

A CISDL LEGAL BRIEF



INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICE & PROSPECTS

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The 2002 Johannesburg Summit and the Law?

How can climate change be slowed by changing rules on foreign direct investment? What is the relationship between new biosafety procedures from biodiversity protection law and existing rules on world trade? How can liability and compensation measures promote safer transportation of hazardous chemicals? How should decisions on financing for development take into account human rights obligations related to environmental protection and poverty eradication?

Sustainable development is about the intersection between social, economic and environmental law. But justice is not always consistent. Social, environmental and economic obligations can overlap, or even conflict. The tangled legal issues arising may have been subject of grand debates, but they are not impossible to resolve. Indeed, compromises are being made every day, in negotiations, courtrooms and tribunals around the world, every time a new regulation is written or challenged.

The legal community is a powerful force to harness for sustainable development. In the past 10 years, there have been startling advancements in international sustainable development law (ISDL). International jurists, professionals and scholars are starting to define the requisite legal principles, instruments and compliance mechanisms. Many of these address international economic, social and environmental law in an integrated, innovative manner.

This legal brief¹ will survey the emerging principles and best practices in ISDL. It aims to make proposals for the WSSD 2002 on the prospects of ISDL, and its links to broader sustainable development governance.

What is International Sustainable Development Law (ISDL)?

The need for stronger international law for sustainable development was identified in the 1992 *Agenda 21* at Chapter 38. Governments committed to the “further development of international law

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 Commission Director Marie-Claire Cordonier Segger of Canada, and CISDL Commission Director Ashfaq Khalfan of Kenya. The CISDL gratefully acknowledges the review and co-authorship of Markus Gehring of Germany, Cairo Robb of the United Kingdom, Katerina-Zoi Varfis of Greece, Caroline Dommen of Switzerland, Witold Tymowski of Canada, and Maria Leichner of Uruguay, CISDL Commission Members.

on sustainable development, giving special attention to the delicate balance between environmental and developmental concerns.” Governments also recognised the “need to clarify and strengthen the relationship between existing international instruments or agreements in the field of environment and relevant social and economic agreements or instruments, taking into account the special needs of the developing countries.”²

ISDL is still vague and in a process of further definition in many contexts.³ But a growing *corpus* of legal provisions and instruments can be identified which integrate international environmental, social and economic law to one degree or another.

ISDL in Principle

In global governance structures, particularly with regard to the environment, consensus is just developing on which legal principles (and in the end which values) will provide orientation for this integration. Based on prior work by the United Nations Commission for Sustainable Development and many legal experts,⁴ the International Law Association *Committee on the Legal Aspects of Sustainable Development* has elaborated a set of ‘Principles of International Law for Sustainable Development.’⁵

- **Sovereignty over natural resources and the duty of sustainable use of natural resources:** States have sovereign rights over their natural resources, but must not cause damage to the environment. This has evolved into a positive obligation to use natural resources in a sustainable manner. See, for example, the *African Nature Convention*,⁶ the *1992 Climate Change Convention*,⁷ and the *1992 Biodiversity Convention*.⁸
- **The principle of observance of human rights:** Allegations of civil rights breaches have focused on the suppression of environmental discussion and debate of environmental campaigners, restrictions on the rights of association and assembly, press censorship, and restrictions on the rights of access to environmental information.⁹ Human rights issues are also raised in relation to ‘environmental refugees’ forced to flee areas because of drought or desertification, rights to privacy, food security, health and humanitarian issues involving impacts of war.
- **Inter- and intra-generational equity:** The present generation has the obligation to refrain from depriving future generations of environmental, social and economic opportunities of well-being. Also, states should promote a fair utilisation of resources among members of the present generation.
- **Common but differentiated obligations and the recognition of the special needs and interests of economies in transition and least developed countries and peoples:** The common responsibility of states for the protection of the environment, or parts of it, at the national, regional and global levels is balanced by the need to take account of different circumstances, particularly in relation to each state’s contribution to the creation of a particular problem and its ability to prevent, reduce and control the threat.

² *Agenda 21*, 1992 Report of the UNCED, I (1992) UN Doc. A/CONF.151/26/Rev. 1, (1992) 31 I.L.M. 874 at Chapter 38.

³ One of the most compelling explanations for this lack of clarity was presented by C. D. Stone, “Deciphering Sustainable Development” (1994 Symposium on Ecology and the Law) (1994) 69 Chi.-Kent L. Rev. 977. “The term sustainable development is not merely vague - a masker of failed consensus - the way key terms in the U.S. Constitution are vague and require case by case elaboration. ‘Sustainable development’ functions to gloss over not only failed consensus, but a latent collision course. The chasm is less a failure of language ... than a poignant tussle between, roughly, Rich and Poor. The indigenous native who extinguishes a species for food is not trapped in orthodox semantics of conventional pre-materialist *homo economus* cost-benefit analysis. He is trapped in hunger (just as we, the rich, are so often trapped in moral blindness). There is no reason to suppose that killing off a species pains him less than it does us.”

⁴ Including studies by environmental legal experts, such as *No. 31 Draft International Covenant on Environment and Development Commission on Environmental Law of IUCN - The World Conservation Union in cooperation with ICEL - International Council of Environmental Law*, 1995. Second Edition: Updated Text, 2000. IUCN Environmental Law and Policy Series.

⁵ *Report of the Expert Group on Identification of Principles of International Law for Sustainable Development* (London: ILA, 1995). See also International Law Association (ILA), *Report of the Sixty-Second Conference* (Seoul: ILA, 1987) at 1-11, 409-87.

⁶ *African Convention on the Conservation of Nature and Natural Resources*, Sept. 15, 1968, 1001 U.N.T.S. 3, preamble.

⁷ *United Nations Framework Convention on Climate Change*, 9 May 1992, 31 I.L.M. 849, article 3(4).

⁸ *United Nations Convention on Biological Diversity*, 5 June 1992, 31 I.L.M. 822, articles 1,8,11,12,16,17,18.

⁹ M. Murphy, “Human Rights and the Environment: Imprisoned for Protecting the Forests of Guerrero, Mexico” (2000) *Colo. J. Int’l. Env’tl. L. & Pol’y* 149.

- **Common heritage and common concern of humankind:** A global trust implies non-appropriation, international management, shared benefits, and the exclusive use for peaceful purposes. Common concerns are also recognized by society. The respect and protection of such concerns are the legal basis of regulation that imposes obligations on state, regional, and local authorities.
- **Precaution:** It is assumed that natural systems are vulnerable rather than disposable. By giving the benefit of doubt to the environment when there is scientific uncertainty, the precautionary principle shifts the burden of proof to those proposing activities which might cause serious harm. The principle prefers prevention to remediation, focuses on the relevance of scientific data to development decision-making and carries an obligation to take precautionary measures in proportion to potential damage.

They also include procedural elements:

- **The duty to co-operate for global development and protection of the environment:** This is founded upon ‘good neighbourliness’ from Article 74 of the *UN Charter*. The obligation to co-operate is affirmed in part of international bilateral and regional regimes,¹⁰ and global instruments.¹¹
- **Public participation and access to information and justice:** First, people should be able to participate in decision-making processes which affect and impact on their lives and well-being. Second, in order to participate fully, the public must have access to adequate information. Third, in different ways, citizens should have access to independent appeal if their concerns are not addressed. The 1998 *Aarhus Convention* is a mechanism to address these issues, and other regional models are also valid.
- **Good governance:** In its substantive content, good governance includes participation, rule of law, transparency, responsiveness,¹² consensus orientation,¹³ equity, effectiveness and efficiency, accountability, and strategic vision. Interrelated, these core characteristics are mutually reinforcing and cannot stand alone.

These proposed principles, taken together, provide some guidance for jurists forced to balance conflicting or over-lapping social, environmental and economic obligations. They are generating increasing interest in academic, legal and policy debates.¹⁴ A recent CISDL survey of international treaty and customary sources of international law demonstrates that many have been widely adopted. However, much remains to be done. And international law is not only about principles. It is also about cooperation regimes deliberately woven, and financed, by states. Increasingly, these regimes also include many other stakeholders.

ISDL in Practice

Many national laws and judgments have fully acknowledged a connection between environmental protection, economic development and human rights.¹⁵ And on the international level, governments

¹⁰ Early examples include the *London Convention on Preservation of Fauna and Flora in Their Natural State*, Nov. 8, 1933, 172 L.N.T.S. 241. (1933), Art. 12(2); *Convention on Nature Protection and Wildlife in the Western Hemisphere*, Oct 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 193 (entered into force Apr. 30, 1942), Art. VI; and *Convention on the Protection of the Alps* (Alpine Convention), Nov. 7, 1991, 31 I.L.M. 767, Art. 2(1).

¹¹ *Vienna Convention for the Protection of the Ozone Layer*, March 22, 1985, UNEP Doc. 1G.53/5/Rev.1, reprinted in 26 I.L.M. 1529 (1987), Art. 2(2); *Biodiversity Convention*, *supra* note 8, Art. 5.

¹² Institutions and processes try to serve all stakeholders.

¹³ Good governance mediates differing interests to reach a broad consensus on what is in the best interests of the group and, where possible, on policies and procedures.

¹⁴ See P. Sands, “International Law in the Field of Sustainable Development: Emerging Legal Principles” in W. Lang, ed., *Sustainable Development and International Law* (Oxford: Oxford University Press, 1999) at 58; D. Ginthers, M. Deters and P. de Waart*, eds., *Sustainable Development and Global Governance* (London: 1995); M. McGoldrick, ‘Sustainable Development: The Challenge to International Law’ *FIELD Review of European Community and International Environmental Law*, 3 (1994) or P. Sands, “International Law in the Field of Sustainable Development” (1994) 65 *Brit. Y.B. of Int'l L.* 303. For a survey of the uncertainties, see M. Handl, in W. Lang, *ibid.* at 43.

¹⁵ For example, Indian cases such as *Charan Lal Sadhu v.*

Union of India AIR 1990 SC 1480 and *Koolwal v. Rajasthan* AIR 1998,

Raj.2, address environmental pollution as an issue affecting the human

right to life. See also *Leatch v. National Parks and Wildlife Service and Shoalhaven City Council*, 81 LGERA 270 (1993) (NSW Land and Environment Court, Australia); *Vellore Citizens Welfare Forum v. Union of India* [1996] 5 SCC 647 (Supreme Court, India); *Balankulama v. The Secretary, Ministry of Industrial Development*, SAER, Vol 7(2) June 2000 (Supreme Court, Sri Lanka [Supreme Court of the Democratic Socialist Republic of Sri Lanka])

and judges, in binding treaties and international judgments, in 'soft law' declarations and state practice, increasingly perceive these objectives as complementary rather than unrelated or opposing disciplines.

Recognition of integration is key to the practice of ISDL. The need for integration of development and environment policy permeates international law. Principle 4 of the 1992 *Rio Declaration* states that in "order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."¹⁶ But not all economic or social law requires environmental expertise, nor vice versa.¹⁷ Only certain instruments in each regime need to integrate others, in practice. A brief survey of principles, treaties and instruments suggests a particular pattern to the present global weaving of social, environmental and economic considerations. A rough continuum can be identified, based on four degrees of integration. These degrees range from almost entirely separate, independent fields of international economic, social and environmental law to fully integrated international sustainable development law:

- **Separate spheres:** Many international economic, social and environmental laws simply hold a primary focus in one field, with little integration being presently sought or expected. For example, recent human rights accords, such as the Statute for the creation of an *International Criminal Court*,¹⁸ do not include many significantly environmental or economic provisions.
- **Parallel yet interdependent:** Other international legal instruments are not integrated, but exist in a parallel relationship to complementary social, environmental or economic development laws. Inter-linkages between the elements are weak or almost non-existent. For example, environment and labour side agreements run parallel to recent trade liberalisation agreements in the Americas to the trade treaties themselves, such as the *North America Free Trade Agreement* (NAFTA) and the *North American Commission for Environmental Cooperation*,¹⁹ or the *Environmental Side Agreements* to the *Canada-Chile* and the *Canada-Costa Rica Free Trade Accords*.²⁰
- **Regimes in the process of integration:** Still other international legal regimes are in progress toward greater integration, whereby instruments created primarily in one field are slowly taking into account social, economic or environmental priorities. Example of this process include the integration of environmental considerations into trade laws, as indicated by national and regional integrated assessment,²¹ by the provisions of the 4th Ministerial Declaration from Doha, Qatar, by the *World Trade Organisation* (WTO), and recent decisions of the WTO Appellate Body which seek to respect non-trade priorities.²² Environmental and economic law are increasingly being addressed within human rights law by, *inter alia*, the UN Committee on Economic, Social and Cultural Rights, which monitors the implementation of the *International Covenant on Economic, Social and Cultural Rights*.²³

¹⁶ *Rio Declaration on Environment and Development*, United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/6/Rev.1, (1992), reprinted in 31 I.L.M. 874 (1992) at Principle 4. See also the *Stockholm Declaration* (1972) at Principle 13.

¹⁷ This means that not all aspects of international environmental law are international sustainable development law. For example, animal rights, the conservation of 'charismatic mega-fauna', and trans-boundary environmental disputes do not necessarily address sustainable development problems.. A. Boyle & D. Freestone, "Past Achievements and Future Challenges" in W. Lang, *supra* note 6 at 6.

¹⁸ *Rome Statute of the International Criminal Court*, 17 July 1998, U.N. Doc. A/CONF.183/9 (1998).

¹⁹ *North America Agreement on Environmental Cooperation* (Washington, Ottawa, Mexico City), 8, 9, 14 September 1993, in force 1 January 1994; 32 I.L.M. (1993) 1480.

²⁰ M. Cordonier Segger, et al. *Ecological Rules and Sustainability in the Americas* (Winnipeg: IISD/UNEP, 2002)

²¹ 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. For Canada, see DFAIT, *Framework for Conducting Environmental Assessments of Trade Negotiations*, February 2001, <http://www.dfait-maeci.gc.ca/tna-nac/Environment-e.asp>. For the USA, see *Environmental review of trade agreements*, Executive Order 13.141, 16 November 1999, Federal Registry 64.222 18.11.1999 63. See also EXECUTIVE OFFICE OF THE PRESIDENT Office of the United States Trade Representative (USTR), *Guidelines for Implementation of Executive Order 13141: Environmental Review of Trade Agreements*, Tuesday, December 19, 2000, ACTION: *Guidelines for implementation of Executive order 13141-environmental review of trade agreements: final*, in Federal Register Bd. 65 Nr. 244 S. 79442 ff. For the EU, see C. Kirkpatrick, N. Lee and O. Morrissey, *WTO New Round: Sustainability Impact Assessment Study (Phase One Report)*, and C. Kirkpatrick, N. Lee and O. Morrissey, *WTO New Round: Sustainability Impact Assessment Study (Phase Two Report)*, available in electronic form at <http://fs2.idpm.man.ac.uk/sia/Phase2/EXSUMFINAL.htm>

²² See for example *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Complaint by Canada)* (18 September 2000), WTO Doc. WT/DS135/R (Panel Report); *United States- Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by Mexico et. al.)* (20 September 1999), WTO Doc. WT/DS58/AB/R (Appellate Body Report) and *EC - Measures Concerning Meat and Meat Products (Hormones) (Compliant by USA and Canada)* (13 February 1998), WTO Doc. WT/DS26/AB/R, WT/DS48/AB/R. online: World Trade Organization <<http://docsonline.wto.org>> (last accessed: 8 August 2001).

²³ It has stated that the right to health is violated by the "the failure to enact or enforce laws to prevent the pollution of water, air and soil by extractive and manufacturing industries." CESCR, *General Comment No.14*, UN Doc. E/C.12/2000/4, at para. 51. Similarly, the right to food requires the international lending agencies to pay

- **Highly integrated new regimes:** Finally, certain highly integrated treaty provisions and customary principles are now being drafted and ratified, or brought to the fore. Few complete examples exist, but treaties worth further review include the 1994 *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, which attempts to slow the advance of encroaching deserts often created by environmental and economic pressures, primarily for social development (health and community well-being) goals,²⁴ also the 1992 *Convention on Biological Diversity* and the recent *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, which was adopted by the Conference of the Parties to the Convention on 29 January 2000, and which contains provisions regulating trade in genetically modified organisms for social and environmental objectives.²⁵

Prospects for ISDL

In preparation for the 2002 World Summit on Sustainable Development (WSSD), it will be important to strengthen the ISDL agenda, highlight the contribution of international law to sustainable development, and survey innovative ISDL instruments for best practices. This will lead to ISDL recommendations for the 2002 WSSD. Such an agenda should be based on three starting points:

First, international sustainable development regimes and institutions are essential and necessary: they address real global and regional problems and provide an essential forum for dialogue. And international legal frameworks provide a subtle but important baseline for international governance. As such, existing international treaties, institutions and principles in all fields- social, economic and environmental law- must be taken into account when developing sustainable development governance proposals.

Second, as a dynamic goal, sustainable development can help three key areas of law (trade and investment, human rights and development, environment) to meet the needs of present and future generations. Emerging principles of ISDL can provide valuable legal guidance at the intersections of social, economic and environmental obligations. ISDL also consists of integrated instruments and legal mechanisms that serve to bring different constituencies and areas of law together.

Finally, ISDL is not about the environment alone. It is not another 'softer' word for international environmental law, and does not simply refer to environmental law for developing countries, either. It addresses a key sustainable development concept of "needs, in particular the essential needs of the world' poor, to whom overwhelming priority should be given."²⁶ ISDL requires integrating social, economic and environmental law, on the international level. As such, environmental programming is extremely important and must be strengthened. But it is far from being the only place where ISDL must be practiced. Other aspects of the United Nations system, powerful international actors, particularly those with economic and social mandates, must seek ways to realise their sustainable development objectives.

An ISDL Agenda Beyond the 2002 WSSD?

Beyond the 2002 WSSD, sustainable development will have considerable impact on contemporary international law.

attention to the right to food in their lending and credit agreements, and in international measures to address the debt crisis., *General Comment No.12*, UN Doc. E/C.12/1999/5 at para. 41

²⁴ *Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification*, 17 June 1994, 33 I.L.M. 1328.

²⁵ See the 1992 *United Nations Framework Convention on Biological Diversity*, 9 May 1992, 31 I.L.M. 849 at Art 6.

²⁶ World Commission on Environment and Development (Brundtland Report), *Our Common Future* (Osford: Oxford University, 1987) at 43.

In future implementation of ISDL, six areas in particular can be identified where all three fields of law clearly intersect on the international level:

- *Sustainable International Trade, Investment and Competition Law*: The environment and development aspects of laws which govern the regional or global trade in goods and services, sustainability reviews, and analysis of the interaction of trade with parallel environment, labour and development regimes.
- *International Law of Sustainable Natural Resources Use and Stewardship*: The legal aspects of emerging regimes for more sustainable mining, energy, fishing, certain types of forestry and agriculture and other natural resource use.
- *Sustainable International Biodiversity Law*: International law concerning trade in genetically modified organisms, international food security, forests, indigenous and traditional resource rights.
- *Sustainable International Climate Change Law and Vulnerability*: Legal aspects of joint implementation of emissions reduction commitments, emissions trading and development of clean energy technology, as well as vulnerability to disasters linked to climate change.
- *Sustainable International Health Law*: The international health law-making processes, regulation of international health services, trade in hazardous waste and products, international trade and access to medication, environmental law and the right to health.
- *Sustainable International Human Rights Law and Poverty Eradication*: Human rights aspects of environment, trade, investment and development activity, resources mobilization for poverty eradication, the right to participation, access to information, technology and justice, international debt

Important questions include what are the innovative, open and integrated ISDL principles and instruments in this area of intersection? Are there success stories that can be built upon? What are priorities for future research, implementation, and capacity building agendas?

New legal mechanisms and instruments for ISDL provide some success stories. Recent progress in areas such as foreign direct liability, responsibility and compensation mechanisms, human rights related to the environment, advance informed consent or benefit-sharing provisions should be examined. What characterizes the treaty, judicial and contract law regimes for these instruments? How do they provide solutions in areas of intersection between international trade, environment or development laws?

There is an essential procedural aspect to ISDL, as noted above. Transparency, participation and access to justice are key characteristics of successful ISDL. What are innovative mechanisms to foster transparency and public participation, and can these be strengthened in all aspects of ISDL? How can access to justice be ensured in sustainable development disputes?

ISDL needs to be effectively financed, if its goals are to be realised. What is the role of the private sector, and can ISDL instruments help to ensure that conditions exist to fulfill development commitments? How can investment and international assistance for environmentally and socially sustainable technologies, projects and systems be encouraged through ISDL?

Finally, ISDL is only successful when it can count on full and meaningful compliance. How can innovative co-operative mechanisms for effective monitoring, implementation and enforcement be designed to support the goals of ISDL?

The 1972 *UN Conference on the Human Environment* defined some of the key problems, and laid structures in place to seek solutions. The 1992 *UN Conference on Environment and Development* attracted world attention to the problems, and launched groundbreaking processes for international cooperation. The 2002 *World Summit for Sustainable Development* in Johannesburg must focus on priorities, concrete deliverables, and instruments to implement the sustainable development agenda

in partnership with all actors. The legal community of judges, professors, policy makers and professionals, if harnessed, can be a powerful force for change in all countries.

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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