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**SUSTAINABLE DEVELOPMENT
AS FUNDAMENTAL PILLAR
OF ECONOMIC GOVERNANCE
AND PUBLIC AFFAIRS**

**The EU Approach and International
and Domestic Perspectives**

Edited by

**ELISA BARONCINI, FEDERICO CASOLARI
PIETRO MANZINI, ATILA MASSIMILIANO TANZI
GRETA TELLARINI**

with the collaboration of **ALESSANDRA QUARTA**

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CONTENTS

FOREWORD

The Re-Globe Jean Monnet Module Project
Elisa Baroncini

IX

INTRODUCTION

*Elisa Baroncini, Federico Casolari, Pietro Manzini,
Attila Massimiliano Tanzi, Greta Tellarini*

XIII

SESSION I. THE PATH TOWARDS SUSTAINABILITY IN INTERNATIONAL INVESTMENT LAW

Comparing Diverse Approaches to Integrate Sustainable
Development Provisions in the EU and Global South
International Investment Agreements
Aditi Pandey

3

Fair and Equitable Treatment in Renewable Energy Disputes:
Balancing Investment Protection and Sustainability
Maria Laura Marceddu

23

The Energy Charter Treaty 2.0: True, Untrue, and Unintended
Consequences in the Pursuit of a Greener, More Sustainable
World Order
Ylli Dautaj

37

Innovative Energy Investments in Public Interest Under International Investment Law: The Case of Nuclear Fusion <i>Marcin J. Menkes</i>	73
---	----

Using Scientific Knowledge to Combat the “Chilling Effect” of Investor-State Disputes on Climate Policies <i>Marina-Elissavet Konstantinidi</i>	95
---	----

Enhancing Corporate Climate Responsibility: The Intersection of Mandatory Sustainability Due Diligence Laws and International Investment Agreements <i>Monika Feigerlová</i>	111
---	-----

SESSION II. SUSTAINABLE DEVELOPMENT, THE MARITIME SECTOR AND SUSTAINABLE MOBILITY

Environmental Protection and Economic Development in the Maritime Space Planning <i>Greta Tellarini</i>	137
---	-----

Smart Ports as Drivers of Sustainability <i>Elena Orrù</i>	153
---	-----

SESSION III. EU ENERGY LAW, SUSTAINABILITY AND THE EU AUTONOMOUS MEASURES

EU Energy Law and Sustainability <i>Patrick Abel</i>	183
---	-----

The European Union between Sustainable Development and Open Strategic Autonomy: Prospects for Action in Light of the 2023 Strategic Foresight Report <i>Federico Siscaro</i>	201
---	-----

The EU Approach to “Global Value Chain Regulation”: A Seismic Shift in How EU Trade Policy Interacts with the United Nations Sustainable Development Goals? <i>Josephine Norris</i>	219
--	-----

Deforestation and Sustainability in the Cocoa Sector: Analysing the Role of the EU’s Deforestation Regulation <i>Aishwarya Narayanan</i>	235
--	-----

Border Carbon Adjustment Mechanisms: Legal and Political Barriers, and the Reform of the WTO <i>Goran Dominioni and Alessandro Monti</i>	257
--	-----

SESSION IV. MULTILATERALISM, SUSTAINABILITY AND CLIMATE CHANGE

Is an Inclusive and Sustainable Multilateralism Possible? In Search of a New Global Economic Governance <i>Maria Rosaria Mauro</i>	281
--	-----

Renewable Energy Communities: A Tool of the Enhancement of the Territory, Businesses and Citizens <i>Emanuela Rassu</i>	303
---	-----

SESSION V. SUSTAINABLE DEVELOPMENT AND THE MULTILATERAL TRADE SYSTEM

Addressing the Environmental Externalities of the EU Biofuel Policy and International Trade Rules (Malaysia vs EU - DS600). Some Indications for Autonomous Trade-Related Climate Measures <i>Davide Grespan</i>	319
--	-----

E-Commerce and Sustainability: An Overlooked Nexus <i>Victor do Prado and Yanis M. Bourgeois</i>	339
---	-----

SESSION VI. SUSTAINABLE DEVELOPMENT,
FTAs AND THE EU

Labour Standards in International Trade Law: A Historical Overview <i>María Moreno Sancho</i>	373
Civil Society Engagement with Accountability Mechanisms of Multilateral Development Banks: A Critical Examination of the Follow-up Phase <i>Giulia Ciliberto</i>	391
Sustainable Development Chapters in Trade Agreements: The Emergence of a Governing Principle? <i>Emily Reid</i>	411
Some Remarks on Referring to International CSR Standards in “New Generation” EU PTAs <i>Niccolò Lanzoni</i>	431
Promoting Sustainability through Dispute Settlement. The First Practice in the New EU Trade Agreements <i>Elisa Baroncini</i>	447
Mainstreaming Social Sustainable Development Objectives in EU Free Trade Agreements. Possible Legal Implementations in the Case of Labour Standards <i>Ilaria Colombo</i>	467
Removing the Blindfold: An Analysis of the Practice of the Civil Society Mechanism in the EU FTAs in Light of the EU-Colombia FTA Example <i>Felipe Tomazini de Souza</i>	485
Women Provisions in the New Generation of EU Trade Agreements <i>Klarissa Martins Sckayer Abicalam</i>	503

Cultural Cooperation Protocols in the Preferential Agreements of the European Union <i>Alessandra Quarta</i>	521
--	-----

SESSION VII. INTERNATIONAL SUSTAINABLE FINANCE AND THE EU APPROACH

Sustainable Finance for Sustainable Development: Reforming the International Financial System <i>Tiziano Bussani</i>	539
“Gold Standards” for “Greening” Financial Flows? The “Brussels Effect” of the EU Sustainable Finance Agenda <i>Federica Agostini</i>	559
LIST OF AUTHORS AND EDITORS	579

SUSTAINABLE DEVELOPMENT CHAPTERS IN TRADE AGREEMENTS: THE EMERGENCE OF A GOVERNING PRINCIPLE?

*Emily Reid**

1. *Introduction*

The current combination of climate, weather and conflict related global challenges means that the imperative to deliver on the UN sustainable development goals (the goals) has never been greater. Yet, having passed the mid-point of Agenda 2030, the chances of achieving the goals by 2030 appear bleak. The current context, exacerbated by the lack of progress on the goals thus far, requires that all available avenues and potential mechanisms should be used to progress the pursuit of the goals. This chapter therefore provides a preliminary high level evaluation of the role of trade in the delivery of the goals, and its corollary, the role of sustainable development in shaping trade cooperation.

The proliferation of sustainable development chapters in trade agreements raises questions relating to their significance, status and effect: do these chapters indicate that sustainable development should now be recognised as an underlying governing principle of trade relations? Or, bluntly, are they little more than social-green-wash? To answer this question the first part of this chapter locates the analysis in the context of the United Nation's evaluation of the

* I am grateful to Lauren Andrews, who provided valuable research assistance for this paper.

state of progress towards the goals, and examines the inter-relationship of trade cooperation and sustainable development, focusing in particular upon the role, or potential role of trade cooperation as an instrument in the pursuit of sustainable development and the goals. This lays the foundations for the normative claim advanced in this chapter, that sustainable development *ought* to be a governing principle of trade cooperation.

The second part of this chapter provides a high-level overview and analysis of the emergence and typical features of sustainable development chapters. This feeds into an analysis, in the third part, of the substance and effect of sustainable development chapters, and the contribution these make or should make to sustainable development. This analysis highlights the distinction between the potential effect of substantive commitments contained in these chapters, in contrast to the potential effect of their institutional and oversight (process-related) innovations. The final part of this chapter provides brief conclusions regarding the extent to which sustainable development chapters in free trade agreements deliver on the normative claim advanced in the first part, that sustainable development ought to be a governing principle of trade these cooperation.

2. *The role of trade cooperation in the pursuit of the sustainable development goals?*

The goals were adopted nearly a decade ago, recognising the challenge faced in achieving sustainable development. The contemporary context, however, of ever more frequent extreme weather-related events, conflict, and instability, the consequences of which are variously environmental, social, and economic, but invariably devastating gives the universal commitment to pursuit of the goals an urgency that goes well beyond that known even at the time of their adoption.

2.1. *Sustainable development, fragmentation, and integration*

At its three-dimensional essence the commitment to sustainable development recognises that there is an inherent inter-relationship

between economic, social and environmental interests: that pursuit and protection of one cannot be sustained without the others¹. The commitment to delivering “sustainable development”, manifest in the adoption of the goals, thus requires that its three dimensions be considered and pursued together, reinforcing the need for trade which is both environmentally and socially sustainable.

The fragmented structure of international law, however, means that economic, environmental and social interests are predominantly regulated in silos: such as trade law, environmental law, labour law and human rights law. Although the specifics vary, each specialised regime has relatively little consideration of wider interests other than in some instances as exceptions, such as GATT Article XX. While there is recognition and consideration of binary interactions: for example, “trade and labour standards”, “trade and environment” or “trade and development” regulation addressing the triangulated interaction of economic, environmental and social interests is lacking. The seminal WTO trade-environment dispute, *US-Shrimp*², for example focussed upon the GATT compliance of a national environmental measure, however, a very real question concerning the social (and economic) consequences of the relevant environmental measure upon affected fishing communities was outside the scope of consideration. While the GATT general exceptions have been interpreted to include environmental measures, and the WTO recognises the need for special and differential treatment for developing countries, there is a lack of regulatory means by which effectively to tie these two considerations together. This is striking given the potentially significant impact of national environmental measures upon communities in developing and least developed states, as on the facts of *US-Shrimp*.

Adding to the limitations of the current international legal architecture and regulatory regimes, the status of “sustainable devel-

¹ Articulated as three “interdependent and mutually reinforcing pillars of sustainable development” Johannesburg Declaration on Sustainable Development, Article 5. https://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/POI_PD.htm# (accessed on 1st March 2024).

² DS58: *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (accessed on 1st March 2024).

opment” remains contested: it is variously viewed as a concept, an objective and in some instances a principle³. This leads in turn into questions regarding the nature and even existence of its normative effect. There is, however, some recognition that even if there is no consensus around the substantive normative effect of sustainable development, it has weight as a process, or as characterised by Lowe, an interstitial norm⁴. This could lend itself to application as a governing principle, which is the normative claim at the heart of this chapter.

2.2. *Agenda 2030 and the sustainable development goals: a programme in peril*

Despite the fanfare accompanying the adoption of the goals, the UN 2023 special report of progress at the mid-point of Agenda 2030 makes for sobering reading. It observes that:

Delivering change at the speed and scale required by the Sustainable Development Goals demands more than ever before from public institutions and political leaders. It requires bold decisions, [including] the transfer of resources from one sector to another, the *creation of a new regulatory environment*, the appropriate deployment of new technologies, the *advancement of longer-term holistic perspectives*, the *mobilizing of a wide range of actors* and the *capacity to advance disruptive change while strengthening trust and social cohesion* (emphasis added)⁵.

³ See among others V. BARRAL, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, in *European Journal of International Law*, 2012, 23(2), pp. 377-400; J.E. VIÑUALES, *Sustainable Development*, in L. RAJAMANI, J. PEEL (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2nd ed., 2019.

⁴ See among others LOWE, *Sustainable Development and Unsustainable Arguments*, in A. BOYLE, D. FREESTONE (eds.), *International Law and Sustainable Development: Past Achievements and Future Challenges* (1999), at 19; V. BARRAL, *Sustainable Development in International Law*, *ibid.*; J.E. VIÑUALES, *Sustainable Development*, *ibid.*

⁵ UN, *The Sustainable Development Goals Report Special edition*, 2023, at p. 48 available at <https://unstats.un.org/sdgs/report/2023/> (accessed on 1st March 2024).

Recognising the challenge inherent in this, the report notes that these “constitute a set of demands for which contemporary governance systems were not built. It is essential therefore to take action to equip governance systems for transformation”⁶.

Progress on the achievement of the goals has been disappointing, particularly since the pandemic. The principle underlying Agenda 2030 was “leave no one behind” – highlighting the need for “just transition”. Without significant renewed effort this, and the broader achievement of the goals, will be no more than a pipe dream. In this context, sustainable development as an instrument of economic governance appears to be a stretch.

In the face of this lack of progress on the goals, and in the light of the contemporary context which renders pursuit of the goals all the more important, all potential avenues must now be explored. This includes examining the role and contribution, including potential, of trade cooperation. Yet given the international legal architectural and regulatory limitations outlined above, the claim that trade cooperation may or should have a substantive role to play in supporting or catalysing progress towards the achievement of the goals, never mind that sustainable development is or should be a governing principle of trade cooperation, requires to be substantiated. One question to be addressed is what the inclusion of sustainable development chapters in free trade agreements means for the relationship between trade cooperation and sustainable development? Specifically, what role does it suggest for trade cooperation in the pursuit and achievement of the goals. As a corollary, does it indicate that sustainable development is, or is on the way to becoming, a governing principle of trade cooperation. To contextualise these questions, attention now turns specifically to Goal 17, Partnerships for the Goals.

2.3. *Sustainable development Goal 17: the role of trade and of the WTO*

The connection between the three dimensions of sustainable development has been noted above and highlighted in reference to *US-*

⁶ Above, n. 5.

Shrimp. Substantively, UNSDG 17 *Partnerships for the Goals*, explicitly recognises the role of (fair) trade in the achievement of the goals:

the Global Goals can only be met if we work together. International investments and support is needed to ensure innovative technological development, fair trade and market access, especially for developing countries. To build a better world, we need to be supportive, empathetic, inventive, passionate, and above all, cooperative.

To support this, the trade targets of Goal 17 include the promotion of a “universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization, including through the conclusion of negotiations under its Doha Development Agenda” (Target 17.10) a focus on increasing exports from developing states (17.11) and securing market access for least developed countries through the removal of trade barriers (17.12).

The WTO itself has recognised both its role specifically, and the role of trade more generally in meeting the goals⁷ and it reports annually to the UN High-level Political Forum (UNHLPF) on Sustainable Development⁸. Specifically with regard to Goal 17, it (the WTO) “recognizes the need to work in partnership with other international organizations and development partners to improve the capacity of developing economies and least-developed countries (LDCs) to participate more fully in international trade”⁹.

It is worth also noting, however, that beyond the trade context, the targets of Goal 17 include systemic targets: including “policy coherence” for sustainable development (17.14) and, recognising each country’s policy autonomy regarding poverty eradication and

⁷ https://www.wto.org/english/thewto_e/coher_e/sdgs_e/sdgs_e.htm (accessed on 1st March 2024).

⁸ See for example the 2023 update, *The WTO’s contribution to attaining the UN Sustainable Development Goals: 2023 update to the High-Level Political Forum*, available at: https://www.wto.org/english/res_e/booksp_e/un_hlpf23_e.pdf (accessed on 1st March 2024).

⁹ *Ibid.* at p. 30.

sustainable development. (17.15). In addition, targets relating to “multi-stakeholder partnerships” include the “[enhancement of] the global partnership for sustainable development” (17.16) and the encouragement and promotion of “effective public, public-private and civil society partnerships [...]”.

In the light of the conclusion in the 2023 UN Report on the SDGs, that the achievement of the goals will require “the *creation of a new regulatory environment*, the appropriate deployment of new technologies, the *advancement of longer-term holistic perspectives*, the *mobilizing of a wide range of actors*” it is clear that attention must be given to these systemic and multi-stakeholder targets, including looking at the role of trade and trade cooperation for sustainable development beyond the WTO context.

2.4. *The role of trade beyond Goal 17*

The role of trade and its potential contribution to the achievement of the goals is explicitly recognised not only in Goal 17, but also in Goal 8 *Decent work and economic growth* (target 8a requires increased aid for trade, specifically through the Enhanced Integrated Framework for Trade-related Technical Assistance to Least Developed Countries) and Goal 10 *Reduce Inequality within and among countries*. The WTO’s 2021 report to the UN HPF, however, crucially notes that trade’s contribution to Goal 10 requires to be qualified by recognition that trade has the capacity to increase inequality as well as to reduce it¹⁰. Potentially partially mitigating this, Target 10.a. requires the implementation of special and differential treatment for developing countries consistent with WTO rules.

Even a cursory review of the WTO’s annual reports for the UN-HPF confirms the contribution of trade to the achievement of each of the UNSDGs. This should not be surprising, given the three dimensions of sustainable development. It is worth noting, however, that the WTO’s 2021 report recognises, in respect of Goals 12 and

¹⁰ WTO Contribution to the 2021 High Level Political Forum, 2021, available at https://www.wto.org/english/thewto_e/coher_e/sdgs_e/wtoachsdgs_e.htm (accessed on 1st March 24).

13, the connection between trade as a contributor to the achievement of the goals and the WTO's own objectives, as set out in the *Preamble* to the WTO Agreement:

[...] raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development¹¹.

It is indeed striking that the WTO's objectives are cast in social, environmental and economic terms, reflecting earlier articulations of "sustainable development"¹² and seemingly foreshadowing the Johannesburg characterisation of the "three pillars" of sustainable development¹³.

2.5. *The inter-relationship between trade and the sustainable development goals*

The WTO thus has clearly recognised and articulated both the role of trade in the pursuit of the goals, and its (the WTO's) own role in securing this. It has furthermore recognised its potential role working in partnership with others in pursuit of the goals, for example through the establishment, together with UNCTAD and the

¹¹ Preamble, *Agreement Establishing The World Trade Organization*, https://www.wto.org/english/docs_e/legal_e/04-wto.pdf (accessed on 1st March 2024).

¹² Notably the Brundtland definition, *Report of the World Commission on Environment and Development: Our Common Future*, <http://www.un-documents.net/our-common-future.pdf> (accessed on 1st March 2024).

¹³ Much more could be said about the activities of the WTO in support of the goals, and its environmentally focussed activity but this is beyond the scope of the present chapter, which is concerned with the role of trade more generally in the pursuit of the goals, and the significance of "sustainable development" in shaping trade cooperation.

ITC, of the SDG Trade Monitor¹⁴. The role of trade, however, goes beyond the role of the WTO and even beyond the role of the WTO in partnership with others.

Trade relations, and their supporting frameworks for cooperation thus *ought* to be fully utilised as an instrument for the delivery of the goals.

Moreover, the intrinsic links between trade and sustainable development, and, crucially, the capacity of trade to not only support but also to undermine the achievement of the goals, combined with countries' commitment to Agenda 2030 and to the achievement of the goals, means that not only should trade cooperation be fully employed in the pursuit of "sustainable development", but sustainable development *ought* to be recognised as a governing principle of trade relations.

This is certainly an argument which can be made with regard to the WTO and its legal order, in the light of first the overlap between the WTO objectives, sustainable development and the goals and secondly the specific recognition both by the UN and WTO itself, of the role of the WTO in the delivery of the goals. Questions remain, however, about whether such an argument can be made about the broader context of trade and trade cooperation.

Given the contested nature of "sustainable development" and the soft law character of the goals, it might be argued that "ought" is doing a lot of work in the claim that sustainable development "ought" to be a governing principle of trade cooperation. This argument would reflect ongoing questions about the *nature* or even existence of the normative effect of "sustainable development". Despite those questions it is, as noted above, increasingly recognised that there is a normative dimension to sustainable development, albeit that this may be process-related rather than substantive in nature¹⁵. On a practical level it is, therefore, necessary to examine the significance and implications of the inclusion of "sustainable development" chapters in trade agreements in order to evaluate whether the inclusion of such chapters indicates that sustainable develop-

¹⁴ <https://sdgtrade.org/en>.

¹⁵ Above note 5.

ment is emerging as a governing principle of trade cooperation, at least in some contexts.

3. *Beyond the WTO: sustainable development chapters in trade agreements*

The inclusion of environmental, labour and human rights commitments in trade agreements has been occurring in one form or another for more than three decades. The EU, for example, has included human rights as an essential element of development cooperation agreements since the fourth Lomé Convention (1989)¹⁶. NAFTA, 1994 was particularly innovative with regard to environmental cooperation provisions and has been credited as the starting point for the inclusion of “sustainability” provisions in trade agreements¹⁷. The question of the scope and definition of “sustainable development” or “sustainability” is clearly relevant to pinpointing the origin of the development of sustainable development provisions in trade agreements. Currently, however, sustainable development is typically recognised as encompassing chapters and provisions relating to environment, labour, human rights, and cooperation and technical assistance¹⁸. Since the adoption of the goals such provisions have proliferated. In some instances, particularly in the case of EU bilateral agreements, these are now contained within what are explicitly framed as “sustainable development” parts or chapters¹⁹.

Sustainability commitments now frequently explicitly include provision for the engagement of private sector and civil society actors

¹⁶ Article 5. Art. 6 also provided for priority for environmental protection. Fourth ACP-EEC Convention signed at Lomé on 15 December 1989, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A21991A0817%2801%2>.

¹⁷ For a concise overview see <https://www.iisd.org/system/files/publications/nafta-environmental-record-commentary.pdf> (accessed on 1st March 2024).

¹⁸ See UN ESCAP, *Handbook on Negotiating Sustainable Development Provisions in Preferential Trade Agreements*, 2021, at p. 11.

¹⁹ See *inter alia*, *EU-South Korea Free Trade Agreement*, chapter 13, *Trade and Sustainable Development*. (The EU-Korea Agreement was the first of what have been recognised as a new generation of EU trade agreements, including the sustainable development chapter).

and stakeholders. This is not only consistent with Goal 17 but also supports the “mobilization of a wide range of actors” called for by the 2023 report. Similarly, there are a number of elements and characteristics of sustainable development chapters, particularly concerning implementation and oversight frameworks, which mean that they can contribute to the new regulatory environment and governance systems identified by the 2023 Report as essential in order to deliver the goals by 2030. To this extent trade cooperation can be seen to have a role to play in the delivery of the sustainable development goals.

Yet, scrutiny of practice in this field exposes multiple issues which bring into question whether sustainable development chapters are realising their potential to support the achievement of the goals; and whether sustainable development is indeed recognised as a governing principle of trade relations.

3.1. The sustainable development chapters – analytical overview

In order to answer these questions this part provides a high-level overview of key features of sustainable development chapters in selected bilateral and multilateral trade agreements. This provides the basis for a preliminary evaluation of the impact of sustainable development chapters, in particular with regard to the extent to which sustainable development chapters are realising their potential as an instrument in support of the achievement of the goals, and whether this practice might signify the emergence of sustainable development as a governing principle, shaping and/or underpinning trade relations²⁰. The overview presented here reflects conclusions drawn from a sample of trade cooperation agreements, including bi-lateral and multi-lateral agreements, between a range of partners drawn from both developed and developing countries²¹.

²⁰ This snapshot overview will highlight questions to be addressed in order to provide a definitive conclusion on the significance of these chapters, and whether they are realising their potential. Addressing these questions is beyond the scope of the current chapter.

²¹ This sample is part of a large-scale project entailing a more comprehensive review of the sustainability commitments in bi and multi-lateral cooperation agreements.

Recognising the key role of the EU and North America in driving the inclusion of human rights, labour and environmental provisions in trade agreements the sample focussed upon works outwards from EU and US/North American agreements. The spill over effects from these states' agreements to relations between third states is also, however, clearly of interest. Bilateral agreements involving other developed and developing states have also been examined, including some agreements among exclusively developing states.

The sample reviewed supports a preliminary conclusion that the proliferation of sustainable development chapters is principally contained within agreements between developed states, and between developed and developing states. There is significantly less evidence at this stage of inclusion of sustainable development chapters in agreements between exclusively developing countries. The African Free Trade Agreement, for example, does not include sustainable development commitments²².

As indicated above, the US and EU have been active in this field for three decades. As a party to NAFTA, Canada has also had long involvement in sustainability provisions in trade agreements. In recent years, however, Canadian bilateral agreements have contained some interesting developments, including a deepening focus upon indigenous peoples' rights²³. Canada can clearly be seen therefore to be operating autonomously in this context rather than simply rolling out from its original NAFTA commitments. Canada is likely to have been influential in shaping CPTPP, which in turn informs its members' bilateral relations.

While sustainable development chapters are increasingly included in agreements between developed states and some developing states, this is by no means uncontroversial or invariably wel-

²² Agreement Establishing The African Continental Free Trade Area, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (accessed on 1st March 24).

²³ E.g. Chapter 25 of the 2023 Canada-Ukraine Free Trade Agreement, <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ukraine/text-texte/2023/toc-tdm.aspx?lang=eng> (accessed on 1st March 2024).

come: the complexities and sensitivities of this are demonstrated by the experience of the EU-Mercosur negotiations in 2023-24.

One factor which should be noted is the capacity for a development initiated by one state to have a domino effect feeding into future agreements concluded by its partner states. All states are of course bound by all their commitments at once²⁴. Therefore the commitments of the UK with the EU, such as non-regression in environmental and labour standards, apply to the UK at all times. As a consequence, from a competitive perspective and setting aside any question of values, the UK has an interest in building non-regression and equivalent standards into its agreements with other partners: the UK would not want to find itself at a competitive disadvantage with other states if these partners can lower, or maintain lower standards while the UK is tied, through its commitment in the UK-EU PCA, to maintain its standards.

On the other hand, while this might be expected to be a driver for consistency in terms of substantive content, this is balanced by the fact that the content of agreements reflects what could be agreed between parties. Each party may have not only different levels of ambition in this field, but also different priorities: whether environmental, climate, labour, gender or indigenous rights²⁵. The UK's agreements with Australia and New Zealand are a clear demonstration of the compromise entailed in negotiating sustainable development commitments in trade cooperation agreements. As Australia and New Zealand are both members of the CPTPP and these agreements were negotiated while the UK was committed to accession to the CPTPP which it has indeed now joined, it might have been anticipated that these agreements would be substantively very similar. In fact, however, they have distinct sustainable development commitments reflecting different levels of commitment to prioritisation of environment and labour. Furthermore, the sustainable development commitments in both are less than those contained in the UK-EU PCA.

²⁴ Under the principle *pacta sunt servanda*.

²⁵ Chile for example has given greater focus to labour provisions than environmental.

A further factor which cannot be ignored when seeking to draw conclusions about the importance individual states ascribe to sustainable development commitments, is that the bargaining strength of each state varies in each instance according to which partner state or states are involved, inevitably impacting in turn upon the substantive content of agreements. Again, this can be seen in the variety of commitments included in agreements concluded by the UK. Drawing all of these factors together, it is unsurprising that there is seeming substantive inconsistency in state practice.

3.2. *Substance and effect of the sustainable development chapters*

One consistent feature that can be observed is that the commitments in sustainable development chapters typically reaffirm existing commitments of the relevant parties such as the Paris Agreement or ILO Declaration, rather than the parties creating new substantive obligations. Use of universal existing commitments as reference points in this way has the benefit of mitigating the suggestion of an imposition of values and suggests at least the potential for some very high-level consistency. Underlying these chapters is commitment to fostering dialogue and cooperation, through reaffirmation of existing commitments, rather than pursuing the establishment of new commitments.

In evaluating the effect of sustainable development chapters it is crucial to distinguish formal legal effect from the broader influence they may have. The very inclusion of sustainable development chapters in trade agreements has an impact. Not least, there is a snowball effect of inclusion: as this becomes more prevalent, it creates a culture whereby these chapters will become more common still. Their force and effect is also liable to develop incrementally. Australia provides a clear example of evolution in even a single country's practice: it has moved from a position of initial resistance to the inclusion of climate or human rights commitments in trade agreements²⁶ to including sus-

²⁶ On Australia's resistance to the inclusion of human rights conditionality in a trade agreement in negotiations with the EU during the 1990s see E. REID, *Balancing Human Rights, Environmental Protection and International Trade*, Hart, 2015.

tainable development chapters in its agreements with Peru²⁷, South Korea²⁸ and the UK²⁹ although both the substance and formal effect of these varies.

The agreements with Peru and Korea preclude recourse to their dispute settlement provisions for issues arising in respect of the sustainable development chapters, instead providing only for cooperation and consultations. The more recent UK-Australia Agreement does provide for recourse to dispute settlement, with regard to both the labour and environment chapters in the event that consultation and dialogue fails to reach a solution³⁰. The UK-New Zealand Agreement similarly provides for recourse to dispute settlement with regard to both labour and environment where agreement cannot be reached through consultation and cooperation³¹. Incremental shifts in the depth and strength of undertakings entered into are therefore apparent, but it cannot be said that there is a single, consistent, direction of travel. Although there are, as noted, instances in which sustainable development chapters are subject to binding dispute settlement and therefore a degree of legal enforceability, there is a greater tendency to make use of cooperative, consultative proceedings.

3.3. Implementation and oversight

The gains for sustainable development arising from the substantive commitments entered into in sustainable development chapters are limited by both the lack of consistency of content, and the tendency to reaffirm existing commitments rather than create new com-

More recently, with regard to the inclusion of climate commitments in a trade agreement see comments by Australian PM, Scott Morrison, September 2021, <https://news.sky.com/story/australia-and-uk-governments-at-odds-over-why-key-climate-targets-were-stripped-out-of-future-trade-deal-12402967>.

²⁷ Chapters 18 (Labour) and 19 (Environment) Texts of all Australia's in force free trade agreements are available at: <https://www.dfat.gov.au/trade/agreements/in-force> (accessed on 3rd March 2024).

²⁸ Chapters 17 (Labour) and 18 (Environment).

²⁹ Chapter 21 (Labour) and 22 (Environment).

³⁰ Articles 21.16.9 and 22.26 respectively.

³¹ Article 22.26.2(Environment) and 23.22 (Labour).

mitments. There are, however, a number of innovations with regard to implementation and oversight of sustainable development commitments which seek to engage stakeholders and civil society. These provisions have the potential to have a significant impact on operationalisation of substantive commitments, and on the capacity for sustainable development to be seen to shape and indeed govern trade cooperation. Among these innovations two which are potentially of particular importance, and therefore highlighted here, are the “Domestic Advisory Groups” and the USMCA Rapid Response Mechanism.

3.4. *The Domestic Advisory Groups*

Domestic Advisory Groups (DAGs) bring together independent representatives of employers, trade unions and other civil society stakeholders, comprising a balance of business, labour/social and environment expertise and interest. These groups are tasked with providing independent advice and recommendations to Governments regarding the implementation and operationalisation of sustainable development commitments contained in trade agreements. The first instance of DAGs was in the EU-South Korea Agreement, and these have now become a standard feature of the EU’s trade agreements whereby parties commit to the establishment of a DAG and to supporting regular joint dialogues or civil society forums between the respective parties’ DAGs. The UK-EU PCA therefore includes provision for a Domestic Advisory group, as do the UK’s other rollover agreements³². It is notable that the remit of the DAGs under the EU-UK Agreement extends over the entire PCA, whereas the original and still typical model was for the DAG’s remit to be limited to the sustainable development chapters. The UK has also included varying levels of provision for joint dialogue between UK and partner civil society, trade union and business stakeholders in its new post-Brexit agreements. Follow-

³² “Rollover Agreements” is the term used for the Agreements the UK entered into, replacing those it had participated in as an EU member, and incorporating them into UK bilateral agreements with the relevant partner state. For example, the UK-Japan and UK-Canada Agreements.

ing the typical model, the remit of these (with the exception of the UK-EU Agreement) is restricted to the sustainable development chapters of the relevant agreements. In addition, it is worth highlighting that the agreement with Australia, notable for being the UK's first post-Brexit new (not “rolled over”) trade agreement, includes provision for separate consultative mechanisms related to matters relating to the labour³³ and environment³⁴ chapters, as does the UK agreement with New Zealand. It remains to be seen whether this separation will have significant practical implications, but on its face, this undermines the capacity to respond to the inter-related nature of the relationship between trade, environmental protection, and social development, reverting to a more siloed approach. In practice the UK has brought the UK-Australia and UK-New Zealand agreements within the remit of its existing DAG, which covers economic, labour and environmental interests and therefore maintains a holistic overview of the sustainable development chapters, at least from the UK side.

On paper, the DAGs formalise the engagement or “mobilisation” of civil society to ensure oversight of the implementation of sustainable development chapters. In practice their activity and consequently their impact is frequently undermined by lack of resource, and a lack of feedback loop³⁵. This means that as innovative as the DAGs are, they have not yet fulfilled their potential either as a means by which to support the operationalisation and implementation of sustainable development commitments, or in terms of being able to consistently hold governments to account.

3.5. *USMCA Rapid Response Mechanism*

The USMCA “Facility Specific Rapid Response Mechanism” (RRM) provides for swift government action in the event of “a good

³³ Article 21.15

³⁴ Article 22.18.

³⁵ D. MARTENS, D. POTJOMKINA, J. ORBIE, *Domestic Advisory Groups in Eu Trade Agreements. Stuck at the Bottom or Moving up the Ladder?*, Friedrich Ebert Stiftung, November 2020.

faith basis belief that workers at a Covered Facility are being denied the right of free association and collective bargaining”³⁶. Significantly, any interested party can petition the Government if they have credible evidence of a denial of relevant rights. While the DAGs might be struggling to realise their potential, the RRM is already building evidence of some demonstrable impact: as of March 2024 the US had invoked the RRM 19 times since 2021: 14 of these cases have been resolved or concluded through remediation, benefitting 27000 workers³⁷. If it is not possible to resolve the violation of rights through remediation, penalties can be imposed directly upon the specific company in issue until a resolution is achieved. In the event of disagreement between the two Governments, either can request a panel to review the issue. The capacity under the RRM to specifically sanction behaviour and practices at an individual facility is both innovative and potentially highly effective. The RRM usefully leverages the competitive desirability of levelling the playing field to provide a mechanism by which to ensure agreed standards are upheld and specific breaches are addressed. One question is whether an equivalent process could be set up through which to respond to for example violations of environmental protection commitments. The respective bargaining strength of the parties in the USMCA is, however, a distinct factor which cannot be ignored in evaluating the potential transferability of such a mechanism to other fields or agreements between other parties.

A further development to note as best practice concerns the engagement with international organisations such as the ILO, particularly in the context of provision of technical assistance. This is consistent with Goal 17 – *Partnerships for the goals* as well as with mobilization of a wide range of actors. It is also important because technical assistance is key to the imperative to “leave no one be-

³⁶ USMCA Article 31-A.2.

³⁷ US TR, *Fact Sheet: The USMCA Rapid Response Mechanism Delivers for Workers*, Feb 9, 2024, available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/february/fact-sheet-usmca-rapid-response-mechanism-delivers-workers>. See further C.P. BOWN, K. CLAUSSEN, *The Rapid Response Labour Mechanism of the US-Mexico-Canada Agreement*, Peterson Institute for International Economics Working paper, No. 23/9, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4627560. (While the present analysis focuses on the US-Mexico RRM, there is also a Canada-Mexico RRM).

hind” and the engagement of international actors should help mitigate risks of developed states doing to developing states.

4. *Conclusions*

In terms of consistency, the potential persuasive effect of sustainable development chapters is evident, it would be difficult however to substantiate a consistent normative effect. Sustainable development chapters have clear potential as an instrument to support the pursuit of the achievement of the goals and there is some evidence that where they exist, these chapters are indeed playing a role in the pursuit of the goals.

The innovative institutional and procedural processes highlighted above are far from perfect in their operation, yet the underpinning engagement with civil society and stakeholders, and the establishment of specific procedures such as the RRM, are consistent with addressing the need for innovative regulatory mechanisms and mobilization of a wide range of actors, highlighted in the UN sustainable development 2023 special report. In this respect, therefore, there is provision within sustainable development chapters of bilateral trade agreements which manifests some of the innovation called for by the UN in its 2023 report.

If these provisions were effectively operationalised, they would have the capacity to contribute to trade cooperation playing the role it ought to in the pursuit of the sustainable development goals. The lack of resource to secure the effectiveness of some of the innovations, including the DAGs, creates, however, a risk of slippage towards what could be termed “social greenwashing”. This is something all parties should look to guard against. As noted above, rapid progress towards the achievement of the goals is an imperative. Sustainable development chapters have the potential to contribute to this and there is some evidence that in places they are (e.g. the USMCA RRM).

This chapter, however, is not only concerned with the role trade cooperation plays in the pursuit of sustainable development. It also

makes a key normative argument that sustainable development itself ought to be a governing principle of trade cooperation. The high-level overview provided above demonstrates that despite the increasing prevalence of sustainable development chapters, it cannot yet be convincingly claimed that sustainable development is a governing principle of trade cooperation. Sustainable development is undoubtedly having some impact upon the shape of trade cooperation in some contexts. It is clear, however, that its impact is far from universal: there is work to be done regarding both the consistency of provisions included, and also the parties engaged in bringing sustainable development considerations into trade cooperation. Positively, it can be observed that there is some evidence of recognition that trade cooperation should be shaped by the needs of sustainable development, and that this together with the near universal commitment to the UNSDGs provides the basis for further incremental progress. There is, however, a long way to go, and little time to get there.