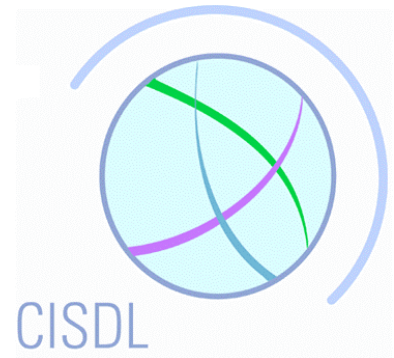


<b>CISDL Doc. #:</b> R1-S4P-E	<b>Session:</b> Plenary Roundtable One
<b>Date &amp; Time:</b> 2002-06-13 14:00	<b>Speaker:</b> Mr. Gilbert M Bankobeza
	<b>Language:</b> English



**Plenary Roundtable One:  
New Legal instruments for ISDL Monitoring &  
Compliance**  
June 13, 2002, Montreal

Sustainable Justice 2002

Implementing International Sustainable Development Law.

June 13-15 2002, Montreal, Canada

INNOVATIVE COOPERATIVE MECHANISMS FOR EFFECTIVE COMPLIANCE,  
MONITORING, IMPLEMENTATION AND ENFORCEMENT UNDER THE  
MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE  
LAYER AND THE WORLD TRADE ORGANIZATION (WTO)

The case for compliance with environmental protection and trade dispute settlement  
mechanisms

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### *General points*

- The Montreal Protocol and WTO Agreements are representative of the efforts of the international community to pursue shared goals in their respective areas. In the development of a mutually supportive relationship due respect must be afforded to them both.
- Sustainable development is an overarching goal shared by many trade and environment agreements; it is therefore an important task to identify and build synergies between them to achieve sustainable development.
- The Montreal Protocol and the WTO agreements represent separate but equal bodies of international law.
- The Montreal Protocol and the WTO emphasize different approaches to securing effectiveness of their respective agreements: the Montreal Protocol focuses primarily on promoting all parties compliance with its provisions and avoiding disputes; the WTO focuses primarily on resolving disputes in a timely and binding manner.
- The fact that the Montreal Protocol was adopted to protect human health and the environment, requiring broad international cooperation, whereas the WTO has a major role in the settlement of trade disputes which arise from perceived injury to commercial interests, helps to explain their differing emphasis on compliance and dispute settlement.

### *Role of compliance measures in the Montreal Protocol and the WTO*

- The overarching goal of compliance measures in both the Montreal Protocol and the WTO is to secure effective implementation of treaty obligations.
- Parties to the Montreal Protocol have explored innovative, constructive approaches to promote compliance, with the objective of preventing non-compliance in advance, and of assisting countries, particularly developing countries and those with economies in transition, to comply through

financial and technical assistance, capacity building and technology transfer.

- In many cases, non-compliance with the Montreal Protocol arises not because of willful violation, but rather because of difficulties in achieving compliance; therefore the best way to address non-compliance is often through the provision of assistance, rather than through punitive measures.
- The Montreal Protocol and the WTO agreements share many common elements in their compliance systems. For example, WTO agreements contain notification requirements and provide for monitoring and transparency as well as review mechanisms by WTO collective bodies. This procedure is similar to the non-compliance Procedure of the Montreal Protocol.
- Transparency, notification requirements and review constitute an important dispute avoidance mechanism in the WTO. The Montreal Protocol relies on an elaborated non-compliance and dispute avoidance procedure that encourages non-complying Parties to return to compliance.

#### *Role of dispute settlement measures in the Montreal Protocol and WTO*

- While the Montreal Protocol focuses on promoting compliance, it also works through the Vienna Convention to include provisions for settling disputes, should they arise.
- The Vienna Convention dispute settlement provisions generally follow a progression including negotiation, good offices, mediation, conciliation, arbitration and judicial settlement.
- The dispute settlement system of the WTO was set up as a central element in providing security and predictability to the multilateral trading system. Its aim is to secure a prompt resolution of disputes, with a view of finding mutually acceptable solutions to the Parties to a dispute, which is consistent with the covered agreements.

- The compulsory nature, exclusive jurisdiction, and binding effects of WTO dispute settlement process could lead to the WTO attracting disputes it was not properly equipped to resolve.
- Disputes between two Montreal Protocol parties would be very unlikely ever to be addressed in WTO dispute settlement although this might not necessarily be the case for disputes between a party and a non-party to the Montreal Protocol both of which are parties to the WTO, though such a case has yet to occur.

#### *Strengthening compliance and enforcement in the Montreal Protocol*

- Enforcing compliance measures in the Montreal Protocol may provide an important way to reduce potential for environmental disputes to arise in the context of the WTO.
- Increasing the capacity of governments to implement the Montreal Protocol and WTO — and realizing the synergies between trade and environment capacity building efforts — could help avoid trade and environment disputes.
- Increasing the number of parties to the Montreal Protocol could decrease the likelihood of disputes arising in the WTO, especially those involving a non-party to the Montreal Protocol.

#### *Importance of capacity building*

- Capacity building is a crucial element in the implementation of the Montreal Protocol and there is a need for the Montreal Protocol and WTO to undertake more joint activities in this area. WTO regional seminars on trade and environment are one important context in which this could be done.

*Role of cooperation and information exchange between the Montreal Protocol and WTO*

- Greater policy coordination at the national level is important to ensure that all relevant rights and obligations in the Montreal Protocol and WTO Agreements have been considered during the implementation of these instruments and the negotiation of new ones, thereby reducing the likelihood of conflicts, and increasing the mutual supportiveness of both trade and environment institutions.
- More cooperation and information exchange between the Ozone Secretariat and the WTO contribute to enhanced coordination between the agreements.
- Greater information exchange in the area of compliance and dispute settlement has to date assisted both the Montreal Protocol and WTO officials in understanding the objectives of their different agreements. In the context of the WTO, it assists officials to understand the utility of conservation measures under the Montreal Protocol, in the event of a Montreal Protocol-related dispute in the WTO.

## **Background to sustainable development law**

### *The application of principles of sustainable development in the ozone protection regime*

Sustainable development is a term that derives its current usage from the 1987 Report of the World Commission on Environment and Development,<sup>1</sup> hereinafter, the Commission Report, which defined sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. The Commission Report identified two concepts of sustainable development — the concept of needs, in particular the essential needs of the poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.<sup>2</sup>

In the context of the ozone regime, the objectives of both the Vienna Convention and the Montreal Protocol are about sustainable development in dealing with environmental protection and human health in relation to issues of science, technology and economics. The principle of sustainable development resonates in the determination by the Parties to the Vienna Convention and the Montreal Protocol to protect the ozone layer.

#### (a) The principle of sustainable use of natural resources

The principle of sustainable use deals with standards governing the rate of use or exploitation of specific natural resources rather than on their preservation for future generations. Concern for sustainable development is about limiting the sustainable utilization of natural resources.

### *The principle of sustainable use as applied in the ozone protection regime*

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<sup>1</sup> *Our Common Future*, (Oxford University Press, 1987), 43

The Parties to the Vienna Convention express in the preamble, that they are aware that measures to protect the ozone layer from modifications due to human activities require international cooperation and action, and should be based on relevant scientific and technical considerations.<sup>3</sup> The modifications of the ozone layer referred in the preamble reflect the unsustainable human activities causing ozone depletion, which the Parties are intent to reverse by returning to sustainable use, the resources that are causing ozone-depletion. To achieve this purpose, the Parties undertake to take appropriate measures to protect human health and the environment against adverse effects resulting from human activities, which are likely to modify the ozone layer and to cooperate in research and scientific assessments.<sup>4</sup>

The control measures to limit and eventually phase out ozone-depleting substances provided in Article 2 are meant to achieve the sustainability use of ozone-friendly substances and protect the ozone layer.

Ozone depletion was a direct result of unsustainable use of ozone-depleting substances that have affected the atmospheric composition of the ozone layer with adverse consequences to human health and the environment. The primary objective of the legal measures adopted in the ozone protection instruments is the sustainable use of ozone-friendly substances that will not deplete the ozone layer.

*(b) The principles of equity and common but differential responsibilities*

The underlying objective of the principle is how to allocate future responsibilities for environmental protection between states which are at different levels of economic development, have contributed in different proportions to particular problems and have different environmental and developmental needs and priorities. It is as well associated and sometimes used interchangeably with the principle of common but differentiated responsibility, which takes account of the needs and capabilities of different countries and their historic contribution to a particular problem.

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<sup>2</sup> Ibid.

<sup>3</sup> A similar formulation is found in the Preamble to the Montreal Protocol.

### *Application of the principle to the ozone regime*

The principle is stated in the preamble to both the Vienna Convention and the Montreal Protocol. The Parties to the Convention, in their desire to protect the ozone layer, agree to take into account the circumstances and particular requirements of developing countries, while under the Montreal Protocol they aim at controlling equitably total global emissions of substances that deplete the ozone layer.

The relevant substantive Articles of the Montreal Protocol that manifestly apply the principle of equitable use are Articles 2 and 5, both of which deal with the phase out schedule of ozone-depleting substances. Both Articles contain the concept of basic domestic needs which allows production of controlled substances by a percentage of between ten and fifteen per cent higher than the allowable limit for each controlled substance, for the purpose of supplying developing countries to satisfy the basic domestic needs.

The basic domestic needs concept was intended to hedge developing countries against economic and social disruptions of their development, brought about by the change of technology due to phase out of ozone-depleting substances.

The principle of equitable use within the context of basic domestic needs of developing countries was also applied in Article 5 of the Protocol through the ten-year grace period before the mandatory phase out of ozone-depleting substances.

The ten year-grace period was meant to build capacity of developing countries through technical and financial assistance under Article 10 and 10A of the Protocol so that by the time the phase out of ozone-depleting substances starts, enough capacity will have been built to enable them to phase out ozone-depleting substances without negative impact to their economic and social development. Moreover, ozone-friendly technology transfer to developing countries, would occur under fair and most favourable conditions,<sup>5</sup> in keeping with the principle of equitable use of a resource by preferential treatment of developing countries under the ozone protection regime.

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(c) *The principle of integration of environment and development*

The principle of integration is about the commitment to integrate environmental considerations into economic and other social development in determining environmental obligations. There are interlinkages between economic and social development with environmental protection, neither of which can be realized sustainably at the expense of the other. Economic and social development, including eradication of poverty, is a fundamental goal for all states and peoples but at the same time it is a fact that if environment is left to deteriorate, will have far reaching economic and social effects that will undercut any economic gains.

The relevance of the principle in the ozone regime is found in the acknowledgment by the Parties to the Montreal Protocol that developing countries, owing to their limited capacity to respond to environmental requirements of protecting the ozone layer, special provision is needed to meet their development needs, including the provision of additional financial resources and access to relevant technologies and the funds can be expected to make substantial difference in the world's ability to address the scientifically established problem of ozone depletion and its harmful effects.<sup>6</sup>

The fact that the financial resources promised were intended to be additional to the resources already available in developing countries is an affirmation of the intent of the Parties to the Protocol to avoid disruption of the developmental path of these countries while at the same time ensuring its integration with environmental protection.

The principle of integration of environmental protection and development is relevant in the implementation of the Montreal Protocol in two other applications. First, no any ozone-depleting substance has been phased out completely without identifying scientifically and technologically tested substitute or alternative or linked to the essential use criteria, for developed countries. Secondly, developing countries were granted the ten-year grace period before phasing out ozone-depleting substances for the purpose of meeting their basic domestic needs.

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In the context of the Montreal Protocol, the Parties have made the principle of integration of environment and development for both developed and developing countries an integral part of achieving the phase out of ozone-depleting substances but at the same time without compromising the objectives of the ozone protection regime.

(d) *The precautionary approach to human health, natural resources and eco systems*

The precautionary principle is a legal principle of general application in environmental law that provides guidance where there is scientific uncertainty in protecting the environment. While scientific research is underway to provide answers to environmental risks, in the interim, precautionary measures have to be taken to respond to situations of uncertainty by prescribing procedures for mitigating those risks and their effects to human health and the environment. This is the essential aspect of the precautionary principle, to take remedial action upon evidence of a significant risk even in the absence of proof of environmental harm.

Both the Vienna Convention and the Montreal Protocol were negotiated amid scientific uncertainty regarding the precise cause and effects of ozone depletion to human health and the environment. It is a fact that is acknowledged in the texts of the two instruments, albeit in the preambular paragraphs. Nevertheless, the actions called for in the instruments are all predicated on the precautionary principle.

The preamble to the Vienna Convention apart from making specific reference to the precautionary measures, which the parties were taking to protect the ozone layer in the midst of scientific uncertainty, they were also doing so while aware of the *potentially harmful impact* (emphasis added) on human health and the environment through modification of the ozone layer.

The precautionary principle is apparent also from the general obligations by the Parties to the Convention which include taking appropriate measures against adverse effects *likely to result* or *are likely to modify the ozone layer*, and accordingly agree to adopt appropriate legislative or administrative measures *should it be found*

that human activities are *likely to have adverse effects* resulting from *likely modification* of the ozone layer. This formulation is typical of different approaches to policy choices that have been adopted in subsequent environmental instruments.

The Montreal Protocol contains provisions for precautionary measures almost similar to the Convention and also reaffirming the precautionary intent of the parties in protecting the ozone layer. In the preamble, the Parties are determined to protect the ozone layer by taking precautionary measures and take note of the precautionary measures for controlling emissions of certain chlorofluorocarbons that have already been taken at national and regional levels.

Other references in the preamble that suggest the precautionary measures the Parties were taking include using the language of likelihood and potential in phrases like being mindful of their obligation under the Vienna Convention to take appropriate measures against adverse effects *likely* to result from, ---in a manner *likely* to result in adverse effects, ---conscious of *the potential* climatic effects of emissions.

Other important features of the precautionary measures in the Montreal Protocol include the notion of *adjustments* to ozone-depletion potentials (ODPs) of ozone-depleting substances and the *reductions of production and consumption* of ozone-depleting substances (ODS).