

# Economic Dimensions of Sustainable Development Law – Future Generations and the Economy

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# Overview

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# Introduction

- Current constitutional provisions on economy and sustainable development in Hungary:
- Article 9 [Economy, property, free competition] (1) The economy of Hungary is a market economy, in which public and private property shall receive equal consideration and protection under the law. (2) The Republic of Hungary recognizes and supports the right to enterprise and the freedom of competition in the economy.
- Article 18 [Healthy environment] The Republic of Hungary recognizes and shall implement the individual's right to a healthy environment.
- Proposal 5 by the Commissioner for Future Generations in Hungary on the economic dimensions: “For the sake of environmental protection and in the interest of future generations, proprietary rights may be limited by law even without compensation.”
- Against the background of international economic law and in comparison with other constitutions/jurisprudence, is the current version representing what a modern constitution should contain?
- Is Proposal 5 a useful addition?

# CISDL



**The Centre for International Sustainable Development Law (CISDL)**  
[www.cisd.org](http://www.cisd.org)

- **Dialogue:** Conferences (*Sustainable Justice 2002: Implementing International Sustainable Development Law*, Montreal); Legal Experts Panels (WSSD, UN CBD, WTO, UNCCD); Academic Workshops (McGill, Yale, Oxford), etc.
- **Curriculum:** Legal Seminars & Courses (McGill, Oxford, UVic, Capetown, UdM, Cambridge, Chile, etc.); Judicial Education (UNEP, IDLO, NJI).
- **Research:** Six Research Programmes, led by nine Lead Counsel, with over 80 Legal Research and Associate Fellows and a Student Research Group.
- **Publications:** *Sustainable Development Law: Principles, Practices & Prospects* (Oxford University Press, 2004); *Sustainable Justice* (Martinus Nijhoff, 2004); *Sustainable Development in World Trade Law* (Kluwer Law International, 2005); *World Trade Law in Practice* (Globe, 2006); *Sustainable Development in World Investment Law* (Kluwer Law International, 2010) etc.

# 1. Global Trends – Trade and Sustainable Development

- **Building on the 1992 UN Conference on Environment and Development (Rio ‘Earth Summit’)**
- **Addressing economic interdependence in the 2002 Johannesburg World Summit on Sustainable Development.**
- **“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.”**
- **WSSD recognized the need to balance and reconcile economic, social and environmental priorities**

# 1. Global Trends – Trade and Sustainable Development

- *US - Shrimp Turtle Case* WTO Appellate Body: “We believe [the objective of sustainable development] must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement.”
- Current WTO negotiations and cases reflect that the objective of sustainable development has become an integral part of the world trading system.
- Not just aimed at economic liberalisation but rather balancing of competing public interests.
- Future generations represented in large margin of discretion by WTO member states (for example “reasonable health official” in *EC-Asbestos* case)
- WTO as such does not determine national priorities – full discretion how to regulate economy (as long as it is not discriminating).

## 2. Global Trends – Investment and Sustainable Development

### An Emerging Network of Int'l Investment Agreements (IIAs):

- Current int'l legal framework governing foreign investment consists of a vast network of over 2700 IIAs, in addition to 350+ trade treaties, some of which have investment chapters.
- IIAs seek to create 'favourable conditions' or a 'stable framework' for investment, for economic development, by impose binding obligations on States re: treatment of foreign investment:
  - (i) a wide asset-based definition of investment;
  - (ii) guarantees of non-discrimination (national and most-favoured-nation treatment);
  - (iii) a minimum standard of treatment often expressed as 'fair and equitable treatment' coupled with an obligation not to impose arbitrary or discriminatory measures;
  - (iv) the right to transfer investments and profits out of the host state; and
  - (v) compensation for measures tantamount to expropriation.

## 2. Global Trends – Investment and Sustainable Development

**Concerns: Would investors try to use IIAs to attack rules adopted in the interest of sustainable development or future generations?**

- In most IIAs, foreign investors enforce new rights through investor-state arbitration provisions, using State's general consent to arbitration.
- **Concern:** IIA rules on 'regulatory expropriation' might limit pollution control measures
- **Concern:** IIA rules on 'fair & equitable treatment' might constrain introduction of new environmental rules
- **Concern:** IIA rules on 'transparency & notification' might constrain new laws
- **Concern:** Expansive reading of expropriation might constrain balancing of economy and the environment

**Concerns founded on cases**

Such concerns first raised in 4 controversial claims under *North American Free Trade Agreement* (NAFTA) Ch 11 :

\* *Ethyl v. Canada*: challenged export/inter-provincial trade ban on MMT fuel additives;

\* *Azinian v. Mexico*: challenged cancellation of a municipal waste concession;

\* *Metalclad v. Mexico*: challenged closure of a hazardous waste site; and

\* *Methanex v. United States*: challenged Californian ban on the use of MTBE, another fuel additive.



## 2. Global Trends – Investment and Sustainable Development

### Potential for Progress: Can IIAs promote investor confidence, wise regulations and more sustainable investments?

- Recent *Parkering* arbitral award and other ‘jurisprudence’ suggests public interests can be included in assessment of ‘like circumstances’ ...
- “The policy rationale for expropriation protection cannot rest on a general principle of protection against wealth deprivation. Many regulations result in some form of wealth deprivation. Police power regulation allows for wealth deprivations when the state determines drastic action is required to protect the populace...” (Newcombe 2010)
- As long as governmental/state action is transparent and has a level of predictability, IIAs leave states with large margins of discretion.
- As such, under police powers more than just limitations of property rights are permitted in international investment law.

## 4. Global trends - sustainable economic law in national constitutional law

Example: German Constitution, Article 20a Basic Law 1994

“The state, also in its responsibility for future generations, protects the natural foundations of life and the animals in the framework of the constitutional order, by legislation and, according to law and justice, by executive and judiciary.”

- Similar to the European Court of Human Rights jurisprudence, there was a constitutional consensus that the emerging environmental protection regimes fulfills an important constitutional function and serves to protect fundamental rights – in particular human dignity and right to health.
- Introduction has facilitated environmental friendly legislation and constitutional jurisprudence.

## 4. Sustainable Economic Law in National Constitutional Law

- BVerfG, 2 BvG 1/00 of 5.12.2001, Bavaria trying to force the Federal Government to explore the salt mine in Gorleben as a final nuclear deposit – questionable if nuclear deposit is warranted by Art 20a but no sub-federal entity can as such rely on this provision.
- BVerfG, 1 BvR 1031/07 of 25.7.2007 - Taxation of biofuels decision – state has large margin of discretion how to protect the environment; economic disadvantages for the German biofuels industry are irrelevant for this provision.
- BVerfG, 1 BvR 1178/07 of 10.11.2009 - Final Nuclear Depository Konrad – Can the litigants rely on Art. 20a in conjunction with their fundamental rights – Court left the question open due to large margin of discretion by the State.
- BVerfG, 2 BvF 1/07 of 12.10.2010 - Provisions on keeping laying hens unconstitutional – “Art. 20a requires the state to protect animals. Animal welfare is a concern of constitutional status which is to be taken into account in the decision on the weighing of interests. The legislative bodies must take account of animal welfare as an aim of state policy in appropriate provisions; in this connection, they have a broad drafting discretion.”

## 4. Sustainable Economic Law in National Constitutional Law

- BVerfG, 1 BvF 2/05 of 24.11.2010 - Genetic Technology Act
- “In its possibility of deliberately creating changes in genetic makeup, genetic engineering intervenes in the elementary structures of life. It is extremely difficult or impossible to reverse the consequences of such intervention. Once genetically modified material has been released into the environment, it is difficult or impossible to restrict its spread. The legislature has a particular duty of care in view of the fact that the state of scientific knowledge has not yet been finally established when assessing the long-term consequences of the use of genetic engineering. In making law, it must not only balance the constitutionally protected interests affected by the use of genetic engineering on the one hand and their regulation on the other hand, but must similarly comply with the duty contained in Article 20a GG to also protect natural resources with responsibility for future generations.”
- In other words, the legislator has a duty to carefully balance economic interest and sustainable development.

# Conclusion

- The current constitution does not reflect advances in the debate about economy and sustainable development at the international level. An overemphasis of private property in this context appears out of date.
- Proposal 5 by the Commissioner for Future Generations provides a useful update and rather conservatively reflects the current status of the debate in international economic law, given that regulatory expropriations may be permitted for similar reasons.
- A more 'adventurous' constitutional proposal, could actively embrace the transition to a green economy. It could signal to the constituents (and courts) that the intent of sustainable development for the benefit of future generations is to foster rather than frustrate new economic activity. This helps both to balance, and also to channel development in more sustainable directions.

Many thanks

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### 3. Sustainable Development in the EU

- Introduced as an objective of the Community in the *Treaty of Amsterdam* (Art. 2 EC).
- EU's 2002 Council Decision on A Strategy for Sustainable Development, the well-known Brundtland definition for sustainable development was adopted: "Development that meets the needs of present generations without compromising the needs of future generations."
- In Art. 3.3 TEU Lisbon Version, clear three pillar approach, where Members agree that the EU "shall work for the sustainable development of Europe - based on balanced economic growth and price stability, / a highly competitive social market economy, aiming at full employment and social progress,/ and a high level of protection and improvement of the quality of the environment."
- In the ECJ, certain arguments have been advanced based on the sustainable development objective (see AG Leger in *First Corporate Shipping* or trade unions in *Viking/Laval*), but in very few judgments does the Court actually rely on sustainable development (perhaps the *Cartagena Protocol Opinion* and *Small Arms Judgment*).
- EU Charter of Fundamental Rights; Preamble "The Union contributes to the preservation and to the development of these common values [...]; it seeks to promote balanced and sustainable development and ensures free movement of persons, services, goods and capital, and the freedom of establishment." Then, on Solidarity, Art. 37 "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."

# 1. Sustainable Development and Trade

- The trade perspective
  - Economic growth through trade will solve all environmental problems
- The environment perspective
  - The environment is threatened by the status quo
- The development perspective
  - Poverty needs first and foremost policy attention

## The environmental Kuznets curve

Environmental Degradation

