doi: 10.5102/rdi.v16i2.5972

A brief overview of sustainable development: how a debated concept with a much-contested legal nature could perform a valuable role in the decision-making*

Uma breve síntese sobre o desenvolvimento sustentável: debates sobre conceito e natureza legal

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Abstract

Sustainable development has reached a center stage in the international agenda. International actors have been taking efforts to launch conferences on the issue, to negotiate and to implement all sort of international commitments in order to promote sustainable development. It has become a global objective. Despite its leading role within the international community, sustainable development remains an unclear issue in international law. There is neither a universal agreed concept, nor a consensus on its legal nature. Regardless of the lack of consensus on both issues, we identified some preliminary thoughts on how sustainable development could become a valuable instrument at the hands of international decision-makers. We propose to reassess the literature to identify the state-of-the-art debate on sustainable development concept and legal nature; with a clearer view over the issue, we will develop how arbitrators should rely on sustainable development as a mandatory interpretation tool.

Keywords: Sustainable development. Legal nature. Decision-making.

Resumo

O desenvolvimento sustentável alcançou papel central na agenda internacional. Os mais diferentes atores – Estados, organizações internacionais, atores não-estatais – estão empenhados em promover o desenvolvimento sustentável, seja ao criar conferências internacionais sobre o tema, ou ao negociar e implementar diferentes compromissos internacionais no sentido de preservá-lo e incentivá-lo. Tornou-se, assim, um verdadeiro objetivo global. No entanto, a despeito de seu papel central para a comunidade internacional, o desenvolvimento sustentável permanece como uma questão incerta no direito internacional. Não há um conceito universalmente aceito, ou tampouco consenso quanto à sua natureza legal. De todo modo, essas lacunas são preenchidas por uma rica literatura que explora as duas questões, e, ainda que um consenso não tenha sido alcançado em relação a diversas facetas da discussão, há um ponto de convergência quanto ao papel que o desen-

* Recebido em 10/04/2019
Aprovado em 21/08/2019

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volvimento sustentável pode assumir na formação do convencimento de julgadores internacionais. Sugerimos uma revisão da literatura para identificar o estado da arte quanto ao debate acerca do conceito e da natureza legal do desenvolvimento sustentável; com uma visão mais clara de onde a literatura se encontra, debateremos o desenvolvimento sustentável como uma ferramenta mandatória de interpretação.

Palavras-chave: Desenvolvimento sustentável. Natureza legal. *Decision-making*.

1 Introduction

Sustainable development has reached a center stage in the international agenda[1]. States, international organizations and non-state actors – including non-governmental organizations and the private sector[2] – have been taking efforts to launch conferences on the issue, to negotiate and to implement all sort of international commitments in order to promote sustainable development. It is a global objective[3], which relevance is comparable to concepts as democracy and human rights[4].

Despite its leading role within the international community, sustainable development remains an unclear issue. There is neither a universal agreed concept, nor a consensus on its legal nature. Regardless of the lack of consensus on both issues, we identified some preliminary thoughts on how sustainable development could become a valuable instrument at the hands of international decision-makers. We propose to reassess the literature to identify the state-of-the-art debate on sustainable development concept and legal nature; with a clearer view over the issue, we will develop why arbitrators shall rely on sustainable development as a mandatory interpretation tool.

This paper follows with an overview of sustainable development's history, focusing on the conferences which contributed to crystalize it in the international agenda. Next, we will discuss the concept of sustainable development and its open-ended character. Then, we will present the debate on its legal nature, discussing the different views we found in the literature, and, subsequently, we will address a valuable common feature presented by some of these authors, to further explore how sustainable development should be employed in international decision-making - not at the discretion of decision-makers, but as a compulsory device.

2 A short history of sustainable development

The modern history of global environmental governance is based on cooperation; as no multilateral environmental organization has emerged, the United Nations and its members have rather relied on a kind of governance based both in mutual agreement and in a fragmented system of international treaties[5]. Sustainable development's history is no different, as it has also developed from international cooperation.

Even though the ancient origins of sustainable development are millenary[6], the modern understanding of the concept may be traced back to the 1972 Stockholm Conference on the Human Environment. Although no direct mention is made to sustainable development in the outcome documents, there were (preliminary) discussions about the integration between environment and development[7]. It is the initial mark of a modern debate on the relationship between development, environment and society[8]; developed countries claimed for

[1] WEERAMANTRY, C. G. Achieving sustainable justice through international law. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.*). Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 118.

[2] MARONG, Alhaji B. M. From Rio to Johannesburg: reflections on the role of international legal norms in sustainable development. *The Georgetown Int'l Envtl. Law Review*, v. 16, p. 21-76, 2003.

[3] ORTINO, Federico. Investment treaties, sustainable development and reasonableness review: a case against strict proportionality balancing. *Leiden Journal of International Law*, v. 30, p. 83, 2017.

[4] LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 30-31.

[5] O'NEILL, Kate. *The environment and international relations*. Cambridge University Press, 2009. p. 71.

[6] WEERAMANTRY, C. G. *Universalizing international law*. Brill Academic Publishers, 2004.

[7] ELLIOT, Jennifer A. *An introduction to sustainable development*. Routledge Perspectives on Development, 2013. p. 43; BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 379, 2012.

[8] Making a long story short, the protection of the environment was an issue highly debated among developed and developing countries – and it still is nowadays in a certain manner. After the 1972 Stockholm Conference, developed countries were enthusiastic about

a stricter environmental protection while developing countries questioned the protection of environment in purely environmental terms, demanding environmental conservation should not be achieved at the expense of poorer nations and future generations to meet their own development[9]. The challenge was to reconcile and translate these claims into international policies and actions[10].

Following this initial approach, a 1983 United Nations' General Assembly resolution established the World Commission on Environment and Development which, after some years investigating the state of global environment, produced one of the most renowned documents related to sustainable development: Our Common Future, or, simply, the Brundtland Report[11]. Its iconic definition of sustainable development has been widely endorsed for decades now: "[…] development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[12]. The referred report focusses on people and human development, as well as on the respect for future generations; it does not question whether economic development was desirable, it rather claims for a growth less material intensive, which generates less pollution and could be better shared for present and future generations[13].

The Brundtland Report's ideas were later confirmed in the 1992 United Nations Conference on Environment and Development, which took place in Rio de Janeiro (Rio 92). The debate on development and environment was being intensified and more robust answers were claimed by the international community. Rio 92 became the main stage for bringing developing and developed countries together and to coordinate environment and development issues. Even though developed countries' main interests dominated the discussion agenda – including biodiversity and climate change[14] –, a lowest common denominator was reached and four agreements were executed[15]. From those, two are essential to understand sustainable development: the Rio Declaration on Environment and Development (a twenty--seven principles statement to assist in the consecution of sustainable development), and Agenda 21 (a political guide to decisions on development and environment). Both are non-binding, soft-law instruments that do not provide a legal framework to implement sustainable development[16]; nonetheless, until present time, they are strongly influent and represent an international consensus on core principles of law and policies concerning development, environmental and social protection for the most different actors[17].

By directly referring to sustainable development, the discussions held on Rio 92 contributed to a global understanding of the concept. It reaffirmed sustainable development beyond a purely environmental agenda: the integration between economic growth, environment and society became essential to a new and widely accepted concept of development[18]. Rio 92 provided

the idea of environmental protection; nonetheless, developing states faced it as a threaten to their sovereignty and as a new form of colonialism. In fact, developing countries feared that environmental protection was only a discourse by developed countries to hinder their own development. Within this context, any idea about sustainable development had to be flexible enough to attend both developed and developing countries. For further details, see: TARLOCK, A. Dan. Ideas without institutions: the paradox of sustainable development. *Indiana Journal of Global Legal Studies*, v. 9, n. 1, p. 35-49, 2001.

9 O'NEILL, Kate. *The environment and international relations*. Cambridge University Press, 2009. p. 28.

10 ELLIOT, Jennifer A. *An introduction to sustainable development*. Routledge Perspectives on Development, 2013. p. 45.

11 PALLASSIS, Stathis N. Beyond the global summits: reflecting on the environmental principles of sustainable development. *Colorado Journal of International Environmental Law and Policy*, v. 22, p. 45, 2011.

12 SCHRIJVER, Nico. Advancements in the principles of international law on sustainable development. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 99-100.

13 ELLIOT, Jennifer A. *An introduction to sustainable development*. Routledge Perspectives on Development, 2013. p. 46-47.

14 ELLIOT, Jennifer A. *An introduction to sustainable development*. Routledge Perspectives on Development, 2013. p. 47-48.

15 The agreements executed are the following: Agenda 21, the Rio Declaration, the United Nations Framework Convention on Climate Change and the United Nations Convention on Biological Diversity.

16 PALLASSIS, Stathis N. Beyond the global summits: reflecting on the environmental principles of sustainable development. *Colorado Journal of International Environmental Law and Policy*, v. 22, p. 49, 2011.

17 BOYLE, Alan; FREESTONE, David. Introduction. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 4. For the influence of soft law instruments in the making of environmental law, see: SOUZA, Leonardo R.; LEISTER, Margareth A. A influência da soft law na formação do direito ambiental. *Revista de Direito Internacional*, v. 12, n. 2, p. 767-784, 2015. The referred authors discuss how conferences such as Rio 92 contribute for the creation of a global public opinion on the relevance of environmental protection.

18 SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:*

international community with the language of sustainable development[19], while granting it a credible international standing[20].

Ten years later, the 2002 World Summit on Sustainable Development (WSSD) was held in Johannesburg. The conference was highly socially oriented, as the social aspect was further highlighted and strengthened; alleviating poverty became central to the discussion, combined with the role of businesses as a major vehicle for achieving sustainable development[21]. The conference resulted in the signing of the Johannesburg Declaration on Sustainable Development (a collective political commitment) and the Plan of Implementation (a framework of action), non-binding documents which reinforce the commitment to sustainable development and stress the relevance of multilateralism to achieve it[22]. However, both documents essentially reaffirm previous commitments. In fact, Rio 92's agreements had already settled principles and policies to sustainable development, and, therefore, one decade later international community was avid for implementing and monitoring their progress. Johannesburg's conference failed to provided it[23].

A following convention took place in 2012, the United Nations Conference on Sustainable Development (Rio+20). Attending international community's former expectations, the focus moved from creation of principles and policies to implementation of standards to actually reach sustainable development. The attention was also directed to a variety of innovative governance that involved the government, stakeholders, foundations and businesses; the idea of a sustainable development governance to balance economic development with the protection of the environment and the pursue of social concerns grew even stronger[24]. The outcome document, known as "The Future We Want", is essentially a political document which suggests practical measures to promote sustainable development; no new international agreements were executed at that time, as it had occurred in Rio 92. This conference also marked the beginning of discussions on the Sustainable Development Goals[25], a plan of action which is currently the main United Nations' platform to promote sustainable development[26].

These conferences were crucial to refine the concept and to consolidate sustainable development into the international agenda; they raised awareness on the issue, set environmental norms, principles and goals, as well as established procedural frameworks to meet these goals[27]. The conferences have, indeed, granted sustainable development a prominent role in the international arena; the need to balance economic development and environmental protection has transformed international relations, which witnessed in the last decades how these partnerships between states, non-governmental actors and the people have flourished[28]. Such eminence has led to the inclusion of the concept into several binding and non-binding agreements and policy outcomes through the last decades, such as the Kyoto Protocol to the United Nations Framework Convention on Climate Change, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, and the United Nations Convention on the Law of the Sea.

Besides multilateral agreements, there is a new generation of international investment agreements that also incorporate into their texts the promotion and protection of sustainable development. The new treaty generation is challenged to find an adequate balance between investment protection and the host state's policy space

1992-2012. Routledge, 2017. p. 42-43.

19 SEYFANG, Gill. Environmental mega-conferences: from Stockholm to Johannesburg and beyond. *Global Environmental Change*, n. 13, p. 224, 2003.

20 SCHWARZ, Priscilla. Sustainable development in international law. *Non-State Actors and International Law*, n. 5, p. 129, 2005.

21 PALLASSIS, Stathis N. Beyond the global summits: reflecting on the environmental principles of sustainable development. *Colorado Journal of International Environmental Law and Policy*, v. 22, p. 55-56, 2011.

22 SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 49.

23 SEYFANG, Gill. Environmental mega-conferences: from Stockholm to Johannesburg and beyond. *Global Environmental Change*, n. 13, p. 223-228, 2003.

24 Developing countries, Brazil included, furthered the relevance of discussing in another conference the need of balancing environmental protection with economic rights and social concerns. For further reference on the idea of development discussed in Rio+20, according to a Brazilian perspective, see: AUBERTIN, Catherine. Repensar o desenvolvimento mundial: o Brasil se coloca em cena na Rio+20. *Revista de Direito Internacional*, v. 9, n. 3, p. 15-27, 2012.

25 For further information: https://www.un.org/sustainabledevelopment/sustainable-development-goals/. Last access on: June 5, 2018.

26 KANIE, Norichika; BIERMANN, Frank. *Governing through goals:* sustainable development goals as governance innovation. The MIT Press, 2017.

27 O'NEILL, Kate. *The environment and international relations*. Cambridge University Press, 2009. p. 27.

28 SOUZA, Leonardo R.; LEISTER, Margareth A. A influência da soft law na formação do direito ambiental. *Revista de Direito Internacional*, v. 12, n. 2, p. 767-784, 2015.

to promote and protect questions of public interest, such as the environment and human rights[29]. This new face of investment agreements was essential for them to become integral part of an international agenda which places sustainable development into its center[30].

Despite sustainable development's prominent role in the international agenda, its concept is still widely debated as we will see in the next session.

3 Sustainable development as a debated concept

Sustainable development emerged as a bridge between developed and developing states over the issue of environmental protection. Among different views, the concept had to be flexible and wide enough to be accepted by the greatest number of countries, and, thus, become part of the international agenda. In this context, the Brundtland Report presented one of the most well-known concepts of sustainable development. However, to please both developed and developing countries, it was so extensive that it ended up being of little utility; it neither delineates the exact parameters of an international commitment, nor does it precise the concept's normative content[31]. The following conferences – Rio 92, WSSD and Rio+20 – also failed in presenting a definitive concept of sustainable development.

As states could not reach an agreement over the concept, they rather focused on how to achieve sustainable development; several international treaties include sustainable development among its objectives and goals, contributing to turn it into part of accepted international law[32]. The literature, on its turn, remained with the task to define sustainable development, what soon enough proved to be a herculean process. No universal concept ever emerged; on the contrary, possibly hundreds of different definitions, several interpretations and numerous manners to apply it in practice were suggest by authors from the most different origins[33].

Authors have instead looked for a minimum framework usually referred to when sustainable development is defined. They have found sustainable development as the realization that economic development shall not be considered apart from environmental and social protection – they are, in fact, inseparable, as part of a whole; it is an attempt to reconcile economic development with other concerns, while making it clear that the concept is not contrary to the growth of economic activities[34]. The idea that sustainable development shall be read as a means, rather than an end itself has also been highlighted: a means to further the quality of people's life in all dimensions - including environmental, economic and social aspects[35]. It is not surprising, therefore, that most definitions encompass these standards of protection – economic development, environmental protection and social concerns – constantly looking for a way to integrate and balance them[36]. This integrative nature is crucial to understand sustainable development[37] and its practical relevance, turning it into

[29] NOWROT, Karsten. How to include environmental protection, human rights and sustainability in international investment law. *The Journal of World Investment & Trade*, v. 15, p. 612-644, 2014; STERN, Brigitte. The future of international investment law: a balance between the protection of investors and the States´ capacity to regulate. *In:* ALVAREZ, José; SAUVANT, Karl (ed.). *The evolving international investment regime:* expectations, realities, options. Columbia University, 2007. p. 174-192.

[30] MANN, Howard. Reconceptualizing international investment law: its roles in sustainable development. *Lewis & Clark Law Review*, n. 17, p. 521-544, 2013.

[31] SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 55-56.

[32] WEERAMANTRY, C. G. *Universalizing international law*. Brill Academic Publishers, 2004.

[33] ELLIOT, Jennifer A. *An introduction to sustainable development*. Routledge Perspectives on Development, 2013. p. 16.

[34] SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 29-98; BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 377-400, 2012; FRENCH, Duncan. Sustainable development. *In:* FITZMAURICE, Malgosia; ONG, David M.; MERKOURIS, Panos. *Research handbook on international environmental law*. Edward Elgar Publishing, 2010. p. 51-68.

[35] MORAIS, Dulce Teresinha B. M. *et al.* O papel do direito no contexto do desenvolvimento sustentável: uma avaliação qualitativa de programas corporativos de responsabilidade socioambiental. *Revista de Direito Internacional*, v. 9, n. 3, p. 149, 2012.

[36] BANDI, Gyulia *et al. Sustainability, law and public choice*. Europa Law Publishing, 2014. p. 122.

[37] Rio Declaration, principle 4 refers to integration: "In order to achieve sustainable development, environmental protection shall constitute integral part of the development process and cannot be considered in isolation from it."

a powerful tool in the hands of decision-makers[38].

A time element is also seen as inherent to sustainable development and it gives support to one of the concept's most commonly referred aspects: the intergenerational equity[39]. It means each generation shall leave the planet in no worse condition than it was received, so next generations may equally have access to the planet's resources and benefits[40]. When deciding on the development agenda, states must preserve their environmental capital so future generations can also enjoy it, and, in this sense, it has become one of the most important tenets of international public policy[41].

Intergenerational equity leads to another aspect: the intragenerational equity[42]. A fair and just relationship should also be found within the present generation, for better development opportunities and a more just income distribution around the world[43]. Development is sustainable when both intergenerational and intragenerational equity are integrated[44].

Besides the fundamental elements – integration, intergenerational and intragenerational equity – there are several standards and principles essential to sustainable development's consecution. To consolidate them, the International Law Association indicated in the New Delhi Declaration[45] seven principles commonly deemed essential to operationalize sustainable development: the duty of states to ensure sustainable use of natural resources; the principle of equality and the eradication of poverty; the principle of common but differentiated responsibilities; the principle of the precautionary approach to human health, natural resources and ecosystems; the principle of public participation and access to information and justice; the principle of good governance; and the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. The list is non-exhaustive and, therefore, other standards and principles could be included; nonetheless it is an excellent starting point to understand sustainable development and to reflect its multidimensional character and its integrative and interrelated nature[46].

Within this context, sustainable development is certainly not a static concept; on the contrary, it has an evolutive nature. What needs to be done to achieve it evolves according to the time in which the conflicting economic, environmental and social interests emerge (*ratione temporis*), to the characteristics of the state concerned or to whom the referred interests apply (*ratione personae*) and to the type of activity, as the integration of standards will vary from one economic sector to another (*ratione materiae*). Variability is inherent to the concept[47].

Some vagueness is also intrinsic to sustainable development, as there is no blueprint or framework to how achieve it. Each particular situation must be analyzed through the lens of sustainable development according to its own characteristics. It is not an end point or a state; on the contrary, it is as open-ended concept, a constant consideration of how development must interact with environmental and social concerns, according to each particular situation[48]. It is a process with no fixed recipe.

Some authors suggest the constant evolution and lack of a precise definition would be a kind of fault[49],

[38] FRENCH, Duncan. The Sofia guiding statements on sustainable development principles in the decisions of international tribunals. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 180.

[39] Reference is made to intergenerational equity in Rio Declaration, principle 3: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."

[40] WEISS, Edith Brown. In fairness to future generations and sustainable development. *American University International Law Review*, v. 8, n. 1. p. 19-26, 1992.

[41] HANDL, Gunther. Environmental security and global change: the challenge to international law. *Yearbook of International Environmental Law*, v. 1, n. 1, p. 3-33, 1991.

[42] Intragenerational equity in Rio Declaration, principle 5: "All States and all people shall co-operate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world."

[43] SCHRIJVER, Nico. *The evolution of sustainable development in international law: inception, meaning and status*. Brill Nijhoff, 2009.

[44] BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 380, 2012.

[45] Available at: http://cisdl.org/tribunals/pdf/NewDelhiDeclaration.pdf. Last access on: May 4th, 2018.

[46] SCHRIJVER, Nico. *The evolution of sustainable development in international law:* inception, meaning and status. Brill Nijhoff, 2009; SCHWARZ, Priscilla. Sustainable development in international law. *Non-State Actors and International Law*, n. 5, p. 127-152, 2005.

[47] BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 382, 2012.

[48] ELLIOT, Jennifer A. *An introduction to sustainable development*. Routledge Perspectives on Development, 2013. p. 24.

[49] See Lelé: "Where the SD movement has faltered is in its in-

others understand these characteristics precisely as sustainable development's greatest strength. We stand with the latter. The concept's malleability not only allow it to be interpreted in the most diverse ways, but it also contributes to the conciliation of divergent interests – economic, environmental and social ones[50]. It is actually open to multiple interpretations[51], hugely contributing to decision-making and to the interpretation of each case according to its own facts and characteristics, with due respect to the particularities of the parties' claims.

In fact, the vagueness of the concept is an opportunity to adjudicators when deciding a case, as it enhances the options of interpretation and enables the court to engage in judicial law or policy-making[52]. A concept such as sustainable development that is in constant flux and is adaptable to multiple situations should not be faced as a challenge to be overcome, but rather as a powerful tool in the hands of arbitrators, who could make use of it to better understand and interpret the parties' claims and to solve conflicting norms issues.

This is exactly what turn sustainable development into such an attractive instrument for decision-making. The fact no definitive concept has been achieved is indeed a positive aspect, as adjudicators may apply it into the concrete facts of litigation in the most flexible way, respecting the case's contours. Moreover, sustainable development's main elements - the integrative nature, intragenerational and intergenerational equity - are widely known and suffice to guide arbitrators into their interpretative function, who should pursue the balance of economic, environmental and social aspects of the claims.

The lack of a widely accepted concept to sustainable development or the fact it may contain some vagueness should not disregard it as a legal tool of paramount relevance. If well used by adjudicators to fully understand, balance and integrate conflicting aspects of the case, it could lead to a more responsible and just outcome of the litigation.

From all the above, we understand the concept suggested by Cordonier Segger is simple enough to be extensively adaptable to multiple situations, as well as reflects the main characteristics we mentioned, and, therefore, this is the one we use in this work:

> In essence, sustainable development can be defined as a new type of development that does not irreversibly deplete essential natural capital, one that reconciles social, economic and environmental policies to enable improvements in present generations' quality of life, in a way that takes the interests of the future into account.[53]

The fact no widely agreed concept to sustainable development has been reached does not mean that it has been vulgarized[54]. All the aforementioned aspects, if well integrated, form the basis of a very effective tool, one that has solid legal consequences and which could, in fact, influence the outcome of a litigation. This will be discussed in the next session; we will analyze in depth not only sustainable development's legal nature, but also its function as a tool for legal interpretation.

4 Sustainable development: a much-contested legal nature

Sustainable development's legal nature has been debated through decades. International courts have evidenced little willingness to analyze it in depth and to formalize its legal nature[55], leaving great room for

ability to develop a set of concepts, criteria and policies that are coherent or consistent – both externally (with physical and social reality) and internally (with each other)." (LELÉ, Sharachchandra M. Sustainable development: a critical review. *World Development*, v. 19, n. 6, p. 607-621, 1991). Other authors also point to the vagueness of the concept as an object of criticism: DERNBACH, John C.; CHEEVER, Federico. Sustainable development and its discontents. *Transnational Environmental Law*, v. 4, n. 2, p. 247-287, 2015; FRENCH, Duncan. Sustainable development. *In:* FITZMAURICE, Malgosia; ONG, David M.; MERKOURIS, Panos. *Research handbook on international environmental law*. Edward Elgar Publishing, 2010. p. 51-68; TARLOCK, A. Dan. Ideas without institutions: the paradox of sustainable development. *Indiana Journal of Global Legal Studies*, v. 9, n. 1, p. 35-49, 2001.

[50] BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 383, 2012.

[51] O'NEILL, Kate. *The environment and international relations*. Cambridge University Press, 2009. p. 28-29.

[52] KULICK, Andreas. From problem to opportunity?: an analytical framework for vagueness and ambiguity in international law. *German Yearbook of International Law*, v. 59, 2016.

[53] SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 57.

[54] SCHRIJVER, Nico. *The evolution of sustainable development in international law:* inception, meaning and status. Brill Nijhoff, 2009. p. 217.

[55] FRENCH, Duncan. The Sofia guiding statements on sustainable development principles in the decisions of international tribu-

academic discussion. The debate has been fruitful and resulted in different lines of thoughts with distinct legal consequences, from authors who deny any legal nature to sustainable development, to those who believe the concept has indeed a binding legal one.

Despite some scarce voices who claim understanding sustainable development's legal nature would be unnecessary[56], or that it would be more useful to focus instead on how law could contribute to the realization of sustainable development[57], the discussion is still highly opportune. Sustainable development's nature directly influences how parties and decision-makers deal with the case: if legally binding, judges and arbitrators may not avoid to apply and enforce it[58]; if not legally-binding, decision-makers may decide whether to apply it, although, depending on the circumstances, they may be deemed responsible for not taking it into account[59]. The debate on the concept's nature is not purely academic, therefore.

In a very brief summary of a long debate, we identified six main lines of thoughts regarding sustainable development's nature[60]: (i) a political norm; (ii) a guidance for international community; (iii) an international customary law; (iv) a principle of international law; (v) an interstitial norm; and (vi) a complimentary approach that recognizes sustainable development as a field of international law with its own legal principles and treaties, while also acknowledging it as an interstitial norm. Table one summarizes the referred lines of thoughts:

Table 1 - Sustainable development´s much-contested legal nature

Political norm	An expectation or a guidance	International customary law	Principle of international law	Interstitial norm (also referred as a modifying or mediating norm)	Two complimentary approaches
"Customary law is a legal instrument, while sustainability is a political norm that is increasingly being transformed into legal rules." (OREBECH; et. al., 2005, p. 20)	"(…) there is a legitimate international expectation that states would behave in furtherance of the objectives of sustainable development" (MARONG, 2003, p. 49)	"Sustainable development has entered the corpus of international customary law, requiring different streams of international law to be treated in an integrated manner." (SANDS, 2003, p. 254)	"(..) a principle accepted not merely by the developing countries, but one which rests on a basis of worldwide acceptance." (Gabčíkovo-Nagymaros Project, Separate Opinion of Vice President WEERAMANTRY, p. 95)	"It is a meta-principle, acting upon other legal rules and principles (...)" (LOWE, 1999, p. 34)	"(…) corpus of international legal principles and treaties (…)." + "different type of norm in its own right, one that exerts a certain pull between conflicting international norms (…)." (CORDONIER SEGGER, 2017, p. 92/93)
"(…) the concept largely remains one of rhetoric and policy without clear legal parameters." (PALASSIS, 2011, p. 42)	"(…) sustainable development is somewhat a guidance, an objective, a theoretical fundament, we should strive for, and less a legal requisite." (BANDI, 2014, p. 130)	"(…) sustainable development, as an objective, already constitutes a principle of customary law, even if this principle is a very general one, with a high degree of abstraction and which requires case by case substantiation" (BARRAL, 2012, p. 388)	"(…) a guiding general principle for the consideration of environmental and developmental issue." (Pulp Mills on the River Uruguay, Separate Opinion of Judge CANÇADO TRINDADE, p. 187)	"(…) it may be used as a 'meta principle' that exercises an 'interstitial normativity' in reconciling conflicting developmental and environmental norms." (STEPHENS, 2012, p. 211)	
			"(…) a principle with normative content which is defined by the integration of present and future economic, social and environmental interests (…)." (VOIGT, 2009, p. 186)	"(…) a mediating principle between the right to development and the duty to control sources of environmental harm." (BOYLE, 2014, p. 129)	

nals. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 177-241; TLADI, Dire. The principles of sustainable development in the case concerning Pulp Mills on the River Uruguay. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 242-243; SZABÓ, Marcel. Sustainable development in the judgements of the International Court of Justice. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 266-280; STEPHENS, Tim. International courts and sustainable development: using old tools to shape new discourse. *In:* JESSUP, Brad; RUBENSTEIN, Kim (ed.). *Environmental discourses in public and international law*. Cambridge University Press, 2012. p. 195-217.

56 BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 378, 2012.

57 MARONG, Alhaji B. M. From Rio to Johannesburg: reflections on the role of international legal norms in sustainable development. *The Georgetown Int´l Envtl. Law Review*, v. 16, p. 76, 2003.

58 BODANSKY, Daniel. Customary (and not so customary) international environmental law. *Indiana Journal of Global Legal Studies*, v. 3, p. 117, 1995.

59 ROBB, Cairo; SEGGER, Marie-Claire Cordonier; JO, Caroline. Sustainable development challenges in international dispute settlement. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 167-169.

60 Note that the categorization is presented for a better understanding of the issue; it is not intended to be exhaustive or to include all and every author who has already discussed the question.

Despite so many distinct views, we have noticed a common feature among several authors. Apart from discussions about legal nature, and, consequently, whether judges and arbitrators are bound to apply and enforce the concept, they seem to agree on the relevance of sustainable development to assist decision-makers in reaching a balanced and integrated decision regarding economic, social and environmental aspects of the claim. At least this island of consensus seems to prevail.

4.1 Different approaches to sustainable development´s nature

From the start, note that the fact there is no conclusive answer to sustainable development's legal nature does not mean a compromise may never be reached. The law is under constant evolution[61], and so is sustainable development's legal nature. Hence, the discussion presented is only a contemporary view over the issue.

(i) Sustainable development as a political norm

This view claims sustainable development has not achieved a legal status and is essentially a norm of political character. Orebech[62] et. al. understand the concept lacks legal nature as sustainable development has neither been widely included into binding multilaterals treaties or resolutions nor has evolved bottom-up into customary law. They claim it is rather a top-down norm of social justice which enjoy political support by the international community and is seen as a *meta-goal* or an aspiration, but no legal obligation can be extract from it so far.

Departing from a different perspective, but reaching a similar outcome, Palassis[63] understands sustainable development remains a concept of rhetoric, reinforcing its political nature. He claims sustainable development lacks legal nature as no legal direction may be drawn out of a concept which has not achieved an agreed definition: neither its goals nor the means to reach them are clear. Such uncertainty would leave no room for legal parameters, but it would be valuable as an *outcome to be reached*.

They both affirm sustainable development's political nature is possibly a transitional phase. The practice of states and the sense of obligation growing out of it may lead sustainable development to eventually become customary international law[64]. However, so far, no normative value could be extract from it and the concept would not have become enforceable law yet.

(ii) Sustainable development as an expectation or a guidance

Some authors focus instead on sustainable development's role as an expectation or a guidance for the international community. For them, the nature of the concept would be closer to what Dworkin has long named as policy: "[…] that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community"[65].

Bandi[66] claims sustainable development lack a definite meaning and the complexity of the concept – which includes environmental protection, the fight against poverty and economic development – make it impossible to set up a consistent legal system. Rather, "sustainable development is somewhat a guidance, an objective, a theoretical fundament, we should strive for, and less

[61] As taught by Fuller, law is inherited and recreated by constant efforts of its participants. It can exist by degrees and besides being a continuous (re)creation, it can also be (re)constructed in parts. It is possible to talk about law under construction and therefore "law is not an all-or-nothing proposition". Normativity is also a continuum, as constant attempts are made to produce norms to provide structure to human existence (BRUNNÉE, Jutta; TOOPE, Stephen J. International law and constructivism: elements of an interactional theory of international law. *Columbia Journal of Transnational Law*, v. 39. p. 60, 2000). International law is no different as it is also continuously developing (LOWE, Vaughan. The politics of law-making: are method and character of norm creation changing? *In:* BYERS, Michael (ed.). *The role of law in international politics:* essays in international relations and international law. Oxford University Press, 2001. p. 207-226).

[62] OREBECH, Peter *et al. The role of customary law in sustainable development*. Cambridge University Press, 2005.

[63] PALLASSIS, Stathis N. Beyond the global summits: reflecting on the environmental principles of sustainable development. *Colorado Journal of International Environmental Law and Policy*, v. 22, p. 41-77, 2011.

[64] OREBECH, Peter *et al. The role of customary law in sustainable development*. Cambridge University Press, 2005. p. 384; PALLASSIS, Stathis N. Beyond the global summits: reflecting on the environmental principles of sustainable development. *Colorado Journal of International Environmental Law and Policy*, v. 22, p. 73, 2011.

[65] DWORKIN, Ronald. *Taking rights seriously*. Harvard University Press, 1977. p. 22.

[66] BANDI, Gyulia *et al. Sustainability, law and public choice*. Europa Law Publishing, 2014.

a legal requisite"[67]. It could actually influence different policy fields, but it lacks a clear and concrete legal requirement. Schrijver[68] follows this same path, acknowledging sustainable development as an established objective of the international community.

International community's practice – or, rather, the lack of it – is the main reason why Marong[69] understands sustainable development has not become yet a binding norm of international law. He claims a mainstream discourse has emerged out of treaties, resolutions and international agreements executed within the last decades recognizing the role of sustainable development, and, consequently, a legitimate international expectation arose that states and non-state actors should behave to further the goals of sustainable development. However, actual practice has not followed up the discourse: there would be a gap between political rhetoric and practical action[70]. For this reason, sustainable development would be a guidance norm that represents a legitimate expectation: "it has come to symbolize the desire and expectation of international society to integrate economic, environmental and social considerations in decision-making process"[71].

These authors do not deny a normative nature to sustainable development; rather, they acknowledge it as a valuable guide to discourse and deliberation, which could, eventually, influence behavior and evolve into hard legal norms[72]. Dworkin also maintained that a policy, such as Schrijver[73], Bandi and Marong have defined sustainable development, has a normative value and could be of a decisive value to decision-making, especially to protect a collective goal[74]. In this context, although sustainable development is an objective, it is arguably one vested with a degree of normative rather than a merely exhortatory status[75].

(iii) Sustainable development as an international customary law

Crossing the line of a binding legality, some authors understand sustainable development has turned into international customary law, and, therefore, states would be abided by it – to implement measures to this end and/or to promote the concept –, regardless of their participation in the practice from which it sprang[76]. A rule, statutory or customary, is applied in an all-or-nothing fashion and decision-makers must observe it. Rules do not have the dimension of weight or importance, as principles do: either they are applicable to the case and must be observed, or they are not applicable and will not be taken into account. The application of a rule to the facts of a case lead to specific consequences, then[77]. Sands[78] and Barral[79] claim this is sustainable development's nature, a binding rule which influences states' behavior and could not be disregarded by decision-makers.

67 BANDI, Gyulia *et al. Sustainability, law and public choice*. Europa Law Publishing, 2014. p. 130.

68 SCHRIJVER, Nico. Advancements in the principles of international law on sustainable development. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 99-108.

69 MARONG, Alhaji B. M. From Rio to Johannesburg: reflections on the role of international legal norms in sustainable development. *The Georgetown Int´l Envtl. Law Review*, v. 16, p. 21-76, 2003.

70 MARONG, Alhaji B. M. From Rio to Johannesburg: reflections on the role of international legal norms in sustainable development. *The Georgetown Int´l Envtl. Law Review*, v. 16, p. 49, 2003. Bodansky has also been long affirming that states´ practice and discourse are disconnected regarding international environmental law: "[i]nternational environmental norms reflect not how states regularly behave, but how states speak to one another" (BODANSKY, Daniel. Customary (and not so customary) international environmental law. *Indiana Journal of Global Legal Studies*, v. 3, p. 115-116, 1995).

71 MARONG, Alhaji B. M. From Rio to Johannesburg: reflections on the role of international legal norms in sustainable development. *The Georgetown Int´l Envtl. Law Review*, v. 16, p. 52, 2003.

72 BANDI, Gyulia *et al. Sustainability, law and public choice*. Europa Law Publishing, 2014. p. 141. MARONG, Alhaji B. M. From Rio to Johannesburg: reflections on the role of international legal norms in sustainable development. *The Georgetown Int´l Envtl. Law Review*, v. 16, p. 52, 2003.

73 SCHRIJVER, Nico. Advancements in the principles of international law on sustainable development. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 99-108.

74 DWORKIN, Ronald. *Taking rights seriously*. Harvard University Press, 1977.

75 SCHRIJVER, Nico. Advancements in the principles of international law on sustainable development. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 99-108.

76 THIRLWAY, Hugh. *The sources of international Law*. Oxford University Press, 2015. p. 55-56.

77 DWORKIN, Ronald. *Taking rights seriously*. Harvard University Press, 1977. p. 22-28.

78 SANDS, Philippe. *Principles of international environmental law*. 2. ed. Cambridge University Press, 2003.

79 BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 377-400, 2012.

Sands categorically maintains that "[t]here can be little doubt that the concept of 'sustainable development' has entered the corpus of international customary law […]."[80]. Barral[81] understands both traditional constituent elements of custom[82] – state practice and *opinio juris* – have been observed as to sustainable development. She claims the fact it has received wide support through the last decades, being included in countless legal documents such as declarations of states, resolutions of international organizations, *programmes* of actions, codes of conduct, conventions, and international treaties[83] evidences both consistent practice of states and their belief they must so behave to respect the law.

Barral does not ignore neither that the concept may be vague and imprecise, nor that it has been widely included into non-binding international instruments (in opposition to multilateral binding treaties). Nonetheless, she supports that softness in the wording of an obligation should not be an obstacle to its validity and binding legal nature. Provisions set out in form of incentives ("to promote") would still be valid norms of international law, even though such flexibility would increase the margin of appreciation of the parties and decision-makers. The author[84] concludes:

> States are under an obligation to pursue sustainable development; they are bound by an obligation of means, and by implementing these countless treaties they contribute, day after day, to progressively making sustainable development requirements real.

Diniz[85] reinforces the arguments presented by Barral. He dialogues with this author to corroborate that sustainable development is indeed a customary law that imposes an obligation of means for states. For him, states are obliged to take the best efforts to promote development in a sustainable fashion; there is not a single expected behavior to reach sustainable development yet all behavior shall be directed at reaching this ultimate goal[86].

(iv) Sustainable development as a principle of international law

A different view supports sustainable development as a principle of international law. Dworkin defines principle as "[…] a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality"[87]. The law is more than rules; it is impossible to consider a system with specific rules to cover every situation[88]. It is precisely because of international law incompleteness[89] that principles are relevant. They are not specific to a case, their operation is not automatic and they may even conflict[90], but the idea behind them is that they fill gaps and overlaps of the system and assist decision-makers in weighing and reconciling divergent interests. From this point of view, sustainable development would introduce a sense of justice and dynamism to international law[91].

The case concerning the Gabcikovo-Nagymaros Project[92] before the International Court of Justice

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80 SANDS, Philippe. *Principles of international environmental law*. 2. ed. Cambridge University Press, 2003. p. 254.

81 BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 377-400, 2012.

82 THIRLWAY, Hugh. *The sources of international law*. Oxford University Press, 2015. p. 56-57. As will be seen below, a third element has been added by the award rendered in the North Sea Continental Shelf Cases, before the International Court of Justice (1969): the norm-creating character.

83 Reference to sustainable development in international agreements would be made as an objective to be achieved by the parties and/or in the form of measures to be taken in the operative part of the conventions; although even Barral acknowledges the latter occur in a smaller account (BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 377-400, 2012).

84 BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 384-385, 2012.

85 DINIZ, Pedro I. Natureza jurídica do desenvolvimento sustentável no direito internacional. *Revista de Direito Internacional*, v. 12, n. 2, p. 739-766, 2015.

86 DINIZ, Pedro I. Natureza jurídica do desenvolvimento sustentável no direito internacional. *Revista de Direito Internacional*, v. 12, n. 2, p. 761, 2015.

87 DWORKIN, Ronald. *Taking Rights Seriously*. Harvard University Press, 1977. p. 22.

88 THIRLWAY, Hugh. *The sources of international law*. Oxford University Press, 2015. p. 94-95.

89 LOWE, Vaughan. The politics of law-making: are method and character of norm creation changing? *In:* BYERS, Michael (ed.). *The role of law in international politics:* essays in international relations and international law. Oxford University Press, 2001. p. 207-226.

90 DWORKIN, Ronald. *Taking rights deriously*. Harvard University Press, 1977. p. 90-96; THIRLWAY, Hugh. *The sources of international law*. Oxford University Press, 2015. p. 95.

91 VOIGT, Christina. *Sustainable development as a principle of international law*. Brill, 2009. p. 164.

92 In a nutshell, the case concerns a dispute between Hungary and (then) Czechoslovakia over the construction of dams on the Danube river. The parties executed a treaty in 1977 by means of which they agreed to jointly build and operate some dams. Both parties agreed

(ICJ or the Court) is paradigmatic. For the first time, the Court made express reference to the concept of sustainable development[93]; however, the legal nature was not debated. The Court acknowledged sustainable development's normative value[94] – when stating the need to reconcile economic development to the protection of environment – but rather simply referred to it as a concept[95]. Disagreeing with the award as it was rendered, Vice-President Weeramantry submitted a separate opinion in which he expressly acknowledged sustainable development as a principle of international law[96] to be used to reconcile norms (especially the right to development and the need to protect the environment, so they do not collide[97]).

Weeramantry highlights the relevance of sustainable development for life as we know it and reinforces that the idea of reconciling development with environmental protection is millennial. He claims sustainable development counts with international community's ample support, due to its inclusion in several international instruments, and, for this reason, it would be a valuable tool to solve environmentally related dispute:

> The concept has a significant role to play in the resolution of environmentally related disputes. The components of the principle come from well-established areas of international law-human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighbourliness – to mention a few. It has also been expressly incorporated into a number of binding and far-reaching international agreements, thus giving it binding force in the context of those agreements. It offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection, and that neither of these rights can be neglected.[98]

In a latter case, the Court once again decided not to face the issue of sustainable development´s legal nature. In the case concerning Pulp Mills on the River Uruguay[99], the Court opted to refer to sustainable development merely as an objective[100]. Nonetheless, following Weeramantry's steps, Judge Cançado Trindade in his separate opinion confronts the issue and recognizes sustainable development as a general principle for the consideration of environmental and developmental issues. The inclusion of sustainable development in numerous international instruments and the fact they place people at the center of concerns, calling for the reassessment of traditional concepts such as development vis a vis environmental and social protection, would be strong reasons to recognize the concept as a principle of international law.

In line with Weeramantry and Cançado Trindade, several authors make reference to sustainable development

from the start that the project, among other features, involved diverting the Danube river waters. The construction was initiated, but, in 1989, the works were suspended by Hungary, who claimed that the construction of the dams as agreed would cause a significant negative impact to the environment around the river. Czechoslovakia (from 1993, Slovakia) decided to continue the construction unilaterally. Hungary then requested to terminate the referred treaty, but Slovakia denied such request and referred the matter to the ICJ in 1993. The judgment was rendered in 1997.

93 STEPHENS, Tim. International courts and sustainable development: using old tools to shape new discourse. *In*: JESSUP, Brad; RUBENSTEIN, Kim (ed.). *Environmental discourses in public and international law*. Cambridge University Press, 2012. p. 210.

94 Voigt highlights that the Court acknowledged some normative force to sustainable development, even though it preferred not to define its nature: "The Court acknowledged the legal force and function of sustainable development not only in a procedural manner to 'achieve an accommodation of views and values' but also in a substantive way. Requiring a satisfactory volume of water be released from the channel into the main river clearly indicated the substantive impact of sustainable development" (VOIGT, Christina. *Sustainable development as a principle of international law*. Brill, 2009. p. 174).

95 VOIGT, Christina. *Sustainable development as a principle of international law*. Brill, 2009. p. 163-164.

96 Some years later, he confirmed that even though sustainable development began in the realm of aspirational ideas, with the progress of time it became a part of the established legal order (WEERAMANTRY, C. G. Achieving sustainable justice through international law. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 109-124).

97 LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 21.

98 The case concerning the Gabcikovo-Nagymaros Project, ICJ, separate opinion of Vice-President Weeramantry, 1997, p. 95.

99 In a very brief summary, Argentina and Uruguay contended over the construction of pulp mills on Uruguay river. Argentina alleged that Uruguay gave authorization for the construction of the pulp mills without observing the requisites of the former agreements executed by the parties regarding the joint use of the Uruguay river, a boundary between both countries. The requisites cited by Argentina are especially related to the communication processes between the parties as to constructions over the river, including the alleged lack of information from Uruguay regarding the environmental impact study of the pulp mills. The judgment was rendered in 2010.

100 TLADI, Dire. The principles of sustainable development in the case concerning Pulp Mills on the River Uruguay. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 252-253.

when discussing general legal principles[101]. Voigt discusses the issue in depth. To emerge a principle of international law, she arguments, it suffices a common legal conscience (*opinio juris communis*), a shared understanding of the international community as to the existence of the principle and its implications – in contrast to customary law, no practice of states is needed. Concerning sustainable development, *opinio juris communis* would be evident from numerous international agreements, national legal systems and jurisprudence of national and international courts which refer to the concept[102].

As for the functions of a principle, claims Voigt, sustainable development would also perfectly fit them: filling gaps left open by treaty and customary law and assisting courts to weight and reconcile divergent interests. For her, the breadth of sustainable development – or its (certain degree of) indeterminacy – would be ideal to fill the gaps left open in international law, in a case-by-case analysis. In the same way, the equity, fairness and integrational character intrinsic to the idea of sustainable development, whichever definition is used, would be valuable to assist decision-makers in the search for a balance over conflicting interests[103].

Principles, concludes Voigt, have normative role not only when determining states' conduct or designing policy measures, but also when influencing the outcome of a case; this is how sustainable development should be understood: "[i]ts normative force, broad scope and support in the international community are indicative of its principled character and make it difficult to argue otherwise."[104].

(v) Sustainable development as an interstitial norm

A widely known view as to sustainable development's legal nature was initiated by Lowe[105] and has since been referred by several scholars – even if only to reject it[106]. Denying to the concept *opinio juris* and a fundamentally norm-creating character[107], Lowe claims it has not become an international customary law or a general principle yet; it rather is an interstitial norm acting upon other legal rules and principles in order to assist decision-makers to find a balance among them[108].

Lowe acknowledges there may be evidence of state practice, due to the frequent inclusion of sustainable development into international agreements; nonetheless it does not mean there would be general acceptance of the concept as a legal binding rule – in other words, it lacks *opinio juris*. In fact, for him, the concept is so open-ended that there is no clear agreement on what it actually means, what obligations are inferred from it and what are the consequences of its eventual breach; therefore, it does not have a normative constraining behavior over states. For this same reason, the norm-creating character is also missing: "[n]ormativity, by definition, must express itself in normative terms; it must be possible to phrase a norm in normative language. But it is by no means clear that the components of sustainable development can be so phrased"[109]. Absent both *opinio juris* (or *a common legal conscience*) and the norm-creating character, sustainable development could not have achieved the status of either a customary law or a general principle.

Moreover, openly discussing Weeramantry's separate opinion in the Gabcikovo-Nagymaros case, Lowe

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[101] KISS, Alexandre; SHELTON, Dinah. *International environmental law*. Transnational Publishers, 2004. p. 216-218; BROWNLIE, Ian. *Principles of public international law*. 7. ed. Oxford University Press, 2008. p. 278; HUNTER, David; SALZMAN, James; ZAELKE, Durwood. *International environmental law and policy*. 5. ed. Foundation Press, 2015. p. 312.

[102] VOIGT, Christina. *Sustainable development as a principle of international law*. Brill, 2009. p. 152-157.

[103] VOIGT, Christina. *Sustainable development as a principle of international law*. Brill, 2009. p. 153-170.

[104] VOIGT, Christina. *Sustainable development as a principle of international law*. Brill, 2009. p. 186.

[105] LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 19-37.

[106] BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 377-400, 2012; MARONG, Alhaji B. M. From Rio to Johannesburg: reflections on the role of international legal norms in sustainable development. *The Georgetown Int'l Envtl. Law Review*, v. 16, p. 21-76, 2003; VOIGT, Christina. *Sustainable development as a principle of international law*. Brill, 2009.

[107] In the 1969 North Sea Continental Shelf cases, before the ICJ, the Judges acknowledged that in order to decide whether a provision would constitute international customary law, it was necessary to identify if it would "[…] be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law". If the provision had no norm-creating character, there was no need to continue searching for remaining requisites. It added, then, a new requisite to international customary law: the norm-creating character.

[108] LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 24-31.

[109] LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 26.

emphatically states it would not even be necessary to grant sustainable development a status of general principle of law. There would be no logical or systemic need for an independent, extraneous principle of resolution. An eventual conflict between two norms could be overcome by simply delimiting their inherent limits, and, thus, a principle of sustainable development to resolve economic, social and environmental concerns would be redundant.

In the end, Lowe concludes sustainable development is an interstitial norm with normative status as an element of the decision-making process: "[i]t is a meta-principle, acting upon other legal 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."[110]. As all legal systems are indeterminate, the author claims, rules and principles would overlap or conflict when applied to the facts of the claim, and decision-makers constantly find themselves in this kind of situation. An interstitial norm assists them in overcoming this scenario, establishing the relationship between clashing norms, such as the right to development and the protection of environment. It would color the understanding of the norms it modifies, guiding decision-makers when deciding how to establish priorities and to accommodate conflicting norms and principles.

Stephens[111] follows Lowe's steps and also acknowledges sustainable development as an interstitial norm, highlighting its relevance in providing a conceptual language to resolve disputes which involve traditional norms of international law that could collide or otherwise be hostile to contemporary concerns. Similarly, Boyle claims sustainable development is better understood as a modifying norm, which could influence the outcome of litigation; it sets limits, it provides guidance, it determines how conflicts between rules or principles could be resolved. Therefore, decision-making would be sustainable development's main element[112].

(vi) Sustainable development under two complimentary approaches: *as an objective and an interstitial norm*

Finally, a last view claims sustainable development should be seen through a hybrid approach: a *corpus* by itself of international legal principles and treaties, and an interstitial norm. A single-sided view would be incomplete.

Cordonier Segger claims sustainable development has not emerged yet as neither customary international law nor as a general principle. Even though there is ample, significant and voluminous evidence of state practice committing to sustainable development – substantiated into almost universal treaties, declarations and formal notices by ministers and official representatives of states, votes in international institutions in favor of policies in support of sustainable development, cases in which parties argue about the promotion of sustainable development and tribunals are willing to accept them, and local legislation –, neither *opinio juris* nor a norm-creating character are found. As to *opinio juris*, it is not clear whether international commitments on sustainable development are made by means of an international obligation rather than to a common global objective or to a moral obligation, as the language used in those documents are mostly hortatory and rarely refer to the concept as a biding legal obligation. As to the norm-creating character, lack of consensus regarding the concept and the absence of a virtually uniform practice would hinder the emergence of a specific and normative commitment to sustainable development which could form the base of a legal claim[113].

Sustainable development should rather be viewed under two complimentary approaches. First, due to wide state practice and numerous references in treaties to an international law in the field of sustainable development[114], sustainable development would constitute a *corpus* of congruent international legal norms – as treaty rules, customary norms and principles – "[…] which address the areas of intersection between internatio-

[110] LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 31.

[111] STEPHENS, Tim. International courts and sustainable development: using old tools to shape new discourse. *In:* JESSUP, Brad; RUBENSTEIN, Kim (ed.). *Environmental discourses in public and international law*. Cambridge University Press, 2012. p. 195-217.

[112] BOYLE, Alan. Soft law in international law-making. *In:* EVANS, Malcolm D. (ed.). *International law*. Oxford University Press, 2014. p. 118-136.

[113] SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 29-98.

[114] Such as principle 27 of the Rio Declaration.

nal economic law, international environmental law and international human rights law, in order to achieve the object and purpose of sustainable development"[115]. It includes substantive and procedural norms which not only contribute to construct the concept but also play a relevant role in its implementation[116]. Second, sustainable development should also be seen as an interstitial norm, as taught by Lowe, serving as a decision-making concept to assist judges and arbitrators to curb excesses of states in development activities[117].

4.2 Best assessment of sustainable development's nature: interstitial norm

Having made a brief presentation of the different views over sustainable development's legal nature, we now take a stand and, within short paragraphs, will present the reasons why we understand it shall be understood as an interstitial norm.

Interstitial norms are a form of secondary rules which act within interstices to contribute to the understanding and precise application of primary rules (these last ones are those that truly regulate and modify behavior). Knowing systems of law are incomplete by nature[118] it is just natural the emergence of these interstices; they arise from factors internal to international law – through either the overlap/conflict of norms or the possibility of applying different norms to concrete facts[119], leading to lack of consensus on law itself and to emerging multiple possible interpretations – or from social, political and material contextual changes, resulting in new legal interpretations or the creation of social and political conditions unfamiliar to old laws[120].

Interstitial rules arise to address this situation[121]; they act in the interstices, upon primary rules and principles, directing the interpretation over these spaces of ambiguity, overlap or conflict and the interaction in practice of rules and principles[122]. They conduct interpretation and application of conflicting norms, assisting adjudicators to find a just outcome to the case. Hence, by their own nature, one can conclude interstitial norms are very powerful and may drive more legal change than traditional rules themselves[123].

This is precisely how sustainable development must be understood. The open-ended character of the concept makes it widely adaptable, applicable to different situations and suitable to clarify, interpret, modify and distinguish applicable norms according to each particular situation[124]. The inherent vagueness is actually highly adequate to offer guidance on conflicting norms; it acts upon them, helping in their application by adjudicators when there is a threat of collision, and, in this sense, it could actually influence the outcome of litigation[125].

Sustainable development is more than a political norm, a guide or a mere expectation; it is naive to suggest no legal obligation could be extracted from the concept or that it would miss a concrete legal requirement. Quite the contrary, the use of sustainable development to address interstices evidences that legal obligation and legal requirement may be extract out of it;

115 SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 93.

116 As examples of these norms, it could be mentioned the precautionary principle (Principle 15 of the Rio Declaration) and the polluter pays principle (Principle 16 of the Rio Declaration).

117 SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 29-98.

118 BRUNNÉE, Jutta; TOOPE, Stephen J. International law and constructivism: elements of an interactional theory of international law. *Columbia Journal of Transnational Law*, v. 39. p. 60, 2000.

119 LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 19-37.

120 NEWELL, Michael E. Interstitial rules and the contested application of human rights law and the laws of war in counterterrorism. *Global Constitutionalism*, v. 5, n. 2, p. 207-237, 2016.

121 LOWE, Vaughan. The politics of law-making: are method and character of norm creation changing? *In:* BYERS, Michael (ed.). *The role of law in international politics:* essays in international relations and international law. Oxford University Press, 2001. p. 207-226.

122 NEWELL, Michael E. Interstitial rules and the contested application of human rights law and the laws of war in counterterrorism. *Global Constitutionalism*, v. 5, n. 2, p. 207-237, 2016; LOWE, Vaughan. The politics of law-making: are method and character of norm creation changing? *In:* BYERS, Michael (ed.). *The role of law in international politics:* essays in international relations and international law. Oxford University Press, 2001. p. 207-226.

123 BRUNNÉE, Jutta; TOOPE, Stephen J. International law and constructivism: elements of an interactional theory of lnternational law. *Columbia Journal of Transnational Law*, v. 39. p. 66, 2000.

124 O'NEILL, Kate. *The environment and international relations*. Cambridge University Press, 2009. p. 28-29.

125 LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 19-37.

adjudicators could refer to the concept to find balance between economic, environmental and social concerns when different applicable norms threaten to conflict. There is clearly a judicial normativity within the concept[126].

Nonetheless, it has neither achieved the nature of customary law or principle. The same open-ended character that makes sustainable development so suitable to be an interstitial norm is an obstacle for it to become a binding legal obligation[127]. For the emergence of an international customary law, it is necessary to make proof of state practice, *opinio juris* and the norm-creating character of the provision claimed to have become a custom; and it all must be extensive and virtually uniform in the sense of the provision invoked[128]. For the emergence of a general principle, *opinio juris* suffices. Neither *opinio juris* nor the norm-creating character are found.

It is not difficulty to evidence state practice, due to the number of international agreements which include sustainable development. However, the uncertainty over the concept and the absence of clear standards of review suggest there is no international agreement as to what would constitute a sustainable development behavior: should states develop in a sustainable way? Should states not develop in an unsustainable manner? Should states promote sustainable development? Or should it be questioned through the lens of a right to promote sustainable development? The answer is that there is no answer. No agreement has been reached as to how sustainable development could constrain behavior, and, therefore, no *opinio juris* nor the norm-creating character could emerge:

> For a state obligation on sustainable development, it is necessary to define the specifc legal norm that States must respect, even if this were simply to be defined in the context of one type of economic activity, or in the exploitation of a particular natural resource. [...] However, there is a lingering lack of clarity as to whether most States undertake such a commitment due to a sense of legal obligation, or simply due to a common commitment to a noble goal. It is not clear, essentially, that a principle of 'sustainable development' has yet emerged in international customary law yet.[129]

From the above, we understand sustainable development fits better as an interstitial norm assisting decision-makers to reach balanced and integrated decisions, taking into account economic, environmental and social interests. We will see below that the relevant role of sustainable development in the decision-making is also highly appraised even among those who disagree with its nature as an interstitial norm.

4.3 A common feature, or, at least, an island of consensus: sustainable development relevance in the decision-making

Despite all views on sustainable development's legal nature, we have found some consensus over the relevance of the concept to the decision-making. Regardless of its standing as political norm, policy, rules or principles; either as *lex lata* or *lex ferenda*, or even as a combination of them[130], the fact is that several authors with different perspectives converge that the concept is a powerful hermeneutical tool in the hands of judges and arbitrators, assisting them in finding balance among divergent interests.

Not surprisingly, authors who claim sustainable development is an interstitial norm are enthusiastic when stressing its essential role to decision-making. Lowe states sustainable development can be used by a court

126 SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 92-93; BOYLE, Alan. Soft law in international law-making. *In:* EVANS, Malcolm D. (ed.). *International law*. Oxford University Press, 2014. p. 118-136; LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 34.

127 LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 19-37.

128 SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 70-75.

129 SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 71-72.

130 ROBB, Cairo; SEGGER, Marie-Claire Cordonier; JO, Caroline. Sustainable development challenges in international dispute settlement. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 147-171; LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International Law and Sustainable Development*. Oxford University Press, 1999. p. 19-37.

to modify the application of norms and principles. For him, an interstitial norm has an immense gravitational pull and acts upon other legal rules and principles, pushing and pulling their boundaries when they threat to overlap or conflict. This would be the true normativity of sustainable development: assisting decision-makers to find balance among applicable rules, and, in this sense, it could end up affecting the case's outcome[131]. Boyle highlights sustainable development would lay down parameters which affect the way courts decide cases, claiming they should balance the three main areas of concern: economic, social and environmental[132]. Cordonier Segger emphasizes that, as a decision-making concept, it assists adjudicators to curb the worst excesses in the implementation of development agendas[133].

Even authors who maintain different views on sustainable development's legal nature also emphasize that judge and arbitrators should take the concept into account when deciding the claims presented to them. Marong[134] highlights sustainable development has come to symbolize the desire and expectation of society as to the integration of economic, environmental and social considerations by judges and arbitrators. In this sense, it would be a guiding norm which provide a framework for the application of legal rules; by means of sustainable development decision-making could be improved and contribute to economic growth with equity, environmental protection and social well-being. It could actually serve as an instrument of development and change when considered in the interpretation process.

For Voigt[135], sustainable development's normative element is found in judicial reasoning. Based on a holistic approach, it assists decision-makers to examine claims in a broader context, rather than looking at them in isolation. It does have a normative pull over norms and principles applied to the litigation and it exerts its force from the integrative character of the concept. In cases where reconciliation of competing social, economic and environmental priorities is claimed, sustainable development could be of great relevance to integrate them and reach a just outcome.

Barral[136] joins this same path, claiming sustainable development influences decision-making and provides adjudicators with a framework to render balanced decisions. She further claims it is a powerful hermeneutical tool in the hands of decision-makers, used to weigh in the interpretation of applicable norms. Resorting to sustainable development as an interpretative guide would legitimize a dynamic interpretation of rules and even lead to the revision of treaties, granting great power and degree of liberty to arbitrators and judges. Diniz[137] reinforces the ideas furthered by Barral as he makes an express reference to her work while acknowledging that the interpretative function of sustainable development is highly relevant – highlighting that any analysis regarding the concept´s legal nature should not ignore its convenient and significant role as a hermeneutical tool.

Voigt[138] and Marong[139] emphasize sustainable development's role in decision-making is agreed even among authors with divergent positions. Referring to Lowe and Weeramantry's separate opinion in the Gabcikovo-Nagymaros case, Voigt suggests their conflicting points of view would merely be a matter of semantics: "[d]espite their different approaches, their underlying ideas about legal normativity of sustainable development seem essentially the same."[140].

The International Law Association, in the 2012 Sofia Guiding Statements on the Principles of International Law on Sustainable Development[141], also reinforced

131 LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 34.

132 BOYLE, Alan. Soft law in international law-making. *In:* EVANS, Malcolm D. (ed.). *International law*. Oxford University Press, 2014. p. 130.

133 SEGGER, Marie-Claire Cordonier. Commitments to sustainable development through international law and policy. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 93.

134 MARONG, Alhaji B. M. From Rio to Johannesburg: reflections on the role of international legal norms in sustainable development. *The Georgetown Int'l Envtl. Law Review*, v. 16, p. 21-76, 2003.

135 VOIGT, Christina. *Sustainable development as a principle of international law*. Brill, 2009.

136 BARRAL, Virginie. Sustainable development in international law: nature and operation of an evolutive legal norm. *The European Journal of International Law*, v. 23, n. 2, p. 377-400, 2012.

137 DINIZ, Pedro I. Natureza jurídica do desenvolvimento sustentável no direito internacional. *Revista de Direito Internacional*, v. 12, n. 2, p. 739-766, 2015.

138 VOIGT, Christina. *Sustainable development as a principle of international law*. Brill, 2009.

139 MARONG, Alhaji B. M. From Rio to Johannesburg: reflections on the role of international legal norms in sustainable development. *The Georgetown Int'l Envtl. Law Review*, v. 16, p. 21-76, 2003.

140 VOIGT, Christina. *Sustainable development as a principle of international law*. Brill, 2009. p. 170-171.

141 The Guiding Statements were elaborated to support the con-

the consensus over sustainable development role in decision-making, namely in interpretation and rule development. The second statement reads: "[t]reaties and rules of customary international law should, as far as possible, be interpreted in the light of principles of sustainable development […]."

There seems to be, therefore, an agreement in the literature over sustainable development's function as a hermeneutical tool for judges and arbitrators, who shall use it to reach an integrated decision, balancing economic, social and environmental aspects of the claim. It goes way beyond a simple judicial rhetoric and it shall actually be used to integrate and contemporize legal norms and treaty rules[142]. Sustainable development certainly does not provide a formula to how integration and balancing shall occur[143]; in fact, decision-makers should take advantage that the concept has an open-ended character and, thus, is adaptable to multiple situations, to use it to clarify, interpret, modify and distinguish applicable norms according to each particular situation[144]. It leaves adjudicators with greater freedom to determine the appropriate balance between the case's aspects[145], what, ultimately, may lead to more just and complete decisions.

We find evidence in practice that sustainable development has been indeed been used as an interpretation tool in international dispute-resolution. Weeramantry argued in his separate opinion in the Gabcikovo-Nagymaros case that the principle of sustainable development enables the Court to "hold the balance even between the environmental considerations and the development considerations raised by the Parties"[146]. Highlighting the role sustainable development may play to interpret international disputes, he furthers that it is indeed crucial to the determinations of the competing considerations of the case, for it may be used to weight considerations of development against environmental concerns[147]. Judge Weeramantry then follows to analyze how to conciliate the right to development of people of both Hungary and Slovakia and the protection of environment – as a right of the whole mankind –, exploring the limits of both rights and debating how to harmonize them.

Cançado Trindade, in his separate opinion in the case concerning Pulp Mills on the River Uruguay, declares sustainable development as a principle of international law; he then declares that "[p]rinciples of international law shed light into the interpretation and application of international law as a whole"[148], acknowledging the relevance of sustainable development to balance the competing interests of the parties.

In spite of this island of consensus, the fact is that judges and arbitrators are not legally bound to use sustainable development as a hermeneutical tool. As seen, there is no agreement over the concept's legally binding nature; in fact, the best assessment, as we discussed, is to accept it as an interstitial norm, which, by its own nature and definition, is not a binding rule – recalling that Lowe refers to it as a legal concept[149]. So far, no court or tribunal has interpreted sustainable development as a biding rule, and the inclusion of the concept into decisions – as an aid to interpretation or as a means of contextualization – was at the discretion of the decision-makers, as we above saw in the separate opinions

tinued development of the seven principles of the New Delhi Declaration. A full version of the report is available at: FRENCH, Duncan. The Sofia guiding statements on sustainable development principles in the decisions of international tribunals. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 177-241.

142 FRENCH, Duncan. The Sofia guiding statements on sustainable development principles in the decisions of international tribunals. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 180.

143 CROCKETT, Antony. The integration principle in ICSID awards. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 545; ORTINO, Federico. Investment treaties, sustainable development and reasonableness review: a case against strict proportionality balancing. *Leiden Journal of International Law*, v. 30, p. 85, 2017.

144 ELLIOT, Jennifer A. *An introduction to sustainable development*. Routledge Perspectives on Development, 2013. p. 16; O'NEILL, Kate. *The environment and international relations*. Cambridge University Press, 2009, p. 28-29; SCHWARZ, Priscilla. Sustainable development in international law. *Non-State Actors and International Law*, n. 5, p. 139-141, 2005.

145 ORTINO, Federico. Investment treaties, sustainable development and reasonableness review: a case against strict proportionality balancing. *Leiden Journal of International Law*, v. 30, p. 86, 2017.

146 The case concerning the Gabcikovo-Nagymaros Project, ICJ, separate opinion of Vice-President Weeramantry, 1997, p. 85.

147 The case concerning the Gabcikovo-Nagymaros Project, ICJ, separate opinion of Vice-President Weeramantry, 1997, p. 85.

148 Pulp Mills on the River Uruguay, Separate Opinion of Judge CANÇADO TRINDADE, p. 199.

149 LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 19-37.

of Judges Weeramantry and Cançado Trindade[150].

However, it is about time judges and arbitrators face the issue from a different angle. Sustainable development as a hermeneutical tool to balance economic, environmental and social concerns shall not be used at the discretion of decision-makers. They must consider it an obligation, they must feel responsible to actually take it into account at all opportunities the parties' claims demand conciliation of conflicting interests. This is so because of the context in which decision-making occurs.

In fact, international courts and tribunals do not sit in isolation, they rather function in the context of an increasingly interdependent world[151], whose core concepts' boundaries are becoming more flexible[152]. The interdependency of the whole international community becomes even more evident when discussing issues related to the relationship between economic development, environmental protection and social concerns. The modern era of international cooperation – initiated with the 1972 UN Conference on the Human Environment, in Stockholm, and further developed through mega-conferences within the last four decades – is based on the premise that economic development may not mean a threat to environmental and social protection[153]. A balance must be found and decision-makers may not be alien to this process. They are, indeed, part of the solution; they are responsible to decide cases under their jurisdiction taking into account this international community's claim.

Disputes between parties are disputes *inter partes*, in the sense that the decision is only applicable and binding to them. However, this is not true for disputes regarding the interaction of economic, environmental and social issues. They are not merely *inter partes*, as they may affect other parties besides those who initiated the claim: "[s]o the judge, whether domestically or internationally, has to have his eye also in the impact of the Court's decision on the community"[154]. There is a public interest over these issues, especially regarding the protection of environment, which transgresses the interests of litigators; it goes beyond and becomes part of the whole community concern[155].

A globalizing culture of environmental consciousness has risen and sustainable development has taken over the mainstream discourse, reshaping international order. Within this context, it is emerging a culture that is not dismissive of public interest and which "[…] is likely to result in decision-makers for whom it is the norm to consider the social, environmental and developmental needs […]"[156]. Hence, judges and arbitrators, in the name of public interest and to enhance legitimacy, consistency and predictability of the system[157] shall resort to sustainable development whenever it is applicable[158].

It is in this context we suggest that regardless of sustainable development's legal binding nature, it shall be used by arbitrators and judges as a hermeneutical tool. Tribunals must employ sustainable development not because it is obligatory as a matter of law, but rather because it is how legal reasoning should proceed[159].

150 FRENCH, Duncan. Sustainable development. *In:* FITZMAURICE, Malgosia; ONG, David M.; MERKOURIS, Panos. *Research handbook on international environmental law*. Edward Elgar Publishing, 2010. p. 64-65.

151 ROBB, Cairo; SEGGER, Marie-Claire Cordonier; JO, Caroline. Sustainable development challenges in international dispute settlement. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 167-169.

152 It is no longer accepted that states may act in the way they please, without taking into regard the consequences of their acts to the international community. We are witnessing the transition from a rigid state territory and sovereignty to a more flexible understanding of these concepts, more compatible to global environmental challenges (BOYLE, Alan; FREESTONE, David. Introduction. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 1-18).

153 O'NEILL, Kate. *The environment and international relations*. Cambridge University Press, 2009. p. 28.

154 WEERAMANTRY, C. G. *Universalizing international law*. Brill Academic Publishers, 2004. p. 437-438.

155 HANDL, Gunther. Environmental security and global change: the challenge to international law. *Yearbook of International Environmental Law*, v. 1, n. 1, p. 3-33, 1991.

156 MILES, Kate. *The origins of international investment law:* empire, environment, and the safeguarding of capital. Cambridge University Press, 2013. p. 345-346. The referred author refers expressly to investment disputes, nonetheless we understand that her argument may be applicable – with no loss of content – to a broader idea of decision-making.

157 This is even clearer in a more restrict system of law, such as investment arbitrations under the auspices of the International Centre for the Settlement of Investment Disputes. In this particular case, not rarely arbitral tribunals make reference to past decisions, in a so-called *system of de fact precedent* (CROCKETT, Antony. The integration principle in ICSID awards. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 539-553).

158 LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 19-37.

159 LOWE, Vaughan. The politics of law-making: are method and character of norm creation changing? *In:* BYERS, Michael (ed.).

Economic issues may not be seen in isolation; on the contrary, the dynamic relationship with environmental and social protection must not be disregarded by adjudicators. They are responsible to take sustainable development into account[160]. If they close their eyes to this concept, the consequences may be very harmful for the environment and the society.

5 Final conclusions

From the above, sustainable development has arguably found a central place in the global agenda. The last four decades have witnessed the consolidation of the concept into international community's mind and practice, by means of several mega-conferences[161] which have placed sustainable development into the core of international agreements and turned it into the object of policy measures aiming at contributing to a better integration of developmental, environmental and social concerns.

Despite all excitement over the issue, and the real intent of state and non-state actors to contribute to the pursue of sustainable development, the fact is that there still remain several grey clouds over it. No agreement has ever been reached to a universal concept of sustainable development, or to a framework with the main roads which could lead to it. On the contrary, the concept remains open and in constant evolution, adaptable to multiple situations, what, under our understanding, is sustainable development's greatest strength from the decision-making point of view.

No consensus has also been found as to the concept's legal nature. From a merely political stand to a binding legal character, sustainable development has been analyzed through many lenses, but no one has prevailed so far. We stand with those authors who understand sustainable development as an interstitial norm, having great influence over interpretation and application of true primary rules. From this sight, sustainable development gains relevance as a hermeneutical tool.

Nonetheless, even those who claim a different nature to the concept acknowledge and praise sustainable development as a relevant device to be used by judges and arbitrators. In fact, it seems to exist a consensus that whenever parties' claims demand conciliation of conflicting economic, environmental and social interests, adjudicators should analyze the case under sustainable development's lens and find a way to integrate these interests, with no prevalence of any of them; conciliation, integration and some element of justice would be inherent to sustainable development, and, in this sense, it would be of great relevance in the decision-making at the discretion of adjudicators.

Beyond this island of consensus, we understand a further step could be taken and judges and arbitrators should change the way they face the issue; they should actually understand the use of sustainable development as a hermeneutical tool not as a discretion, but rather as an obligation. Tribunals should employ sustainable development not because it is obligatory as a matter of law, but rather because it is how legal reasoning should proceed. The integrated context in which litigation occurs and the public interest over claims involving environmental and social concerns signalize that courts are responsible to take sustainable development into account.

The role of law in international politics: essays in international relations and international law. Oxford University Press, 2001. p. 207-226. As Lowe said in a different opportunity: "The judges employ these modifying norms because they are judges, not because the law expressly requires them to be employed." (LOWE, Vaughan. Sustainable development and unsustainable arguments. *In:* BOYLE, Alan; FREESTONE, David (ed.). *International law and sustainable development*. Oxford University Press, 1999. p. 33).

[160] ROBB, Cairo; SEGGER, Marie-Claire Cordonier; JO, Caroline. Sustainable development challenges in international dispute settlement. *In:* SEGGER, Marie-Claire Cordonier; WEERAMANTRY, C. G. (ed.). *Sustainable development principles in the decisions of international courts and tribunals:* 1992-2012. Routledge, 2017. p. 167-169.

[161] SEYFANG, Gill. Environmental mega-conferences: from Stockholm to Johannesburg and beyond. *Global Environmental Change*, n. 13, p. 223-228, 2003.

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