

International Courts and the Application of the Concept of “Sustainable Development”

Philippe Sands

I. Introduction

In 1992, at the United Nations Conference on Environment and Development (UNCED), States adopted the Rio Declaration on Environment and Development. Principle 27 of the Rio Declaration states:

“States and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.”

The language of Principle 27 is premised on the view that even at the time of its adoption there existed a body of “international law in the field of sustainable development”. However, Principle 27 does not indicate the content of that law, in particular whether it is procedural or substantive or both, or where its content may be identified. Shortly after the adoption of the Rio Declaration a group of independent legal experts sought to identify its content, on the basis of a review of legal and policy instruments and the international practice of States (which was then, and remains now, somewhat limited). The group concluded that

“the concept of ‘sustainable development’ is now established in international law, even if its meaning and effect are uncertain. It is a legal term which refers to processes, principles and objectives, as well

as to a large body of international agreements on environmental, economic and civil and political rights".¹

I have previously sought to review what these processes, principles and objectives might be. My conclusion was that "international law in the field of sustainable development" coalesced around

"a broad umbrella accommodating the specialised fields of international law which aim to promote economic development, environmental protection and respect for civil and political rights. It is not independent and free-standing of principles and rules, and it is still emerging. As such, it is not coherent or comprehensive, nor is it free from ambiguity or inconsistency. [...] The significance of the UNCED process is not that it has given rise to new principles, rules or institutional arrangements. Rather, it endorses on behalf of the whole of the international community (states, international institutions, non-governmental actors) an approach requiring existing principles, rules and institutional arrangements to be treated *in an integrated manner*."²

At the time of writing the term "sustainable development" had not been the subject of international judicial consideration. Subsequently, "sustainable development" has found expression in a number of new international instruments and is regularly invoked to support all manner of positions which states seek to justify. "Sustainable development" has also now been invoked before bodies charged with resolving international disputes, including the ICJ and the Appellate Body of the World Trade Organisation. The purpose of this short comment is to consider what, if anything, the jurisprudence of those two bodies has added to our understanding of "sustainable development".

II. International Court of Justice

Before the ICJ the concept of "sustainable development" received its first through airing in the case concerning the Gabčíkovo-Nagymaros

¹ See Foundation for International Environmental Law and Development, "Report of the Consultation on Sustainable Development: the Challenge to International Law", *Review of European Community and International Environmental Law* 3 (1994), 1 et seq.

² See P. Sands, "International Law in the Field of Sustainable Development", *BYIL* LXV (1994), 303 et seq., (379) (emphasis added).

project, between Hungary and Slovakia.³ The case concerned a dispute over whether or not to build two barrages on the Danube shared by Hungary and Czechoslovakia. In 1977, by treaty, the two countries had agreed to build two barrages which would then be jointly operated. The 1977 Treaty envisaged the diversion of waters from the Danube, where it was a boundary river, onto Czechoslovak territory and the operation of a the dual system of barrages by "peak-power" (rather than "run-of-river" mode). Construction began and proceeded more slowly than had been originally envisaged. In the mid-1980s political opposition in Hungary focused on the environmental aspects of the barrage as a means of achieving broader political change.

In May 1989, great public pressure led Hungary to suspend work on large parts of the project. The two countries sought to reach an agreement as to how to proceed. Both were intransigent and committed to different approaches. Czechoslovakia took the view that the barrages posed no serious threat to the environment, Hungary was certain they would lead to significant environmental harm to water supplies and to biodiversity. Absent an agreed resolution of the problem, and in the face of Hungary's refusal to continue work on the project, in 1991 Czechoslovakia proceeded unilaterally to implement what it termed a "provisional solution" (referred to as "Variant C"), comprising a single barrage on the Czechoslovakian side, but requiring the diversion of some 80% of the shared water and its territory. It argued that this was justified by the 1977 Treaty which, in effect, gave it rights over that amount of water for the purposes of operating a barrage on its side. As "Variant C" proceeded in late 1991 and early 1992 Hungary took the view that it had no option but to terminate the 1977 Treaty, which apparently provided the sole basis upon which Czechoslovakia claimed to be able to proceed to its unilateral and provisional solution. In May 1992 Hungary purported to terminate the 1977 Treaty. A complicated situation which was made no easier when, in January 1993, Czechoslovakia split into two countries, with the Czech Republic and Slovakia agreeing as between themselves that Slovakia would succeed to ownership of the Czechoslovak part of the project. In the meantime, in October 1992 Czechoslovakia had dammed the Danube and diverted over 80 per cent of the waters of the Danube into a bypass canal on Slovak ter-

³ ICJ Reports 1997, 7 et seq. The Court had previously referred to Principle 24 of the Rio Declaration on Environment and Development in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, 226 et seq., (242).

ritory. In April 1993, largely under the pressure of the Commission of the European Communities, Hungary and Slovakia agreed to refer the matter to the ICJ.

The Court was presented with an opportunity to address a wide range of international legal issues, including the law of treaties, the law of state responsibility, the law of international watercourses, the law of the environment, and the inter-relation of these areas. The Court was specifically asked to address three questions posed by the parties. What did it rule?

First, it found on the facts that Hungary was not entitled in 1989 to suspend or terminate — on environmental grounds — work on the joint project. *Second*, it ruled that Czechoslovakia (and subsequently Slovakia) was not entitled to operate from October 1992 a unilateral solution diverting the Danube without the agreement of Hungary (although it ruled that construction prior to operation was not unlawful). *Third*, the Court went on to say that Hungary was not entitled in May 1992 to terminate the 1977 Treaty, which remained in force to this day. As to the future, the Court indicated the basis for cooperation and agreement which it hoped the Parties might pursue, suggesting that the preservation of the *status quo* — one barrage not two, jointly operated, no peak power — would be an appropriate solution, in effect rewriting the 1977 Treaty. It was in relation to future arrangements that the majority of the Court invoked the “concept of sustainable development” to suggest a way forward. Specifically, what it said was this

“Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities, but also when continuing with activities begun in the past. *This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.*”⁴

⁴ Ibid., 78 (para. 140) (emphasis added).

The Court followed this by concluding, in the same paragraph of the Judgment, that

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

At least three aspects of what the Court said are to be noted. *First*, the fact that it invokes "sustainable development" at all, indicates that the term has a legal function. *Second*, "sustainable development" is a "concept" and not a principle or a rule. And *third*, as a "concept" it has both a procedural/temporal aspect (obliging the parties to "look afresh" at the environmental consequences of the operation of the plant) and a substantive aspect (the obligation of result to ensure that a "satisfactory volume of water" be released from the by-pass canal into the main River and its original side arms). The Court does not, however, indicate the content of the procedural/temporal requirement (for example does this require a formal or informal environmental impact assessment? And if so, according to what standards?) or the factors for determining whether the volume of water flowing in the Danube would be said to be satisfactory.

Paragraph 140 is cryptic, to say the least. During the course of written arguments both sides had invoked "sustainable development" to justify their positions.⁵ The pleadings will repay a careful study, since they reflect the inherent malleability and uncertainty of the term. Hungary invoked "sustainable development" to justify its view that there should be no barrages, whereas for Slovakia the "concept" justified the opposite conclusion, namely that "sustainable development" could only

⁵ See e.g. Slovakia: "It is clear from both the letter and the spirit of these principles that the overarching policy of the international community is that environmental concerns are not directed to frustrate efforts to achieve social and economic development, but that development should proceed in a way that is environmentally sustainable. Slovakia submits that these have been, and are today, the very policies on which the G/N Project is based." (Counter-Memorial, para. 9.56). In reply, Hungary takes the opposite view to support its argument that the G/N Project is unlawful: "Well-established ... operational concepts like "sustainable development" ... help define, in particular cases, the basis upon which to assess the legality of actions such as the unilateral diversion of the Danube by Czechoslovakia and its continuation by Slovakia." (Hungarian Reply, para. 3.51).

be achieved if both barrages envisaged by the 1977 Treaty were constructed. It might be said that Hungary focused on the environmental aspect of the concept whilst Slovakia focused on its "developmental" elements. For its part the Court invokes the concept to achieve an accommodation of views and values whilst leaving to the parties the task of fleshing out the harder practical consequences. The Court appears to use the concept to build a bridge, justifying a conclusion other than that which would tend to flow directly from its earlier reasoning and conclusions, namely that with its finding that the 1977 Treaty remained in force Hungary ought logically to be required to construct the second barrage at Nagymaros.⁶ To be clear, the Court did not rely exclusively on "sustainable development" to justify this conclusion, having found as a matter of fact that Slovakia itself had conceded that no second barrage was now necessary.⁷ "Sustainable development" was used to fortify that conclusion and provide some guidance as to its consequences.

Beyond paragraph 140 the Court provided no further assistance as to the status of "sustainable development" in international law, or its practical consequences, beyond the fact that it was to fulfil a function of integrating the potentially competitive societal objectives of environment and development. Perhaps some assistance as to what the Court might have had in mind may be gleaned from the Separate Opinion of Judge Weeramantry, who joined in the majority judgement, and whose hand may have guided the drafting of paragraph 140. According to Judge Weeramantry the Gabčíkovo-Nagymaros case offered a unique opportunity for the application of the "principle" of sustainable development, focusing attention "as no other case has done in the jurisprudence of the Court, on the question of the harmonisation of developmental and environmental concepts".⁸ The principle fulfilled a harmo-

⁶ Or, as two other authors have put it: "What is perhaps more remarkable, however, is that the Court, despite its endorsement of a treaty regime that smacked of unsustainability, went on to invoke sustainable development in order to miraculously salvage something from a sinking ship": S. Stec and G. Eckstein, "Of Solemn Oaths and Obligations: Environmental Impact of the ICJ's Decision in the Case Concerning the Gabčíkovo-Nagymaros Project", *Yearbook of International Environmental Law* 8 (1997), 41 et seq., (47).

⁷ "Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both parties of peak power operation, there is no longer any point in building it", ICJ Reports 1997, 7 et seq., (76 para. 134).

⁸ *Ibid.*, 90.

nising and reconciling function, requiring development and environment to be treated in a balanced way to avoid "a state of normative anarchy"⁹

"It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of modern international law. It is compendiously referred to as sustainable development."¹⁰

Judge Weeramantry traces the emergence of "sustainable development", noting its roots in the early 1970s, through to the "considerable endorsement" which it has received from all sections of the international community and which amounts to "a wide and general recognition of the concept".¹¹ For him the principle of sustainable development is "a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community",¹² and has "a significant role to play in the resolution of environmentally related disputes",¹³ providing "an important principle for the resolution of tensions between two established rights",¹⁴ within the fields of human rights, state responsibility, environmental law, economic and industrial law or other matters. It reaffirms, he says, "in the area of international law that there must be both development and environmental protection, and that neither of these rights can be neglected".¹⁵ Judge Weeramantry notes also that the concept of sustainable development is one recognised in traditional legal systems.¹⁶ In sum, it is "not merely a principle of modern international law. It is one of the most ancient of ideas in the human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law".¹⁷

⁹ Ibid.

¹⁰ Ibid., 92.

¹¹ Ibid., 93.

¹² Ibid., 95.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Ibid., 98.

¹⁷ Ibid., 110, 111.

These words provide some illumination of the place which "sustainable development" may have in the international legal order, but does not indicate with any degree of precision how reconciliation or harmonisation are to be achieved or how, on the facts of this case, one barrage rather than two might better achieve the objective of "sustainable development". This of course is not a criticism, but rather a comment on the difficulties posed for the judicial function of measuring and then balancing competing objectives. In this sense the term "sustainable development" appears useful as a means of bridging two views without necessarily having to provide close reasoning as to method or outcome.

III. WTO Appellate Body

By way of contrast, the approach of the ICJ may be compared with that of the Appellate Body of the World Trade Organisation in the subsequent case concerning the import prohibition imposed by the United States on Certain Shrimp and Shrimp Products from India, Malaysia, Pakistan and Thailand, on the grounds that they were harvested in a manner which adversely affected endangered sea turtles.¹⁸ In 1987 the United States had issued regulations (pursuant to its 1973 Endangered Species Act) requiring all United States registered shrimp trawl vessels to use approved turtle excluder devices (TEDs) in specified areas where there was a significant mortality of sea turtles in shrimp harvesting. TED's allowed for shrimp to be harvested without harming other species, including sea turtles. The United States regulations became fully effective in 1990, and were subsequently modified to require the general use of approved TEDs at all times and in all areas where there was a likelihood that shrimp trawling would interact with sea turtles. In 1989 the United States enacted Section 609 of Public Law 101-162, which addressed the importation of Certain Shrimp and Shrimp Products. Section 609 required the United States Secretary of State to negotiate bilateral or multilateral agreements with other nations for the protection and conservation of sea turtles. Section 609(b)(1) imposed (not later than 1 May 1991) an import ban on shrimp harvested with the commercial fishing technology which may adversely affect sea turtles. Further regulatory guidelines were adopted in 1991, 1992 and 1996, governing *inter alia* annual certifications to be provided by harvesting nations. In broad terms, certification was to be granted only to those

¹⁸ AB-1998-4, 12 October 1998; *ILM* 33 (1999), 118 et seq.

harvesting nations which provided documentary evidence of the adoption of a regulatory programme to protect sea turtles in the course of shrimp trawling. Such a regulatory programme had to be comparable to the programme of the United States, with an average rate of incidental taking of sea turtles by their vessels which should be comparable to that of the United States vessels. The 1996 guidelines further required that all shrimp imported into the United States had to be accompanied by a shrimp exporter's declaration attesting that the shrimp was harvested either in the waters of the nation certified under Section 609, or under conditions that did not adversely affect sea turtles, including through the use of TEDs. From a WTO perspective the difficulty was that the United States was, in effect, applying its conservation laws extraterritorially to activities carried out within — or subject to the jurisdiction of — third states. This, of course, raises an issue of general international law, namely the circumstances (if any) in which a state may apply its conservation measures to activities taking place outside its territory or jurisdiction, including by non-nationals. The United States sought to justify its actions on the grounds that the sea turtles it was seeking to protect were recognised in international law as being endangered.

The United States legislation was challenged by India, Malaysia, Pakistan and Thailand. At first instance a WTO Panel¹⁹ concluded that the import ban applied on the basis of Section 609 was not consistent with Article XI:1 of GATT 1994 and could not be justified under Article XX of GATT 1994.²⁰ The United States appealed to the WTO Appellate Body, invoking in particular Article XX(g) to justify the legality of its measures. Article XX(g) permits, as an exception to the GATT rules, measures "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption". In appraising Section 609 under Article XX of GATT 1994 the Appellate Body followed a three-step analysis. *First*, the Appellate Body asked whether the Panel's approach to the interpretation of Article XX was appropriate; and it concluded that the Panel's reasoning was flawed and "abhorrent to the principles of interpretation we are bound to apply" (paras. 112–124, at 121). *Second*, the Appellate Body asked whether Section 609 was "provisionally justified" under Article XX(g). Invoking the concept of "sustainable development", it found that it was so justified (paras. 125–145). And *third*, it asked whether Section 609 met the requirements of

¹⁹ See in this respect also under IV., 14 the article of A. Ziegler in this Volume.

²⁰ WT-DS58/R of 15 May 1998.

the chapeau of Article XX, concluding that it did not because the US actions imposed an "unjustifiable discrimination" and an "arbitrary discrimination" against shrimp to be imported from India, Malaysia, Pakistan and Thailand. It is in relation to the second and third steps that the Appellate Body invokes the principle of "sustainable development", as an aid to interpretation.

The Appellate Body's approach is premised upon an application of the "customary rules of interpretation of public international law" as required by article 3 para.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which rules "call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved".²¹ It is these customary rules which the Panel failed to apply, leading to the conclusion at step one that the Panel's approach was flawed.

It is then in relation to step two that the Appellate Body initially invokes the principle of sustainable development, in determining whether the measures taken by the United States are "provisionally justified". As a "threshold question" the Appellate Body has to decide whether Section 609 is a measure *concerned with* the conservation of "exhaustible natural resources", in the face of the argument that the term refers only to finite resource such as minerals, and not biological or renewable resources such as sea turtles (which, it was argued, fall to be covered by Article XX(b)). This argument was rejected by the Appellate Body. It ruled that Article XX(g) of GATT 1994 extends to measures taken to conserve exhaustible natural resources, whether living or non-living, and that the sea turtles here involved "constituted 'exhaustible natural resources' for the purpose of Article XX(g) of the GATT 1994".²² In reaching that conclusion, it stated that Article XX(g) must be read by a treaty interpreter "in the light of contemporary concerns over the community of nations about the protection and conservation of the environment".²³ Referring to the Preamble to the 1994 WTO Agreement, the Appellate Body noted that its signatories were "fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy" and that the Preamble "explicitly acknowledges 'the objective of *sustainable development*'".²⁴ This, says the

²¹ See note 18, para. 114.

²² *Ibid.*, paras. 131 and 134.

²³ *Ibid.*, para. 129.

²⁴ *Ibid.*

Appellate Body, is a "concept" which "has been generally accepted as integrating economic and social development and environmental protection".²⁵ According to the Appellate Body this conclusion is supported by modern international conventions and declarations, including the UN Convention on the Law of the Sea.²⁶ It follows that the sea turtles at issue were an "exhaustible natural resource" and they were highly migratory animals, passing in and out of the waters subject to the rights of jurisdiction of various coastal states on the high seas.²⁷ The Appellate Body then observes

"Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat — the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for the purpose of Article XX(g)".²⁸

The concept of "sustainable development" is not expressly invoked to justify this potentially far-reaching conclusion as to the nexus between the sea turtles and the United States. Nevertheless, the concept appears to inform that conclusion, apparently establishing the necessary link between the interest of the United States in the proper conservation of a distant natural resource located from time to time outside its jurisdiction, and the finding that Section 609 is "provisionally justified" under

²⁵ Ibid., para 129, at note 107 and accompanying text. The Preamble to the WTO Agreements provides *inter alia* that "the Parties to this Agreement, recognising that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means of doing so in a manner consistent with their respective needs and concerns at different levels of economic development ...".

²⁶ Ibid., para. 130, citing article 56 para.1 lit.(a) of the 1982 UNCLOS.

²⁷ Ibid., paras. 132 and 133.

²⁸ Ibid., para. 133.

Article XX(g). Although the Appellate Body claims that it does “not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g)”, its conclusion appears hardly consistent with such a limitation. Between the lines, then, the concept of “sustainable development” (and the need to integrate economic and social development and environmental protection) appears to have been implicitly invoked to extend (by interpretation) the jurisdictional scope of Article XX(g). If this is correct then “sustainable development” has a significant substantive element. This marks a significant move away from the approach of the earlier Tuna Dolphin panels and an opening which could, depending on your perspective, either strengthen global environmental objectives or contribute to unwarranted interferences by one state in the affairs of another.

Having found that the US measures are “provisionally justified” the Appellate Body then moves on to the third step of its analysis, namely whether Section 609 is consistent with the requirements of the chapeau to Article XX. In my view the Appellate Body rightly concludes they are not, because the measures are applied in an unjustifiable and arbitrarily discriminatory manner. Of interest, however, is the fact that the Appellate Body invokes “sustainable development” again, this time in the context of its conclusion that Section 609 is an “unjustifiable” discrimination.²⁹ In the introduction to this part of its analysis, the Appellate Body revisits the Preamble to the WTO Agreement, noting that it demonstrates that WTO negotiators recognised “that optimal use of the world’s resources should be made in accordance with the objective of sustainable development” and that the preambular language, including the reference to sustainable development

“must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble”.³⁰

In support of the relevance of “sustainable development” to the process of interpretation of the WTO Agreements, the Appellate Body then invokes the Decision of Ministers at Marrakech to establish a Permanent Committee on Trade and Environment. That Decision refers, in part, to the consideration that “there should not be ... any policy contradiction

²⁹ Sustainable development is not invoked or referred to justify the conclusion that Section 609 constitutes an “arbitrary discrimination”.

³⁰ *Ibid.*, para. 153.

between ... an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other ...".³¹ The Appellate Body notes that the terms of reference for the establishment by this Decision of the Committee on Trade and Environment, which makes further reference to the concept of sustainable development, specifically refers to Principles 3 and 4 of the Rio Declaration on Environment and Development.³²

This is all by way of introduction. There is no further reference to the concept of sustainable development, at least explicitly. Why then has it been invoked by the Appellate Body? No clear answer can be given to that question. However, it appears that "sustainable development" informs the conclusion that the United States' measures constituted an unjustifiable discrimination: Section 609 established a rigid and unbending standard by which United States officials determined whether or not countries would be certified, and whilst it might be quite acceptable for a government to adopt a single standard applicable to all its citizens throughout that country, it was not acceptable, in international trade relations, "for one WTO member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory programme, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members".³³ Shrimp caught using identical methods to those employed in the United States had been excluded from the US market solely because they had been caught in waters of countries that had not been certified by the United States, and the resulting situation was "difficult to reconcile with the declared [and provisionally justified] policy objective of protecting and conserving sea turtles".³⁴ This suggested that the United States was more concerned with effectively influencing WTO members to adopt essentially the same comprehensive

³¹ *Ibid.*, para. 154. See further in this respect the article by R. Tarasofsky in this Volume.

³² Principle 3 of the Rio Declaration provides that "the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations". Principle 4 states "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process, and cannot be considered in isolation from it".

³³ *Ibid.*, para. 164.

³⁴ *Ibid.*, para. 165.

regulatory regime as that applied by the United States to its domestic shrimp trawlers. Moreover, the United States had not engaged the appellees "in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition".³⁵ The failure to have *a priori* consistent recourse to diplomacy as an instrument of environmental protection policy produced "discriminatory impacts on countries exporting shrimp to the United States with which no international agreements [were] reached or even seriously attempted".³⁶ The fact that the United States negotiate seriously with some but not other members that exported shrimp to the United States had an effect which was "plainly discriminatory and unjustifiable". Further, different treatment of different countries' certification was observable in the differences in the levels of efforts made by the United States in transferring the required TED technology to specific countries.³⁷ Moreover, the protection and conservation of highly migratory species of sea turtles demanded "concerted and cooperative efforts on the part of the many countries whose waters [were] traversed in the course of recurrent turtle migrations".³⁸ Such "concerted and cooperative efforts" were required by *inter alia* the Rio Declaration (Principle 12), Agenda 21 (para. 2.22 lit.(i)), the Convention on Biological Diversity (article 5) and the Convention on the Conservation of Migratory Species of Wild Animals. Further, the 1996 Inter-American Convention for the Protection and Conservation of Sea Turtles provided a "convincing demonstration" that alternative action was reasonably open to the United States, other than the unilateral and non-consensual procedures established by Section 609.³⁹ And finally, whilst the United States was a party to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), it had not attempted to raise the issue of sea turtle mortality in relevant CITES Committees, and had not signed the Convention on the Conservation of Migratory

³⁵ Ibid., para. 166.

³⁶ Ibid., para. 167.

³⁷ Ibid.

³⁸ Ibid., para. 168.

³⁹ Ibid., para. 170. The 1996 Convention establishes obligations to reduce harm to sea turtles and encourages the appropriate use of TEDs (article IV para.2 lit.(h)). It also provides expressly that in implementing the Convention the parties shall act in accordance with the WTO Agreement, including in particular the Agreement on Technical Barriers to Trade and Article XI of GATT 1994 (article XV).

Species of Wild Animals or the 1982 UNCLOS or ratified the 1992 Convention on Biological Diversity.⁴⁰

The concept of "sustainable development" appears to have been invoked to provide "colour, texture and shading" to the concept of an "unjustifiable discrimination" in the chapeau of Article XX. That in turn allows the Appellate Body to reach out to these other, non-trade instruments to ascertain what are the minimum standards to be met before discriminatory measures such as those to be found in Section 609 may be justified under Article XX. In this way "sustainable development" has — beyond its substantive use in relation to the meaning of Article XX(g) — a procedural element, namely the requirement that appropriate diplomatic means — including those available within relevant multilateral agreements — be exhausted before unilateral measures may be taken.

IV. Conclusions

To what extent is a reader of these two decisions enlightened about *sustainable development*? Both the ICJ and the Appellate Body refer to sustainable development as a "concept". Both treat it as having a status in international law, in the sense that it is invoked as part of a legal analysis to justify a legal conclusion. Neither body explores its international legal status, whether as custom or convention law, or adds significantly to our sense of what it is or what role it has in the international legal order, beyond indicating that in normative terms it may have both procedural and substantive consequences. And yet both bodies apparently use "sustainable development" as a significant aid to assist in reaching fairly radical conclusions. For the ICJ "sustainable development" contributes to the construction of the bridge across which the majority travels to justify its conclusion that although the 1977 Treaty between Hungary and (Czecho)Slovakia requires the construction of two barrages and remains in force, it does not now require Hungary to participate in the building of a second barrage. In effect, "sustainable development" is utilised by the Court to assist in rewriting the 1977 Treaty, to justify an interpretative conclusion which would not on its face be outcome of its earlier prior analysis. The emergence of "sustainable development" is a post-Rio fundamental change of circumstances

⁴⁰ Ibid., para. 171 and note 174 (and accompanying text).

which was not present in 1989 so as to justify Hungary's original suspension of works.

For the Appellate Body, "sustainable development" provides the "colour, texture and shading" to permit interpretation of the GATT 94 text which legitimately permits one state to take measures to conserve living resources which are threatened by actions in another state, subject to a need to exhaust multilateral diplomatic routes which may be available. This too is a far-reaching conclusion which breaks with prior international practise and for which little, if any, international precedent can be found.

From these two cases it appears, then, that "sustainable development" remains an elusive concept which essentially requires different streams of international law to be treated in an integrated manner.⁴¹ In the words of Judge Weeramantry, it aims at harmonisation and reconciliation with a view to avoiding "a state of normative anarchy". The jurisprudence of those two bodies has not added greatly to our understanding of "sustainable development": we do not know with a great deal more certainty what it is, or what international legal status it has, or in what precise way it is to be made operational, or what consequences might flow from its application.⁴² What we do know is that two important international judicial bodies have been prepared to invoke it to justify or support conclusions with consequences which challenge some basic tenets of traditional international law and are potentially far-reaching. At the very least, these two cases indicate that the "concept" or "principle" of "sustainable development" has gained legal currency and that its consequences will be felt more rather than less widely. One can therefore expect "sustainable development" to be relied upon in other fora, perhaps to justify the integration of environmental considerations into foreign investment protection agreements (for example in the context of ICSID proceedings) or the integration of

⁴¹ See more generally P. Sands, "Treaty, Custom and the Cross-Fertilisation of International Law", *Yale Hum. Rts. Dev. L.J.* 3 (1998), 1 et seq., http://diana.law.yale.edu/yhrdlj/vol01iss01/sands_philippe_article.htm.

⁴² See also A. E. Boyle, "The *Gabčíkovo-Nagymaros* Case: New Law in Old Bottles", *Yearbook of International Environmental Law* 8 (1997), 13 et seq. (18), noting that the International Court's treatment of "sustainable development" left open two very large questions, namely whether the Court could review development proposals on the ground that they were not sustainable, and whether the principle had an *erga omnes* character.

developmental considerations into the application of human rights norms.