

SUSTAINABILITY THROUGH PROCESS FOR WTO LAW?

A CISDL LEGAL BRIEF

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THE WTO Committees on Environment and Development have been widely perceived as ineffectual. It is possible that in Doha, they will be granted a new purpose – to survey new trade negotiations. This appears to indicate that the WTO is beginning to seek ways to integrate development, environment and trade policy. This could constitute a crucial first step in complying with its Preamble goal and oft-referenced mandate for sustainable development.

The first question in everyone's mind is – how could such a task be carried out? Out of the available policy tool kit, one useful mechanism is multilateral, participatory sustainability impact assessment (SIA). This legal brief¹ surveys the history, practice and current application of SIA procedures with a view to its possible use by the WTO.

Sustainability Impact Assessment in the WTO?

UNDER the last section “Organisation and Management of the work programme” the draft 4th Ministerial Declaration proposes a timid attempt to put the goal of sustainable development into practice for future negotiations. At para. 41, it is stated that:

The Committee on Trade and Development and the Committee on Trade and Environment will, within their respective mandates, each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected in the negotiations.

For the first time the WTO would, if ministers approve this paragraph, evaluate the negotiation of trade rules and their possible impacts on the environment and development. Of course the caveat

of respective mandates still restricts these Committees from taking up overall discussions. In addition, at present the current proposed involvement of the CTD and CTE does not clearly request the use of assessment methodologies. However, this mildly innovative proposal for the CTD and CTE can build upon undertakings from individual country Members to assess the impact of changes to trade rules on the environment or to conduct SIAs (Canada, the US, the EU, Norway and the Czech Republic).² Existing integrated assessment procedures and methodologies are still diverse, and any step in this direction would have to be requested by WTO Members. Nevertheless the involvement of the CTD and especially of the CTE would constitute a step forward. Whether this exercise can support sustainable development as hoped depends mainly on the procedure chosen by both Committees.

Background on Impact Assessment

THE introduction of impact assessment procedures is becoming one of the most obvious examples of ‘integrated thinking’ in the international arena.³ An impact assessment is a procedure that is carried out to determine possible effects of a project on the environment or on communities. It usually includes a preliminary scientific or information-gathering phase and a report, which is then followed by a decision to proceed, sometimes in tandem with additional

² The USA first raised the issue in 1996 and called for national environmental reviews, see WT/CTE/W/37 23 July 1996. Discussions continued and were intensified in 2000 in the WTO Committee on Trade and Environment where countries described their respective efforts, WTO document WT/CTE/M/23, 5 April 2000. The WTO Secretariat provided a background paper for the discussions, WTO document WT/CTE/171.

³ Although international law may not currently require development to be sustainable, international law can require development decisions to be the outcome of a process which promotes sustainable development – including the carrying out of EIA on the correct levels and ensuring public participation in decision making. See S. Nooteboom & K. Wieringa, “Comparing strategic environmental assessment and integrated environmental assessment”, *Journal of Environmental Assessment Policy and Management*, (1999) Vol. 1, No. 4 at 441-57; and D. Devuys, “Sustainability assessment: the

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. This brief was prepared by CISDL, CISDL Commission Members Markus Gehring of Germany, and Alhagi Marong of The Gambia, and CISDL Commission Director Marie-Claire Cordonier Segger of Canada. The CISDL.

measures such as full investigations and studies, public meetings or consultations, and the publication of extensive studies with recommended mitigation measures. Integrated assessment is based on Environmental Impact Assessment (EIA). The earliest mandatory EIA procedures were introduced in the 1970s by the US National Environmental Protection Act.⁴ The increasing recognition of its utility on a national level is reflected in Principle 17 of the 1992 *Rio Declaration*, which provides:

“Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”⁵

Obligations to conduct a variety of EIA procedures are found in the 1991 *Protocol to the Antarctic Treaty on Environmental Protection*,⁶ and under the 1982 *UN Convention on the Law of the Sea* (UNCLOS).⁷ In certain instances, there may be obligations for EIA in customary international law.⁸

The Development Aspect of Impact Assessment

IN other international treaty law, the ‘people’ factor of Integrated Assessment is becoming more explicit. This can be seen both in the general framework of the 1992 *UN Biodiversity Convention* and the 1994 *UN Convention to Combat Desertification*,⁹ and in specific assessment related provisions of particular treaties. For example, Article 4(2)(f) of the 1989 *Basel Convention on the*

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⁴ 42 U.S.C. § 4321-47. The Act applies only to US Federal Government projects.

⁵ 1992 *Rio Declaration on Environment and Development*, Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev. 1, (1992) 31 I.L.M. 874 [hereinafter *Rio Declaration*] at Principle 17.

⁶ See the *Antarctic Environmental Protocol* (1991), 30 I.L.M. 1461, at Article 23(1). Nine parties have ratified the Protocol to date but all Antarctic Treaty Consultative Parties, amounting to 26, are required to bring it into force. See also *Convention on the Conservation of Antarctic Marine Living Resources*, 20 May 1980, T.I.A.S. No. 10240, 1329 U.N.T.S. 48 (1980).

⁷ *United Nations Convention on the Law of the Sea*, 10 December 1982, 21 I.L.M. 1245, (entered into force 16 November 1994) preamble, Art. 192, 194 [hereinafter UNCLOS]. See also *Agreement for the Implementation of the Provisions of the U.N. Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, (1995) 34 I.L.M. 1542, [hereinafter *Straddling Stocks Agreement*], preamble, Art. 2, 5 addressing issues such as the inadequate management of high seas fisheries, the over-utilization of fishing resources, and the inadequate regulation of fishing vessels. UNCLOS states, at Art. 206: “When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.”

⁸ For a survey of hard and soft legal obligations to conduct EIAs, see P. N. Okowa, “Procedural Obligations in International Environmental Agreements” (1996) *Brit. Y.B. of Intl L.* 275.

Control of Transboundary Movements of Hazardous Wastes and their Disposal specifically requires information on effects on human health and the environment.¹⁰ The 1991 *Esppo Convention*, upon which the European Communities EIA Directive is modelled, refers in Article 1(vii) to any effect ... on the environment including human health and safety [and] includes effects on cultural heritage or socio-economic conditions.’ Article 4(1) of the 1992 *UN Framework Convention on Climate Change* refers to ‘impact assessments formulated with a view to minimising adverse effects on the economy, on public health and on the quality of the environment.’

International development banks and financial institutions also include social assessment aspects both in their EIA procedures and separately. Indeed, the World Bank was the first to introduce environmental impact assessment requirements in 1991, and this initiative has since been replicated in other international organisations. The World Bank’s current EIA requirements are contained in its Operational Policy and Bank Procedures 4.01, and require that EIAs address a number of issues including indigenous peoples and socio-cultural aspects of development.¹¹ In EIAs across the board, social impacts are increasingly being considered alongside environmental impacts. Debate continues regarding the benefits and drawbacks of integrated as compared to thematic parallel assessments. Recent proposals for sustainability assessments are giving an innovative perspective to these discussions. On the international level, there are other non-project level actions which can have significant consequences, such as structural and sectoral adjustment programmes, international trade liberalisation agreements and fundamental policy initiatives (for example, privatisation). More recent studies in the NAFTA context have found that structural, scale, technology and product effects of trade and investment liberalisation policies can impact on environmental and development options.¹²

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¹⁰ See online: UNEP <<http://www.unep.ch/basel/text/con-e.htm>>.

¹¹ See D. Bradlow, “A Test Case for the World Bank” (1996) 11 *Am. U. J. Intl L. & Pol’y* 247 at 262. For an up-to-date summary of Inspection Panel decisions, see the report by the Center for International Environmental Law, online: <<http://www.ciel.org/wbip.html>> (date accessed 23 March 2000). See I. F. I. Shihata, “The World Bank and the Environment: Legal Instruments for Achieving Environmental Objectives” in I. F. I. Shihata, *The World Bank in a Changing World, Vol. II* (Cairo: Martinus Nijhoff Publishers, 1995). See also The World Bank, *The World Bank Inspection Panel, Resolution 93-10*, online: World Bank <<http://www.worldbank.org/html/ins-panel/operatingprocedures.html>>.

¹² The North American Commission for Environmental Cooperation (NACEC) has designed a framework for assessing environmental effects of the North American Free Trade

And Sustainability Impact Assessment?

RECENTLY, there have been innovative efforts in cooperation with civil society organisations, on the domestic and international levels, to devise and apply 'sustainability impact assessments' procedures (SIAs) which take environmental, social and economic factors into consideration.¹³ New SIA instruments apply to policies, plans and programmes as well as to projects, and seek strategies for longer term sustainability.¹⁴ They are based on procedural innovations, such as the recent identification of combined international sustainability indicators.¹⁵ A broad distinction can be drawn between target-related indicators and process related indicators. The former involves expressing sustainable development goals in terms of a set of targets to be achieved at a specified future point in time, and developing a corresponding set of indicators to measure progress (performance-based indicators). Process indicators relate to the soundness of institutional planning and management processes including mechanisms for the meaningful involvement of the appropriate stakeholders. They focus on strengthening institutional capacity and decision making along sustainable development lines (management or systems based indicators).¹⁶ The task remains of translating the SIA concept into operational appraisal criteria and then into law.

The best overview of the different approaches can be found in a recent UNEP Reference Manual for the Integrated Assessment of Trade-Related

Policies.¹⁷ One example is the Sustainability Impact Assessment Study of the proposed *Millennium Round* negotiations in the World Trade Organisation (WTO), which was commissioned by the European Commission. Though political factors resulted in the delay of the proposed trade liberalisation negotiations, this cutting edge attempt to undertake a comprehensive international SIA of the proposed WTO trade liberalisation programme offers lessons from a highly integrated impact assessment instrument for future WTO efforts.

An Illustrative SIA Methodology:

WHILE there are still few existing concrete international legal obligations with regard to SIAs, leading international efforts have been undertaken to formulate sustainability assessment procedures, indicators and appraisal criteria. The first phase of an SIA can include a review of literature on trade-related assessments (covering economic, social and environmental impacts relevant to sustainable development), an examination of relevant cases where these assessment methodologies have been applied with an evaluation of their effectiveness, and a proposal for a fully defined sustainable impact assessment methodology.¹⁸

The second phase can be more comprehensive, involving an examination of the potential sustainability impact of each measure that plan to be covered by the WTO negotiations. Impacts, positive and negative, can be assessed for relevant groups of countries (such as the European Union, developing countries, least developed countries, and the world as a whole). In this phase, a study can examine 'core sustainability indicators' (including economic factors such as average real income, net fixed capital information and employment; social factors such as equity and poverty; health and education, and gender inequalities; and environmental factors such as ecological quality - air, water, land-, biological diversity; and other natural resource stocks). This should be done in the context of 'significance criteria' (including the extent of existing economic, social and environmental stress, in affected areas; direction of changes to base-line conditions; nature, order of magnitude, geographic extent and duration of changes; and regulatory and institutional capacity to implement mitigation measures). An SIA can then consist of four main phases:

- *screening*: to determine which measures require SIA because they are likely to have significant impacts,

NACEC, 1999). See also D. C. Esty, *Greening the GATT* (Chicago: Institute for International Economics, 1994); *UNCTAD Newly Emerging Environmental Policies with a Possible Trade Impact: A Preliminary Discussion – Report by the UNCTAD Secretariat*, (New York: United Nations, 1995); and *UNCTAD Trade and the Environment: Issues of Key Interest to the Least Developed Countries*, (New York: United Nations, 1997).

¹³ Sustainability Impact Assessments have recently been done on a national level by governments and NGOs in the Netherlands, Philippines, Indonesia and in the USA. See for example Oxfam, *Trade Liberalisation as a Threat to Livelihoods: the Corn Sector in the Philippines*, (1998) online: Oxfam <<http://www.oxfam.org.uk/policy/research/corn.htm>>; or A. Strutt & K. Anderson "Estimating Environmental Effects of Trade Agreements with Global CGE Models: A GTAP Application to Indonesia" (paper presented at Workshop on *Methodologies for Environmental Assessment of Trade Liberalization Agreements*, OECD, Paris, October 1999). They have been conducted at the level of Europe in the EC, for example in relation to transport strategy, see OECD *Freight and the Environment: Effects of Trade Liberalisation and Transport Sector Reforms* (Paris: OECD, 1997).

¹⁴ M. Perrin. "Sustainability Assessment of Trade Liberalisation Agreements" (paper presented at Workshop on *Methodologies for Environmental Assessment of Trade Liberalization Agreements*, Paris: OECD, October 1999).

¹⁵ B. Moldan & S. Billharz, *Sustainability Indicators: Report of the Project on Indicators of Sustainable Development*, (Chichester: John Wiley, SCOPE 58, 1997).

¹⁶ D. W. Pearce & G. D. Atkinson, "Capital theory and measurement of sustainable development: an indicator of "weak" sustainability" (1993) 8*Ecological Economics*. 103-8.

¹⁷ UNEP, Geneva, 2001 <www.unep.org>

¹⁸ C. Kirkpatrick, N. Lee & O. Morrissev. *WTO New Round*:

- *scoping*: to establish the appropriate coverage of each SIA,
- *preliminary sustainability assessment*: to identify potentially significant effects, positive and negative, on sustainable development, and
- *mitigation and enhancement analysis*: to suggest types of improvements which may enhance the overall impact on sustainable development of WTO trade liberalisation measures.

The findings can distinguish those areas where negotiations are likely to have a relatively limited impact and those where the impact might be greater. Additionally, proposals can be formulated for mitigation and enhancing measures.

Procedural Principles

FROM a legal point of view there are three procedural principles that should guide an SIA as a policy tool regardless the political level.

First, the exercise has to be transparent. Transparency is one of the principles of WTO law,¹⁹ and external transparency is being improved in the WTO. To include the CTE is also a step forward, since the CTE, with observers from 20 international organisations (including some of the most important Multilateral Environmental Agreement secretariats), is the most open body of the WTO. For SIA, transparency means that at least the indicators, methods and baseline scenarios should be available –possibly through the use of information technology – to the broader public.²⁰

On a national level any impact assessment has to be guided by a second principle: participation. The process has to be accessible to the broader public.²¹ There can be procedures for consultation with civil society organisations. Workshops and meetings can be held at each phase of reports.²² In initial efforts, an interactive website can be designated with reports, timely publications and informal mechanisms for involvement. Only certain of these measures can be applicable to the WTO, as a merely inter-governmental organisation (IGOs). But international civil society organisation could be

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¹⁹ Almost every Uruguay Round agreement contains an obligation to make measures or regulations available to all WTO members.

²⁰ OECD Secretariat, "Timing and Public Participation Issues in Undertaking Environmental Assessments of Trade Liberalisation agreements", (paper presented at Workshop on *Methodologies for Environmental Assessment of Trade Liberalization Agreements*, Paris: OECD, October 1999).

²¹ The US Executive Order 13141 on Environmental Reviews of Trade Agreements and the Canadian Framework on Environmental Assessment of Trade Negotiations include binding legal obligation to ensure that the respective administration allows a broad public participation, while as regulatory instruments do not take social considerations into account.

²² C. Kirkpatrick, N. Lee & O. Morrissev. *WTO New Round*:

consulted as well as other IGOs. Especially the latter could provide information and expertise on potential implications of certain negotiation positions for existing international legal obligations.

The third procedural principle is provision of a mechanism to ensure that the results of the impact assessment are taken into account. Impact assessment is constructed as an informative policy tool and can be overruled in the final decision by more important considerations. In these cases, an explanation must at least be given, with the reasons that the assessment advice was not followed. If this is not provided, most national and international laws grant access to justice or other legal enforcement mechanisms. Transferring this last aspect to the WTO levels seems impossible but especially in light of the principle of special and differential treatment, rejected recommendations from the CTD should at least receive a justification.

Conclusions

PROPOSED expanded mandates for the CTD and the CTE are just a starting point in finding procedures to ensure that WTO law becomes more sustainable. National policy instruments can help to raise awareness among negotiators and therefore single WTO members will and should probably carry out their own assessments.²³ The SIA debate can be seen by developing country representatives as a new way to proceed with disguised protectionism. Some fear that impact assessments could become a pre-condition for trade agreements,²⁴ or could bind the resources of already struggling environmental ministries. A multilateral SIA would have to ensure broad developing country participation. Further inclusion of other international stakeholders, or transferring the process to competent international organisations such as UNEP and UNDP would be true innovations. The limits of the policy tool should also be noted. It will not immediately make trade law more sustainable, the latter implies a huge amount of political will.

Sustainable development is based on subsidiarity, and SIAs are also a useful policy tool to develop national negotiating positions. But there are international sustainable development challenges; these can best be addressed through multilateral cooperation. The roles of the WTO CTD and CTE are still not fully defined, and past studies and current policy tools would help the two bodies to better analyse new trade negotiations, or to coordinate existing national and regional assessments. If both Committees worked against

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²³ Canada announced the intention XXX, available under the EU has called for tender .

each other, WTO would once again have no process to contribute to its international sustainable development goal. From an ISDL perspective, the most important recommendation is for the two WTO Committees to develop a joint strategy which leads to robust sustainable development analysis.

CISDL

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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