



SUSTAINABLE DEVELOPMENTS IN RECENT WTO LAW AND ‘JURISPRUDENCE’

**for the 2003 Fifth Session of the Ministerial Conference of the World Trade Organization
Cancun, Sept. 10-14, 2003**

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? Can the WTO live up to its main challenge from the World Summit for Sustainable Development, which states, at 45, “Globalization offers opportunities and challenges for sustainable development. We recognize that globalization and interdependence are offering new opportunities to trade, investment and capital flows and advances in technology, including information technology, for the growth of the world economy, development and the improvement of living standards around the world. At the same time, there remain serious challenges, including serious financial crises, insecurity, poverty, exclusion and inequality within and among societies.”¹

This legal brief surveys recent positive movement made towards international sustainable development law in the WTO, and suggests further directions for progress. Sustainable development is not simply a vague concept. It embraces a coherent body of legal principles. The most recent expression of these principles can be found in the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development.² These must be taken into account when dealing with intersecting economic, development or environmental priorities.

Sustainable Development in the WTO?

Since 1995, there have been several indications that in interpreting WTO law, the Dispute 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*” (emphasis added). In the same case, the Appellate Body (AB) stated that sustainable development “must add colour, texture and shading to our interpretation of the agreements annexed to the *WTO Agreement*.”

The Duty of States to Ensure Sustainable Use of Natural Resources

¹ 2002 WSSD Plan of Implementation, Sustainable development in a globalizing world, Ch. V.

² International Law Association, Committee on the Legal Aspects of Sustainable Development, *Fifth Report on the Principles of International Law relating to Sustainable Development* (London: I.L.A. 2002). See also II.A Resolution 3/2002: *New Delhi Declaration Of Principles Of International Law Relating To Sustainable*

The WTO made some progress in the area of this legal principle, as highlighted by various decisions in the *Shrimp-Turtle Case*.³ This case has often been analysed.⁴ The *Article 21.5 Recourse decision* of the Appellate Body should be highlighted in this respect.⁵ The Appellate Body found that: "Requiring that a multilateral agreement be concluded by the United States in order to avoid "arbitrary or unjustifiable discrimination" in applying its measure would mean that any country party to the negotiations with the United States, whether a WTO Member or not, would have, in effect, a veto over whether the United States could fulfill its WTO obligations. Such a requirement would not be reasonable." In other words, there is a duty to negotiate in good faith to reach an international agreement, before applying trade measures to achieve sustainable use of natural resources. However, it is not required to successfully conclude negotiations with an international treaty before implementing such measures.

The decision to start negotiations about harmful fishery subsidies in the Doha Declaration can also be seen as a step into the right direction. But as the Draft Ministerial Declaration rightly points out, negotiations have to accelerate "including fisheries subsidies, with a view to shifting its emphasis from identifying issues to seeking solutions."⁶ These negotiations should be further guided by the Duty of States to Ensure Sustainable Use of Natural Resources in sustainable development law.

The Principle of Equity and the Eradication of Poverty

There are some new tendencies in this area. While much work remains to be done, under various WTO Agreements, promising attempts are proceeding to grant (in particular) Least Developed Countries (LDCs) special treatment.⁷

Some progress has been made with regard to the right to health and corresponding human rights, in the context of the Doha Declaration on TRIPS and Public Health. Options for developing countries have been expanded, granting particular credence to the principle of equity.⁸ However, as the WTO has recognised "...finding a balance in the protection of intellectual property between the short-term interests in maximizing access and the long term interests in promoting creativity and innovation is not always easy..."⁹ Evolving negotiations have been unpredictable, but have sought to resolve the impasse that arose from the inconclusive Paragraph 6 of the Declaration on TRIPs and Public Health in the context of the Doha "Development Agenda." Paragraph 6 has not provided a solution for countries that have no manufacturing capacity to issue compulsory licences to produce essential medicines. The TRIPs Council was mandated to find an interpretative solution to the impasse by 31 December 2002 and but the negotiations did not reveal a solution. An additional 8 months of negotiations have led to a series of missed deadlines, as well as tentative hopes that the matter will be satisfactorily resolved at the Cancun Ministerial Meeting. Slow progress, coupled with an impasse in the negotiations credited to interventions by the US pharmaceutical industry and its influence on government negotiating positions, has led to a number of near misses. Despite these negotiations, the human rights and public health concerns that were the primary motivation for the Declaration have not abated. The public health crisis in a number of developing countries¹⁰ is worsening, with more than 25 million Africans living with HIV/AIDS according to estimates.¹¹ Although WTO negotiations to find a lasting interpretation to the wording of paragraph 6 will not resolve the human rights and public health conflict overnight, they could remove an important stumbling block to access to essential medicines. A recent analysis shows that out of the 6 million people living with HIV/AIDS who presently require anti-retroviral drug therapy, only 230 000 or less than 4% having access to the said therapy.¹²

³ Please note that the dispute settlement decisions of the WTO Dispute Settlement Mechanism cannot be regarded 'jurisprudence' as such, but WTO practice is largely influenced by the dispute settlement mechanism. Although there is no *stare decisis*, panel and above all the Appellate Body reports are persuasive and become part of the practice of the WTO members, see John H. Jackson, *The World Trading System*, 2nd ed. 1997, p. 122 and 126.

⁴ See for further references Gary R. Sampson, *Trade, Environment, and the WTO: the Post-Seattle Agenda* (2000) or Joel P. Trachtman, "United States - Import Prohibition of Certain Shrimp and Shrimp Products, 6 November 1998," 10 Eur. J. Int'l Law 192 (1999)

⁵ United States – Import Prohibition of Certain Shrimp and Shrimp Products - Recourse to Article 21.5 of the DSU by Malaysia, Appellate Body, AB-2001-4, 22 October 2001, WTO Document WT/DS58/AB/RW.

⁶ WTO Draft Cancun Ministerial Text, 24 August 2003, available at http://www.wto.org/english/thewto_e/minist_e/min03_e/draft_decl_e.htm.

⁷ See WTO Members agree on ways to boost LDC participation in services negotiations, Press/351

3 September 2003.

⁸ Special thanks to Tenu Avafia, country manager for Namibia, Trade Law Centre for Southern Africa (tralac) who contributed this part of the legal brief.

⁹ Refer to the WTO document on Pharmaceutical patents and the TRIPS agreement http://www.wto.org/english/tratop_etrips_e/pharma_ato186_e.htm.

¹⁰ The HIV/AIDS pandemic that has gripped sub-Saharan countries, especially the southern African countries has worsened since 2001 and without widespread access to essential medicines being available to the countries concerned, there appears to be no hope of overcoming the health crisis.

¹¹ Refer to the UNAIDS report on global HIV/AIDS Epidemic 2002 p. 8

To comply with TRIPs obligations, countries that do not presently afford patent protection to pharmaceuticals must do so by 2005. Many suggest that this would jeopardise their existing (and insufficient) supply of essential medicines.¹³ It is clear that even though a solution to the impasse on the interpretation of Paragraph 6 of the Public Health Declaration has been found by the WTO members,¹⁴ further tensions are likely, and will continue to provide hurdles to the realisation of access to essential medicines. More effort will have to be made to explore long lasting solutions and compromises to tensions that may arise between the right to health and other human rights (such as the right to development) and the TRIPs provisions.

The Principle of Common but Differentiated Responsibilities

The principle of Common but Differentiated Responsibilities is largely regarded as finding its equivalent in the special but differential treatment provisions of nearly all WTO Agreements. However, this principle was extensively discussed in Johannesburg at the World Summit for Sustainable development.¹⁵ In the Johannesburg Plan of Implementation, the decision on corporate responsibility appears based on this principle, where, at 45ter, countries commit to “Actively promote corporate responsibility and accountability, based on the Rio Principles, including through the full development and effective implementation of intergovernmental agreements and measures, international initiatives and public-private partnerships, and appropriate national regulations, and support continuous improvement in corporate practices in all countries.”

It is possible that negotiations could proceed on at least two of the four Singapore issues, including business facilitation measures and government procurement. Issues related to corporate citizenship and common but differentiated responsibilities are being discussed within the WTO, in ongoing debates about government procurement measures. It is not yet clear if government procurement can be negotiated into a binding agreement for all WTO members. The existing plurilateral Agreement on Government Procurement leaves some questions with regard to establishing corporate social and environmental responsibility as a qualification for suppliers (art. VIII Agreement on Government Procurement). Key questions revolve around whether provisions can or should be mandatory and legally binding, and whether disputes could be referred to the WTO Dispute Settlement Mechanism (DSU), if so. A number of developing countries are concerned about the enforcement rules in this area, including the use of the DSU. In government procurement matters, the primary interested parties are companies which benefit the most from international transparency in bid for tender processes. It seems unlikely that companies would gain direct access to the WTO DSU, as this is purely a state-to-state dispute settlement mechanism. In this respect, the principle of common but differentiated responsibilities would suggest that developing countries, in particular, might be given special consideration with regards to new disciplines.

The Principle of the Precautionary Approach to Human Health, Natural Resources and Ecosystems

Precaution is a two-tiered principle, with both significant substantive and procedural dimensions.¹⁶ The WTO has made cautious progress in both areas.

Substantively, the WTO allowed precautionary interpretation with regard to health measures in the *EC - Asbestos case*.¹⁷ More recently, in the *Japan – Apples case*, the panel¹⁸ found that Japan’s measure was not based on a sufficient risk assessment. Japan failed to properly analyse the ‘likelihood’ of the disease spreading. In an interesting statement, the panel concluded that “[g]iven the negligible risk identified on the basis of the scientific evidence and the nature of the elements composing the phytosanitary measure at issue,

¹³ Refer to Haochen Sun, ‘Reshaping the TRIPs Agreement concerning Public Health- Two Critical issues’ Journal of World Trade, Vol. 37 no. 1, February 2003 p 163 at 165.

¹⁴ See *Implementation of paragraph 6 of the Doha Declaration on the TRIPs Agreement and public health*, 30 August 2003, WT/L/540, available at http://www.wto.org/english/tratop_e/trips_e/implem_para6_e.htm.

¹⁵ For details see CISDL Legal Brief, *The Principle of Common But Differentiated Responsibilities: Origins and Scope*, 2002 available at http://www.cisd.org/pdf/brief_common.pdf.

¹⁶ See T. O’Riordan, J. Cameron & A. Jordan, *Reinterpreting the Precautionary Principle*, London 2001, .296

¹⁷ XXX See our Oxford journal article and the real

the measure on the face of it is disproportionate to that risk.”¹⁹ While this case appears to disregard precaution, it should be rather seen as a further explanation of the matter. The relationship between risk assessment and precaution is complicated,²⁰ but should the Appellate Body affirm the panel’s views in the *Japan Apples case*, the ‘proportionality’ element could actually ease the risk assessment requirements with regard to measures that entail risks for human health. In such an instance, even a small risk might be perfectly proportionate to the measure, as the integrity of human life and health can be given significant weight as a very important legal value.

With regards to the procedural dimension of precaution, para. 32 of the Doha Declaration recognises the value of environmental reviews of trade policy. Corresponding references to impact assessment at para. 91(d) of the Johannesburg Plan of Implementation encourage the voluntary use of environmental impact assessments as an important national level tool to better identify trade, environment and development inter-linkages. These two sets of policy guidance, taken together, suggest increasing acceptance of these instruments on the national level. Furthermore, the discussions under para. 52 of the Doha Declaration may be seen as timid first steps toward realisation of sustainable development, through procedural innovation in the WTO. By checking measures before they are adopted into WTO treaty law, and granting a review mandate to both the Committee on Trade and Environment, and the Committee on Trade and Development, the WTO is becoming more procedurally cautious in its decision-making.²¹ Further progress could be made, as well as valuable ‘streamlining’ of meeting schedules, by providing for joint ‘sustainable development’ oriented sessions of both Committees in their efforts to carry out this mandate.

The Principle of Public Participation and Access to Information and Justice

Sustainable development has an important procedural element. Only a few years ago, the WTO was not one of the most recognized international organisations with regard to progressive public participation and access to information procedures. More recently, the WTO highlights its achievements in the area of accountability, and indeed, the WTO website has become a very useful source of material for trade and sustainable development scholars, among others.

There has been some progress with regard to openness in recent years.²² There have also been positive signals towards increased public participation in the DSM in the *Asbestos Case*.²³ The Appellate Body issued an Additional Working Procedure for the *Asbestos case* to accept amicus curiae briefs,²⁴ whereby “any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body” was required to apply to do so by a specific deadline. The application must contain information about the applicant, the special interest in the dispute, and the specific issues of law. The decision to publish the criteria was made “in the interest of fairness and orderly procedure in the conduct of this appeal” the Appellate Body wrote in a communication that accompanied the decision.²⁵ The Appellate Body decided to establish an ‘Additional Procedure’ (AP) because it had already received 13 spontaneous submissions, many from developing country industry associations, and expected to receive more in a case closely watched by public interest groups.

The Appellate Body reviewed the applications and had the discretion to invite certain organisations to submit amicus curiae briefs. Independent amicus briefs, those which were not included the submissions of a Party or a third party, were rarely taken into account in the WTO prior to this procedure.²⁶ While the Appellate Body certainly had the authority to accept and consider amicus briefs where it was ‘pertinent and

¹⁹ *Japan - Measures Affecting the Importation of Apples*, Panel report, WT/DS245/R, 15 July 2003, para. 8.181.

²⁰ See for the opposite conclusion European Court of First Instance, Case T-13/99, *Pfizer Animal Health SA v Council of the European Union*, 11 September 2002.

²¹ See CISDL Legal Brief, *Sustainability through Process for World Trade Law?*, available at http://www.cisd.org/pdf/wto_sia.pdf.

²² See Gabrielle Marceau and Peter N. Pedersen, “Is the WTO Open and Transparent?” JWT 33 (1999), No. 1, 5.

²³ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R and M. Gehring & M.-C. Segger, “The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute,” Vol 15 No 3 (2003) Oxford Journal for Environmental Law 289.

²⁴ *Communication from the Appellate Body*, WT/DS135/9, 8 November 2000.

²⁵ WT/DS 135/9

²⁶ It should be noted that, relying in part on conclusions of the Appellate Body, a North American Free Trade Agreement tribunal has recognised that there is legitimate public interest arising out of certain subject matter. The tribunal also found that its dispute settlement mechanism “could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive.” See *In the Matter of an Arbitration under Chapter 11 of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules: Methanex Corporation v United States of America* Decision of the Tribunal on Petitions from Third

useful' to do so,²⁷ non-state actors had not been offered a formal procedure before. This potentially opened an avenue for under-resourced developing country civil society groups to participate, too, and indeed, many of the requests to file were submitted by organisations in developing countries. 13 written submissions were received from non-governmental organisations before the AP was established, including submissions from groups in Swaziland, Sri Lanka, Korea, El Salvador, Senegal, Japan, Colombia and other countries.²⁸ However, certain WTO Members immediately demanded a special General Council meeting to discuss concerns that the Appellate Body might not have acted in consistency with WTO law. Submissions that were received prior to the adoption of the application process were returned to senders with a letter informing them of the new procedure. According to the Appellate Body Report, Canada and the EC not only consented to the AP, but wrote to request copies of all applications filed. Pursuant to the AP, the Appellate Body received 17 application requesting leave to appeal, six of which were received after the deadline, resulting in denial. The 11 applications which arrived within time limits were 'carefully reviewed and considered', but leave was denied to all of them. In spite of the denial, a written brief was submitted by FIELD, on its behalf and on behalf of Ban Asbestos Network, Greenpeace International, International Ban Asbestos Secretariat and WWF. The brief was not accepted.²⁹ According to ICTSD Bridges,³⁰ shaken by the outrage expressed by certain members of the WTO, the Appellate Body members and the WTO secretariat refused to answer any questions on the AP, and organisations which used the AP to request leave to file written briefs were turned down with tersely-worded letters.

Under the DSU, the Appellate Body may, in consultation with the chair of the DSB and the Director General, develop working procedures for individual cases.³¹ It is therefore simply consistent and no violation of WTO rules to establish a procedure, particularly in a case which has attracted strong public interest. Unfortunately, a restrictive procedure and tight deadlines limited the effectiveness of this step, and the reaction of members (in spite of the prior written consent of the Parties to the dispute), blunted the attempt. This was unfortunate. Due process has been recognised by the Appellate Body as applying to panels' procedures and as being implicit in certain provisions of the GATT 1994.³² Indeed, the Appellate Body has expressly noted that a party to a WTO appeal is "always entitled to its full measures of due process" and that WTO Members themselves are bound to administer domestic procedures in accordance with standards of basic fairness and due process.³³ This consistent respect for fairness and due process should extend not only to parties to the dispute but to any person engaged in the dispute settlement process, including persons invited to apply for leave to submit a written submission in accordance with a new procedure. At a minimum, the Appellate Body should have given reasons for not granting the requested leave to appeal.

The Principle of Good Governance

This principle is particularly important with regard to the Dispute Settlement Mechanism in the WTO. An interesting new development can be found in the recent *Asbestos* case. For the first time in the history of GATT/WTO law, a member of the Appellate Body made a 'concurring' statement regarding ethical considerations in the case at issue. At para. 149 of the EC – Asbestos Appellate Body report, the Appellate Body states: "One Member of the Division hearing this appeal wishes to make a concurring statement."

The Member goes on to state: "The Panel... ruled that it [has] sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres." In fact, the scientific evidence of record for this finding of carcinogenicity of chrysotile asbestos fibres is so clear, voluminous, and is confirmed, a number of times, by a variety of international organisations, as to be practically

²⁷ *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, Report of the Appellate Body adopted 7 June AB-2000-11, 8 November 2000, WT/DS138/AB/R at para 39.

²⁸ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R 12 March, 2001 at para. 53.

²⁹ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* WT/DS135/AB/R 12 March, 2001 at paras. 54 - 57.

³⁰ ICTSD, *Amicus Brief Storm Highlights WTO's Unease with External Transparency, Bridges Between Trade and Sustainable Development*, Year 4 No.9, Geneva, November-December 2000.

³¹ Working Procedures for Appellate Review, 28 February 1997, WT/AB/WP/3, drawn up pursuant to Article 17.9 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

³² *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body adopted 25 September 1997, WT/DS27/AB/R at para 144; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, Report of the Appellate Body adopted 16 January 1998, WT/DS50/AB/R, at para 95; *Argentina – Certain Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, Report of the Appellate Body adopted 20 March 1997, WT/DS56/AB/R, at para 79; *Brazil – Measures Affecting Desiccated Coconut*, Report of the Appellate Body adopted 20 March 1997, WT/DS22/AB/R at p 15. For measures implicit, see *United States – Restrictions on Imports of Cotton and Man-Made Fibre Underwear*, Report of the Appellate Body adopted 25 February 1997, WT/DS24/AB/R at p 10.

overwhelming... It is difficult for me to imagine what evidence relating to economic competitive relationships as reflected in end-uses and consumers' tastes and habits could outweigh and set at naught the undisputed deadly nature of chrysotile asbestos fibres, compared with PCG fibres, when inhaled by humans, and thereby compel a characterization of 'likeness'..." The Member then concludes with a second point that: "... in future concrete contexts, the line between a 'fundamentally' and 'exclusively' economic view of 'like products' under Article III:4 may well prove very difficult, as a practical matter, to identify. It seems to me the better part of valour to reserve one's opinion on such an important, indeed, philosophical matter, which may have unforeseeable implications..."

These statements are significant in a substantive and a procedural way. In substance, the Member in question is stating first that in this particular case, to him, carcinogenicity is a valid reason in itself to find that the fibres in question are not 'like' the non-carcinogenic alternatives. The Member is also stating that he has substantial doubts about the necessity or appropriateness of adopting a fundamentally economic interpretation of product likeness- he thinks that other questions may sometimes be more relevant and that as such, it will become less possible to stick to commercial criteria only with a clear conscience. These statements recognise, fundamentally, the manner in which WTO law is increasingly affecting, and being affected by, non-traditionally trade law concerns. In terms of the process- this is nothing short of bizarre. The Member, with the support of his fellow Division Members, is breaking ranks to express concern as to the way that the Appellate Body can take into account 'philosophical' non-economic views.

This indicates an increasing flexibility for dissenting views in the Appellate Body mechanism. It could mean a movement toward a more 'rules-based' or even 'principles-based' international trading regime, allowing more comprehensive judgements which encompass richer consideration of the plurality of the issues.

The Principle of Integration and Interrelationship, in Particular in Relation to Human Rights and Social, Economic and Environmental Objectives

A current example of necessary further integration is tobacco and trade.³⁴ Tobacco use is a serious threat both to human health and the environment. About one in every two long-term smokers will die from smoking. The WHO estimates that tobacco products currently kill 4.2 million people each year; by the year 2030, this annual toll will rise to nearly ten million deaths or one in six adults globally per year.³⁵ In addition to the absolute human cost, there are important regional variations. Country specific analyses of the tobacco industry by the World Bank, in collaboration with the WHO, found that tobacco addiction imposes high opportunity costs on many poor households, who spend significant proportions of their income on tobacco instead of on nutrition and other needs.³⁶ Most of the projected deaths will occur in low and middle income countries. Moreover, as market share in industrialized countries decline, and as tobacco companies target developing countries and world youth, the disease burden caused by tobacco usage will increase at an alarming rate.³⁷

As such, there is no greater area of structural conflict between trade liberalization and public health than that of tobacco control. Empirical evidence confirms that trade openness leads to increased tobacco

³⁴ Thanks to Dr. Maya Prabhu for this contribution.

³⁵ WHO, Economics of Tobacco Control, at 2, WHO Doc. A/FCTC/WG1/2 (Aug. 20, 1999), at <<http://www.who.int/gb/fctc/wg1/PDFwg1/elt2.pdf>> (summarizing World Bank, *Curbing the Epidemic* (1999)) [hereinafter Economics of Tobacco Control]; Intergovernmental Negotiating Body of the WHO Framework Convention on Tobacco Control, Activities Since the Previous Session, at 1, WHO Doc. A/FCTC/INB5/4 (Sept. 12, 2002), at <<http://www.who.int/gb/fctc/PDF/inb5/einb54.pdf>>

³⁶ Intergovernmental Negotiating Body of the WHO Framework Convention on Tobacco Control, Activities since the Previous Session at 1, WHO Doc. A/FCTC/INB5/4/ (Sept. 12, 2002), at <www.who.int/gb/fctc/PDF/inb5/einb54.pdf>.

³⁷ WHO, Opening Statement by the Director-General, at 1-2, WHO Doc. A/FCTC/INB1/DIV/3 (Oct. 16, 2000), available at <www.who.int/gb/fctc/inb1/PDFinb1/e1inbd3.pdf>; Burden of Disease at tobacco.who.int/page/cf?sid=47.

consumption.³⁸ Tobacco control measures such as tobacco tax increases, higher tariffs, smoking bans and health warnings on packaging all substantively reduce tobacco consumption.³⁹

Most countries have faced strong challenges to implementing comprehensive control measures. However, a new area of contention may be opened by the WHO's Framework Convention on Tobacco which was adopted on May 21, 2003.⁴⁰ The FCTC is a comprehensive multilateral treaty that will cover everything from tobacco smuggling to tobacco advertising, taxes, warning labels design and the extent of the liability of tobacco companies. In a hopeful example of non-health organizations supporting the work of the WHO, the World Bank specifically required that international agencies support the FCTC. What makes the FCTC unique is that its structure is that of a framework convention or treaty with legally binding terms - an important step forward from the WHO's usual soft-law approach. Tobacco control and trade promises to be an important area for ISDL principles. There are still several issues for discussion: the significance of TRIPS on trademark protection and the disclosure of confidential product information; the implications of GATS in relation to restrictions on cigarette advertising; the affect of the TBT in relation to packaging and labelling; the WTO Agreement on Agriculture in relation to government support for tobacco production.

Conclusion

Sustainable developments in recent WTO law and 'jurisprudence' are recognizable, and can be considered progress. However, further progress can be made, and additional integration of ISDL principles is clearly warranted.

³⁸ Taylor, A.L., Bettcher, D.W. WHO Framework Convention on Tobacco Control: A Global Good For Public Health. Bulletin World Health Organization 2000; 78(7): 920-9. Review.

³⁹ Townsend, J. Price, Tax and Smoking in Europe. Copenhagen: World Health Organization, 1998. The World Bank; Curbing the Epidemic; Governments and the Economics of Tobacco Control. Series: Development in Practice. Washington DC: The World Bank, 1999; Jha, P., Chaloupka, F.J. (Eds.) Tobacco Control in Developing Countries, New York: Oxford University Press, 2000.

⁴⁰ For a complete discussion of the use of international law in connection with tobacco control, see World Health Org., World Health Report 1999: Making a Difference 78 (1999). Press Release: World Health Assembly Adopts Historic Tobacco Control Pact May 21 2003 at:

The Centre for International Sustainable Development Law (CISDL) is based in the McGill University Faculty of Law in Montreal, Canada, works in cooperation with 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. CISDL convened Sustainable Justice 2002: Implementing International Sustainable Development Law in Montreal, June 13-15, 2002, as part of a legal partnership for sustainable development, and launches an International Jurists Mandate for the Implementation of International Sustainable Development Law (available at www.cisd.org), as well as a new book, *Weaving the Rules for Our Common Future*, at the WSSD.

CISDL Directors: Marie-Claire Cordonier Segger | Ashfaq Khalfan, mcsegger@cisd.org | akhalfan@cisd.org
Centre for International Sustainable Development Law, 3661 Peel St. Montreal, Quebec H3A 1X1 Canada
Tel: 001 514 398 8918 / Fax 001 514 398 8197 www.cisd.org