

RESOLUTION 05/2022

COMMITTEE ON SUSTAINABLE DEVELOPMENT AND THE GREEN ECONOMY IN INTERNATIONAL TRADE LAW

The 80th Conference of the International Law Association, held in Lisbon, 19-24 June 2022:

HAVING CONSIDERED the Reports of the Committee on Sustainable Development and the Green Economy in International Trade Law,

RECALLING the 1992 Rio Declaration, the Preamble to the Agreement Establishing the World Trade Organization (WTO), the 2030 Agenda for Sustainable Development, the UN Human Rights Council Resolutions 48/10 and 48/13 of 8 October 2021 on the Right to Development and the Human Right to a Clean, Healthy and Sustainable Environment respectively,

RECOGNISING the existential threat posed by the climate crisis, and the transboundary risks posed by climate change to States, the global commons, and ecosystems,

RECOGNISING ALSO, the important role that international trade law can play in the pursuit and realisation of sustainable development and the creation of a green economy to mitigate this threat,

ACKNOWLEDGING that in pursuing the realisation of sustainable development and the creation of a green economy, voices of developing countries and least developed countries may be excluded or side-lined,

CONVINCED that sustainable development, climate change policies, and trade require effective coordination of norms, institutions, and actors – both public and private, and that such coordination should be based on the principle of solidarity,

CONFIRMS the well-established ability of governments to pursue environmental policies in accordance with their WTO obligations,

STRESSES the central role of international trade law, including binding dispute settlement in respect of any internationally agreed rules, to avoid the introduction of disguised restrictions on trade or discriminatory measures under the guise of an environmentally-sound trade policy,

EMPHASISES that the pursuit of climate-supportive trade policies should balance the need for urgent action with active and meaningful participation by all interested parties, both public and private,

ENDORSES the principle of mutual supportiveness between trade and the environment, including the practice of interpreting WTO law harmoniously with international environmental law in accordance with customary rules of interpretation of public international law by all relevant actors, and at all stages of norm development, including trade negotiations and dispute settlement proceedings,

ADOPTS the Lisbon Recommendations on Sustainable Development and the Green Economy in International Trade Law annexed to this Resolution,

REQUESTS the Secretary-General of the International Law Association to forward this Resolution, along with the Recommendations annexed to it, to the UN Secretary-General and relevant UN specialised agencies and programmes, the Director-General of the WTO, the Director-General of the World Intellectual Property Organization, the Secretary-General of the UN Conference on Trade and Development, the Secretary-General of the Organization for Economic Cooperation and Development (OECD), and other relevant intergovernmental and non-governmental organisations for their consideration, including organisations at the regional level,

RECOMMENDS to the Executive Council that the Committee, having completed its mandate, be dissolved.

ANNEX

LISBON RECOMMENDATIONS ON SUSTAINABLE DEVELOPMENT AND THE GREEN ECONOMY IN INTERNATIONAL TRADE LAW

I. Meaningful Participation and Engagement

1. Governments should ensure that meaningful participation by developing countries and least developed countries (LDCs) is secured in any discussions that touch on their interests at an early stage in the development of any new instrument for climate-supportive trade policies.
2. Governments must continue and expand efforts to support participation of developing countries and LDCs in all multilateral fora relevant for trade, including the WTO, international standard setting bodies, and institutions of regulatory cooperation. Participation should include government representatives and relevant interest groups where appropriate.
3. Any new obligations on States should wherever possible be matched by support for technical assistance and capacity-building, explicitly identified and funded through commitments.

II. Subsidies and Sustainability

1. WTO Members should work to link the climate harmfulness of agricultural subsidies with the rules disciplining subsidies under the Agreement on Agriculture (AoA) and to ensure climate-friendly agricultural subsidies, which are not otherwise prohibited, are not subject to disciplines. In particular, they should:
 - i. Initiate discussions in the Committee on Trade and Environment (CTE) and/or the Trade and Environmental Sustainability Structured Discussions (TESSD) to develop a plan to study this issue and a timeline for synthesizing and publishing information documenting the degree to which (a) climate harmful agricultural subsidies are not disciplined under the AoA and (b) climate-friendly agricultural subsidies are disincentivised by the current WTO rules;
 - ii. Place on the negotiating agenda the issue of reforming agricultural subsidy disciplines so that the disciplines align with the climate friendliness or unfriendliness of the subsidies and thereby encourage measures such as R&D subsidies tied to lowering the greenhouse gas (GHG) emissions generated by various types of agricultural production, while discouraging subsidies that, while not distorting production, are incentivizing agricultural production that generates high levels of GHG emissions;
 - iii. At a minimum, consider forming a Joint Statement Initiative (JSI) with the objectives set out in ii, subject to securing meaningful participation of relevant parties; and
 - iv. Take a holistic approach to food security, consistent with the sustainable food systems approach of key UN specialised agencies and programmes in the food and agricultural community. In particular, WTO Members should assess whether the current rules on trade and food security could be better aligned with this approach, in light of the *status quo* of some developing country Members going beyond the use of public stockholding (which is permitted under the AoA) and additionally restricting food exports indirectly through other means, including tariffs and quotas on imported foodstuffs.
2. WTO Members must finally deliver on their commitment to eliminate subsidies that contribute to illegal, unreported, or unregulated fishing, and prohibit certain forms of subsidies that contribute to overcapacity and overfishing under Sustainable Development Goal (SDG) 14.6. They should:
 - i. Begin work immediately to develop comprehensive disciplines in relation to certain forms of subsidies that contribute to overcapacity and overfishing, drawing on the previous draft Agreement circulated on 24 November 2021;
 - ii. Make specific commitments where possible to support the WTO Fisheries Funding Mechanism. Members should continue to work with, and through, other relevant organisations, such as the

- Food and Agriculture Organization (FAO) and regional fisheries management organisations (RFMOs), to provide technical assistance and capacity building in relation to improving fisheries management and the surveillance of harmful fishing practices; and
- iii. Continue to further elaborate rules on fisheries subsidies under preferential trade agreements (PTAs), in line with commitments made, and expected to be made, at the WTO. Any such rules should be mutually supportive of trade and environmental commitments by building on both WTO commitments and the existing legal framework for maritime conservation.
3. WTO Members must deliver on their commitment at COP26 to accelerate efforts to phase-out inefficient fossil fuel subsidies (FFS). They should leverage international trade agreements, in close collaboration with other intergovernmental institutions, to:
 - i. Develop new rules targeting FFS to limit their environmentally-harmful impact. New rules on FFS should take into account the different circumstances of WTO Members by (for example) exempting LDCs, linking subsidy phase-outs to technical assistance and capacity-building, providing technology transfers, and/or providing an exemption (or longer implementation periods) for subsidies aimed at providing energy access to low-income communities; and
 - ii. Improve the mandatory notification regime under the Agreement on Subsidies and Countervailing Measures (ASCM), increase the use of cross-notification, and more consistently address FFS in WTO Members' Trade Policy Reviews. Additionally, strengthen transparency of FFS through the improvement of voluntary notifications.
 4. WTO Members should continue to support the uptake of low-carbon and environmentally-sound technologies (ESTs). Where support takes the form of subsidies, such subsidies should be:
 - i. Granted only insofar as necessary to achieve an environmentally-positive impact (by, for example, promoting the generation of energy from renewable and sustainable sources);
 - ii. Limited to the minimum amount needed to achieve the legitimate environmental objective, and take into account any potential negative trade effects (in particular for developing countries and LDCs);
 - iii. Origin-neutral (that is, available to imported and domestic products) and not conditioned on local content requirements; and
 - iv. Duly notified in a timely manner under the mandatory notification regime under the ASCM and through voluntary notifications.

III. Environmentally-Beneficial Market Access

1. Governments that seek to introduce a border carbon adjustment (BCA) to ensure the accurate reflection of carbon costs in products, and avoid carbon leakage, should ensure that any BCA:
 - i. Is subject to consultation with partners. Governments should develop a common position on BCAs or mutual recognition agreements with third countries, or an international agreement on principles and best practices for the creation and implementation of BCAs;
 - ii. Is developed in line or in cooperation with ongoing work at international standard setting bodies where all standardising bodies can be represented (such as the International Organization for Standardization);
 - iii. Is preceded by genuine and substantial efforts to agree common positions on carbon prices internationally;
 - iv. Follows principles of fairness and due process, and provides for sufficient flexibility to take into account the specific conditions prevailing in any exporting country, and be consistent with international trade and environmental law and principles;
 - v. Leads to stronger climate action by incentivising GHG emission reductions and avoiding any features that undermine the environmental effectiveness of the measure; and
 - vi. Is designed with developing countries and LDCs in mind. This may include exemptions for LDCs or channelling revenues from the BCA to developing countries to support low-carbon and climate-resilient development. In line with commitments under the UN Framework Convention on Climate Change and the Paris Agreement, BCAs adopted by developed

- countries should, *inter alia* respect the principle of common but differentiated responsibilities, and be flanked by additional financial, technological, and capacity-building support to help with the implementation of commitments under climate change treaties.
2. Governments should continue efforts to liberalise environmental goods and services. Specifically, they should:
 - i. Revive efforts to conclude the Environmental Goods Agreement at the WTO. Members should view unilateral, bilateral, and regional efforts to liberalise trade in environmental goods as complementary to building momentum for multilateral negotiations;
 - ii. Work closely with relevant organizations, such as the OECD and the United Nations Environment Programme (UNEP), to develop an objective set of criteria to determine the classification of environmental services and their inclusion in any future negotiations. Any work undertaken should be used as the basis for negotiations on environmental services liberalisation at the bilateral, regional, or multilateral level; and
 - iii. Prioritise the liberalisation of environmental goods for their Generalised System of Preferences (GSP) schemes. Where GSP schemes are conditioned on environmental performance, Members should consult closely with developing and LDC partners and, wherever possible, base their criteria on internationally agreed standards and principles.

IV. Green Supply Chain Governance and Natural Resources Management

1. Governments should ensure that private actors are not able to ‘opt-out’ of national environmental commitments and should, where appropriate, ensure compliance across transnational supply chains. When designing or implementing supply chain due diligence obligations, governments should:
 - i. Recognise the importance of internationally agreed standards and accountability mechanisms and prioritise their use where possible, as the basis for any national obligations;
 - ii. Consult actively and meaningfully with private actors in developing countries and LDCs when creating new obligations. Additional obligations imposed on private actors from developing countries or LDCs should be accompanied by suitable commitments in relation to technical assistance or capacity-building; and
 - iii. In the case of WTO Members, recognise their obligations under the Agreement on Technical Barriers to Trade (TBT) and encourage private standard setters to base their approaches on internationally agreed standards and related accountability mechanisms. To support this process, Members should make funds available to ensure that environmentally-beneficial standards are freely available to businesses (especially Micro, Small and Medium-sized Enterprises), prioritising those in developing countries, LDCs, and those that have made commitments under ‘Race to Net Zero.’
2. WTO Members should maximise the use of flexibilities currently available to them under WTO law in relation to government procurement and encourage the conditioning of procurement contracts on objective criteria in relation to environmental performance and outcomes, where possible, based on internationally agreed standards.
3. Governments should support sustainable forestry management and trade in forestry products. They should:
 - i. Work closely with each other and standard setting bodies to develop transparent and effective mechanisms for the certification of sustainable forestry products. Plurilateral approaches, such as the Agreement on Climate Change, Trade and Sustainability, may provide a useful basis for these efforts;
 - ii. Consider a scheme of regional forestry management, drawing on lessons learned from fisheries management, and presume compliance of products where harvested or produced within areas covered by such agreements;
 - iii. Work with and through the World Customs Organization to ensure that the Harmonized System incorporates separate tariff lines for species, subspecies, and varieties of flora at risk, including

- those identified under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the UNEP World Conservation Monitoring Centre; and
- iv. Continue the practice of cross-referencing obligations under relevant MEAs, such as the CITES, to enhance mutual supportiveness between trade and environmental objectives under their PTAs. Governments should consider recognising specific standards relating to sustainable forestry management under their PTAs (drawing on the example of other sectoral approaches, such as the automotive sector).
- 4. When concluding trade, investment, and development agreements affecting sustainable water usage, sanitation, and health, governments should pay greater attention to the supply and distribution of water, with no party being obliged to allow its commercial use.

V. Creating, Sharing and Protecting Green Knowledge

1. Governments should recognise that a future green economy is expected to rely on the dynamic development of ESTs and their use in mitigating or adapting to climate change. The international framework for intellectual property (IP), therefore, should remain sufficiently flexible to allow governments (and, in particular, WTO Members) to balance incentives for new technologies with their dissemination and transfer. Future IP provisions should be drafted accordingly.
2. Governments should draw on lessons from other fields of technology, such as digital networks, to ensure that international IP norms are set and applied in a manner that allows legislators and courts to adapt to fast-moving technological and social change.
3. Governments should be careful not to bind themselves to Trade-Related Intellectual Property Rights (TRIPS)-plus commitments, which may not afford sufficient flexibility to accommodate appropriate responses to the development and transfer of ESTs to mitigate and adapt to climate change.

VI. Governing Sustainability and the Role of Dispute Settlement Structures

1. Governments should ensure that Trade and Sustainable Development (TSD) chapters are included in PTAs with a view to strengthening the mutual supportiveness between trade and environmental policies and international agreements in both legal and institutional terms.
2. At the same time, governments should ensure that they recognise the importance of other relevant PTA chapters (such as on subsidies, rules of origin, or market access) for sustainable development and the creation of a green economy.
3. Governments should ensure that procedures and mechanisms fostering active civil society participation in decision-making are strengthened under both domestic law and PTAs. Such approaches could include the expansion of reporting of complaints under TSD chapters by individuals, or through national agencies (similar to those commonly available for trade remedies).
4. WTO Members should draw inspiration from the practice under PTAs and pre-existing multilateral negotiations to provide guidelines for the interpretation and application of exceptions under WTO law invoked for the justification of environmental measures with an impact on trade. Such guidelines could be adopted by Decision of the CTE to provide greater certainty.

VII. Sustainability and WTO Reform

1. Recognising the central role that the WTO can and should play in supporting the mutual supportiveness between trade and environmental measures, WTO Members should continue – and expand – their efforts to explore options for trade measures that promote sustainability, circular, and green economies within the WTO legal framework.
2. WTO Members should consider embedding consideration of sustainability concerns in the work of all WTO bodies, not only the CTE. In particular, they should consider the potential role of the Trade Policy Review Mechanism, the Committee on Regional Trade Agreements, the SCM Committee and the structured discussions between like-minded Members, such as the TESSD, Informal Dialogue on

Plastics Pollution and Environmentally Sustainable Plastics Trade, and Fossil Fuel Subsidies Reform, as forums for discussion.

3. WTO Members should adopt a broad view of WTO reform, to include improving the effectiveness of WTO rules and the WTO as an institution in line with the UN SDGs. This includes the search for new options for the WTO's institutionalised dispute settlement mechanism, which would allow for the effective and inclusive enforcement of any new commitments that necessarily impact on sustainable development or the green economy.
4. WTO Members should analyse the practice and effects of plurilateral efforts (such as the JSIs) and their relation to the WTO framework and WTO decision-making processes. The desire to pursue further advances, especially in relation to climate supportive policies, should be accommodated at the WTO by preference, even if by groups of Members. WTO Members are encouraged to develop best practices in relation to the use of JSIs, drawing on the experience of groups, such as the TESSD, with active stakeholder engagement, to ensure that they support inclusiveness of all WTO Members and their interests, including developing country and LDC Members.