development has been replaced with disillusionment and frustration as governments face the realization that the world is probably farther from the goal of sustainable development than it was in 1992 at Rio. Nonetheless the idea of sustainable development probably represents one of the twentieth century's enduring legacies to future generations. The task in the coming years will be to ensure that it is a positive legacy.

## 1. Introduction

### 1.1 Overview of the Subject

This Article examines the concept of sustainability in international law. Sustainability has emerged as one of the defining preoccupations of human affairs at the opening of the twenty-first century. It has proven to be simultaneously as alluring and as challenging to international lawyers as it has to scientists, politicians, businesspeople and others. It provides a powerful symbol around which diverse interests can converge, but at the same time it eludes concrete definition, encompasses conflicting agendas and promises to generate continuing debate and controversy.

There is a tendency today to associate sustainability almost exclusively with the idea of sustainable development. This is understandable, given the heavy emphasis on sustainable development since the 1992 United Nations Conference on Environment and Development (UNCED, also known as the Earth Summit). Nonetheless the idea of sustainability has had a varied history in modern international law. The current vogue for the term “sustainable development” tends to gloss over the tensions and transformations in modern international law's treatment of sustainability.

It is possible to identify at least three closely related but fairly distinct senses in which “sustainability” has been understood and pursued in modern international law. Although the idea of sustainable development dominates thinking about sustainability in international law at the opening of the twenty-first century, the other versions of sustainability were prominent in earlier periods and are still influential in certain areas of international law. All three coexist in contemporary international law, interacting and overlapping with the others but representing three relatively distinct currents of thought. The three approaches to sustainability discussed in this Article are:

1. *Sustainability as Optimal Living Resource Exploitation;*

2. *Sustainability as Respect for Ecological Limits;* and
3. *Sustainability as Sustainable Development.*

The first theme, sustainability as optimal resource exploitation, supplied the dominant idea of sustainability in international law throughout most of the twentieth century (see Section 3). From the early twentieth century until around 1970, sustainability had a narrow connotation in international law as a technical objective for the management of fisheries and certain other renewable natural resources. Used in this sense, sustainability refers to the goal of ensuring maximum harvests on an ongoing basis by exploiting a resource as heavily as possible without exceeding its biological regenerative capacity. This idea is most often expressed as obtaining the *maximum sustainable yield* (MSY) from living resources. (See “*Natural Resource Perspectives on Sustainability*,” EOLSS on-line, 2002) Although subject to controversy, particularly regarding the role of social and economic considerations in determining harvest levels, MSY has been the predominant management objective of international fisheries agreements since the mid twentieth century. It is found in many prominent international treaties concerning marine living resources.

Starting around 1970, sustainability came to be associated in international law with broader concerns about human-nature interaction, and in particular with the idea that the Earth’s ecological systems impose inherent limits upon human activity and economic growth that must be respected if human society is to persist and flourish (see section 4). At this time the second theme of sustainability, respect for ecological limits, emerged into the mainstream of international law. Sustainability in this sense typically involves several closely related propositions: that human society and ecological systems are fundamentally interconnected; that ecological systems impose inherent and unavoidable limits on human activity; that historical and current patterns of economic development flout these ecological limits; and that human activity must be brought into line with ecological limits if human societies are to survive and flourish. This vision of sustainability was propelled onto the main stage of international law by the United Nations Conference on the Human Environment in Stockholm in 1972. It was and remains highly controversial, particularly among representatives of developing countries who view the idea of “limits to growth” as a “Northern” concern that could be used to limit their ability to pursue their own development paths. The idea of sustainability as respect for ecological limits is found in the numerous “soft,” non-binding international declarations and action plans and in emerging principles of customary international law such as the ecosystem approach, but has not achieved the prominence of the other two themes of sustainability in international law.

The 1980s saw the ascendancy of a new idea in international law, sustainable development (see Section 5). The theme of sustainability as sustainable development entered the mainstream of international law around the time of the World Commission on Environment and Development (WCED, or the Brundtland Commission) and has dominated thinking about sustainability in international law since at least UNCED in 1992. It has pervaded all fields of international law and diplomacy and has been incorporated as a goal or guiding principle in hundreds of international treaties and declarations. Sustainable development is often described in general terms as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It is a controversial and notoriously ill-defined principle in international law. It represents an historic compromise between environment and development: not simply a compromise between the

affluent industrial democracies of the global “North” and the developing countries of the global “South,” but also a compromise between advocates of environmental protection and proponents of economic growth and market liberalization everywhere.

The sustainable development compromise proved attractive to governments, environmental groups and industry in developed and developing countries alike. It brought environmental concerns into the political and legal mainstream to an unprecedented degree. By calling for the integration of environmental concerns into all areas of decision making, sustainable development heralded the emergence of environmental protection as a central concern of the international legal system as a whole rather than a narrow issue consigned to a specialized subfield. At the same time, this historic compromise allowed governments and industry to embrace the goal of environmental protection without necessarily accepting any fundamental challenge to the institutions of industrial society or the desirability of sustained economic growth. Sustainable development differs from earlier formulations of sustainability in that it shifts from a rhetoric of respecting biological or ecological *limits* to one of *balancing* a set of environmental, social and economic priorities each of which has an equal claim to validity. In some cases, in fact, the need for poverty alleviation or sustained economic growth is seen as a limit on the pursuit of environmental protection.

In recent years international lawyers and diplomats have expended a great deal of energy attempting to give concrete meaning and specific institutional expression to the idea of sustainable development by establishing international bodies and programs devoted to sustainable development, concluding treaties that address particular aspects of sustainable development and fleshing out numerous principles of international law often associated with sustainable development, such as the precautionary principle, the polluter pays principle, and so on. Whether these efforts can resolve the tensions and debates surrounding the idea of sustainable development remains to be seen.

By way of conclusion, Section 6 looks to the future of sustainability in international law. The remainder of this Introduction describes the scope of the Article (Section 1.2) and provides a brief introduction to international law for readers who are not familiar with the field (Section 1.3).

## **1.2 Scope of the Article**

This Article provides an overview of the major ways in which the idea of sustainability has been developed and used in modern international law as a normative principle to govern activities affecting the environment and development. Readers should keep in mind two important limitations on the scope of the Article.

First, it considers only *international* law, as represented by such things as treaties, customary international law rules, decisions of international tribunals, and statements of international organizations and conferences. Domestic laws are excluded from the scope of the Article.

Second, it emphasizes *multilateral* legal arrangements. Bilateral legal arrangements are excluded unless they have had an important influence on multilateral legal relations, because the number of bilateral treaties and other arrangements is too great to deal with

adequately in this short space. In addition, due to space constraints this Article does not attempt to examine European Community law in any detail, although this represents a very important regional legal system.

### 1.3 What is International Law?

International law is typically defined as the legal principles and rules binding on members of the international community in their relations with each other. It establishes a framework within which the members of the international community may cooperate, establish norms of behavior, and resolve their differences. This definition of international law raises two questions: (1) which rules and principles count as “law” in the international system, and (2) who are the “members of the international community”? The standard answers to these two questions are, briefly, that (1) only those obligations arising from a very short list of recognized “sources” of international law count as “law”, and (2) the “international community” is made up of nation-states. International lawyers widely acknowledge that both of these standard answers are inadequate and unrealistic in today’s world.

#### 1.3.1 What Counts as “Law”?

The question of what counts as international “law” (*i.e.*, which norms are “legally binding”) begs the thorny issue of how or why international law is binding in the first place, especially in the absence of an international sovereign with authority to enforce commands. International lawyers have typically supplied two principal answers to this question. According to *legal positivist* theories, international law is binding by virtue of states’ consent to be bound by it. In this view the binding force of international law is supplied by states’ expressed consent to treaties or implied consent to international customs. This view attempts to anchor international law in the concrete realities of international politics. According to theories in a *natural law* tradition, on the other hand, international law is binding because it embodies universally valid principles of justice or follows from the very nature of international society. In this view, certain basic rules such as fundamental human rights, prohibitions against genocide and torture, and the sovereign equality and independence of states may be binding regardless of whether particular states have consented to them. This view attempts to anchor international law in the utopian ideal of an international society.

Both these arguments coexist in international law, although modern international law tends to give priority to the first (that states are bound only by obligations to which they have consented). As a result, in any given situation international lawyers and diplomats may justify or oppose a rule or principle by reference either to the hard realities of state consent or the universal ideals of international community. This tension has never been and probably never will be fully resolved in international law. Indeed, it is arguably a source of flexibility and resilience, helping international law to adapt and persist.

In fact most international lawyers tend to worry less about how or why international law is binding than about the need get on with what they see as the pressing practical job of building and improving agreements, rules and institutions to facilitate international cooperation and foster human progress. Modern international law therefore by and large sidesteps or assumes away the thorny issue of what makes it binding, instead simply

identifying a list of recognized “sources” of law that can be used to determine the applicable international law in particular circumstances. The 1946 Statute of the International Court of Justice (ICJ), which is generally recognized as authoritative in this regard, lists three sources of international law: international treaties, international custom, and “general principles of law recognized by civilized nations.” The decisions of courts and tribunals (such as the ICJ, national courts, war crimes tribunals, trade dispute settlement panels and so on) and writings of eminent scholars may be used as subsidiary means to determine whether a rule or principle falls into one of these three categories, but they do not count as independent “sources” of law themselves.

It will be useful to consider each of the three sources briefly in turn. *Treaties* (also often called conventions, agreements, covenants, pacts, protocols, etc.), like contracts between private parties, are express written agreements that states conclude with each other with the intent to be bound by their agreement. They may be bilateral or multilateral, regional or global, and may create binding obligations on just about any subject. Examples include the United Nations Charter, the Convention on Biological Diversity and the Kyoto Protocol on climate change. Treaties are negotiated by diplomats, often through lengthy international conferences, and come into force only when formally ratified by the states that are party to them. Most multilateral treaties specify the number of ratifications needed to bring them into force.

*Custom* consists of those generally accepted customary rules that states observe consistently out of a sense of legal obligation. It has two components: state practice, which must be extensive and consistent; and *opinio juris*, i.e., the fact that the practice follows from a sense of legal obligation rather than political expediency. Once a custom is established, it is binding on all states regardless of whether they participated in its creation. A customary rule is not, however, binding on a state that has persistently objected to it. Because each state has the capability to opt out of customary law by persistent objection, states that do not object are usually taken to have given their implied consent to the rule. Since custom need not be in written form its content can be highly controversial, especially as practices and ideas change. Thus the existence and content of some customs are widely agreed (such as states’ obligation not to cause transboundary environmental harm or their exclusive jurisdiction over the sea and its resources out to 200 nautical miles), while others are vague and contested (such as the precautionary principle). Some customary rules, such as prohibitions against genocide and aggression and perhaps certain environmental obligations, may be so basic that no state may opt out of them no matter how much it may object, although the identity and content of such *peremptory norms* in the environmental area are highly contested.

*General principles of law recognized by civilized nations* make up a debated and unsettled source of international law that is used to fill some of the gaps left by treaties and custom. They may include legal rules accepted as valid in all “civilized” states, procedural or evidentiary rules of domestic law applicable to ordinary private disputes that may be applied by analogy to interstate relations, and general “natural law” principles of justice or equity. Some writers have suggested that sustainable development, for instance, may be a general principle of law, and the International Court of Justice has indicated some willingness to treat it as such; but the legal status and content of the principle are far from clear.

In theory, if a rule or principle falls within one of these three enumerated “sources” it counts as international law; otherwise it does not. In practice, this list of sources of law is almost universally recognized as inadequate to reflect the realities of contemporary international law because it fails to recognize as “law” a wide range of pronouncements, principles and arrangements that play important roles in contemporary international affairs, including:

1. Declarations and resolutions of international conferences such as the 1992 Rio Declaration;
2. Resolutions, decisions, guidelines and other statements issued by international organizations such as the United Nations General Assembly, the United Nations Environment Programme (UNEP) or the World Bank, and
3. Statements and reports of non-governmental organizations (NGOs) such as the World Conservation Union (IUCN) or the World Business Council for Sustainable Development (WBCSD).

Many such instruments are known as “*soft law*” because they do not qualify formally as sources of international law, yet they are recognized as having significant normative weight in international affairs. Practitioners and commentators in fields such as environmental protection, human rights and sustainable development regularly ignore the traditional categories of international law, relying heavily on informal sources such as conference declarations, action plans, expert reports, and statements of NGOs as authority for legal principles and rules. As a result these fields blur the lines of what counts as international law.

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