

## *Sustainable Development*

### INTRODUCTION

SUSTAINABILITY HAS BEEN described as ‘one of the most contested words in the political vocabulary’.<sup>1</sup> And yet, perhaps paradoxically, sustainable development is also a virtually uncontested central reference point in all manner of policy debates, and is a pervasive term in environmental debate. The World Commission on Environment and Development published the seminal work on sustainable development in 1987, the ‘Brundtland Report’.<sup>2</sup> This report provides an influential and widely adopted (including by the EU<sup>3</sup>) ‘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’.<sup>4</sup> Sustainable development was initially a child of international law and policy, and arguably its strength still lies in the international development arena.

This chapter begins by discussing some key issues in sustainable development, as it evolved in international law. After this brief introduction, I turn to sustainable development in EU law and policy, including the role of the ‘environmental integration’ principle. The ‘green economy’ was a major theme of the latest international conference on sustainable development and is increasingly central in the EU; that will be explored in the following section. The danger that the environmentally protective core of sustainable development will be overwhelmed by the pursuit of economic growth is real, in the EU and elsewhere. This chapter then turns to EU governance of sustainable development, in particular examining the use of ‘indicators’, and the disappointingly weak mechanisms for reporting and review. Sustainable development continues to have a potentially important role to play, but this examination of the governance framework suggests that its value as a policy concept in the EU, notwithstanding its place in the Treaties and legislation, is rather fragile. It is central to this chapter that sustainable development is ultimately a political question, based on values that are properly the subject of public debate. Sustainable development demands, and at its best provides,

<sup>1</sup> A Dobson, *Green Political Thought* (London, Routledge, 2000) 62.

<sup>2</sup> Named for its Chair, Gro Harlem Brundtland, *World Commission on Environment and Development, Our Common Future* (Oxford, Oxford University Press, 1987).

<sup>3</sup> Eg European Commission, ‘A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development’ COM (2001) 264 final (the Sustainable Development Strategy).

<sup>4</sup> Brundtland Report (n 2) 8 and 43.

consensual space for that debate about how we pursue some social objectives, without compromising others.

THE INTERNATIONAL EVOLUTION  
OF SUSTAINABLE DEVELOPMENT

‘Sustainable development’ emerged at the international level out of an attempt to reconcile the agendas of rich and poor countries, especially the economic development concerns of the poor, and the environmental concerns of the wealthy.<sup>5</sup> It was first acknowledged that human development and environmental protection must be brought together at the Stockholm Conference on Environment and Development in 1972.<sup>6</sup> The developing/developed country, economic/environmental division is of course overly polarised.<sup>7</sup> In particular, the coupling of economic growth with environmental protection is equally attractive for the wealthy world, with a similar power to bring together potentially competing economic and environmental actors inside and outside government. Sustainable development provides common language and common objectives, which are a starting point (rather than a conclusion) for debate.<sup>8</sup>

The UN Convention on Environment and Development (the famous Rio Earth Conference) took place in 1992. For our purposes, the *Rio Declaration on Environment and Development* (the Rio Declaration) is most significant for its elaboration of environmental principles, such as the precautionary principle and the polluter pays principle discussed in chapter one, which whilst well-established now, were hard-fought.<sup>9</sup> In 2002, the *Johannesburg Declaration on Sustainable Development* (the Johannesburg Declaration)<sup>10</sup> provided what has become a competitor to the Brundtland ‘definition’ of sustainable development, asserting ‘the interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection.’<sup>11</sup> This lacks the elegance of the Brundtland approach, but reflects

<sup>5</sup> For discussion of persistent tensions between developing and developed countries, see L Rajamani, ‘From Stockholm to Johannesburg: The Anatomy of Dissonance in the International Environmental Dialogue’ (2003) 12 *Review of European Community and International Environmental Law* 23; P Kohona, ‘The Future We Wanted—The Future We Will Get’ (2012) 42 *Environmental Policy and Law* 137.

<sup>6</sup> UN Doc A/CONF.48/14.

<sup>7</sup> On tensions between developing countries, see K Morrow, ‘Rio+20, the Green Economy and Re-orienting Sustainable Development’ (2012) 14 *Environmental Law Review* 279.

<sup>8</sup> See especially M Jacobs, ‘Sustainable Development as a Contested Concept’ in A Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford, Oxford University Press, 1999).

<sup>9</sup> Principles 15 and 16.

<sup>10</sup> UN Doc A/CONF.199/20. For critical discussion, see M Pallemmaerts, ‘International Law and Sustainable Development: Any Progress in Johannesburg?’ (2003) 12 *Review of European Community and International Environmental Law* 1.

<sup>11</sup> Johannesburg Declaration *ibid* [5].

dominant understandings of sustainable development, appealing to a number of different 'good things'. Both the Brundtland and Johannesburg approaches were picked up in the agreement reached at the 'Rio+20' conference in 2012, *The Future We Want*,<sup>12</sup> which commits to '[ensuring] the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations'.<sup>13</sup> Rio+20 conceptualises the three pillars as three 'dimensions', which may place greater emphasis on the *integration* of economic, social and environmental concerns. That the pursuit of 'economic development, social development and environmental protection' should attract widespread consensus is unsurprising. The consensus can reveal itself to be something of an illusion when one attempts to identify the precise meaning of sustainable development in particular cases.

As a definition, the Brundtland soundbite (development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs'<sup>14</sup>) is not particularly helpful. A single phrase selected from a report that runs to almost 400 pages, it cannot do justice even to the report itself, let alone the huge academic and political literature on sustainable development. It highlights, however, the centrality of justice to future generations, which is perhaps the most distinctive element of sustainable development. Notwithstanding the desirability of other, including economic,<sup>15</sup> bequests to the future, depleting environmental resources is the clearest way in which we prejudice future generations: 'the results of present profligacy are rapidly closing the options for future generations'.<sup>16</sup> There is a complex debate around the desirability and feasibility of formulating duties and rights in respect of future generations.<sup>17</sup> But even accepting that intuitive notions of justice extend to at least some future generations, this impulse of responsibility does not tell us what to do: how to prioritise current and future generations, or how future generations are likely to value environmental, economic and social bequests. Sustainable development is often seen as an injunction to leave open the greatest possible range of options, but this is not straightforward either.<sup>18</sup> Specific development paths or decisions cannot be determined by acknowledging the importance of future generations, although a debate may be sparked. The significance of 'future generations' in academic and policy

<sup>12</sup> *The Future We Want* UN Doc A/Res/66/288. Proposals are often made for a fourth pillar, on topics including culture, health, peace and security.

<sup>13</sup> *Ibid* [1]. The themes of Rio+20 were the green economy and institutions for sustainable development, *ibid* [12]. On the latter, see R Cléménçon, 'Welcome to the Anthropocene: Rio+20 and the Meaning of Sustainable Development' (2012) 21 *Journal of Environment and Development* 311.

<sup>14</sup> Brundtland Report (n 2) 8 and 43.

<sup>15</sup> Eg, the disagreement about the speed with which national debt should be reduced is often framed in terms of inter-generational justice in the UK.

<sup>16</sup> Brundtland Report (n 2) 8.

<sup>17</sup> Eg E Brown Weiss, 'Intergenerational Equity: A Legal Framework for Global Environmental Change' in E Brown Weiss (ed), *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo, United Nations University Press, 1992); contributions to Dobson (n 8).

<sup>18</sup> A Dobson, *Citizenship and the Environment* (Oxford, Oxford University Press, 2003) ch 4.

analysis of sustainable development is constantly reinforced by repetition of the Brundtland 'definition'. Even the Brundtland Report itself, however, pays relatively little attention to future generations, compared to justice within the current generation. After an appearance in the Rio Declaration,<sup>19</sup> the very long-term future was decidedly neglected in the Johannesburg Declaration. Vague references to the future continue to pepper *The Future We Want*,<sup>20</sup> although the main focus is on the present generation. Given the importance of the long term to environmental protection, this may be of some concern.<sup>21</sup>

Justice within the current generation, specifically the links between 'poverty, inequality and environmental degradation', rather than inter-generational justice for future generations, was the major theme of the Brundtland Report.<sup>22</sup> It confirmed the legitimacy and necessity of continued economic development, even in the face of environmental problems, and the imperative of environmental protection in the face of poverty. The connections between environmental protection and poverty eradication are drawn from the observation that the global poor bear the brunt of environmental degradation, being more likely to live in environmentally degraded areas;<sup>23</sup> more likely to rely directly on environmental resources (forests, soil, climate) for food, shelter and warmth; and less able to protect themselves from the effects of environmental degradation such as climate change. And just as the poor suffer from environmental degradation, the poor may degrade the environment in search of survival. It is often agreed that a certain level of prosperity is necessary before environmental protection becomes either desirable or technically feasible.<sup>24</sup> None of this should distract attention from the contribution of rich developed economies (and individuals in them) to environmental damage. But importantly, sustainable development attempts to side step the perception that environmental protection is a hobby of the rich. The ways in which the different dimensions of sustainable development feature in actual decisions are not dictated by the concept itself.

<sup>19</sup> 'The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations', principle 3.

<sup>20</sup> Above (n 12). As well as the title, see eg [1], [31], [39], [50], [86], [158], [191], [197].

<sup>21</sup> M Jacobs, *Environmental Modernisation: The New Labour Agenda* (London, Fabian Society, 1999) argues that the severity of current environmental degradation means that references to the future are no longer necessary.

<sup>22</sup> Brundtland Report (n 2) xii. This pervades the Report, but see eg 2–3; 28–30; chs 5 and 9. This also pervades European Commission, 'A Decent Life for All: Ending Poverty and Giving the World a Sustainable Future' COM (2013) 92 final, eg 3.

<sup>23</sup> This resonates also with the environmental justice movement within developed countries, touched on below.

<sup>24</sup> This is in part a broad political argument, but sometimes refers to the 'environmental Kuznets curve', which posits that certain forms of environmental degradation can be seen first to increase, but then to decline, with an increase in per capita income. The conclusion should not be drawn that economic growth will necessarily take care of all environmental degradation. See DA Kysar, *Regulating from Nowhere: Environmental Law and the Search for Objectivity* (New Haven, Yale University Press, 2010) 128–30.

One of the major outcomes of Rio+20 was the commitment to begin a process for the agreement of ‘sustainable development goals’ (SDGs), which will spell out some more content for sustainable development.<sup>25</sup> *The Future We Want* places SDGs in the context of the UN Millennium Development Goals (MDGs).<sup>26</sup> The MDGs were agreed at the turn of the millennium in eight areas: poverty and hunger; universal education; gender equality; child health; maternal health; HIV/AIDS; environmental sustainability; and global partnership.<sup>27</sup> The MDGs are supplemented by targets and official indicators: for example, the goal of poverty eradication is supplemented by a target to ‘halve between 1990 and 2015 the proportion of people whose income is less than \$1 a day’.<sup>28</sup> The target date for the MDGs is 2015, when they expire. Whilst the MDGs focus on poverty, and on the developing world,<sup>29</sup> the SDGs have to be ‘global in nature’,<sup>30</sup> and include ‘all three dimensions of sustainable development and their interlinkages’.<sup>31</sup> The MDGs were simply stated, and although not without their critics, they captured the development agenda and contributed to broad agreement around the pursuit of particular focused development objectives. This is a considerable achievement. Learning from this, SDGs are to be ‘action oriented, concise and easy to communicate, limited in number, aspirational’.<sup>32</sup> Whilst simplicity is a great political strength of ‘goals’ like this, it has its drawbacks. Conspicuous absences are inevitable (for example climate change does not feature in the MDGs, nor do reproductive rights), and the appropriate degree of ambition will always be controversial.<sup>33</sup> Averages can disguise national inequalities, or lead to an emphasis on quantity over quality,<sup>34</sup> and causal links are not clear. There is also a risk of over-prioritising the things that can be easily measured.

<sup>25</sup> Information on process for the agreement of SDGs can be found at [sustainabledevelopment.un.org/index.php?menu=1300](http://sustainabledevelopment.un.org/index.php?menu=1300). The UN Secretary General’s High Level Panel of Eminent Persons reported in 2013, *A New Global Partnership: Eradicate Poverty and Transform Economies through Sustainable Development* (New York, United Nations, 2013), identifying five ‘transformative shifts’, and 12 (indicative) goals.

<sup>26</sup> *The Future We Want* (n 12) [18], [245]. Millennium Declaration UN Doc A/RES/55/2, see [www.un.org/millenniumgoals/](http://www.un.org/millenniumgoals/).

<sup>27</sup> Relationships between developing/developed countries, and developing countries and the private sector.

<sup>28</sup> See United Nations, *Millennium Development Goals Report 2013* (New York, UN, 2013). Now \$1.25, *ibid*.

<sup>29</sup> Including the four targets within the ‘sustainability’ MDG: ‘integrating sustainable development into country policies and programmes and reverse the loss of environmental resources’, reducing biodiversity loss, halving the proportion of the population without access to safe drinking water and basic sanitation, and achieving (by 2020) ‘a significant improvement in the lives of at least 100 million slum dwellers’.

<sup>30</sup> *The Future We Want* (n 12) [247].

<sup>31</sup> *Ibid* [246].

<sup>32</sup> *Ibid* [247].

<sup>33</sup> Eg, whilst the 100 million people target for slums has been met, the number of people living in slums has increased, United Nations (n 28) 50.

<sup>34</sup> Eg, the primary education target is measured by numbers in primary education, and not the quality of that education.

Although the SDGs are to cover all three ‘dimensions’ of sustainable development, poverty eradication is still at its heart, described in *The Future We Want* as the ‘greatest global challenge facing the world today’.<sup>35</sup> The centrality of poverty is often seen as a manifestation of the growing strength of developing countries in international negotiations, from the time of the first Rio conference.<sup>36</sup> The emphasis on poverty should remind us that economic growth can be an ethically serious concern to stand alongside environmental protection, straddling the economic and social elements of sustainable development. The ‘social development’ dimension of sustainable development also addresses a wide range of social justice and equality issues *within* nations and regions, including for example in *The Future We Want* ‘gender equality and women’s empowerment’, ‘universal health coverage’, ‘decent work for all’, ‘equal access to education’.<sup>37</sup>

Andrea Ross expressed concern some years ago that the environment could get ‘squeezed out’ of sustainable development, given all the good things being promised, and that the dominance of sustainable development could actually lead to the neglect of environmental protection.<sup>38</sup> The danger of ‘squeezing out’ environmental protection is particularly acute when social development merges into the pursuit of economic growth. Growth is a core aspect of poverty eradication as understood in all of these international agreements, and in the EU, as discussed below. *The Future We Want* reasserts commitment to a list of earlier environmental agreements, including the three treaties agreed at the first Rio conference in 1992,<sup>39</sup> and discusses various environmental issues, including oceans, climate change and biodiversity.<sup>40</sup> It does not, however, contain any specific and novel environmental commitments.<sup>41</sup> Both the SDGs and the ‘green economy’ (another important outcome of Rio+20, discussed below) have the potential to become challenging environmental commitments, putting paid to concerns about sustainable development squeezing out the environment at the international level. But in neither case can environmental commitments go without saying, and the danger of consensus around (economic) growth at virtually any (environmental) cost is also real.

<sup>35</sup> *The Future We Want* (n 12) [2]. Ending poverty is the first ‘transformative shift’ identified by the Eminent Persons (n 25), expressed as a need to ‘leave no one behind’. Poverty was also a major focus in Johannesburg, although with little in the way of fresh commitments, see L Kimball, FX Perez and J Werksman, ‘The Results of the World Summit on Sustainable Development: Targets, Institutions and Trade Implications’ (2002) 13 *Yearbook of International Environmental Law* 3.

<sup>36</sup> Cléménçon (n 13).

<sup>37</sup> *The Future We Want* (n 12) [8], [139], [147], [229].

<sup>38</sup> A Ross, ‘Is the Environment Getting Squeezed Out of Sustainable Development?’ [2003] *Public Law* 249, discussing the UK.

<sup>39</sup> United Nations Framework Convention on Climate Change (1992) 31 ILM 851, the Convention on Biological Diversity (1992) 31 ILM 818, and the Convention to Combat Desertification 1992 (1994) 33 ILM 1328.

<sup>40</sup> *The Future We Want* (n 12) [158], [190], [197]. On the UN Environment Programme’s role in the preparation of Rio+20, see Morrow (n 7).

<sup>41</sup> For a critical review, see Cléménçon (n 13).

## SUSTAINABLE DEVELOPMENT IN EU LAW AND POLICY

Article 3(3) of the Treaty on European Union (TEU) provides:

The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Environmental protection is clearly part of Article 3, but the emphasis is, arguably, on the economic side, in particular in the reference to economic *growth* (albeit balanced). Sustainable development has an important place in the treaties, also featuring in the recitals to the TEU and in the provisions on external action.<sup>42</sup> I focus here on the internal dimension, but as suggested in the Preface, not because the external dimension is unimportant.

Sustainable development as an attempt to minimise the trade-off between economic growth and environmental protection has been implicit and explicit in a number of EU environmental action programmes.<sup>43</sup> A broader approach, with more focus on the social dimension, emerged in the 2001 Sustainable Development Strategy,<sup>44</sup> and a Renewed Strategy was adopted by the European Council in 2006.<sup>45</sup> The Renewed Strategy, like its predecessor, adopts the classic approach: ‘the needs of the present generation should be met without compromising the ability of future generations to meet their own needs’, and including the three pillars of ‘environmental protection’, ‘social equity and cohesion’ and ‘economic prosperity’ in its four ‘key objectives’ (together with ‘meeting our international responsibilities’).

The EU Sustainable Development Strategy was, however, rather overshadowed by the economically-oriented ‘Lisbon Agenda’,<sup>46</sup> which aimed to make the EU ‘the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.’<sup>47</sup> Improving economic performance was at the heart of the Lisbon

<sup>42</sup> Art 3(5) TEU; Art 21 TEU.

<sup>43</sup> Eg 5th Environmental Action Programme, *Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development* [1993] OJ C138/5. The proposed 7th Environmental Action Programme (7th EAP) is also full of references to sustainability, European Commission, *Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020, ‘Living Well, Within the Limits of Our Planet’* COM (2012) 710 final. See M Pallemmaerts, ‘Developing More Sustainability?’ in A Jordan and C Adelle (eds), *Environmental Policy in the EU: Actors, Institutions and Processes* (Abingdon, Routledge, 2013) on the evolution of sustainable development in the EU.

<sup>44</sup> Commission (n 3).

<sup>45</sup> *Renewed Sustainable Development Strategy* (2006), European Council Document 10917/06.

<sup>46</sup> Eg R Steurer and G Berger, ‘The EU’s Double-Track Pursuit of Sustainable Development in the 2000s: How Lisbon and Sustainable Development Strategies Ran Past Each Other’ (2011) 18 *International Journal of Sustainable Development and World Ecology* 99; Pallemmaerts (n 43).

<sup>47</sup> Lisbon European Council Conclusions, 23 and 24 March 2000.

Agenda, although it also contained some important social objectives, on issues including training, employment, social exclusion and poverty. The addition of an environmental perspective by the Sustainable Development Strategy, whilst important, always seemed like something of an afterthought.<sup>48</sup> The successor to Lisbon, ‘Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth’,<sup>49</sup> is now said by the Commission to be the main instrument for the pursuit of sustainable development.<sup>50</sup> It does have a more significant sustainable development agenda than Lisbon, including ‘resource efficiency, low carbon economy, research and innovation, employment, social inclusion and youth’,<sup>51</sup> as well as the ‘green economy’ theme discussed further below. But the focus of *Europe 2020* is very much on responding to the economic crisis, and economic growth is the priority. Employment is the main social concern; climate change the main environmental concern. This shallow approach to the social and environmental dimensions of sustainable development is not surprising given the severity of the economic shock. It is at least something that the economy should be ‘smart’ (‘based on knowledge and innovation’), ‘sustainable’ (‘more resource efficient, greener and more competitive’) and ‘inclusive’ (‘high employment’; ‘delivering economic, social and territorial cohesion’).<sup>52</sup> But if environmental values are cast aside when things get difficult, there is little hope of progress.

Although *Europe 2020* is not completely bereft of environmental concerns, its dominance of the sustainable development agenda does not bode well for the ‘squeezing out’ of environmental protection.<sup>53</sup> The Commission’s proposed 7th Environmental Action Programme (7th EAP) adds an independent, overarching environmental strategy to mediate the pursuit of growth.<sup>54</sup> That the 7th EAP is being prepared at all (and it is still to be agreed through the ordinary legislative process) was not a foregone conclusion.<sup>55</sup> Given the weak embedding of environmental objectives (other than climate change) in *Europe 2020*, an independent

<sup>48</sup> The Gothenburg European Council in 2001 brought the sustainable development strategy within the Lisbon process.

<sup>49</sup> European Commission, ‘Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth’ COM (2010) 2020 final.

<sup>50</sup> The Commission says it will implement its Rio+20 commitments ‘in particular’ through *Europe 2020*, see Commission (n 22) 6; also European Commission, ‘Rio+20: Towards the Green Economy and Better Governance’ COM (2011) 363 final. There seems to be some disagreement between Council and Commission, see the Commission’s ‘statement’ appended to Council Conclusions, *Rio+20: Outcome and Follow Up to the UNCSD 2012 Summit*, 25 October 2012. See also the discussion in European Sustainable Development Network (ESDN) Quarterly Report No 28, *The Future of the EU SDS in Light of the Rio+20 Outcomes* (ESDN, 2013).

<sup>51</sup> Highlighted by Commission (n 22).

<sup>52</sup> Commission (n 49) 10.

<sup>53</sup> ESDN Quarterly Report, *Sustainable Development Governance and Policies in the Light of Major EU Policy Strategies and International Developments* (ESDN, 2011) analyses the limited coverage in *Europe 2020*.

<sup>54</sup> Above (n 43).

<sup>55</sup> European Commission, ‘Impact Assessment of Proposal for a Decision on a General Union Environment Action Programme to 2020, “Living Well, Within the Limits of Our Planet”’ SWD (2012) 398 final, 43.

environmental planning and review process is important. The 7th EAP may also help to ‘underpin and legitimise the environmental agenda’.<sup>56</sup>

EU environmental legislation often, although by no means invariably,<sup>57</sup> refers to sustainable development, generally presenting environmental legislation as the mechanism by which its environmental dimension is implemented.<sup>58</sup> Non-environmental legislation only rarely mentions sustainable development,<sup>59</sup> and explicit duties of sustainable development (subject to the obligation contained in Article 3(3) TEU) are rare.<sup>60</sup> As well as legitimising the incorporation of environmental considerations into other areas,<sup>61</sup> sustainable development also brings economic considerations into the pursuit of environmental values. *R v Secretary of State for Environment, Transport and the Regions, ex p First Corporate Shipping*<sup>62</sup> concerned a challenge by a property owner against the UK Government’s notification of a site to the Commission for designation under the Habitats Directive.<sup>63</sup> In his discussion of the relevance of economic considerations in the designation of sites for nature conservation purposes under the Directive, Léger AG observes that:

sustainable development does not mean that the interests of the environment must necessarily and systematically prevail over the interests defended in the context of the other policies pursued by the Community ... On the contrary, it emphasises the necessary balance between various interests which sometimes clash, but which must be reconciled.<sup>64</sup>

<sup>56</sup> Ibid [6.2.1]. However, environmental action programmes have so far had relatively limited policy impact, I von Homeyer, ‘Emerging Experimentalism in EU Environmental Governance’ in CF Sabel and J Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford, Oxford University Press, 2010).

<sup>57</sup> Eg there is no reference to sustainable development in Directive 2010/75/EU on Industrial Emissions (Integrated Pollution Prevention and Control) [2010] OJ L334/17, although there was in its predecessor, Directive 2008/1/EC Concerning Integrated Pollution Prevention and Control [2008] OJ L24/8, Recital 10. Art 3 TEU nevertheless applies.

<sup>58</sup> Eg Regulation 1907/2006/EC concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) [2006] OJ L396/1 provides that ‘A high level of human health and environmental protection should be ensured ... with the goal of achieving sustainable development’, Recital 3.

<sup>59</sup> Legislation relating to external trade agreements frequently refers to sustainable development. In terms similar to environmental legislation, Directive 2011/24/EU on the application of patients’ rights in cross-border healthcare [2011] OJ L88/45, refers to the contribution of health systems to sustainable development, Recital 3.

<sup>60</sup> By contrast with the UK, see A Ross, ‘Why Legislate for Sustainable Development? An Examination of Sustainable Development Provisions in UK and Scottish Statutes’ (2008) 20 *Journal of Environmental Law* 35. Eg the Greater London Authority Act 1999, provides for the exercise of certain powers ‘in the way which it considers best calculated ... to contribute towards the achievement of sustainable development in the United Kingdom’, s 30(5).

<sup>61</sup> Mainly through the integration principle, see below.

<sup>62</sup> Case C-371/98 *R v Secretary of State for Environment, Transport and the Regions, ex p First Corporate Shipping* [2000] ECR-I 9235. See D McGillivray, ‘Valuing Nature: Economic Value, Conservation Values and Sustainable Development’ (2002) 14 *Journal of Environmental Law* 85.

<sup>63</sup> Directive 1992/43/EEC on the conservation of natural habitats and of wild fauna and flora (‘Habitats Directive’) [1992] OJ L206/7.

<sup>64</sup> *First Corporate Shipping* (n 62) [54] (Léger AG). The Court did not refer to this part of the Opinion.

Whilst the idea that there are difficult decisions to be made is unobjectionable, this approach is a demonstration of sustainable development enhancing the status of economic concerns in environmental decisions. On the particular facts of the case, it allows economic concerns to creep into a decision that, arguably, should be taken on ecological grounds alone.<sup>65</sup>

To take a different example, undefined ideas of sustainability ('sustainable water policy', 'sustainable use', encouragingly also 'environmental sustainability') pervade the Water Framework Directive.<sup>66</sup> The 'purposes' of the Directive include the promotion of 'sustainable water use based on a long-term protection of available water resources'.<sup>67</sup> As discussed in chapter four, the Water Framework Directive sets an overarching ambitious environmental target of 'good water status', but alongside extensive opportunities to meet alternative, less onerous standards. An initial reading of the Directive would suggest that 'sustainable development' constrains the use of alternatives to this primary environmental objective; but equally, it may allow those exceptions to be shaped around economic arguments. For example, 'new modifications' (such as reservoirs or canalisation) to water bodies, or 'alterations to the level of bodies of groundwater' (for example by abstraction) may mean that a body of water fails to achieve good water status. One of the ways in which the Member State can nevertheless avoid a breach of the Directive is if the benefits 'to the environment and to society' of meeting the Directive's ecological objectives are 'outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to *sustainable development*'.<sup>68</sup> Further conditions apply, but essentially sustainable development is balanced *against* water status. We might see in the Water Framework Directive the (mis)use of the philosophy of sustainable development to undermine ecological objectives. Or alternatively, perhaps the ambitious ecological objectives are only possible because they can be compromised in necessary cases. In that case, the philosophy of sustainable development would be doing precisely what it is supposed to, given the intimate connection between the use of water and human and economic wellbeing. Either way, at best sustainable development opens up the space for these debates to take place during implementation. It is unlikely that the word 'sustainable' alone imposes significant *legal* constraints on decisions.<sup>69</sup>

<sup>65</sup> McGillivray (n 62).

<sup>66</sup> Directive 2000/60/EC establishing a framework for community action in the field of water policy ('Water Framework Directive') [2000] OJ L327/1, Recitals 5, 13, 18, 23, 41. Note also eg the mediation of health and environmental concerns by economic (or socio-economic) concerns under REACH (n 58), ch 9 below.

<sup>67</sup> *Ibid* Art 1.

<sup>68</sup> *Ibid* Art 4(7), italics added. See also Art 4(3).

<sup>69</sup> In the context of a controversial river diversion in Greece, Kokott AG held that 'despite its detrimental effects on the environment, water power is a typical example of sustainable power generation'; 'irrigation of agricultural land is to be regarded as an overriding public interest or—perhaps—as a sustainable development measure', Case C-43/10 *Nomarchiaki Aftodioikisi Aitolokarnanias* not yet reported in the ECR, [84]–[91]. Common Implementation Strategy, *Guidance Document No 1 Economics and the Environment—The Implementation Challenge of the Water Framework Directive*

Sustainable development could raise serious questions about the EU's social and economic order. A radical approach to sustainable development would need to put the very real tension between economic development, social development and environmental protection at the forefront of the debate. Whilst in the long term, and in the aggregate, environmental protection may indeed be compatible with, and necessary for, economic and social benefits, short-term conflicts are real. The basic insistence in the EU that our current lifestyle is consistent with environmental protection (and social justice, etc) brings out the central optimism of sustainable development as a concept. Positively, it at least enables debate and modest steps in a society embedded, as the EU is, in the market economy. Nevertheless, the further marginalisation of the more challenging aspects of sustainable development within economic strategy is worrying, and confirms the importance of maintaining a strong environmental strategy that is independent of sustainable development.

#### ENVIRONMENTAL INTEGRATION

A core aspect of the implementation of sustainable development in the EU is the 'integration principle', contained in Article 11 of the Treaty on the Functioning of the European Union (TFEU):<sup>70</sup> 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development'. Improving 'environmental integration and policy coherence' remains one of the nine 'priority objectives' of the proposed 7th EAP.<sup>71</sup> At its simplest, environmental policy integration attempts to act on the recognition that more can be achieved by incorporating environmental concerns within other policy areas (such as agriculture, transport, industry, tourism) than by leaving them to explicitly 'environmental' policy.<sup>72</sup> Like sustainable development, environmental integration is in part an effort to 'shift from a traditional antagonistic model' of the relationship between different policy objectives and policy actors, 'to a new co-operative model'.<sup>73</sup>

Notwithstanding long standing political and legal support, introduced in the new environment Title of the Single European Act 1986, and 'promoted' to a

(2003) does little more than rehearse the difficulties and competing approaches to sustainable development, see Box D2a.2 and 216.

<sup>70</sup> On the development of environmental policy integration, see A Jordan, A Schout and M Unfried, 'Policy Coordination' in Jordan and Adelle (n 43).

<sup>71</sup> 7th EAP (n 43).

<sup>72</sup> European Commission, 'A Blueprint to Safeguard Europe's Water Resources' COM (2012) 673 final is a good example.

<sup>73</sup> J Hertin and F Berkhout, 'Analysing Institutional Strategies for Environmental Policy Integration: The Case of EU Enterprise Policy' (2003) 5 *Journal of Environmental Policy and Planning* 39, 44. See also Mazák AG: 'the objectives of the common agricultural policy and those of environmental protection are not mutually exclusive; rather they should be considered to be complementary', Case C-61/09 *Landkreis Bad Dürkheim v Aufsichts- und Dienstleistungsdirektion* [2010] ECR I-9763 [20].

general principle in the Amsterdam Treaty of 1997, the consensus seems to be that environmental integration is poorly understood and poorly implemented.<sup>74</sup> Integration is difficult to institutionalise, demanding the involvement of and cooperation between many actors in different parts of the decision-making process,<sup>75</sup> and is especially difficult in the EU's fragmented decision-making context.<sup>76</sup> Procedural approaches to integration have dominated.<sup>77</sup> Environmental assessment, discussed in chapter seven, can make an important contribution; impact assessment of major policy initiatives, discussed in chapter two, is the dominant mechanism for integration at EU level.<sup>78</sup> The outcome of a policy of integration on the ground is poorly understood,<sup>79</sup> although it is easy to identify anecdotally areas of any policy where environmental concerns have blatantly not been integrated.

Jordan and Lenschow compare strong approaches to integration, in which priority is given to environmental objectives,<sup>80</sup> with weaker approaches, which emphasise the search for win-win options and weigh the different objectives more evenly.<sup>81</sup> The latter seems to be the approach taken in the EU. Geelhoed AG, for example, has rejected the proposition that Article 11 requires environmental protection to 'always be taken to be the prevalent interest', confirming instead its procedural ('take due account') dimension.<sup>82</sup> In this respect, the integration principle at least legitimises the relevance of environmental considerations to other areas of policy, and the Treaty's mandatory language<sup>83</sup> should create an obligation on decision-makers. Environmental protection may 'form part of'<sup>84</sup> or even be 'regarded as an objective' of other areas of policy.<sup>85</sup> But save an egregious failure to

<sup>74</sup> A Jordan and A Lenschow, 'Environmental Policy Integration: A State of the Art Review' (2010) 20 *Environmental Policy and Governance* 147.

<sup>75</sup> For a sense of the challenges, see also European Environment Agency (EEA), *Environmental Policy Integration in Europe: Administrative Culture and Practices* (EEA Technical Report No 5/2005).

<sup>76</sup> Jordan, Schout and Unfried (n 70).

<sup>77</sup> Hertin and Berkhout (n 73).

<sup>78</sup> The role of impact assessment is reaffirmed by the 7th EAP (n 43). The 'Cardiff process', which placed responsibility for integration on the different Council formations, 'quietly expired' during the mid-2000s, Jordan and Lenschow (n 74) 154; Cardiff is not mentioned in the proposed 7th EAP, *ibid*. The website survives, although there has been no obvious activity since the mid-2000s, [europa.eu/legislation\\_summaries/environment/sustainable\\_development/128075\\_en.htm](http://europa.eu/legislation_summaries/environment/sustainable_development/128075_en.htm). EEA (n 75), dismisses Cardiff as 'little more than the development of a roadmap', 29.

<sup>79</sup> Jordan and Lenschow, *ibid*.

<sup>80</sup> *Ibid*; see also W Lafferty and E Hovden, 'Environmental Policy Integration: Towards an Analytical Framework' (2003) 12 *Environmental Policy* 1.

<sup>81</sup> Ambiguously, the EEA (n 75) interprets environmental policy integration as requiring environmental issues to be 'reflected' in policy-making, as well as part of a general effort to coordinate policy, Executive Summary.

<sup>82</sup> Case C-161/04 *Austria v European Parliament and Council* [2006] ECR I-7183 [59] (Geelhoed AG).

<sup>83</sup> By contrast with the language of the other 'integration' principles, discussed below, text at nn 87–88. Case C-379/98 *PreussenElektra AG v Schleswig AG* [2001] ECR I-2099: 'Article 6 is not merely programmatic; it imposes legal obligations' [231] (Jacobs AG).

<sup>84</sup> Eg Case C-428/07 *R (on the application of Horvath) v Secretary of State for Environment, Food and Rural Affairs* [2009] ECR I-6355 [29].

<sup>85</sup> Eg Case C-440/05 *Commission v Council* [2007] ECR I-9097 [60].

consider relevant information, it is difficult to imagine a successful judicial review based on a failure to integrate.<sup>86</sup>

Environmental policy was the only beneficiary of ‘integration’ before Lisbon. Now, environmental integration sits alongside other similar provisions, on ‘the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health’, consumer protection, animal welfare and discrimination,<sup>87</sup> as well as a general requirement on the EU to ‘ensure consistency between its policies and activities, taking all of its objectives into account’.<sup>88</sup> Whilst the range of integration principles may reduce the visibility and status of environmental integration, it is more in line with the breadth of sustainable development.<sup>89</sup> It also puts paid to any lingering hope that environmental policy integration might be about the *prioritisation*, rather than the simple consideration, of environmental values. Integration seems to be a tool to enhance ‘policy coherence’ generally, ensuring that all relevant issues are understood and considered as fully as possible, rather than a tool of environmental protection.<sup>90</sup> Whilst this may be a conceptually limited approach to integration,<sup>91</sup> and should be part of any policy process, it is at least an important minimum.<sup>92</sup>

#### THE GREEN ECONOMY

One of the real achievements of sustainable development has been to make the case that, at least in principle, environmental protection need not be a challenge to economic growth. This perspective on sustainable development has now been strongly asserted as the ‘green economy’<sup>93</sup> theme in Rio+20.<sup>94</sup> Michael Jacobs identifies two versions of the ‘green economy’ thesis: first that regulating for

<sup>86</sup> G Marín Durán and E Morgera, ‘Commentary on Article 37 of the EU Charter on Fundamental Rights—Environmental Protection’ in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, 2014).

<sup>87</sup> Arts 8–13 TFEU.

<sup>88</sup> Art 7 TFEU.

<sup>89</sup> Integration, of economic, social and environmental issues, is a Policy Guiding Principle found in the *Renewed Strategy* (n 45).

<sup>90</sup> A Persson, *Environmental Policy Integration: An Introduction* (Stockholm, Stockholm Environmental Institute, 2004) distinguishes between ‘normative’ and ‘organisational’ approaches to environmental policy integration, 19–20, citing LJ Lundqvist, *Sweden and Ecological Governance: Straddling the Fence* (Manchester, Manchester University Press, 2004).

<sup>91</sup> Lafferty and Hovden (n 80).

<sup>92</sup> And procedure and substance cannot be separated, see eg chs 2 and 7.

<sup>93</sup> See M Jacobs, ‘Green Growth: Economic Theory and Political Discourse’, *Grantham Research Institute on Climate Change and the Environment Working Paper* No 92 (2012) for a very useful discussion of the economic theory behind ‘green growth’, which he describes as a ‘sister term’ of ‘green economy’. On the institutional development of the green economy, see Jacobs, *ibid*; E Morgera and A Savaresi, ‘A Conceptual and Legal Perspective on the Green Economy’ (2013) 22 *Review of European Community and International Environmental Law* 14. For sceptical discussion, see Morrow (n 7).

<sup>94</sup> *The Future We Want* (n 12) contains a full section on the ‘green economy’.

environmental protection is less economically costly than doing nothing;<sup>95</sup> and secondly, that environmental protection is not simply compatible with good economic performance, but can actually improve economic performance, even in the relatively short term. The proposed 7th EAP claims ‘important socio-economic benefits’ from environmental protection, including employment and the exploitation of the global market for ‘eco-industries’,<sup>96</sup> as well as cost savings from resource efficiency.<sup>97</sup> The theoretical and empirical claims for the green economy are, of course, disputed,<sup>98</sup> and it is ‘quite plausible that *some* environmental policies will be growth-enhancing, but others will act as a constraint’.<sup>99</sup> Given that some of the time, and especially in the short term, economic and environmental (and social) objectives will conflict, the role of values and politics in making choices, as discussed below, remains crucial.

The green economy, undefined in *The Future We Want*, appears to narrow sustainable development to the economy/environment linkage. For some, this enhanced focus is a great advantage, but that does depend on what one wants from sustainable development. Michael Jacobs argued in an earlier paper that approaches to sustainable development differ along four main fault lines: the degree of environmental protection required; the importance of equity; the role of public participation; and the scope of the subject matter. Jacobs suggested that a radical, challenging approach to sustainable development will tend to argue for higher levels of environmental protection, a central role for equity and public participation, and a broad scope to the subject matter covered by sustainable development. Whilst the level of environmental protection remains open, the green economy otherwise, at first glance, focuses on a narrow set of economy/environment concerns. However, for better (ambition) or worse (lack of focus), the approach to the green economy at Rio+20 is set ‘in the context of sustainable development and poverty eradication’. Rather than superseding sustainable development, it is ‘one of the important tools available for achieving sustainable development’, and ‘should contribute to eradicating poverty as well as sustained economic growth, enhancing social inclusion, improving human welfare and creating opportunities for employment and decent work for all, while maintaining the healthy functioning of the Earth’s ecosystems’.<sup>100</sup>

The green economy is one aspect of *Europe 2020*, and ‘a resource-efficient, green and competitive low-carbon economy’ is one of the nine priority objectives of the proposed 7th EAP. *Europe 2020* frames the ‘green’ part of the green economy primarily in terms of climate change, which is the only one of the five ‘headline

<sup>95</sup> See Jacobs (n 93).

<sup>96</sup> Commission (n 43) [29].

<sup>97</sup> Commission, *ibid.* See also Commission (n 55), Annex V, which adds discussion of environmental taxes and environmentally harmful subsidies, the internalisation of environmental externalities, see ch 4.

<sup>98</sup> Jacobs (n 93).

<sup>99</sup> *Ibid.* 16.

<sup>100</sup> *The Future We Want* (n 12) [56]. Jacobs (n 8).

targets' that could be described as environmental. Environmental relevance is slightly extended by concern with resource efficiency, and a *Resource Efficient Europe* is one of the seven 'flagship initiatives' set in motion by *Europe 2020*,<sup>101</sup> as well as an important feature of the proposed 7th EAP. Resource (including carbon) efficiency is important, but has well known limitations. In particular, efficiency does not necessarily reduce resource consumption overall, for example if cars are more fuel efficient, but we drive further.<sup>102</sup> The Commission acknowledges that 'overall, consumption is increasing over time and generally faster than improvements in resource efficiency',<sup>103</sup> and the European Environment Agency (EEA) observes that the EU is better at resource efficiency than ecosystem resilience, describing the relationship between resource efficiency, decreased environmental pressures and ecosystem resilience as 'ill-defined'.<sup>104</sup>

Jacobs attributes the rise of the 'green growth' discourse to the 'decreasing traction' of sustainable development, as well as (and probably related to) continued environmental degradation after years of sustainable development policy.<sup>105</sup> We might also note the coincidence of this discourse with economic recession,<sup>106</sup> when resurrecting economic growth is perceived to be of absolutely central importance, and arguing against growth, even for the slowing down of growth, is politically very difficult.<sup>107</sup> Green growth has emerged from a 'mainstream and pragmatic community of environment-economic policymakers', whilst sustainable development was, at least in part, a conscious response to the 'limits to growth' debate of the 1970s.<sup>108</sup> For current purposes, the central thesis of 'limits to growth' is that because the resources of the earth are finite, human ingenuity will not allow us to design our way out of trouble: technological fixes to environmental problems will at best postpone, rather than prevent, environmental collapse.<sup>109</sup> Limits to growth envision absolute incompatibility between economic growth and environmental protection, making the pursuit of pragmatic environmental protection measures very difficult. Although the debate about environmental limits did not simply go away with

<sup>101</sup> European Commission, 'A Resource-Efficient Europe—Flagship Initiative under the Europe 2020 Strategy' COM (2011) 21. Note also the industrial policy flagship initiative (European Commission, 'An Integrated Industrial Policy for the Globalisation Era: Putting Competitiveness and Sustainability at Centre Stage' COM (2010) 614), which discusses the green economy, focussing on competitiveness.

<sup>102</sup> Commission (n 43). Resource efficiency is relatively wide ranging, including a concern for biodiversity.

<sup>103</sup> Commission (n 55) 33.

<sup>104</sup> EEA, *Environmental Indicator Report 2012: Ecosystem Resilience and Resource Efficiency in a Green Economy in Europe* (EEA, 2012), Part 3; [124].

<sup>105</sup> See n 93. The proposed 7th EAP paints a grim picture of current environmental trends (n 43) 7.

<sup>106</sup> Also Morgera and Savaresi (n 93).

<sup>107</sup> There is of course much to say on this, and important voices argue against the assumption that growth is a necessary part of the good life, see eg T Jackson, *Prosperity without Growth: Economics for a Finite Planet* (London, Earthscan, 2009).

<sup>108</sup> Jacobs (n 93) 6.

<sup>109</sup> DH Meadows et al, *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (New York, Universe Books, 1972). See the discussion in Dobson (n 1).

the rise of sustainable development,<sup>110</sup> sustainable development is a concept that denies absolute limits. It asserts that whilst, for example, some resources are non-renewable, limits are equally determined by technological and social organisation; and ‘technological and social organisation can be both managed and improved to make way for a new era of economic growth’.<sup>111</sup> The serious disruption to ways of life and human values implied by an acceptance of limits was deliberately absent from sustainable development, even before the rise of the ‘green economy’.

If the green economy is just one part of sustainable development, it is also a rhetorically powerful sharpening of an existing environment/economy debate. Its potential to narrow the scope of sustainable development in the EU is seen in the dominance of economic growth, mediated by a shallow greening through climate change and resource efficiency, over other objectives in *Europe 2020*, and the dominance of *Europe 2020* in policy-making. Like sustainable development itself, the green economy may be a Trojan horse for business as usual, or a minor technical tweak to business as usual. If we place the emphasis on the ‘green’, however, it could be a (missed) opportunity to ‘[place] environmental management at the centre of economic development’.<sup>112</sup> All depends on its implementation; as Jacobs puts it, political economy is as important as economic theory.<sup>113</sup>

#### IMPLEMENTATION AND GOVERNANCE OF SUSTAINABLE DEVELOPMENT

Sustainable development has not so far featured heavily in judicial review, and it is difficult to imagine a court condemning a particular decision as substantively unsustainable. Sustainable development can also be difficult to challenge politically. A decision might be deemed sustainable because of its impact on poverty, or because it provides employment, whilst others might place greater emphasis on the environmental impact. Critics who say that sustainable development can justify any decision are not quite correct though. Sustainable development provides language for the political censure of a decision, and we might ask whether calling *Europe 2020* a sustainable development strategy is simply an abuse of language.<sup>114</sup> But the tractability of sustainable development means that additional criteria are necessary if we are to hold decision-makers to account for the quality of implementation.

<sup>110</sup> G Mace, ‘The Limits to Sustainability Science: Ecological Constraints or Endless Innovation?’ (2012) 10 *PLOS Biology*; available at [www.plosbiology.org/article/info:doi/10.1371/journal.pbio.1001343](http://www.plosbiology.org/article/info:doi/10.1371/journal.pbio.1001343).

<sup>111</sup> Brundtland Report (n 2) 8.

<sup>112</sup> Morgera and Savaresi (n 93) 23.

<sup>113</sup> Jacobs (n 93) 18.

<sup>114</sup> The furore in the UK over the justification of a crudely pro-development draft national planning policy framework in terms of ‘sustainable development’ is another example. Some sense of the debate can be seen in Department of Communities and Local Government (DCLG), *National Planning Policy Framework: Summary of Consultation Responses* (DCLG, 2012).

The promotion of indicators to measure progress in sustainable development dates back to the first Rio conference. Like SDGs, sustainable development indicators (SDIs) attempt to simplify and render measurable a complex idea, increasing transparency by providing something specific for which decision-makers can be held to account.<sup>115</sup> Whilst the language is sometimes used interchangeably, goals or targets specify a desired end point, and indicators simply provide information on the direction of travel, without necessarily telling us when we have ‘arrived’. Goals are often designed to drive progress and/or to hold actors to account. Some indicators might simply provide a snapshot of a situation for which no one can easily be held to account, but which might help policy-making. In the EU, common indicators also allow comparison and spread of good practice between Member States.

The usual approach to measuring the ‘success’ of a country, and the most widely adopted indicator of all, is gross domestic product (GDP). GDP per capita is the first SDI in the EU, the headline indicator of the ‘socio-economic development’ theme.<sup>116</sup> GDP measures in money the goods and services produced in a country, and its limitations are well-rehearsed.<sup>117</sup> For example, undesirable activities, including pertinently the cost of cleaning up pollution, add to GDP. Nor does GDP have anything to say about distribution, so that GDP can rise alongside rising poverty. There are many reasons for GDP’s success, but one is ‘the powerful attraction of a single headline figure allowing simple comparisons of socio-economic performance over time or across countries’.<sup>118</sup> ‘Composite indicators’, of which one of the better known is perhaps the ‘ecological footprint’ method, attempt to provide a similarly clear ranking of a country’s overall environmental performance.<sup>119</sup> What is included in composite indicators, and how the different criteria should be weighed, are highly contested matters. Composite indicators might be ‘better regarded as invitations to look more closely at the various components that underlie them’.<sup>120</sup>

*The Future We Want* added to already persistent calls to judge performance on measures beyond GDP.<sup>121</sup> There are various possible approaches, one of which is the simple reference to a wider range of indicators that has long been implicit in SDIs. The EU has a ‘beyond GDP’ project to develop ‘indicators that are as clear

<sup>115</sup> A Ross, *Sustainable Development Law in the UK: From Rhetoric to Reality* (Abingdon, Earthscan, 2012) ch 9 discusses in detail the roles of different types of indicators; also EEA (n 75), ch 3.

<sup>116</sup> Eurostat, *Sustainable Development in the European Union: 2011 Monitoring Report of the EU Sustainable Development Strategy* (Luxembourg, European Union, 2011).

<sup>117</sup> See JE Stiglitz, A Sen, J-P Fitoussi, *Report by the Commission on the Measurement of Economic Performance and Social Progress* (2009) (the ‘Stiglitz-Sen-Fitoussi Report’).

<sup>118</sup> Stiglitz-Sen-Fitoussi *ibid* [135] (Narrative Report).

<sup>119</sup> See the discussion in *ibid* and European Commission, ‘GDP and Beyond: Measuring Progress in a Changing World’ COM (2009) 433 final.

<sup>120</sup> Stiglitz-Sen-Fitoussi, *ibid* [140]. We might say the same about GDP.

<sup>121</sup> *The Future We Want* (n 12) [38]. Stiglitz-Sen-Fitoussi, *ibid*, provides an extremely useful review of the issues.

and appealing as GDP, but more inclusive of environmental and social aspects of progress'.<sup>122</sup> An emerging consensus around the value of measuring 'wellbeing' has also received a lot of attention. The Stiglitz-Sen-Fitoussi Commission, reporting to the French President, identified eight dimensions of wellbeing, each of which should in principle be reported on simultaneously: material living standards; health; education; personal activities including work; political voice and governance; social connections and relationships; environment (present and future); insecurity (economic as well as physical).<sup>123</sup> This approach to wellbeing would not be out of place in a conventional set of SDIs. Both objective and subjective (perceived wellbeing, for example self-reported levels of 'overall life satisfaction' or happiness<sup>124</sup>) measurements can be taken into account. Importantly, these dimensions of wellbeing cannot be taken to indicate adequate levels of environmental quality over time; high levels of wellbeing may be compatible with environmental degradation. The Stiglitz-Sen-Fitoussi Report places heavy emphasis on the importance of separate environmental evaluation,<sup>125</sup> and this warning should apply to the use of any set of SDIs. The 7th EAP should provide for an independent review of environmental indicators in the EU.<sup>126</sup>

Economic analysis, including the expression of environmental resources in monetary terms, can also be a significant element of SDIs. The EU is developing an approach that measures 'capital' to assess sustainable development,<sup>127</sup> and it is striking that the proposed 7th EAP frames one of its priority objectives in terms of protecting, conserving and enhancing 'natural capital', rather than biodiversity or resilient ecosystems, for example. Framing natural resources as capital is not a new notion, and has been very influential in attempts to 'measure' sustainable development. Total capital stock is comprised of natural capital, physical capital and human capital, including for example technology, works of art and factories, as well as forest, fossil fuels and an intact ozone layer. What has become known as 'weak' sustainability (although just as 'sustainable development' has no fixed and stable meaning, nor does 'weak' or 'strong' sustainability<sup>128</sup>) requires the bequest of at least equal amounts of 'total capital stock' to future generations: natural, human and physical capital are essentially substitutable. 'Strong' sustainability on the other hand denies the fungibility of human or physical capital with natural

<sup>122</sup> [www.beyond-gdp.eu](http://www.beyond-gdp.eu); Commission (n 119).

<sup>123</sup> Stiglitz-Sen-Fitoussi (n 117) 14.

<sup>124</sup> Eurofound, *Third European Quality of Life Survey: Quality of life in Europe: Impacts of the crisis* (Luxembourg, European Union, 2012); the former is said to be 'cognitive', the latter 'emotional'. Measuring subjective wellbeing can be controversial, since it tends not to change a great deal, but can also change arbitrarily and be influenced by, for example, the last question asked.

<sup>125</sup> Stiglitz-Sen-Fitoussi (n 117) [36] (Narrative Report).

<sup>126</sup> 7th EAP (n 43).

<sup>127</sup> European Commission, 'Our Life Insurance, Our Natural Capital: an EU Biodiversity Strategy to 2020' COM (2011) 244 final.

<sup>128</sup> Or indeed 'very weak' and 'absurdly strong' sustainability, see A Holland, 'Substitutability: Or, Why Strong Sustainability is Weak and Absurdly Strong Sustainability is not Absurd' in J Foster (ed), *Valuing Nature? Economics, Ethics and the Environment* (London, Routledge, 1997).

capital, and requires natural capital to be maintained. The dispute between strong and weak sustainability lies in disagreement over whether ‘natural capital has a unique or essential role in sustaining human welfare’,<sup>129</sup> and the degree of permissible substitution. Neither weak nor strong sustainability argues for either infinite or zero substitutability: weak sustainability would not argue that everything (climate for example) is capable of substitution; and strong sustainability does not deny absolutely the possibility of depleting natural capital.<sup>130</sup> An inability to predict which natural resources are ‘critical’ to human wellbeing mean that this is as much a political as a technical or economic argument.<sup>131</sup>

On the one hand (in common with the longstanding language of ‘natural resources’, or the more recent turn to ‘ecosystem services’) the framing of the debate in terms of ‘capital’ emphasises economic dependence on ecosystems: ‘the EU’s economic prosperity and well-being is underpinned by its natural capital, which includes ecosystems that provide essential goods and services, from fertile soil and multi-functional forests to productive land and seas ...’<sup>132</sup> But it is also a ‘loaded’ term,<sup>133</sup> which emphasises the commodification of nature, and may ultimately support measuring the ‘environment’ in wholly monetary terms. The Stiglitz-Sen-Fitoussi Report emphasises the importance of physical environmental indicators for the evaluation of sustainable development.<sup>134</sup> The EEA does gather data and report on physical indicators, including on biodiversity, where the ‘natural capital’ approach is most developed.<sup>135</sup>

The EU maintains data on a range of indicators from a range of sources, including *Europe 2020*, the *Renewed Strategy*, environmental action programmes, as well as disparate areas of law and policy. The proposed 7th EAP lists targets and indicators from existing law and policy, and promises the development of further indicators in conjunction with the ‘flagship initiative’, *A Resource Efficient Europe*.<sup>136</sup> The miscellany of indicators in the EU makes the tracking of performance more difficult than it should be. Broadly, the five headline targets and seven flagship initiatives of *Europe 2020* are monitored through EU and national reporting

<sup>129</sup> D Pearce and EB Barbier, *Blueprint for a Sustainable Economy* (London, Earthscan, 2000) 23. See also the discussion in ch 2 of the criticism of HM Treasury, *The Stern Review on the Economics of Climate Change* (UK Treasury, 2006) by D Helm, ‘Climate Change Policy: Why has So Little Been Achieved?’ (2008) 24 *Oxford Review of Economic Policy* 211.

<sup>130</sup> H Daly, ‘On Wilfred Beckerman’s Critique of Sustainable Development’ (1995) 4 *Environmental Values* 49.

<sup>131</sup> M Arias-Moldonado, ‘Rethinking Sustainability in the Anthropocene’ (2013) 22 *Environmental Politics* 428. This is resonant of the discussion of ‘limits’, below.

<sup>132</sup> Commission (n 43) [16].

<sup>133</sup> Dobson (n 18) 155.

<sup>134</sup> Stiglitz-Sen-Fitoussi (n 117) [39] (Narrative Report).

<sup>135</sup> Commission (n 127), has a headline target of ‘Halting the loss of biodiversity and the degradation of ecosystem services in the EU by 2020’, and emphasises the importance of data gathering and monitoring.

<sup>136</sup> Commission (n 43); see also (n 101).

cycles.<sup>137</sup> The EEA keeps data on over 200 environmental indicators, and reports every four years on the state of the environment.<sup>138</sup> SDIs are reported on by Eurostat every two years.<sup>139</sup> The Eurostat reports do not aim to assess ‘success’, ‘as there is no political or scientific consensus on what this state of sustainability would be, or on the optimal levels for many of the indicators’; reporting instead ‘provides a relative assessment of whether the EU is moving in the right direction’ on the SDIs.<sup>140</sup> Sunshine and cloud symbols are used to indicate ‘favourable’, ‘moderately favourable’, ‘moderately unfavourable’ and ‘clearly unfavourable’ change. This is clear, and potentially resonant with a broad public, but obviously simplistic.<sup>141</sup>

There is no shortage of reporting. But reporting should not be the end of the matter. The 2011 Eurostat report concludes that since ‘nearly half of the headline indicators are moving in a moderately unfavourable direction, it cannot yet be concluded that the European Union is on a pathway to sustainable development’,<sup>142</sup> an appropriately modest response that leaves it to political actors to draw stronger inferences. There seems, however, to be no obligation on EU actors to respond to data on SDIs. The Commission seems not to have reported properly on sustainable development since 2009.<sup>143</sup> By contrast, the *Europe 2020* targets and flagship initiatives are subject to high profile review: the *Annual Growth Survey* sets out the priorities for national and EU level reporting;<sup>144</sup> Member States submit their ‘National Reform Programmes’; and the Commission makes ‘country specific recommendations’, which need to be discussed by Council and endorsed by European Council.<sup>145</sup> There is an explicit comparison of national performance.<sup>146</sup> Almost by accident, monitoring and review of the environmental and the economic seem to have been separated, with all of the emphasis on the economic.

<sup>137</sup> The Lisbon Agenda was famously subject to the ‘open method of coordination’, an archetype of the move to ‘new governance’ discussed in ch 4 below, with an elaborate set of guidelines, indicators and benchmarks, and for the use of publicity and peer review. There is an enormous literature, see P Craig and G de Búrca, *EU Law: Text, Cases and Materials* (Oxford, Oxford University Press, 2011) ch 6.

<sup>138</sup> EEA, *The European Environment: State and Outlook 2010* (EEA, 2010).

<sup>139</sup> The latest report at the time of writing is Eurostat (n 116). The 2013 monitoring report was released in December 2013.

<sup>140</sup> *Ibid* 11.

<sup>141</sup> Eg, the report recognises that improvement in climate change indicators is attributable to economic downturn rather than long-term innovation (on which see ch 6 below), *ibid* 24, but that cannot be reflected in the pictorial representation.

<sup>142</sup> *Ibid*, 13.

<sup>143</sup> European Commission, ‘Mainstreaming Sustainable Development into EU Policies: 2009 Review of the European Union Strategy for Sustainable Development’ COM (2009) 400 final. Oddly, this review came before the 2009 Eurostat report, *ibid* 3. The Commission was supposed to report every second year, ‘Renewed Strategy’ (n 45). See EESC, *Opinion on the 2011 Monitoring Report on the EU’s Sustainable Development Strategy (own initiative opinion)* (Brussels, EESC, 2012). This is, however, little more than a summary, highlighting some of the negative trends, and emphasising the importance of political debate. It did criticise the Commission for failing to report on progress [1.2]. By 2012, however, the Commission had turned to *Europe 2020* for sustainable development strategy (n 50).

<sup>144</sup> The 2013 survey barely mentions the environment (or even climate change), COM (2012) 750 final.

<sup>145</sup> [ec.europa.eu/europe2020/index\\_en.htm](http://ec.europa.eu/europe2020/index_en.htm).

<sup>146</sup> [ec.europa.eu/europe2020/making-it-happen/key-areas/index\\_en.htm](http://ec.europa.eu/europe2020/making-it-happen/key-areas/index_en.htm).

An open-ended objective like sustainable development resists familiar legal mechanisms of accountability. Chapter four discusses the merits of broadly framed objectives, and sustainable development might usefully be considered in that context. Governance mechanisms that ensure the generation of knowledge and adaptation of norms in response to lessons learned are important. The data gathering and initial reporting on SDIs provides opportunities for learning, although currently without significant additional incentives to adapt policies in response. Obligations on the Commission to respond to performance exist in specific pieces of environmental legislation, but not currently in respect of overall performance. An obligation on political actors, most obviously the Commission and Member States, but also Council and Parliament, to respond to performance on broader environmental (and social) indicators, as they do on *Europe 2020*, is sorely needed. The relative absence of the Parliament in official sustainable development discourse is especially striking. Open and public reporting would allow for public (including environmental interest group), as well as peer (Member State and EU institutions), review and political debate. That is possible for *Europe 2020*, and there is some potential for environmental indicators in the promise that the proposed 7th EAP is to be monitored ‘in the context of the *Europe 2020* Strategy’s regular monitoring process’.<sup>147</sup> A re-energising of something like the network of Member State sustainable development coordinators<sup>148</sup> would heighten the opportunities for peer review and challenge.

A wealth of technical expertise is being applied to sustainable development, especially through the use of indicators. As discussed in the previous two chapters, technical expertise alone cannot provide everything we need to pursue sustainable development. First, inevitable uncertainty about the short and long-term effects of human activity precludes clear technical answers to questions about sustainable development. Even retrospectively, the availability and quality of data on SDIs,<sup>149</sup> together with their simplistic representation (sunshine and clouds), raise questions about knowledge. And uncertainty is magnified if composite indicators are used, and all values are expressed in the same (possibly monetary) currency.<sup>150</sup> Secondly, identifying indicators implies some commitment on what contributes to ‘sustainability’,<sup>151</sup> as well as prioritisation and balancing between the different aspects of sustainable development (environmental against economic, but also,

<sup>147</sup> 7th EAP (n 43) [101].

<sup>148</sup> They have had little influence, and were not invited to contribute to the development of the *2020 Strategy*, Steurer and Berger (n 46) 104.

<sup>149</sup> L Ledoux, R Mertens and P Wolff, ‘EU Sustainable Development Indicators: An Overview’ (2005) 29 *Natural Resources Forum* 392 discuss the quality of the data for the EU SDIs.

<sup>150</sup> A Stirling, ‘The Appraisal of Sustainability: Some Problems and Possible Responses’ (1999) 4 *Local Environment* 111.

<sup>151</sup> On a smaller scale, see the discussion of the choice of indicators to represent the quality of a water ecosystem, H Josefsson and L Baaner, ‘The Water Framework Directive—A Directive for the Twenty-First Century?’ (2011) 23 *Journal of Environmental Law* 463, 470.

for example, local air pollution against climate change).<sup>152</sup> This makes sustainable development an unavoidably political matter, based on values that might properly be subjected to debate. Assessing ‘success’ or ‘failure’ when a range of indicators move in different directions for different reasons, is similarly politically complex.<sup>153</sup> Thirdly, whilst information and expertise on physical environments is crucial, even if clear and certain it cannot provide an answer to the ‘big’ questions about how we should prioritise different social, economic and environmental goods. There is no ‘analytical fix’ to sustainable development; it is a ‘social process’ rather than an analytical exercise.<sup>154</sup>

We might also note the potential of environmental impact assessment, strategic environmental assessment and regulatory impact assessment, discussed in chapters seven and two, to contribute to sustainable development.<sup>155</sup> As with SDIs, there is some tension between the technical and the political aspects of environmental assessment. For now, as procedural tools, the requirement to assess the likely environmental (and social) impacts of a proposed development, activity or policy, provides a tool for integrating environmental issues into decision-making. Impact assessments are often subject to at least some consultation opportunities. An open, participatory process of decision-making allows the values involved in difficult decisions to be explicitly discussed, potentially capturing the multi-dimensionality of sustainable development.<sup>156</sup> If done with a ‘democratising’ intent, public participation can also contribute to the ‘social development’ aspect of sustainable development.

Nor can technical assessments easily tell us about ‘justice’, a recurring notion in sustainable development, in particular the relationship between inter- and intra-generational justice.<sup>157</sup> Whatever its intuitive core, ‘justice’ is subject to many competing, contentious and complex definitions and approaches. The environmental justice movement as it developed in the US examined collective discrimination, highlighting the relationship between the environment and poverty or race, in particular the exposure of those belonging to minority groups to greater environmental risks and worse environmental conditions than other citizens.<sup>158</sup> The way in which environmental goods and bads are distributed, in space (globally) and over time, is a significant issue in sustainable development. There has been relatively little research into environmental justice in the EU, and

<sup>152</sup> Eg E Rametsteiner et al, ‘Sustainability Indicator Development—Science or Political Negotiation?’ (2011) 11 *Ecological Indicators* 61.

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

<sup>154</sup> Stirling (n 150) 121 and 131.

<sup>155</sup> Commission, 7th EAP (n 43); *The Future We Want* (n 12) [63].

<sup>156</sup> Stirling (n 150) 119. See chs 7 and 8.

<sup>157</sup> M Stallworthy, ‘Environmental Justice Imperatives for an Era of Climate Change’ (2009) 36 *Journal of Law and Society* 55 argues for greater reliance on environmental justice, in part because of the failure of sustainable development, 56.

<sup>158</sup> OW Pedersen, ‘Environmental Justice in the UK: Uncertainty, Ambiguity and the Law’ (2011) 31 *Legal Studies* 279 provides a useful brief overview of the emergence of environmental justice in a number of jurisdictions.

we do not have a detailed understanding of how environmental goods (such as access to green spaces) and bads (such as pollution) are distributed.<sup>159</sup> As with the approach to environmental rights discussed in chapter one, environmental justice in the EU is dominated by a procedural approach, in the sense that a ‘just’ process of decision-making makes for a ‘just’ decision, focusing on the sorts of participatory rights discussed in chapters seven and eight. A more substantive approach, aiming for the just distribution of environmental goods and bads may be especially difficult to square with the free-market liberal direction of the EU.<sup>160</sup> But justice is an important factor in sustainable development, challenging technocratic approaches to decision-making, and with the potential to pose a radical challenge to our ways of life.<sup>161</sup>

## CONCLUSIONS

The position of sustainable development in the EU is a little more fragile now than when I wrote the first edition of this book. Dissatisfaction with sustainable development’s vagueness grows, as does the critique that its assertion of the compatibility between conflicting objectives is empty rhetoric that fails to adequately protect the environment.<sup>162</sup> The strength of sustainable development holds the clue to its weakness. That sustainable development is vague in its aspirations and content cannot really be denied,<sup>163</sup> but that is not necessarily environmentally disadvantageous.<sup>164</sup> In its vagueness, sustainable development provides space for the environmental case to be made.<sup>165</sup> Many, however, now reject sustainable development’s ability to provide space for the ‘green’ argument in the day to day battles over environmental regulation.<sup>166</sup> Andrea Ross, an important observer of sustainable development, for example, argues that ‘early interpretations of sustainable development as a vague, malleable policy tool based on weak sustainability’ have failed.<sup>167</sup> She argues for a turn to ‘ecological sustainability’ or ‘respecting

<sup>159</sup> But see J Holder, ‘Building Spatial Europe: An Environmental Justice Perspective’ in J Scott (ed), *Environmental Protection: European Law and Governance* (Oxford, Oxford University Press, 2009); A Layard and J Holder, ‘Seeking Spatial and Environmental Justice for People and Places within the European Union’ in A Philippopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Abingdon, Routledge, 2011).

<sup>160</sup> Holder, *ibid.*

<sup>161</sup> On the ways in which ‘environmental justice’ pushes boundaries, see D Schlosberg, ‘Theorising Environmental Justice: The Expanding Sphere of a Discourse’ (2013) 22 *Environmental Politics* 37.

<sup>162</sup> Eg Morrow (n 7); Stallworthy (n 157).

<sup>163</sup> A requirement for a supplier to demonstrate ‘sustainable purchasing’ and how it contributes to ‘improving the sustainability of the coffee market’ is not clear enough to comply with the ‘obligation of transparency’ in public procurement, Case C-368/10 *Commission v Netherlands* not yet reported in the ECR.

<sup>164</sup> See Jacobs (n 8), for a discussion of the benefits of vagueness.

<sup>165</sup> *Ibid.*

<sup>166</sup> Jacobs (n 93).

<sup>167</sup> A Ross, ‘Modern Interpretations of Sustainable Development’ (2009) 36 *Journal of Law and Society* 32, 33.

the Earth's environmental limits' as a separate normative principle.<sup>168</sup> It is, as discussed, important that environmental protection continues to be addressed ambitiously and independently, and this greater emphasis on the environment would be desirable. But these terms are unlikely to be any more self-executing or purely technically determinable than 'sustainable development'. Limits, for example, is an argument about values as much as physical states. There are certainly physical limits at which particular species, ecosystems or human activities will cease (although fine predictions are probably impossible), and technological fixes will not always be available; profound change is necessary. But limits vary depending on whether we apply them to species, ecosystems, or human activities, and the political question is still how much we want to protect those species, ecosystems or human activities.<sup>169</sup> Even the identification of relatively clear limits beyond which human life is impossible is of only limited policy assistance, since presumably our ambition is far greater than survival. I doubt that there is any overarching language that can shortcut the need to argue in detail for environmental prioritisation in decision-making. Whenever the complexity of a problem demands something other than straightforward quantitative or qualitative rules, we face these difficulties.

It is unwise to make predictions, but it seems unlikely that 'sustainable development', well embedded as it is in law and policy, will cease to be a core term in EU environmental law and policy. Arguing for its removal without a convincing successor would be politically difficult—the promise that genuinely positive social objectives can be reconciled is simply irresistible (who would want to do away with development that 'meets the needs of the present without compromising the ability of future generations to meet their own needs?'). Several decades of intellectual investment have even given sustainable development a certain moral and conceptual heft, albeit one that cuts both ways, and can be appropriated by powerful interests. The 'green economy' is certainly an attractive flag around which to gather political momentum, as is 'wellbeing'. Equally, however, both fit very neatly into existing approaches to sustainable development and this seems to be a casting around for fresh language, rather than new ideas or new approaches to implementation. By contrast, a turn to 'ecological sustainability', may be a more meaningful shift, prioritising environmental protection in such a way as to demand a real change to our ways of carrying on. But it would still demand a political exercise that assesses environmental, economic and social effects in any particular case. It is quite proper that there is a continuous debate about the meaning of sustainable development. It is dynamic and open, allowing for the prioritisation of different social objectives.

<sup>168</sup> A Ross (n 115) ch 12, and *ibid.* Ross makes a good case for plausibility, with climate change at the centre. Note the reference to 'environmental sustainability' in the Water Framework Directive (n 66).

<sup>169</sup> Dobson (n 18) 146, referring to 'thresholds' rather than 'limits'. See also Royal Commission on Environmental Pollution, *Demographic Change and the Environment* (2011) Cm 8001, 60.