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## INTRODUCTION

Sustainable development has not been the most straightforward exercise for commentators, courts and other sources of law to comprehend, with each forming (marginally) different interpretations on this subject. Almost 30 years since the concept of sustainable development was born, a very broad terminology would find most of us in agreement. It is development that should meet the needs of the present without compromising the abilities (and needs) of future generations. Yet, the difficulty that arises concerns the balance between the different needs that it tries to protect. When the economic, environmental, social, political, and cultural dimensions that underpin human actions come at a conflict, and thus different individual requirements seem to be at stake, the viewpoints of our sources start to shift away. Sometimes, different interpretations (or rather degrees) of the concept, can be found in the same source, for example the International Court of Justice (hereafter ICJ) and the International Tribunal for the Law of the Sea (hereafter ITLOS).

This paper will analyse the most significant judgments of the ICJ and ITLOS in relation to sustainable development law, and their contribution in developing respective principles, integrating them as part of modern international law. It will first argue how the ICJ has exerted influence in the very definition of sustainable development, given its function as the primary judicial body of public international law. By assessing some major cases, some conclusions will be drawn as to whether the Court has adequately played its part as one of the major influencing bodies of international law, or whether there is more to be done. While first significant case in which the phrase sustainable development was explicitly documented is *Gabcikovo-Nagymaros*<sup>1</sup>, a brief examination of two preceding cases will be made. The paper will continue to consider three major cases that arose after *Gabcikovo-Nagymaros*, examining them in the context of other developments such as the emergence of international environmental instruments and the surfacing of scientific expertise in the international debate. It will be concluded that the ICJ has not been as consistent in its interpretation of sustainable development as it would be expected to be.

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<sup>1</sup> Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia) [1997] ICJ Rep. 7.

Moving on, the contribution of ITLOS jurisprudence in the emergence of sustainable development principles will be discussed in Chapter 2. It will be identified that the Tribunal's record on marine environmental disputes is a positive one, despite the absence of any discussion upon the merits of the provisional cases. The *Seabed Mining Advisory Opinion* will also be considered, as it offers a significant contribution to sustainable development and general international law through its discussion of due diligence and precautionary approach. The paper will then move on to discuss some of the current challenges the international community faces in relation to sustainable development. It will conclude with an overview of the sustainable principles developed by ITLOS and ICJ as well as some ending remarks.

## CHAPTER I - ICJ JURISPRUDENCE

### [Pre-Gabčíkovo-Nagymaros ICJ jurisprudence](#)

#### *i. Case Concerning the Continental Shelf (Libyan Arab Jamahiriya v Malta).*

In 1985, the court found the opportunity to discuss the concept of “equitable principles”,<sup>2</sup> in the context of a delimitation line concerning the continental shelf between the two parties. The court stressed that it has the authority to apply and weight these equitable principles in line with the relevant circumstances of the case. Principles that the court considered to be equitable in that case were main features of the coasts, the difference in their lengths and the distance between them. So it is evident that the court shows a willingness to examine certain aspects relating to the environment, even though it is hesitant to explicitly recognise them or naming them (as) “sustainable” *per se*.

#### *ii. Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway).*<sup>3</sup>

A similar case was raised some years later, giving the court the opportunity to re-state and re-apply this idea of equity that it had previously developed in the context of another delimitation

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<sup>2</sup> Continental Shelf (Libyan Arab Jamahiriya v Malta), Judgment, ICJ Reports 1985, p. 13 at para 45

<sup>3</sup> Maritime Delimitation in the Area between Greenland and Jan Mayen, Judgment, ICJ Reports 1998, p. 38.

case. While the court still hesitated to introduce the principle of sustainability, it made reference to a “reasonable proportionality standard”<sup>4</sup> that ought to be considered as part of those equitable principles rather than as a separate element.

What must also be taken into account on the case is the separate opinion given by Judge Weeramanthy. While the judge agreed with the court’s decision, he gave some deeper considerations of the principle of equity, stressing that environmental factors are a crucial component of the principle when it comes to maritime boundary delimitations. He further linked equity as a means to safeguard the environment and the welfare of future generations. It appears that, the principles of sustainable development introduced in the Rio Declaration on Environment and Development<sup>5</sup> that was made some months before the judgment, were given some form in the words of the judge’s separate opinion, despite his reservation to name them explicitly.

#### The Sustainability Principle in *Gabčíkovo-Nagymaros Project* case

In 1997, the ICJ seized an opportunity to assess questions of international environmental law and sustainable development for the first time in *Gabčíkovo-Nagymaros Project* case.<sup>6</sup> And while some months before The ICJ mentioned in its Advisory Opinion on Threat or Use of Nuclear Weapons that the principle of sustainable development was “part of the body of international law relating to the environment”, the *Gabčíkovo-Nagymaros* dispute is the first case where an extensive discussion of the principles is made by the court.

##### *i. Background and facts*

An agreement was made to facilitate the construction of a hydraulic power plant system between Hungary and Czechoslovakia. According to the 1977 plans, the system included two barrages, one built by the Czechoslovak Republic and another planned at Nagymaros in Hungary. The project in Nagymaros was not to be built as a result of environmental and technical concerns that had arisen from the project. However, Hungary was unable to convince Czechoslovakia to suspend its work until a proper environmental examination was to be

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<sup>4</sup> *Ibid*, at para 66.

<sup>5</sup> The Rio Declaration on Environment and Development (1992) U.N. Doc. A/CONF.151/5/Rev.1, 31 I.L.M. 874.

<sup>6</sup> *Gabčíkovo-Nagymaros*, *supra* note 1.

performed (this was in 1989). Czechoslovakia, for its part, was convinced that Hungary intended to withdraw from the project altogether and decided to unilaterally complete the barrage system, considerably diverging from the original plans that were described in the treaty. Such unilateral action essentially allowed for Czechoslovakia to divert Danube regardless of the Hungarian reservations. Hungary terminated the 1977 treaty in 1992, citing ecological necessity as its basis for withdrawing from the treaty and suspending the project. In spite of the Hungarian termination, Czechoslovakia unilaterally diverted the Danube later in 1992, and made the Gabčíkovo barrage operational at the same time. In 1993 Czechoslovakia broke down, and that area was now part of Slovakia. The countries requested ICJ ruling on whether (a) the 1977 treaty remained in force after Hungarian termination and (b) whether Slovakia could (unilaterally) keep operation of the project features that related to the Gabčíkovo faculty.

*ii. Judgment and analysis*

The Court held that Hungary's suspension of the work at *Nagymaros* and the termination of the 1977 Treaty were unlawful. Yet, it stressed that despite the fact that Czechoslovakia had the right to unilaterally make the installations, it nevertheless acted unlawfully when as a result of its actions it diverted the overwhelming majority of the flow of the Danube from its original bed, "depriving Hungary of its right to an equitable and reasonable share of the frontier watercourse".<sup>7</sup> The court used some strong environmental language to express its ecological reservations concerning the activities undertaken in the area, acknowledging that they amounted to an "essential interest"<sup>8</sup> of Hungary. The court referred to "the continuing effects of the diversion of these waters on the *ecology* of the riparian area of the Szigetköz",<sup>9</sup> emphasizing "the *great significance* that it attaches to respect for the environment; not only for the States but also *for the whole of mankind*".<sup>10</sup>

While environmental considerations were evidently present and recognised in the analysis of the court, they were still not sufficient to trump the contractual overarching principle of *pancta sunt servanda*. In consequence, Hungary's arguments that "the previously existing obligation

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<sup>7</sup> Marie-Claire Cordonier Segger and C. G Weeramantry, *Sustainable Development Principles In The Decisions Of International Courts And Tribunals 1992-2012* (Routledge 2017); see also *Ibid*, para. 78.

<sup>8</sup> *Gabcikovo-Nagymaros*, *supra* note 1, at para 53.

<sup>9</sup> *Ibid*, at para 85.

<sup>10</sup> *Ibid*, at para 53.

not to cause substantive damage to the territory of another state had ... evolved into an *erga omnes* obligation of prevention of damage pursuant to the precautionary principle”<sup>11</sup> were found to be insufficient to terminate the 1977 treaty and were thus rejected. Treaty law comes first, and the sustainable development principles can not trump a state’s treaty obligations.

Hungary also attempted to justify the non-performance of its contractual obligations based on the argument of ecological necessity under the rules of state responsibility.<sup>12</sup> It stated that the threat of a grave and imminent peril to the environment, should explain its suspension from the project. The Court rejected these arguments by stressing that there was not sufficient evidence of Hungary’s perils, which were also not “imminent”.<sup>13</sup> It continued to say that Hungary had available at the time other ways of dealing with these perceived perils apart from the “suspension and abandonment of works with which it had been entrusted”.<sup>14</sup> Yet, the court fails to clarify what would account to “imminent” peril in order for environmental necessity to apply, and what were the other options available for Hungary. Moreover, information on how much and what kind of evidence would suffice to accept Hungary’s arguments was also not given by the court. The requirement for necessity to be imminent is also absurd given that a lot of the environmental effects could appear much later on than when a project is introduced (for example loss of biodiversity).

It is clear that there is some reluctance of the court to deal with these questions. The raising competing scientific claims that arise in environmental matters could explain the court’s stance on the matter. With the progress of time, [and this is still 1997], science has been used more and more often to justify a state’s behavior; piles of scientific arguments of several thousand pages were used by the two parties in *Gabčíkovo-Nagymaros*, presented “in an equally compelling manner”.<sup>15</sup> Unlike some national systems where scientific assessors join panels to support in untangling technical information and evidence, in the international sphere, the judge will be alone to decide on the merits of a sensitive environmental issue (despite their option to appoint experts for consultation).

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<sup>11</sup> *Ibid*, at para 97.

<sup>12</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Article 25, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, available at: <https://www.refworld.org/docid/3ddb8f804.html> [accessed 9 May 2019].

<sup>13</sup> *Gabčíkovo-Nagymaros*, *supra* note 1, at para 57.

<sup>14</sup> *Ibid*.

<sup>15</sup> Philippe Sands, 'Litigating Environmental Disputes: Courts, Tribunals And The Progressive Development Of International Environmental Law' [2008] OECD: Global Forum on International Investment <<https://www.oecd.org/investment/globalforum/40311090.pdf>> accessed 14 May 2019, at page 4.

What is truly unfortunate however is the court's understanding of what sustainable development should entail – While the court's acknowledgment that industrial development and mechanisation could jeopardize the natural environment of current and future generations should be seen as a step towards the right direction, its formulation of what a proper balance under sustainable development should include is not analogous to what has been agreed by the drafters of the Rio Declaration 5 years before the decision.<sup>16</sup> Sustainable development should strive for the integration of 3 (conflicting) areas of public international law; international economic law (Economic development), international environmental law (environmental development), and human rights law (Social development). It is regrettable that the court does not make any reference to social rights, especially when there was plentiful evidence submitted by Hungary on the impact that the activities could have on the living population of the area.

In paragraph 140 of the judgment, the ICJ makes reference to “vigilance” and “prevention” in its evaluation of environmental risks,<sup>17</sup> implicitly referring to the sustainable development principles of “precaution” and “prevention”. It is again unfortunate why the court does not explicitly refer to them. Such reference could serve as a verification that the principles from part and parcel of customary international law. A possible explanation for this cautious use of vocabulary could be the Court's “reluctance to descend into detail if to do so is to adjudicate upon a dispute that has a broader context and that might lead to changes that the court is legislating”.<sup>18</sup> Despite the above, it must be re-stressed that the court is innovative in its use of environmental language especially in regards to the need of conducting environmental impact assessments prior to project developments. This could be in fact interpreted as an implicit recognition that sustainable development has already gained customary international law status.

In his Separate Opinion, Vice President Weeramantry examined sustainable development in more detail, stressing that it is “more than just a concept”<sup>19</sup>, stating that the right of environmental protection and the right to development are currently forming part of the body of international law, and need to be reconciled with the principle of sustainable development. He further concluded that because sustainable development has already been widely accepted

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<sup>16</sup> The Rio Declaration on Environment and Development (A/CONF.151/26, vol.I) and Agenda 21 (A/CONF.151/26, vol.II), adopted by the United Nations Conference on Environment and Development on 14 June 1992.

<sup>17</sup> *Gabcikovo-Nagymaros*, *supra* note 1, at para 140.

<sup>18</sup> *Litigating Environmental Disputes*, *supra* note 15, at page 3.

<sup>19</sup> *Gabcikovo -Nagymoros Case 1997* (no 1 above), Separate Opinion of Judge Weeramantry at page 88

by the global community, it is therefore already a recognised principle of international law.

Moreover, the judge makes reference to a “continuing environmental impact assessment”<sup>20</sup> (not a one-time exercise only to be made before the start of a project) and “principle of contemporaneity”<sup>21</sup> to be considered along sustainable development, topics that were dealt by the majority but separate to sustainability. This last reference is particularly significant as it raises an important question when it comes to environmental law and international contractual obligations; Should the terms used in the treaty be interpreted according to their meaning at the time it was concluded (principle of contemporaneousness), or is it appropriate to assume meanings that emerge later? i.e. an evolutionary interpretation (in line with sustainable development). So, while the judge agreed with the decision of the majority, such statements implicitly recognise that there might be cases where environmental protection could potentially overcome treaty obligations if this is necessitated by sustainable development principles, which have become “an integral part of modern international law”.<sup>22</sup> The ICJ essentially starts to form an increasing awareness that safeguarding the river environment is not solely a matter of equity between the parties in a contract, but it is also a concern of the international community as a whole.

### [The Pulp Mills Case – tension between sustainable development principles](#)

Thirteen years after the *Gabčíkovo-Nagymaros* case, *The Case Concerning Pulp Mills on the River Uruguay*<sup>23</sup> offered the Court an opportunity to clarify and further evolve sustainable development law and theory. Similar to *Nagymaros*, the court was requested to interpret on the appropriate utilisation of a river. Both cases concerned projects with economic benefits, where one State argued that because of environmental reasons they must stop. They are living examples of the tension between the different components that sustainable development strives to safeguard, especially the economic and environmental, and the ICJ’s endeavors to clarify the appropriate balance between them is admittedly not a very straightforward exercise. Like its preceding case, *Pulp Mills* has produced some significant dissenting and separate opinions which require some serious consideration.

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<sup>20</sup> *Gabčíkovo-Nagymaros*, *supra* note 1, at paras 111-113.

<sup>21</sup> *Ibid*, at paras 113-115.

<sup>22</sup> *Supra* note 18, Separate Opinion of Judge Weeramantry at page 89.

<sup>23</sup> *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 2010 ICJ Reports 14.

During the time interval between *Gabčíkovo-Nagymaros* and *Pulp Mills*, the dialogue on sustainable development was fostered, with international tribunals and national courts engaging with environmental principles upon their rulings. What is more, different international organisations increasingly adopted instruments which enclosed sustainable development principles,<sup>24</sup> while extensive academic sources and opinions were published on the increasing importance of the environment.<sup>25</sup> Consequently, the court had a much larger body of laws and principles to rely and engage in a richer discussion of sustainable development principles. And while the court did touch on a number of environmental issues, it did not meet its role expectations as an influencer and the principal developing body of international law.

*i. Background and facts*

The 1961 Montevideo Treaty defined River Uruguay as a boundary between Uruguay and Argentina. Article 7 of that Treaty provided for the two states to institute a “regime for the use of the river. This regime was to put in place by the 1975 Statute of the River Uruguay. Argentina claimed that Uruguay was in breach of both its procedural and substantive obligations under that statute.

Before studying the facts in more detail it is worthwhile to list some of the provisions of the provisions of the 1975 Statute, as they have been central in the court’s discussion and findings. Articles 7-12 relate to procedural obligations that aim to ensure that the purpose of Article 1 is fulfilled. Article 1 aims to “establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties”.<sup>26</sup> Article 7 dictates that if one of the parties conducts any project that could “affect navigation, the regime of the river or the quality of its waters, it shall notify”<sup>27</sup> a commission created to enhance coordination between the two states. According to Article 11, if the notified Party

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<sup>24</sup> See for instance – Cartagena Protocol on Biosafety to the Convention on Biological Diversity 2000; Stockholm Convention on Persistent Organic Pollutants 2001.

<sup>25</sup> See for instance – Alan Boyle and David Freestone, *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford: OUP, 1999); Daniel Bodansky, Jutta Brunnée and Ellen Hey, *The Oxford Handbook of International Environmental Law* (Oxford: OUP, 2007); Duncan French, *Global Justice and Sustainable Development* (The Netherlands: Martinus Nijhoff Publishers, 2010).

<sup>26</sup> Statute of the River Uruguay. Signed at Salto on 26 February. 1975, Article 1.

<sup>27</sup> *Ibid*, Article 7.

concludes that the planned project might indeed “significantly impair navigation, the regime of the river or the quality of its waters”,<sup>28</sup> it should notify the other Party and update on the areas of the project it disagrees on and the alterations that should be undertaken to ameliorate it. If after consultations the parties remain in disagreement on how to proceed, Article 12 allows for the parties to proceed to alternative methods of settlement, including reference to the ICJ.

As it concerns substantive obligations, Article 41 is a central provision, urging that parties should “protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and measures in accordance with applicable international agreements”.<sup>29</sup> Under Article 35, parties should implement methods to guarantee that “the management of the soil and woodlands and the use of the groundwater and waters of the river do not cause changes which may significantly impair the regime of the river or the quality of its waters”.<sup>30</sup> Lastly, Article 27 warns that the right of the parties to use the waters of the River Uruguay within their jurisdiction for all purposes “shall be exercised without prejudice to the application of the procedure” under Articles 7-12.<sup>31</sup>

In light of the above key provisions of the 1975 Statute, some more factual information on the parties’ actions should be given. Uruguay authorized the construction of two pulp mills, ENCE Mill and Botnia Mill without totally wearying the communication channel provisions in Article 7 to 12, even though the works of the ENCE mill ultimately halted. In both projects, the commission only found out about the project from the Spanish entity that was assigned to construct the mill. Only after numerous calls made by the Commission did Uruguay submit a paper of environmental impact updates. What is more, Uruguay gave environmental authorization for construction before consulting either the commission or Argentina.

ii. *Judgment and analysis*

The court held that Uruguay did not comply with its procedural obligations. In fact, there was no doubt even by Uruguay itself that it was in breach of its procedural obligations. The true call for the court was to assess whether there was a breach of the substantive obligations under

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<sup>28</sup> *Ibid*, Article 11.

<sup>29</sup> *Ibid*, Article 41.

<sup>30</sup> *Ibid*, Article 35.

<sup>31</sup> *Ibid*, Article 27.

the treaty and whether it should order the termination of the project. While the court acknowledged that due diligence “is now part of the corpus of international law relating to the environment”,<sup>32</sup> it rejected Argentina's argument that the breach of the procedural obligations implied at the same time a breach of the substantive obligations, underlining that due diligence is an obligation of conduct and not one of result.<sup>33</sup> In answering Argentina’s submission in the negative, the court uses environmental language and discusses principles of sustainable development, namely the principles of precaution and prevention.

As it concerns the procedural obligations, the court stresses the importance of communication, cooperation and information by one party to the other as laid out in Articles 7-12. It stressed that key is also application of the “principle of prevention”, which obliges states to use all the means at their disposal so as to avoid inflicting significant damage to the environment of another state. The court recognized the principle to be part of customary international law. It went on to explain that notification should be submitted early, as soon as the party intends to start the activity of a “plan which is sufficiently developed”, and prior to deciding on the environmental feasibility of the project.<sup>34</sup>

On the subject of substantive obligations Argentina argued that the principle of precaution implied a reversal of the burden of proof or a finding that the burden applies equally to both parties. The Court held that “while it may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as reversal of the burden of proof”.<sup>35</sup> Thus, the burden of proof remained on the party asserting the breach of environmental obligations.

So unlike *Gabčíkovo-Nagymaros*, the court explicitly referred to these two principles. Yet, its approach towards them is much more incorporeal than substantial. As Tladi argues, sustainable development is more at the “periphery” of the court’s judgment;<sup>36</sup> Beyond a recognition that the principle of prevention necessitates notification that an activity could be harmful to be provided in a timely manner, the court failed to examine how the principle could affect the interpretation in other parts of the 1975 Treaty. What is more, according to the court, this

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<sup>32</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996 (I), at 242, para. 29.

<sup>33</sup> Case Concerning Pulp Mills, *supra* note 23, at para 187.

<sup>34</sup> *Ibid*, at paras 105 and 120.

<sup>35</sup> Case Concerning the Pulp Mills, Judgment, *supra* note 23 at para. 164.

<sup>36</sup> Dire Tladi, The principles of sustainable development in the case concerning Pulp Mills on the River Uruguay in *Sustainable Development Principles In The Decisions Of International Courts And Tribunals 1992-2012* (Routledge)

important environmental principle, only concerns procedural obligations and does not play any role with substantive obligations of treaties. When digesting this statement, it is absurd to say the least, that the court did not find a (causal) link between the obligation to prevent environmental damage and obligations such as protecting and preserving the aquatic environment under Article 41.

The same goes with the precautionary principle. The Court did not shed any light on the scope and the exact application of the principle. It is regrettable how the court does not describe precaution as principle but as an “approach”.<sup>37</sup> Such formalist treatment of the principle raises the question of whether the court truly recognizes it to form part of customary international law. This is even more shocking when someone considers the views of the parties on the matter, with both states acknowledging it as a principle of law, despite their vastly diverged assessments concerning its application. So, while the court is obviously conscious of the two principles it is unwilling to integrate them into its decision, choosing not to deal with some significant environmental questions raised by the parties in the case, for example to examine whether the mills presented a risk to the ecosystem of the River Uruguay. What can be extracted from the different definitions of the precautionary principle is “that it involves a balance between benefits, costs, risks, uncertainty, foreseeability, vulnerability and resilience amongst other factors”.<sup>38</sup> When and how this balance is made has not been explained. By answering these questions, the Court could make use of its position to give some clarity to the principles and their application, contributing more widely to their recognition as fundamental elements of sustainable development law.

What is more, the court quotes the *Gabčíkovo-Nagymaros* judgment when it formulates what sustainable development means, noting that it relates to the “need to reconcile economic development with protection of the environment”. This is an unjustifiably narrow approach taken, considering the aforementioned academic, judicial and legislative developments that have taken place since *Gabčíkovo-Nagymaros*. The court once again ignored to include human rights (Social development), despite arguments raised by Argentina on the potential damage of the project on the living populations in the area. It plainly stated that Uruguay had no obligation to consult affected communities and that Uruguay did actually consult those communities.

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<sup>37</sup> *Ibid.*

<sup>38</sup> Case Concerning Pulp Mills, *supra* note 23, at 251.

Social concerns are (at least) considered in the strong separate opinion of Judge Cançado Trindade who defines sustainable development as “encompassing the fostering of economic growth, the eradication of poverty and the satisfaction of basic human needs (such as those pertaining to health, nutrition, housing, education).”<sup>39</sup> The judge is also critical of the way the court deals with the two principles of precaution and prevention, stressing that the judges did not show the same “zeal and diligence” when dealing with legal principles as they did in relation to the factual and scientific questions. This statement once more confirms the rather “fragmented” approach the ICJ takes on sustainable development, discussing it as a separate component that ought to be mentioned instead of as an essential component of its analysis. The judge stresses that both principles are general principles of international environmental law, and refers to them in various parts of its separate opinion. He further pinpoints that the two principles should have guided the Court’s interpretation of the 1975 Treaty.

On a more positive note, in relation to the obligation to prevent pollution and preserve the aquatic environment (Article 41) , the Court stresses that there is a general requirement to undertake environmental impact assessments for planned activities given that it has received so much acceptance by different states and national courts that it “now forms part of the corpus of international law”.<sup>40</sup> The Court also emphasizes that environmental impact assessments have to be undertaken before a project is implemented and that from the moment they start to operate there should be continuous monitoring of their environmental effects.<sup>41</sup> This idea of continuous environmental assessments has been the “*obiter*” in the separate opinion of Judge Weeramantry. This is a prime example of how a judge’s separate opinion in the ICJ can be adopted by later judgments and become the principle. The court’s approach on continuous environmental assessments is a step towards the right direction. Yet, when it comes to concluding its decision it simply stated that it was not convinced that an assessment of alternative sites was not performed, without giving any more details or explanations on how it reached this decision.

So despite stressing the “need to reconcile the varied interests of riparian States” and the “need to strike a balance between the use of the waters and the protection of the river consistent with the objectives of sustainable development”, the Court does little to explain how this balance

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<sup>39</sup> Case Concerning Pulp Mills, *supra* note 23, in the separate opinion of Cancado Trindade at 132.

<sup>40</sup> Dire Tladi, *Supra* note 36.

<sup>41</sup> Case Concerning Pulp Mills *supra* note 23, at 205.

should be struck and what is the significance of the principles of prevention and precaution in maintaining that balance. Thus, while the Court's decision that the requirement for environmental impact assessments forms part of customary international law is a positive and valuable input to the development of sustainable development law, it could have gone further to dictate on the quality of the environmental impact assessments by setting minimum requirements for their scope and content. It could be accordingly concluded, that the court's approach on sustainable development is very restrictive and cautious, focusing only on the procedural obligations of the 1975 Statute, overlooking the real conflict – the risk of serious environmental degradation as a result of the project activities in River Uruguay.

[Whaling in the Antarctic case \(Australia vs Japan\) – Scientific evidence and the ICJ.](#)

The most recent case of the sustainable development saga, is perhaps the *Whaling in the Antarctic* case.<sup>42</sup> The court has been especially innovative in engaging with scientific evidence. Yet, the majority's approach on the principles of sustainable development is retrospective to say the least, leaving one's apprehension of what (and what not) the Court concedes as sustainable development in a state of limbo.

*i. Background and facts*

The case concerned allegations of Australia that Japan had violated the terms of the International Convention for the Regulation of Whaling (ICRW), undertaking commercial whaling activities contrary to what was included in the convention. The language used in 1931 by the Convention aimed for the balance between economic interests in whaling and the “sustainability of the whaling industry”<sup>43</sup>, purely for having enough whales to exploit in the future, without any substantial environmental interest or concern. Later on, Australia and Japan respectively stressed conservation and sustainable exploitation as the object and purposes of the Convention [ICRW] in the light of which the provisions should be interpreted. Because of the nature and site of the contested activities, New Zealand participated in the case as an intervening non-party, with a comparatively smaller role. Yet, the court put a significant weight to the country's legal arguments, despite its restricted position in the proceedings. The

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<sup>42</sup> *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)* (Judgment), 31 March 2014, <[www.icj-cij.org/docket/files/148/18136.pdf](http://www.icj-cij.org/docket/files/148/18136.pdf)>.

<sup>43</sup> *Ibid*, at para 43.

judgment was much centered on Article VIII (1) of the Convention which stated:

*“Notwithstanding anything contained in this Convention any Contracting Government may grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research, subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit, and the killing, taking and treating of whales in accordance with the provisions of this Article shall be exempt from the operation of this Convention”.*<sup>44</sup>

*ii. Judgment and Analysis*

The challenging exercise for the court was the interpretation of the phrase “scientific research”. On the one hand, as a term in a treaty, according to public international law it followed that the right approach should be the rules of treaty interpretation according to the VCLT,<sup>45</sup> an argument raised by Japan.<sup>46</sup> On the other hand, the meaning of the phrase, could be a more appropriate exercise for scientific experts to define, which was Australia’s argument.<sup>47</sup> In interpreting the scientific purpose of the research, the court was not persuaded to follow the latter’s arguments. It held that, contrary to claims raised by Australia, it was not an essential requirement that whales are killed for scientific purposes solely where a non-lethal method of undertaking the research is not accessible.<sup>48</sup> However, after examining scientific and non-scientific information that was given by Japan, the court found that “the evidence does not establish that the program’s design and implementation are reasonable in relation to achieving its stated objectives . . . the special permits granted by Japan for the killing, taking and treating of whales in connection with JARPA II are not for purposes of scientific research”.<sup>49</sup> What is more, the court further accepted Australia’s submission that Japan’s grant of commercial fishing in sanctuary territories violated other terms of the Convention.<sup>50</sup>

In contrast to its earliest judgments, which were (almost entirely) relying to the arguments of

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<sup>44</sup> International Convention for the Regulation of Whaling (opened for signature 2 December 1946, entered into force on 10 November 1948) [Convention]. art VIII (1).

<sup>45</sup> United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <https://www.refworld.org/docid/3ae6b3a10.html> [accessed 19 May 2019]

<sup>46</sup> *Whaling in the Antarctic*, *supra* note 42 at 74.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid* at para 224.

<sup>49</sup> *Ibid* at para 227.

<sup>50</sup> *Ibid*, at para 233.

the parties before it, this time, the ICJ significantly engaged with the scientific evidence put by the two parties' expert witnesses. The court did not appoint its own experts, it relied on the expert evidence by the two sides, and reached its own conclusions after cross-examining them. This shift in the court's approach raises significant questions; does such reliance effectively assist the court in adopting a "just" decision? Is the role of a judge as an adjudicator undermined by a heavier consideration of such evidence?

On the one hand it is very difficult to presume that a judge has all the knowledge required in matters of science. On the other hand, the role of experts should only be to shed light on some of the facts, but by no means overshadow the judge's role of applying principles and rules of international law. As Mbengue explains, the international adjudicator is facing a "time of [scientific] perplexity" and "postmodern [factual] anxieties."<sup>51</sup> These concerns are also reflected in the separate and dissenting opinions of the Court, where judges stressed that it should not be appropriate for them to decide whether research is qualified as "scientific",<sup>52</sup> an exercise that "befits scientists, not jurists".<sup>53</sup>

While stressing the importance of cooperation, the court did not find that Japan violated the requirements in Paragraph 30 and its procedural obligations. Also, the majority did not discuss directly neither the *Gabčíkovo-Nagymaros* case, nor the principles that it raised, later recognized in *Pulp Mills* i.e. the principle of prevention and the principle of precaution. It is difficult to reconcile why the court did not integrate these principles in its analysis of the ICRW Convention, especially when both parties addressed them in their memorials and arguments that were submitted in front of the court. Not only did the court fail to define sustainable development, its scope and application in the Convention, but also this retrospective approach towards environmental principles, once again distorts one's understanding of their standing in modern international law and practice.

In his separate opinion, Judge Cançado Trindade, explicitly refers to environmental principles, acknowledging their role in analyzing cases such as the *Whaling in the Antarctic* which concerned endangered activities, stressing that the issues involved in the case will have direct

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<sup>51</sup> Martti Koskeniemi & Päivi Leino, *Fragmentation of International Law?: Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553, 553 (2005).

<sup>52</sup> M. M. Mbengue, 'Scientific Fact-Finding By International Courts And Tribunals' (2012) 3 Journal of International Dispute Settlement. at page 79; Thomas M. Franck, *Epistemology at a Time of Perplexity*, 13 EUR. J. INT'L L. 1025, 1025 (2002).

<sup>53</sup> *Whaling in the Antarctic* (Dissenting Opinion of Judge Yusuf) (no 42) para 44.

consequences on future generations.<sup>54</sup> He additionally addressed the principles of precaution and prevention, stating that the former “marks a noticeable presence in the interpretation and application of treaties and instruments of international environmental law”.<sup>55</sup> Judge Ad Hoc Charlesworth held a similar view, stressing that the precautionary principle enables the court to contemplate “the interpretation of treaty obligations in light of new approaches to environmental protection”.<sup>56</sup>

Following the above, it could be argued that the ICJ’s approach in *Whaling in the Antarctic* “may well turn to be a new en vogue structure of legal discourses”.<sup>57</sup> The court’s innovative approach to extensively consider scientific evidence (risking to give a scientific assessment of what has happened instead of giving a legal ruling), is an oxymoron to its very restrictive approach when it comes to sustainable development, evading to explicitly make reference to it and its principles when interpreting the Convention. This hesitation of the ICJ to “pronounce and dwell upon”<sup>58</sup> sustainable development, and its emerging easiness to rely on experts might mean that the ICJ does not find itself equipped enough to deal with complex environmental matters. In other words, the judgment could be seen as an acknowledgment of judges’ limitations as legal professionals and the often imperfect answers they could give to questions of science.

### Costa Rica v Nicaragua – The first ICJ environmental compensation case

This is another important case giving rise to significant questions in regards to a State’s procedural and substantive obligations under international environmental law. More specifically the ICJ emphasized the strong intertwinement between the obligations of due diligence, undertaking an environmental impact assessment and notifying the appropriate stakeholders involved. The court also made reference to the significance of scientific evidence in resolving environmental disputes.

#### *i. Background and facts*

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<sup>54</sup> *Ibid*, (Separate Opinion of Judge Cançado Trindade).

<sup>55</sup> *Ibid*, at para 71.

<sup>56</sup> Separate Opinion of Judge Ad Hoc Charlesworth, *Whaling in the Antarctic* (Australia v Japan: New Zealand Intervening), para 7.

<sup>57</sup> Jean d’Aspremont, ‘The International Court Of Justice, The Whales, And The Blurring Of The Lines Between Sources And Interpretation’ (2016) 27 *European Journal of International Law* at page 1041.

<sup>58</sup> Separate Opinion of Judge Cançado Trindade, *Whaling in the Antarctic* (Australia v Japan: New Zealand Intervening), at para 71.

A dispute arose between the two States following their activities in the San Juan River area. On November 2010, Costa Rica commenced proceedings against Nicaragua in the case concerning *Certain Activities carried out by Nicaragua in the Border Area*. (Costa Rica v Nicaragua). The claimant State built its arguments on Article XXXI of the Pact of Bogotá,<sup>59</sup> and Article 36.2 of the ICJ Statute.<sup>60</sup> One year later, Nicaragua also instituted proceedings against Costa Rica concerning the *Construction of a Road in Costa Rica on the San Juan River*. (Nicaragua v Costa Rica).

Costa Rica's asked for the ICJ to "adjudge and declare that Nicaragua is in breach of its international obligations . . . as regards the incursion into and occupation of Costa Rican territory, the serious damage inflicted to its protected rainforests and wetlands, and the damage intended to the Colorado River, wetlands and protected ecosystems, as well as the dredging and canalization activities being carried out by Nicaragua on the San Juan River"<sup>61</sup> Nicaragua argued that all of the accused activities were taken in its own territory and did not cause or put at risk of harm the claimant State. It further emphasized that for the hazards consequent to its activities, such as in regards to the fallen trees, it would take steps to re-plant ten trees for every one that fell. After two separate orders in April 2013 the ICJ joined the proceedings of the two cases and carried out its judgment on 16 December 2015.

In the joined cases, the Court held that Costa Rica had sovereignty over the disputed territory and that Nicaragua should compensate Costa Rica for committing material damage to the environment following its prohibited activities on the disputed territory. If the parties failed to agree on the amount of compensation within twelve months of the judgment, compensation would be settled by the ICJ.<sup>62</sup> As the parties failed to reach an agreement within the given time period, Costa Rica requested the ICJ to decide on the matter. The Court delivered its Judgment on 2 February 2018. The Court's decision that damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law is a positive step towards safeguarding the environment.

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<sup>59</sup> American Treaty on Pacific Settlement (Bogota, 30 April 1948; in force 6 May 1949).

<sup>60</sup> Statute of the International Court of Justice (San Francisco, 26 June 1945; in force 24 October 1945) ('ICJ Statute').

<sup>61</sup> Application of the Republic of Costa Rica Instituting Proceedings, 2, at 26. Available at: <<http://www.icj-cij.org/docket/files/150/16279.pdf>> accessed 28 April 2019.

<sup>62</sup> Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 ICJ Rep. 665 (Dec. 16) at 149.

For the first time, the ICJ had awarded compensation for environmental damage, and it is only the third time in ICJ history that compensation was awarded. However, the court's analysis leaves much to be desired. While the paper will mostly be concerned with the court's analysis of the obligation to undertake environmental assessments and the substantive obligations they hold in regards to trans-boundary harm, an overview of the Court's methodology in finding the appropriate compensation will also be made briefly as the court's approach interlaces with how it deals with sustainable development issues and principles.

*ii. Judgment and Analysis*

In its judgment, the court examined in detail the procedural obligations that arise under international environmental law, and made important references to sustainable development principles such as those associating with the ones found in the New Delhi Declaration 2002.<sup>63</sup> Also, despite not expressly making reference to the precautionary approach, it examines in some detail some important elements of the principle of precaution and their relationship, namely the obligation to exercise due diligence, an environmental impact assessment and the obligation to notify.

Principle 1 of the New Delhi Declaration calls for the duty of States to ensure the sustainable use of natural resources and specifically that "all States have the sovereign right to manage their own natural resources pursuant to their own environmental and developmental policies, and responsibility to ensure that activities within their jurisdiction or control do not cause significant damage to the environment of other States or of areas beyond the limits of national jurisdiction".<sup>64</sup> The Court's reasoning reflects this principle when stressing the obligations Costa Rica holds under the Ramsar Convention<sup>65</sup>. The ICJ emphasizes that "pending delivery of the judgment on the merits, Costa Rica must be in a position to avoid irreparable prejudice being caused to the part of that wetland where that territory is situated" and "for that purpose Costa Rica must be able to dispatch civilian personnel charged with the protection of the environment to the said territory".<sup>66</sup>

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<sup>63</sup> New Delhi Declaration of Principles of International Law Relating to Sustainable Development, Resolution 3/2002. Available at: <<http://www.ila-hq.org/en/committees/index.cfm/cid/25>> accessed 29 March 2019 [New Delhi Declaration].

<sup>64</sup> Ibid, principle 1.1

<sup>65</sup> Decision of ICJ on the request for the indication of provisional measures submitted by Costa Rica in the case concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*. Available at: <<http://www.icj.org/docket/files/150/16324.pdf>> accessed 24 March 2015 [*Costa Rica v Nicaragua*] at para 80.

<sup>66</sup> Ibid.

Furthermore, the Court, accepting Costa Rica's request for provisional measures, opined that both countries should refrain from sending or maintaining any personnel to the contested area, acknowledging that Nicaragua's activities on the San Juan River inflicted environmental degradation in the area. This could be argued to reflect the principles of precaution and prevention, previously developed by the ICJ and recognized as a principle of customary international environmental law. Reference to the precautionary principle can also be found in principle 4 of the New Delhi Declaration which states that "a precautionary approach is central to sustainable development in that it commits States, international organizations and the civil society, particularly the scientific and business communities, to avoid human activity which may cause significant harm to human health, natural resources or ecosystems, including in the light of scientific uncertainty".<sup>67</sup> In particular the court states a provisional measure is justified so as "to prevent the aggravation and/or extension of the dispute".

One of the fundamental elements in applying a precautionary approach is the obligation to undertake environmental impact assessments and is widely discussed in the judgment. However, the court reaches a different conclusion when examining the two cases. In *Costa Rica v Nicaragua* the ICJ stated on the subject that a State, "to fulfil its obligation to exercise due diligence in preventing significant transboundary environmental harm ... must, before embarking on an activity having the potential adversely to affect the environment of another State, ascertain if there is a risk of significant transboundary harm, which would trigger the requirement to carry out an environmental impact assessment".<sup>68</sup> The Court, after examining experts' evidence it held that the dredging program carried out by Nicaragua was not capable of imposing a risk of significant transboundary harm to the river. It thus concluded that, Nicaragua was not obliged to carry out an environmental impact assessment.

In *Nicaragua vs Costa Rica*, after recalling the need a State holds to employ due diligence in averting significant transboundary harm; if there is such risk of such harm, there is an obligation to undertake an environmental impact assessment. Based on the evidence in front of it, the court held that Costa Rica failed to provide of any concrete evidence that it exercised a preliminary assessment of the risks posed by the road project.<sup>69</sup> The diagnostic assessments

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<sup>67</sup> New Delhi Declaration, *supra* 63, principle 4.

<sup>68</sup> *Costa Rica v. Nicaragua/Nicaragua v. Costa Rica*, *Supra* note 62 above, at paragraph 104.

<sup>69</sup> *Ibid*, at paragraph 153.

presented by Costa Rica were mostly “post hoc assessments of the environmental impact of the stretches of the road that had already been built”.<sup>70</sup> It further stressed that there was not any urgent justification for constructing the road right away and for not undertaking an environmental impact assessment before beginning the construction. To enhance its reasoning, the court made reference to the *Pulp Mills* case, which called for “an *ex ante* evaluation of the risk of the transboundary harm” which is done by conducting an environmental impact assessment “prior to the implementation of a project”.<sup>71</sup>

The court, via associating the obligation to exercise due diligence and that of carrying an environmental impact assessment, it treats them (a) as two interlinked concepts, and (b) as subsets of the (same) more general obligation / principle to take a precautionary approach towards the environment. This intertwining between the two is reflected in the words of Judge Owada; “To summarize, conducting an environmental impact assessment is one important constituent element of the process that emanates from the international obligation of States to act in due diligence to avoid or mitigate significant transboundary harm, rather than a separate and independent obligation standing on its own under general international law”.<sup>72</sup>

However, it is unfortunate that the court did not really talk about the principle of precaution more expressly in the case. While a valid supposition, the above is still an assumption of how the court’s reasoning indirectly connotes the importance of applying the principle. It is even more unfortunate that the court’s formed approach on the relationship between due diligence and environmental assessments lacks any backing by state practice. Also, the court’s approach in *Costa Rica v Nicaragua*, treats, contrary to the above approach, the obligation to apply due diligence as a prerequisite to undertaking an environmental impact assessment, which makes them two mutually exclusive elements. This argument is supported by the dissenting opinion of Judge ad hoc Dugard, who stressed that the obligation to undertake an environmental impact assessment “is not an obligation dependent on the obligation of a State to exercise due diligence in preventing significant transboundary harm. Due diligence is the standard of conduct that the State must show at all times to prevent significant transboundary harm, including the decision to conduct an environmental impact assessment, the carrying out of the environmental impact

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<sup>70</sup> Yoshifumi Tanaka, 'Costa Rica V. Nicaragua And Nicaragua V. Costa Rica: Some Reflections On The Obligation To Conduct An Environmental Impact Assessment' (2017) 26 Review of European, Comparative & International Environmental Law at page 94.

<sup>71</sup> *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), [2010] ICJ Rep. 14 ('Pulp Mills').

<sup>72</sup> *Costa Rica v Nicaragua*, Separate Opinion of Judge Owada, at para 18. <https://www.icj-cij.org/files/case-related/150/18852.pdf>

assessment and the continued monitoring of the activity in question”.<sup>73</sup>

Thus, despite the strong references made on the relationship between due diligence and environmental impact assessment obligations, an uncertainty remains on how that relationship is determined, especially because of the lack of *opinio juris* in the judgment of the court. What is more, according to the ICJ, a State must (a) determine whether there is a risk of significant transboundary harm that would (b) oblige a state to undertake an environmental impact assessment. So, if first requirement not fulfilled there is no need to perform the impact assessment at all as ruled in *Costa Rica v Nicaragua*. But again, how this “significant” transboundary harm is found is not made very clear by the court, and it is arguably subject to the discretion of the judges hearing the case, whether that threshold is met.

Another procedural matter the ICJ examined in line with the requirements of undertaking an environmental assessment is the obligation to notify. The court specifically stated that “If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk”.<sup>74</sup> The construction of the court’s reasoning initially suggests that only when an environmental impact assessment proves that there is risk of significant transboundary harm an obligation to notify arises. Again, the court fails to give support to this argument from State Practice or *opinio juris*, discounting it from any solid legal source. Judge Donoghue precisely questions this very formulation, suggesting that there might be other instances that could call for notification, for example when cooperation from an outside State is needed to determine the transboundary harm; in that occasion, obligation to notify comes hand-in-hand with the obligations to carry due diligence and the environmental assessment. It is thus unfortunate that the precise moment calling for a State to notify has not been clearly determined by the court.

As a last note, an overview of the legal framework applicable to the dispute must be given. Costa Rica asked the court to declare and adjudge that Nicaragua acted contrary to international treaties and conventions. These include, (among others) the Ramsar Convention on Wetlands<sup>75</sup>

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<sup>73</sup> *Costa Rica v. Nicaragua/Nicaragua v. Costa Rica*, supra no 65, Separate Opinion of Judge ad hoc Dugard, at paragraph 9; <https://www.icj-cij.org/files/case-related/150/18868.pdf>

<sup>74</sup> *Costa Rica v. Nicaragua/Nicaragua v. Costa Rica*, supra note 65, at paragraph 104.

<sup>75</sup> Ramsar Convention on Wetlands 996 UNTS 245; TIAS 11084; 11 ILM 963 (1972)

and the Treaty, the 1858 Treaty of Limits between Costa Rica and Nicaragua and the Arbitral Award made by President Cleveland in 1888. What is more the Central America region which comprises of the two States has signed and ratified various conventions relating to sustainable development and the environment. Examples include the Convention on Priority Protected Areas and Biodiversity Conservation in Central America<sup>76</sup> and the American Convention on Climate Change.<sup>77</sup>

The above Conventions acknowledge important sustainable development principles including the obligation to inform and consult in good faith, for example, as found in Article 4 of the Convention on Biological Diversity. Subsection 14(c) of the document precisely writes that any contracting party shall “Promote, on the basis of reciprocity, notification, exchange of information and consultation on activities under their jurisdiction or control which are likely to significantly affect adversely the biological diversity of other States or areas beyond the limits of national jurisdiction, by encouraging the conclusion of bilateral, regional or multilateral arrangements, as appropriate”.<sup>78</sup> What is more, both States had ratified the Central American Protected Areas Convention. This treaty stresses the significance of border strips in protecting natural resources by signifying that the conservation of habitats and biodiversity in boundary waters necessitates the willingness of all, including external support at regional and global levels. It further urges States to undertake all possible measures to maintain the conservation of biodiversity and its sustainable use and development.

In relation to any possible breaches of parties to their treaty obligations, the court considered the obligations of the parties in relation to the Ramsar Convention, and specifically Articles 3.2 and 5. In relation to the former, the court found that Nicaragua’s activities did not produce a change in “the ecological character” of the wetland. Concerning Article 5, which requires for parties to consult on implementing obligations arising from the Convention, the court found that the provision did not create an obligation for Nicaragua to consult Costa Rica on its dredging program on the river.

Moving on, the court went to examine whether any of the two States failed to meet their

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<sup>76</sup> Convention for the Conservation of the Biodiversity and the Protection of Priority Wilderness Areas in Central America, entered into force December 24 1994 [www.sica.int/ccad/convenios.aspx?IdEnt=2](http://www.sica.int/ccad/convenios.aspx?IdEnt=2).

<sup>77</sup> Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 19 August 2019].

<sup>78</sup> Convention on Biological Diversity Article 14(c)

substantial obligations as a result of causing transboundary harm to the river from their activities. The two sides presented detailed scientific evidence to justify their arguments. As already stated, the review of scientific evidence is a particularly difficult exercise for the Court, which has in front of it highly technical and conflicting information. And despite that Article 50 of the ICJ dictating that “the Court may, at any time, entrust any individual, body, bureau, commission, or other organization that it may select, with the task of carrying out an enquiry or giving an expert opinion”,<sup>79</sup> the ICJ failed to make use of it. For both sides, the court’s approach was that there was no need to refer or assess in detail the scientific validity of what was presented by their experts. In *Costa Rica v Nicaragua*, it stated that Costa Rica failed to give evidence of a causal link of Nicaragua’s dredging activities and the effects on the claimant’s part of the river.

In *Nicaragua v Costa Rica*, it also dismissed the former’s claim that the construction of the road by Costa Rica could cause significant harm to Nicaragua. It provided that the “amount of sediment in the river due to the construction of the road represents at most 2 per cent of the river’s total load, according to Costa Rica’s calculations based on the figures provided by Nicaragua’s experts and uncontested by the latter”.<sup>80</sup> By taking into consideration this percentage among other factors, the ICJ concluded that there was no proof of that having effect to the navigation or morphology of the river to conclude that there was significant transboundary harm.<sup>81</sup> Once again, the court does little to explain what would constitute a significant harm. Some light could be shed when looking at the report of the ILC articles on Prevention of Transboundary Harm and Hazardous Activities. According to that, significant is something more than “detectable” but must not be at the level of “serious” or “substantial”,<sup>82</sup> and it is determined mostly by factual rather than legal considerations.<sup>83</sup> While it is beyond the purposes of this essay to assess whether the ICJ was right in what it concluded on this matter, it should be noted that, given the increasing environmental issues that arise and in order to maintain the validity of its rational and authority, the court should seriously consider its option to appoint experts in the future.

### *iii. Environmental compensation*

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<sup>79</sup> Statute of the International Court of Justice (San Francisco, 26 June 1945; in force 24 October 1945) Article 50.

<sup>80</sup> *Costa Rica v. Nicaragua/Nicaragua v. Costa Rica*, supra no 65, at paragraph 186.

<sup>81</sup> *Ibid* at paragraphs 203-207.

<sup>82</sup> Report of the International Law Commission on the work of its fifty-third session

YB Intl L Commission (2001) -[http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_2001\\_v2\\_p2.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf)

<sup>83</sup> *Ibid*.

In the 2018 judgment on compensation, the court for the first time explicitly acknowledged the environment to be itself remunerative under international law. This recognition could create opportunities for (previously hesitant States) to bring in the forefront environmental claims as their main line of arguments, rather as secondary factors to be taken into consideration behind other public law violations. For example, in the current case, apart from international environmental law violations there were allegations brought by Costa Rica concerning the sovereignty over the contested territory, compliance with provisional measures, alleged breaches of treaty obligations and reparation claims. In this respect, the position taken by the ICJ to compensate environmental harm is to be welcomed. However, the court's analysis lacks merit in several aspects. With the increasing environmental and sustainable development claims coming in front of international tribunals and courts, the ICJ could have made better use of this opportunity to provide some more material guidance on how to value environmental damage.

In their respective arguments on what the appropriate environmental damage should be, the parties presented very different methodologies. Costa Rica suggested an “ecosystem services approach,”<sup>84</sup> which is to be valued by taking into account goods and services which have “a direct value” such as timber or coal, but also goods and services which have an “indirect value” (cannot be traded on the market), such as flood prevention or the planting of trees. Nicaragua suggested that the appropriate valuation should be made via a “replacement costs approach”,<sup>85</sup> amounting to “the cost of preserving an equivalent area while the affected area recovers”.<sup>86</sup> As a result of these differing methodologies, the parties came to considerably different conclusions as to the appropriate amount of compensation. Costa Rica estimated that environmental damages should be approximately \$6.711 million while Nicaragua estimated an amount of \$188,504.

While the approaches put forward by both parties had precedents, the Court stressed that there was also precedent for other methods of calculating compensation. It thus stated that it would not choose between the two methodologies set out by the parties, but rather wherever “certain

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<sup>84</sup> ICJ Renders First Environmental Compensation Decision: A Summary of the Judgment, <https://www.iucn.org/news/world-commission-environmental-law/201804/icj-renders-first-environmental-compensation-decision-summary-judgment>

<sup>85</sup> Ibid.

<sup>86</sup> Jason Rudall, 'Certain Activities Carried Out By Nicaragua In The Border Area (Costa Rica V. Nicaragua)' (2018) 112 American Journal of International Law at page 292.

elements of either method offer a reasonable basis for valuation, the Court [would] nonetheless take them into account”.<sup>87</sup> The Court chose to apply an “overall valuation approach”, based on an overall evaluation of the impairment or loss of environmental goods and services instead of calculating particular categories of environmental goods and services. After identifying the existence and extent of the damage to environmental goods and services caused by Nicaragua’s wrongful activities, the court subsequently went on to evaluate the existence of a direct and certain causal link between such damage and Nicaragua’s activities. This amounted to US\$378,890.59 (including pre-judgment interest) to be paid by Nicaragua to Costa Rica by 2 April 2018.

In its reasoning, the Court made reference to the *Charzów* formula which requires for “an obligation to make reparation in an adequate form” i.e. to put the damaged party in the position it was before the act happened (as if the wrongdoing never occurred).<sup>88</sup> It also concluded that its methodology was the most fitting in light of the particular characteristics of the area in question. Yet, the Court did not really justify why its chosen approach was the most appropriate, or rather, why other approaches would not be suitable; it did not elaborate on the details of “the overall valuation” method, except that it “can account for the correlation between the removal of the trees and the harm caused to other environmental goods and services” and that it “is dictated by the specific characteristics of the area affected by the activities of Nicaragua”.<sup>89</sup> Lacking any reasoning behind how the approach accomplishes these objectives, it does not provide for any solid guidelines to be applied by coming cases in the future.

Lastly, as also stated above the Court takes a backward approach to the one it developed in its previous judgments on the subject of consulting experts to assess environmental damage. In both *Whaling in the Antarctic* and *Pulp Mills*, seeking advice from experts has been endorsed by the ICJ. In the later case, the Dissenting Opinion of Judge Simma stressed the importance of consulting experts where a case involves complicated scientific facts. Article 50 of the Statute of the ICJ allows the court to seek such guidance. What is more, despite the third case where the ICJ has awarded interstate compensation, it is the only one where the court did not appoint its own experts to assess the appropriate amount of compensation. Other international

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<sup>87</sup> Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) ICJ, 2 February 2018 at para 52.

<sup>88</sup> Factory at Chorzów, Jurisdiction, Judgment, 1927 PCIJ (ser. A) No. 9, at 21 (July 27).

<sup>89</sup> Costa Rica v. Nicaragua/Nicaragua v. Costa Rica, supra no 65 at paras 79-81.

tribunals such as ICSID in *Perrenco v Ecuador*<sup>90</sup>, acknowledging the difficulty in evaluating compensation and the testimonies of parties, have appointed their own impartial environmental experts to assist with their task.

The amount awarded by the Court constituted around 5% of the Costa Rica's original claim. Whether the Court's approach was justified is difficult to say, primarily because of the opacity in its methodology. The court's hesitation to rely on experts is clear in the judgment. In any case, the court's acknowledgment that environmental damage itself is entitled to compensation should be welcomed as a positive step forward, and it should be hoped that the court will make better use of its position in the next environmental dispute that is to come, to give some more clarity on how to make valuations on environmental damage.

### Final remarks

There is no doubt that the ICJ has contributed in defining and developing sustainable development law. In the *Gabcikovo-Nagymaros* case the court's willingness to stress the importance of environmental due diligence such as environmental impact assessments marked the beginning of coupling environmental law along treaty interpretation, despite highlighting that the later would trump in cases of conflict. In *Pulp Mills*, the court acknowledged sustainable development as a norm of customary international law, explicitly referring to principle of prevention and principle of precaution, as well as developing its jurisprudence on the importance of continuing environmental assessments. Yet, it was obvious that the court could have seized the opportunity to clarify and elaborate further on the application and legal status of the aforementioned principles.

In *Whaling in the Antarctic*, the majority has been reluctant to include sustainable development language in the text of the decision, adopting a backward approach in comparison to its language in the two preceding cases. Lastly, *Costa Rica v Nicaragua* case marked the first time where the ICJ has decided an environmental compensation case. It is however unfortunate that the Court remained unclear on the reasons behind its "overall valuation approach" choice and how it arrived at its final compensation award.

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<sup>90</sup> *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/08/6, Interim Decision on the Environmental Counterclaim (Aug. 11, 2015).

It is hoped that the ICJ in a future case will be more active and take advantage of its role as an influencer and developing body of international law, and engage more explicitly with sustainable development principles. The court should take into account the sustainable development language that itself has developed more explicitly in the textual analysis of its decisions and not only when it is absolutely necessary to do so. The author can not stress enough, the fundamental role that the *opinio juris* in the separate opinions of the judges in the cases above should play, which must be closely examined for the future advancements of international environmental law and sustainable development.

## CHAPTER 2 - ITLOS JURISPRUDENCE

This chapter will now examine the effect of the International Tribunal for the Law of the Sea on the evolution of sustainable development. ITLOS has developed a significant volume of jurisprudence on environmental issues affecting the oceans. And while sustainable development is not expressly mentioned, a lot of the issues touched by this international body have given some light on the importance that humanity should put in this area of the law. In fact if one takes a closer look to the provisions of the 1982 United Nations Convention on the Law of the Sea<sup>91</sup> (LOSC), especially Part XII, references to sustainability notions can be found such as the need for an “equitable and efficient utilization” of the resources of the ocean or the “economic and social advancement of all peoples of the world”.<sup>92</sup> The convention is one of the most significant multilateral environmental agreements concluded, and its provisions have had a considerable impact on the practice of States and international organisations. It is also worth stressing that LOSC was actually concluded 5 years before the term “sustainable development” was included “in the lexicon” under the 1987 report of the World Commission on Environment and Development.<sup>93</sup> In other words, the ITLOS has made a significant contribution to environmental law via establishing a well-defined jurisdictional framework for the adoption and enforcement of national measures to protect the marine environment.

ITLOS has two key functions; the peaceful settlement of disputes in regards to the interpretation and application of LOSC and the clarification and development of international law. Over the years, the tribunal had the opportunity to address important disputes touching on issues of sustainable development. It must be mentioned from the outset that while the Tribunal was established by the Convention as a new standing court<sup>94</sup> it is not the one and only court competent to handle disputes on the interpretation and application of the LOSC. States have the option to choose other settlement mechanisms to peacefully solve their disputes according to Article 281 paragraph 1 of the convention – including the ICJ, Annex VII arbitral tribunals and Annex VIII special arbitral tribunals. Over the years 27 cases have been submitted to the

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<sup>91</sup> United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994).

<sup>92</sup> Ibid, Part XII.

<sup>93</sup> Brundtland Commission, World Commission on Environment and Development, *Our Common Future* (1987).

<sup>94</sup> Article 1, paragraph 1, of Annex VI to the Convention provides that “[t]he International Tribunal for the Law of the Sea is constituted and shall function in accordance with the provisions of this Convention and this Statute.”

tribunal covering a vast range of topics. The essay will focus on two different groups of cases; the first involving provisional measures cases and the second considering advisory jurisdiction the tribunal has given on issues of sustainability.

### Provisional measures cases

Article 290 of the LOSC enables interim orders in order to “preserve the respective rights of the parties to the dispute or to prevent serious harm to the maritime environment, pending final decision”.<sup>95</sup> This demonstrates how the very purpose of provisional measures is to act as precautionary means to avoid damaging the oceans. One could thus draw parallels with the principle of precaution developed by the ICJ in its attempt to enhance sustainable development objectives. Three cases will be examined here – and despite that the tribunal refused to proceed to the merits in all three cases, there is an evident willingness to take a precautionary approach in order to ensure the avoidance of maritime environment from severe future damage.

#### *i. The Southern Bluefin Tuna case*<sup>96</sup>

From all the cases where the precautionary principle was attempted to be argued in front of the ITLOS, the *Southern Bluefin Tuna* is perhaps the one where the tribunal reaches closer to the application of the principle. The case concerned a dispute arising over the sustainable management of stocks of southern Bluefin tuna fish, listed in Annex I United Nations Convention on the Law of the Sea as a highly migratory species, migrating via the EEZs of different countries and across the high seas. Australia and New Zealand sought provisional measures against an increase in tuna fishing by Japan in the Southern Ocean which was operating a large-scale “experimental fishing program”. Pending for the establishment of an arbitral tribunal to settle the dispute, Australia and New Zealand requested the ITLOS for provisional measures ordering Japan to stop its experimental program. The two states went further to argue for substantial issues, alleging that Japan failed to comply with LOSC provisions such as the duty “to cooperate ... in the conservation and management of living resources of the high seas” under Article 118.<sup>97</sup>

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<sup>95</sup> Convention on the Law of the Sea, *supra* note 91.

<sup>96</sup> *Southern Bluefin Tuna (New Zealand v Japan; Australia v Japan)* (provisional measures) (1999) 117 ILR 148, (1999) 38 ILM 1624.

<sup>97</sup> United Nations Convention on the Law of the Sea, *supra* note 91, Article 118.

While it refused to proceed and examine the case on the merits, ITLOS, by eighteen votes to four agreed with Australia and New Zealand that the catches of the species must be stabilized at the level suggested by the Commission for the Conservation of Southern Bluefin Tuna<sup>98</sup> and with twenty votes against two that Japan must suspend its experimental fishing program. The tribunal acknowledged the obligation that State parties hold in conserving the living resources of the sea as this is “an element in the protection and preservation of maritime environment”.<sup>99</sup> Without expressly using the term “precaution”, the Tribunal’s reasoning comes close to that of the precautionary approach as developed by the ICJ.<sup>100</sup> It stressed that the parties should “act with prudence and caution in order to ensure that effective conservation measures are taken”.<sup>101</sup> The Tribunal made a link between the provisions of the LOSC to protect and preserve the maritime environment and those concerning the conservation and sustainable management of fisheries. What is more, while the Tribunal was hesitant to conclude the scientific evidence presented by the parties, it found that in any case “measures should be taken as a matter of urgency... to avert further deterioration of the southern Bluefin tuna stock”.<sup>102</sup>

It thus follows that a precautionary approach (in this case recognizing the uncertainties and ecological hazards that could occur from Japan’s future activities) is inherent in the very notion of provisional measures. Taking this a step further, it could be interpreted that the Convention should (always) be interpreted by taking into account the precautionary principle itself. It could be thus argued, that similarly to the ICJ, and despite its hesitation to express this directly, the tribunal contributes in easing the way for the principle of precaution to become a rule of customary international law. The awarding of a customary status to precaution is already reflected in the comments of various writers and authors and in the words of the ILC Special Rapporteur on transboundary harm, who argued that the precautionary principle is already a component of customary rules on prevention of harm and environmental impact assessment, “and could not be divorced therefrom”.<sup>103</sup>

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<sup>98</sup> Convention for the Conservation of Southern Bluefin Tuna, 1819 UNTS 360; 1994 ATS No. 16 (entered into force on 20 May 1994)

<sup>99</sup> *Southern Bluefin Tuna*, *supra* note 96 at [70].

<sup>100</sup> Tullio Treves, “The Settlement of Disputes concerning the Protection of the Marine Environment and the Exploitation of the Marine Resources: The Practice of ITLOS” Marta Chantal Ribiero (ed.), 30 Years after the Signature of the United Nations Convention of the Law of the Sea: The Protection of the Environment and the Future of the Law of the Sea, Coimbra Editora, 2014.

<sup>101</sup> *Southern Bluefin Tuna*, *supra* note 96 at [77].

<sup>102</sup> *Ibid* at para [80].

<sup>103</sup> ILC, ‘Report of the International Law Commission on the work of its 52nd Session’ (1 May to 9 June and 10 July to 18 August 2000) UN Doc A/55/10 (2000) para. 716.

ii. *MOX Plant case*<sup>104</sup>

The MOX Plant was established by the United Kingdom in Shellfield, Cumbria in the Irish Sea to produce mixed oxide (MOX) fuels. Once the plant begun to operate, Ireland developed concerns on the safety and protection of their territory, especially from the emission of radioactive materials and pollution of the marine environment. It thus brought claims in front of different dispute settlement forums including the LOSC where it argued that the UK failed to take the appropriate measures under LOSC to prevent, reduce and control the pollution of the marine environment by failing to conduct a fitting environmental impact assessment.

The applicant claimed that “the precautionary principle places the burden on the United Kingdom to demonstrate that no harm would arise from discharges and other consequences of the operation of the MOX plant, should it proceed, and that this principle might usefully inform the assessment by the Tribunal of the urgency of the measures it is required to take in respect of the operation of the MOX plant”.<sup>105</sup> The Tribunal reiterated its wordings in *Southern Bluefin Tuna* on the importance of “prudence and caution” that must be paid by the two sides in relation to the marine environment, encouraging them to share information concerning the risks and effects of the plant, “devising ways to deal with them as appropriate”.<sup>106</sup> It could be argued that in this way, the tribunal includes the obligation to cooperate, as an inherent element of ensuring “prudence and caution”, rather than as a separate component that has to be satisfied.

However, the tribunal concluded that the situation did not require a restraining order to prevent the United Kingdom from taking further steps in its plans to instruct a new nuclear processing plant. It found that there was not any evidence to indicate that the alleged activities would have any apparent environmental impact until period that the merits of the were to be heard at the Annex VII tribunal. As a provisional measure, the tribunal ruled *inter alia* that “Ireland and the United Kingdom shall cooperate and shall, for this purpose, enter into consultations forthwith in order to ... monitor risks or the effects of the operation of the MOX plant for the Irish Sea”.<sup>107</sup>

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<sup>104</sup> *MOX Plant (Ireland v United Kingdom)* provisional measures (2002) 41 ILM 405.

<sup>105</sup> *Ibid.*, at 108–109, para. 71.

<sup>106</sup> *Ibid.*, at 110, para. 84.

<sup>107</sup> *Ibid.*, at 110–111, para. 89.

iii. *Straits of Johor case*<sup>108</sup>

Claims on the applicability of the precautionary principle were also made in the case concerning Land Reclamation in and around the Straits of Johor, a narrow international strait separating Singapore from Malaysia. Malaysia initiated proceedings to for the institution of an Annex VII arbitral tribunal which would identify the maritime boundary between the two parties, requesting it to further rule that Singapore failed to comply with its LOSC obligations to preserve the marine environment. Malaysia tried to raise “precautionary principle arguments”, by stressing that “Singapore has placed itself in breach of its obligations under international law”, involving “the precautionary principle, which under international law must direct any party in the application and implementation of these obligations”.<sup>109</sup> Singapore on the other hand stated that there was “no room for applying the precautionary principle for the prescription of provisional measures”. The tribunal, echoing the importance of paying “prudence and caution” linked it once more with cooperation and the need to exchange information.<sup>110</sup> More specifically, it was suggested that the parties set up a group of independent experts to conduct a study to determine the effects of Singapore’s activities and to suggest, suitable measures to engage with any adverse effects of such land reclamation. In his separate declaration Judge Anderson stated that the orders of ITLOS are “intended to be constructive guidance to the parties” to protect the marine environment.

### Advisory Jurisdiction

The most important contribution of the tribunal to sustainable development was made in Seabed Mining Advisory Opinion<sup>111</sup> by the Seabed Dispute Chamber, an independent body within ITLOS, responsible “to interpret Part XI of the LOSC and regulations on the exploration and exploitation of minerals at or beneath the international seabed, ‘the Area’ beyond the limits of national jurisdiction”.<sup>112</sup> The Seabed Mining Advisory Opinion was requested by the International Seabed Authority (ISA) Council, responsible for the administration of the Area, following fears by the Republic of Nauru on the potential dangers of the developing states which were funding mining activities in the Area. While not explicitly mentioning “sustainable

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<sup>108</sup> *Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v Singapore)* (provisional measures) ITLOS Case No 12.

<sup>109</sup> *Ibid* at 35.

<sup>110</sup> *Ibid*, at 99.

<sup>111</sup> Advisory Opinion, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Seabed Dispute Chamber of the International Tribunal of the Law of the Sea, Case No 17, 1 February 2011).

<sup>112</sup> Aline Jaeckel and Tim Stephens, *The interpretation of sustainable development principles in ITLOS* in Cordonier Segger M-C and Weeramantry C. G, *Sustainable Development Principles In The Decisions Of International Courts And Tribunals 1992-2012* (Routledge 2017)

development”, the tribunal examines quite thoroughly recalls some of the principles with reference to judgments of other courts, such as the precautionary approach developed by the ICJ. What is more, as French argues, the Advisory opinion not only supports sustainable development in general, but it is further “seeking to address various emerging normative aspects of the concept”, for example reiterating principles found in the ILAs 2002 New Delhi Declaration of Principles of International Law such as the sustainable use of natural resources. For the sake of clarity, it is worth to deal with each of these principles separately.

i. *Sustainable use of natural resources*

As already mentioned, the duty of States to maintain the sustainable use of natural resources, is a wide-ranging concept, including several inter-connected obligations in international law, some of which are settled (for example, Principle 21 of the 1972 Stockholm Declaration on the Human Environment)<sup>113</sup> and others which continue to be more contested (namely, that States should manage their ‘territorial’ natural resources sustainably). It has been thus acknowledged that how we define the obligation to manage resources sustainably, greatly depends on context, for example on the wording and interpretation of international treaties, instruments and domestic legislation.

The first element the tribunal introduced on ensuring sustainability of natural resources is “the responsibility to ensure”. More specifically it stated that “The expression ‘to ensure’ is often used in international legal instruments to refer to obligations in respect of which, while it is not considered reasonable to make a State liable for each and every violation committed by persons under its jurisdiction, it is equally not considered satisfactory to rely on mere application of the principle that the conduct of private persons or entities is not attributable to the State under international law”.<sup>114</sup> As the Chamber emphasizes, it is an obligation of conduct and not result, which requires the deployment of “adequate means, to exercise best possible efforts, to do the utmost to obtain this result”. This is not different from the fundamental and long-established principle of due diligence – requiring States to act in such a way to guarantee that their activities under their jurisdiction or control will not inflict damage to the environment of other States or areas. The principle is acknowledged to be part of customary international law, echoed under

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<sup>113</sup> Rio Declaration on Environment and Development, UN Doc. A/CONF. 151/26 (vol I); 31 ILM 874 (1992).

<sup>114</sup> Responsibilities and obligations of States with respect to activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, at 41, para 112.

Principle 21 of the Stockholm Declaration. Whilst not expressly quoting the Stockholm Declaration, the chamber does attempt to justify its analysis by drawing attention from other entities of international law. It further makes reference to LOSC Article 194(2)<sup>115</sup>, which essentially codifies Principle 21 in the context of the law of the sea, to further enhance its reasoning.<sup>116</sup>

The Chamber quotes the ILC Articles on Prevention of Transboundary Harm from Hazardous Activities which dictate that “It is the conduct of the State of origin that will determine whether the State has complied with its obligation”.<sup>117</sup> In explaining the connection with the responsibility to ensure and the obligation to carry due diligence, the Chamber further makes reference to the ICJ case of the Case concerning Pulp Mills on the River Uruguay (hereafter *Pulp Mills*). It cites the ICJ’s approach that due diligence, is “an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control...such as the monitoring of activities”.<sup>118</sup> This “judicial borrowing” from *Pulp Mills* occurs in various parts of the Advisory opinion.

Noting that due diligence is “a variable concept”, not easy to be defined in precise terms, it goes a step further than *Pulp Mills*, to give different factors which could influence what is the appropriate level of due diligence that must be carried by States. Firstly, it acknowledges that fundamentally because of its nature, due diligence is a constantly-changing principle, which should modify and develop based on new insights and evidence. It states precisely that “measures considered sufficiently diligent at a certain moment may become not diligent enough in light . . . of new scientific or technological knowledge”.<sup>119</sup> This should be true with every principle of environmental law, which should be able to adapt with new information that comes into light. Secondly, it re-emphasises that the level of due diligence that must be carried out should greatly depend on context, including the type of activities taking place and the nature of the risk. It further notes that the risks may differ depending on the exact minerals that are

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<sup>115</sup> United Nations - [https://www.un.org/depts/los/convention\\_agreements/texts/unclos/unclos\\_e.pdf](https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf)

<sup>116</sup> Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. Enacted as: entered into force as the “United Nations Convention on the Law of the Sea” on Nov. 1, 1994 Article 194(2).

<sup>117</sup> 2001 Articles on Transboundary Harm, commentary to Article 3 (Report of the International Law Commission on the work of its Fifty-Third Session, 47; [http://untreaty.un.org/ilc/publications/yearbooks/contents/2001\\_v1\\_e.pdf](http://untreaty.un.org/ilc/publications/yearbooks/contents/2001_v1_e.pdf)

<sup>118</sup> *Pulp Mills Judgment*, *supra* note 23, at paragraph 197.

<sup>119</sup> Advisory Opinion *supra* note 111, paragraph 117.

subject to mining activity. The riskier the activity, the more severe the standard of due diligence should be.<sup>120</sup>

Lastly, the Chamber points out on other independent obligations that come along with the obligation to carry due diligence such as the precautionary approach, to support and undertake environmental impact assessments and to support the International Seabed Authority in emergencies as well as overall. By linking these obligations with the more general duty of due diligence (linking procedural with substantive obligations) “it enriches due diligence and highlights the integrated and over-arching nature of the obligation”.<sup>121</sup> The Chamber particularly explained that “compliance with these obligations can also be seen as a relevant factor in meeting the due diligence ‘obligation to ensure’ and that the said obligations are in most cases couched as obligations to ensure compliance with a specific rule”.<sup>122</sup> This is really essential; apart from blending the reasonings of other judicial bodies, the chamber further agreeably blends due diligence with other important environmental principles and elements, instead of dealing with due diligence of sponsoring states as a segregated concept. And while the Chamber could be a bit more clear on how this integration of environmental obligations is to occur, as Jaeckel and Stephens note, it effectively indicates how the principle of sustainable development could be “reinforced when advanced in multiple forums”.<sup>123</sup>

It is worth examining a bit further the court’s approach towards environmental impact assessment obligations, which also forms an essential part of the more general principle of ensuring the sustainable use of natural resources. Apart from linking it with the “responsibility to ensure”, the chamber treats environmental impact assessment as an autonomous environmental obligation. They are after all already acknowledged to be part and parcel of customary international environmental law.<sup>124</sup> The Chamber, after stressing the importance of carrying a preliminary assessment, goes on to highlight the importance of a continuous or “ongoing” monitoring to ensure effective protection, a point also raised in the *Pulp Mills* case. While acknowledging the specific characteristics in *Pulp Mills*, namely the issue of shared

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<sup>120</sup> Ibid.

<sup>121</sup> Duncan French, 'From The Depths: Rich Pickings Of Principles Of Sustainable Development And General International Law On The Ocean Floor—The Seabed Disputes Chamber’S 2011 Advisory Opinion' (2011) 26 The International Journal of Marine and Coastal Law at page 541.

<sup>122</sup> Advisory Opinion supra note 111, paragraph 123.

<sup>123</sup> *The interpretation of sustainable development principles in ITLOS*, Supra note 110 at 348.

<sup>124</sup> Advisory Opinion supra note 111 at paras 145, 147–49.

freshwater resources over the maritime boundary delimitation, it recognises the utility of the ICJ's analysis over the subject, drawing a number of points from it.

Recognising it to be a rule of customary international law, it states that “the Court’s reasoning in a transboundary context may also apply to activities with an impact on the environment in an area beyond the limits of national jurisdiction; and the Court’s references to ‘shared resources’ may also apply to resources that are the common heritage of mankind”.<sup>125</sup> While having in mind the ICJ’s note that environmental impact assessment is not precise on its scope and content, it makes it clear that this non-precision is not enough to neglect this important customary rule. Thus, despite the lack of guidance, States might sometimes be required to undertake environmental impact assessments “beyond the scope of application of specific provisions of the Regulations”.<sup>126</sup>

ii. *Precautionary approach*

In *The Seabed Mining Advisory Opinion* the court takes a progressive approach towards the precautionary principle, contributing to its increasing recognition as a customary rule of international environmental law. While the ISA regulations do require sponsoring States to apply a precautionary approach, the court further expands the principle by interlinking precaution with due diligence; by making the former an inherent element of the later, it necessitates its application even to undertakings not falling within ISA regulations. What is more, the relevant regulations, (Nodules and Sulphides Regulations) expressly direct that the States and the Authority shall apply the precautionary approach as dictated in Principle 15 of the Rio Declaration. As it has been pointed out, “it is highly unusual, if not unique”<sup>127</sup> for a judicial body to expressly interpret the Rio Declaration itself, and for this reason the legal significance and content of interpreting the precautionary approach by this Chamber should given some more thorough examination.

On a very general understanding, precautionary approach entails actions that should be taken so that the risk of damage is avoided. However, different judicial bodies have found difficulties

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<sup>125</sup> Ibid, at paragraph 148.

<sup>126</sup> Guidance of the Contractors for the Assessment of the Possible Environmental Impacts Arising from Exploration for Polymetallic Nodules in the Area.

<sup>127</sup> Duncan F, *supra* note 119 at page 548.

in effectively determining its legal status. What is more, as the ICJ judgments have shown above, while the Court initially appeared to take a promising approach over the principle of precaution in the case of the *Gabčíkovo-Nagymaros*, instead of making effective use of the development of different legal instruments and academic writing over the years to evolve the principle, it rather adopted a backward approach in *Whaling in the Antarctic case*, 20 years later. The Advisory Opinion assists in the development modern international law by attempting to clarify some of the controversies and uncertainties that come along with the principle.

By quoting the ICJ in *Pulp Mills* that “a precautionary approach may be relevant in the interpretation and application of the provisions of the relevant treaty”, it interprets the precaution to be relevant rule of general international law for the purposes of Article 31(3)(c) of the 1969 Vienna Convention on the Law of Treaties.<sup>128</sup> It further mentions that the constant citing on the precautionary approach by international treaties and other instruments “has initiated a trend towards making this approach part of customary international law”.<sup>129</sup> However, the court halts this evolutionary interpretation at that point, leaving the ultimate proclamation of the principle’s customary status to be made by another (even more daring) judicial body.

The Chamber referred on and embraced the intertwinement between precaution and due diligence developed in the *Southern Bluefin Tuna* case, ascertaining precaution as an integral element of due diligence. It actually applied a very low threshold for this element, stating that “this obligation [namely, of due diligence] applies in situations where scientific evidence concerning the scope and potential negative impact of the activity in question is insufficient but where there are plausible indications of potential risks. A sponsoring State would not meet its obligations of due diligence if it disregarded those risks”.<sup>130</sup> It is evident that the wording used is much more “relaxed” than the language “threats of serious or irreversible damage” used in Principle 15 of the Rio Declaration to describe the application of the precautionary approach. A number of points must be made on the Chamber’s choice of wording here. First, it is unlikely that the Chamber would go that far to explicitly, and without any textual justification change the wordings of the Rio Declaration – that would be too daring for an international judicial body to do. D French argues that the Chamber might have aimed to draw a distinction between

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<sup>128</sup> Vienna Convention on the Law of Treaties UN Doc. A/Conf.39/27; 1155 UNTS 331; 8 ILM 679 (1969); 63 AJIL 875 (1969) Article 31(3)(c).

<sup>129</sup> Advisory Opinion *supra* note 111, at para 135

<sup>130</sup> *Ibid*, at para 131.

how the precautionary principle comes into play in the context of the due diligence obligation in contrast to the precautionary approach as an independent obligation. In other words, when applied in line with due diligence under a more general framework, precaution “loses some of its prescriptiveness and legal rigour”.<sup>131</sup> To support its argument on its interpretation, it draws attention to the 1999 ITLOS Order in the *Southern Bluefin Tuna*, where, (arguably) the threshold for applying precaution was the looser requirement of “prudence and caution”.

Second, this lower threshold of “plausible indications of potential risks”, should encourage States to be more cautious without drifting away from their environmental obligations by simply arguing that there was no proof of an irreversible damage arising from their actions. This broader application is definitely a positive development for international environmental law – Thirdly and very importantly, by “breaking previous silence on the legal status of precaution”, and acknowledging the emerging number of soft law instruments that endorse it, the Chamber’s evolutionary interpretation of the principle effectively contributes to its recognition as a customary rule of law. Taking an evolutionary approach towards the precautionary approach is fundamental given the rising and continuous environmental degradation, which requires judicial bodies to be adaptive and quick to react to the challenges ahead. Lastly, by treating precaution as an element under the more general obligation of due diligence and not just as an autonomous concept, it forces States to pay attention and apply the principle in every aspect of their respective activities.

#### Additional remarks

It is worth also briefly examine the importance of LOSC as a contributor to the development of modern international environmental law, often referred as the “constitution for the oceans” – it is a document which holistically aims to cover and protect the law of the sea and is considered by many superior to any other maritime treaty. Its superiority is reflected in Article 311, which states that it should prevail over pre-existing treaties which do not accord with it or alter in some way its provisions. For this reason, a lot of other maritime treaties provide that they are to be applied consistently with LOSC.<sup>132</sup>

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<sup>131</sup> Ibid.

<sup>132</sup> See, for example, the London Dumping Convention, Art. XII; the CITES Convention, Art. XIV(6).

However, due to its ambitious attempt to cover all possible issues relating to the law of the sea, its provisions often lack substantial content on sustainability or environmental protection norms. While this makes sense given that disproportionately long documents are unwelcomed in the international law sphere, the problem of substance still exists. What is more, given the rapidly changing environment, even where the provisions provide for material measures on how to deal with the oceans, a higher standard of protection is now required. Thus, it is argued that more than 35 years after its adoption, the function of the LOSC should be more seen as a framework rather than a canon. It is for the future conventions to set a higher target on what needs to be addressed, and how the marine environment is to be safeguarded. Yet, despite its deficiencies in providing normative guidelines and rules the LOSC has done well to provide a clear jurisdictional framework for the adoption and enforcement of national measures to protect the marine environment. This is acknowledged in Goal 14 of the 2030 Agenda for Sustainable Development, providing for member States of the United Nations to “enhance the conservation and sustainable use of oceans and their resources by implementing international law as reflected in the United Nations Convention on the Law of the Sea, which provides the legal framework for the conservation and sustainable use of oceans and their resources”.<sup>133</sup> It also assists in informing States and other stakeholders on the different ecological issues – but the extent of its influence on the practice of states is difficult to determine.

There seems to be an understanding of the urgent changes that need to be considered by UN Convention on the Laws of the Sea, which as of September 2018 has started conducting meetings to discuss and negotiate a new global oceans treaty. The negotiating states aim for a “package deal” consisting of four key elements: Marine genetic resources (also allowing poorer countries to benefit from any natural discoveries), area-based management tools, such as marine protected areas, environmental impact assessments and capacity building and the transfer of marine technology.<sup>134</sup> While US, Russia and some whale-hunting countries like Japan and Iceland remain reluctant, campaigners are hopeful that a deal will soon be reached. As Peggy Kalas from the High Seas Alliance told the BBC “the current high seas governance system is weak, fragmented and unfit to address the threats we now face in the 21<sup>st</sup> Century”.<sup>135</sup>

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<sup>133</sup> Transforming our world: the 2030 Agenda for Sustainable Development, UN A/RES/70/1, 21 October 2015, p. 24

<sup>134</sup> 'The UN Negotiations For The First Conservation Treaty For The High Seas' (*Drupal*, 2019) <<https://www.iass-potsdam.de/en/output/dossiers/ocean-treaty>> accessed 9 July 2019.

<sup>135</sup> Matt McGrath, 'UN Treaty Would Protect High Seas From Over Exploitation' *BBC News*(2018) <<https://www.bbc.com/news/science-environment-45397674>> accessed 8 July 2019.

States should urgently take the appropriate measures to protect the oceans via legally binding commitments.

On a last note, ITLOS has attempted to create a Chamber for Marine Environmental Disputes under the special chambers mechanism of Annex VI to the LOSC, similar to that of ICJ. Yet both these Environmental Chambers have never been used in practice. This demonstrates that States tend to favor their disputes to be heard by generalist rather than specialist bodies. This highlights the critical importance of (i) drawing links between different sustainable development principles similar to the approach in *Seabed Mining Advisory Opinion* (interconnecting due diligence with the precautionary approach) to strengthen one another and (ii) applying the principle of integration (the obligation to integrate environmental concerns into the process of relevant policy-making) as sustainability issues mostly arise along (or as a result of) other legal questions.<sup>136</sup>

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<sup>136</sup> Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi (13 April 2006), UN Doc. A/CN.4/L.682 (2006) <<http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G06/610/77/PDF/G0661077.pdf?OpenElement>>.

### CHAPTER 3: INTERNATIONAL AND DOMESTIC LAW CHALLENGES AND THE FUTURE OF SUSTAINABLE DEVELOPMENT

It is a constant struggle of international law to adapt in time to the dangers and challenges it continuously faces. Without a doubt, the biggest struggle that the international community and law faced during the last century were the two world wars. The devastating effects of the First World War were not enough to keep alive the operation of the League of nations and sustain peace. The League's failure to solve major political disputes, and the denial of many States to give up some of their privileges to meet their international obligations, prevented it to develop as an effective international organization to ensure the advancement of equality, justice and global health. What is more, while an intergovernmental organization, supposed to present the world and encompass all countries, a lot of major countries such as the US were not members, while other such as the former Soviet Union and Germany were not allowed to join. All these imbalances along others led to the outbreak of the Second World War just some years later – and after more destruction occurred, the international community finally became more serious on the need to establish an international body of nation states and a universally binding body of legal principles. The United Nations replaced the League of Nations and “The Charter that bound it together achieved the status of a supreme legal instrument effective among all nation states, producing a universally recognized system of positive law that every member of the world community accepted as binding, with all the force of law”.<sup>137</sup> And while the existence of International Law acquired a more solid form, the international community still fails many times to give it the respect and authority required to maintain global peace and security. More importantly, the acceptance of universally binding legal rules by the international community and the willingness of States to “sacrifice” some of their sovereignty only came after the planet was almost destroyed.

More than 50 million people lost their lives during World War II alone (with some figures estimating 75 million); the twenty-first century has brought new challenges for the international community. They are of social, economic, and environmental nature and are as grave and urgent as the wars of the last century. Sustainable development was introduced to combat these global challenges, including the eradication of poverty, inequality, climate, environmental degradation, prosperity, and peace and justice.

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<sup>137</sup> H. E Judge C.G. Weeramantry, Achieving sustainable justice through international law in Marie-Claire Cordonier Segger and C. G Weeramantry, *Sustainable Development Principles In The Decisions Of International Courts And Tribunals 1992-2012* (Routledge 2017) at 109.

Both the social and environmental pillars of sustainable development are currently in a state of crisis. For example, in the context of refugees. While the enactment of international instruments such as the Convention Relating to the Status of Refugees<sup>138</sup> and Protocol Relating to the Status of Refugees<sup>139</sup> list some standards of treatment that States must abide to, the current framework is still insufficient to deal with the challenges that affect this area. The same problem relates to climate refugees, as more and more people are estimated to be leaving their traditional habitat because of marked environmental disruptions that jeopardize their existence and quality of life. And while there is an increasing awareness on these topics, more pro-active measures are needed in order to adequately deal with them.

As it concerns the environmental pillar, the international community must increase its awareness and understanding on the 26 principles of the the 1972 Stockholm Declaration on the Environment<sup>140</sup> given that they they act as a guiding framework for international environmental law. Principle 1 emphasises that humans have a fundamental right to freedom, equality and adequate conditions of life, not in the abstract, but “in an environment of quality that permits a life of dignity and well-being.”<sup>141</sup> As it has been stated, “the other human rights become worthless if the environment is so damaged as to deny this quality of life, and take away the health of our people”.<sup>142</sup> Increasing awareness for conventions such as the Word Charter for Nature<sup>143</sup> in schools should also be welcomed, to acknowledge that intertwinement between nature and humanity as a whole, should be a relationship of support rather than control.

### [The importance of custom in the development of Sustainable development law](#)

Over the last years, there has been a surge of treaty law and international conventions to deal with the global challenges of the 21st century, including sustainable development. Treaty law has considerable advantages as opposed to custom, as (i) it involves the express consent of the signatory States, thus not undermining their autonomy and sovereignty and (ii) it provides a clear(er) and more structured form of the obligations assumed, minimising the uncertainties on whether a particular obligation falls within the ambit of a general principle that is invoked.

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<sup>138</sup> Convention Relating to the Status of Refugees, 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954) .

<sup>139</sup> Protocol Relating to the Status of Refugees, 31 January 1967, 606 UNTS 267 (entered into force 4 October 1967).

<sup>140</sup> Stockholm Declaration on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14, 11 ILM 1461 (1972).

<sup>141</sup> Ibid, Principle 1

<sup>142</sup> Achieving sustainable justice through international law, supra note 138 at 112

Yet, as Judge C.G. Weeramantry notes in “a world whose survival will increasingly depend in the future on active cooperation rather than mere co-existence” it is very difficult to bind and guarantee consent of each individual nation. Treaty law would be inadequate and too slow to effectively deal with urgent environmental issues. Customary international law, comes into force without the need for a State to give an express consent, making it more quick to react and tackle these matters. Even if all states across the globe would come to agree on a treaty, it would still be a time-consuming process, and even if it is to be clear, structured and well-thought there will almost definitely be some gaps or difficulties in its interpretation and some supplementary input would be needed to fill these lacunae in the law. For this reason, the significance of customary law as a tool to deal with these challenges should by no means be underestimated.

As Oscar Schachter has expressed: “However, treaties have not fully met the needs of new law. For one thing, the processes of treaty negotiation are often slow and cumbersome. It is easy to see why. The increase in the number of States, the diversity of interests, the novelty of the problems faced, the shortage of competent officials, are factors which combine to delay and complicate the treaty-drafting negotiations and ratifications. The difficulty of obtaining ratifications and accessions, even for States that had supported and signed the treaties has been a discouraging feature. Even when multilateral treaties obtained the requisite number of parties, a substantial number of countries remained outside the treaty, though they had no significant substantive objections and voted for its adoption by the drafting conference.”<sup>144</sup> In other words, with constantly evolving matters such as sustainable development law, the time lost until a treaty comes to an agreement could result to failure in effectively dealing with the urgency of the situation. Customary international law can overcome the constraints of formality and time, and should act as a valuable weapon for the near future.

Taking into consideration the above, and in light of the urgency to preserve and protect the environment and deliver international equity, it appears that there is no longer room for negating the legal status of sustainability; it is time for the principles to be more warmly embraced by the international community (including judicial bodies, the states of the world

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<sup>144</sup> Oscar Schachter, “New Custom: Power, *Opinio Juris* and Contrary Practice” in *Theory of International Law at the Threshold of the 21st Century, Essays in Honour of Krzysztof Skubiszewski* (Cambridge: Cambridge University Press, 1995) at 531.

and individuals). But in order for the principles to be fully recognized and enforced, a collective contribution must be made to overcome certain obstacles.

[The treatment of sustainability and the environment in domestic legal systems: An overview of the civil and common law theories in light of property law.](#)

It is essential to examine the understanding of sustainability and the environment in light of the jurisprudential theories and developments of domestic legal systems. This is because the way international law emerges and develops is often a reflection of the mentality and ideologies of domestic legal systems, especially those of the “Western” world. Both common law and civil law concentrate almost exclusively on the rights of those who are alive at the time the measures take place, overlooking potential rights of future generations. It is an evident characteristic of modern law, to pay attention and protect the rights of solely the current living generations. This is a very restrictive view and it does not encompass all the ideologies and arguments that have been developed in relation to the environment and sustainability. The theories of different “Western” philosophers, especially on the relationship between property law and the environment will be briefly examined to demonstrate the anthropocentric nature of how humans learnt to deal with the environment, but also indicate the potential to change this mentality.

Highly influenced by medieval jurists and their established concepts of *dominium* and *ius*, seventeenth century commentators found themselves re-interpreting these notions of justice to apprehend the foundations of the political culture and environment of their times. The law for St Thomas Aquinas was regarded as a pattern of entitlements and obligations with the aim to increase human welfare but also operate in harmony with the natural environment.

With the abolishment of feudalism under the Tenures Abolition Act 1660,<sup>145</sup> society was no longer underpinned by universal consensus about the collective good, but as a deeply fragmented collection of individuals who articulate their own notions of what is good, which contested with the rival notions of their neighbors. The concept of responsibility and obligation to act in accordance with the natural environment was thus transformed to that of individual rights, with property rights being a central part of this model. With a rising population and

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<sup>145</sup> The Tenures Abolition Act 1660 (12 Car 2 c 24).

rising needs, the common use of land turned to be impractical and the manifestation of private property was inevitable. The civic idea of private property was embedded in the writings of philosophers such as Grotius, for whom the understanding of justice was primarily anthropocentric. An illustration of this is his reference to the Bible where he states that “for no beings, except those that can form general maxims are capable of possessing a right”. For Grotius, the original use-right of property given by God to homo sapiens was for them to use and flourish. Nevertheless, it is stated within its writings, that only usage of rights which is necessary for sustaining a person’s “immediate bodily needs” should be accepted by natural law. Grotius perceived humans as beings with purely innocent morals. It is stated in his writings that “it is not so with man, who possessing the knowledge of good and evil ... from doing hurt”.<sup>146</sup> This ignorance of evil in natural law theorists, was a point of argument for the subsequent positivist thinker, that the structure of the law must contain strict rules to prevent harmful behaviour. As it will be discussed below, these rules did not do much to protect the natural environment but rather the anthropocentric interests of individuals.

While Grotius’s philosophical interpretation of natural rights entails an anthropocentric element, Pufendorf’s theory argues that sociality is naturally the most effective way to protect the sum (i.e. what belongs to the person).<sup>147</sup> As it regards property, man owns a moral responsibility “not to permit the Creator’s gifts to perish for lack of use”<sup>148</sup> and “be useful to others insofar as he conveniently can”.<sup>149</sup> Interpreting this theory in the context of sustainability, rights to property are to some extent tied to responsibilities to act for the good of society as a whole. Emphasis should be therefore given on the distinction Pufendorf takes. Human consumption of the earth’s natural resources is an obligation to act in accordance with the natural environment rather than a right to exploit it.

The seventeenth century relationship between property and the environment was also illustrated by John Locke. Locke’s natural law embodies his empiricism which was about propounding principles of justice based on a certain understanding of human nature.<sup>150</sup> His sufficiency proviso of the “non-deprivation of one’s labour as long as there is enough and as

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<sup>146</sup> Hugo Grotius and William S Knight, *De Iure Belli Ac Pacis (Prolegomena)* (1st edn, Kluwer Law International 1952) II.2.ii.88.

<sup>147</sup> Alejandra Mancilla, “What We Own Before Property: Hugo Grotius And The Suum” (2015) 36 *Grotiana*.

<sup>148</sup> Samuel Pufendorf, *On The Duty Of Man And Citizen According To Natural Law* (1st edn, Cambridge University Press 2007).

<sup>149</sup> *Ibid.*

<sup>150</sup> C. S. Galik and P. Jagger, “Bundles, Duties, And Rights: A Revised Framework For Analysis Of Natural Resource Property Rights Regimes” (2015) 91 *Land Economics*.

good left in common for others”<sup>151</sup> and his spoliation proviso of exploiting as much land “as anyone can make use of”<sup>152</sup> before it spoils nevertheless implies an anthropocentric way of thinking towards property and the environment. His labour theory suggests that a person would effectively remain “an economic island unto itself”<sup>153</sup> whose well-being depends solely upon the capacities of his labour. Locke’s sophisticated theory, was considered by Gray and Gray of comprising three main features; a presumptive right to exclude, suggesting notions of property absolutism which would be subsequently developed by Blackstone, the right to prioritise resource values, in the sense that the proprietor could choose whether to sell or retain his property and immunity from summary cancellation, in the sense of “the idea that property is not arbitrarily terminable at the will of others”.<sup>154</sup>

Furthermore, his argument that land has no value unless mixed with labour, in a world of unlimited wants but scarce resources, could potentially have destructive effects to the natural environment. Uncultivated common land such as forests, one of the major combatants against climate change according to Locke’s thought hold no value unless cultivated. It is thus evident how the seventeenth century writers failed to point out the negative environmental consequences that could develop from their interpretative theories. The seventeenth century was an era of minimal destruction to the climate, where technology was seen to correspond with the conservation and cultivation of the natural environment.<sup>155</sup> The invention of money led the way for a faster development of agrarian capitalism and a *laissez-faire* ideology, which solely aimed for economic prosperity. All goods including products of nature acquired a monetary value depended on how much people were willing to pay. Consequently, the relationship between individuals and property became primarily economic, while relationship with nature was unjustifiably perceived as perfectly harmonious.

The products of the theories of Grotius, Pufendorf and especially Locke transformed the deep structure of the law in relation to property in ways which are still felt today. It is submitted

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<sup>151</sup> Kevin Gray and Susan Francis Gray, *Land Law* (1st edn, OUP Oxford 2011) 7.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid* 53.

<sup>154</sup> *Ibid.*

<sup>155</sup> Sean Coyle and Karen Morrow, *The Philosophical Foundations Of Environmental Law* (1st edn, Hart Pub 2004) 40.

that while twenty-first century conception of property entails these theories of rights and responsibility, the “seventeenth century supposition of unqualified harmony between environment and human interests is no longer sustainable”.<sup>156</sup>

Natural rights theorists had explained property principally through its theological origins and its place in human social life. While their reasoning was largely anthropocentric in nature, they nevertheless perceived human flourishing and the environment to be in complete harmony. By the eighteenth century, thinkers such as Bentham and Blackstone viewed rights as interpersonal and wholly determined by (positivist) law, away from wider moral questions such as the nurturing of the environment. The positivistic way of thinking has been perfectly referred to as “business of arranging yesterday’s results in whatever way will be most convenient for those working on today’s problems”.<sup>157</sup> An example of this could be argued to be Bentham’s principle of utility, which was primarily contained within Locke’s natural theory of labour in the context of dominium. What is more, common law came to be viewed not so much as an independent forum that interprets principles, but rather as a means of rigidly applying pre-established canons and statutes.

Blackstone was also a supporter of the rule of law, characterising law as “a rule of action, prescribed by a superior, which an inferior is bound to obey”.<sup>158</sup> His absolutist conception of a person’s property consisted of “the free use, enjoyment, and disposition of all his acquisitions, without any control or diminution, save only by the laws of the land”.<sup>159</sup> According to Blackstone, property rights were a compromise of an individual’s natural liberty to the laws of the land which influenced the philosophy of the 18th century onwards; that private property rights conflict with the common good. Consequently, as a result of this thought, modern lawyers would see the nature of property rights as inessential insofar as they held no role in relation to policy grounds of the application and interpretation of statutes.

Over the years, environmental law evolved from a “convenient umbrella term of legal provisions”<sup>160</sup> to a separate area of law through the development of different statutes and other regulatory measures. Having already referred to private and public law, the former deals with

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<sup>156</sup> *Ibid.*

<sup>157</sup> Stroud Francis Charles Milsom, *The Nature Of Blackstone's Achievement* (1st edn, Selden Society 1981) 1.

<sup>158</sup> John Cairns, “Blackstone, The Ancient Constitution And The Feudal Law\*” (1985) 28 *The Historical Journal*.

<sup>159</sup> Frederick Stoeve Dickson and William Blackstone, *An Analysis Of Blackstone's Commentaries* (1st edn, Stevens and Sons 1880).

<sup>160</sup> N. E. Simmonds, “The Changing Face Of Private Law: Doctrinal Categories And The Regulatory State” (1982) 2 *Legal Studies*.

horizontal relationships of individuals based on the notion of right or duty, while the later refers to a “set of considered choices taken based on aggregative and distributive policies”.<sup>161</sup>

It is argued that society’s property laws should thus be shaped and textured by deep moral values gradually developed from the influences of both public and private law (rather than expanding on their dichotomy). Thus, these moral values should not necessarily take the view of solely one philosophical position. It is echoed within the philosophical writings of natural thinkers such as Hobbes and Locke, that the public and private realms are dependent and mutually explicable. Furthermore, it makes sense that in the way statutory provisions impose restrictions to private property rights, property rights themselves should also allow for leeway in their presumptive right to exclude anyone other than the person in possession, and emerge on the form of wider collective interests. It should be the task of both philosophical thinking and legal reasoning to invoke thoughtful ideas about nature, rights and moral responsibility.

Environmental law could thus be seen as an attempt to trace out the relationships between the above concepts. The environmental lawyer is thus put to make a systematic treatment of these values. There is definitely no easy answer to which values should be given priority. There is thus an upcoming need for an attempt to assess the old and create new ways in which property, nature and the moral good could co-exist. For example, an innovative and creative approach has been taken by Kevin and Susan Francis Gray for a shift away from right-based theories of property towards one of responsibility (or obligation). This theory brings closer the idea of property with that of the environment as “proprietary utilities available to a landholder are inherently curtailed by a community-directed obligation to conserve and promote fragile features of the environment”.<sup>162</sup> In this case collective interests are a necessary component for the existence of individual rights. By thus fusing the so far private-public distinctions, new theories are born. It could be argued that the responsibility theory is perhaps the most suitable solution for understanding private property but also for dealing as a solution to sustainable development issues that arise within the sphere of domestic law.

The domestic legal order currently represents a movement towards technicality and positivism. It is not yet too late for sustainable development law to act and establish a deeper formation of environmental responsibility and intrinsic value. As it has been accurately stated,

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<sup>161</sup> M. Rosenfeld, "Rethinking The Boundaries Between Public Law And Private Law For The Twenty First

<sup>162</sup> Kevin Gray and Susan Francis Gray, *The Idea Of Property In Land* (1st edn, Oxford University Press 1998).

“environmental law without a sense of philosophy and history is a pale and bloodless creature”; to summarise in the scope of the question posed, while the law structure may currently act as a constraint to the environment, by looking a bit deeper into it, an environmental lawyer could find the tools necessary to create a theory for the natural environment.

Domestic law jurisprudence and its influence on international law should by no means underestimated. The way domestic legal systems approach questions on environment and sustainability is reflected into international law. What is more, with emerging information and accessibility of platforms such as the Oxford Reports on International Law in Domestic Courts, (ILDC) domestic courts have over the recent years, contributed to the changing nature of international legal norms from historically “outward-looking” (state-to-state) to “inward-looking” (obligating the state to take certain action within the domestic legal order). Given this increasing recognition and pivotal role of domestic legal systems in influencing international law, understanding the philosophical foundations under which they have formed is fundamental to combat the challenges these systems and consequentially, international law face.

#### [The principle of generational justice in African Thought](#)

Having considered the above, it must be stressed that not all regions in the world share the same anthropocentric view towards the environment. What is more, in the Western world, there are no definitive philosophical arguments supporting the idea of generational justice. This means that each generation could, if it wished to do so, simply ignore the interests of the subsequent generations, even behaving in ways which could deter future generations from ever coming into existence. Yet, it is by now obvious that concerns about pollution, population growth, poverty, depletion of natural resources, the destruction of the marine environment and the loss of ecosystems around the globe, will not only have an impact on the current generation, but the future generations too. This is something that has been appreciated and developed in African thought, that the present generations have a moral obligation to future generations.

The concept and understanding of the relationship between man and land in Western legal systems has been already mentioned above. And despite that overall the Western models of land ownership have prevailed across the globe, the traditional understanding in Africa has been that land cannot be individually owned, but rather it is something that belongs to the

community as a whole, including the past, present and future generations. The land, contrary to Lockean theory for example, is generally interpreted to mean the environment, and cannot be cultivated by humans in any way they choose. There seems to be a direct obligation to future generations to protect the environment, as the land is considered a resource that must be shared with others in posterity; in other words, land represents more than a geographical definable piece or plot, encompassing the environment more broadly. This notion of “sharing is caring” finds support in the words of Matthew Izibili who describes the relationship between people and land as that of a mortgage. According to this theory, natural goods do not belong to a particular person, tribe or generation and each should regard their property as something received on loan, which must be returned to the next generation at least as good as when it was borrowed.

What is more, there is an “indirect moral obligation” towards future generations based on an obligation to predecessors<sup>163</sup>; that the current generations must show their gratitude to their ancestors by following their example and guaranteeing that their descendants also inherit and enjoy an environment which can meet their basic needs. The idea that ancestors continue to exercise an influence over their living descendants is key in African upbringing and society. This is reflected in the words of philosopher Wiredu who has stated that; “Of all the duties owed to the ancestors none is more imperious than that of husbanding the resources of the land so as to leave it in good shape for posterity. In this moral scheme the rights of the unborn play such a cardinal role that any traditional African would be nonplussed by the debate in Western philosophy as to the existence of such rights. In upshot there is a two-sided concept of stewardship in the management of the environment involving obligations to both ancestors and descendants which motivates environmental carefulness, all things being equal”.<sup>164</sup> Similar approaches on this subject can be found in other African writers such as Amulche Nnamani and Munyaradzi Felix Murove.<sup>165</sup> The difference of how moral responsibility is perceived and treated in relation to the future generations between Western and African thought is evident.

It is apparent, that there is a strong sense of community in African thought, which entails much more than the current generations. Behrens describes this as a “moral circle”, given that it aims to include “contingent, future beings that do not yet exist, within the set of morally considerable

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<sup>163</sup> Kevin Gary Behrens, 'Moral Obligations Towards Future Generations In African Thought' (2012) 8 *Journal of Global Ethics* at 180.

<sup>164</sup> H. Odera Oruka, *Philosophy, Humanity, And Ecology* (ACTS Press, African Centre for Technology Studies 1994) at 46.

<sup>165</sup> See for example Munyaradzi Felix Murove, *African Moral Consciousness* (Austin Macauley Publishing 2016).

entities”.<sup>166</sup> It must be clarified that moral obligations arguments do not connote that current generations are expected to assume exactly every specific need of subsequent generations; but any generation should be expected to enjoy certain basic needs such as clean water, clean air, food and shelter. The African thought on the environment and sustainability thus aims to form a society which includes a sense of solidarity and shared identity with the future generations. This societal framework should be seriously considered by Western societies and modern international lawyers in re-establishing ways on how to effectively deal with the broader environment. Modern international law can no longer afford to concentrate on the individual, the isolated State and the present generation. Sustainable development goals (if properly understood) essentially aim to look beyond this narrow aperture of the lens and consider the duties owed to subsequent generations. International law must constantly seek to develop, define and implement intergenerational justice as part of the wider sustainable development principles. That along principles of prevention, precaution and good governance have the potential to become some of the “principal formative influences over international law of the future”.<sup>167</sup>

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<sup>166</sup> 'Moral Obligations Towards Future Generations In African Thought', *supra* note 1.

<sup>167</sup> H. E Judge C.G. Weeramantry, Achieving sustainable justice through international law in Marie-Claire Cordonier Segger and C. G Weeramantry, *Sustainable Development Principles In The Decisions Of International Courts And Tribunals 1992-2012* (Routledge 2017) at 117.

## CONCLUDING REMARKS

As this essay has demonstrated, over the past three decades, international disputes and adjudication on sustainable development questions have become more prevalent. Decisions of the ICJ and ITLOS on sustainable development principles have become more sophisticated, taking into account the environmental, social and economic considerations that arise. What is more, their analysis often reflects principles such as the 2002 ILA New Delhi Declaration of Principles of International Law Relating to Sustainable development and the 1992 Rio Declaration on Environment and Development. International law evolves with caution, and reliance upon the New Delhi Principles on sustainable development is still a work-in-progress for the majority of international adjudication and dispute settlement bodies. The principles have just started to form international decision-making processes and influence remedies. Customary international law and the judgments of judicial bodies will be of increasing significance in the area of sustainable development law, and for this reason what is said and included and how it is said in a judgment will offer signals “to guide future international expectations and understandings when economic, human rights and environmental priorities intersect or appear to collide”.<sup>168</sup>

Below there is an overview of the principles discussed and developed by the ICJ and ITLOS in the cases examined above, and aims to remind of what has been achieved by the two judicial bodies in this area.

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<sup>168</sup> *Marie-Claire Cordonier Segger, Alexandra Harrington and Francesse Joy Cordon, Judicial Deliberations and Progress on Sustainable development, supra note 137 at 811.*

Figure 1 – Summary table of sustainable development principles

| COURTS & TRIBUNALS                                                                                                                 | ICJ                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                           |                                                                                                                                                                                                                       | ITLOS                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                                                                                                                                                                                                                                                                                                                                           | COMMENTARY                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
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|                                                                                                                                    | Principle                                                                                                                                                                                                                                                                                                                 | Gabčíkovo-Nagymaros                                                                                                                                                                                                                                                                                                                                                                                                                       | Pulp Mills                                                                                                                                                                                                            | Whaling in the Atlantic                                                                                                                                                                                                                                                                                  | Costa Rica v Nicaragua                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | Provisional cases                                                                                                                                                                                                                                                                                                                                                                         | Advisory Opinion                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| <b>Precaution</b><br><br><i>In order to protect the environment, actions should be taken so that the risk of damage is avoided</i> | <ul style="list-style-type: none"> <li>No explicit reference to precaution, court mentions “vigilance” instead.</li> <li>Discussion of undertaking Environmental assessments; in his Separate Opinion Vice President Weeramantry, stresses the significance of a “continuing environmental impact assessment”.</li> </ul> | <ul style="list-style-type: none"> <li>Rejection of argument that precaution can operate as a reversal of the burden of proof.</li> <li>Explicit reference for the first time to precaution, but characterized as an “approach” rather than a principle.</li> <li>Recognition of the majority for the need to undertake continuous environmental impact assessments (obiter in <i>Gabčíkovo–Nagymaros</i> becoming the ratio).</li> </ul> | <ul style="list-style-type: none"> <li>No discussion of the principle by the majority</li> <li>Reference to the principle in the Separate Opinion of Judge Cançado Trindade and ad hoc judge Charlesworth.</li> </ul> | <ul style="list-style-type: none"> <li>Reference to precautionary approach in avoiding human activity which could cause significant harm to human health, natural resources and ecosystems.</li> <li>Unfortunate that court did not really expressly and elaborately discussed the principle.</li> </ul> | <ul style="list-style-type: none"> <li>In <i>Southern Bluefin Tuna</i>, the tribunal reached closer to the application of precautionary principle; while not expressly mentioning it, the tribunal stated that parties should behave with “prudence and caution” to ensure effective conservation.</li> <li>In <i>MOX plant</i>, tribunal reiterates “prudence and caution”, integrating it with the obligation to cooperate.</li> <li>In <i>Straits of Johor</i> case, it was suggested that the two parties set up a group of independent experts to determine the</li> </ul> | <ul style="list-style-type: none"> <li>Applies precautionary approach in light of Principle 15 of Rio Declaration.</li> <li>States that a precautionary approach should be taken where there are plausible indications of potential risks, significantly lowering the threshold dictated by the language in Rio which talks about “threats of serious or irreversible damage”.</li> </ul> | <ul style="list-style-type: none"> <li>It is evident that the ICJ, has contributed to the evolution of sustainable development, especially post <i>Gabčíkovo-Nagymaros</i>. However, it is rather unfortunate that the court is still hesitant to fully embrace and expressly discuss precaution in many cases describing it as “an approach” rather than a principle.</li> <li>ITLOS (especially in its advisory opinion) deals with precautionary approach both as an independent principle, but also as an integral element of due diligence,</li> </ul> |

*Sustainable development in the law of the International Court of Justice*

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|                                                                                                                                                            |                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                         |                                                                                                                                        | <p>effects of the activities as part of a “prudence and caution” approach.</p> <ul style="list-style-type: none"> <li>Therefore, no express discussion of “precaution” per se in the above cases.</li> </ul> |  | <p>significantly contributing to the evolution of sustainable development in this way.</p>                                                                                                                                                                        |
| <p><b>Prevention</b></p> <p><i>In order to protect the environment actions should be taken in order to prevent damage (before damage has occurred)</i></p> | <ul style="list-style-type: none"> <li>Notification should be submitted early, as soon as the party aiming to commence the activity is in possession of a ‘plan which is sufficiently developed’, and definitely before a decision has been made on the environmental viability of the project.</li> </ul> | <ul style="list-style-type: none"> <li>Express reference to principle of prevention and that states should use all the means at their disposal to avoid inflicting significant damage to the environment of another state.</li> <li>Recognized for the first time the principle to be part of customary international law</li> <li>Notification should be submitted early, as soon as the party intends to start the activity “of a plan which is sufficiently developed” and prior to deciding on the environmental feasibility of a project”.</li> </ul> | <ul style="list-style-type: none"> <li>No discussion of the principle by the majority</li> <li>Reference to the principle in the Separate Opinion of Judge Cançado Trindade.</li> </ul> | <ul style="list-style-type: none"> <li>Provisional measures “to prevent the aggravation and / or extension of the dispute”.</li> </ul> |                                                                                                                                                                                                              |  | <ul style="list-style-type: none"> <li>The ICJ is more willing to discuss prevention, especially in the earlier cases, but it fails to integrate the principle in its overall analysis, not giving it the full substance and significance it deserves.</li> </ul> |

*Sustainable development in the law of the International Court of Justice*

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| <p><b>Other Sustainable development issues</b></p> |  | <ul style="list-style-type: none"> <li>• A rather “fragmented” approach on sustainable development, discussing it as a separate component rather than as an essential part of its general analysis.</li> </ul> | <ul style="list-style-type: none"> <li>• Significant willingness of the Court to engage with scientific evidence; nevertheless, a retrospective approach to what has been developed in regards to sustainable development law by the previous two cases.</li> <li>• Potential recognition of the judges limitation to deal with complex environmental questions?</li> </ul> | <ul style="list-style-type: none"> <li>• Associating sustainable development analysis with the principles listed in New Delhi Declaration 2002, namely the obligation to exercise due diligence, environmental impact assessment, the obligation to notify and sustainable use of natural resources.</li> </ul> |  |  | <ul style="list-style-type: none"> <li>• ICJ’s approach in both <i>Gabčíkovo-Nagymaros</i> and <i>Pulp Mills</i> in defining sustainable development talks about the “need to reconcile economic development with protection of the environment”, neglecting to include social development in the definition.</li> <li>• ITLOS embraces other sustainable principles in light of the precautionary approach such as the sustainable use of natural resources; by interlinking different principles together strengthens the significance and position of each of them.</li> </ul> |
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This essay attempted to shed some light on the work of ITLOS and ICJ, as well as the challenges that sustainable development currently faces. By increasing judicial dialogue between them, taking lessons from what has been developed (and what has been neglected) by previous cases as well as via studying various instruments including the New Delhi Principles on Sustainable Development, it is hoped that sustainable development principles will be implemented in a manner that will benefit the present and future generations and ameliorate environmental law and enforcement through greater transparency and awareness.

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**Abstract:**

*Sustainable development has not been the most straightforward exercise for commentators, courts and other sources of law to comprehend. Almost 30 years since the concept of sustainable development was born, a very general terminology would find most of us in agreement. It is development that should meet the needs of the present without compromising the ability of future generations. Yet, the difficulty that arises concerns the balance between the different needs that it tries to protect. When the economic, environmental, social, political, and cultural dimensions that underpin human actions come at a conflict, and thus different individual requirements seem to be at stake, the viewpoints of our sources start to shift away. Sometimes, different interpretations (or rather degrees) of the concept, can be found in the same source, for example the International Court of Justice. In fact, the International Court of Justice and the International Tribunal for the Law of the Sea have not been as consistent in their formulation of what role sustainable development plays in public international law as one would expect them to be.*

*Nachhaltige Entwicklung war für Kommentatoren, Gerichte und andere Rechtsquellen nicht die einfachste Aufgabe. Fast 30 Jahre, seit das Konzept der nachhaltigen Entwicklung geboren wurde, stimmen die meisten von uns mit einer sehr allgemeinen Terminologie überein. Es ist eine Entwicklung, die den Bedürfnissen der Gegenwart gerecht werden soll, ohne die Fähigkeiten künftiger Generationen zu beeinträchtigen. Die Schwierigkeit, die dabei entsteht, betrifft das Gleichgewicht zwischen den verschiedenen Bedürfnissen, die es zu schützen versucht. Wenn die wirtschaftlichen, ökologischen, sozialen, politischen und kulturellen Dimensionen, auf denen menschliches Handeln beruht, in Konflikt geraten und somit unterschiedliche individuelle Anforderungen auf dem Spiel zu stehen scheinen, beginnen sich die Standpunkte unserer Quellen zu verschieben. Manchmal finden sich unterschiedliche Auslegungen (oder eher Grade) des Konzepts in derselben Quelle, zum Beispiel beim Internationalen Gerichtshof. Tatsächlich haben der Internationale Gerichtshof und der Internationale Gerichtshof für Seerecht nicht so konsequent formuliert, welche Rolle nachhaltige Entwicklung im Völkerrecht spielt, wie man es erwarten würde.*