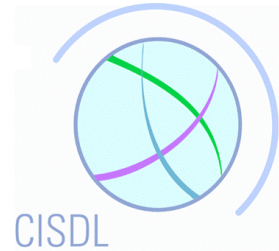


THE WTO IN INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW

A CISDL LEGAL BRIEF

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WTO Members often re-affirm their Marrakesh Agreement commitment to the objective of sustainable development. But what does this really mean, and how has world trade law developed in recent years toward this goal?

Sustainable development is not simply a vague concept. It embraces a coherent body of legal principles that have to be taken into account when dealing with economic, development or environmental issues.

This legal brief¹ surveys recent positive movement made towards international sustainable development law in the WTO, and suggests further directions for progress. After a short introduction outlining the interpretation of the goal of sustainable development, the main legal principles of International Sustainable Development Law and their reception in the WTO are examined. This starts with the principle of international co-operation, which requires international actors to find common solutions for common problems. The next principle analysed is that of equity, for which special and differential treatment is a starting point, though the law should develop toward common but differential responsibility. Sections on the principles of subsidiarity and of precaution follow. Finally, this brief analyses the principle of openness, which in large parts lacks recognition in WTO law.

Sustainable Development in the WTO?

SINCE 1995 there have been several indications that in interpreting WTO law, the Dispute

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¹ The Centre for International Sustainable Development Law (CISDL), based in Montreal, Canada, is a new legal institution which examines areas of intersection between environmental, social and economic law. For further information please visit our website under www.cisdll.org. This brief was prepared by CISDL Commission Member Markus Gehring of Germany, and CISDL Commission Director Marie-Claire Cordonier Segger of Canada with CISDL Researcher Mario Prost, France. The CISDL Commission gratefully acknowledges advice from Matthew Stillwell, CIEL and Prof. Armand DeMontiel, McGill University. Special thanks to Caroline

Settlement Body (DSB) is far from ignorant of a sustainable development *approach*. In the 1998 *Shrimp-Turtle Case* for example, the panel noted that “the first paragraph of the Preamble of the WTO Agreement acknowledges that the optimal use of the world’s resources must be pursued *in accordance with the objective of sustainable development*”. In the same case, the Appellate Body (AB) considered that sustainable development “must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*”.

Unilateralism vs. International Co-operation?

SUSTAINABLE development requires strengthening international systems of co-operation at all policy levels of environment, development and trade, according to the 1994 IISD Winnipeg Principles. In a more general context, the principle of international cooperation can also be found in the Rio Declaration.² This fundamental norm underlies all International Sustainable Development Law (ISDL), in order to avoid international conflict, and bring about the most sustainable solution to intrinsically transboundary problems.

The principle appears to have had a major influence in the most recent interpretations of WTO law. The 1998 *Shrimp-Turtle Case* formally recognised the need for international cooperation, when dealing with the unilateral character of environmental measures adopted under GATT Article XX. Indeed, in this case an obligation to co-operate was deduced from Article XX’s chapeau provisions. Often this might imply an obligation to negotiate but there are cases where unilateral measures, e.g. to avert crises, are justified. The 2001 compliance panel under Article 21:5 in that case decided for the US measures not to constitute an “unjustifiable discrimination”, the US “had to take the initiative of negotiations” and “to make serious efforts in good faith to negotiate” prior to any unilateral

initiative. On 22 October 2001, the AB reinforced the panel's decision.³

The recognition of the principle may have particular importance in future efforts to adopt measures relevant to WTO law under the Kyoto Protocol. If the obligation to make serious efforts to negotiate in good faith is clearly fulfilled, claims under WTO law are unlikely to succeed. As such, recent developments suggest that a reasonable compromise can be found between unilateral action and international cooperation for sustainable development.

Special and Differential Treatment vs. Common but Differential Responsibility?

A second fundamental principle of sustainable development is equity, defined by the Principle 3 of the 1992 Rio Declaration "meet developmental and environmental needs of present and future generations". While States are empirically sovereign equals, international law also recognises that developing countries and developed ones share "common but differentiated responsibilities" in the transition to sustainability.⁴

Special and differential treatment for the economically weakest countries can be seen as a principle of international law. It was largely included in GATT Part IV, which is still part of the WTO Agreements. Other legal instruments that highlight equity are the Convention on the Rights of the Child and the Covenant on Economic, Social and Cultural Rights. In the WTO, special and differential treatment has most commonly been given effect to by extending timelines for compliance or occasionally reducing the extent of obligations. In the draft Ministerial Declaration WTO members "note the concerns expressed regarding their (special and differential treatment provisions) operation in addressing specific constraints faced by developing countries, particularly least-developed countries."

Concerns that special and differential treatment is not being transformed into action were expressed by the Committee on Trade and Development and have partly been translated into the draft Ministerial decision on implementation. However, from an ISDL perspective, this decision cannot be seen as sufficient evidence of the WTO taking equity into account, as do other international regimes (for example in human rights law).

In recent interpretation of WTO law, there is movement towards an obligation to consider the particular situation of developing countries when adopting environmental measures. It has been recognised that conservation measures should be adapted, *inter alia*, to the environmental, social and economic conditions prevailing where they

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are to be applied. The compliance panel in the *Shrimp Case* has expressly mentioned the principle of "common but differentiated responsibilities" in its Conclusions. This principle was also recognized by the Appellate Body in the 2001 *EU - Asbestos Case*, where measures necessary to protect human health were reviewed with due consideration given to Members' practical ability to implement alternatives. It appears that equity in respect to the latter has penetrated WTO law. This is a partial recognition at best - other aspects of equity, such as its intergenerational component (often said to be the heart of sustainable development), have not yet been seriously considered by the DSB.

Global Decisions vs. Subsidiarity?

ACTIONS necessary to archive sustainable development may be taken at different levels of jurisdiction, depending on the nature of issues. The principle of subsidiarity implies a choice based on the relative effectiveness of action at any particular level. In international policies should be adopted only when this is more effective than policy action by individual countries. This principle advocates that decisions are made at the lowest level consistent with effectiveness, but the WTO is clearly designed as a global policy making organisation. The role of regional agreements and bi-lateral accords is still unclear in the law of the world trading system. However, there has been movement in this respect. Recent WTO law has demonstrated willingness to respect measures taken under a regional agreement. In the 1999 *Turkey - Restrictions on Imports of Textile and Clothing Products Case*, it was found that under certain conditions, Article XXIV can justify a measure which is inconsistent with other obligations under the GATT 1994.

Science and Precaution vs. Science without Precaution?

ACTING in order to reconcile trade, environment and development requires a robust scientific knowledge about the complex interactions between these areas, wherever possible. But our understanding of ecosystems is still highly uncertain and in many circumstances environmental changes cannot be easily reversed, if at all. For these reasons, precaution, which underlies a number of multilateral agreements, such as the Cartagena Protocol on Biosafety, should be used in decision making for sustainable development. Where scientific uncertainty exists, it shall not be used as a reason for postponing measures to prevent potential harm. That means that precaution has to be part of any scientific decision.

The need for sound science has been emphasized in cases interpreting the SPS Agreement, such as in the 1998 *Australia - Salmon Case*. and the

Products Case, where Members were expected to provide scientific evidence in risk assessments to justify measures to conserve wild salmon stocks and fruit. However, WTO law is only beginning to take the precautionary principle into account. In the 1997 *EU-Hormones Case*, the AB stated that “the precautionary principle (...) still awaits authoritative formulation” and felt it “unwise” to offer authoritative judgement on the issue. It saw the principle incorporated in certain SPS provisions such as the application to provisionally adopted measures. More recently, the 2001 *EU Asbestos Case* took health risks into account for denying a like product determination between white chrysotile carcinogenic asbestos and its substitutes, in spite of legally contested uncertainty as to the availability of controlled use strategies. This shows that science and precaution need to be taken into account mutually. Thus there is legally no “sound science” without precaution.

Green Room vs. Openness?

WHILE multilateral environmental agreements (MEAs) have taken a lead role for openness in the recent decade,⁵ human rights law has also addressed similar questions in the past, and economic law is currently under pressure to include a broader spectrum of actors. In the International Labour Organisation, there is also a strong level of involvement of the public, and tripartite delegations of business, labour unions and national government officials represent each country in negotiations.⁶ Particularly in the field of ISDL, there are many international actors other than States, such as private sector associations (including corporations) and civil society organizations (including non-governmental, community based, other public interest organisations and indigenous peoples organisations).⁷

Earlier GATT and WTO practice included an informal aspect in which many significant decisions were reached between a few Members, behind closed doors in the so-called Green Room process. In terms of internal transparency, the Organisation has moved on and says it will now

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⁵ CSOs play prominent roles in the negotiation and implementation of some international agreements, and MEAs have been among the most progressive systems in providing for increased openness. CSOs attended all of the negotiations for the *Framework Convention on Climate Change* and the *Kyoto Protocol*, where they distributed information, prepared agreed positions on issues, and developed draft text of the Convention to advocate to governments. The *Convention on Biological Diversity* highlighted CSO’s involvement in Ministerial Declarations. In the *Convention on International Trade in Endangered Species*, the World Conservation Monitoring Centre for many years computerized the national reports of countries on the trade in endangered species and prepared reports for tracking the trade, as part of implementing the Convention’s control of international trade in endangered species.

⁶ For a description see L. Sohn, *Human Rights and International Law* (Cambridge: Cambridge University Press, 1994).

⁷ The 1998-99 edition of the Yearbook of International Organisations records more than 6,415 intergovernmental

try to include all WTO members in the negotiations. But in terms of openness to the general public, much remains to be done. The immediate release of the draft Ministerial Statement might constitute a first step.

Openness has gained high levels of legitimacy in domestic law related to sustainable development and it holds the potential to become a principle of international customary law. In trade matters, some governments now hold consultation processes to aid in the development of national positions, and even brief domestic actors by conference call from global events. However, at the international level, openness was traditionally more difficult. In the WTO, many States emphasise the contractual nature of the organisation to defend their view that only they are the bearers of rights and duties, and hence the only subjects with the right to intervene or participate in international treaty negotiations, implementation and monitoring or in the settlement of disputes.⁸ In international law, sovereign states are still seen as the principal actor, and conventional wisdom suggests that others should only intervene by seeking to influence foreign policy decision-making on their respective domestic levels. From this viewpoint, the increasing number and diversity of states makes consensus challenging enough without additional intervenors.⁹

However, other perspectives are being increasingly recognised. Civil Society Organisations (CSOs) do not just advocate- they can infuse alternative perspectives into narrow mission programs; provide factual information; articulate more universal perspectives; participate directly in enforcement; and often have a role in allocating or investing resources. CSOs can be distinguished from private interests. Legitimate activities of CSOs in recent international processes have included direct participation in international negotiations; shuttle diplomacy, and the power to convene; promotion of accountability of international institutions; international oversight of domestic law (eg. the citizen petitions process under the North American Agreement on Environmental Cooperation under Articles 14 and 15); expanded role in compliance; sounding the alarm, bringing science to the attention of policymakers; and sharing environmental law and information.

Finally, it is often pointed out that if CSOs wish to participate in ISDL, there must be mechanisms for them ‘to be held accountable for their opinions.’ This raises the valuable question of

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⁸ J. Leslie Brierly, “The Law of Nations: An Introduction to the International Law of Peace” in Sir Humphrey Waldock ed., 6th ed. (Oxford: Oxford University Press, 1963) at 41-42.

⁹ At the beginning of the twentieth century, there were only thirty-four generally recognized states, and fifty-one when the United Nations was formed in 1945. At the beginning of the year 2000

how to structure participation in a constructive manner. There has been an important evolution in the basic ground rules of process and participation in international law in recent decades. The United Nations Economic and Social Council (ECOSOC) Resolution on NGOs gives an indication of structures that have developed, not insignificantly for economic and social issues, and offers procedures that may be of use to all branches of ISDL. But it is important to note that the ECOSOC procedure is only one way to formally address the issue. Other ways could be to establish a certain degree of expertise on the relevant issues or provide proof of non-profit organisation status.

These kinds of broad criteria are sufficient to allow a wide range of groups access to international tribunals, while at the same time providing a measure of quality control. Even with an accreditation process for NGOs seeking direct participatory rights in international organisations, concerns still exist that only the wealthiest groups (large national or international Western-based NGOs) will have the resources to take advantage of these rights. Accordingly, international organisations may find it necessary to provide resources and funding to some less-established NGOs in order to ensure fair representation of all eligible groups.¹⁰ The WTO's decision to hand select 645 NGOs and allow them one representative each might appear to some as following the words of the principle of openness but its spirit can not be reflected through such a restricted access. The contractual character of the WTO cannot counter this argument because transparency is an overall principle of most domestic business laws especially with respect to shareholders and CSOs can be seen as comparable to those.

Conclusions

THE different sections of this legal brief all highlight the connector "versus." But neither sustainable development nor the WTO should seek to emphasise these differences. In some areas it is clear that the WTO does recognise ISDL principles, in other areas many challenges remain. An ISDL perspective on the development of this increasingly broad and important area of law recommends that more weight be placed on subsidiarity and openness and equitable treatment

of developing countries. Without the integration of these essential international principles, the WTO attempt to avoid directly addressing complex interactions between trade liberalization, protection of the environment and development considerations. The complete implementation of ISDL's principles would certainly require strong political will and impetus from the WTO Member States. While some progress has been made in recent years, the WTO still has work to do to move into a more sustainable world trading system.

The Centre for International Sustainable Development Law (CISDL) commission is based in the McGill University Faculty of Law (founded in Montreal, Canada, in 1849), works in cooperation with the McGill School of the Environment, the Université de Montreal Faculty of Law, and the Université de Québec à Montreal, with guidance from the three Montreal-based multilateral environmental accords (the NAFTA Commission for Environmental Cooperation, the UNEP Biodiversity Convention, and the Montreal Protocol multilateral fund). Its mission is to promote sustainable societies and the protection of ecosystems by advancing the understanding, development and implementation of international sustainable development law.

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¹⁰ See J. Jendroska, "U.N.E.C.E. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters: Towards More Effective Public Involvement in Monitoring Compliance and Enforcement in Europe" (1998) 13 Nat'l Envtl. Enforcement J. 32. See also D. A. Wirth, "Re-examining Decision-Making Processes in International Environmental Law" (1994) 79 Iowa L. Rev. 769. The International Court of Justice which, like the WTO dispute settlement process, has been relatively impenetrable for NGOs. For a review of the participation of NGOs in international tribunals. See D. Shelton, "The Participation of Nongovernmental Organizations in International Judicial Proceedings" (1994) 88 Am. J. Int'l L. 611 et

