

FROM ASPIRATIONAL POLITICS TO SOFT LAW? EXPLORING THE INTERNATIONAL LEGAL EFFECTS OF SUSTAINABLE DEVELOPMENT GOAL 7 ON AFFORDABLE AND CLEAN ENERGY

LESLIE-ANNE DUVIC-PAOLI*

This article examines the international legal impacts of Sustainable Development Goal ('SDG') 7 on 'access to affordable, reliable, sustainable and modern energy for all' five years after its adoption. The inclusion of a standalone goal on energy in Transforming our World: 2030 Agenda for Sustainable Development has been hailed as a historic shift away from the reluctance of states to govern energy issues at a global level. At the same time, the ability of SDG 7 to strengthen the role played by international law in the field of energy appears limited because it is a deeply political commitment. This article argues that SDG 7 has so far remained an aspirational goal and proposes a taxonomy of normative effects that, if fulfilled, could qualify the Goal as a soft law instrument. First, it presents the SDGs as political aspirations that entertain ambiguous relationships with international law: as a result, their normative status does not bring much clarity about the role played by SDG 7 in the international legal system. Second, it focuses on the origins and crystallisation of the aspirational goal to understand the place of SDG 7 within existing multilateral efforts to govern the energy sector cooperatively. Third, it maps the impacts of SDG 7 on institutional, treaty and customary law to argue that while these remain at present minimal, SDG 7 could in the future behave like a soft law tool.

CONTENTS

I	Introduction.....	1
II	The Sustainable Development Goals as Aspirations and Their Place in the International Legal System	4
III	The Construction and Crystallisation of an Aspiration: Nothing New under the Sun for the Energy Goal?.....	8
IV	SDG 7 as a Soft Law Norm: Taxonomy of Normative Effects	12
	A From Aspiration to Transformation: Re-Aligning the International Legal Order ..	13
	B From Aspiration to Inspiration: Developing International Treaty Law.....	15
	1 SDG 7 and the <i>Paris Agreement</i>	15
	2 SDG 7 as a Precursor to Treaty Law	16
	3 SDG 7 and <i>Droit Dérivé</i>	18
	4 SDG 7 and Norm Interpretation.....	19
	C From Aspiration to Right: Contributing to the Emergence of a Human Right to Energy.....	20
V	Conclusion	23

I INTRODUCTION

Adopted by the United Nations General Assembly ('UNGA') in September 2015, the *Transforming Our World: 2030 Agenda for Sustainable Development* ('2030 Agenda') consists of a compilation of 17 goals and 169 targets that represent a plan of action agreed by the international community to end poverty, protect the

* Senior Lecturer in Environmental Law, The Dickson Poon School of Law, King's College London; Fellow, Sorbonne University—Paris Institute for Advanced Study, leslie-anne.duvic-paoli@kcl.ac.uk.

environment and ensure peace and prosperity.¹ The Sustainable Development Goals ('SDGs') build upon and expand the scope of the Millennium Development Goals ('MDGs'), the eight objectives adopted following the 2000 United Nations Millennium Summit to galvanise the world's efforts to fight poverty.² Fifteen years later, the SDGs offer a new set of global priorities for the international community during the 2015–30 period. They express concern about, inter alia, poverty, hunger, gender inequality and environmental degradation. Their novelty lies in their ability to take a broader view of sustainability than before, integrating economic, social and environmental concerns into a single sustainable development agenda, and to adopt a universal plan requiring that every state, not only those developing, act.

Amongst these goals, the inclusion of Sustainable Development Goal ('SDG') 7, a standalone goal on 'access to affordable, reliable, sustainable and modern energy for all',³ has been praised for being a major development in the global landscape of energy law and policy.⁴ Obtaining agreement on 'basic elements of a global energy future',⁵ which, a few years before, seemed impossible given that governments have historically been reluctant to address energy cooperatively,⁶ is a significant milestone for global energy governance. The SDG frames the international community's response to both the poverty crisis and the climate emergency by setting targets to facilitate access to energy while increasing reliance on renewable energies and improving energy efficiency. It seeks to remedy the fact that 2.8 billion people (around 37% of the world's population) do not have access to clean fuels and technologies for cooking, and 789 million people (approximately 10% of the world's population) live without electricity.⁷ It also aims to make a significant contribution to the reduction of greenhouse gas emissions in light of the fact that 'accelerated deployment of renewables ... deep electrification and increased energy efficiency, can achieve over 90% of the energy-related CO₂ emissions reductions needed by 2050'.⁸

By encouraging structural changes, SDG 7 establishes itself as the international community's unifying objective on the topic of a fair and sustainable energy transition. The SDGs are described by the UNGA resolution

¹ *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UN GAOR, 70th sess, 4th plen mtg, Agenda Items 15 and 116, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015) Preamble ('2030 Agenda').

² See *United Nations Millennium Declaration*, GA Res 55/2, UN GAOR, 55th sess, 8th plen mtg, Agenda Item 60(b), UN Doc A/RES/55/2 (18 September 2000) ('UN Millennium Declaration').

³ *2030 Agenda*, UN Doc A/RES/70/1 (n 1) 14.

⁴ See, eg, Raphael J Heffron et al, 'A Treatise for Energy Law' (2018) 11(1) *Journal of World Energy Law and Business* 34, 41; Rafael Leal-Arcas and Stephen Minas, 'Mapping the International and European Governance of Renewable Energy' (2016) 35(1) *Yearbook of European Law* 621, 643–5; Catherine Redgwell and Lavanya Rajamani, 'And Justice for All? Energy Justice in International Law' in Íñigo del Guayo et al (eds), *Energy Justice and Energy Law* (Oxford University Press, 2020) 48, 49.

⁵ Neil Gunningham, 'Confronting the Challenge of Energy Governance' (2012) 1(1) *Transnational Environmental Law* 119, 131.

⁶ Sylvia I Karlsson-Vinkhuyzen, 'The United Nations and Global Energy Governance: Past Challenges, Future Choices' (2010) 22(2) *Global Change, Peace and Security* 175, 175.

⁷ International Energy Agency et al, *Tracking SDG 7: The Energy Progress Report 2020* (Report, 2020) 2.

⁸ International Renewable Energy Agency, *Global Energy Transformation: A Roadmap to 2050: 2019 Edition* (Report, 2019) 23 ('Global Energy Transformation').

as ‘aspirational’ objectives,⁹ and their fulfilment is acknowledged to be a political, rather than legal, matter.¹⁰ This does not, however, mean that law and regulation do not have a place in SDG 7, as the expanding domestic regulatory activity aligned with SDG 7 proves.¹¹ But internationally, the programmatic, goal-setting nature of the SDGs has been conceptualised as an alternative to international law, a sign of the inability of traditional top-down, legally binding mechanisms to solve global problems.¹² Such a non-legal solution is particularly well suited in the context of global energy governance, which remains weak due to states giving priority to energy security concerns and their rights to exploit their own natural resources, with voluntary commitments and multi-stakeholder partnerships being preferred to other more formal forms of cooperation.¹³

Five years after the adoption of the SDGs, however, an actual evaluation of the international normative impacts of the adoption of a common energy objective remains lacking. While the legal scholarship that has emerged after the adoption of the SDGs has so far mainly concentrated on how certain international institutions or instruments could promote the fulfilment of the SDGs,¹⁴ this article aims to evaluate the other side of the coin, that is, whether SDG 7 has had, or could have, any impact on existing international law. By doing so, this article aims to make two distinct contributions to our understanding of the burgeoning field of international energy law: first, to offer a detailed legal and para-legal analysis of an SDG that remains under-explored in the scholarship and, second, to provide an analytical framework to continuously evaluate the transformational role of the SDG in shaping and consolidating the characteristics of international legal processes and norms governing the energy transition.

⁹ 2030 Agenda, UN Doc A/RES/70/1 (n 1) para 55.

¹⁰ United Nations, ‘The Sustainable Development Agenda’, *Sustainable Development Goals* (Web Page) <<https://www.un.org/sustainabledevelopment/development-agenda-retired/>>, archived at <<https://perma.cc/PR6L-NRNC>>.

¹¹ Noting that ‘89% of the 44 countries set national policy or agenda to accelerate energy development, most of them are aligned with SDG7 targets’: United Nations Department of Economic and Social Affairs, *Analysis of the Voluntary National Reviews relating to Sustainable Development Goal 7 2018: Ensuring Access to Affordable, Reliable, Sustainable and Modern Energy for All* (Report, 2018) vi (‘*Analysis of the Voluntary National Reviews*’).

¹² Frank Biermann, Norichika Kanie and Rakhyun E Kim note that ‘the new approach to global governance by goal-setting is largely detached from the international legal system’: Frank Biermann, Norichika Kanie and Rakhyun E Kim, ‘Global Governance by Goal-Setting: The Novel Approach of the UN Sustainable Development Goals’ (2017) 26–27 *Current Opinion in Environmental Sustainability* 26, 26. Ryan Brenner argues that the Millennium Development Goals are ‘an implementation plan without any legal significance’: Ryan Brenner, ‘Global Goal-Setting: How the Current Development Goal Model Undermines International Development Law’ (2015) 24(1) *Michigan State International Law Review* 145, 168. Oran R Young compares goal-setting and rule-making: Oran R Young, ‘Conceptualization: Goal Setting as a Strategy for Earth System Governance’ in Norichika Kanie and Frank Biermann (eds), *Governing through Goals: Sustainable Development Goals as Governance Innovation* (MIT Press, 2017) 31, 34.

¹³ Gonzalo Escibano, ‘Fragmented Energy Governance and the Provision of Global Public Goods’ (2015) 6(2) *Global Policy* 97, 97–8, 100–2; Ann Florini and Benjamin K Sovacool, ‘Who Governs Energy? The Challenges Facing Global Energy Governance’ (2009) 37(12) *Energy Policy* 5239, 5239; Stuart Bruce, ‘International Law and Renewable Energy: Facilitating Sustainable Energy for All?’ (2013) 14(1) *Melbourne Journal of International Law* 18, 22–9.

¹⁴ See, eg, Cosimo Beverelli, Jürgen Kurtz and Damian Raess (eds), *International Trade, Investment, and the Sustainable Development Goals* (Cambridge University Press, 2020).

This article clarifies the international legal nature of SDG 7 by looking at its formal status, its content and its potential international legal impacts. Part II sets the scene by examining the normative value of the SDGs. It presents the SDGs as political aspirations characteristic of goal-setting as a new form of governance, noting that their ambiguous relationship with international law does not bring much clarity to the role played by SDG 7 in the international legal system. In Part III, the analysis then focuses on the origins and crystallisation of the aspirational goal to understand the role and place of SDG 7 within existing multilateral efforts to govern the energy sector cooperatively. In Part IV, this article then proposes a taxonomy of normative impacts that, if fulfilled, could qualify the SDG as a soft law instrument. This endeavour is evidently not devoid of conceptual challenges given that the term ‘soft law’ has itself been the subject of multiple scholarly debates and does not represent a clear legal concept with a defined scope and content. However, the term ‘soft law’ is used in this article to evaluate the legal relevance of non-binding instruments and, in particular, how they shape existing international law and contribute to its development.¹⁵ Qualifying the move of SDG 7 from an aspirational objective to a soft law norm helps to understand the role played by the SDGs at the intersection between goal-setting governance and international law, and, importantly, to identify the legal effects of new forms of multilateral cooperation that have emerged as alternative ways to respond to the reluctance of states to cooperate through more constraining means. In Part IV, therefore, the analysis concentrates on the capacity of SDG 7 to produce legal effects, by mapping the existing and potential impacts on institutional, treaty and customary law.

II THE SUSTAINABLE DEVELOPMENT GOALS AS ASPIRATIONS AND THEIR PLACE IN THE INTERNATIONAL LEGAL SYSTEM

In order to identify the possible normative effects of SDG 7, I start with a general assessment of the normative status of the SDGs. Such an examination is needed to understand how the SDGs were originally conceived as aspirations and assess whether their place in the international legal system has given them any normative effects. Indeed, should the SDGs be legally binding, then the ability of SDG 7 to create or change international law would be clearly established. Conversely, if the SDGs have been conceived as an alternative method to respond to the failure of international law to produce satisfactory results in the field of sustainable development, then one could imagine that the ability of SDG 7 to produce international normative effects would be minimal.

The SDGs represent a programmatic agenda that entertains an ambiguous relationship with law, and its formal status brings little clarity regarding the expected legal effects of SDG 7. Scholarly assessments carried out immediately after their adoption have used the lawmaking process, the intentions of member states and the content of the SDGs as factors to identify their normative nature. Evaluations vary significantly and depend on the conceptualisation of the law/non-law dichotomy (as an either/or scenario or as a sliding scale), the

¹⁵ See generally Dinah Shelton, ‘Soft Law’ in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge, 2009) 68; Daniel Thürer, ‘Soft Law’ in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, online at March 2009).

definition given to soft law and the normative consequences attached to non-treaty agreements. As a result, some authors have argued that the SDGs carry no normative value,¹⁶ others believe they are at the ‘softest end’ of soft law¹⁷ and others still argue that they fall under the soft law category.¹⁸

It is clear that the SDGs were initially viewed as political aspirations without normative potential. They were adopted in the form of UNGA Resolution 70/1, entitled *Transforming Our World: The 2030 Agenda for Sustainable Development*.¹⁹ In a formal sense, their adoption as a UNGA resolution means that the SDGs are not legally binding. While non-legally binding UNGA resolutions are not devoid of normative impacts and can sometimes be considered to fall under the scope of ‘soft law’, there are doubts as to whether this resolution even qualifies as soft law. Indeed, UNGA Resolution 70/1 described the SDGs as ‘aspirational’.²⁰ An aspirational goal is in stark contrast with a legal norm, which is characterised by specificity and accountability.²¹ The intent of states, from the start of the negotiating process, was to avoid creating new legal commitments. The Rio+20 outcome document, which initiated the intergovernmental process on the SDGs, had already framed the SDGs as ‘aspirational’,²² in effect denying them any binding effect. As a result, the question of the legal force of the *2030 Agenda* was left completely unaddressed during the negotiations: it was not even mentioned, even if to be denied or left aside.

It is instructive to contrast this complete absence of the law with past examples of programmatic exercises in the field of international development.²³ For instance, the lively debate that took place on the duty-creating character of Resolution 2626(XXV) on the *International Development Strategy for the Second United Nations Development Decade* offers a valuable counterexample

¹⁶ Werner Scholtz and Michelle Barnard talk about ‘normative nihilism’: Werner Scholtz and Michelle Barnard, ‘The Environment and the Sustainable Development Goals: “We Are on a Road to Nowhere”’ in Duncan French and Louis J Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar Publishing, 2018) 222, 225–6. See also Duncan French, ‘The Global Goals: Formalism Foregone, Contested Legality and “Re-Imaginings” of International Law’ in Zeray Yihdego, Melaku Geboye Desta and Fikremarkos Merse (eds), *Ethiopian Yearbook of International Law 2016* (Springer, 2017) 151, 165–6.

¹⁷ Åsa Persson, Nina Weitz and Måns Nilsson, ‘Follow-Up and Review of the Sustainable Development Goals: Alignment vs Internationalization’ (2016) 25(1) *Review of European, Comparative and International Environmental Law* 59, 60.

¹⁸ Riccardo Pavoni and Dario Piselli, ‘The Sustainable Development Goals and International Environmental Law: Normative Value and Challenges for Implementation’ (2016) 13(26) *Veredas do Direito* 13, 35.

¹⁹ *2030 Agenda*, UN Doc A/RES/70/1 (n 1).

²⁰ *Ibid* para 55.

²¹ Martha Finnemore and Michelle Jurkovich argue that the SDGs should be characterised as ‘aspirations’ because they do not assign responsibilities for their implementation: Martha Finnemore and Michelle Jurkovich, ‘The Politics of Aspiration’ (2020) 64(4) *International Studies Quarterly* 759, 764.

²² *The Future We Want*, GA Res 66/288, UN GAOR, 66th sess, 123rd plen mtg, Agenda Item 19, UN Doc A/RES/66/288 (11 September 2012, adopted 27 July 2012) para 247.

²³ Michel Virally, ‘La notion de programme: Un instrument de la coopération technique multilatérale’ (1968) 14 *Annuaire français de droit international* 530.

which highlights the purely aspirational nature of the SDGs.²⁴ There, the wording of the Resolution, which is fairly similar to that of Resolution 70/1 — in which states ‘pledge’ and ‘resolve’²⁵ to implement the strategy — was considered to have the potential to reflect some legal authority, whereas they are now considered to be representative of political, and perhaps moral, authority. Similarly, it is noticeable that the scholarship on the normative nature of the predecessor of the SDGs — the MDGs — has been significantly more law-oriented. Some scholars have gone as far as to say that the MDGs can be considered to represent customary international law;²⁶ however, compared to the SDGs, they benefited from an even weaker formal status since they were not included in the actual *United Nations Millennium Declaration* adopted by the UNGA but were only later accepted by the UNGA as an annex to a UN Secretary-General report.²⁷ And yet Philip Alston, for instance, argues that the MDGs (or at least some of them) have reached customary status on the basis that the ‘satisfaction of the right is demonstrably within the reach of the government in question assuming reasonable support from the international community’,²⁸ or, in other words, on the basis that they did not represent mere aspirations but rather achievable objectives.

In contrast, by framing the SDGs as aspirations, the intention of states was to avoid any ambiguity regarding the SDGs’ purely political nature. The SDGs embody shared values and forward-looking objectives to structure international action but without holding states accountable: notably, an accountability mechanism was considered to be too intrusive, and a voluntary ‘follow-up and review’ process was adopted instead.²⁹ According to Martha Finnemore and Michelle Jurkovich (who studied the meaning of aspirations in international politics), the term refers to ambitious goals that are future-oriented and encourage us to imagine a different world.³⁰ While strongly desired objectives, they are in reality unlikely to be met. SDG 7 indeed corresponds to this profile: it is estimated that if progress remains at its present rate, the world will not meet its energy objectives by 2030.³¹

²⁴ *International Development Strategy for the Second United Nations Development Decade*, GA Res 2626(XXV), 25th sess, Agenda Item 42, 1912th plen mtg, UN Doc A/RES/2626(XXV) (24 October 1970) (*‘International Development Strategy’*). See Michel Virally, ‘La deuxième décennie des Nations Unies pour le développement: Essai d’interprétation para-juridique’ (1970) 16 *Annuaire français de droit international* 9, 19–25.

²⁵ *International Development Strategy* (n 24) para 12.

²⁶ Philip Alston, ‘Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals’ (2005) 27(3) *Human Rights Quarterly* 755, 771–774; Gobind Nankani, John Page and Lindsay Judge, ‘Human Rights and Poverty Reduction Strategies: Moving towards Convergence?’ in Philip Alston and Mary Robinson (eds), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, 2005) 475, 496–7.

²⁷ *Road Map towards the Implementation of the United Nations Millennium Declaration: Report of the Secretary-General*, GA Res 56/326, UN GAOR, 56th sess, Agenda Item 40, UN Doc A/56/326 (6 September 2001) annex, 55.

²⁸ Alston (n 26) 774.

²⁹ See Kate Donald and Sally-Anne Way, ‘Accountability for the Sustainable Development Goals: A Lost Opportunity?’ (2016) 30(2) *Ethics and International Affairs* 201, 205–6.

³⁰ Finnemore and Jurkovich (n 21) 760, 764.

³¹ United Nations Department of Economic and Social Affairs, *Accelerating SDG 7 Achievement: Policy Briefs in Support of the First SDG7 Review at the UN High-Level Political Forum 2018* (Report, 2018) 3.

The programmatic nature of the SDGs has been understood as an alternative to, and outside the realm of, international law,³² which has been perceived as deficient because it has been unable to put states on the path to sustainable development in the past decades.³³ Scepticism about the possibility of reaching consensus over meaningful binding multilateral agreements encouraged the international community to think outside the box of traditional lawmaking tools. It strengthened goal-setting as an alternative method of multilateral cooperation, focused less on domestic compliance with internationally binding duties and offering more flexibility for a state-led design of international commitments. Sakiko Fukuda-Parr describes goal-setting as ‘an international agreement on an idea’,³⁴ with goals that ‘are prescriptive rather than regulatory in that they define what “ought to be done” rather than prohibit what “should not be done”’.³⁵ Frank Biermann, Norichika Kanie and Rakhyun E Kim present goal-setting as a new form of global governance not only characterised by a lack of legal bindingness but also weak institutional arrangements, an inclusive negotiating process and flexibilities to accommodate national choices and preferences.³⁶

Aspirations, even if operating in the political sphere, can nevertheless carry normative effects or lead to legal change. A sharp distinction between, on the one hand, a goal-setting technique operating in the realm of politics and, on the other hand, a soft law instrument at the margins of international law cannot be endorsed. This is the position adopted by, for instance, Kanie et al, who identify different types of international goal-setting, depending on how aspirational goals intersect with existing institutions: for instance, they distinguish between goals that are ‘solely aspirational’ and those that ‘start as aspirational but later acquire consensus and support through formal institutions’.³⁷ Despite the reluctance of negotiators to create legal commitments, the SDGs do not operate completely outside of the legal sphere and cannot therefore be expected to remain ‘solely aspirational’. References to international law are plentiful in the *2030 Agenda*. The SDGs explicitly endorse various international treaties and declarations³⁸ and, when calling to implement the SDGs ‘in a manner that is consistent with’ their international obligations,³⁹ reveal a certain deference to international law. It is clear that negotiators sought to avoid a situation in which the SDGs would undermine existing legal commitments, operate in contradiction with them or even re-open negotiations of treaty-based rules. The SDGs are

³² Biermann, Kanie and Kim (n 12) 26.

³³ Norichika Kanie et al, ‘Rules to Goals: Emergence of New Governance Strategies for Sustainable Development’ (2019) 14(6) *Sustainability Science* 1745, 1745–6.

³⁴ Sakiko Fukuda-Parr, ‘Global Development Goal Setting as a Policy Tool for Global Governance: Intended and Unintended Consequences’ (Working Paper No 108, International Policy Centre for Inclusive Growth, April 2013) 3.

³⁵ Ibid 4. See also Sakiko Fukuda-Parr, Alicia Ely Yamin and Joshua Greenstein, ‘The Power of Numbers: A Critical Review of Millennium Development Goal Targets for Human Development and Human Rights’ (2014) 15(2–3) *Journal of Human Development and Capabilities* 105, 112.

³⁶ Biermann, Kanie and Kim (n 12) 26–7.

³⁷ Norichika Kanie et al, ‘Introduction: Global Governance through Goal Setting’ in Norichika Kanie and Frank Biermann (eds), *Governing through Goals: Sustainable Development Goals as Governance Innovation* (MIT Press, 2017) 1, 6–7.

³⁸ See, eg, *2030 Agenda*, UN Doc A/RES/70/1 (n 1) paras 10–11, 19, 31, 33, 42.

³⁹ Ibid para 18.

therefore sometimes viewed to be complementary to the tools of international law,⁴⁰ while international law is considered to either facilitate or hinder the implementation of the SDGs.⁴¹ As a result of the potential interactions between SDG 7 and international law in this context, it can be expected that the operation of the Goal will have the potential to create or change international law.

Ultimately, the complexities of the role played by the SDGs in the international legal system at the intersection between governance by means of goal-setting and law come to the fore. The formal legal status of the SDGs does not shed much light on the potential normative impacts of SDG 7. The SDGs are considered to be aspirations, a manifestation of a non-legal form of governance, but such an approach overlooks the complexities of the normative sphere within which they operate. The examination of the normative impacts of SDG 7 below will show that governance through goals is able to carry normative impacts and could transform the international law of energy. In order to better understand the relationship between SDG 7 and its international legal landscape, the analysis now focuses on the Goal itself.

III THE CONSTRUCTION AND CRYSTALLISATION OF AN ASPIRATION: NOTHING NEW UNDER THE SUN FOR THE ENERGY GOAL?

Assessments of the legal impacts of the SDGs tend to be holistic, but a more granular examination, undertaken on a goal-by-goal basis, is necessary to take into consideration the specificity of the international legal landscape applicable to each individual SDG.⁴² The analysis below reflects on the complementarity, or otherwise, between the objectives of the international community in the field of energy before and after SDG 7. It shows that SDG 7 on affordable and clean energy does not bring about a legal revolution; on the contrary, the changes it encourages are minimal. Certainly, it is consistent with the role played by international cooperation in governing the energy sector before the adoption of the *2030 Agenda*. At the same time, the inclusion of SDG 7 is significant given the already mentioned reluctance of states to regulate energy matters at the international level. By acting as a ‘compromise between sovereignty and the need to establish rules to govern international relations’,⁴³ it fulfills a function generally characterising soft law norms.

The adoption of SDG 7 is noteworthy given that a standalone goal on energy was absent in the MDGs.⁴⁴ In the 10 years preceding the adoption of the MDGs, the role of energy in contributing to sustainable development had been acknowledged but remained controversial. Indeed, it had been explicitly

⁴⁰ Rakhyun E Kim, ‘The Nexus between International Law and the Sustainable Development Goals’ (2016) 25(1) *Review of European, Comparative and International Environmental Law* 15, 16–17.

⁴¹ See, eg, Adamantia Rachovitsa and Marlies Hesselman, ‘Introduction to the Special Issue: International Law for the Sustainable Development Goals’ (2020) 2(1) *Brill Open Law* 1; French (n 16) 163.

⁴² In relation to energy, see generally Stuart Bruce and Sean Stephenson, *SDG 7 on Sustainable Energy for All: Contributions of International Law, Policy and Governance* (Issue Brief, 2016).

⁴³ Thürer (n 15) [6].

⁴⁴ *UN Millennium Declaration*, UN Doc A/RES/55/2 (n 2).

recognised in the Brundtland report,⁴⁵ but no consensus was reached on a potential standalone chapter on energy in Agenda 21 at the 1992 Rio Conference on Environment and Development.⁴⁶ Intergovernmental disagreements over what was perceived as a politically sensitive topic continued in the following decade, so that energy was then omitted from the MDGs, despite it being acknowledged to be a key enabler of the other goals.⁴⁷

Proposals to set global targets to govern energy, as now found in SDG 7, were initially faced with strong objections. When energy eventually entered the international agenda in 2002 at the World Summit on Sustainable Development, the Johannesburg Plan of Implementation called for action to improve ‘access to reliable, affordable, economically viable, socially acceptable and environmentally sound energy services’,⁴⁸ but it did not set specific global targets, in sharp contrast with the MDGs’ numerical targets that were reaffirmed for water, sanitation and food.⁴⁹ Similarly, the European Union’s proposal at the 2006 and 2007 sessions of the UN Commission on Sustainable Development, at which energy was considered as a thematic cluster,⁵⁰ to decide on time-bound targets to significantly improve energy access, energy efficiency and renewable energy production — objectives now at the heart of SDG 7 — was too controversial and prevented the Commission on Sustainable Development from adopting an outcome document.⁵¹

The content of SDG 7 can be traced back to the high-level political meeting organised at the International Conference for Renewable Energies in Bonn in 2004 but without the specific metrics. The Conference resulted in the adoption of a political declaration by 154 governments on the need to substantially increase the global share of renewable energy in the total energy supply, improve energy efficiency and facilitate energy access⁵² — the three aims of SDG 7. Further progress towards what eventually became SDG 7 was made in 2010 by the High-Level Advisory Group on Energy and Climate Change, a multi-stakeholder partnership held under the auspices of the UN Secretary-General. Its contribution was dual: first, it made the targets more specific by providing metrics; second, it

⁴⁵ *Report of the World Commission on Environment and Development: Note by the Secretary-General*, UN GAOR, 42nd sess, Agenda Item 83(e), UN Doc A/42/427 (4 August 1987) annex (‘*Report of the World Commission on Environment and Development: Our Common Future*’) [58].

⁴⁶ *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26 (Vol IV) (28 September 1992) annex II.

⁴⁷ During the High-Level Plenary Meeting of the General Assembly on the MDGs in 2010, energy was recognised as a key prerequisite for achieving these goals: Imran Habib Ahmad et al, ‘A Report of the High-Level Plenary Meeting of the 65th Session of the UN General Assembly on the Millennium Development Goals (MDGs)’ (2010) 153(9) *MDG Summit Bulletin* 1, 5. See also UN Energy, *The Energy Challenge for Achieving the Millennium Development Goals* (Report, 22 June 2005) 5–6.

⁴⁸ *Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (26 August – 4 September 2002) annex (‘*Plan of Implementation of the World Summit on Sustainable Development*’) [9(a)], [20].

⁴⁹ On halving the proportion of people without access to safe drinking water by 2015: *ibid* [7(a)]. On halving the proportion of people without access to sanitation by 2015: *ibid* [25]. On halving the proportion of people who suffer from hunger by 2015: *ibid* [40(a)].

⁵⁰ Peter Doran et al, ‘Summary of the Fourteenth Session of the Commission on Sustainable Development: 1–12 May 2006’ (2006) 5(238) *Earth Negotiations Bulletin* 1, 3.

⁵¹ Twig Johnson et al, ‘Summary of the Fifteenth Session of the Commission on Sustainable Development: 30 April – 11 May 2007’ (2007) 5(254) *Earth Negotiations Bulletin* 1, 7.

⁵² ‘Political Declaration’ (Declaration, International Conference for Renewable Energies, 4 June 2004) 1 [2]–[3].

linked decarbonisation objectives with access to energy priorities. The Advisory Group called for the adoption of two goals: one on universal access to modern energy services by 2030 and another on reducing global energy intensity by 40% by 2030.⁵³ A third target — to double the share of renewables in final energy to 30%, also by 2030 — was added later.⁵⁴ Following the recommendations of the Advisory Group to launch a campaign on ‘energy for sustainable development’,⁵⁵ the UN Secretary-General launched the following year, in 2011, the ‘Sustainable Energy for All’ (‘SE4ALL’) initiative to drive action and mobilise commitments to achieve three objectives by 2030: first, universal access to modern energy services; second, double the global rate of improvement in energy efficiency; and third, double the share of renewable energy in the global energy mix (from 15% to 30%).⁵⁶

These targets have been instrumental in framing negotiations on SDG 7. From the start of the process, states accepted that a reference to sustainable energy would need to be included.⁵⁷ The lack of reference to energy in the MDGs was recognised as being a significant weakness of the development agenda, which had contributed to the missed implementation of the MDGs. In response to a questionnaire sent by the UN Secretary-General at the start of the negotiations process, member states ranked energy third in terms of priority, after food and water.⁵⁸ They supported the SE4ALL initiative and generally recognised that its targets should provide inspiration for a standalone energy goal.⁵⁹ Proposals to move beyond the SE4ALL targets and include other, different targets were made during the negotiating process. Early drafts included an objective to increase the ‘share of clean energy ... technologies, including sustainable biomass and advanced cookstoves’⁶⁰ and to ‘phase out fossil fuel production and consumption subsidies that encourage wasteful use, while ensuring secure affordable energy for the poor’.⁶¹ However, the adopted form of

⁵³ The Secretary-General’s Advisory Group on Energy and Climate Change, *Energy for a Sustainable Future: Report and Recommendations* (Report, 28 April 2010) 9 (‘*Energy for a Sustainable Future*’).

⁵⁴ ‘Ban Launches High-Level Group to Mobilize Action on Sustainable Energy for All’, *UN News* (online, 1 November 2011) <<https://news.un.org/en/story/2011/11/393842>>, archived at <<https://perma.cc/Z7YU-2GDS>> (‘Ban Launches High-Level Group’).

⁵⁵ *Energy for a Sustainable Future* (n 53) 12.

⁵⁶ ‘Ban Launches High-Level Group’ (n 54).

⁵⁷ For a detailed analysis of the negotiations over the energy goal, see Sylvia I Karlsson-Vinkhuyzen, ‘The UN, Energy and the Sustainable Development Goals’ in Thijs Van de Graaf et al (eds), *The Palgrave Handbook of the International Political Economy of Energy* (Palgrave Macmillan, 2016) 115.

⁵⁸ Noting that this represents a partial sample of views of member states, representing roughly one third of the UN Membership: *Initial Input of the Secretary-General to the Open Working Group on Sustainable Development Goals*, GA Res 67/634, UN GAOR, 67th sess, Agenda Item 20(a), UN Doc A/67/634 (17 December 2012) para 16.

⁵⁹ *Progress Report of the Open Working Group of the General Assembly on Sustainable Development Goals* (Progress Report, 2014) 17 [113] <<https://sustainabledevelopment.un.org/content/documents/3238summaryallowg.pdf>>, archived at <<https://perma.cc/8LBA-AMJJ>>.

⁶⁰ *Working Document for 5–9 May Session of Open Working Group* (Working Document, 5–9 May 2014) 4 <https://sustainabledevelopment.un.org/content/documents/3686WorkingDoc_0205_additional supporters.pdf>, archived at <<https://perma.cc/V3JR-HCAZ>>.

⁶¹ *Introduction and Proposed Goals and Targets on Sustainable Development for the Post 2015 Development Agenda* (Zero Draft rev 1, 2015) 7 [7.4] <<https://sustainabledevelopment.un.org/content/documents/4523zerodraft.pdf>>, archived at <<https://perma.cc/C3LY-LAEH>>.

SDG 7 replicates almost verbatim the three targets of SE4ALL, with the exception of the renewable energy global rate that was watered down from an objective of doubling to one of substantial increase. It is complemented by two implementation targets not present in the SE4ALL targets, a first one on enhancing cooperation and promoting investments in the field of energy and a second on expanding infrastructure and upgrading technology.

Given the symmetries that exist between the directions taken by global energy governance and SDG 7, it can be said that the SDG has not played a disruptive function but has merely reinforced the forms taken by international cooperation in the field. Its content is not in itself innovative and does not change the directions that the international community had set itself in the field of energy governance. What is important is the symbolism of the adoption of the SDG, which signals the willingness of the international community to improve their international cooperation in the energy sector while maintaining enough freedom and flexibility to avoid entering into a binding commitment. Despite the apparent symmetry between energy governance pre-2015 and post-2015, the inclusion of an energy goal in the *2030 Agenda* is not inconsequential because it moved the sustainability concerns of international energy law from operating in a technical realm to a more political sphere. A first reason relates to the fact that SDG 7 reinforces the legitimacy and universality of the SE4ALL targets, upgrading what was initially a technical agreement to a para-legal commitment. The SDG is now formally recognised as one of the foundational priorities of the international community until 2030. It transforms the bureaucratic objectives into a universally accepted norm with potentially wideranging effects. It is significant because the SE4ALL initiative itself was not backed by all UN members. For instance, in 2012, the inclusion of a reference to the initiative in the Rio+20 outcome document was particularly controversial, with the G77/China negotiating group rejecting it.⁶² Ultimately, the outcome document ‘note[d]’ the launch of the initiative, falling short of supporting or encouraging it.⁶³ The international support that the proposal to include an energy goal immediately gained during the *2030 Agenda* negotiations is therefore in stark contrast. As a result, the SE4ALL targets benefit from significantly more weight and legitimacy and also fall under more scrutiny by the international community and civil society. At the same time, the infrastructure already in place to implement the SE4ALL targets is also an advantage, in that the SDG is able to benefit from its organisational structure, follow-up mechanism and multi-stakeholder partnerships.

A second reason concerning the added value of SDG 7 compared to the SE4ALL targets is that it brings an additional consideration to the SE4ALL initiative by positioning it as one amongst other sustainability challenges. In the context of a sustainable development agenda made of indivisible goals, the SE4ALL targets operate in interaction with other natural resources also governed

⁶² Karlsson-Vinkhuyzen (n 57) 129.

⁶³ *The Future We Want*, UN Doc A/RES/66/288 (n 22) para 129.

by the SDGs, such as food and water.⁶⁴ This is important because the implementation of SDG 7 might require significant trade-offs between other sustainability objectives.⁶⁵ Indeed, changes affecting the management of one resource can significantly affect others. For instance, the use of renewable energies to limit greenhouse gas emissions, as encouraged by SDG 7, might create new tensions in other areas: the use of agricultural lands for the production of biofuels can undermine food security, while unconventional fracking techniques might cause water pollution. Presenting these difficult policy considerations in a coherent, holistic programme highlights potential synergies as well as tensions between different goals.

IV SDG 7 AS A SOFT LAW NORM: TAXONOMY OF NORMATIVE EFFECTS

I now turn to the normative effects that would move SDG 7 from an aspirational goal to a soft law norm. I understand the term ‘soft law’ to refer to instruments which have debatable legal force but which nevertheless have a capacity to produce certain legal effects. The objective is to understand the ability of SDG 7 to produce international legal impacts by identifying the impacts it has had so far and highlighting potential future effects. The *2030 Agenda* emphasises the fact that the SDGs are ‘integrated’ and ‘indivisible’⁶⁶ and should therefore be seen as an ensemble. As a result, the normative impacts of the SDGs are generally assessed holistically. The SDGs have been described as shaping the application and interpretation of existing legal instruments,⁶⁷ realigning or reorchestrating the existing landscape,⁶⁸ acting as a ‘catalyst’ to the progressive development of international law⁶⁹ or reflecting pre-existing treaty or customary obligations.⁷⁰ At the same time, each SDG has unique normative effects as a consequence of, inter alia, the extent to which it replicates, extends or contradicts existing international law. An empirical assessment of such impacts is, however, a complex task. A first difficulty emerges from the fact that explicit references to SDG 7 are rare; instead, they are subsumed under a more general reference to the *2030 Agenda* that says nothing about its specific implications for

⁶⁴ Food and Agriculture Organization, *Water-Energy-Food Nexus for the Review of SDG 7* (Policy Brief No 9, 2018) 4; Joachim Monkelbaan, *Governance for the Sustainable Development Goals: Exploring an Integrative Framework of Theories, Tools, and Competencies* (Springer, 2019) 95–100.

⁶⁵ Måns Nilsson, Dave Griggs and Martin Visbeck, ‘Map the Interactions between Sustainable Development Goals’ (2016) 534(7607) *Nature* 320, 320.

⁶⁶ *2030 Agenda*, UN Doc A/RES/70/1 (n 1) Preamble para 3, paras 5, 18, 55, 71.

⁶⁷ ‘International Law and the Sustainable Development Goals: Shaping the Rules for Our Common Future’, *Public International Law Discussion Group (Part II)* (University of Oxford, 2017) 00:37:10 <<http://podcasts.ox.ac.uk/international-law-and-sustainable-development-goals-shaping-rules-our-common-future>>, archived at <<https://perma.cc/3QHB-ZPMD>>. Specifically, in relation to the SDG 6 on water, see Catherine Brölmann, ‘Sustainable Development Goal 6 as a Game Changer for International Water Law’ (2018) 7(5) *ESIL Reflections* 1, 8; Otto Spijkers, ‘The Cross-Fertilization between the Sustainable Development Goals and International Water Law’ (2016) 25(1) *Review of European, Comparative and International Environmental Law* 39.

⁶⁸ Kim (n 40) 15–17.

⁶⁹ Owen McIntyre, ‘International Water Law and SDG 6: Mutually Reinforcing Paradigms’ in Duncan French and Louis J Kotzé (eds), *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar Publishing, 2018) 173, 174.

⁷⁰ Kim (n 40) 16; Spijkers (n 67) 40.

the energy sector. A second difficulty with identifying the normative impacts of SDG 7 pertains to the basis on which to detect such impacts. This article considers textual references to SDG 7 in legal sources as evidence of change while acknowledging it carries limitations: a reference in a legal instrument does not automatically have normative influence; conversely, a lack of reference does not necessarily mean that SDG 7 did not have an impact, even if implicit, on the making and interpretation of a text.⁷¹ The analysis that follows identifies three types of legal impacts that SDG 7 can have on international institutions (Part IV(A)), international treaty law (Part IV(B)) and the development or crystallisation of international customary law (Part IV(C)).

A From Aspiration to Transformation: Re-Aligning the International Legal Order

Soft law can play a fundamental role in the evolution of the international legal order by providing an accepted frame to which institutions and states can refer to reaffirm the directions taken by their public policies. The SDGs have been described as having the potential to orchestrate existing regimes and organisations to facilitate their alignment with the *2030 Agenda*.⁷² SDG 7, in particular, has been depicted as a meta-norm,⁷³ in the sense that it raises expectations regarding the conduct of international actors and carries important functions of coordination between states, as well as other actors, including international organisations. While the SDG does not create a legal commitment, it can influence the legal order by imposing the creation of constraining rules through procedures and institutions. In this context, international institutions and initiatives carry an important role as norm entrepreneurs that work towards supporting SDG 7 by steering conduct and enabling states and other actors to pursue their aligned goals. In return, their work moves from the technical to the political sphere, and they benefit from enhanced legitimacy and increased visibility.

However, the move from an aspirational nature to a transformative function is not necessarily as wideranging as one might estimate, in the sense that not every potentially relevant international institution seems to be affected by SDG 7. For instance, compared to other goals, SDG 7 operates in a trade vacuum, whereas international trade can both facilitate (as a source of finance, for instance) and hinder (due to the risk of regulatory chill associated with trade rules) the clean energy transition. Other SDGs have explicitly integrated the need

⁷¹ There are instances where the influence of the SDGs can be sensed. For example, the announcement of the World Bank in December 2017 to stop financing upstream oil and gas projects to align with the *Paris Agreement* tried to find a balance between transitioning to renewable forms of energy while at the same time ensuring energy access for the poor: see World Bank, ‘World Bank Group Announcements at One Planet Summit’ (Press Release, 12 December 2017) <<https://www.worldbank.org/en/news/press-release/2017/12/12/world-bank-group-announcements-at-one-planet-summit>>, archived at <<https://perma.cc/5JA3-XFVW>>.

⁷² Kim (n 40) 16–19. Cf Arild Underdal and Rakhyun E Kim, ‘The Sustainable Development Goals and Multilateral Agreements’ in Norichika Kanie and Frank Biermann (eds), *Governing through Goals: Sustainable Development Goals as Governance Innovation* (MIT Press, 2017) 241, 254.

⁷³ Volker Roeben and Gökçe Mete, ‘What Do We Mean When We Talk about International Energy Law?’ in Peter D Cameron, Xiaoyi Mu and Volker Roeben (eds), *The Global Energy Transition: Law, Policy and Economics for Energy in the 21st Century* (Hart Publishing, 2021) 73, 74. More generally, in relation to SDGs, see also Monkelbaan (n 64) 28.

to reform international trade law, such as SDG 2, which aims to '[c]orrect and prevent trade restrictions and distortions in world agricultural markets'⁷⁴ or SDG 14, which targets the prohibition of harmful fisheries subsidies⁷⁵ and 'illegal, unreported and unregulated fishing';⁷⁶ but trade is notably absent from SDG 7.⁷⁷ As a result, the report published by the World Trade Organization in 2018 on how trade could contribute to delivering some SDGs does not mention SDG 7.⁷⁸

In addition, when SDG 7 does have a normative impact on the role of international institutions and programmes, these impacts are often incremental, in that they have encouraged small adjustments within institutions, the missions of which were already close to the objectives of the SDGs. One prominent example is the SE4ALL initiative, set up in 2011, the targets of which inspired SDG 7. The adoption of the SDG has technically changed very little of the mandate and work of the initiative, but it has nevertheless rebranded itself in light of the new context, alongside a new status (as a quasi-international organisation under Austrian law), leadership and governance structure. The SEforALL initiative (note the slight change in spelling) now presents itself as an organisation that aims to 'drive faster action towards the achievement of Sustainable Development Goal 7 ... in line with the *Paris Agreement*'.⁷⁹ It gains legitimacy, dynamism and efficiency, thanks to its inclusion in a recognised, holistic international agenda, the addition of the two implementation targets and the institutionalised and visible follow-up framework. Another example includes the Regulatory Indicators for Sustainable Energy, developed before the adoption of the SDGs by the World Bank as a 'set of indicators to help compare national policy and regulatory frameworks for sustainable energy',⁸⁰ which are now explicitly portrayed as facilitating the implementation of the SDGs.⁸¹ In sum, the international institutional landscape has, at least partially, aligned with SDG 7 and its objectives, but the evidence suggests that its reorchestration function has so far only led to minimal changes.

⁷⁴ *2030 Agenda*, UN Doc A/RES/70/1 (n 1) para 2.b.

⁷⁵ *Ibid* para 14.6.

⁷⁶ *Ibid* para 14.4.

⁷⁷ Trade-related questions on energy were not completely absent from the SDG negotiations: the preparatory work of the Open Working Group of the General Assembly on Sustainable Development Goals had highlighted the role of law in energy trade and investment, and the question of fossil fuel subsidies was initially discussed under SDG 7. However, these were moved after the last session of the Open Working Group to SDG 12 on sustainable consumption and production and were worded in a more diluted and convoluted form: see United Nations General Assembly Open Working Group on Sustainable Development Goals, *TST Issues Briefs* (Compendium, October 2014) 106.

⁷⁸ World Trade Organization, *Mainstreaming Trade to Attain the Sustainable Development Goals* (Report, 2018).

⁷⁹ 'Who We Are', *Sustainable Energy for All* (Web Page) <<https://www.seforall.org/who-we-are>>, archived at <<https://perma.cc/YX7M-R84M>>.

⁸⁰ Sudeshna Ghosh Banerjee et al, 'Regulatory Indicators for Sustainable Energy: A Global Scorecard for Policy Makers' (Working Paper No 112828, World Bank, 1 January 2017) xv.

⁸¹ *Ibid*.

B From Aspiration to Inspiration: Developing International Treaty Law

SDG 7, despite not being of a legal nature, complements existing legal norms and can therefore strengthen international treaty law.

1 SDG 7 and the Paris Agreement

A first route of analysis before looking at the general impacts of SDG 7 on treaty law is to analyse its effects on the *Paris Agreement*.⁸² Indeed, the SDGs and the *Paris Agreement* are regularly mentioned together, as an ensemble, despite the fact that the *2030 Agenda* addressed energy and climate change separately, seemingly ignoring the fact that the reason for transitioning to the renewable energies it encourages in SDG 7 is to operationalise SDG 13 on fighting climate change.⁸³ Their adoption a few months apart in 2015, the inclusion of a climate goal in the sustainable development agenda referring back to the UN Framework Convention on Climate Change regime and their shared sense of direction towards building a sustainable planet presents them as a logical combination. The reduction of annual energy-related CO₂ emissions by 70% below today's level in order to be in line with the Paris objectives of carbon neutrality⁸⁴ will primarily need to be implemented through an increase in renewable energy and energy efficiency.⁸⁵ SDG 7 hence complements the objectives of the *Paris Agreement*: it provides guidance on how to achieve them by encouraging renewable energy expansion and emphasising energy efficiency. By fostering international mobilisation and facilitating international cooperation in the energy sector, SDG 7 becomes a means to meet the temperature goals of the *Paris Agreement*. Yet, such an operational role does not necessarily strengthen the normativity of the SDG.

The question that arises, therefore, is whether SDG 7 can have a direct legal impact on the *Paris Agreement* and, if it does, what it would mean in terms of the SDG's normativity. Soft law scholars have argued that a non-obligatory norm could see its non-binding character lost when operating in conjunction with an international agreement.⁸⁶ The situation appears more complex here because, while SDG 7 operates in close conjunction with the *Paris Agreement*, the route through which SDG 7 could integrate the treaty is through Nationally Determined Contributions ('NDCs'), the legal status of which is still debated.⁸⁷ The majority of the 2018 voluntary national reviews on SDG 7 highlighted the interlinkages between energy and climate⁸⁸ but did not 'elaborate on the connection between the country's SDG7 objectives and its nationally determined contributions under

⁸² *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016).

⁸³ See, eg, 2018 HLPF Review of SDG Implementation: SDG 7 — Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for All (Report, 2018) 7.

⁸⁴ *Global Energy Transformation* (n 8) 23.

⁸⁵ *Ibid.*

⁸⁶ Alan E Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law' (1999) 48(4) *International and Comparative Law Quarterly* 901, 906.

⁸⁷ See, eg, Sharaban Tahura Zaman, 'Exploring the Legal Nature of Nationally Determined Contributions (NDCs) under International Law' (2015) 26 *Yearbook of International Environmental Law* 98; Benoit Mayer, 'International Law Obligations Arising in Relation to Nationally Determined Contributions' (2018) 7(2) *Transnational Environmental Law* 251.

⁸⁸ 68% of the reviews mention the relationship: *Analysis of the Voluntary National Reviews* (n 11) vi.

the *Paris Agreement*'.⁸⁹ Many NDCs make some reference to the energy sector, sometimes setting targets in terms of renewable energy⁹⁰ or energy efficiency.⁹¹ This is significant because the agreed guidance on the NDCs provides that '[p]arties strive to include all categories of anthropogenic emissions or removals in their nationally determined contributions and, once a source, sink or activity is included, continue to include it'.⁹² This means, first, that the energy sector, as a major source of emissions, has an important role to play in the NDCs and, second, that all the NDCs that have so far referenced renewable energy or energy efficiency objectives are expected to continue referring to them. Given that states have a duty not to downgrade an existing NDC and to submit increasingly ambitious commitments every five years,⁹³ they have a continuous obligation to commit to SDG 7. Hence, a better integration of SDG 7 and the *Paris Agreement* has the potential to change the nature of SDG 7: it does not remain an aspirational goal, the domestic implementation of which is reviewed on a voluntary basis and without any obligation on states to continuously commit to it; instead it becomes a norm, the individual and collective implementation of which is regularly reported upon and reviewed under the procedures of the *Paris Agreement*.

2 SDG 7 as a Precursor to Treaty Law

Beyond the specific relationship between SDG 7 and the *Paris Agreement*, another route to understand the potential soft law effects of SDG 7 is to look at whether it can act as '*pré-droit*', as a precursor to international treaty law. The need to adopt a treaty specifically dedicated to implementing some or all of the elements of SDG 7, such as on access to energy or on renewable energy promotion, has been discussed in the scholarship,⁹⁴ but there is at present little appetite to transform the political ambitions of SDG 7 into legally binding commitments. Yet, two scenarios in which SDG 7 can influence treaty-making processes ought to be mentioned as alternatives.

First, SDG 7 can influence the making of new international treaties that do not necessarily make it their object and purpose but nevertheless integrate a

⁸⁹ Ibid v.

⁹⁰ *Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions: Note by the Secretariat*, 21st sess, Provisional Agenda Item 4(a), UN Doc FCCC/CP/2015/7 (30 October 2015) [12], [154].

⁹¹ Ibid [155].

⁹² *Report of the Conference of the Parties on its Twenty-First Session, Held in Paris from 30 November to 13 December 2015: Addendum: Part Two: Action Taken by the Conference of the Parties at its Twenty-First Session*, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2016) [31(c)]; *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement on the Third Part of its First Session, Held in Katowice from 2 to 15 December 2018: Addendum: Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Paris Agreement*, 26th plen mtg, UN Doc FCCC/PA/CMA/2018/3/Add.1 (19 March 2019) annex II ('Accounting for Parties' Nationally Determined Contributions, Referred to in Decision 1/CP.21, Paragraph 31') [3(b)].

⁹³ Lavanya Rajamani and Jutta Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement' (2017) 29(3) *Journal of Environmental Law* 537, 541 n 28, 544–5.

⁹⁴ Peter Kayode Oniemola, 'International Law on Renewable Energy: The Need for a Worldwide Treaty' (2013) 56 *German Yearbook of International Law* 281, 309; Bruce (n 13) 48.

reference to it. Notably, a number of trade and investment agreements adopted after 2015 reference the SDGs to express the alignment between the treaty's objectives and the sustainable development agenda.⁹⁵ Such an inclusion lacks direct legal effects but endorses the wider normative framework within which the treaty operates. For instance, references to the SDGs in the preamble of bilateral investment treaties⁹⁶ alleviate concerns of conflicts between the objectives of the treaty and other priorities of the international community. However, the extent to which this reference can be used as an enabler or for interpretation — and whether it signals a legally binding intention of the parties to act in accordance with the *2030 Agenda* — remains debatable. This is, in particular, made more difficult given that free trade agreements often seek to promote energy cooperation,⁹⁷ yet references to the SDGs are made for context and do not specifically pinpoint to SDG 7.⁹⁸ A crystallisation of the legal nature of SDG 7 in a preambular form is therefore unlikely.

A second, more convincing role for SDG 7 as a precursor to treaty law relates to the ongoing work on the modernisation of *The Energy Charter Treaty* ('ECT').⁹⁹ Factors that are contributing to the modernisation of the ECT are, evidently, multiple and cannot only be traced back to SDG 7, but the SDG can be seen as a precursor to this modernisation process. The 'Bucharest Energy Charter Declaration', adopted in 2018 by the ECT Parties, on the modernisation of the Treaty notes 'the rapid changes that have occurred in recent years' in the energy sector, without explicitly referencing the SDGs.¹⁰⁰ SDG 7 is, however, explicitly mentioned in relation to investment risks and the 'policy [and] legal ... environment'.¹⁰¹ There, the Declaration notes that

⁹⁵ Texts that present the SDGs as one of their core objectives include: *Protocol on Trade in Services*, signed 21 March 2018, 58 ILM 1053 (entered into force 30 May 2019) art 3(2)(b); *Comprehensive and Enhanced Partnership Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and the Republic of Armenia, of the Other Part*, signed 24 November 2017, [2018] OJ L 23/4 (entered into force 1 March 2021) art 272(1); *Free Trade Agreement between the EFTA States and Georgia*, signed 27 June 2016 (entered into force 1 September 2017) art 10.1(1); *Free Trade Agreement between the EFTA States and the Philippines*, signed 28 April 2016 (entered into force 1 June 2018) art 11.1(1); *Economic Partnership Agreement between the CARIFORUM States, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part*, signed 22 March 2019, [2019] MS 18 (not yet in force) Preamble, art 1(a); *Comprehensive Economic Partnership Agreement between the Republic of Indonesia and the EFTA States*, signed 16 December 2018 (not yet in force) Preamble; *Comprehensive Economic Partnership Agreement between the EFTA States and the Republic of Ecuador*, signed 25 June 2018 (entered into force 1 November 2020) art 8.1(1).

⁹⁶ See, eg, Azerbaijan 2016 Model Bilateral Investment Treaty Preamble; Belgium-Luxembourg Economic Union 2019 Model Bilateral Investment Treaty Preamble.

⁹⁷ Elena Cima, 'Promoting Renewable Energy through FTAs? The Legal Implications of a New Generation of Trade Agreements' (2018) 52(4) *Journal of World Trade* 663, 663.

⁹⁸ See above n 95.

⁹⁹ *The Energy Charter Treaty*, opened for signature 17 December 1994, 2080 UNTS 95 (entered into force 16 April 1998).

¹⁰⁰ 'Bucharest Energy Charter Declaration' (Declaration, Energy Charter Conference, 27 November 2018).

¹⁰¹ *Ibid.*

governments have a high degree of responsibility to create an environment conducive for investment in the energy sector and to mobilise finance from a wide variety of sources, in particular in recognition of the large investment requirements towards a sustainable energy future and to meet UN Sustainable Development Goal 7, which stipulates access to sustainable energy for all.¹⁰²

In addition, some states have indeed argued that one of the core reasons for modernising the *ECT* was to take into account and give ‘added value’ to the SE4ALL initiative, the SDGs and the *Paris Agreement*.¹⁰³

3 *SDG 7 and Droit Dérivé*

Alternatively, SDG 7 could steer the direction of existing international treaty law, when integrated into the *droit dérivé* of these treaties, by means of decisions of the parties. Although these decisions are, strictly speaking, not legally binding, they are well known for their influence on treaty practices. The international legal context within which SDG 7 operates — one where international law related to energy is dispersed over different fields of international law — is important. For instance, parties to watercourse treaties, such as the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*,¹⁰⁴ have integrated SDG 6 on clean water and sanitation for all into the treaty’s work programme and explicitly used it as a guiding principle.¹⁰⁵ However, the situation is different for SDG 7 because the lack of a unifying treaty means that the SDG can only have a more fragmented, and less targeted, impact. The work programme of some treaties has been influenced by SDG 7, such as in the case of the *Convention on the Conservation of Migratory Species of Wild Animals*, in the context of which parties have been prompted to deepen their work on the impact of the move to renewable energies for migratory species.¹⁰⁶ Other impacts are more difficult to circumscribe when the exact implications of the SDGs have not necessarily been spelt out — or at least not in relation to SDG 7 — and when references to the SDGs are used as a contextual element, to reassert support for the *2030 Agenda*. This has often been the case when meetings of the parties to other treaties have made more wideranging references to the SDGs in general, leaving it for parties and scholars to identify their exact implications. For instance, the meetings of the parties of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental*

¹⁰² Ibid.

¹⁰³ Comments submitted by Azerbaijan, Luxembourg, Switzerland and Turkey make references to the SDGs: Energy Charter Secretariat, *Decision of the Energy Charter Conference*, Doc No CCDEC 2019 08 STR, 6 October 2019, 38–40.

¹⁰⁴ *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, opened for signature 17 March 1992, 1936 UNTS 269 (entered into force 6 October 1996).

¹⁰⁵ Economic Commission for Europe, *Report of the Meeting of the Parties on its Eighth Session*, 8th sess, UN Doc ECE/MP.WAT/54 (30 January 2019) 8 [21]–[26].

¹⁰⁶ *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983). The Meeting of the Parties made an explicit reference to SDG 7 in the resolution: *Renewable Energy and Migratory Species*, 13th mtg, UN Doc UNEP/CMS/Resolution 11.27 (Rev.COP13) (February 2020) Preamble para 6.

*Matters*¹⁰⁷ and the *Convention on Environmental Impact Assessment in a Transboundary Context*¹⁰⁸ have acknowledged the importance of SDGs to their work, as well as their contribution towards meeting the goals.¹⁰⁹ Energy activities carrying environmental risks fall under the scope of these Conventions,¹¹⁰ requiring parties, when applicable, to carry out environmental impact assessments and meet public participation requirements. As such, theoretically, SDG 7 becomes relevant, but the question of how to link the procedural focus of these Conventions with the energy goal's substantive targets remains unexplored.

4 *SDG 7 and Norm Interpretation*

More generally, while the non-legal character of the SDGs precludes direct legal effects, the SDGs can nevertheless be used as an interpretative aid to define the contours of the oft-vague concept of 'sustainable development' included in a wide variety of international treaties. Thanks to a more comprehensive approach to energy issues at the international level, the energy sector is now conceptualised in the three dimensions of sustainable development: the environmental pillar is concerned with energy as a source of impact, the economic pillar looks at energy as indispensable to growth and development and the social pillar envisages energy as a basic human need.¹¹¹ Non-legally binding instruments have, in the past, played a significant role in determining the meaning and application of the concept of sustainable development in the energy sector — including the *Rio Declaration on Environment and Development* or the *The Future We Want* resolution¹¹² — documents which are referenced in

¹⁰⁷ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) ('*Aarhus Convention*').

¹⁰⁸ *Convention on Environmental Impact Assessment in a Transboundary Context*, opened for signature 25 February 1991, 1989 UNTS 309 (entered into force 10 September 1997) ('*Espoo Convention*').

¹⁰⁹ In relation to the *Espoo Convention*, see *Report of the Meeting of the Parties to the Convention on Its Seventh Session and of the Meeting of the Parties to the Convention Serving as the Meeting of the Parties to the Protocol on Its Third Session*, UN Docs ECE/MP.EIA/23-SEA/7 (19 September 2017) 10–12 [35]–[43]; *Report of the Meeting of the Parties to the Convention on Its Seventh Session and of the Meeting of the Parties to the Convention Serving as the Meeting of the Parties to the Protocol on Its Third Session: Addendum: Decisions and the Declaration Adopted Jointly by the Meeting of the Parties to the Convention and the Meeting of the Parties to the Convention Serving as the Meeting of the Parties to the Protocol*, UN Docs ECE/MP.EIA/23/Add.1-SEA/7/Add.1 (19 September 2017) Decision VII/3-III/3 Preamble [5], Decision VII/7-III/6 Preamble [2], [1(c)(ii)], Minsk Declaration Preamble [4]. In relation to the *Aarhus Convention*, see *Report of the Sixth Session of the Meeting of the Parties: Addendum: Decisions Adopted by the Meeting of the Parties*, UN Doc ECE/MP.PP/2017/2/Add.1 (10 January 2018) Decision VI/1 Preamble [3], Decision VI/2 Preamble [3], Decision VI/3 Preamble [4].

¹¹⁰ For a detailed analysis, see Leslie-Anne Duvic-Paoli, 'Public Participation in the Context of Energy Activities: The Role of the Aarhus Convention Compliance Committee' in Marc Ozawa et al (eds), *In Search of Good Energy Policy* (Cambridge University Press, 2019) 224.

¹¹¹ See Adil Najam and Cutler J Cleveland, 'Energy and Sustainable Development at Global Environmental Summits: An Evolving Agenda' (2003) 5 *Environment, Development and Sustainability* 117, 118–19.

¹¹² *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (Vol 1) (3–14 June 1992) annex I ('*Rio Declaration on Environment and Development*'); *The Future We Want*, UN Doc A/RES/66/288 (n 22). See, eg, Panel Report, *India — Certain Measures relating to Solar Cells and Solar Modules*, WTO Doc WT/DS456/R (24 February 2016) [7.269].

the *2030 Agenda*.¹¹³ SDGs have yet to be used in the context of international dispute settlement in the same way as MDGs had been.¹¹⁴ But they have been used in domestic litigation to assess the sustainability of public policies. For instance, in 2019, a Kenyan tribunal, asked to rule on the legality of Kenya's first coal-fired power plant,¹¹⁵ referred to the SDGs to clarify the purpose of the environmental impact assessment process. Understanding environmental impact assessments as enablers of sustainable development, the Tribunal defined sustainable development in light of the SDGs on the basis that they require a balancing act between ending poverty and preserving our environment. It concluded that, guided by the SDGs, 'the common perception that a coal power plant project will always be rejected in Kenya as part of its development agenda is not correct'.¹¹⁶ This example shows that the political aspirations represented by SDG 7 can contribute to defining normatively the very open-ended concept of sustainable development. The SDGs do not provide the same type of content as a legally binding norm would, and they have been criticised for remaining too vague themselves.¹¹⁷ In addition, trade-offs will need to be made in the context of the *2030 Agenda*, and, while synergies between the content of the SDGs are generally highlighted,¹¹⁸ conflicts might emerge, with little guidance on how to resolve them. However, SDG 7 can be used in international dispute settlement as an indication of the international meaning and effects of the concept of sustainable development in the energy sector.

C *From Aspiration to Right: Contributing to the Emergence of a Human Right to Energy*

A final route to investigate regarding the move of SDG 7 from political aspiration to soft law concerns the potential contribution of SDG 7 to the emergence of a human right to energy — either as evidence of emerging custom or as the basis of a subsequent legal agreement. Such a contribution would be intricate given the politically sensitive place given to human rights in the *2030 Agenda* and can, at present, only remain in the realm of legal imagination. On the one hand, the *2030 Agenda* has tried to put human rights at the centre of the policy process and assumes that it would advance a number of human rights. The commitment that 'no one will be left behind'¹¹⁹ has been considered to be

¹¹³ *2030 Agenda*, UN Doc A/RES/70/1 (n 1) paras 11, 14.c.

¹¹⁴ For instance, noting Goal 8 on developing a global partnership for development and its target on new information and communication technologies: Panel Reports, *Brazil — Certain Measures concerning Taxation and Charges*, WTO Docs WT/DS472/R and DS497/R (30 August 2017) [7.563].

¹¹⁵ *Save Lamu v National Environmental Management Authority (NEMA)* [2019] eKLR (National Environmental Tribunal of Kenya, Appeal No NET 196 of 2016, 26 June 2019) [16].

¹¹⁶ *Ibid* [16]–[17].

¹¹⁷ Biermann, Kanie and Kim (n 12) 27.

¹¹⁸ For example, the UN General Assembly recognised that universal energy access will be achieved through cost-competitive renewable energy, in particular in off-grid areas: *Ensuring Access to Affordable, Reliable, Sustainable and Modern Energy for All*, GA Res 73/236, UN GAOR, UN Doc A/RES/73/236 (15 January 2019, adopted 20 December 2018) para 6. As a further example, the International Renewable Energy Agency notes that energy efficiency and renewable energy measures need to be combined, for instance, by integrating renewable technologies in the renovation of public buildings: International Renewable Energy Agency, *Global Energy Transformation: A Roadmap to 2050* (Report, 2018) 69.

¹¹⁹ *2030 Agenda*, UN Doc A/RES/70/1 (n 1) Preamble.

‘one of the most transformative elements of the *2030 Agenda*’ because it consecrates the human rights of equality and non-discrimination.¹²⁰ On the other hand, clear human rights language was strongly resisted by some governments during the negotiations,¹²¹ and, as a result, the SDGs have been criticised for failing to fully take into account the human rights framework.¹²²

The question of the contribution of SDG 7 to human rights is made more complex than in relation to other SDGs because energy is not evidently related to existing rights. However, meeting SDG 7 can nevertheless have positive impacts on existing human rights given that it is an enabler of other SDGs. For instance, the right to energy should benefit from the consolidation of the right to water, which is itself dependent upon a right to access to energy services (eg, for desalination and sanitation treatment). Conversely, implementing SDG 7 might negatively affect certain existing rights, for instance, the right to food in case of the wide development of biofuels.¹²³

A more difficult question relates to whether SDG 7 could contribute to the development of international law by consolidating a human right related to energy. Contrary to other basic resources such as food and water, a right to affordable and clean energy has not yet been recognised under international law.¹²⁴ Can a political commitment create the conditions for a legal duty? Two routes need to be distinguished here: one reliant on the interpretation of existing human rights in light of the objectives of SDG 7, the other on the practice emerging from the fulfilment of SDG 7. With regards to the first route, arguably, the three objectives of SDG 7 are already implied within existing human rights, such as the right to an adequate standard of living and the right to enjoy the benefit of scientific progress and its application.¹²⁵ In addition, the right to energy might benefit from the increased recognition of climate rights deriving from existing human rights. Indeed, by asking states to undertake a ‘fundamental shift from hydrocarbon to renewable energy sources’¹²⁶ and review their energy policies in

¹²⁰ Hilal Elver, *Interim Report of the Special Rapporteur on the Right to Food*, 74th sess, Agenda Item 72(b), UN Doc A/74/164 (15 July 2019) [7] (*‘Interim Report’*).

¹²¹ Magdalena Sepúlveda Carmona and Kate Donald, ‘The Promise and Pitfalls of the Sustainable Development Goals: Has the Time Come for a Rights-Based Approach to Poverty Reduction?’ in Dapo Akande et al (eds), *Human Rights and 21st Century Challenges: Poverty, Conflict, and the Environment* (Oxford University Press, 2020) 266, 269.

¹²² See, eg, Thomas Pogge and Mitu Sengupta, ‘The Sustainable Development Goals (SDGs) as Drafted: Nice Idea, Poor Execution’ (2015) 24(3) *Washington International Law Journal* 571, 576–7.

¹²³ *Interim Report*, UN Doc A/74/164 (n 120) [63].

¹²⁴ See Marc Clemson, ‘Human Rights and the Environment: Access to Energy’ (2012) 16 *New Zealand Journal of Environmental Law* 39, 68–76.

¹²⁵ Christophe Golay, *No One Will Be Left Behind: The Role of United Nations Human Rights Mechanisms in Monitoring the Sustainable Development Goals That Seek to Realize Economic, Social and Cultural Rights* (Academic Briefing No 11, January 2018) 103.

¹²⁶ Committee on Economic, Social and Cultural Rights, *Climate Change and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2018/1 (31 October 2018) para 9.

order to protect existing human rights from climate impacts,¹²⁷ human rights bodies can be seen to contribute towards the protection of a right to clean energy. But, because, overall, the existing international legal framework remains inadequate to protect such a right, the question of the contribution of SDG 7 to a more explicit recognition remains pressing.

The second route therefore relies on the practice emerging from the implementation of SDG 7. Alston argues that the MDGs might contribute towards the formation of customary international law ‘by virtue of the fact that they have reiterated the commitment so frequently and on so many solemn occasions’.¹²⁸ However, applying this argument to SDG 7 seems unduly optimistic. Surely, a community of practice, an expectation and potentially a moral requirement might, under certain circumstances, play a role in the formation of custom. The consensus that emerged during the negotiations of the SDGs, the state practice related to the implementation of SDG 7 and the multiple UNGA resolutions on energy¹²⁹ are important elements contributing towards the emergence of a customary right. However, the element of *opinio juris* is clearly missing, the adoption of the *2030 Agenda* having proceeded on the basis that it would not create legal commitments.

The commitment that the world’s population will have access to energy by 2030 could contribute to making the case for a formal recognition of the right to energy. The practice of states might not be enough for the emergence of a customary norm, but it could form the starting point of a campaign that mobilises states around the recognition of such a right, inspired by the successful precedent of the recognition of the right to water and sanitation by the UNGA in 2010.¹³⁰ The first target of SDG 7 on ‘universal access to affordable, reliable and modern energy services’¹³¹ employs a vocabulary familiar to the human rights lexicon and is worded in similar terms as the human right to ‘safe, clean, accessible and affordable drinking water and sanitation for all’.¹³² However, relying on the first target of SDG 7 could only be a first step in the development of a right to energy because it does not explicitly endorse the sustainability dimensions of SDG 7 and does not clarify state obligations with respect to the right. The recognition of a right to energy can therefore be expected to be a long process.

¹²⁷ See, eg, Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Fifth Periodic Report of Australia*, 61st sess, 47th mtg, UN Doc E/C.12/AUS/CO/5 (11 July 2017, adopted 23 June 2017) [11]–[12]; Committee on the Elimination of Discrimination against Women, *Concluding Observations on the Ninth Periodic Report of Norway*, 66th sess, UN Doc CEDAW/C/NOR/CO/9 (22 November 2017, adopted 23 October – 17 November 2017) [14]–[15].

¹²⁸ Alston (n 26) 771.

¹²⁹ The UN General Assembly recalled the 15 resolutions adopted since 1998 on the topic: *Ensuring Access to Affordable, Reliable, Sustainable and Modern Energy for All*, GA Res 73/236, UN GAOR, 73rd sess, Agenda Item 20(i), UN Doc A/RES/73/236 (15 January 2019) Preamble para 1. See Yinka Omorogbe, ‘Policy, Law, and the Actualization of the Right of Access to Energy Services’ in Kim Talus (ed), *Research Handbook on International Energy Law* (Edward Elgar Publishing, 2014) 361, 385–6.

¹³⁰ *The Human Right to Water and Sanitation*, GA Res 64/292, UN GAOR, 64th sess, 108th plen mtg, Agenda Item 48, UN Doc A/RES/64/292 (3 August 2010).

¹³¹ *2030 Agenda*, UN Doc A/RES/70/1 (n 1) 19 para 7.1.

¹³² *The Human Right to Water and Sanitation*, UN Doc A/RES/64/292 (n 130) para 2.

V CONCLUSION

This article was interested in the transformational potential of SDG 7 on the international law on energy. SDG 7 is a political aspiration shaped by ambitious, and perhaps unachievable, goals and a hopeful vision to transform the global energy landscape. It represents a historical stepping stone to a multilateral approach to the energy sector but its actual impacts on international law have so far been limited. However, this does not necessarily mean that it will stay in the political realm: this article has shown that goal-setting does not preclude the creation of legal effects and that SDG 7 can act as a complement to or an inspiration for existing and new legal norms. It operates as a bridge that connects political aspirations to the normative foundations of the international system and encourages legal change. As states continue to engage with the *2030 Agenda* and as SDG 7 moves closer to the legal realm, the analysis offered in this article could provide a framework to help identify the future international legal impacts of SDG 7.