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(Un)Sustainable Development(s) in International Economic Law: A Quest for Sustainability

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Abstract: This article aims to contribute to the ongoing debate on post-capitalist economy by exploring the contours of a sustainability-oriented model of economic governance. To this end, the article analyzes the issues of sustainable development in the three main strands of international economic law (trade, investment, and finance) at national and transnational levels. The analysis reveals a policy interdependence between international economic law and sustainable development. The latter hence represents a specific regulatory construct that aims at compensating the losses of exhaustible resources with investments in technology and knowledge. This, however, merely justifies and legitimizes the over-exploitation of certain parts of the globe, including not only their natural resources, but also human and other capitals. To overcome these unsustainable models, the article proposes a paradigm shift away from the standard of sustainable development in international economic law, towards one of sustainability. The idea is to replace sustainable development with sustainable economy. Law can act as a trigger of such a shift through ensuring trust and cooperation between public institutions, private companies, civil society, local communities, and individual citizens.

Keywords: sustainability law; social justice; degrowth; low-carbon sharing economy; progressive sustainability agenda

1. Introduction

Thomas Hobbes, in describing the natural condition of mankind, said that, in general, men were equal but apt ‘to invade and destroy one another [. . .] Let him therefore consider with himself, when taking a journey, he arms himself and seeks to go well accompanied [. . .]’ [1]. Following the enclosure of common lands, the peasants of England were gradually freed, which, by the time Hobbes was born, frequently meant a forced relocation from their lands and means of subsistence, leaving them ‘free’ to work for a mediocre wage, or starve [2] (pp. 323–328). Progressively, the concept and practice of the commons were fiercely opposed by, and eventually unseated by, those of property [3] (pp. 6–17). A growing admiration for property in Western Empires, now constantly ‘armed and well accompanied’ to protect their sovereign and private property went hand-in-hand with forced displacements and the hecatomb of Native Americans, colonization, and the transatlantic slave trade, and a general advent of the universal system of private exchanges [4] (pp. 98–150). The decolonization, the emergence of the concept of development designating the status of a country in a global economic hierarchy, and the subsequent advancement of the developmental rule of law have involved the ‘freeing’ of the former colonies—from now on, ‘developing states’—with the consequences comparable to those, with which peasants were freed during Hobbes’ times [5] (p. 38).

Today, the global developmental hierarchy seems to be an uncomfortable idea for many. In April 2018, at the Seventh Annual Conference of the Society of International Economic Law, Victor do Prado, a coryphaeus of the World Trade Organization (WTO) Secretariat, has repeatedly stressed that such

distinctions as ‘developed/developing countries’ and ‘global north/global south’ are outdated and merely too simplistic [6]. If the divide, and especially its ‘global north/south’ element, is taken at its face value, it is obviously easy to overturn it—for most of the population of the so-called Global South live north of the equator. True, the divide is part of the nomenclature of the Cold War period and its direct predecessors are the east/west and Third World classifications [7]. Yes, the Cold War is over, and with its end some scholars even claimed the end of history [8]. Furthermore, yes, being labelled ‘developed’ means belonging to the Global North as opposed to being part of the Global South, which implies a certain lack of development. Yet, if the divisions ‘developed/developing’ and ‘North/South’ are relevant no more, does this mean that the Global South today reached the level, which is socially, politically, economically, and ecologically, as well as industrially and technologically equal to the Global North? The answer to this merely rhetorical question is obvious. Today, the question is how could we actually overcome this global divide, both in theory and policy?

Speaking more precisely about international economic law (IEL), on the one hand, it is true that such norm-complexes as, for example, foreign direct investment (FDI) relations or global value chains (GVC) continuously distort and reshape that ‘either/or’ categorization of countries by their developmental status. On the other hand, how then to apprehend, theoretically and practically, such countless IEL concepts, norms, and mechanisms underlining differences in national development as the special and differential treatment contained in various provisions of the General Agreement on Tariffs and Trade (GATT) Part IV specifically addressing ‘Trade and Development’; the GATT generalized system of preferences waiver for developing and least developed countries; or else a conventional view that international investment law represents an expedient tool to foster development [9], and more recently, sustainable development?

The general question of this paper is therefore the following: given the asserted incoherence of the developmental labeling, how should lawyers today understand and apprehend the standard of sustainable development in international economic law?

The additional questions are three. ‘What?’—i.e., what issues are included in the universal standard of sustainable development, what is in/out, and what relations does this standard create? ‘Who?’—i.e., which actors are concerned, who are insiders/outside, who benefits? ‘How?’—how does sustainable development generally fit (or not) in a larger picture of today’s transboundary economic relations?

As a main method, I use systems analysis, which engages with a system as one whole. The construct of sustainable development in international economic law is thus analyzed both functionally and institutionally, including norm-setting and law-making, formal application and enforcement, actual effects, as well as limitations.

The main problem that this paper addresses is a policy interdependence between international economic law and sustainable development, which results from economic dynamics associated with the nexus ‘growth-development’ and thus affects the sustainability transformations of society. The timeframe of the analysis is set between the end of World War Two (WWII) and nowadays. The aftermath of WWII is taken as a starting point on account of many reasons, such as the time of birth of the Bretton Woods system, which will be addressed in different sections of the article; the so-called ‘Great Acceleration’ of the mid-20th century, i.e., an industrial, scientific, and technological progress leading to an unprecedented natural resources regression; the creation and expansion of international environmental law; and eventually, the emergence of the universal standard of sustainable development.

In terms of material and data, the general archive of this analysis is international economic relations. More specifically, I engage with a field traditionally known as international economic law. I address in turn its three general strands: namely, (i) world trade law (for today international trade law is virtually represented by the law of the WTO, so it seems more coherent to call it ‘world trade law’); (ii) transnational investment law and arbitration (the transnational, not ‘inter-national’, nature of investment law and arbitration is apparent from, for instance, the mere fact that private

companies expressly participate in its law-making—typically, through arbitration); and (iii) global financial regulation (for the so-called ‘international’ financial law actually represents an informal global regime regulating the allocation of transnational credit where private and state actors intermingle, as in the case of sovereign borrowing, for example). I will proceed with the analysis of negotiations, treaty texts, and case law, as well as a more ‘informal’ norm creation—for example, deliberations at meetings of various special committees, such as WTO committees and working groups.

I submit that IEL, through its three main regimes outlined above, does not actually tackle the global developmental disparities. During its heyday, sustainable development was usually seen as a concept aimed at diminishing the said divide by, among others, balancing economic and non-economic concerns inside IEL and dealing with negative externalities of international economic relations. The main contribution of this article is a critical discussion and analysis of ‘unsustainability’ of the global principle and politics of sustainable development. The broader contribution of this study is to get a better idea of responsiveness of existing transboundary trade, investment, and finance to the global public through reviewing and critically assessing those activities in IEL, which positively or negatively affect sustainability transformations of society, including tackling global developmental disparities. Ultimately, the article identifies alternative visions of how to deal with the said unsustainable developments.

This article proceeds as follows. I first provide an overview of the history, the state-of-the-art, and principle and politics of sustainable development in international law, with a particular emphasis on the three main regimes of IEL: world trade law, transnational investment law and arbitration, and global finance. Secondly and thirdly, I analyze the relevant interface of sustainable development and the state, and sustainable development and non-state actors, respectively. Fourth, I offer some avenues for a systemic departure from the standard of sustainable development in international economic law towards the construct of sustainability, thus seeking to overcome the unsustainable models of constant growth and development that the contemporary idea of sustainable development is beset with.

2. Sustainable Development in International Economic Law

2.1. *Setting the Stage*

International environmental cooperation efforts date back to the early 20th century, when the First International Congress for the Protection of Nature was held in Paris [10] (p. 50). The things hastened with the so-called Great Acceleration of the mid-20th century. This unprecedented industrial, scientific, and technological boom—that involved an also unprecedented use of natural resources and their subsequent depletion—has ultimately led to a contemporary global ecological crisis [11]. At the international level, for the first time these issues were clearly identified at the Stockholm Conference in 1972, whose key objective was ‘to serve as a practical means to encourage, and to provide guidelines [. . .] to protect and improve the human environment and to remedy and prevent its impairment’ [12]. The conference adopted the Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), which stressed the importance of conservation of natural resources and paved the groundwork for the ensuing concepts of the environmental protection and sustainable development [13]. Progressively, the focus of international environmental activism expanded, thus synthesizing the economic and developmental considerations in environmental decision-making in an attempt to ensure the further progressive development of mankind through a balance between reasonable consumption and conservation of natural resources [14].

In 1987, the World Commission on Environment and Development published its seminal Brundtland Report, “Our Common Future”, which embodied the spirit of the Stockholm Declaration and gave the definition of sustainable development as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” [15]. By the time of the United Nations Conference on Environment and Development (Rio Conference, the First ‘Earth

Summit') held Rio de Janeiro in 1992, therefore, one of the main tasks for the international community became one of "boldly positing the legal and political underpinnings of sustainable development" [14]. The United Nations Declaration on Environment and Development (Rio Declaration) adopted in 1992, stressed that the environment is an integral part of the development process [16]. Adopted 20 years apart, the Stockholm and Rio Declarations thus appear to be major stepping stones for not only the evolution of international environmental law [14], but also, and indeed especially, that of sustainable development norms.

The expansion of the international (mostly recommendatory) norms of sustainable development further progressed through holding international conferences, and the adoption of various conservation strategies and action plans. The need to combine economic and environmental development was emphasized in the United Nations (UN) Millennium Declaration (2000) [17] as well as in the UN Framework of the Agenda for the 21st Century (Agenda 21)—a global action plan in the form of 27 non-binding principles, Millennium Development Goals (MDGs), intended to guide the journey towards global sustainable development consecrated in the Rio Declaration [18].

Ten years after the first Earth Summit in Rio, world leaders and the international community met in 2002 at the Johannesburg World Summit on Sustainable Development (WSSD) to improve strategies for implementing Agenda 21. The 1992 objectives of the Rio Declaration were reiterated in the adoption of the Johannesburg Declaration on Sustainable Development, which gently committed nations once again to sustainable development [19]. Another decade, another Earth Summit, the UN Conference on Sustainable Development (UNCSD, 'the Rio+20 meeting') of 2012 clarified the three core dimensions of what now embodies the contemporary construct of sustainable development: "economic growth and diversification, social development and environmental protection" [20]. During the Rio+20 meeting, UN Member States agreed to begin developing a set of Sustainable Development Goals (SDGs) that would explicate the commitments made in the expiring MDGs and converge with the Post-2015 Development Agenda goals designed to replace MDGs [20] (para. 19). The urgency of the concept of sustainable development was underscored by the UN General Assembly through the adoption of the resolution "Transforming our world: the 2030 Agenda for Sustainable Development", which re-emphasized the three core components of sustainable development outlined above [21].

Overall, the mainstream idea of sustainable development grew far beyond its intergenerational framework of the Stockholm and Brundtland-type of visions that ecological concerns set inevitable externally imposed biophysical limits, or "planetary boundaries" [15,22] (pp. 44–46) onto economic growth dependent on current social organization and available technologies. At present, more emphasis is clearly on the environmentally sustainable and socially inclusive economic growth [23].

As to contemporary scholarly approaches to, and definitions of, sustainable development, they have been continuously changing over the last 30 years. Acknowledging this, to date there is a large and burgeoning literature on sustainable development in law (e.g., [24–28]) and other social sciences (e.g., [29–33]). One of such latest scholarly advances on the subject matter calls "to create and maintain conditions, under which *humans and nature can exist in productive harmony*, that permit fulfilling the social, economic, and environmental requirements of present and future generations (my emphasis)" [34]. That is, to actually go on along the axis 'growth-development'.

It is true that, while from a point of view of neo-classical economics achieving sustainable development means liberalizing trade and investment in order to facilitate the access of goods and services to foreign markets, and to stimulate foreign investment flows and subsequent growth, in development and human rights circles sustainable development stands for environmental sustainability, human rights protection and gender equality, as well as equitable development in order to reduce poverty, improve global health, and promote peace [35] (pp. 24–25).

Today, sustainable development is recorded in more than 400 instruments [36], and is either implied or expressly referred to in international jurisprudence, including the case law of the International Court of Justice (ICJ) [37–39], WTO law [40], and investment arbitration [41–44].

However, while the concept per se of sustainable development now seems established in law, its legal scope remains controversial. Is it merely a ‘principle of action’ that relates to political statements and objectives outside law properly so called? Or is it a legal principle? In traditional international law terms, scholarship asks whether it is a principle formulated with the intention of modifying (or else confirming) elements of the existing legal order [45] or ought to be implemented in such a way as to “actually produce that result” [45]?

The orthodox international law scholarship suggests that sustainable development should be seen as a “conceptual matrix” that can give more substance to various legal principles [46] (p. 886). While for others it is an “interstitial standard” [47] (p. 34) that can change the meaning of certain norms and thus guide the evolution of law and relations within and between different bodies of law—for instance, international economic law and international environmental law. Given that the concept by its nature is an ‘open texture’ standard in the hands of adjudicators, it may serve as a basis for “an evolutionary interpretation of treaties, and resolve a conflict of norms or else interests, or even go as far as to revise certain treaty provisions”—hence, its legal scope has a potential to reach beyond a merely “hermeneutic impact” [48] (pp. 276–315).

Sustainable development is also viewed as a normative concept of an “objective yet to be achieved” [48], which may then imply obligations for states to fulfil [49]. Of course, it could be counter-argued that we deal here with allegations of means rather than results; but those could nonetheless be quite firm obligations: i.e., “the obligation to pursue sustainable development, the obligation to strive for it...”, by implementing the principles underlying it and enabling it to be achieved [48] (p. 290). In particular, the principle of integration could link economic development, social development, and environmental protection [48]. Although, here we are back to the questionable nexus ‘growth-development’.

In the particular field of international economic law, should and could sustainable development play a specific role of a guiding/interpretative principle when applying the rules of international trade or investment agreements to national public policy? And if so, how and with which possible consequences? The remainder of Section 2 of the article looks at deployments, likelihoods, and challenges of sustainable development within the three key strands of IEL: world trade law, transnational investment law and arbitration, and global financial regulation.

2.2. Sustainable Development and World Trade Law

After the end of WWII, along with the advent of the Bretton Woods system, the international community sought to multilaterally regulate global trade transactions through an attempt to create a multilateral trade institution based on a legally binding document. Hence, the process started in 1947 by drafting the so-called Havana Charter for a nascent International Trade Organization (ITO) that was approved in 1948 at the conference in Havana, Cuba [50].

The charter was intended to deal with such socially important topics as labor rights, restrictive business practices and commodity agreements, amongst others [51] (p. 43). For example, the draft contained an ambitious Chapter VI on inter-governmental agreement to address the issues facing trade and investment in energy, including such matters as the protection of natural resources from needless exhaustion and similar developments, only tacitly directing to, though crucial for, the notion of sustainable development.

Given the space limits, I will not further elaborate here on various provisions that could today be fairly qualified as sustainability provisions of the draft charter. In addition, the draft Havana Charter was never ratified by the United States (US), generally, due to the change of the US administration, and also, and somewhat consequently, to the enthronement of Cold War, and the ITO project was hence abandoned by the international community [52] (pp. 654–655). For the next four decades, the GATT became virtually the sole multilateral legal basis for transboundary commerce, though most sustainability Havana Charter disciplines were not included in the GATT 1947. One of the key reasons to drop most of them was the clash of the two opposite ideologies of that time. Namely, a so-called

Keynesian model, favoring active policy responses from national governments to sustainably stabilize the economy was progressively unseated by the 'liberal model' (until the triumph of the latter over the former in the 1970s) [53,54].

The general idea of liberalism is about a dedication to the concept of freedom: that is, market freedom, i.e., free unobstructed movement of goods, services, and capital, as well as individual freedom of a model market citizen [55] (p. 704). The GATT, being the 'liberal' face of the Havana Charter, anticipated this trend, as the 'Keynesian' part of the Havana Charter, advocating for more domestic regulatory policy space and fair state interventionism in socially imperative sectors, was abandoned.

It could be easily argued that such a liberal approach is intuitively contrary to sustainable development because it seeks to generally deregulate trade and investment. Paradoxically, it could otherwise fit well in a sustainable development picture if painted by neo-classical economists as highlighted in above Section 2.1. Indeed, from an orthodox economic point of view, achieving sustainable development could mean trade and investment liberalization, hence a greater market opening for goods and services to reach foreign markets and to stimulate foreign investment flows. This duality of sustainable development in international trade points to a greater indeterminacy of the concept of sustainable development in general IEL, discussed throughout this article.

With the creation of the WTO in 1995, the amended GATT and other WTO agreements have included some old and new non-economic imperatives. The main societal discipline of the older, GATT 1947, language was the well-known GATT Article XX stipulating protections regarding health, exhaustible natural resources, and other public policy exceptions—although those are not trade rules, but exceptions to trade rules. A major development among the new disciplines was the so-called WTO Social Clause—i.e., the Preamble to the WTO Agreement, containing far-reaching objectives with respect to the preservation of the environment, higher employment standards, more general standards of living, and sustainable development [56]. Although the Preamble is not binding, it serves as guidance for the implementation of WTO agreements, as well as for the judicial interpretation in case of disputes. The first WTO case where sustainable development was expressly cited as an objective of the world trade system was *US—Shrimp* [40] (paras. 129–131, 152–155). Although, sustainable development was eventually not added as, for example, another GATT Article XX general exception, in which scenario it could have had more teeth because it would have been expressly referred to in case of WTO disputes involving domestic public policy.

In 1994, the ministerial Decision on Trade and Environment, adopted in Marrakesh, established a bond between trade, environment, and the overall sustainable development [57] (pp. 17–18). It also created the WTO Committee on Trade and Development (CTD) and the Committee on Trade and Environment (CTE). The Doha WTO Ministerial Declaration of 2001 called for negotiations on the relationship between existing WTO rules and specific trade obligations related to sustainable development, since the WTO recognized sustainable development as a central principle running through all Doha negotiations [58].

Developing members of the WTO, however, continuously resisted to giving sustainable development too much legal weight. Namely, they stressed that sustainable development's emphasis on intergenerational equity meant to collectively solve problems created only by a handful of the most industrialized states, and also feared that rich countries would enact national regulations based on the notion of sustainable development which would act as a Trojan horse—as disguised trade protectionism, that is [59] (p. 624). A more general argument against any further inclusion and a more formal deployment of the concept of sustainable development in WTO law was that the WTO was a trade organization, and sustainable development was hence outside its mandate [59]. The above considerations crystallized in today's mainstream official WTO approach to sustainable development: trade liberalization and sustainable development are mutually supportive, and thus, not conflicting (see e.g., the Preamble to the WTO Agreement).

Recent WTO disputes with relevance to sustainable development are abundant, with a rising tendency of respondents to appeal to GATT Article XX(a) defending the standards of public morals [60].

Nevertheless, given that the standard of sustainable development is itself too broad comparing to concrete public policy goals of disciplines of GATT Article XX (and similar WTO law exception provisions contained in other WTO agreements, such as Technical Barriers to Trade (TBT) Agreement Article 2.2, Sanitary and Phytosanitary Measures (SPS) Agreement Article 2.1, etc.), it would be very problematic to justify conflicting domestic measures directly based upon the vague and broad standard of sustainable development.

Regarding another realm of powerful actors impacting sustainable development, namely, transnational corporations (TNCs), some relevant debates were held in the framework of the WTO work program on investment, in particular within the Working Group on the Relationship between Trade and Investment (WGTI) [61]. Yet in 1999, the European Union (in that time, European Communities) started the discussion on the investment-related social disciplines and the investor's behavior by addressing the matter of codes of conduct or voluntary guidelines [62]. The two main presented approaches were a government-sanctioned approach and a company driven one, though it was stressed that civil society was going to play a driving role in both of them in any case [62].

Both approaches were based on voluntary commitments by the private investors themselves. Another document, submitted by a group of developing countries raised important societal concerns within the framework of FDI in the Global South, such as the respect of the rights of consumers in host states, effective consumer protection, safety and quality of the goods and services, adherence by the corporations to environmental and safety practices of the host state, steps to protect the environment and to rehabilitate the environment when there is damage caused by the investor [63]. Importantly, the document called for conclusion of effective multilateral agreements with legally enforceable rules on investors' and overall corporate behavior [63].

The above discussions have however gradually moved away from the WTO to bilateral, regional (nowadays including mega-regional), and private settings. This happened mainly because investment-related talks and settlements within the GATT/WTO as such met considerable political opposition. This was, as surveyed above, especially the case of the Global South. The latter saw the GATT/WTO mandate on investment as essentially 'westernized' and thus also a sort of direct threat upon the sovereign right and duty to regulate of the developing states [64].

All in all, challenges and prospects within the WTO regarding the scope and actual application of the concept of sustainable development are not scarce. Should GATT Article XX be amended so as to include a general exception for state measures that are relating to and/or necessary for the respect of international norms of sustainable development surveyed in Section 2.1? Should such global action plans for sustainable development as UN SDGs also make part of these potentially targeted international law norms? Or should we leave trade liberalization and sustainable development continue being 'mutually supportive' within the key world multilateral trade forum and move away to private, regional, and bilateral settings? The sections that follow look at these and connected considerations.

2.3. Sustainable Development and Transnational Investment Law and Arbitration

For many years, it was a conventional view (mostly supported by the investment lawyers, that is) that investment law and arbitration represent expedient tools to foster development, as enshrined, for instance as a very primary aim of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) [65] (pp. 4–5). To wit, by the break of the day of investment arbitration, in a 1981 dispute, the international arbitral tribunal deciding on that case has emphasized that "to protect investments is to protect the general interest of development and of developing countries" [66]. The more transnational investment law and arbitration (TILA) advanced in time and space, the more the discourse that they were here to provide the "underdeveloped" ones of this world [67] with more development, only propagated [68]. The latest decade has also, and indeed increasingly, seen the spread of ideas that investment law and arbitration also bring—or could bring—to states hosting foreign investment more of sustainable development [69–71]. The heavy

metal of the universal soft law of sustainable development, namely, UN's Agenda 21 stipulates that FDI in developing countries is vital for their economic growth and hence vital for their sustainable development: "greater foreign direct investment should be encouraged and technology transfer enhanced through national policies that encourage investment" [72].

This section does not look at such issues as, for instance, the developing world's participation in the investment treaty system or in transnational investment arbitration, since these questions were already addressed in detail elsewhere [73,74]. It instead focuses on review and analysis of the most recent formulations invoking sustainable development in various investment arrangements (from some 'last-generation' investment treaty models through actual investment treaties to economic integration agreements), as well as some relevant case law. That is, the section looks at the reference, usage or incorporation of the notion of sustainable development and relating formulations in said instruments and disputes, anyhow relevant for the interface 'developed/developing'.

Before delving into the most recent relevant formulations, however, a particular problem crucial for this discussion should be addressed first. This problem is the conventional vision in TILA of the one-sided nature of investment treaties as well as of their application and interpretation, providing investors with an asymmetrical right of quasi-judicial review of national regulatory action [75], including national public policy based on standards of sustainable development. This vision partially results from a traditional idea of the very narrow jurisdiction of investment tribunals. To wit, such vision allows excluding any matters not directly related to the 'investment', which usually exclude, for instance, any issues related to human rights, the environment, and similar societal matters from the jurisdictional scope of investment tribunals [76] (p. 83).

The structure of investment treaties allows investors (but normally not host states) to initiate claims for violation of their rights [77]. Under these claims, every arbitral tribunal is ad hoc and draws its jurisdiction on a case-by-case basis. The arbitration agreement, or clause, could be restricted to "investment disputes" ... or to alleged violations of the substantive rights in the investment treaty." [78] (p. 10). Arbitration clauses are consistently included in bilateral and multilateral treaties providing the extent of the tribunal's jurisdiction. It is important for the tribunal to assess whether a claimed investment is actually an 'investment' under the related treaty in order to establish its mandate over the dispute.

The conventional view is that the investment tribunals usually establish their competence to rule on the applicable law solely from the will of the parties based precisely on the arbitration clause, and their jurisdiction is "consequently both based on and limited to that agreement" [76] (p. 83). The 'old-generation' investment treaties clearly delimit themselves to apply only to breaches of those treaties' obligations, that is, directly relevant for investments, thus potentially excluding any non-economic concern [79]. The bulk of traditional TILA scholarship, as well as a number of texts, actual treaties, and jurisprudence that could be qualified as 'old-generation' ones, suggest a one-sided and categorical understanding of investment agreements in general, and specifically regarding societal regulation, that is, non-economic concerns, both in terms of jurisdiction and applicable substantive law [76,80,81].

These restrictions to disputes originating from the breach of a treaty obligation coupled with the fact that these treaties contain no substantive standards relating to sustainable development, result in arbitral tribunals that would declare a lack of competence to rule on claims involving sustainable development issues.

The ICSID decision *Urbaser v. Argentina* seems, however, to make a 'U-turn' before the traditional understanding of investment agreements and the jurisdiction they grant to tribunals concerning societal issues. In this case, the arbitrators dismissed the applicant's objection regarding the asymmetric nature of investment treaties that, in the latter's view, prevented the host state from invoking any right based on the applicable treaty [82]. The tribunal has for the first time recognized the admissibility of a state's counterclaim related to the case only factually (para. 1154) and not legally, as established before in *Saluka v. Czech Republic* [83].

The *Urbaser* award represents a modest yet critical shift within the nexus of ‘sustainable development—investment arbitration’, not only because in this case the arbitrators established jurisdiction over a state counterclaim linked only factually to the investment in dispute and based on a claimed human rights violation. It also, and indeed especially, declared that an investment dispute and a human rights claim were not mutually exclusive (para. 1154), and that, since corporations are the right-holders under international investment agreements, they are subjects of international law and thus can also bear obligations in international law (para. 1155). Namely, the tribunal rejected the claimant’s view that, as a non-state actor, it was not bound by human rights obligations (para. 1194). Last but not least, the tribunal appealed to corporate social responsibility (CSR) “as a standard of crucial importance for companies operating in the field of international commerce” (para. 1195).

The *Urbaser* decision is crucial, but, as said, yet a very modest step of TILA towards better sustainable development targeting. Its main contributions are appeals to state counterclaim only factually related to the investment in ICSID proceedings and to the possibility of recognizing not only TNCs’ rights but also obligations under international law. Certainly, encouraging countries to contest foreign investors’ unsustainable behavior and activities through arbitral counterclaims is an important trend with a lot of potentials for the host states. For example, such trend bears a potential of a certain approximation, so to say, between adjudicatory practices with public policy relevance of the WTO and that of investment arbitration. Namely, GATT’s Article XX-style general exceptions clauses allow for a certain margin for regulation enabling states to adopt measures necessary for the protection of selected permitted objectives, such as protection of health and the environment. It could be thus expected that the practice of concluding new international investment agreements (IIAs) has a potential to trigger a significant shift towards sustainability.

Aside from new interpretive moments, the changes that are relevant for sustainable development include treaty language of some recent IIAs. This new language offers more elaborate general exception clauses referring to clear social and environmental standards, as well as preambles mentioning sustainable development. For instance, the preambles of the 2008 New Zealand–China free trade area (FTA) and the Japan–Papua New Guinea bilateral investment treaty (BIT) are almost identical in that they both recognize that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development, and that cooperative efforts of parties to these agreements to promote investment can play an important role in enhancing sustainable development [84]. That said, the IIAs preambles could only be used as a ‘compass’ for interpretation of applicable law in case of arbitral disputes.

The new treaty language that aims at defending sustainable development should be more ambitious through, for example, treaty provisions bearing substantive obligations of investor. For instance, the final draft of its Pan-African Investment Code (PAIC) in its Article 2 (‘Objective’) says that its objective is to “promote, facilitate, and protect investments that foster the sustainable development of each Member State, and in particular the Member State where the investment is located” [85]. This could have suggested that only investment that contributes to sustainable development of the host country should be promoted, facilitated, and eventually protected. However, there are at least two major challenges to such an avenue. Primarily, the draft text does not offer a definition of sustainable development. It ‘takes into account’ in its preamble the reference to the usual suspects, that is, the UN SDGs, as well as the Investment Policy Framework for Sustainable Development of the United Nations Conference on Trade and Development (UNCTAD). Yet, substantially this is rather vague language put in addition into a lax form—as said, in investment arbitration preambles serve at best as guidance to adjudicators.

Whereas the draft PAIC does not define sustainable development, it surely gives the definition of investment. Namely, its Article 4.4 posits that in order to qualify as such, “the investment must have the following characteristics: the substantial business activity according to Paragraph 1, commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significant contribution to the host State’s *economic* development (my emphasis).” That is, this substantive law

provision bears a rather traditional set of investment characteristics [86] defining investment in a very broad manner and with no trace of sustainable development.

Still, the draft PAIC contains GATT Article XX-style general exceptions clause, namely, Article 14, allowing host states to adopt measures necessary for the protection of certain accepted objectives, such as public health, safety, and the environment (see also its Articles 8, 9, and 10). In this sense, Canada's Model Foreign Investment Protection and Promotion Agreement 2004 was one of the first model BITs to introduce general exceptions drawing on GATT Article XX and allowing states to regulate for the protection of certain concrete public policy objectives [87]. Therefore, the Comprehensive Economic and Trade Agreement (CETA) today contains Article 28(3) based on the Canadian model IIA, which offers a general exception in the CETA for measures "necessary to protect public morals and human, animal, or plant life or health" [88].

The recent BIT between Morocco and Nigeria [89] sets positive obligations to 'strive' for sustainable development through high levels of CSR (Article 24), as well as obligations of environmental impact assessment (Article 14(1)) and social impact assessment (Article 14(2)). It is important to stress, however, that while the language of this BIT is surely another step towards a more targeted sustainable development in TILA, not so many investors have either Morocco or Nigeria as their 'home' country. Whereas such important countries 'fertile' in investors' incorporations as the US, Switzerland, the Netherlands, or else Singapore, show no sign of progress in delimiting the scope of investment through linking it to sustainable development, or through including other investors' substantive obligations in relation to sustainable development norms, by, for instance, revising their model investment agreements accordingly [90].

To sum up, most of the surveyed changes in the (re-)formulation of relevant standards and definitions in the new investment arrangements appear to represent rather political than legal claims of the states' authors of these new instruments, thus at best softly addressing foreign investors. That is, due to a general ambiguity of these new formulations about sustainable development (for the most part, the preambular language), they neither clearly speak to investment tribunals, nor seem to have teeth regarding foreign investors. To wit, these new instruments contain no substantive treaty standards on sustainable development, nor they plainly refer to the international standards that justify sustainable development's importance, when compared with some of the other goals represented in the IIAs provisions stipulating general exceptions, such as Article 14 of the draft PAIC or Article 28(3) of the CETA. For example, in the *Saluka* award, non-discriminatory measures enacted for clear environmental purposes and not breaching due process requirements were not considered expropriatory (para. 55), whereas in the *Urbaser* decision, the tribunal referred to the Universal Declaration on Human Rights and the International Covenant on Economic, Social and Cultural Rights to establish that there were human rights obligations associated with a right to water, as well as to CSR as an international standard of crucial importance (paras. 1195–1197). However, since comparable international standards and instruments that justify sustainable development's importance are not clearly targeted in this 'new-generation' treaty language, it would be challenging to defend the importance of the value of sustainable development when a state policy, which is based upon such broad international standard, impairs FDIs.

Eventually, there are some striking relevant similarities between WTO law and TILA. Namely, just as it was established regarding the current legal weight of sustainable development in WTO law, and especially, in its dispute settlement in above Section 2.2, at present it would be very challenging for host states to justify the importance of the value of sustainable development for their regulatory measures impairing FDIs. Hence, in case of disputes, the legitimacy of domestic regulation and reform seeking sustainable development when such policies affect foreign investments would also be challenging to justify in front of arbitral tribunals.

2.4. Sustainable Development and Global Financial Regulation

In his seminal *The Political Economy of International Relations*, Robert Gilpin stated that global financial flows progressively dwarfed global trade and investment flows, and that a well-functioning international monetary system hence was a cornerstone of both prosperous world economy and national economies [91] (pp. 118–119). In her last paper, Susan Strange underlined that, while Gilpin was right about the importance of a stable and workable international monetary system, he did not distinguish clearly enough between the international monetary system, that is, national currency and exchange rate policies, and international financial system, meaning creation and access to (trade in) transnational credit [92]. In this section, I address some relevant sustainability highlights of the first, monetary, dimension, and then also look at this second strand, namely, an informal regime governing the allocation of transnational credit. I will not look at such constructs, arguably advancing sustainable development through financial means, as the World Bank's Environmental and Social Framework (ESF), Equator Principles (EPIII), or else the Environmental and Social Performance Standards (ESPS) of the World Bank's private sector arm, the International Finance Corporation (IFC) [93], for they have even less legal and actual weight in global finance than the comparable deployment of sustainable development in trade and investment regimes surveyed in above Sections 2.2 and 2.3.

Looking back at the Bretton Woods system, the latter assumed that the welfare state would keep control over exchange rates, the incoming to and outgoing from each country capital flows, as well as the regulation of related risks [94] (p. 17). To wit, one of the main Bretton Woods architects, John Keynes, in the 1944 negotiations that established the system, sought above all the economic stability and social security, which could be provided by an enhanced oversight over national and international trade and financial systems. Namely, he proposed an International Clearing Union and a strict international system for the management of currencies through settling national accounts with one another and issuing a global currency, the 'bancor' [54] (p. 123). Keynes envisaged these institutions managing an international trade and payments system with strong incentives for countries to avoid substantial trade deficits or surpluses [95] (pp. 535–559). The US' greater negotiating weight, however, meant that the final outcomes were much closer to the more liberal plans of the US represented by Harry Dexter White, the US Chief Negotiator [54] (p. 124). On almost every point where he was outweighed by White, Keynes was later proved right by real-life events [96].

The two new institutions, the International Bank of Reconstruction and Development (later known as the World Bank) and the International Monetary Fund (IMF), were born as a compromise that primarily reflected the US vision [54] (pp. 124–125). Instead of incentives for countries to avoid a large trade surplus, the actual system provided for the burden for correcting trade imbalances to lie only on the deficit states (that is, for the most part, the countries soon after called 'developing' and 'least-developed'), which, Keynes maintained, would not be able to cope with imbalances without imposing economic hardship on their citizens [92] (p. 24). It should be emphasized that the 'US vision' in this situation mostly meant US financial and business interests that sought freedom to produce and sell goods (and later, services) in the post-war Europe and Japan (and later, all around the world) [54] (pp. 131–134). Obviously, a strict oversight over trade balance, national exchange controls, and financial flows and risk management by the states-recipients of US exports would hinder such a 'business plan'.

In the questions relevant for both a developmental status and the achievement of sustainable development, the growth and stability of states reside not only in resources, including natural resources. What is less frequently spelled out is that sustainable development, or better say, actual sustainability, also means financial stability, both national and global. Yet, in the 1980s, and surely by the 1990s, states could not anymore cope with regulating a now totally globalized financial system. Instead, they had to privatize, deregulate, and liberalize their financial markets. One of the final 'master strokes' on the stability of the financial system was done when the Bank of International Settlements (BIS) in Basel and the IMF in Washington, D.C., have shifted the bank prudential supervision, that is, the financial risk-management from state regulators to banks themselves [92] (p. 15). These gave rise to an amazingly permissive market for transnational banking and financial services [92] (p. 16).

The rise of the global competition between countries for financial market shares on the one hand, and the change in technology, knowledge, and production structures on the other, were among key factors grounding the structural change in world market economy that occurred around the end of Cold War [92] (p. 9). Global competition for financial market shares prompted states to drastically deregulate their financial systems—that is, to partially or totally abandon control over exchange rates and regulation of financial risks, as well control of the overall inward–outward movement of capital [92] (p. 9). The technological change, on its side, shifted the production power from states to private firms, including transnational corporations [54] (p. 131).

Contrary to main visions of the Bretton Woods of how to achieve growth and stability, the liberal ideas of trade and investment mean international trade system is being founded on trade liberalization and international investment system is being founded on investment liberalization (see *supra*, Sections 2.2 and 2.3). Same could then be said about international finance: liberal market economy requires the free open market of capital to achieve more growth and stability. Though, the liberalization of finance has actually brought the opposite of growth and stability. In his study for the United Nations Development Programme (UNDP), the British economist John Eatwell criticized the theory praising financial liberalization that led to bad financial governance and eventually hindered development globally [92,97]. For instance, Eatwell concluded, capital actually flows from poor countries to rich ones, not the other way around; the outburst of new financial products, including derivative products did not mitigate systemic risks, but, on the contrary, created new systemic risks unforeseen in theory; more efficient allocation of capital and other resources did not result in faster growth and more investment; and market forces did not drive countries into policies promoting growth and stability [92,97]. Oppositely so, the 1990s saw an unprecedented rise of economic and financial instability and crises all around the globe, from the European Exchange Rate Mechanism crisis of 1992 to the Nasdaq crisis of 2000.

Yet in the early 2000s, some economists including Eatwell, after challenging the validity of virtually any theoretical postulate in favor of the liberalization of capital as being contrary to the practical experience of states who actually followed those postulates, have stressed at least two fundamental gaps in the structure of regulation of the global economy: (i) the need for theory and policy that would tie (not separate!) microeconomic risk-taking (risks in commerce, including international trade and FDI) to the macroeconomic propagation of systemic risks (e.g., trade in transnational credit and indirect, or portfolio, investment); and (ii) the need to develop a coherent and accountable institutional setting that would ensure stable and predictable—that is, sustainable—international financial policy [98] (pp. 2 and 17–40).

Specifically regarding sustainable development matters, as it was demonstrated in the two previous sections, in international trade and investment law, so far, the usage of the standard of sustainable development seems to be made in a ‘safe’ manner. That is, by clearly saying in WTO law that sustainable development and trade liberalization are mutually supportive, or by appealing to sustainable development only in preambles of WTO and international investment agreements, sustainable development is thus safely neutralized and currently does not have teeth, especially regarding the enforcement of such agreements in relevant situations. In global finance, there seems to be more problems, hence maybe more solutions.

Given the structural problems that have been present since the aftermath of the settlement of the Bretton Woods system (e.g., continuous trade deficits and surpluses predicted by Keynes and the overall unstable and unpredictable global financial system), and especially since the latest global crisis of 2008, as well as the ensuing Eurozone crisis, the problems in global finance are more numerous, complex, and maybe more difficult to conceal than in trade and investment. The law and regulation of global finance are also much more fragmented, and hence could be more flexible than a crusty TILA law-making that overall seems to continue following a certain neo-liberal matrix, and even more rigid WTO law (in the sense that it is very complicated to both review existing WTO multilateral agreements and create new ones). To wit, there are views that fragmentation could be turned into

a ‘cooperative decentralization’, thus creating better climate for tolerance, diversity, and coexistence among multiple regimes, where the regulatory diversity would better reflect local circumstances as well as allow mutual institutional learning [99–101].

Obviously, it is not by inserting the word ‘sustainable’ before the word ‘finance’ in various international financial institutions’ so-called guidelines that any sustainability of global financial system would be achieved. The critical gaps in the structure of regulation of global economy with a particular emphasis on finance, and the need to fill them that were uncovered by Eatwell and Taylor in the late 1990s and early 2000s, seem to be only more pressing in 2018. Progressive research has already started looking at the legal and normative questions surrounding current unsustainability of transnational finance [102,103]. Hopefully, the prospective ideas from legal scholars for how to make global financial regulation more just and accountable will be as many as the current challenges to it.

The pressing sustainability issues of global finance for discussion are indeed not scarce. They are, for instance, the strengths, gaps, and challenges of theory and practice of macroprudential regulation and supervision—an understanding of the financial system and its risks and risk regulation as a coherent whole, allegedly changing under, and responding to, external systemic pressures [104]—that became especially prominent after 2008. Another challenge is how to actually make the major credit rating agencies—Moody’s, Standard & Poor’s, and Fitch—more accountable and liable, as they de facto oligopolistically control access of lenders, including states, to the capital market, and regulate together with, or sometimes instead of, state regulators. Otherwise, years of marginalization and exclusion from international financial regulatory fora have left the Global South ill-equipped to integrate global financial governance bodies. It thus created a huge gap between developed and developing states, which after 2008 resulted in a harsh divide on many issues of financial regulation, such as accounting or capitalization standards (pp. 172–173)—a divide that today should be addressed by lawyers.

The post-WWII macroeconomic order that started from Keynesian aspirations of an active intervening welfare state has ultimately led to economic globalization and so far, overlooked the fundamental vision of Keynes: to ensure that the markets do not impede but enhance economic stability and social security—in sum, social welfare. Even if accounting or capitalization standards became more inclusive today; if the major credit rating agencies become more transparent, accountable, and liable; or even if the market of credit rating agencies expands, thus bringing in more competition, including prospective rating agencies from developing countries; that is, even if overall privately-induced changes become more positive and numerous—it is still tough to imagine how these changes alone would provide solutions to the macroeconomic and global coordination challenges discussed in this section, not to mention providing the same level of social welfare as the modern welfare state. The two sections that follow therefore address the interface of the world market economy (before and after a structural change, now including the standard of sustainable development) with the state and private actors, respectively.

3. Sustainable Development and the State

The archive of the literature that generally navigates under the banner of ‘law and development’ is the role of law and legal institutions in furthering economic progress in developing countries [105,106]. Categorizing the poorer nations of Asia, Africa, and Latin America as ‘developing countries’ suggests that they are experiencing same economic and social transformations than those already undergone by the industrialized countries of the Global North [107]. Law and development therefore focuses on problems of the interface of law, economics, and the practices of those engaged in legal development work [105]. The idea of development itself evolved over time from a focus on industrialization and gross domestic product (GDP) growth to current concerns with sustainable development [105].

The earlier, post-WWII idea of development with regards to the state was a combination of social, political, and economic changes; growth of industry; and transformation of agriculture, and its central concern was: “when and how does the behavior of the State facilitate or impede development?” [107] (p. 3557). For the sake of argument, if one rephrases the same question regarding the three IEL regimes,

namely, world trade law, TILA, and global finance, that would be: when and how does the behavior of the state facilitate or impede . . . trade liberalization/promotion, facilitation, and protection of FDI/free unobstructed transnational movement of capital?—quite an orthodox liberal vision, that is.

Overviewing the Bretton Woods system, as well as the fall thereof and the rise of the so-called Washington Consensus [108], it is hence important to understand the role of the state in earlier periods of industrialization and making parallels with sustainable development and the state. The table that I propose below is an elementary summary of various development paradigms temporally associated with main contemporary development periods and the state, from the Bretton Woods to a so-called technocratic, or neo-liberal, state. My aim is not to paint a full canvas that could be called ‘Development and the State’ or create such particular theory; opposite so—in this table, I seek to very generally summarize the main highlights and to set the stage for further discussion of the interface of sustainable development and the state.

Table 1 is briefly explained as follows. As you can see from it, many development strategies in sections trade and industry, and investment, of the categories ‘modern welfare state’ and ‘developmental state’ are the same or very similar. This is because the whole idea of both development and calling the poorer countries of the Global South ‘developing’ ones was exactly about the latter catching up with the Global North. Hence, the Global South should undertake same economic and social transformations than those already experienced by the developed states. Few differences in development strategies remain, including important characteristics of developmental state, such as enhanced import substitution and diminished export promotion in trade, or increased stimulation of domestic manufacturing, domestic entrepreneurship and investment, as well as increased investment in human capital, public services, and especially state economic bureaucracy.

Enhanced import substitution, lessened exports of primary materials, as well as increased state involvement in fostering long-term entrepreneurial perspectives among national private sector and in supplying essential public investments in education, health, and infrastructure have revealed and confirmed themselves today as vital for development [107] (p. 3557). This is an ideal vision of developmental planning that partially or totally succeeded in some developing countries, especially Asian, and more specifically East Asian nations, while failed immediately, or over time, in many other developing states, including African and Latin American countries. Reasons for that are many, including the Cold War races and conspiracies of the US and the USSR, actual armed conflicts, the differences in growth paths between mineral-exporting developing countries and manufacturing ones, or else too high corruption of self-interested government elites of many developing states [111] (pp. 140–143). Therefore, one key structural feature of the success stories of the developmental state, such as in East Asia, is a “capable, coherent economic bureaucracy closely connected to, but still independent of, the business community” [107] (p. 3558). This capable state apparatus, and in particular, its economic cluster, is grounded, in turn, in mechanisms such as enhanced investment in public service, involving meritocratic recruitment and competitive public service careers that offer long-term rewards comparable to those available in the private sector [107] (p. 3558).

A wealth of literature, especially in African studies, often tends to blame for the failure of the developmental state solely corrupted state leaderships, while shying away from the analysis of multilevel implications and responsibilities of Western corporations, who used to control most of mineral exports-related operations, particularly in Africa [112] (pp. 36–39). So, oftentimes diminished or even neglected, the role of foreign corporations in creating regressive conditions for the developmental state should instead be emphasized and thoroughly analyzed.

Last but not least, an absence of a sustainable architecture of public regulation of domestic financial markets as another structural feature of the developmental state (the question mark in the corresponding box of Table 1 is not an omission) was not a mere a difference with the financial strategies of the welfare state (and especially, the Bretton Woods ideal scenario thereof). Crucially, it also, and indeed especially, constituted a lacuna that was decisive in the decline and eventual demise of the developmental state. The severe Asian financial crisis of the 1997–98 also coincided

with the expansion of the neo-liberal ideology preaching the maximum retreat of the state from domestic regulation, which became prevalent not only globally, but also locally—that is, among state economic bureaucracies of developed and developing countries alike [110] (pp. 222, 230). As a result of the Asian crisis, even the most exemplar developmental states—the Asian ‘miracles’—now needed urgent international assistance, and thus their legal and regulatory systems became the targets of IMF, World Bank, and US Treasury Department’s pressure for neo-liberal reforms [110] (pp. 264–283). The so-called developmental rule of law has become the Trojan horse of neo-liberal strategies, such as enhanced deregulation, privatization, liberalization, export-oriented growth, etc., and the promotion thereof has become part and parcel of the efforts of the main actors of the Washington Consensus.

Table 1. Development and the state [107,109,110].

	Modern Welfare State (from Bretton Woods to Mid-20th Century Model)	From Developmental Planning to Developmental State	Technocratic State (Neo-Liberal Model)
Trade and industry	<ul style="list-style-type: none"> —Certain degree of state interventionism, especially in stimulating the aggregate demand —Certain accumulation of productive capacity —Certain degree of trade protectionism 	<ul style="list-style-type: none"> —Certain degree of state interventionism, especially in stimulating the aggregate demand —Increased accumulation of productive capacity —General industrialization —Import substitution —Diminishing export promotion —Certain degree of trade protectionism 	<ul style="list-style-type: none"> —Stimulation of aggregate supply —Increase of/stimulation of consumption —Industrial privatization —Import promotion —Export-oriented growth (for the Global South countries) —Gradual trade liberalization and deregulation
Investment	<ul style="list-style-type: none"> —State investment in public health, education, etc. —Stimulation of domestic public and private investment in infrastructure, energy production —Mix of foreign direct investment and stimulation of domestic investment, especially private, in productive capacity —State investment in human capital and public services 	<ul style="list-style-type: none"> —State investment in public health, education, etc. —Public investment in infrastructure, energy production —Stimulation of domestic investment, especially private, in productive capacity, including manufacturing —Enhanced state investment in human capital and public services 	<ul style="list-style-type: none"> —Investment liberalization, including privatization of health, education, etc. services —Increased FDI in infrastructure, energy production —Increased FDI in productive capacity —Underinvestment in human capital and public services (and the unprecedented stimulation of and rise of private sector careers)
Finance	<ul style="list-style-type: none"> —State financial risk regulation and supervision —Certain (though, declining over time) degree of state interventionism in exchange controls and over incoming/outgoing capital 	?	<ul style="list-style-type: none"> —Privatization of risk management —State retreat from, and deregulation of exchange controls and incoming/outgoing capital —Deregulation of, and creation of, a permissive market for (now transnational) banking services

The paradigm of sustainable development was supposed to bring in new and different dimensions in the development strategies of the state. Though, it is very doubtful that it eventually did. Both the summary of its main findings (Table 2) and the highlights from relevant SDGs (below) rather demonstrate that the model ‘sustainable development and the state’ mostly draws on the neo-liberal ideology, merely trying to make it (or sometimes just call it) more ‘sustainable’.

Among the UN Sustainable Development Goals running till 2030, the SDG no. 17 advocates to only increase trade and investment liberalization (but is silent about, for instance, regulating corporate extraction); to go on with the food commodity markets (but is silent about tackling the financial speculation on those markets); and to enhance global macroeconomic stability through ‘policy coordination’ (but is silent about a need for greater regulation of financial markets and tax policies) [113].

The SDG no. 8 calls for sustainable growth—specifically, the growth which is inclusive, promoting full employment and decent work—and for a decoupled economy [113]. Yet, it is about growth, which principally means GDP growth. The decoupling promotes an economy able to sustain

GDP growth without having a negative impact on environmental conditions [114]. Namely, it focuses on existing technological options for both developing and developed states to accelerate decoupling, hence boost their resource ‘productivity’. That is, to decouple environmental ‘bads’ from economic ‘goods’ and thus bring in both the economic and environmental ‘benefits’ [115]. Substitutability means the methods by which any climate policy could be realized in equivalent terms through the commodification of, for example, pollution and its subsequent trading, such as CO₂ trading. I discuss in greater detail the contradictions of SDGs later in this analysis, namely, in Section 5.

Table 2. Development, sustainable development, and the state.

	Modern Welfare State (from Bretton Woods to Mid-20th Century Model)	From Developmental Planning to Developmental State	Technocratic State (Neo-Liberal Model)	Sustainable Development and the State
Trade and industry	<ul style="list-style-type: none"> —Certain degree of state interventionism, especially in stimulating the aggregate demand —Certain accumulation of productive capacity —Certain degree of trade protectionism 	<ul style="list-style-type: none"> —Certain degree of state interventionism, especially in stimulating the aggregate demand —Increased accumulation of productive capacity —General industrialization —Import substitution —Export promotion —Certain degree of trade protectionism 	<ul style="list-style-type: none"> —Stimulation of aggregate supply —Increase of/stimulation of consumption —Industrial privatization —Import promotion —Export-oriented growth (for the Global South countries) —Gradual trade liberalization and deregulation 	<ul style="list-style-type: none"> —Sustainable growth —Sustainable production and consumption —Private-/self-regulation-/or sustainability- standards and codes —Responsible trade liberalization —SDG no.17.10 ...
Investment	<ul style="list-style-type: none"> —State investment in public health, education, etc. —Stimulation of domestic public and private investment in infrastructure, energy production —Mix of foreign direct investment and stimulation of domestic investment, especially private, in productive capacity —State investment in human capital and public services 	<ul style="list-style-type: none"> —State investment in public health, education, etc. —Public investment in infrastructure, energy production —Stimulation of domestic investment, especially private, in productive capacity, including manufacturing —Enhanced state investment in human capital and public services 	<ul style="list-style-type: none"> —Investment liberalization, including privatization of health, education, etc. services —Increased FDI in infrastructure, energy production —Increased FDI in productive capacity —Underinvestment in human capital and public services (and the unprecedented stimulation of and rise of private sector careers) 	<ul style="list-style-type: none"> —Sustainable FDI —‘Green’ investment —Investment in substitutability —SDG no.17.10 ...
Finance	<ul style="list-style-type: none"> —State financial risk regulation and supervision —Certain degree of state interventionism in exchange controls and over incoming/outgoing capital 	?	<ul style="list-style-type: none"> —Privatization of risk management —State retreat from, and deregulation of, exchange controls and incoming/outgoing capital —Deregulation of, and creation of, a permissive market for (now transnational) banking services 	<ul style="list-style-type: none"> —‘Green’ portfolio investment —Responsible project finance —SDG no.17.13 ...

To sum up, neither an increased consumption of imported goods within the neo-liberal strategy, nor an accumulated productive capacity of earlier development models could mitigate natural resource depletion, climate change, and environmental degradation. The new, SDGs-based, development strategy does not help either, since economic growth, even if sustainable, could slightly increase money incomes of the poor, but the ownership of more consumer goods could not provide for an improved sustainable national well-being or compensate for ecological degradation. It is hard to defend development policies premised on the idea that an exhausted natural resource could be compensated by investments in technology and knowledge thus providing an ongoing equivalent income [116] (p. 136).

Is development about well-being rather than about increasing per-capita income, GDP, or producing and/or consuming more? If so, is it at all possible to make development genuinely

sustainable? And what should be the corresponding role of the state? Should and could the contemporary state share sustainability responsibilities and well-being concerns with non-state actors?

4. Sustainable Development and Non-State Actors

In both the welfare state and the developmental state models, the responsibility for good governance lay first and foremost with states, whereas the neo-liberal model advocated for progressive retreat of the state from the governance. What does the paradigm of sustainable development bring to the picture? Various sustainability codes and standards, from those that are global and informally bind states, such as ISO (International Organization for Standardization) standards [117] to private self-governance codes of corporations whose market capitalization surpasses GDP of certain countries [118], nowadays represent a realm of global governance. They thus regulate the promotion and fulfilment of global sustainable development objectives initially set for and by states. Hence, entire countries now seem to be regulated by these codes and standards oftentimes emitted by private and hybrid actors. This generally happens through incorporation of those norms into states' sustainable development objectives, thus defining national governments' policy preferences and orienting overall national development, especially in the Global South [117].

On the non-state front, this global governance by various allegedly voluntary and non-binding sustainability codes and standards generally navigates under the banner 'corporate social responsibility'. CSR, understood as a form of corporate self-regulation governing responsibility of corporations towards people, communities, and environments concerned by their operations, is en vogue these days, with a torrent of captivating scholarship on the subject. Acknowledging this, there is currently a growing body of research on corporate accountability [119], CSR codes and domestic private law [120], business and human rights [121], the interface of consumer law, market regulation and ethical consumption [122], and general interface of sustainability with company law [123].

What seems to be still less common, however, is a critical tendency in the legal literature that would bring together the whole range of the latest substantial scholarly advances on CSR, and, at the same time, address legal-doctrinal as well as normative and behavioral perspectives of corporate liability for harmful acts across supply and production chains (but see e.g., [123]). Indeed, globalization has overwhelmingly expanded the operating scope of transnational corporations, making cost-saving arrangements such as subcontracting across global production or supply chains commonplace. Today, actors as different as workers, investors, individual consumers, and shareholder activists claim that corporations should accept greater responsibility for communities and environments affected by their activities elsewhere across their value chains [124]. The UN 2030 SDGs are, for instance, silent regarding the matter of clear societal and environmental liability of lead corporations, or simply biggest firms, in global value chains. The SDGs limit themselves by a totally unrevolutionary call to "encourage companies, especially large and transnational companies, to adopt sustainable practices" (goal no. 12).

A plethora of scholarship has already started a critical legal-doctrinal analysis of liability of companies in global production and supply value chains [125]. Yet, some questions such as a normative inquiry about the extent to which it is desirable to legalize companies' liability in value chains, and how this can be brought about, if at all, are not yet answered, and are barely asked. Same goes for an empirical study of liability in and of global value chains, including both quantitative methods (e.g., large-N, quantitative statistical analysis) and qualitative ones (e.g., historical perspective, systematic interviewing, surveys, content analysis).

In order to complement those doctrinal legal perspectives (mostly, from private law) on sustainability and non-state actors, paradoxically, we should also revisit and rethink the relevant role of the state. To wit, a redefined role of the state in enhancing sustainability could actually mean delivering and sustaining collective goods and services, such as clean air and water, health and education, and in protecting and sustaining the commons, both natural and cultural [107] (p. 3560). Finding ways to convince companies that they should stop polluting the environment or exploiting women and children, that they should take into account the local consent and conditions and a social

impact of investment decisions, or else invest in clean production techniques requires much more state apparatus' skill and capacity than helping firms to increase their profits through protectionism, tax-breaks, or 'green' subsidies [107] (p. 3560). A sustainability-centered shift should thus induce private economic agents in the provision and preservation of collective goods and the commons, as well as involving non-state social agents, such as unions, associations, NGOs—overall, the civil society—to complement the state in the feat of making companies providing and sustaining collective goods and the commons. In this way, trust as a mutual bond between private companies, public institutions, and citizens could serve a common interest of sustainable society.

5. From Sustainable Development to Sustainability

Could the universal standard of sustainable development today adequately cover such pressing issues as social security, economic stability, environmental protection, preservation of the commons, social justice, and overall well-being, and eventually could be an efficient vehicle of public interest in international economic law?

Answering this question may be more intricate than it seems. Some radical critics charge that sustainable development seeks to unite three irreconcilable domains (economic, social, and environmental), and hence fails both along environmental lines, since “sustainability, with its implication of limited resource consumption, is the enemy of development, which requires an ever-accelerating use of resources”, and social lines, since clear boundaries are drawn between rich and poor [59] (p. 629).

This section presents possible answers to the above question. It first unveils sustainable development as an actual foe of sustainability; it then proposes some methodological, theoretical, and real-life alternative directions for a departure from sustainable development towards sustainability; and lastly it offers a potential way forward.

5.1. An(Other) Unsustainability of Sustainable Development

Generally, the UN 2030 Agenda, and in particular, its post-2015 SDGs underline a universal growth through productive harmony and seek the global resource efficiency in consumption and production. To wit, the goal no. 8 calls to “[i]mprove progressively, through 2030, global resource efficiency in consumption and production and endeavour to *decouple* economic growth from environmental degradation (my emphasis)”. The matters of environmental degradation are hence somewhat controversially placed in the global normative basket of ‘economic growth’. Moreover, an assumption that environmental degradation and economic growth can and should be de-linked through a more ‘eco-efficient’ growth patterns is quite contradictory. That is, the models ensuing from this assumption, namely, decoupling and substitutability, are counter-sustainable. The decoupling participates in the making of new forms of jurisdiction, rights, and values—for example, through the operations of carbon trading, while substitutability is a mainstream business and industry argument that we may compensate future generations for the loss of exhaustible natural resources with ‘human-made’ capital (machinery, buildings, etc.) and properly ‘human’ capital (technology, skills, and knowledge) [116] (p. 136). The rationale of this—quite simplified—argument is that an exhausted natural resource could create a basis for trading (e.g., carbon trading), as well as be compensated by investments in technology and knowledge [116] (p. 136).

The SDGs’ controversial relationship with sustainable development through growth extends, in the very first goal, to its approach to global poverty. There are several problems that such an approach entails. Firstly, there is a problem of ‘catching-up’. Namely, the entire bottom 60 percent of humanity received only 5 percent of the income generated by global GDP growth between 1999 and 2008 [126]. The gap between rich and poor also amplified inside the wealthiest parts of the world, and in particular in the US, where between 1979 and 2007, the increase in the share of the top 1 percent’s real, after-tax income exceeded the total amount of income that the poorest 40 percent received [127]. Given the gap between the income of the richest (1 percent!) and the poorest, it is projected that the global economy

will have to grow by 175 times its present size and it will take 207 years to eliminate poverty with this strategy [126]. Secondly, even if such unrealistic growth were possible, it would have ratcheted climate change up to catastrophic levels, not to mention that, according to data provided by the Global Footprint Network, it would have practically needed at least 3.4 Earths to sustain this level of growth [128].

Another foe, SDG no. 6, claims a universal access to safe water and sanitation and sound management of freshwater ecosystems. Yet, while relevant national indicators are often (but not always) available, it is not the case of the local data, which could be crucial, especially in the poorest countries. It is crucial because considering such factors as the costs involved, the multiplicity of water sources used, the reliability, availability, accessibility (rights, restrictions, social challenges), distance to each source (physical, social, and emotional), as well as the gendered nature of water collection around the world is critical, since without these data we could not and should not assess to what extent the access to water is sustainable and simply safe [129]. Indeed, in many cases when the ‘final product’—water—is deemed ‘safe’ and ‘clean’, it would not have been estimated as such, had the extent to what the access to water in many places of the Global South is regularly pressurized and stressful, and oftentimes dangerous and violent for women and girls in charge of procuring water for their households, been taken into account [129]. In order to measure and balance gender and social lines of, and more generally sustainability of, access to water, we need more of local—not national—data, and qualitative—not quantitative—targets and objectives.

The universal standard of sustainable development underpinning the targets of the UN SDGs measures the concerned global problems in a metric that looks at only very specific quantifiers to estimate the coverage of a problem. The SDGs seek to reduce global inequality by levelling the playing field for the poorest, while leaving the income of the top 1 percent intact, but they seem more unwilling than unable to see the forest for the trees. Namely, SDGs do not admit that both climate change and the global poverty are the direct consequences of overconsumption and extreme wealth accumulation by a few, entailing processes of enclosure, extraction, and exploitation [126]; and whether those overconsumption, accumulation, exploitation, extraction, and enclosure are sustainable or not will not change the situation.

In sum, neither the concept nor the principle of sustainable development as they currently stand properly embrace such pressing issues of general public interest as environmental protection, social justice, or a wider well-being. Namely, sustainable development as a standard, a working concept, and a policy tool seems to be anchored in modern instrumental rationality, with the aim of tackling the negative economic externalities of industrial modernity, preserve the resource base necessary to sustain global productivism and consumerism, and thus legitimate contemporary sustainable regimes of economic accumulation. The key word here is not ‘sustainable’ but ‘accumulation’.

To connect this conceptual critique with life, we could for instance look at one of the IEL core regimes, transnational investment law and arbitration. In this regime, sustainable development seems to be actually understood—often by the very states hosting foreign investments—as sustainable exploitation of resources and generation of ‘sustainable’ economic benefits. Contemporary transnational investment law seems to offer plenty of opportunities for arbitral interpretation so that investors end beneficiaries against other legitimate interests in case of disputes (see cases surveyed in Sections 2.1 and 2.3). The most recent measures, treaty language, and case law addressing sustainable development issues surveyed earlier in this analysis, at best raise legal questions regarding the relationship between host state’s right to regulate on the one hand, and foreign investors’ property and economic rights on the other hand. However, what about the rights and interests of adversely affected parties, that is, communities and environments actually hosting a foreign investment project? Comparable respective questions could be asked regarding the two other IEL systems, namely WTO law and global financial regulation.

The lines that follow look at those questions and, more generally, at how the gaps identified in this section could be bridged, including from the public interest perspective—that is, from the perspective of concerned local communities, ecosystems, etc.

5.2. *Shades of Sustainable Public Interest in Global Economic Law and Governance*

Today, most of the relevant existing tools and procedures, as demonstrated throughout this analysis, at best consider instruments aimed at the main actors of globalization, and the responsiveness of such instruments to sustainable development goals. These key actors are the usual suspects—states, international organizations, and transnational corporations. Yet, as the term ‘glocalization’ reminds us, globalization does not exist outside processes of generalization from local practices, while any global agenda or program only become real when adopted, adapted, and respected (or enforced) by local actors [130]. The question is, therefore, how to move back and forth along the sustainability axis between this global level and more local ones?

For example, there are in the WTO law-related literature three different levels of public interest: ‘communal’, ‘sovereigntist’, and ‘collective preferences’ public interest [131] (pp. 83–91). The ‘communal’ public interest generally informs that the interest of distinct actors of a given regime, or ‘community’ (essentially, the parties to the main constitutive acts of that regime), is ‘private’, as opposed to the ‘public’ interest of that community as a whole. The ‘sovereigntist’ level of public interest refers to the public interest envisaged in agreements provisions: interpretive provisions aiming at reconciling economic and non-economic concerns, public policy exceptions when an agreement might become unenforceable due to its conflicts with a public policy deduced from national legislation, escape clauses, etc. The ‘collective preferences’ level of public interest emphasizes the fact that states are also collectivities, and in any transnational legal regime—be it the GATT/WTO or any other system—communities delegate the organization of their communal goods to one ‘single identity’—the state [132] (p. 47). I suggest that these three idioms of public interest could be equally informative to study the wider realm of IEL, including investment law and arbitration, and global financial regulation.

In order to depart from revealed contradictions of sustainable development, in terms of public interest, we should not only study the ‘sovereigntist’ conception of public interest in the relevant law- and norm-making and adjudication processes. For a relevant methodological update, the legal research should concurrently use mainly the first (‘communal’) and the third (‘collectivist’) analytical lines of public interest. I submit that this could update the notion of law and norms of IEL from a particular sustainability perspective that is at once wider and deeper than state and inter-state law, at both national and post-national levels. That is, such a method is expected to facilitate a fundamental analysis of sustainability issues in a community of states mediated by norms of international economic law, as well as communities inside and across states mediated through various forms of relevant norms. It is thus more coherent to categorize such norms as ‘global economic law and governance’.

5.3. *The Way Forward: From Sustainable Development in International Economic Law to Sustainability in Global Economic Law and Governance*

The ideational predecessors of the divide ‘developed/developing’ are the divisions ‘civilized/barbaric’, ‘culture/nature’, ‘mind/body’, ‘men/women’, and ‘subject/object’ that also lay down the foundations of modernity, and, ultimately, of capitalism [133]. Valuing and sustaining plural and diverse abilities may represent a departure away from the perspective that assesses everything against the standard of a healthy able body, since it runs against dominant orthodox approaches, which strive for universalism and division by comparison. The same universalism and division by comparison equally underpin the contemporary construct of sustainable development.

Based on the analysis in various sections of this study, a tentative working definition of sustainability-directed paradigm shift in global economic law and governance could be as follows: *A shift from growth and development as the main objectives of the economy and from corresponding regulatory*

constructs toward degrowth, sharing, and collaborative economy, where the value of growth is replaced by the values of social justice, low-carbon economy, the ethics of collaboration, and an overall well-being.

Simply put, the idea is to replace the sustainability of development by the sustainability of economy.

One of the main rationales behind such a vision is building resilience based on contraction and collaboration against destabilizing forces such as climate change [134]. Resilience is crucial for the paradigm of sustainability for it represents a benchmark according to which the global “system is capable of learning, self-organizing, and adapting while preserving its coherence” [135]. Key aspects of resilience are “diversity, modularity, reciprocity, social capital (that is, relation of trust and solidarity among community members) and tight feedback loops; [its key drivers are] the support of a dynamic local economy; the empowerment of local governance and control; the optimization of assets; the recognition of the value of local distinctiveness [. . .]; the development of sustainable infrastructures (such as, for example, affordable housing, interest-free banks, community land trusts, and autonomous energy production); and the construction of a social solidarity economy” [134] (p. 127).

Ideally, the paradigm shift to sustainability should not be merely about re-localization, that is, bringing the globalized law, economy, and politics back to local levels; but rather about ‘glocalization’ as delineated earlier in this study. Specifically, this means focusing on the relationship between the local, the national, and the global, thus emphasizing multi-scale and multi-level interdisciplinary strategy [136]. For instance, endeavors focusing on local levels can co-exist in harmony with the approach of the global commons [134] (p. 128). In such a paradigm, the role of law as a trigger of a more sustainable economy should be precisely providing trust and ensuring collaboration between citizens, public institutions, and private companies.

To ensure sustainability, some research proposes to adopt at the national level a sort of integrated cross-sectoral sustainability legislation that addresses several issues in the economic, social and environmental spheres at once [137]. In support of this position, it could be said that integration promotes technological innovation, as the cross-sectoral range of objectives can potentially provide more options to achieve sustainability. However, aside from possible problems of a quite tenuous practical feasibility of such laws, even if adopted, they could also become an easy target in international economic dispute settlement as it stands today. For example, in the WTO, as discussed earlier, conflicting national policies could be justified only if they refer to concrete standards, such as protection of the environment, but not necessarily if they are based upon such broad international standards as sustainable development.

In a similar vein, another group of scholars writing more precisely on environmental laws and sustainability underlines the centrality of a kind of sub-national governments in achieving sustainability, and emphasizes that development, and, moreover, sustainability is when people live in harmony with nature, rather than exploit it [138].

There is also an expanding strand of the environmental and sustainability scholarship, including the so-called future studies [25,139,140] who speak, among others, about re-imposing the external bio-spherical limits on our economic activities, industrial growth, and scientific progress. A particular fraction of the future studies, the radical Green thought, calls for a transition to a low-carbon economy of sharing, “in which the goal of growth is displaced by the values of social justice and the ethics of collaboration, thus liberating humanity from the yoke of ‘economism’” [134] (p. 127).

These are but few literature references and conceptual suggestions of how to enhance and leverage sustainability of global economic relations, including every individual actor and place, from a village to the globe. They represent, however, mostly spot approaches.

Academia should therefore strive to provide a more integrated perspective on the responsiveness of existing transboundary trade, investment, and finance to the global public, as well as to explore and ruminate on how to better re-calibrate global economic law and governance so as to make them sources of public trust and sustainable well-being.

6. Conclusions

The freeing of peasants and enclosures of the commons could be compared to contemporary ‘enclosures’ of sustainability values within the models of constant growth and development. For these two paradigms reveal a particular understanding of developmental differences, social inequalities, and environmental degradation as ‘negative externalities’ of the post-WWII global economic architecture. Post-war international economic law or market relations, it is assumed by the liberal IEL orthodoxy, simply did not initially extend to the particular domains of environmental and social disparities. One of main laminations of this paper is that sustainable development is hence presented as a specific regulatory construct that separates economic growth from actual resource use and proposes to compensate the loss of exhaustible resources with investments in technology and knowledge. Such a construct, however, only justifies and legitimizes the over-exploitation of resources and people.

In this study, I considered relevant lacunae, challenges, and prospects in the three main regimes of international economic law at national and transnational levels. Specifically, I analyzed relevant recent developments, such as the most current scholarly advances on both sustainable development and sustainability in IEL; the most recent trade and investment deals and pertinent case law; the relevant post-2015 development agenda goals; as well as more informal norm-creation. I identified some concrete avenues of how to make global economic system more just, responsible, and eventually sustainable. A few of the most general implications and recommendations for a progressive sustainability agenda are amazingly consistent with earlier thinking preceding the neo-liberal age in the transborder economy. To quote just a few, for a more coherent regulation of the global economy, we need to develop both theory and policy that would clearly link microeconomic risk-taking to the macroeconomic propagation of systemic risks, as well as to create a coherent and democratically responsible legal and institutional setting that would ensure stable and predictable global financial policies. An active intervening welfare state should ensure that the markets do not impede but enhance an overall social welfare. The sustainability-centered redefinition of the role of the state includes providing and sustaining collective goods and the commons. Private economic agents should have clear parts and responsibilities in the delivering and preserving collective goods and the commons, and the civil society should complement the state in monitoring and imposing onto companies the responsibility to deliver and sustain those goods and the commons.

Based on those avenues, the sustainability paradigm should encompass the local, the national, and the global, thus emphasizing multi-scale and multi-level interdisciplinary strategy of replacing the sustainability of development by the sustainability of economy. The role of law is to trigger a more sustainable economy through guaranteeing trust and cooperation between private companies, public institutions, civil society, local communities, and individual citizens.

The study of different levels and legal regimes of the global economy revealed a number of gaps and questions, both the old unanswered and the new unexpected ones. The main challenge was not only to ask the right questions, but also, and especially to deliver systemic answers to those questions. To summarize, they are about how to provide a more integrated perspective on the accountability of existing transboundary trade, investment, and finance to the global public, as well as how to better re-calibrate global economic law and governance so as to make them sources of trust and well-being.

Given the sheer need and an increasing importance of making the globalized economy sustainable, as well as an absence of clear solutions how to overcome the global developmental divide, the relevance of a holistic research how to systemically evolve from the so-called sustainable development in international economic law to sustainability in global economic law and governance, is obvious. The importance of such study is at least twofold. First, it would focus on sustainability based on de-growth, re-distribution and, even more importantly, solidarity and non-domination—not on mere sustainable development grounded in sustainable economic growth. Second, it would look at the subject matter from the position of the global public, namely, in plural and differential settings, not through universalized one-size-fits-all sustainable development norms, objectives, and standards.

Overall, the progressive research agenda should aim at reviewing and critically assessing those activities in global economic law and governance, which are positively or negatively affecting sustainability transformations of society. A special emphasis should be put on actors, instruments, and regimes of the economic globalization.

Since sustainability as it is delineated in this paper is rather under-studied by lawyers, greater contributions from the scholarship working with international law, public and private alike, as well transnational, national, comparative, historical and socio-legal perspectives are needed to holistically study and advance sustainability in global economic law and governance. The perspective that measures all states and communities living inside them against the norm of development—and more recently, that of sustainable development—could be hopefully overcome by the proposed conception of sustainability, which will value diversity and sustain abilities.

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82. The arbitral tribunal referred to the arbitration clause of the Spain-Argentina BIT stated that disputes, namely, Art. X (1).
83. *Saluka Investments B.V. v. Czech Republic*; UNCITRAL, Decision on Jurisdiction over the Czech Republic’s Counterclaim, 7 May 2004, paras. 65, 79.
84. Preamble, New Zealand-China FTA (2008): ‘The Governments ... [are] [m]indful that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development and that closer economic partnership can play an important role in promoting sustainable development ...’. Preamble, Japan-Papua New Guinea BIT (2011): ‘Recognizing that economic development, social development and environmental protection are interdependent and mutually reinforcing pillars of sustainable development and that cooperative efforts of the Contracting Parties to promote investment can play an important role in enhancing sustainable development.’ For a similar language, see also, e.g., preambles to Canada-Peru FTA (2009); Panama-Taiwan FTA (2004).
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