

SMART DELIVERABLE

D2.2. Report on international regulatory complexity of EU trade and investment



We study the barriers and drivers for market actors' contribution to the UN Sustainable Development Goals within planetary boundaries, with the aim of achieving Policy Coherence for Development.

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REPORT ON INTERNATIONAL REGULATORY COMPLEXITY OF EU TRADE AND INVESTMENT - MAPPING AND ANALYSIS

Analysis of international and EU law for trade and investment flows between the EU and other countries of various levels of development

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Executive Summary

This executive summary of our report draws on the research and analysis of Dr Clair Gammage and Prof. Tonia Novitz (University of Bristol) who lead the 'Trade and Investment' stream of Work Package 2. Our discussions here are informed by the contributions by various SMART participants from a variety of different countries, as well as the papers presented at the SMART conference on 'Trade and Investment' in Oslo in May 2017.

Our international mapping considers the prospects for 'policy coherence for development' for regulation of sustainable market actors. This involves analysis of European Union (EU) treatment of sustainability issues in trade and investment (in part internal in relation to the EU single market, but largely focused on external action), alongside international legal and institutional developments. In so doing, we are exploring relationships between international, multilateral and regional frameworks.

In particular, we focus on four potential obstacles to policy coherence concerning sustainable development:

1. *the diverse forms of governance* that operate at international, regional and national levels and the regulatory gaps between them. We are interested in the criticism that pluralism has led to normative fragmentation that detracts from combined and reinforcing legal and policy frameworks. We point to the interactions between trade, supply chains, investment and finance and the need to find modes of linkage.
2. *access to justice*, which remains questionable in a variety of contexts. One is the standard supply chain situation where those affected are distanced from the corporate entity

ultimately responsible for harm. Others include the dispute mechanisms used in trade and investment agreements, which allow minimal recourse to human rights or other social or environmental values. Issues of standing also arise in this context.

3. *the roles of different actors* who create and enforce legal and regulatory norms in this sphere. We have a particular interest in China, the EU and the US as public actors who wield particular influence. We also observe that the ‘shrinking of the state’ in many countries (and the EU27 are no exception) is leading to arguments for stronger transnational regulation under international public law but also at national level private (including company and tort) law. The scope for innovative regulatory solutions which create hybrid actors and the scope for careful demarcation of their competence will be relevant here. In this context, we have identified the relevance of power imbalances between states but also between states and private actors. This observation leads to our identification of a fourth potential impediment to PCD and sustainability objectives –
4. the problem of *accountability*. International, regional and national mechanisms interact in complex ways involving a myriad of public, private and hybrid actors. The ways in which they interact is not always transparent and mere provision for transparency will not necessarily cure all problems. It does not help that different systems are often in conflict. This means that trade, supply chain, investment and finance regulation does not operate in ways fully accountable to democratic domestic systems. This makes it difficult to pursue sustainability objectives, even at the basic level of consensus reached in the Sustainable Development Goals (SDGs) at the United Nations (UN) in 2015.

Our report has the following structure:

1. Sustainability at the international and EU levels
2. Trade Law: The World Trade Organisation (WTO) and the role of free trade agreements (FTAs)
3. Supply chains and multilevel regulation
4. The content of investment treaties and conduct of investment arbitration
5. Funding, finance and tax: links between state and non-state actors
6. Recommendations for policy coherence: what the EU could do

I. SUSTAINABILITY AT THE INTERNATIONAL AND EU LEVELS

In this part of the report, we set out briefly what we understand to be the origins of the ideal of sustainability (or sustainable development) alongside its evolution on the world stage and in EU policy. This is not a detailed or exhaustive study, as these issues are also developed further in other SMART reports. Rather, we seek to explain the basis on which we (and other SMART contributors) draw certain conclusions in later parts of the report.

A. THE INTERNATIONAL ORIGINS OF THE IDEA OF ‘SUSTAINABILITY’ AND ITS CURRENT FORMULATIONS

We identify two strands of international legal history that led to the current SDGs: the powerful idea of environmental (inter-generational) sustainability and an intra-generational predominantly economic and social ‘development’ agenda. These symbiotic connections between the environmental, economic and social pillars of sustainable development has been given a more concrete form by Kate Raworth in her recent book on ‘Doughnut Economics’ offering scope for thinking about the interaction between economic, social and planetary boundaries.¹ We also identify sustainability as being driven by social consensus and participation at the local, national, regional and international levels,² which is recognised in SDG 16.7 which aims to: ‘Ensure responsive, inclusive, participatory and representative decision-making at all levels.’³ Further, a link can be made here between achievement of sustainability and the activities of international organisations relating to trade. One key target in SDG17 is to achieve ‘a universal, rules-based, open, non-discriminatory and equitable multilateral trading system under the World Trade Organization’,⁴ presumably relating not only to trade in goods, but trade in services and to investment too. Further, we see ‘sustainability’ as a normative interpretive tool in litigation, whether within the WTO or other settings.⁵ For example, the judgment in *Pulp Mills* refers to ‘this interconnectedness between

¹ Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (Cornerstone Books, 2017).

² Starting with the Rio Declaration, Principle 10. See <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm/>

³ A/Res/70/1 available at <https://sustainabledevelopment.un.org/post2015/transformingourworld/publication>.

⁴ SDG 17.10.

⁵ Virginie Barral, ‘Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm’ (2012) 23(2) *European Journal of International Law* 377.

equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development'.⁶ This difficult balancing exercise is now a feature of all attempts in the 2030 Agenda to apply the SDGs and may arise in any trade dispute litigation or investment arbitration also.

B. EVOLVING UNDERSTANDINGS OF SUSTAINABILITY IN THE EUROPEAN UNION

The objective of 'sustainability' is written into the constitutional fabric of the Treaty on European Union (TEU). For example, Article 3(3) of the TEU requires the EU to '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'. It is also a principle that is intended to guide the external dimension of EU activities. Article 3(5) TEU provides that: 'In its relations with the wider world, the Union shall... contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights ...'⁷

In the more detailed report, we trace this evolution and note the following aspects of EU internal market policy which address sustainability objectives:

1. Appreciation of the intersection of economic, social and environmental factors in the Treaties, EU legislation and litigation before the Court of Justice of the EU (CJEU).
2. Governance of not only member state actors (and to a more limited extent third countries) but also private actors exercising free movement rights within the EU (and seeking protection from unfair market competition), with the EU institutions placing a role on constructing the norms of fair competition in line with economic, social and environmental norms.

⁶ *Case Concerning Pulp Mills on the River Uruguay* ICJ Judgment 20 April 2010 available at: www.icj-cij.org/docket/files/135/15877.pdf at 177, discussed by Barral (2012) at 388 – 97.

⁷ See also TEU, Art 21(2)(d) and (f), according to which the EU will '*foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty*' and '*help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development*'.

3. Recognition of the significance of participatory governance, for example as regards social sustainability the practice of social dialogue.
4. The importance of mechanisms for redistribution of wealth in order to achieve market integration, for example the EC regional fund and the European Globalisation Adjustment Fund (EGF).⁸ We also observe the controversy over the 'Troika' bailout packages and austerity measures arising under the Memoranda of Understanding (MoU) in this context.⁹ The notion of fiscal sustainability was clearly central to the content of the MoU; in other words, the ambition was to provide a longer term cure for the financial instability experienced. However, there remains a concern that social objectives as well as environmental issues were overlooked.

In terms of external relations, we note that development objectives were first codified into primary law in the Maastricht Treaty (1992) and most recently in Article 208 of the Lisbon Treaty. As a legal obligation, Article 208(1) TFEU provides that 'development cooperation shall have as its primary objective the reduction and, in the long term, the eradication of poverty'. Furthermore, Article 208(2) TFEU requires that the EU and its Member States 'comply with the commitments and *take account* of the objectives they have approved in the context of the United Nations and other competent international organisations' (emphasis added). Further, under TEU, Art 21(2)(d) and (f), the EU will 'foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty' and 'help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development'. This is consistent with the more general objectives in Article 3(5) TEU. In the longer report, we analyse here three facets of 'sustainability' actively promoted by the EU in its external relations policy:

1. 'GSP+', which has evolved as a special incentive tariff arrangement for those states which ratify and apply key international instruments relating to good governance and sustainable development;¹⁰

⁸ See on the EGF, <http://ec.europa.eu/social/main.jsp?catId=326> and on other dispersal of structural funds (including the European Social Fund) by the European Commission, see <http://ec.europa.eu/social/main.jsp?langId=en&catId=325>.

⁹ See Claire Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They are Not EU Law' (2014) 10 European Constitutional Law 393.

¹⁰ Council Regulation 732/2008 O.J. L 211/1 (2008), Chapter 2, Section II.

2. the EU insertion of a 'sustainable development' facet and treatment of trade agreements with third countries (FTAs) – one of the latest examples being the Comprehensive Economic Trade Agreement (CETA) between Canada and the EU;¹¹
3. the EU 'policy coherence for development' framework, which emerged in 2006 with the adoption of the first *European Consensus for Development*¹² and was replaced by the new Consensus on Development was signed in June 2017.¹³

All three measures speak powerfully of the EU's commitment to sustainable development and (ultimately) the UN SDGs, which are largely compatible with these initiatives. The difficulty for the EU is that its capacity for action on such issues is shaped and constrained by broader international legal and regulatory dynamics. The EU needs to be aware of the actors within these structure, the power imbalances between them and the causes of existing barriers to sustainability, if the EU's own initiatives are to be effective.

II. TRADE LAW: THE WORLD TRADE ORGANISATION (WTO) AND THE ROLE OF FREE TRADE AGREEMENTS (FTAS)

The international trade regime is governed at the multilateral level by the World Trade Organisation (WTO), which is not itself a UN agency but works alongside other UN agencies such as the International Monetary Fund (IMF) and the World Bank Group in an endeavour to bring relative stability to world trade. The WTO framework recognises and enables what have become known as 'free trade agreements', which seek to substantially liberalise all trade between the parties, whether as a customs union or otherwise. FTAs can cover matters regulated under WTO auspices, such as goods and services, but also a wider range of issues which the WTO has declined to regulate, such as environmental and labour matters, alongside competition law and public procurement (many of these are colloquially known as the 'Singapore issues').

¹¹ <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

¹² See OJ C 46/1 24.2.2006 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AC%3A2006%3A046%3A0001%3A0019%3AEN%3APDF>.

¹³ Available at: https://ec.europa.eu/europeaid/sites/devco/files/european-consensus-on-development-final-20170626_en.pdf.

A. THE WORLD TRADE ORGANISATION ON 'DEVELOPMENT' AND 'SUSTAINABILITY'

Since its creation from January 1995, the World Trade Organisation (WTO) has been, at least on paper, sensitive to the requirements of developing countries and 'sustainable development'.¹⁴ The creation of the WTO was significant for many reasons, not least of which was the multilateral agreement to move beyond the provisionally applied General Agreement on Tariffs and Trade 1948 (GATT) to create forms of global regulation for services and intellectual property, alongside certain plurilateral specific agreements.

In our analysis of the WTO, we observe:

1. The WTO regime is concerned solely with the actions of states parties, while private parties and NGOs may bring pressure to bear on states and provide representations in the dispute settlement process, their roles are largely overlooked in legal terms.
2. The key WTO principles are concerned with 'reciprocity'. For example, the most favoured national (MFN) principle, which requires any WTO member to receive the same privileges regarding tariffs (GATT) or market access (GATS) as any other. There is also a requirement of 'national treatment', whereby the same rules will apply to foreign as domestic goods or services, as long as the state in question is a WTO member. Development objectives of certain states can operate under a principle of 'special and differential treatment' (SDT) as exceptions to this principle of reciprocity (see for e.g. Part IV of the GATT). The EU's GSP system is a case in point under the Enabling Clause.¹⁵ Environmental concerns can be raised as an exception under Article XX of the GATT and Article XIV GATS which enable unilateral state action under certain limited conditions.
3. The dispute settlement understanding (DSU) adopted on foundation of the WTO in 1994 is leading to significant changes. For example, it is only relatively recently that the requirement that the North operate GSP transparently and fairly has been recognised within the WTO,

¹⁴ See for example the preamble to the Marrakesh Agreement establishing the World Trade Organisation (WTO) available at: https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

¹⁵ The Enabling Clause: 'Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries' – Decision of 28 November 1979 L/4903 – appended to GATT (which continues to apply as part of GATT 1994 under the WTO) available at: https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm. See also Omphemetse S. Sibanda Sr, 'Towards a Revised GATT/WTO Special and Differential Treatment Regime for Least Developed and Developing Countries' (2015) 50 *Foreign Trade Review* 31.

due to findings of the Appellate Body.¹⁶ There is an evolving case law on the relevance of environmental protections under Article XX culminating in litigation on the *EC Seals* case, where the objective of EU measures was regarded as coming within the (a) public morals exception, but that the execution was not proportionate.¹⁷ However, developing countries have difficulty accessing and making effective use of the DSU despite initiatives like the creation of the Advisory Centre on WTO Law (ACWL) in 2001.¹⁸ Environmental NGOs have the opportunity to make submissions by virtue of WTO Appellate Body rules.¹⁹

There are a number of points to note here:

1. Environmental norms, rather than social concerns, tend to receive attention in current WTO litigation, because this is the area in which states tend to act unilaterally (especially the US) and other states object.
2. The objective of sustainable development is recognised and plays a role in ‘balancing’ competing issues in WTO litigation. Even prior to adoption of the DSU, in the *Tuna/Dolphin II* dispute, the GATT panel recognised that the ‘objective of sustainable development...includes the protection and preservation of the environment’.²⁰ In the *Shrimp-Turtles* dispute it was acknowledged that states could act together or independently on environmental concerns.²¹
3. International instruments governing environmental standards are receiving increasing recognition as the basis of state practice which could constitute a legitimate exception to standard WTO principles governing international trade. Measures taken need to be even-

¹⁶ Decision of the Appellate Body, *European Communities – Conditions for the granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 7 April 2004. For discussion, see Robert Howse, ‘India’s WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for “Political” Conditionality in US Trade Policy’ (2003) 4(2) *Chicago Journal of International Law* 385.

¹⁷ See Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, 2014, 174; discussed by Daniel Szabo, ‘Sustainable Trade Renewable Energy and the WTO’, paper delivered at Oslo SMART Conference on Trade and Investment May 2017; and Brendan McGivern, ‘The WTO Seal Products Panel: The Public Morals Defense’ (2014) 9(2) *Global Trade and Customs Journal* at 73.

¹⁸ See <http://www.tfafacility.org/advisory-centre-wto-law-acwl>.

¹⁹ For the WTO’s official outline of this practice, see:

https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c9s3p1_e.htm.

²⁰ *United States-Restrictions on Imports of Tuna* GATT Report 33 I.L.M 839 (1994) (*Tuna/Dolphin II*), para 5.42

²¹ Report of the Appellate Body, *US-Shrimp* WT/DS58/AB/R (12 October 1998), para. 185. Note also at para. 155: ‘the objective of sustainable development set out in the Marrakesh Agreement ‘gives colour, texture and shading to the rights and obligations of Members under the WTO Agreement generally, and under the GATT 1994, in particular’.

handed and not lead to arbitrary discrimination or disproportionate treatment of particular groups, such as indigenous peoples.

B. EMBEDDING SUSTAINABLE DEVELOPMENT IN FTAS

FTAs have expanded exponentially and reach across the planet in what has been described as a ‘spaghetti bowl’ effect covering a range of cross-cutting and intersecting connections.²² We examine two illustrations of the use of FTAs to extend the sustainability regulatory agenda. One is the use of FTAs in the context of mega-regional agreements which seek to protect labour standards as a facet of sustainability. This is an area in which the EU has led, although we can also identify some significant developments in the context of US initiatives. The other question with which we grapple is the concern with the sustainability of development in the Economic Partnership Agreements (EPAs) concluded between the EU and groups of African Caribbean and Pacific (ACP) states.

1. The TPP, CETA, sustainability and labour chapters

This shift towards overarching sustainability chapters has been controversial with fears that such an approach fails to recognise labour standards as human rights and loses social concerns in amidst the greater emphasis given to environmental concerns.²³ Certainly, there remain concerns with protecting labour standards, whether in discrete chapters like Chapter 19 of the TransPacific Partnership Agreement (TPP) (since been abandoned by the US Trump administration, although it seems that the other partners may be willing to proceed with its ratification and implementation)²⁴ or Chapter 23 of CETA attached still to an overarching sustainability framework. Our preliminary findings are that it is exceptionally difficult to enforce these chapters in a trade context, as is evident in the view of what ‘affects trade’ taken in the recent panel findings in the dispute between

²² Jagdish Bhagwati, ‘US Trade policy: The infatuation with Free trade agreements’ (1995) discussion paper available at:

http://www.columbia.edu/cu/libraries/inside/working/Econ/ldpd_econ_9495_726.pdf.

²³ Lore Van Den Putte and Jan Orbie ‘EU bilateral trade agreements and the surprising rise of labour provisions’ (2015) 31(3) *International Journal of Comparative Labour Law and Industrial Relations* at 281-282; and Lorand Bartels, *Human rights and sustainable development obligations in EU Free Trade Agreements* (2012) Legal Studies Research paper Series, University of Cambridge Faculty of Law, Paper No. 24/2012 at 1:

http://www.academia.edu/1902855/Human_rights_and_sustainable_development_obligations_in_EU_free_trade_agreements.

²⁴ For reportage see for e.g. <https://www.theguardian.com/us-news/2017/jan/23/donald-trump-first-orders-trans-pacific-partnership-tpp> accessed 29 August 2017.

Guatemala and the US under the Central American Free Trade Agreement (CAFTA).²⁵ Rather, as Franz Ebert has observed, it may be preferable to follow a US approach, which prioritises bringing states into compliance prior to bringing the agreement into operation.²⁶ The pre-ratification plans negotiated by the US with Brunei, Malaysia, and Vietnam may have had more effect than any attempt to enforce labour standards under chapter 19 after the fact. Further, he also observes the significance of redistributive aid which enhances capacity of states to engage in labour standard enforcement, so as to make labour provisions meaningful.²⁷

2. Economic Partnership Agreements (EPAs): Development and redistributive concerns

Our analysis of the Economic Partnership Agreements (EPAs) concluded between the EU and groups of African Caribbean and Pacific (ACP) states, draws on original research from Clair Gammage.²⁸ EPAs are combined trade *and* development cooperation agreements intended to liberalise trade in a development friendly way. Substantial financial assistance is provided to targeted sectors with a view to creating ‘a [transnational] political environment guaranteeing peace, security and stability, respect for human rights, democratic principles and the rule of law, and good governance is part and parcel of long-term development’.²⁹ Recently, there has been a shift toward ‘blending’ of loans through what the Commission defines as ‘Innovative Instruments’ wherein development aid is combined with other private or public sector sources of funding, such as loans, equity, capital and/or risk.³⁰ The current form of assistance is known as Grant and Loan Blending Facilities (GLBFs), which draw on development aid from EU Member States and financial assistance from the following private sector actors: European Investment Bank (EIB), the Agence Française de Développement (AFD), the KfW Bankengruppe, the European Bank for Reconstruction and Development (EBRD), and

²⁵ See for the final report, [http://trade.gov/industry/tas/Guatemala%20%20-%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](http://trade.gov/industry/tas/Guatemala%20%20-%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf). See for analysis of this case, Tonia Novitz, ‘Posted Work for the UK after Brexit: Rationales for Regulation’ in Bernard Ryan (ed), *Migrant Labour and the Reshaping of Employment Law* (Hart, 2018), forthcoming.

²⁶ Franz Ebert, ‘Increasing the Social Sustainability of Trade Agreements Regarding Labour Standards. Insights from the TPP Experience’ paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

²⁷ Franz Ebert, ‘Labour provisions in EU trade agreements: What potential for channelling labour standards-related capacity building?’ (2016) 155(3) *International Labour Review* 407 at 408 available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1564-913X.2015.00036.x/full>.

²⁸ In particular, see Clair Gammage, *North-South Regional Trade Agreements as Legal Regimes: A critical reassessment of the EU-SADC Economic Partnership Agreement* (Edward Elgar, 2017).

²⁹ Recital in the Preamble to the Cotonou Partnership Agreement 2014.

³⁰ See online at: <ecdpm.org/wp-content/uploads/2013/.../Blending-Loans-Grants-Blend-Not-Blend.pdf>.

the Council of Europe Development Bank (CEB).³¹ We return to their significance in the penultimate section of this Executive Summary, where we discuss issues of finance. It is enough to note here that financial concerns interact with those of trade and cannot be neatly delimited. How these lines of financial support are managed then has flow on effects for the ability of ACP States to exercise voice in world trade in line with SDG16. Here the notional engagement only of states with international trade law and FTAs belies the significance of private sector actors.

C. NEGOTIATIONS ON SERVICES: GATS, FTAS, LABOUR AND SOCIAL SUSTAINABILITY

Trade in services is becoming the dominant form of trade in high income countries and the EU is no exception.³² Article I(2) of the General Agreement on Trade in Services (GATS) envisages four modes of supply of services;

1. cross-border supply
2. consumption abroad
3. commercial presence
4. presence of a natural person as a 'service provider' or as an employee posted as a service provider, i.e. migration (of sorts)

That supply is dependent on 'service sector' commitments made by WTO members under the GATS Schedule of Specific Commitments provided for by Article XX. These commitments are sector based. They are linked with terms of 'Market Access' as prescribed and defined under Article XVI and 'National Treatment' (i.e. non-discrimination) under Article XVII of GATS. Trade in services tends also to simultaneously be regulated by provisions within FTAs, such as chapter 10 of CETA.

Low-income countries in the South have sought to take advantage of the opportunities that GATS and other FTAs offer by sending their own skilled workers abroad to high income States (and also low income States where Western multinational companies are present), in reliance on the commitments made under GATS. Such labour can be supplied via agencies or simply direct recruitment. This has the capacity to ensure that shortages in skilled labour in the domestic 'developed' or 'emergent' State labour market can be temporarily met without any (politically

³¹ J.N.Ferrer and A. Behrens, 'Innovative Approaches to EU Blending Mechanisms for Development Finance' CEPS Special Report (18 May 2011) available online at: <<http://www.cps.eu>>.

³² Tonia Novitz, 'Evolutionary Trajectories for Transnational Labour Law: Trade in Goods to Trade in Services?' (2014) *Current Legal Problems* 239 at 240.

controversial) long term migration taking place. It can also provide benefits which have development aspects for the individual worker, insofar as it can provide a worker with a job they might have not had otherwise and also allow wages (which could be higher than those that could have been received in the domestic labour market) to be sent home to support a family or saved for the purposes of education and further training.

Commentators disagree as to whether usage of GATS mode 4 offers a 'virtuous' or 'vicious' circle for the developing countries. Philip Martin suggests that recent experience suggests caution.³³ While Indian IT workers abroad gained relevant expertise that they could bring back to assist in building their own dynamic home economy, he also points to the brain drain caused by mass posting of African healthcare workers in Western Europe. There seem to be more costs to developing countries if it is skilled rather than unskilled workers who spend significant periods of time 'temporarily' placed in high income markets. This also explains why countries in the South agree to 'guest worker' programmes, whereby they export their cheaper labour so as to boost the national economy through the remittances which come home. There are arguments for expanding the scope for low paid labour to take up these Mode 4 opportunities,³⁴ but there is little sign of consensus on this issue. Further, such workers tend to suffer extreme forms of exploitation abroad when they are able to temporarily travel in this way. Examples have arisen in New Zealand where Chinese workers have been temporarily sent, raising questions regarding access to justice concerning breaches of national labour laws and internationally recognised labour standards.³⁵ There does, however, remain scope for unilateral action by states under Article XIV of GATS on grounds of, for example, (a) 'public morality', (b) human life and health, or such matters as 'privacy', 'confidentiality' or 'health'. A further option may be to amend the Annex on Movement of Natural Persons to craft a solution particular to temporary movement of natural persons (i.e. internationally posted workers), but given the sensitivity of migration on the international stage this remains highly contentious. At present, we await the negotiation of the Trade in Services Agreement (TiSA) in which the EU is actively engaged

³³ Philip A. Martin, GATS, Migration and Labour Standards DP/165/2006 (ILO 2006), 4 and 11-13 at http://www.ilo.org/inst/publication/discussion-papers/WCMS_193612/lang--en/index.htm; see also re similar issues emerging in Asia, Churnrurtai Kanchanachitra et al, "Human Resources for Health in Southeast Asia: Shortages, distributional challenges and international trade in health services' (2011) 377 The Lancet 769.

³⁴ Marion Panizzon, *Trade and Labor Migration: GATS Mode 4 and Migration Agreements* (Friedrich-Ebert-Stiftung 2010) <http://library.fes.de/pdf-files/iez/global/06955.pdf>.

³⁵ Tonia Novitz, 'Supply Chains and Temporary Migrant Labour: The Relevance of Trade and Sustainability Frameworks?' in Diamond Ashiagbor (ed.), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Oxford: Hart/Bloomsbury, 2018, forthcoming).

under the auspices of the WTO.³⁶ Indeed, this Mode 4 scenario illustrates the sophisticated interactions between multilateral WTO regulation and FTAs.

III. SUPPLY CHAINS AND MULTI-LEVEL REGULATION

Contemporary modes of manufacture and service provision, combined with various forms of technological change, have led to significant transnational cross-border sites of production and delivery. Multinational corporate enterprises (MNEs) subcontract across national boundaries and, in this way, utilise different legal regimes and lower costs in specific countries. In so doing, there is scope to distance the commercial enterprise which ultimately profits from the labour on which it draws and the actions of its subcontractors insofar as they affect the environment or other pillars of sustainability.

A. THE PROBLEM WITH TRANSPARENCY INITIATIVES AND THE NEED FOR 'DUE DILIGENCE'

There would appear to be consensus that mere exposure of corporate conduct in the supply chains that dominate world trade does not necessarily lead to any change in practices or the introduction of 'due diligence'.³⁷ Due diligence measures entail that 'all reasonable precautions were taken and all due diligence was exercised to avoid the commission of the offence' and, as such, requires the production of 'evidence of the system and procedures ... devised in an effort to avoid unfair practices'.³⁸

1. National transparency measures

We find examples of transparency initiatives in member states of the EU and in the US, in certain national level measures which require disclosure by corporations of their practices in various respects. For example, the UK Modern Slavery Act 2015, section 54, contains such a clause on

³⁶ http://ec.europa.eu/trade/policy/in-focus/tisa/index_en.htm.

³⁷ Susan Aaronson with Ethan Wham, 'Can Transparency in Supply Chains Advance Labor Rights? A Mapping of Existing Efforts' (2016) available on line at: <https://www2.gwu.edu/~iiep/assets/docs/papers/2016WP/AaronsonIIEPWP2016-6.pdf>.

³⁸ Kasey McCall Smith and Andreas Rühmkorf, 'Sustainable Global Supply Chains: From transparency to due diligence' paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

transparency in supply chains. It stipulates that every organisation which carries on a business, or is part of a business, in any part of the United Kingdom with a total annual turnover of £36m or more must issue a slavery and human trafficking statement for each financial year. The statement must describe the organisation's steps to ensure that slavery and human trafficking does not take place in any of its supply chains and its own business or that the organisation has taken no such steps. The section then contains a list of issues that a company 'may include information about'. This list explicitly refers to the company's due diligence processes as one of the issues. However, there is no liability if the company issues a statement that it has taken 'no such steps' – it has then complied with its statutory reporting duty. This is ultimately then a transparency rather than a due diligence measure, as was the California Transparency in Supply Chains Act (SB 657) on which it is based (which has comparable limitations regarding application and design).³⁹ Initiatives regarding conflict minerals in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 have a wider remit but contain only vague obligations, again tailored more to disclosure than action.⁴⁰ Those preparing for operation of the comparable planned EU initiative should aim to learn from these failings of recent legislation.⁴¹ As is currently being evaluated in another part of the SMART Project (on the EU level mapping and analysis), the explicit treatment of due diligence in the EU Non-Financial Reporting Directive contains potential, which requires more work to be realised.⁴²

2. International responses

Due to the failure of national transparency measures to promote due diligence, a great deal would seem to turn on the coordination of international responses to supply chains.⁴³ Examples include 'the principles for responsible contracts: integrating the management of human rights risks into

³⁹ For example, the Californian Act applies only to retail sellers or manufacturers doing business in the State of California with annual worldwide gross receipts in excess of \$100,000,000 and requires disclosure rather than that measures be taken.

⁴⁰ 9 Pub. L. No. 109-456, § 102(14), 120 Stat. 3384.

⁴¹ Ibid., at 11. For progress at the time of writing, see EU Parliament and EU Commission (2017) Draft Regulation laying down supply chain due diligence by importers of minerals and metals originating in conflict-affected and high-risk areas, at <http://www.europarl.europa.eu/sides/getDoc.do?type=AMD&format=PDF&reference=A8-0141/2015&secondRef=156-156&language=EN>.

⁴² Directive 2014/95/EU of the European Parliament and The Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, topic of the SMART conference in Brussels on 19 Sep 2017, see the report here: <http://www.smart.uio.no/news/--we-can-t-tell-companies-to-be-sustainable-we-nee.html>

⁴³ Kasey McCall Smith and Andreas Rühmkorf, 'Sustainable Global Supply Chains: From transparency to due diligence' paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

State-investor contract negotiations: guidance for negotiators', an addendum to the more general 'Guiding Principles on Business and Human Rights: Implementing the United Nations (UN) "Protect, Respect and Remedy" Framework'. Enrique Boone-Barrera, also speaking at the SMART May 2017 event, considered that this instrument could offer states the opportunity to warn major corporate and other business actors that when engaged in investment (and related activities) their economic interests will be reconciled with the human rights (and in that they are connected, the social and environmental aspects of sustainable development).⁴⁴ In this way, the legitimate expectations of investors on which they rely in later investment disputes could be limited with reference to human rights concerns.

There are already instances in which international organisations take account of supply chain due diligence when considering applications for funding. An example is the International Finance Corporation (IFC) in the World Bank Group. In 2006, the IFC, which is the private lending arm of the World Bank group, adopted its first Policy and Performance Standards on Social and Environmental Sustainability. In 2006, the International Finance Corporation (IFC), which is the private lending arm of the World Bank Group adopted its first *Policy and Performance Standards on Social and Environmental Sustainability*. In 2012 these were updated and revised, explicitly acknowledging the issues around supply chains and their regulation.⁴⁵ It has been suggested that these measures are indicative of a rebalancing away from an economic-led model towards a broader social consensus around the terms of fair trade.⁴⁶ Others are more sceptical,⁴⁷ but recent research by Ebert does suggest that the few complaints triggered by NGOs and workers organisations which have led to interventions by IFC staff are beginning to lead to some favourable outcomes.⁴⁸

⁴⁴ Enrique Boone Barrera, 'Human rights obligations in investor-state contracts: Reconciling the investors' legitimate expectations with the public interest' paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

⁴⁵ Available at:

http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbffd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES.

⁴⁶ Hannah Murphy, 'The World Bank and Core Labour Standards: Between flexibility and regulation' (2014) 21(2) *Review of International Political Economy* 399.

⁴⁷ Tonia Novitz, 'Core Labour Standards Conditionality: A Means by which to Achieve Sustainable Development?' in Julio Faundez and Celine Tan (eds), *International Law, Economic Globalization And Developing Countries* (London: Edward Elgar, 2010).

⁴⁸ Franz C. Ebert, 'The Integration of Labour Standards Concerns into the Environmental and Social Policy of the International Finance Corporation' in *VRÜ Verfassung in Recht und Übersee*, Seite 229 – 249.

B. THE EU'S FOREST LAW ENFORCEMENT, GOVERNANCE AND TRADE (FLEGT) ACTION PLAN AND ITS IMPLEMENTATION

The FLEGT Scheme exemplifies the potential to engage in richer multi-level regulation of environmental objectives.⁴⁹ There is a hard law basis to FLEGT to be found in two European Regulations.⁵⁰ The 2005 Regulation awarded privileged access to the EU market for states that entered into a specific 'Voluntary Partnership Agreement' (VPA), entailing creation of an assurance system that the timber had been felled lawfully. The subsequent 2010 Regulation addressed the limited number of VPAs which required market actors placing timber on the EU market to undertake due diligence to ascertain the legality of the timber.⁵¹ As Karin Buhmann reports, the 'smart mix' regulation approach which is reflected in FLEGT 'was recommended by the United Nations Guiding Principles (UNGPs) as a regulatory approach by states to promote business respect for human rights'⁵² and has been embraced explicitly by the EU Commission.⁵³ The EU does not dictate what will be the standards which apply regarding the lawful felling of timber, but rather requires processes undertaken in partner states to elaborate on timber legality definitions and verification. These processes are to involve stakeholders and thereby promote civil society empowerment in partner states.⁵⁴ In this way the participatory aspects of sustainability recognised under SDG16 can be realised. However, thus far the VPA (and accompanying Legal Assurance System (LAS) approved by the EU has only been adopted by Indonesia, with other states (such as Vietnam) currently in the process of negotiation. This has, then, been a relatively slow and unwieldy process, although ultimately it may have the benefit of flexibility in line with the concerns of each third country with whom the EU contracts.

⁴⁹ Karin Buhman, 'Extraterritorial implementation of EU values and policy through 'smart' regulation connecting the law and the market: Reflections on the EU's FLEGT scheme, pitfalls and opportunities for sustainable timber procurement, and insights for SMART' paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

⁵⁰ Council Regulation 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ 2005 L 347/1; and Regulation (EU) 995/2010 of the European Parliament and of the Council of 20th October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ 2010 L 295/23.

⁵¹ See Buhmann (2017) draft research findings.

⁵² United Nations Human Rights Council (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework. UN Doc. A/HRC/17/31, Principle 3, commentary.

⁵³ Commission Communication of 25 October 2011, 'A renewed EU Strategy 2011-2014 for Corporate Social Responsibility', COM(2011)681.

⁵⁴ EU FLEGT facility, 'How are VPAs negotiated', <http://www.euflegt.efi.int/the-process>.

IV. CONTENT OF INVESTMENT TREATIES AND CONDUCT OF INVESTMENT ARBITRATION

A further way in which the EU may exercise normative influence regarding sustainability objectives is as an investor (or investment partner). The longer report explores, first, in detail the drafting of investment treaties and the extent to which they can and do incorporate sustainability objectives. Second, the report considers the extent to which the three pillars of sustainability receive attention in investment arbitration. In both settings, we are concerned with issues concerning participation of stakeholders, the relative balance of power between states, and (insofar as these are affected) issues of accountability and access to justice. A summary of our findings is outlined here.

A. THE DRAFTING AND NEGOTIATION OF INVESTMENT TREATIES

Gradually, over time, there has been greater number of investment treaties (over 3,300 by 2015) and greater inclusion of human rights provisions (including core labour standards discussed above in relation to FTAs at Section II.B). But also we find more clauses directed towards the environmental dimensions of sustainability. Such provisions create scope for a ‘right to regulate’ on matters concerning social and environmental pillars of sustainability, which might otherwise be seen to place unfair regulatory burdens on an investor. The difficulty arises where such provisions, involving the implementation of international legal norms, such as those under the Kyoto Protocol are implemented without attention to the specific circumstances of developing countries and their need for time if transitions are to be made, but also potentially technical and material assistance for the achievement of those objectives. In this context, Shamila Dawood, writing from the perspective of an Indonesian experience, estimates that (according to UNCTAD sources) there is an annual funding shortfall of approximately \$US 2.5 trillion for the achievement of SDG objectives in developing countries.⁵⁵ She argues for application of the principle of ‘common but differentiated responsibilities’ so as to enable low income states to meet the challenges of environmental and social sustainability compliance. This is familiar from the WTO principle of ‘special and differential treatment’ (SDT) discussed above. It is also a practice adopted by China in its investment instruments, the content of which differs depending on whether its investment partner is an EU

⁵⁵ Shamila Dawood, ‘Principle of “Common but Differentiated Responsibilities” in Investment Treaties to Combat Environmental Degradation: A Developing Country Perspective’ paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

member state, such as Germany, or an African state, such as Tanzania. In relation to the former, China tends to adopt standard national treatment and non-expropriation clauses.⁵⁶ In relation to the latter, China is willing to introduce clauses more sympathetic to the development needs of the other country.⁵⁷

The TPP and CETA, as noted above, both set out a distinctive chapter regarding investment flows between the parties. Arguably, both break new ground insofar as they contemplate greater scope for what has been termed ‘indirect expropriation’ than was previously the case. They both, for example, contemplate a right to regulate and implicitly restrictions on compensation,⁵⁸ but it seems that each set of provisions (when in force) will require individual case-based examination and determinations in case of a dispute. What is arguably more distinctive regarding CETA is the provision which contemplates establishment of an International Investment Court. This would overcome a variety of practical obstacles for current litigant investors and respondent states, where by there can be dispute over the appropriate venue for arbitration, the appointment of appropriate arbitrators and the norms that will determine the outcome of any dispute.⁵⁹ However, the Court of Justice of the European Union (CJEU) seems likely to be hostile to such an initiative, which detracts from the powers of the former. The matter is currently the subject of a reference by Belgium.⁶⁰

⁵⁶ See Wei Shen, ‘Leaning Towards a More Liberal Stance? — An Evaluation of Substantive Protection Provisions under the New ASEAN–China Investment Agreement in Light of Chinese BIT Jurisprudence’ (2010) 26(4) *Arbitration International* 549.

⁵⁷ Amy Man, ‘New Players and Old Rules: A Critique of the China-Ethiopian and China-Tanzanian Bilateral Investment Treaties’ paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

⁵⁸ Caroline Henckels, ‘Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP’ (2016) 19(1) *Journal of International Economic Law* 27.

⁵⁹ August Reinisch, ‘Will the EU’s proposal concerning an investment court system for CETA and TTIP lead to enforceable awards?—the limits of modifying the ICSID Convention and the nature of investment arbitration’ (2016) 19(4) *Journal of International Economic Law* 761.

⁶⁰ Requested 6 September 2017 – see <http://hsfnotes.com/arbitration/2017/09/12/belgium-asks-for-the-cjeus-opinion-on-the-compatibility-of-the-investment-court-system-with-european-law/>.

B. INVESTMENT ARBITRATION PROBLEMS

Boone Barrera has identified the *Bilcon* case as emblematic of the ways in which environmental protections can be challenged under investment treaties.⁶¹ In that situation, the arbitral panel observed that the state was entitled to take steps to protect the environment, but in so doing had to respect the 'legitimate expectations' of the investor or expect to compensate accordingly.⁶² There is therefore a tension between the right to regulate and the need to prevent expropriation (whether direct or indirect). Further, in the sphere of development objectives, there can be a tension between promotion of infant industries at the national level and formal legal obligations towards an investor regarding 'fair and equitable treatment' or even 'national treatment'. Much depends, as noted above, on how the investment instrument in question is drafted. So, the different wording of bilateral investment treaties (BITs) that China has concluded with Germany versus Tanzania will be determinative. However, a more fundamental issue is how more standard economic entitlements of an investor are to be balanced against the concerns of the local population on such matters and environmental and social issues.

The standard approach is one in which the investor's economic interests, as in *Bilcon*, have prevailed.⁶³ However, there are indications in the jurisprudence emerging in arbitral awards determined under the International Centre for Investment Disputes (ICSID) Convention that alternatives are possible. In particular, it may be possible to utilise other international instruments as bases for interpretation under Articles 31 and 32 of the Vienna Convention on the Law of Treaties.⁶⁴ Established principles in the *Tecmed* case⁶⁵ enable recourse to human rights jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights to determine whether there has been expropriation in the sense of disproportionate interference with property rights. This could be extended to reference to the object and purposes of the ICSID Convention

⁶¹ *Clayton/Bilcon v. Government of Canada*, (PCA) Case No. 2009-04 (17 March 2015) Award on Jurisdiction and Liability at paras. 595-598, 602, 734-738, online: <<http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf>> (*Bilcon*).

⁶² *Ibid* at 531 – 3.

⁶³ *Compania del Desarrollode Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, paras. 71-72 (Feb. 17, 2000), 15 ICSID Rev. 167 (2000).

⁶⁴ Ahmad Ghouri, 'Interaction and Conflict of Treaty Conflicts in Investor-State Arbitration' paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

⁶⁵ *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, at 20, para. 63 ('*Tecmed*').

concerning ‘development’ objectives in the identification of what ‘investment’ is covered by a BIT and ICSID arbitration.⁶⁶

It is also possible to take a more imaginative approach, utilising the idea of ‘sustainability’ as a principle entailing a balancing exercise with reference to the idea of the ‘reasonable person’.⁶⁷ For instance, in the *El Paso* case, the tribunal stated that ‘if the circumstances change completely, any reasonable investor should expect that the law also would drastically change’.⁶⁸ It indicated that there will be a residual right to regulate, because this is indeed reasonable: ‘no reasonable investor can have such an expectation [of a freeze of the legal system] unless very specific commitments have been made towards it or unless the alteration of the legal framework is total’.⁶⁹ Further, the reasonableness test can be taken to operate in relation to whether the state in question is acting reasonably.⁷⁰ In this sense the *Tecmed* arbitration can be viewed as illustrative of the potential for use of a reasonable man standard, referring to the extent to which a state’s action would be regarded as arbitrary by a reasonable and impartial person the question being ‘what a reasonable and unbiased observer would consider fair and equitable...’.⁷¹ The difficulty, however, is a failure of subsequent arbitral tribunals to provide more detailed analysis of how such an assessment can be made. This is all the more problematic given recent research by the Oslo PluriCourts team of the outcome of investment arbitration for developing countries of the South, namely that foreign investors win in only 17% of the ITA cases brought against high-income respondent states, but in 62% of ITA cases brought against low-income respondent states.⁷² They comment ‘that foreign investors either win or settle close to 80 per cent of all ITA cases against low-income states remains striking’. They conclude by pointing to the enormous significance of the payment of an award by a

⁶⁶ See *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of the President of the Tribunal, Prosper Weil of 29 April 2004, paras 2–4. On such a basis it is also possible to challenge whether ‘sovereign debt’ instruments are investments properly speaking, regarding which see *Abaclat and Others (Case formerly known as Giovanna A Beccara and Others) v The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Professor Georges Abi-Saab, 28 October 2011 (‘*Abaclat*’).

⁶⁷ Ying-Jun Lin, ‘Towards A Sustainable Development-Oriented Interpretation? Some Suggestions to Integrating Sustainable Development in International Investment Law and Investor - State Arbitration’ paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

⁶⁸ *El Paso Energy Co. v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, at para. 363.

⁶⁹ *Ibid.*, para. 374.

⁷⁰ *Lemire v. Ukraine II*, ICSID Case No. ARB(AF)/98/1, Decision on jurisdiction and liability, 14 Jan 2010.

⁷¹ *Tecmed* (2003) above, at para. 166.

⁷² Daniel Behn, Tarald Laudal Berge and Malcolm Langford, ‘Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration’ paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

low income country to an investor, citing the case of Ecuador where a recent payment was equivalent to the size of the country's health budget.⁷³

We note that ICSID and the UN Commission on International Trade Law (UNCITRAL) are seeking consistently to improve procedures and note the significance of the 2014 Convention on Transparency in Treaty-based Investor-State Arbitration applied in CETA.

V. FUNDING, FINANCE AND TAX: LINKS BETWEEN STATE AND NON-STATE ACTORS

It is self-evident that international financial markets have a considerable effect on the capacity of states to engage in various forms of trade. Finance affects the ability of states to pursue various social and economic programmes which promote development and the well-being of citizens. Sovereign debt has the capacity to reduce democratic sovereignty and the independent regulatory design of a country's autonomy.⁷⁴ Indeed, there is an increasing blurring of the line between investment and sovereign debt bonds and other forms of so-called indirect investment, which cause dilemmas for regulation.⁷⁵ In this context, there has been considerable criticism by UN experts of the ways in which structural adjustment, particularly in its new forms of austerity entailing reduction of public spending, impacts upon development and the broader economic, social and environmental pillars of sustainability.⁷⁶ Funding of sustainability objectives can be built into EU internal market trade (see Section I.A. above) and also international funding structures.

⁷³ Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II), ICSID Case No. ARB/06/11, 5 October 2012. Discussed in Behn et al (2017), above.

⁷⁴ Yuri Biondi, 'Sovereign Debt Restructuring, Refinancing and the Financial Market' (2016) 6(3) *Account Econ Law* 179, responding to the analysis of Odette Lienau, *Rethinking Sovereign Debt: Politics, reputation and legitimacy in modern finance* (Harvard University Press, 2014).

⁷⁵ See the majority opinion in *Abaclat* (2011) discussed above; also the issue of EU competence in relation to 'indirect investment' discussed in the EU-Singapore Free Trade Agreement Opinion 2/15 ON 16 May 2017 (available at <http://curia.europa.eu/juris/document/document.jsf?docid=190727&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=309331>)

⁷⁶ For concern expressed by the Independent Expert on the effects of foreign debt and other financial obligations of States, see the reports issued in 2017 available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/57 and on the EU http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/57/Add.1

A. DIVESTMENT, TRUSTS AND CORPORATE CONDUCT

There remain also a variety of ways in which private funding entities can act ethically in their investments globally, for example by virtue of the ways in which trust deeds are drafted or can be interpreted, there may be potential for fossil fuels divestment.⁷⁷ There can also be incentives to avoid complicity in environmental harms by virtue of potential exposure to reputational harms.⁷⁸ While drawing on national laws for their force, such corporate initiatives can also be reinforced through international initiatives, such as the UN Guiding Principles.⁷⁹ On the EU level, initiatives are taken in this area, notably through the recent reform of the Shareholder Rights' Directive and the ongoing work on Sustainable Finance. This is currently under evaluation in the SMART EU level mapping and analysis.⁸⁰

B. ISSUES CONCERNED BLENDED FINANCE

Attention should also be paid to the ways in which finance channeled by international institutions such as the World Bank Group and the EU, which in the form of 'blended finance' is progressively dominated by private financial capital. While providing a rich vein of much needed funding to build capabilities, as note in relation to FTAs above (see II.B.2), difficulties arise in separating out the accountability of public and private actors, especially regarding the imposition of conditionality for lending.⁸¹ As Celine Tan has observed, the engagement of commercial financial sector actors in international development finance focuses on 'asset clauses' designed to secure financial returns to investors while de-prioritising non-commercial objectives. Further, the underlying policy framework of blended finance privileges private solutions over public approaches (by democratically elected

⁷⁷ Benjamin Richardson, 'Fossil Fuels Divestment: Can It Work?' paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

⁷⁸ Ibid.

⁷⁹ United Nations Human Rights Council (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework. UN Doc. A/HRC/17/31.

⁸⁰ This will be included in the SMART Report bringing together the international, EU and jurisdiction-specific level mapping and analysis, to be submitted by 31 August 2018.

⁸¹ Blended Finance Innovators (2016), 'Improving Impact: Increasing Blended Finance to achieve the Sustainable Development Goals', Discussion Draft, 1 October 2016, <http://www.meda.org/investment-publications/286-improving-impact-increasing-blended-finance-to-achieve-the-sustainable-development-goals/file> – analysed as an emergent trend by Celine Tan, 'Creative Cocktails or Toxic Brews? Blended Finance and the Regulatory Framework For Sustainable Development' paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

governments) to a range of global and national public goods.⁸² These are potential threats to the achievement of SDGs, especially in terms of their participatory dimensions.

C. TAX AND SUSTAINABILITY

Finally, in constructing reliable sources of domestic state revenue, there may well be a case for transnational agreement. Otherwise, without external funding, the ability of EU states (let alone third country low income states) to self-regulate sustainability initiatives will be doubtful. We note, in this context, the significance of the European Commission finding that Ireland gave illegal tax benefits to Apple of over Euro 13 billion,⁸³ and the importance of multilevel action beyond the EU on tax-related issues.⁸⁴

VI. RECOMMENDATIONS FOR POLICY COHERENCE: WHAT THE EU COULD DO

Our recommendations address the four themes we identified at the outset, which have been relevant throughout the report and this executive summary:

1. Diverse forms of governance

- a. It is important to recognise that the apparently discrete legal regimes relating to trade, corporate governance, investment and finance interact. Policy coherence requires looking across these formally discrete ‘systems’ to map connections. This may involve extensive communication between ostensibly different EU DGs.
- b. The UN SDGs and the UN Guiding Principles on Business and Human Rights provide at present an international consensus alongside the instruments which the EU has identified as inimical to sustainable development and good governance (for e.g. in GSP+). These need to be the sustained focus of attention to ensure coherence of approach.

⁸² Tan, *ibid.*

⁸³ See the European Commission finding that Ireland gave illegal tax benefits to Apple of over Euro 13 billion: http://europa.eu/rapid/press-release_IP-16-2923_en.htm.

⁸⁴ Discussed by Irene Lynch-Fannon, ‘Core Issues Around Apple Tax’ paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

- c. It may be preferable to build multilateral versus EU initiatives. While the FLEGT scheme and the proposals for a CETA international investment court system are innovative and in many ways laudable, multilateral consensus may be preferable. This makes negotiations in such initiatives as the planned Trade in Services Agreement (TiSA) important.
- d. The regulatory consequence of greater engagement of private actors on the world stage, for e.g. as investors through blended finance, needs to be examined more rigorously. How we shape institutions for such hybrid actors will matter. Voice for democratic institutions and citizens of all countries will need to be protected through such initiatives as stakeholder forums, corporate structures and in various forms of scrutiny and litigation.
- e. South-South agreements must be respected, so that conflicting obligations are not placed in EU-South FTAs or mega-regional agreements which would diminish trade flows and capacity for independent determination of trade relations between parties of equal bargaining power.

2. Access to justice

There remain significant difficulties regarding access to justice in a variety of forums for dispute resolution on the international stage. In particular, issues arise regarding:

- The access of developing (low-income) states to adequate legal advice and representation in WTO dispute settlement, especially when contrasted to the expertise of expert environmental and other non-governmental organisations (NGOs) which can present submissions as *amicus curiae*.
- The scope for interested stakeholders (e.g. environmental groups, but also employer and worker representatives) to bring complaints under fair trade agreements (FTAs).
- The capacity to raise sustainability (especially social, human rights and environmental) concerns in investment disputes, with again developing low income states being at a significant disadvantage in terms of outcomes.

There are also difficulties for citizens to use democratic processes to challenge funding conditionality which affects decision-making concerning sustainability and public goods. Similarly, the scope to enforce due diligence (as opposed to mere transparency) in corporate structures remains minimal.

Accordingly, there remains scope for the EU to:

- a. Reconsider its own rules regarding standing at the CJEU for third country states, NGOs and nationals affected by EU trade, supply chain, investment and finance activities.

- b. Campaign internationally for greater support and initiate further funding for assistance to developing low income states currently disadvantaged within WTO, ICSID and other structures. An important development has been the UN Commission on International Trade Law (UNCITRAL) 2014 Convention on Transparency in Treaty-based Investor-State Arbitration applied in CETA, but which could be further elaborated and developed.
- c. Negotiate for new instruments (and/or amendment to existing international instruments) supporting access to justice or migrant workers caught in supply chains generated by global trade.

3. Roles of different actors

Within the EU, in terms of internal market trade and investment, the significant role of private actors is acknowledged and regulated. This is absent in the international legal treatment of trade, investment and finance. The EU might seek to:

- a. Encourage, through multilateral negotiations and FTAs, greater engagement with multinational enterprises and financial institutions, so that they cannot evade sustainability obligations at the expense of states and their citizens. Voluntary mechanisms are failing.
- b. Set up substantive norms for investment treaties (rather than the procedural norms being incrementally established through UNCITRAL) which ensure sustainability concerns commensurate to the capacities of states are placed in such agreements.
- c. Consider diversification of approach to the content of investment treaties depending on the capacity of partner states, following in this respect an example set by China.
- d. Build capacity within states with weaker bargaining power in terms of civil society institutions, but also social welfare and legal know-how.
- e. Systematize the engagement of private sector financial actors in blended finance and ensure safeguards to prevent their ability to affect democratic decision-making on public goods and achievement of sustainability objectives.

4. Accountability

In this report and executive summary, it emerges that transparency is of considerable importance, but will not alone deliver accountability. More detailed requirements of state and corporate due diligence are required. The EU must be clear as to the relative hierarchy of certain international instruments (for e.g. UN human rights and labour standards, as well as environmental conventions) over the economic entitlements of private market actors. Ethical accountability entails a holistic study of the interaction of trade, supply chains, investment and finance.

FULL REPORT ON INTERNATIONAL REGULATORY COMPLEXITY OF EU TRADE AND INVESTMENT - MAPPING AND ANALYSIS

*Analysis of international and EU law for trade and investment flows
between the EU and other countries of various levels of
development*

Tonia Novitz and Clair Gammage, University of Bristol

ABSTRACT:

This report draws on the research and analysis of Dr Clair Gammage and Prof. Tonia Novitz (University of Bristol) who have been leading the 'Trade and Investment' stream of Work Package 2. Our discussions here are informed by the contributions by various SMART participants from a variety of different countries, as well as the papers presented at the conference on 'Trade and Investment' in Oslo in May 2017.

Our international mapping considers the prospects for 'policy coherence for development' for regulation of sustainable market actors. This involves analysis of European Union (EU) treatment of sustainability issues in trade and investment (in part internal concerning the EU internal market, but largely focused on external action), alongside international legal and institutional developments. In so doing, we are exploring relationships between international, multilateral and regional frameworks.

In particular, we focus on four potential obstacles to policy coherence for sustainable development. The first is *the diverse forms of governance* that operate at international,

regional and national levels and the regulatory gaps between them. We are interested in criticism that pluralism has led to normative fragmentation that detracts from combined and reinforcing legal and policy frameworks. The second is the scope for *access to justice*, which remains questionable in a variety of contexts. One is the standard supply chain situation where a worker or consumer is distanced from the corporate entity causing harm. Others include the dispute mechanisms used in trade and investment agreements, which allow minimal recourse to human rights or other social or environmental values. Issues of standing also arise in this context. A third concern is the difficulty of discerning what are the designated, actual and appropriate *roles of different actors* who create and enforce legal and regulatory norms in this sphere. We have a particular interest in China, the EU and the US as public actors which wield particular influence. We also observe that the ‘shrinking of the state’ in many countries (and the EU27 are no exception) is leading to arguments for stronger transnational regulation under international public law but also at national level private (including company and tort) law. The scope for innovative regulatory solutions which create hybrid actors and the scope for careful demarcation of their competence will be relevant here. This observation leads to our identification of a fourth potential impediment to PCD and sustainability objectives, which is the problem of *accountability*. We consider the difficulties which arise traditionally in international law in this respect.

In this context, we will address problems of *power imbalances*, not only between states as identified above, but also between states and private actors. Further, we will identify regulatory issues that arise in respect of transparency (including the timing of release of information) and compensation. Moreover, we investigate which treaty sources and jurisdictions can and should prevail in seeking to resolve these manifold dilemmas. These power imbalances may also stem, not only from a failure to observe legal formalities, but deep-seated economic inequalities between the parties. It is suggested here that without addressing the need for poverty alleviation and capacity-building in particular states, and making provision in trade and investment agreements for developing states to have genuine opportunities for economic growth (in a myriad of ways), these power imbalances cannot be ameliorated. A sustainable system for international trade, investment and finance demands that such issues be addressed.

This report, accordingly, follows the following structure:

I. SUSTAINABILITY AT THE INTERNATIONAL AND EU LEVELS

II. TRADE LAW: THE WORLD TRADE ORGANISATION (WTO) AND THE ROLE OF FREE TRADE AGREEMENTS (FTAS)

III. SUPPLY CHAINS AND MANIFOLD SOURCES OF REGULATION: DOMESTIC, REGIONAL AND INTERNATIONAL

IV. THE CONTENT OF INVESTMENT TREATIES AND CONDUCT OF INVESTMENT ARBITRATION

V. FUNDING, FINANCE AND TAX: LINKS BETWEEN STATE AND NON-STATE ACTORS

VI. RECOMMENDATIONS FOR POLICY COHERENCE: WHAT THE EU COULD DO

I. SUSTAINABILITY AT THE INTERNATIONAL AND EU LEVELS

In this part of the report, we set out briefly what we understand to be the origins of the ideal of sustainability (or sustainable development) alongside its evolution on the world stage and in EU policy. This is not a detailed or exhaustive study, as these issues are also developed further in other SMART reports. Rather, we seek to explain the basis on which we (and other SMART contributors) draw certain conclusions in later parts of the report.

A. THE INTERNATIONAL ORIGINS OF THE IDEA OF ‘SUSTAINABILITY’ AND ITS CURRENT FORMULATIONS

There are arguably two strands of international legal history that led to the current SDGs.⁸⁵ One is the powerful idea of environmental (inter-generational) sustainability. This has its origins in the Stockholm Conference on the Human Environment of 1972 and the resultant ‘Stockholm Declaration of Principles’, with the Brundtland Report coining the phrase ‘sustainable development’ 15 years later.⁸⁶ The other is the increasing significance of an economic and social ‘development’ agenda. This intra-generational aspect received UN recognition in the 1972 Declaration under Principles 1 and 8,⁸⁷ but was more powerfully acknowledged in the UN Declaration on Right to Development.⁸⁸ In particular, Article 1 of the 1986 Declaration stresses that idea of ‘economic, social, cultural and

⁸⁵ For further development of this analysis in the context of labour standards in supply chains, see Tonia Novitz, ‘Supply Chains and Temporary Migrant Labour: The Relevance of Trade and Sustainability Frameworks?’ in Diamond Ashiagbor (ed.), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Oxford: Hart/Bloomsbury, 2018, forthcoming.)

⁸⁶ See Report of the World Commission on Environment and Development: Our Common Future (1987), esp chs 2 and 3, available at <https://sustainabledevelopment.un.org/post2015/transformingourworld/publication>.

⁸⁷ Principle 1 stated that: ‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.’ Principle 8 recognised that: ‘Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.’

⁸⁸ GA Resolution 41/128 4 December 1986 available at: <http://www.unhchr.ch/html/menu3/b/74.htm>.

political development as ‘an inalienable’ human right. These symbiotic connections between the environmental, economic and social pillars of sustainable development has been given a more concrete form by Kate Raworth in her recent book on ‘Donut Economics’ offering scope for thinking about the interaction between economic, social and planetary boundaries.⁸⁹

Indeed, linked to this is an idea of sustainability as driven by social consensus and participation at the local, national, regional and international levels. That vision is one which is arguably manifested in the 1992 Rio Conference on Environment and Development (and its famous Declaration of Principles).⁹⁰ Principle 10 outlined the importance of ‘participation of all concerned citizens at the relevant level’ including women, young persons and indigenous peoples (Principles 20-22). While the Millennium Development Goals have been criticised as target-ridden and donor-centric rather than qualitative and participatory,⁹¹ this talisman of participation was again picked up in the Johannesburg Declaration of 2002. That instrument recognised the particular effects of globalisation on sustainability,⁹² but also the importance of participation in policy formation.⁹³ In this way, development becomes less a matter for technical experts and more a matter for engagement, requiring protection of human rights by the state alongside multilevel deliberation (and arguably international cooperation) as to their realisation.

Arguably, this understanding of sustainability is also reflected in the statement in Sustainable Development Goals (SDGs) set out in the Resolution adopted by the UN General Assembly on 25 September 2015 - Transforming our world: the 2030 Agenda for Sustainable Development.⁹⁴ For example, SDG 16.7 states that the aim is to: ‘Ensure responsive, inclusive, participatory and representative decision-making at all levels.’ Further, a link can be made here between achievement of sustainability and the activities of international organisations relating to trade. One key target in SDG17 is to achieve ‘a universal, rules-based, open, non-discriminatory and equitable multilateral

⁸⁹ Kate Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (Cornerstone Books, 2017).

⁹⁰ See <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm/>

⁹¹ See <http://www.unmillenniumproject.org/goals/gti.htm>; criticised for e.g. by Jan Vandemoortele, ‘The MDG Conundrum: Meeting the Targets without Missing the Point’ (2009) 27(4) *Development Policy Review* 355; Maya Fehling, Brett D. Nelson, and Sridhar Venkatapuram, ‘Limitations of the Millennium Development Goals: a literature review’ (2013) 8(10) *Global Public Health* 1109 and Jason Hickel, ‘The True Extent of Global Poverty and Hunger: Questioning the Good News Narrative of the Millennium Development Goals’ (2016) 37(5) *Third World Quarterly* 749.

⁹² See para. 14. Available at <http://www.un-documents.net/jburgdec.htm>.

⁹³ Para. 26.

⁹⁴ A/Res/70/1 available at <https://sustainabledevelopment.un.org/post2015/transformingourworld/publication>.

trading system under the World Trade Organization',⁹⁵ presumably relating not only to trade in goods, but trade in services and investment too. There may be a route here towards reform of the most problematic trade rules, whether through the Doha Development Agenda or otherwise.

A further point to note is that sustainability, in the sense of attention to durability, and attention to inter-generational and intra-generational justice may be regarded as having normative, interpretive weight in international disputes. Virginie Barral⁹⁶ has demonstrated how, in *Shrimp-Turtle*,⁹⁷ the WTO Appellate Body drew specific legal consequences from the principle. Further, using the International Court of Justice (ICJ) judgment in the *Pulp Mills* case, she shows how sustainable development may be seen variously as an objective, a means and as a mode of measurement. For example, the Judgment in *Pulp Mills* refers to 'this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development'.⁹⁸ This difficult balancing exercise is now a feature of all attempts in the 2030 Agenda to apply the SDGs and will arise in any trade dispute litigation or investment arbitration also.

B. EVOLVING UNDERSTANDINGS OF SUSTAINABILITY IN THE EUROPEAN UNION

The objective of 'sustainability' is written into the constitutional fabric of the Treaty on European Union (TEU). For example, Article 3(3) of the TEU requires the EU to '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'. It is also a principle that is intended to guide the external dimension of EU activities. So Article 3(5) TEU provides that: 'In its relations with the wider world, the Union shall... contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and

⁹⁵ SDG 17.10.

⁹⁶ Virginie Barral, 'Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm' (2012) 23(2) *European Journal of International Law* 377.

⁹⁷ US – Import Prohibition of certain Shrimp and Shrimp Products WT/DS58/AV/R 1998 at paras 127-31, cited in Barral (2012) above, at 386.

⁹⁸ *Case Concerning Pulp Mills on the River Uruguay* ICJ Judgment 20 April 2010 available at: www.icj-cij.org/docket/files/135/15877.pdf at 177, discussed by Barral (2012) at 388 – 97.

the protection of human rights ...'⁹⁹ In this sub-section, we investigate how understandings and applications of sustainability have shifted in the EU internal markets and EU external relations.

1. The EU internal market and sustainability

It is well known that the EU internal market has four dimensions: free movement of goods, free movement of services, freedom of establishment and free movement of workers.¹⁰⁰ It is also worth noting the supplementary constraints that operate regarding competition law, which were more gradually implemented.¹⁰¹ What is remarkable about the EU regional trade regime is that the form that integration takes gives rights to - and imposes corresponding obligations on - private actors, from individual persons to corporate entities. The internal market does not only recognise the rights and responsibilities of states, as does the World Trade Organisation (WTO) regime. Nor does the single market merely enable investors to bring claims at the expense of other private actors, as do Bilateral Investment Treaties (BITs) or contemporary free trade agreements (FTAs) which include an investment chapter.

In this sense, the EU offers a sophisticated model for trade, which accepts the transnational interdependence of international and domestic systems of law and the interactions between state and private actors. By 1971, Niklas Luhmann was positing the existence of a 'world society' splintered into social, economic, scientific and technological dimensions which lay outside the control of the sovereign state recognised under international law.¹⁰² Gunther Teubner has since posited the idea of an even more starkly fragmented polycentric globalized world, such that 'a variety of competing global regulation regimes have been established, each with their own legal decisional instances' to which he sees no ready solution.¹⁰³ This brand of autopoiesis, however, can

⁹⁹ See also TEU, Art 21(2)(d) and (f), according to which the EU will '*foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty*' and '*help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development*'.

¹⁰⁰ In this respect, see Catherine Barnard's classic text, *The Substantive Law of the EU: The Four Freedoms*, now in its fifth edition (Oxford: OUP, 2016).

¹⁰¹ Alison Jones and Brenda Sufrin. *EU Competition Law: Text, Cases, and Materials* 6th ed. (Oxford: OUP, 2016) at 92 et seq.

¹⁰² Andreas Fischer-Lescano and Gunther Teubner (Michelle Everson trans.), 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003-2004) 25 Mich. J. Int'l L. 999 at 1000 citing Niklas Luhmann, 'Die Weltgesellschaft' (1971) 57 *Archiv For Rechts Und Sozialphilosophie* 21.

¹⁰³ Fischer-Lescano and Teubner (2003-4) above at 1005.

be linked to a focus on communication between these legal spheres, rather than the power relations within and between them. By way of contrast, the EU offers us an opportunity to explore which actors are engaged, how they are engaged and whether the outcomes may be regarded as sustainable.

The first proper mention (and legal codification) of 'sustainability' in an EU context was in the Maastricht TEU of 1992, Art 2 of which referred to the 'promotion, throughout the community, of a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment'. With the Treaty of Amsterdam 1997, Art 2 came to refer to 'sustainable development' of economic activities. In other words, the economic dimension of 'sustainable growth' has been paramount. However, as we know, there are at least three dimensions of sustainability that require attention: the economic (certainly, on which the EU has tended to focus) but also the social and environmental.

From 1957 to 1975, as the European Economic Community (EEC) expanded its operations and developed inter-related trade in (predominantly) goods, supplemented by movement of services, establishment and workers. The economic benefits, in the sense of a larger pie for all to share, became apparent.¹⁰⁴ This was not however without some internal unease regarding the role of national constitutional principles (maintaining the governance of social norms which the economic threatened to upset) and fundamental human rights guaranteed by the Council of Europe. That unease was mitigated by the emergence of the 'general principles' jurisprudence of the Court of Justice,¹⁰⁵ later to be supplemented by agreement on an EU Charter on Fundamental Rights 2000, the explanatory notes to which deferred not only to the European Convention on Human Rights 1950 (ECHR) but also the European Social Charter 1961 (ESC).¹⁰⁶ Moreover, the role of the treaties in establishing rules for fair transfer of goods and services were highlighted by the *Defrenne* litigation,¹⁰⁷ which established the significance of direct effect of Treaty provisions for the benefit of

¹⁰⁴ For e.g., see regarding gross trade creation (GTC), Norman D. Aitken, 'The effect of the EEC and EFTA on European trade: A temporal cross-section analysis' (1973) 63:5 *The American Economic Review* 881.

¹⁰⁵ See Case 11/70 *Internationale Handelsgesellschaft v Einfuhr-und Vorratsstelle Getreide* [1970] ECR 1125. See also Erika Szyszczak, 'Social Rights as General Principles of Community Law' in Nanette Neuwahl and Alan Rosas (eds.), *The European Union and Human Rights* (The Hague: Kluwer/Martinus Nijhoff, 1995).

¹⁰⁶ http://www.europarl.europa.eu/charter/pdf/04473_en.pdf.

¹⁰⁷ Case 80/70 *Defrenne v Belgian State* (No 1) [1971] ECR 445; Case 43/75 *Defrenne v Sabena* (No 2) [1976] ECR 455, para. 12; Case 149/77 *Defrenne v Sabena* (No. 3) [1978] ECR 1365.

individuals and against private actors, as well as a principle of equal treatment which would have guiding (indirect) interpretative effect.

Economic objectives were thereby checked by reference to countervailing social goods recognized constitutionally, encompassing human rights norms given European-wide status, and (at this stage) the very few social norms embedded in the Treaty of Rome (later elaborated in subsequent European Community and EU treaties). In other words, an effective market structure had to be socially embedded to be durable (or sustainable) and the Court of Justice recognized this early on.

The Commission, in the wake of the oil shocks, took the need for a 'social face' for the single market seriously,¹⁰⁸ and the Council agreed to legislative proposals which addressed the social effects of redundancies, insolvency and transfers of undertakings.¹⁰⁹ Social policy had begun, even if it was still justified primarily on an economic basis and only tacitly explained in terms of a longer view of sustainability.¹¹⁰

Further, redistributive concerns loomed large in the early EEC and its subsequent manifestations. The EC regional fund¹¹¹ has considered the disparity between wealth within particular subnational

¹⁰⁸ Michael Shanks, 'Introductory Article: The social policy of the European Communities' (1977) 14 *Common Market L. Rev.* 375.

¹⁰⁹ Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies OJ L 225/16, 12.8.98 – derived from Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies OJ L 48/29, 22.2.1975, as amended by Directive 92/56/EEC (OJ L 245/3, 26.8.1992). Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer OJ L 283/36 28.10.2008 – derived from Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the insolvency of their employer OJ L 283/23, 28.10.1980. Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L 82/16-20, 22.3.2001 – derived from Council Directive 77/187/EEC of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses OJ L 61/26, 5.3.1977.

¹¹⁰ Tonia Novitz, 'The Paradigm of Sustainability in a European Social Context: Collective Participation in Protection of Future Interests?' (2015) 31(3) *International Journal of Comparative Labour Law and Industrial Relations* 243

¹¹¹ See Ross B. Talbot, 'The European Community's Regional Fund: a study in the politics of redistribution' (1977) 8 *Progress in Planning* 183-281. For more contemporary discussion, see regarding the formal creation of the European Regional Development Fund and the later control by the European Commission of such structural funding, Chiara Del Bo, Massimo Florio, Emanuela Sirtori, and Silvia Vignetti, 'Additionality and Regional Development: Are EU Structural Funds

regions of the EU, and structural funds, including a European Globalisation Adjustment Fund (EGF), are used by the European Commission today to build infrastructure so as to assist further market integration internationally and to cushion states (and regions within states) from global market shocks.¹¹²

The idea has been to build up, not just the economy of a particular state so that the country would be able to play a meaningful role in the then common and later single market, but all parts of each member state. The regions are thereby to be integrated into the whole of the EU (and even into world markets) without significant differentials in costs or capacity. This redistributive approach is reminiscent of the preamble to the International Labour Organisation (ILO) constitution, which acknowledges that: *'the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries'*. So too, the failure to address poverty in any member state, which disables market participation, would disrupt and ultimately thwart the EEC/EC/EU market objectives to improve wealth, stability and security for its members. This redistributive strategy has not always been as effective as it might be, with the Commission at various times overlooking the profound negative structural effects of particular EU laws, for example regarding the posting of workers, as shall be discussed later in this paper.¹¹³ However, the Commission does receive evidence on such matters and funds studies which can lead to proposals for reform. These include the changes regarding regulation of posted work (related to free movement of services) proposed in 2016.¹¹⁴

Issues of redistribution also arose in the context of the financial crisis in relation to the extent to which EU institutions would assist countries experiencing extreme sovereign debt. In this anomalous time, the EU has been rather inventive in its attempt to harness some of the expertise of EU institutions, without engaging in standard forms of EU regulations. So, the Troika (the International Monetary Fund in combination with the European Commission and European Central Bank) has provided funds, while offering individualized prescriptions for recipient States through a

complements or substitutes of national Public Finance?' (2016) available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2723402.

¹¹² See on the EGF, <http://ec.europa.eu/social/main.jsp?catId=326> and on other dispersal of structural funds (including the European Social Fund) by the European Commission, see <http://ec.europa.eu/social/main.jsp?langId=en&catId=325>.

¹¹³ See Tonia Novitz, 'Collective Bargaining, Equality and Migration: The Journey to and from Brexit' (2017) 46(1) *Industrial Law Journal* 109.

¹¹⁴ Commission Proposal to amend the Posted Workers Directive COM(2016) 128 final, 8.3.2016; and .

Memorandum of Understanding (MoU), which set out the terms of the loan agreement.¹¹⁵ This has been an interesting development. For example, these measures indicate concern more with government policy than the behaviour of actors within states, which were previously the preoccupation of EU lawyers. It also indicates the potential interplay of global actors (such as the IMF) and regional actors (like EU institutions) in situations of crisis. The Court of Justice correspondingly saw the bailouts and linked conditionality as extra-legal action over which it had no jurisdiction, despite convincing arguments that the Charter of Fundamental Rights should still be applied to the actions of EU institutions.¹¹⁶ The notion of fiscal sustainability was clearly central to the content of the MoU; in other words, the ambition was to provide a longer term cure for the financial instability experienced.¹¹⁷ However, there remains a concern that social objectives were overlooked as were environmental issues. It is arguable that this absence of the full ambit of sustainability objectives led to a lack of domestic political commitment (and some very vocal opposition) to the measures demanded by the Troika.

There has been an even greater struggle to incorporate the environmental dimension of sustainability into the objectives and operations of the EU. After the Single European Act 1986, Article 130r(2) of the EC Treaty stated that: 'Environmental protection requirements shall be a component of the Community's other policies'. Now Article 11 of the TFEU makes it clear that: 'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities.' This recognition of environmental protection as one of the 'essential objectives of the Community' was emerging from the case law as early as 2005.¹¹⁸

¹¹⁵ Catherine Barnard, 'EU Employment Law and the European Social Model: The Past, the Present and the Future' (2015) 67 *Current Legal Problems* 199; Aristeia Koukiadaki and Lefteris Kretsos, 'Opening Pandora's Box: The sovereign debt crisis and labour market regulation in Greece' (2012) 41 *Industrial Law Journal* 276; Stefan Clauwaert and Isabelle Schömann, *The Crisis and National Labour Law Reforms: A mapping exercise* ETUI Working Paper 2012.04; and Aristeia Koukiadaki, Isabel Tavora and Miguel Martinez Lucio, *The Transformation of Joint Regulation and Labour Market Policy in Europe during the Crisis: Comparative Project Report* (University of Manchester/The European Commission 2014).

¹¹⁶ See Claire Kilpatrick, 'Are the Bailouts Immune to EU Social Challenge Because They are Not EU Law' (2014) 10 *European Constitutional Law* 393 at 397 and 418-9, who discusses C-434/11 *Corpul Național al Polițiștilor*, Order of 14 Dec. 2011; C-134/12 *Corpul Național al Polițiștilor*, Order of 10 May 2012; C-462/11 *Cozman*, Order of 14 Dec. 2012; C-127/12 *Sindicato dos Bancários do Norte*, Order of 7 March 2013; C-264/12, *Sindicato Nacional dos Profissionais de Seguro v. Fidelidade Mundial*, Order of 26 June 2014.

¹¹⁷ See in relation to Greece for example, the primary documentation and referenced concern with 'fiscal sustainability' at: <http://www.consilium.europa.eu/en/policies/financial-assistance-eurozone-members/greece-programme/>.

¹¹⁸ See Case C-176/03 *Commission v Council (criminal penalties)* (2005) paras 41-42.

Redistribution concerning environmental issues, as well as economic, is also manifest in the structural funding criteria applied by the Commission.¹¹⁹ Nevertheless, there remain dangers that environmental (and social) values remain subsidiary to the market rules of the EU, as exceptions, rather than a basis for cross-national European level regulation. Again, the effects of the economic crisis from 2007 to the present date make it difficult to assess the true potential of the latter.

Post-Lisbon, the current TEU (preamble and Art 3) state that the EU shall work for the ‘sustainable development of Europe’ with reference to all three pillars. What will perhaps be most interesting in this context is the extent to which the new trio of public procurement directives will respond to the demands of sustainable development. They provide that member states shall take ‘appropriate measures’ to ensure ‘economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or international...’¹²⁰ These procurement issues are investigated in greater depth in another stream of the SMART project.

2. EU external relations and sustainable development in third country states

As noted above, development objectives were first codified into primary law in the Maastricht Treaty (1992) and most recently in Article 208 of the Lisbon Treaty. As a legal obligation, Article 208(1) TFEU provides that ‘development cooperation shall have as its primary objective the reduction and, in the long term, the eradication of poverty’. Furthermore, Article 208(2) TFEU requires that the EU and its Member States ‘comply with the commitments and *take account* of the objectives they have approved in the context of the United Nations and other competent international organisations’. Further, under TEU, Art 21(2)(d) and (f), the EU will ‘foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty’ and ‘help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural

¹¹⁹ See, for example, regarding structural funding aimed at sustainable energy, Dalia Streimikiene, Valentinas Klevas, and Jolanta Bubeliene, ‘Use of EU Structural Funds for Sustainable Energy Development in new EU Member States (2007) 11(6) *Renewable and Sustainable Energy Reviews* 1167. For contemporary considerations which include ‘sustainable development’ alongside the language of ‘smart, sustainable and inclusive growth’, see the criteria applied for 2014 – 2020 at http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/pa_guidelines.pdf.

¹²⁰ Directive 2014/23/EU, Article 30(3); Directive 2014/24/EU, Article 18(2) and Directive 2014/25/EU, Article 36(2).

resources, in order to ensure sustainable development’. This is consistent with the more general objectives in Article 3(5) TEU (outlined at the start of Section I (b)).

In the context of trade and aid, we would expect the EU by reason of its commitment to policy coherence to apply the same multi-faceted approach to the ‘sustainable development of the Earth’. Such initiatives are consistent with the insertion of a ‘special incentive arrangement for sustainable development and good governance chapter’ to the granting of tariff relief under the EU Generalized System of Preferences (GSP), which has come to be known as ‘GSP+’,¹²¹ and the EU insertion of a ‘sustainable development’ facet and treatment of free trade agreements with third countries (FTAs).¹²²

a. EU GSP+

In 1994, the EU GSP regulatory framework made provision for tariff preferences to be temporarily withdrawn in whole or in part in various circumstances, including breach of human rights and key labour standards.¹²³ This provided the legal basis for subsequent withdrawal of trade preferences from Burma/Myanmar.¹²⁴ In 2001, ‘special incentive arrangements’ operated separately in respect of the development, drugs, the environment and labour standards. The assumption was that such measures were permissible by reason of the WTO Enabling Clause, which allows developed states at their discretion to provide tariff preferences for developing countries.¹²⁵ After the successful challenge by India to the problematic drug arrangements case,¹²⁶ the EU’s response to the findings

¹²¹ Council Regulation 732/2008 O.J. L 211/1 (2008), Chapter 2, Section II.

¹²² See for discussion, Lore Van den Putte and Jan Orbie, ‘EU bilateral trade agreements and the surprising rise of labour provisions’ (2015) 31(3) *International Journal of Comparative Labour Law and Industrial Relations* 263.

¹²³ See Article 9 of Council Regulation (EC) 3281 /94 and Article 9 of Regulation 1256/96.

¹²⁴ Regulation 552/97 of 24 March 1997 temporarily withdrawing preferences from Myanmar.

¹²⁵ the Enabling Clause: ‘Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries’ – Decision of 28 November 1979 L/4903 – appended to GATT (which continues to apply as part of GATT 1994 under the WTO) available at: https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm.

¹²⁶ Decision of the Appellate Body, European Communities – Conditions for the granting of Tariff Preferences to Developing Countries, WT/DS246/AB/R, adopted 7 April 2004. Discussed in Robert Howse, ‘India’s WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for “Political” Conditionality in US Trade Policy’ (2003) 4(2) *Chicago Journal of International Law* 385; and Robert Howse, ‘Back to Court After Shrimp/Turtle? Almost But Not Quite Yet: India’s Short Lived Challenge to Labor and Environmental Exceptions in the European Unions’ Generalized System of Preferences’ (2003) 18 *American University International Law Review* 1333. Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm.

of the WTO Appellate Body in that case was to incorporate the key international instruments relating to human rights, core labour rights and environmental standards in an overarching ‘special incentive arrangement for sustainable development and good governance chapter’ (which has come to be known as ‘GSP+’);¹²⁷ an approach that has been maintained in the current incarnation of the GSP.¹²⁸ However, whereas the 2008 GSP+ Regulation was concerned with ‘effective implementation’ of key international instruments, the 2012 Regulation merely applies where there is no ‘serious failure’ to implement.¹²⁹ What is interesting for our purposes is the labelling of this aspect of GSP+ along the lines of ‘sustainability’, suggesting that this normative content is vital for durability of economic, social and environmental relations in trade and commerce.

b. Sustainable development in FTAs

The EU’s commitment to extending the protection of environmental standards, and promoting sustainable development, through regional trade is evident in the services chapters of the FTAs recently concluded with Colombia and Peru, Singapore, and Georgia. At the multilateral level, members may adopt measures that are otherwise WTO inconsistent where they are ‘relating to the conservation of exhaustible natural resources’ (Article XX(g) of the General Agreement on Tariffs in Trade (GATT)) or where such measures are ‘necessary to protect human, animal or plant life or health’ (Article XX(b) GATT; Article XIV(b) of the General Agreement on Trade in Services (GATS)). There is no such provision relating to environmental conservation in the GATS that corresponds with Article XX(g) GATT. However, environmental conservation is afforded some protection at the multilateral level, namely through a ‘wide interpretation’ of the link between Article XX(g) and Article XX(b) of the GATT,¹³⁰ and an application of this interpretation to Article XIV(b) GATS.¹³¹ This wide interpretation has resulted in the Appellate Body and panel recognising clean air,¹³² mineral

¹²⁷ Regulation (EC) No 732/2008, Chapter 2, Section II.

¹²⁸ Regulation No 978/2012.

¹²⁹ For criticism, see Jeff Vogt, ‘A little Less Conversation: The EU and the (Non) Application of Labour Conditionality in the Generalized System of Preferences (GSP)’ (2015) 31(3) *International Journal of Comparative Labour Law and Industrial Relations* 285.

¹³⁰ *United States-Import Prohibitions of Certain Shrimp and Shrimp Products* Report of the Appellate Body WT/DS58/AB/R (12 October 1998), paras 128-131.

¹³¹ Bregt Natens, *Regulatory Autonomy and International Trade in Services: The EU Under GATS and RTAs* (Cheltenham: Edward Elgar, 2016), 296.

¹³² *United States — Standards for Reformulated and Conventional Gasoline (United States — Gasoline)* Report of the Appellate Body Report WT/DS2/AB/R (20 May 1996), DSR 1996:I, 3 at 14.

resources,¹³³ petroleum,¹³⁴ fish,¹³⁵ and turtles¹³⁶ as falling within the meaning of ‘exhaustible natural resources’. Identifying the shortcoming of Article XIV GATS, the EU has included an explicit clause within its FTAs with Colombia and Peru,¹³⁷ Singapore,¹³⁸ and Georgia¹³⁹ providing an exception for measures relating to the conservation of natural resources. The exception arises only if it is applied in conjunction with restrictions on domestic entrepreneurs or investors, or on the domestic supply or consumption of services. As trade in services becomes ever more significant, this shift toward better protection of the environment at the EU FTA level fills the gap left by the multilateral level. While this step-forward by the EU may appear to further fragment the regulatory regimes, we argue that this offers a model for other WTO Members negotiating FTAs in a manner that promotes sustainable development and could offer a new model for the general exceptions in the GATS if that agreement is renegotiated in the future,¹⁴⁰ albeit that seems highly improbable.

We note that, in the most recent FTAs concluded by the EU, in particular the Comprehensive Economic Trade Agreement (CETA) concluded between the EU and Canada, there is a tendency to give even greater prominence to the language of sustainable development. Chapter 22: ‘Trade and Sustainable Development’, for example, is designed to encompass Chapters 23 (Trade and Labour) And 24 (Trade and Environment). Accordingly, the overarching aims are in Art. 22.1(3) to:

- (a) Enhance ‘coordination and integration’ of ‘labour, environmental and trade policies’
- (b) Promote ‘dialogue and cooperation... with a view to developing their economic and trade relations in a manner that supports their respective labour and environmental protection measures’
- (c) Enhance ‘enforcement’ and ‘respect’ for such measures
- (d) ‘Promote the full use of instruments, such as impact assessment and stakeholder consultations in the regulation of trade, labour and environmental issues...’

¹³³ *China – Rare Earths (Panel)* Panel Report WT/DS433/R, paras 7.248-7.249.

¹³⁴ *United States-Import Prohibitions of Certain Shrimp and Shrimp Products* Report of the Appellate Body WT/DS58/AB/R (12 October 1998), paras 128.

¹³⁵ *United States – Tuna (Mexico) (GATT Panel)* para 4.9; *Canada – Herring and Salmon (GATT) Panel* para 4.4.

¹³⁶ *United States-Import Prohibitions of Certain Shrimp and Shrimp Products* Report of the Appellate Body WT/DS58/AB/R (12 October 1998), paras 131.

¹³⁷ Article 167.1(c) EU-Colombia and Peru FTA.

¹³⁸ Article 8.62(c) EU-Singapore FTA.

¹³⁹ Article 134.2(c) EU-Georgia Association Agreement.

¹⁴⁰ Bregt Natens, *Regulatory Autonomy and International Trade in Services: The EU Under GATS and RTAS* (Cheltenham: Edward Elgar, 2016), 302.

- (e) 'Promote public consultation and participation in the discussion of sustainable development issues...' (SD)

This is an integrated approach to the three pillars of sustainability, in which certain institutional mechanisms are key. These are a Committee on Trade and Sustainable Development (CTSD) comprised of high level representatives regarding trade, environment and labour (Art. 22.4) with use of 'contact points' to facilitate discussion and include session with the public annually. Also there is to be a Civil Society Forum to conduct an annual 'dialogue' on the SD aspects of CETA (Art. 22.5). There is a supplementary stress on 'transparency' in Art.22.2 linked to 'public information and awareness' – para. 1: 'each Party shall encourage public debate with and among non-state actors as regards the development and definition of policies that may lead to the adoption of labour law and standards by its public authorities'. CETA is now to be scrutinised by the Court of Justice of the European Union, following a reference brought by Belgium,¹⁴¹ and the content of some of its provisions (including those relating to sustainability and investment disputes) remain the subject of controversy.¹⁴² Nevertheless, it is indicative again of the EU's determination to identify and pursue 'sustainability' objectives in external trade.

c. *Policy Coherence for Development*

The idea of Policy Coherence for Development (PCD) at EU level emerged in 2006 with the adoption of the first *European Consensus for Development*¹⁴³ and was emphasised again in the 2011 EU Communication on the Agenda for Change.¹⁴⁴ This initiative has centred on a number of key themes, including trade and finance.¹⁴⁵ In particular, the DG responsible for development cooperation

¹⁴¹ This has been requested following the CJEU issue of Opinion 2/15 ON 16 May 2017 (available at <http://curia.europa.eu/juris/document/document.jsf?docid=190727&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=309331>) regarding the EU-Singapore Free Trade Agreement (FTA) and concerns Chapter 8 'Investments' and Section F 'Resolution of investment disputes...' regarding a newly devised Investment Courts System. See http://www.uniglobalunion.org/sites/default/files/files/news/declaration_du_royaume_de_belgique_en_uni_global_union.pdf and <https://greennews.ie/ecj-examine-legality-ceta-investment-dispute-settlement-system/>.

¹⁴² See on the scope to build on the provisions in CETA, for example, <http://cjel.law.columbia.edu/preliminary-reference/2017/trade-investment-and-sustainable-development-in-ceta/>.

¹⁴³ See OJ C 46/1 24.2.2006 at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AC%3A2006%3A046%3A0001%3A0019%3AEN%3APDF>.

¹⁴⁴ COM(2011) 637 final, Brussels, 13.10.2011.

¹⁴⁵ Others include food security, climate change and environmental protection, migration and security.

(DEVCO) and the other directorates of the Commission have taken steps to measure the impacts of trade and investment on developing countries through:

- Impact Assessment Guidelines and the Better Regulation framework (including the Tool Kit)
- Internally, DG DEVCO has worked with the Commission to create a toolbox for consideration by other DGs when externalising their policies.

The collective aim of these measures is to ensure PCD is mainstreamed across all Commission activities – it is an internal and external goal/tool of the EU. Progress has been monitored through bi-annual PCD reports, which have been in place since 2007. The most recent report was issued in 2015.¹⁴⁶ Member States report their activities to demonstrate that PCD is mainstreamed, providing a snap-shot of the country situation. Through the monitoring process, the MS are accountable to the Commission but the reports also raise awareness with civil society. Findings are disseminated through a ‘launch party’. EU delegations are now included in the reporting process, which marks a significant shift in the framework. They are required to report on their observed impacts of EU policies in developing countries.

The new Consensus on Development was signed in June 2017¹⁴⁷ and replaces the previous decade-old version. It contains, in particular, a new chapter on PCD and a new chapter on the environment. The PCD chapter is more specific than the previous iteration but the concept is framed more concretely in the language of the 2015 SDGs so that, at least at the international level, PCD is situated within the 2030 Agenda through the monitoring and reporting requirements of the SDGs. The new Consensus notes that PCD is ‘a fundamental contribution to achieving the SDGs’¹⁴⁸ and will be operationalised through a rights-based approach to development.¹⁴⁹ It notes that universal values such as ‘democracy, good governance, the rule of law, and human rights for all’ are ‘preconditions of sustainable development’¹⁵⁰ and, as such, the EU will promote universal values in its development policies. Much like the first Consensus in 2006, the EU continues to endorse a broad concept of development which acknowledges the economic, social, and environmental dimensions of development. Stating the aims of the new Consensus, paragraph 4 provides:

¹⁴⁶ See the Council Conclusions available at <http://data.consilium.europa.eu/doc/document/ST-13202-2015-INIT/en/pdf>.

¹⁴⁷ Available at: https://ec.europa.eu/europeaid/sites/devco/files/european-consensus-on-development-final-20170626_en.pdf.

¹⁴⁸ The New Consensus, above, para. 10.

¹⁴⁹ Ibid., para. 16.

¹⁵⁰ Ibid., para. 61.

The EU and its Member States are committed to a life of dignity for all that reconciles economic prosperity and efficiency, peaceful societies, social inclusion, and environmental responsibilities...efforts will be targeted toward eradicating poverty, reducing vulnerabilities, and addressing inequalities to ensure that *no-one is left behind*.

In the context of external relations and trade, the new Consensus provides that the EU will ‘continue through its trade policy to ensure that developing countries, particularly the most vulnerable, reap the benefits of inclusive growth and sustainable development from enhanced participation in regional integration and the multilateral trading system’.¹⁵¹ In this sense, PCD can be understood as also integral to the Commission’s most recent iteration of its external trade policy, *Trade for All*.¹⁵²

C. CONCLUSION

We are not suggesting here that the EU acts in an ideal fashion at all times internally or externally, but that it has offered models for recognition of social and environmental sustainability, not merely as exceptions to market rules but as free-standing issues of regulatory importance. Further, the EU market rules, which acknowledge the autonomy and significance of the actions of private actors across borders, also offers an alternative vision of transnational trade regulation. The structural redistributive facets of EU internal and external activities indicate the kinds of subsidiary measures that are needed to ensure that market rules are perceived generally as fair. These are not merely ‘aid’ but driven by recognition that all benefit from having more ‘equal’ and ‘equipped’ trading partners and their direction and operation is intended to be framed within a broader understanding of the multiple dimensions of sustainability: economic, but also social and environmental.

¹⁵¹ Ibid. at para. 23.

¹⁵² European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (2015)

II. TRADE LAW: THE WORLD TRADE ORGANISATION (WTO) AND THE ROLE OF FREE TRADE AGREEMENTS (FTAS)

In this section, we turn to the dynamics of international trade and the mechanisms and legal instruments utilised for its regulation. In so doing, we consider the role of the World Trade Organisation (WTO) and free trade agreements as potential promoters of (or detractors from) sustainable development. It is important to note from the outset that, when turning from EU to international law, the legal regime is concerned solely with the actions of state parties, rather than the private actors which initiate trade relations or, indeed, investors, whose concerns are largely to be represented elsewhere, such as in the International Centre for Settlement of Investment Disputes (ICSID) within the World Bank framework (to which we return in Part IV).

We begin with analysis of the WTO and, in this respect, draw on the contributions made by Daniel Szabo and Clair Gammage at the SMART conference on Trade and Investment in May 2017. We then turn to the issue of free trade agreements, drawing again on the work of Clair Gammage on North-South Free Trade Agreements (FTAs) from a development perspective and that of Franz Ebert on the treatment of labour standards in the new mega-regional FTAs. In this context, we also draw on the research of Tonia Novitz on trade and work, and more particularly trade in services and its potential relevance for sustainability, the relevance of which will also be pertinent in the context of the problem of ‘supply chains’ discussed in Part III.

A. THE WORLD TRADE ORGANISATION ON ‘DEVELOPMENT’ AND ‘SUSTAINABILITY’

Since its creation from January 2015, the World Trade Organisation (WTO) has been, at least on paper, sensitive to the requirements of developing countries and ‘sustainable development’.¹⁵³ The creation of the WTO was significant for many reasons, not least of which was the multilateral agreement to move beyond the provisionally applied General Agreement on Tariffs and Trade 1948

¹⁵³ See for example the preamble to the Marrakesh Agreement establishing the World Trade Organisation (WTO) available at: https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

(GATT) to create forms of global regulation for services and intellectual property, alongside certain plurilateral specific agreements.

On a superficial level, the WTO might seem to resemble the EU's concern with trade in goods and in services (the latter coming to the fore later, just as the EU Services Directive¹⁵⁴ took time to be adopted). However, as observed at the start of this section, the WTO regime is concerned solely with the actions of states parties. The international regime governing trade is in this way fractured between the international financial institutions (notably the IMF and the World Bank Group, which are UN agencies, with parts of the latter being more concerned with the actions of private commercial actors) and the WTO as a multilateral institution originally intended to have United Nations (UN) anchoring, but which was lost for historical reasoning.¹⁵⁵ In this way, the WTO organisationally has a rationale whereby the economic is severed from the social and environmental aspects of development. Whereas sustainable development can and will be actively the subject of UN intervention, for example, as regards the adoption of the Sustainable Development Goals in 2015,¹⁵⁶ there is apparently scope for the inclusion of these objectives into the preoccupations of WTO activity, despite the aspirations of SDG 17.

1. Key legal principles (and exceptions) at the WTO

There are certain key principles, which are understood to operate as basic rules of trade within the GATT and GATS. These can be understood as formal rules of reciprocity between nations. There is the most favoured national (MFN) principle, which requires any WTO member to receive the same privileges regarding tariffs (GATT) or market access (GATS) as any other. There is also a requirement of 'national treatment', whereby the same rules will apply to foreign as domestic goods or services, as long as the state in question is a WTO member. Quantitative restrictions are unacceptable. The application of these rules and their exceptions is managed through politically constituted committees (such as that on Regional Trade Agreements) but also a 'Dispute Settlement Understanding' which sets out clear guidance as to the establishment and operation of panels to

¹⁵⁴ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L376/36 (the Services Directive); see also Catherine Barnard, 'Unravelling the Services Directive' (2008) 45 Common Market Law Review 323.

¹⁵⁵ Dan Sarooshi, 'Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?' (2014) 49 Tex. Int'l L. J. 445.

¹⁵⁶ <http://www.undp.org/content/undp/en/home/sdgoverview/post-2015-development-agenda.html>

hear issues, recourse to an Appellate Body and implementation of findings by the contracting parties.

It took some considerable time for concerns relating to stages of economic development to receive attention within the GATT. In this respect, the introduction of Part V and amendment of Articles XVIII - XX of the GATT can be seen as an acknowledgement of the specific needs of developing countries, including a principle of non-reciprocal treatment, their efficacy for changing fundamentally the uneven dynamics of world trade has been questioned.¹⁵⁷ Moreover, while the developed states in the Global North have the opportunity under an 'Enabling Clause' to make provision for non-reciprocity and redistribution through tariff preferences, there is no obligation to do so.¹⁵⁸ It is only recently that the requirement that the North operate GSP transparently and fairly has been recognised within the WTO due to findings of the Appellate Body.¹⁵⁹ Even then, the broader ambit of 'sustainable development', which also has social and economic dimensions does not form any explicit part of the allowance made for 'special and differential treatment' (SDT) of developing states in the South. It does not help that the legal framework established with the WTO does not permit of attention to the role of private actors, which becomes problematic when we know that the Gross Domestic Product (GDP) of a developing state may be less than annual profits of a multinational enterprise (MNE). The rules are formalistic in this respect and there seems little change of dramatic progress via the Doha Round of negotiations, which seems to be drawing to a close.¹⁶⁰

¹⁵⁷ See Maria Jobim, 'Drawing on the Legal and Economic Arguments in Favour and Against "Reciprocity" and "Special and Differential Treatment" for Developing Countries within the WTO System' (2013) 6(3) *Journal of Politics and Law* 55; Uché Ewelukwa, 'Special and Differential Treatment in International Trade Law: A Concept in Search of Content' (2003) 79 *North Dakota Law Review* 831; and Donatella Alessandrini, *Developing Countries and the Multilateral Trade Regime* (Hart, 2010), pp. 164 - 181.

¹⁵⁸ The Enabling Clause: 'Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries' – Decision of 28 November 1979 L/4903 – appended to GATT (which continues to apply as part of GATT 1994 under the WTO) available at: https://www.wto.org/english/docs_e/legal_e/enabling1979_e.htm. See also Omphemetse S. Sibanda Sr, 'Towards a Revised GATT/WTO Special and Differential Treatment Regime for Least Developed and Developing Countries' (2015) 50 *Foreign Trade Review* 31.

¹⁵⁹ Decision of the Appellate Body, *European Communities – Conditions for the granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 7 April 2004. For discussion, see Robert Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy' (2003) 4(2) *Chicago Journal of International Law* 385.

¹⁶⁰ See the Nairobi Ministerial Declaration (2015), para. 32: 'This work shall maintain development at its centre and we reaffirm that provisions for special and differential treatment shall remain integral. Members shall also continue to give priority to the concerns and interests of the least developed countries. Many Members want to carry out the work on the basis of the Doha structure, while some want to explore new architectures.' See on this statement, Bryan Mercurio and Antoine

The only scope for social and environmental constraints remains 'General Exceptions', which under Article XX GATT and Article XIV GATS, entails unilateral state action rather than the competence of WTO to declare an injustice and act in response. So, where a state identifies that application of GATT or GATS rules would lead to a specific harm (listed in the 'General Exceptions' clause such as harm to 'human, plant or animal life'), that state can defensibly take action in breach of the standard trade rules. However, this must not be discriminatory or a disguised restriction on trade in terms of what is known as the 'chapeau'. There are also extra-territorial limitations to the operation of the clause. The problem then remains that the social and environmental tend to operate as only 'exceptions' to rather than constitutive of markets, and also can only be asserted by the state that has the market power to do so effectively. We return to this litigation and its outcomes below.

2. The significance of the Dispute Settlement Understanding (DSU) and the Appellate Body (AB) at the WTO

Within the WTO, the Dispute Settlement Understanding (DSU) provides for the internal resolution of disputes. It is the role of the Dispute Settlement Body (DSB), which has 'made the conscious choice to function as if it were a court',¹⁶¹ to interpret the WTO Agreements in accordance with 'customary rules of interpretation of public international law'.¹⁶² Importantly, the recommendations of the Appellate Body and panel 'cannot add to or diminish the rights and obligations provided in the covered agreements'¹⁶³ leading some scholars to posit that the WTO dispute settlement has 'limited domain'.¹⁶⁴ There is some debate surrounding the nature of WTO law as to whether it is a 'hermetic system' isolated from public international law or a system of *lex specialis*.¹⁶⁵ WTO rules are 'rules of

Martin, 'Doha Dead and Buried in Nairobi: Lessons for the WTO' (2017) 16(1) *Journal of International Trade Law and Policy*.

¹⁶¹ Isabelle Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 *EJIL* 606.

¹⁶² See: Article 3.2 Dispute Settlement Understanding, Article 17.6(ii) Anti-Dumping Agreement, Article IX:2 of the WTO Agreement.

¹⁶³ Article 3.2 Dispute Settlement Understanding and Article 19(1) Dispute Settlement Understanding.

¹⁶⁴ Joel P. Trachtman, 'The Domain of Dispute Resolution' (1999) *Harvard International Law Journal* 40: 333.

¹⁶⁵ Pieter van Kuijper, 'The Law of the GATT as a Special Field of International Law' (1994) *Netherlands Yearbook of International Law*, 227; Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) *EJIL* 13: 766-767.

international law that, in certain respects, constitute *lex specialis* vis-à-vis certain rules of general international law'.¹⁶⁶

While not all WTO Members have signed and ratified the Vienna Convention on the Law of Treaties (VCLT), the Appellate Body has confirmed that Articles 31-33 of that Convention constitute customary rules of public international law in a number of disputes.¹⁶⁷ Pursuant to Article 31.1 of the Vienna Convention, treaty provisions are to be interpreted by the Appellate Body and panel 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. If, on applying the reasoning laid out in Article 31 VCLT, the interpretation leads to a result that is 'manifestly absurd or unreasonable', the Appellate Body and panel can refer to supplementary means of interpretation including the *travaux préparatoires*.¹⁶⁸ In addition, and while formally the recommendations of the DSB are not binding on future disputes,¹⁶⁹ a *de facto* rule of precedent appears to have emerged over time.¹⁷⁰ The Appellate Body has stated that 'the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system'.¹⁷¹ Furthermore, and 'absent cogent reasons', the panel and Appellate Body will apply analogic reasoning to cases raising the same legal question in subsequent cases¹⁷² on the basis that adopted reports 'create legitimate expectations'¹⁷³ for WTO Members in subsequent disputes. To date, the Appellate Body has refused to import legal norms from elsewhere in international law and considers these norms to fall outside the scope of

¹⁶⁶ Joost H.B. Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?' (2000) *AJIL* 95, 539.

¹⁶⁷ See: *United States – Standards for Reformulated and Conventional Gasoline* Appellate Body Report WT/DS2/AB/R, para 16-17; Report *US – Final Countervailing Duty Determination with Respect to Certain Soft Lumberwood from Canada* Appellate Body Report WT/DS257/AB/R, para 59; and *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India* Appellate Body Report WT/DS141/AB/RW, at para. 123.

¹⁶⁸ Article 32 VCLT.

¹⁶⁹ In the *US – Zeroing (Korea)* dispute the panel stated: 'In our view, there is not a system of precedent within the WTO dispute settlement system and panels are not bound by Appellate Body reasoning.' See *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea* Report of the Panel WT/DS402/R (18 January 2011), para 7.31.

¹⁷⁰ A. Scully-Hill & H. Mahncke, 'The Emergence of the Doctrine of Stare Decisis in the World Trade Organisation Dispute Settlement System' (2009) *Legal Issues of Economic Integration* 36: 133.

¹⁷¹ *United States – Final Anti-Dumping Measures on Stainless Steel From Mexico*, Appellate Body Report WT/DS344/AB/R (30 April 2008), para. 160.

¹⁷² *Ibid.*

¹⁷³ *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea* above at para 7.31.

the interpretive function of the DSB, unless such a norm relates explicitly to the way in which a trade measure is applied or a conflict of laws arises.¹⁷⁴

The fairness of the DSB procedure remains under scrutiny. While clearly an improvement on the non-binding nature of panel findings prior to 1995 under the GATT, there remain systematic disadvantages for developing countries. These relate to capacity on the international stage as well as bargaining power and, although the WTO offers assistance to such states, difficulties continue to arise in terms of their willingness to bring disputes and see the litigious process through.¹⁷⁵ Since 2001, an Advisory Centre on WTO Law (ACWL) provides free advice on dispute settlement proceedings and training. This is available to developing countries which are members (presently 32 states) and the least developed states (currently 42).¹⁷⁶ While developing country participation has statistically improved, that participation has increased in volume due to the activities of five countries, namely Argentina, Brazil, Chile, India and Thailand. These may more accurately be described as emerging economies and are not representative of developing country experience of the DSU, which can be mystifying in terms of asserting legal rights in terms of limited engagement in global trade.¹⁷⁷ Notably, although no specific provision is made for *amicus curiae* (friends of the court) in the DSU, the AB has accepted the practice of allowing submissions from such sources in support of one party and may even allow these where they are unsolicited, causing particular controversy.¹⁷⁸ It can be the case that where environmental concerns come into conflict with the development objectives of a particular country, the non-governmental organisation (NGO) raising the environmental concerns is more efficacious than a developing country appearing in the same proceedings.

¹⁷⁴ *Mexico-Tax Measures on Soft Drinks and Other Beverages* Appellate Body Report WT/DS308/AB/R (6 March 2006). Conflicts of law issues also fall to be discussed here, which we will address in the extended paper.

¹⁷⁵ Marc Busch and Eric Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/ WTO Dispute Settlement' (2003) 37(4) *Journal of World Trade* 719; and George A. Bermann and Petros C. Mavroidis (eds), *WTO Law and Developing Countries* (CUP, 2007).

¹⁷⁶ See <http://www.tfafacility.org/advisory-centre-wto-law-acwl>.

¹⁷⁷ Hunter Nottage, 'Trade and Development' in Bethlehem et al (eds), *The Oxford Handbook of International Trade Law* (OUP, 2009), especially at 490.

¹⁷⁸ For the WTO's official outline of this practice, see:

https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm.

3. Litigation on Article XX GATT: the emergence of stronger environmental protections?

Article XX was included in the GATT to accommodate for the regulation of trade in accordance with both material and nonmaterial considerations, albeit the test for justifying the restriction of trade on the basis of nonmaterial concerns is extremely narrow and the exceptions under Article XX are 'limited and conditional'.¹⁷⁹ Daniel Szabo, in his paper on 'Sustainable Trade Renewable Energy and the WTO',¹⁸⁰ has commented that regulation of 'process and production methods' (PPMs) often increase market barriers,¹⁸¹ especially since developing countries that do not have state-of-the-art production methods at their disposal.¹⁸² As he observes, it is highly unlikely that the issue of PPMs is going to disappear or diminish in significance, because life-cycle based tools are increasingly favoured by policy-makers for environmental management purposes.¹⁸³ This is due to the increasing realization that integrated product policy based on life-cycle thinking is necessary to get a comprehensive picture of how the entirety of the product's existence, its journey from cradle to grave affects the nine planetary boundaries, as observed in the over-arching design of the SMART project.¹⁸⁴ There would seem to be a gradual change in attitude toward non-product related PPMs based on environmental concerns, perhaps derived from the use of sustainable development as a guiding interpretative principle in such cases.

¹⁷⁹ *United States-Import Prohibitions of Certain Shrimp and Shrimp Products* Appellate Body Report WT/DS58/AB/R (12 October 1998), para 157.

¹⁸⁰ Presented in Oslo, May 2017.

¹⁸¹ See Sanford E Gaines, 'Processes and production methods: how to produce sound policy for environmental PPM-based trade measures?' (2002) 27(2) *Columbia Journal of Environmental Law* 396 and Gabrielle Marceau, 'A Comment on the Appellate Body Report in EC-Seal Products in the Context of the Trade and Environment Debate', (2014) 23(3) *Review of European, Comparative & International Environmental Law* 325.

¹⁸² Emily Barrett Lydgate, 'The EU, the WTO and indirect land-use change' (2013) 47(1) *Journal of World Trade* 20.

¹⁸³ See European Commission, 'Communication from the Commission to the Council and the European Parliament – Integrated Product Policy Building on Environmental Life-Cycle Thinking', COM(2003) 302 final, 2003, <<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0302:FIN:en:PDF> at 4-7 and Steven Alan Cohen, 'Life Cycle Assessment and the US Policy-Making Context' in Nora Savage, Michael E. Gorman, and Anita Street (eds.), *Emerging Technologies: Socio-Behavioral Life Cycle Approaches* (CRC Press, 2013) at 219 - 222.

¹⁸⁴ See Johan Rockström et al, 'Planetary Boundaries: Exploring the safe operating space for humanity' (2009) 14(2) *Ecology & Society* and Will Steffen et al, 'Planetary Boundaries: Guiding human development on a changing planet' (2015) 347/6223 *Science*.

Prior to the creation of the WTO, disputes had been brought before the GATT's DSB relating to the justification of trade restrictions on the basis of environmental concerns.¹⁸⁵ In the *Tuna/Dolphin II* dispute, the GATT panel recognised that the 'objective of sustainable development...includes the protection and preservation of the environment'.¹⁸⁶ This demonstrates that prior to the WTO, there was a notable shift toward the recognition of sustainable development but that this constituted an 'objective' and not a legal norm, *per se*. The issue before the panel required examination of whether the US could impose trade embargoes on tuna 'in pursuit of its environmental objectives'.¹⁸⁷ Marking the first instance in which the DSB appears to interpret the principles of free trade in the context of sustainable development, this balancing approach was subsequently codified in The Marrakesh Agreement at the conclusion of the Uruguay Round in 1994.¹⁸⁸

Perhaps the most significant statements made to date from the WTO's DSB in relation to sustainable development derive from the findings of the Appellate Body in the *Shrimp/Turtles* dispute, concerning a US ban on the importation of shrimp and shrimp products.¹⁸⁹ The United States invoked Article XX(g) which provides that a trade restrictive measure may be adopted where it is '*relating to the conservation of exhaustible natural resources*'. Under Section 609, the US banned all shrimp and shrimp products that had been harvested using trawlers that were not fitted with turtle excluder devices (TEDs) comparable to those used on US trawlers. This ban was justified on environmental grounds, on the basis that sea turtles often migrate through waters with shrimp and subsequently get caught in the trawlers nets. Section 609 was, therefore, implemented on environmental conservation grounds to reduce harm to sea turtles. In analysing the legality of the US trade restrictive measure, the AB asserted that the objective of sustainable development set out in the Marrakesh Agreement 'gives colour, texture and shading to the rights and obligations of

¹⁸⁵ *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon* GATT B.I.S.D. L/6268-35 S/98 (22 March 1988); *Thailand-Restrictions on Importation of and Internal Taxes on Cigarettes* GATT B.I.S.D. DS10/R-37S/200 (7 November 1990); *United States-Restrictions on Imports of Tuna* GATT B.I.S.D. 39S/155 (3 September 1991)[*Tuna/Dolphin I*]; and, *United States-Restrictions on Imports of Tuna* 33 I.L.M 839 (1994)(*Tuna/Dolphin II*).

¹⁸⁶ *United States-Restrictions on Imports of Tuna* GATT Report 33 I.L.M 839 (1994) (*Tuna/Dolphin II*), para 5.42

¹⁸⁷ *Ibid.*

¹⁸⁸ The WTO 'Decision on Trade and Environment' adopted in Marrakesh on 15 April 1994 states: "...Considering that there should not be, nor need be, any policy contradiction between upholding and safeguarding an open, non-discriminatory and equitable multilateral trading system on the one hand, and acting for the protection of the environment, and the promotion of sustainable development on the other..."

¹⁸⁹ *US-Shrimp* Appellate Body Report WT/DS58/AB/R (12 October 1998).

Members under the WTO Agreement generally, and under the GATT 1994, in particular'.¹⁹⁰ Notably, this was a case in which the AB also articulated its entitlement to entertain submissions from amicus curiae, on the basis that panels possess the comprehensive authority to seek information from any relevant source (Article 13 of the DSU) and to add to or depart from the Working Procedures in Appendix 3 to the DSU.¹⁹¹

What is of most interest to the discussion on the judicialisation of the concept of sustainable development is what the Appellate Body emphasised that it did *not* say:

'We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally, or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.'¹⁹²

It did not, however, further recognise sustainable development as a legal norm in the corpus of international law. Indeed, the Appellate Body avoided addressing whether extraterritorial application of a measure was permissible under Article XX.¹⁹³ The compliance report confirmed that the US had removed the discriminatory defects in the application of the measure.¹⁹⁴ Thus since the measure was brought in compliance with WTO law, extraterritoriality may not be an issue in case of Article XX exemptions.

Article XX(b), pertaining to the necessity of protecting human, animal or plant life or health, was relied on as justification in *EC – Asbestos*.¹⁹⁵ The measure banning building materials containing asbestos was deemed capable and necessary to achieve this objective and there were no

¹⁹⁰ Ibid, para 155. (Emphasis added).

¹⁹¹ Ibid., paras 105 – 108.

¹⁹² Ibid, para 185.

¹⁹³ Stephanie Switzer and Joseph A McMahon, 'EU Biofuels Policy — Raising the Question of WTO Compatibility' (2011) 60(3) *International and Comparative Law Quarterly* 734.

¹⁹⁴ Louise de la Fayette, 'United States-Import Prohibition of Certain Shrimp and Shrimp Products-Recourse to Article 21.5 of the DSU by Malaysia' (2002) 96(3) *The American Journal of International Law* 691.

¹⁹⁵ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products* Appellate Body Report WT/DS135/AB/R (12 March 2001) at 59-63.

alternatives reasonably available, and it was also justifiable under the chapeau. Although some would argue that this means that environmental interests are increasingly accepted as justification, it needs to be pointed out that the exemption was used to support local life and health and not extraterritorial protection. The Appellate Body did not take the step to address the jurisdictional issue, despite of that this would have been of particular importance for more ambiguous cases involving climate change, air pollution, or biodiversity.¹⁹⁶ Finally, in *Mexico – Soft Drinks* Mexico tried to rely on Article XX(d), relating to the necessity to secure compliance with laws or regulations. However, the Appellate Body stated that this exception is not available to justify WTO inconsistent measures that seek to make another Member comply with its other international obligations.¹⁹⁷

More recently, the *EC-Seals* dispute provided another opportunity for the Appellate Body to examine the link between trade and sustainable development.¹⁹⁸ This case concerned an EU ban on all seal products into its market on the ground that the methods used to kill seals caused unnecessary pain and suffering.¹⁹⁹ A number of exceptions to the ban were provided including for those seals harvested by indigenous communities and those seals hunted for the sustainable management of marine resources. It is well documented that a trade restrictive measure may be justified under Article XX of the GATT, which provides the exceptions to GATT rules, including the protection of morals under sub-paragraph (a). Both Canada and Norway, two of the world's largest producers of seal products, were affected by the EU ban and sought to challenge its legitimacy in the DSB.

It is generally accepted that animal welfare falls within the broad notion of sustainable development.²⁰⁰ Animal welfare standards constitute an element of sustainability in the agri-food

¹⁹⁶ Barbara Cooreman, 'Addressing environmental concerns through trade: a case for extraterritoriality?', (2016) 65(1) *International and Comparative Law Quarterly* 248.

¹⁹⁷ *Mexico – Tax Measures on Soft Drinks and Other Beverages* Appellate Body Report WT/DS308/AB/R (24 March 2006) DSR 2006:I, at 33.

¹⁹⁸ *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* Appellate Body Report WT/DS400/AB/R / WT/DS401/AB/R (18 June 2014).

¹⁹⁹ Regulation (EC) 1007/2009 of the European Parliament and of the Council of 16 September 2009 on Trade in Seal Products, 2009 OJ (L286) 38.

²⁰⁰ In the *Tuna/Dolphin III* dispute, the Panel noted: 'The protection of dolphins may be understood as intended to protect animal life or health or the environment. In this respect, a measure that aims at the protection of animal life or health need not, in our view, be directed exclusively to endangered or depleted species or populations, to be legitimate.' *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* Panel Report WT/DS381/R (15 September 2011) para 7.347.

production process²⁰¹ and it has long been a normative concern of the EU as manifested most recently in the Lisbon Treaty, wherein animals are conceived of as ‘sentient beings’.²⁰² This contrasts with the *Shrimp/Turtle* dispute, in which the Appellate Body noted that the US had shown no real effort toward the promotion of sea turtle conservation prior to the enactment of its trade embargo under Section 609.²⁰³

The meaning of the public morals exception under Article XX has been taken to mean concepts that ‘vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values’.²⁰⁴ The EU relied on Art. XX(a), relating to the necessity to protect public morals, in its attempt to exempt the measure. Surprisingly, the Panel and the Appellate Body accepted this as provisional justification or basis for legislative distinction, even though the measure did not directly address those moral concerns.²⁰⁵ Indeed, it could be said that the Panel’s approach was one of deference, concluding that each Member can determine what constitutes ‘public morals’ based on the prevailing or widespread belief of that particular society, although it is also the case that seals have been treated with heightened moral claim in international instruments for some time.²⁰⁶

The panel stated that the seal regime is necessary to achieve the objective set for the measure,²⁰⁷ but also revealed that while the ban was not more restrictive than necessary, the exceptions were not even-handed and could have led to unjustifiable and arbitrary discrimination.²⁰⁸ One of the measure’s exceptions treated Canadian and Greenlandic seals from Inuit Hunts differently, while

²⁰¹ Brian Ilbery, ‘Food Supply Chains and sustainability: evidence from specialist food producers in the Scottish/English borders’ (2005) 22 *Land Use Policy* 331-344.

²⁰² Article 13 of the Lisbon Treaty provides: “In formulating and implementing the Union’s agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.”

²⁰³ *US-Shrimp* Appellate Body Report above, para 167.

²⁰⁴ *United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services* Panel Report WT/DS285/AB/R (10 November 2004), para 6.461.

²⁰⁵ See Brendan McGivern, ‘The WTO Seal Products Panel: The Public Morals Defense’ (2014) 9(2) *Global Trade and Customs Journal* at 73; Heather Cook, ‘The EU’s seal products ban tests WTO’s public morals exception’ (2014) 81(4) *Journal of Transportation Law, Logistics and Policy* 329.

²⁰⁶ Katie Sykes, ‘Sealing animal welfare into the GATT exceptions: the international dimension of animal welfare in WTO disputes’ (2014) 13(3) *World Trade Review* 483.

²⁰⁷ Panel Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products* (2014) at 174 and 189.

²⁰⁸ *Ibid.* and see McGivern (2014) at 71-2.

another exception covered most EU produced seal products without covering Canadian produced ones.

In the wake of this dispute, it has been suggested that the product-related and non-product-related distinction may no longer be relevant in the GATT context; the focus should rather be on clarifying what policy considerations are acceptable under Article XX and how these may affect the products in question.²⁰⁹ Certainly, the *EC-Seals* dispute represents an extension of the Appellate Body recommendations in the *Shrimp/Turtle* dispute: both cases relate to the conservation of marine life, albeit justified on different grounds. Enabling Members to import their moral considerations into trade practices preserves the pluralism of the international community. Collectively, these disputes illustrate the interpretive and hermeneutic function of the concept of sustainable development. The Appellate Body has not articulated the concept of sustainable development as a norm of international law but, rather, it is utilised as an interstitial norm which may modify the character of legal norms.

B. EMBEDDING SUSTAINABLE DEVELOPMENT IN FTAS

FTAs have expanded exponentially and reach across the planet in what has been described as a 'spaghetti bowl' effect covering a range of cross-cutting and intersecting connections.²¹⁰ Petersmann argues that FTAs offer an opportunity 'for consolidating a 21st century model of multilevel, democratic governance of transnational public goods' which could have spill-over effects for other regional frameworks in Africa, Latin America, and South-East Asia.²¹¹ In this way, there is a possibility not only to address strategic trade advantages through such instruments, but also more aspirational sustainability and human rights objectives.

At the multilateral level, an attempt was made by the North to conclude multilateral agreements within the framework of the WTO on what are known as the 'Singapore issues' (raised at the Ministerial Conference in Singapore of 1996). The failure to reach agreement on these concerns

²⁰⁹ Petros C. Mavroidis, 'Sealed with a Doubt: EU, Seals, and the WTO' (2015) 6(3) *European Journal of Risk Regulation* 393.

²¹⁰ Jagdish Bhagwati, 'US Trade policy: The infatuation with Free trade agreements' (1995) discussion paper available at:

http://www.columbia.edu/cu/libraries/inside/working/Econ/ldpd_econ_9495_726.pdf.

²¹¹ Ernst-Ulrich Petersmann, 'Transformative Transatlantic Free Trade Agreements without Rights and Remedies of Citizens?' (2015) 18 *Journal of International Economic Law* 583.

with procurement, customs, investment and competition has led to them being dealt with through FTAs. FTAs may be agreed in relation to goods and services and permitted, under specific circumstances, by virtue of Article XXIV GATT and Art. V (and Vbis) GATS. Such FTAs have also become 'deeper' in that they may, according to the wishes of the parties, cover any or all of the Singapore issues and even social and economic objectives, unregulated by the WTO Agreement and its annexes. Attempts in the Doha round of WTO negotiations have (as yet) failed to achieve any consensus on significant modification of basic trade rules for developing countries or greater regulation of the Singapore issues.²¹² There has also been an attempt by countries in the North to seek to protect, not only environmental measures (which receive, as we have seen some measure of protection through WTO instruments and the DSB) but also social sustainability, in particular labour standards which have been explicitly excluded from consideration as a subject of trade negotiations since the Seattle Ministerial Conference of 2001.²¹³

In this section, we examine two illustrations of the use of FTAs to extend the sustainability regulatory agenda. One is the use of FTAs in the context of mega-regional agreements which seek to protect labour standards as a facet of sustainability. This is an area in which the EU has led, although we can also identify some significant developments in the context of US initiatives. In this context, we draw on the research findings of Franz Ebert in his paper presented in Oslo in May 2017 on 'Increasing the Social Sustainability of Trade Agreements Regarding Labour Standards. Insights from the TransPacific Partnership (TPP) Experience'. In this respect, we also draw on some of his other recent writing and on research conducted by Tonia Novitz.²¹⁴ The other question with which we grapple is the concern with the sustainability of development in the Economic Partnership Agreements (EPAs) concluded between the EU and groups of African Caribbean and Pacific (ACP) states, using original research from Clair Gammage.²¹⁵

²¹² Simon Evenett, 'Five Hypotheses concerning the fate of the Singapore issues in the Doha Round' (2007) 23(3) *Oxford Review of Economic Policy* 392.

²¹³ See the decision taken in the Singapore Ministerial Declaration adopted on 13 December 1996 (WT/MIN(96)/ DEC). This was compounded by events in Seattle where both the EU and US favoured some kind of 'social clause', which was rejected by developing countries as well as social and environmental campaigners. See Clyde Summers, 'The Battle in Seattle: Free Trade, Labor Rights, and Societal Values' (2001) 22 *University of Pennsylvania Journal of International Economic Law* 61.

²¹⁴ Some of this research material is taken from Tonia Novitz, *Trade and Work* (Edward Elgar 2019, forthcoming).

²¹⁵ In particular, see Clair Gammage, *North-South Regional Trade Agreements as Legal Regimes: A critical reassessment of the EU-SADC Economic Partnership Agreement* (Edward Elgar, 2017).

1. The TPP, CETA, sustainability and labour chapters

In 2012, in a compelling analysis of recent international trade initiatives, Lorand Bartels observed that SD chapters were emerging in economic partnership agreements, which made reference to protection of labour standards.²¹⁶ These chapters (as opposed to the standard HR clauses) were the new method by which to pursue EU ethical foreign policy objectives. Bartels placed this development at 2008, but Lore Van Den Putte and Jan Orbie see this as a programmatic change introduced by Peter Mandelson as Commissioner for DG Trade in 2005 instantiated in EU GSP from 2005 and in all free trade agreements from EU-Korea in 2011.²¹⁷

Contemporary academic opinion is critical of this shift. Van Den Putte and Orbie see the policy framework of SD as ‘reframing’ labour provisions in ways that are ‘more blurred’ and ‘ambiguous’.²¹⁸ In particular, putting labour standards:

“on the same level as environmental standards, is problematic from a human rights perspective and also has legal consequences. While implicitly they are also part of the essential elements clause, mentioning them also in the chapter on trade and sustainable development harms the indivisibility of human rights. In addition it is not clear how a violation of social norms should be handled: by taking appropriate measures as the violation of essential elements prescribes, or by referring it to the specific dispute settlement mechanism as described in the chapter on sustainable development, they are too different with regard to their objectives and measures to combine them in one oversight mechanism.”

Bartels expresses comparable misgivings, namely that if ‘core labour standards’ are seen as HR they can be subjected to dispute settlement in a way which contemplates suspension of trade

²¹⁶ Lorand Bartels, *Human rights and sustainable development obligations in EU Free Trade Agreements* (2012) Legal Studies Research paper Series, University of Cambridge Faculty of Law, Paper No. 24/2012 at 1: http://www.academia.edu/1902855/Human_rights_and_sustainable_development_obligations_in_EU_free_trade_agreements.

²¹⁷ Lore Van Den Putte and Jan Orbie ‘EU bilateral trade agreements and the surprising rise of labour provisions’ (2015) 31(3) *International Journal of Comparative Labour Law and Industrial Relations* at 281-282. For further discussion of this trend, see Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking trade to labour rights and environmental standards* (Hart/Bloomsbury, 2015).

²¹⁸ Van Den Putte and Orbie (2015) at 281.

concessions, but not if they are considered a matter for SD where softer measures apply. He highlights the obligation within the EU to view civil, political and social rights as indivisible and identifies a lack of ‘internal coherence’ in EU conduct.²¹⁹

In his 2017 paper at Oslo, Franz Ebert suggested that the ‘key challenge in terms of rendering trade agreements more socially sustainable lies in ensuring that trade agreements safeguard rather than hamper decent employment conditions’. He explored this question with reference to Chapter 19 of the TransPacific Partnership Agreement (TPP), which has since been abandoned by the US Trump administration, although it seems that the other partners may be willing to proceed with its ratification and implementation.²²⁰ His findings are analysed with respect to the recent CAFTA panel findings²²¹ and are compared here to the innovations in CETA (between Canada and the EU), which is a North-North trade agreement and therefore has rather different regulatory dimensions, but may be a leader in sustainability-based objectives.

Chapter 19 of the TPP contains a variety of provisions, which are familiar to those who have read prior US trade agreements with clauses pertaining to labour standards. These include the following:

- An obligation that the parties to observe the ‘rights as stated in the ILO Declaration [of 1998]’ (Article 19.3)
- A requirement to enforce relevant labour laws and not ‘waive or otherwise derogate from’ the core rights referred to in the ILO Declaration ‘in a manner affecting trade or investment between the Parties’ (Article 19.5). This obligation is to go beyond merely domestic laws ‘implementing’ the ILO Core Labour Standards (i.e. (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation as set out in Article 2 of the ILO 1998 Declaration of Fundamental Principles and Rights at Work. Instead, the TPP extends this obligation to laws relating to minimum wage, working hours, and health and safety issues to the extent that such a ‘waiver or derogation would weaken or reduce

²¹⁹ Bartels (2012) at 18-19.

²²⁰ For reportage see for e.g. <https://www.theguardian.com/us-news/2017/jan/23/donald-trump-first-orders-trans-pacific-partnership-tpp> accessed 29 August 2017.

²²¹ That analysis is drawn from a chapter, Tonia Novitz, ‘Posted Work for the UK after Brexit: Rationales for Regulation’ in Bernard Ryan (ed), *Migrant Labour and the Reshaping of Employment Law* (Hart, 2018), forthcoming.

adherence to a [related] right [or] condition of work [...] in a special trade or customs area, such as an export processing zone or foreign trade zone, in the Party's territory'.

The difficulty is that we know that such an obligation does not necessarily lead to successful infringement proceedings on core labour standards, let alone these additional entitlements. This is evident from the dispute which arose in relation to interpretation of the Central American Free Trade Agreement (CAFTA) to which both the United States (US) and Guatemala were parties. CAFTA contains a standard provision that the parties undertake to comply with their own labour laws, but this is only to be enforceable to the extent that any non-compliance takes place 'in a manner affecting trade'.²²² The panel's decision in the dispute over Guatemala's treatment of trade unionists indicates that it may be near impossible to demonstrate in a simple concrete (and legalistic) fashion that non-compliance with labour affected the terms of trade (and fair competition) between the states.

It was acknowledged by the panel that the very purpose of CAFTA was 'to promote conditions of fair competition in the free trade area'.²²³ The US then argued that the term 'affecting trade' should be given a broad scope 'so as to include measures that might adversely affect conditions of competition between domestic and imported products on the internal market for the purposes of [the General Agreement on Tariffs and Trade] GATT 1994 Article III:4, and any measure bearing upon conditions of competition in the supply of a service, for the purposes of [the General Agreement on Trade in Services] GATS Article I:1.' Guatemala argued that the US needed to actually demonstrate 'a change in prices of or trade flows in particular goods or services'.²²⁴ While rejecting such a specific requirement, the panel nevertheless found that the US had 'not met its burden to prove that one or more exporter or exporters obtained a competitive advantage from failures to effectively enforce labour laws against the shipping companies, and thus that the failures were in a manner affecting trade'²²⁵ and in relation to garment manufacturers the same finding was reached. Indeed, '[a] complainant must demonstrate that labour cost effects reasonably expected in light of the record evidence are sufficient to confer some competitive advantage' (at para. 488). In particular, the

²²² See for the final report, [http://trade.gov/industry/tas/Guatemala%20%20-%20Obligations%20Under%20Article%2016-2-1\(a\)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf](http://trade.gov/industry/tas/Guatemala%20%20-%20Obligations%20Under%20Article%2016-2-1(a)%20of%20the%20CAFTA-DR%20%20June%2014%202017.pdf).

²²³ Ibid., at para. 120.

²²⁴ Ibid., at para. 165.

²²⁵ Ibid., at para. 455.

Guatemala panel were not convinced that ‘a failure to effectively enforce labour laws protecting the right to organize or the right to bargain collectively necessarily affects conditions of competition’.²²⁶

The newer provisions in the TPP offer the following:

- an obligation requiring parties to ‘adopt and maintain statutes and regulations, and practices thereunder’ relating to minimum wage, working hours and health and safety matters (at Article 19.3) However, the parties retain, however, full discretion regarding the level of protection provided for by these laws so that any law in this area, however weak its content, would seem to suffice for compliance with this provision.
- the parties shall ‘endeavour to encourage’ companies to adopt labour-related CSR policies. (Article 19.7) Whether this vague wording of this provision would spark any concrete action is unclear.
- additional requirements on ‘forced and compulsory labour’, according to which ‘each Party shall also discourage, through initiatives it considers appropriate, the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour’. (Article 19.6) This can be read to encourage the insertion of labour clauses into domestic trade legislation, such as those contained in the US legislation, allowing, for example, imposition of higher tariffs on goods made with forced labour or to block their import altogether. However, the final wording grants the parties utmost leeway (‘through initiatives it considers appropriate’) and its practical relevance is rather doubtful.

Under Article 28.3, the TPP subjects all obligations of the labour chapter (chapter 19) in the TPP to the Agreement’s general dispute settlement mechanism. The parties however need to exhaust first the possibilities to resolve the dispute in the framework of the ‘cooperative labour consultations’ procedure provided for in Article 19.11 and then there would need to be civil society mobilisation to bring forward a dispute sufficient to put a state to this inconvenience and political and trade exposure. This can take some time, as the Guatemalan CAFTA litigation demonstrates (see above). This was initiated by US and Guatemalan trade unions in 2008 with a panel decision issued only in 2017. That case also suggests that it remains difficult for there to be effective enforcement of clauses in US trade agreements, even when the litigation reaches the final stages.

²²⁶ Ibid., at para. 485.

Ebert's observation is that it is the period prior to ratification that is most significant in terms of providing scope for compliance with labour standards relevant to social sustainability. The pre-ratification plans negotiated by the US with Brunei, Malaysia, and Vietnam may have had more effect than any attempt to enforce labour standards under chapter 19 after the fact. (This now being at the behest of the remaining eleven parties to the TPP and not the US due to the recent change of President.)

In terms of capacity building, Ebert has further observed that 'the labour provisions of trade agreements concluded by the United States and Canada have in a number of cases led to significant capacity building in regard to labour standards through development cooperation'.²²⁷ He cites evidence gathered by the ILO regarding the scope for extensive funding which accompanies labour side agreements. For example, in particular, under the US–Central America–Dominican Republic Free Trade Agreement, funds for labour-related capacity building amounted to some US\$85 million between 2005 and 2010. As we shall see below, this link to aid is not a uniform aspect of EU trade agreements. For example, Ebert has pointed to the doubtful evidence that the EU–Chile Agreement led to labour standards-related development cooperation. Rather, he observes that projects centred on Chilean developed were 'reportedly devised by the European Commission's Directorate-General for International Cooperation and Development without much coordination with the actors involved in the administration of the EU–Chile Agreement'. The existence of that agreement possibly enabled such projects, but there was limited coherence between commitments regarding trade obligations which set out the terms of labour standards-related cooperation and the EU's development cooperation.²²⁸ The crucial question is whether there has been any significant shift towards policy coherence in relation to the EPAs.

CETA, chapter 23 appended to the chapter on sustainability (chapter 22)²²⁹ goes much further than the labour chapter of the TPP. Article 23.1 makes clear 'the beneficial role that [decent work, encompassing core labour standards, and high levels of labour protection, coupled with effective enforcement], can have on economic efficiency, innovation and productivity, including export performance' and there is an attempt to 'highlight the value of greater policy coherence in those areas'. This is to be a dynamic process in two ways. Firstly, there is to be 'social dialogue on labour

²²⁷ Franz Ebert, 'Labour provisions in EU trade agreements: What potential for channelling labour standards-related capacity building?' (2016) 155(3) *International Labour Review* 407 at 408 available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1564-913X.2015.00036.x/full>.

²²⁸ Ibid at 424.

²²⁹ See <http://ec.europa.eu/trade/policy/in-focus/ceta/ceta-chapter-by-chapter/>.

matters among workers and employers, and their respective organizations, and governments, and commit to promotion of such dialogue in their territories'. Secondly, there is scope for a right to regulate raising standards of protection for workers under Article 23.2. Article 23.3 like the TPP emphasises the four ILO core labour standards alongside:

- health and safety at work
- 'establishment of minimum employment standards for wage earners including those not covered by collective agreements'
- and non-discrimination in respect of working conditions including for migrant workers.

Further, there is to be implementation of fundamental ILO Conventions which Canada and the EU Member States have ratified (under para. 4). Article 23.4 which entails the familiar requirement to uphold existing levels of protection is phrased differently to the standard CAFTA formulation, referring not to the effect of noncompliance with one's own labour standards but rather deviation from these as a means to 'encourage trade or investment'.

Substantively, then, CETA's text in chapter 23 is more potent in content than that contemplated in the other planned mega-regional agreement, the TPP. However, in terms of enforcement it is arguably not much stronger. Once again, 'cooperative activities' (including national contact points) are envisaged (under Article 23.7). There is, as is now common in EU sustainability chapters, a requirement for domestic labour or sustainable development advisory groups. (Article 23.8) There can be consultations where a dispute arises and a Committee on Trade and Sustainable Development (CTSD) could be convened to consider the matter and may seek the advice of the Parties' domestic labour or sustainable development advisory groups under Art. 23.8. Where a matter cannot be satisfactorily addressed through such consultations, State Parties may request that a 'Panel of Experts' be convened... it is not entirely clear that they need to have labour law expertise under Art.23.10 – expertise in 'the resolution of disputes under international agreements' may suffice. The Experts will be taken from a list of panellists established by the Committee on Trade and Sustainable Development. The Panel of Experts should under Art.23.10(9) seek information from the ILO – such as 'pertinent available interpretative guidance'... (No comparable provision for policy coherence is in the TPP.) But the State Parties may reach a mutually agreed solution ... 'Upon notification, the panel procedure shall be terminated.' Indeed, the same would be the case under mainstream dispute settlement under the dispute settlement chapter as it is under the TPP. Therefore, once again, much depends on the will of any given state party to enforce the terms of the CETA labour chapter and, if they cannot persuade a state to act, civil society actors such as trade unions have no access to the proceedings.

2. Economic Partnership Agreements (EPAs): Development and redistributive concerns

In FTAs such as the Economic Partnership Agreements (EPAs) with segments of African Caribbean and Pacific (ACP) states, the EU has the opportunity to shape the procurement, customs, investment and competition rules with only limited opposition.²³⁰ EPAs are combined trade *and* development cooperation agreements intended to liberalise trade in a development friendly way. Substantial financial assistance is provided to targeted sectors with a view to creating ‘a [transnational] political environment guaranteeing peace, security and stability, respect for human rights, democratic principles and the rule of law, and good governance is part and parcel of long-term development’.²³¹ North-South FTAs, like the EPAs, are designed to give ‘the process of globalisation a stronger social dimension’.²³² Initially, the EPAs were designed as regional agreements for the liberalisation of trade in goods, services, intellectual property, government procurement, and competition. Only two EPAs are currently being implemented, one in the Caribbean (the CARIFORUM EPA) and one in southern Africa (the SADC EPA), and both fell short of the EU’s original ambitions. Through normative argumentation, the ACP countries have harnessed the EU’s rhetoric of the EPAs as ‘drivers of development’ to strategically direct the negotiations toward development objectives. While the CARIFORUM EPA was the first agreement to be concluded and, indeed, remains the only comprehensive EPA in place, the Five Year Review shows that implementation and ratification have been poor.

As trade and development cooperation agreements, the EPAs have a dual legal base: Article 207 TFEU (common commercial policy) and Article 208 TFEU (development cooperation). Common principles on development cooperation have been articulated by the EU in its *Consensus on Development*²³³ which reiterates the eradication of poverty as its ‘primary and overarching objective’ in paragraph 5. In paragraph 7, the broad notion of development cooperation is evident:

‘We reaffirm that development is a central goal by itself, and that sustainable development includes good governance, human rights and political, economic, social and environmental aspects.’

²³⁰ Clair Gammage, ‘Overcoming the Development Deficit of Article XXIV: Promoting equality through North-South RTAs’ (2016) 9(1) *Law and Development Review* 69.

²³¹ Recital in the Preamble to the Cotonou Partnership Agreement 2014.

²³² Ibid.

²³³ European Union, *The European Consensus*, (2006) OJ C 46/1 of 24.2.2006.

In addition, the adoption of Regulation 1905/2006,²³⁴ which establishes a financing instrument for development cooperation as complemented by Regulation 234/2014,²³⁵ which establishes a partnership instrument for cooperation with third countries, demonstrates a concrete expression of the broad notion of development cooperation by the Union. Since 1959, the ACP States and Overseas Countries and Territories (OCTs) have received financial support from the Commission through the European Development Fund. To date, there have been ten previous cycles of EDF financing and we are now in the eleventh phase. Typically, each cycle of EDF correlates with a particular international and/or partnership between the EU and the ACP. It remains the world's 'largest and most advanced financial and political contractual framework for North-South cooperation'.²³⁶

However, in recent cycles there has been a shift toward 'blending' of loans through what the Commission defines as 'Innovative Instruments' wherein development aid is combined with other private or public sector sources of funding, such as loans, equity, capital and/or risk.²³⁷ Given the ongoing needs for developing countries in the pursuit of achieving the Sustainable Development Goals (SDGs), the blending mechanism offers an alternative source of funding in addition to the voluntary funds allocated by EU Member States. In a bid to improve the quality and quantity of development assistance the EU, as part of its commitments in the Paris Declaration of Aid Effectiveness (2007), the Accra Agenda for Action (2008), and the European Code of Conduct on Division of Labour in Development Policy (2007), introduced a new form of assistance known as Grant and Loan Blending Facilities (GBLFs).

Since 2007, the EU has established GBLFs which draw on development aid from EU Member States and financial assistance from the following private sector actors: European Investment Bank (EIB), the Agence Française de Développement (AFD), the KfW Bankengruppe, the European Bank for Reconstruction and Development (EBRD), and the Council of Europe Development Bank (CEB).²³⁸ In

²³⁴ OJ L 378/41 of 27.12.2006. Paragraph 2 states: "The Community pursues a development cooperation policy aimed at achieving the objectives of poverty reduction, sustainable economic and social development and the smooth and gradual integration of developing countries into the world economy."

²³⁵ OJ L 77/77 of 15.3.2014

²³⁶ See *ODI Report* of 31 January 2012 available online at:

<www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion.../8218.pdf>, 3.

²³⁷ See ECDPM Report 2013 available online at: <ecdpm.org/wp-content/uploads/2013/.../Blending-Loans-Grants-Blend-Not-Blend.pdf>.

²³⁸ J.N.Ferrer and A. Behrens, 'Innovative Approaches to EU Blending Mechanisms for Development Finance' CEPS Special Report (18 May 2011) available online at: <<http://www.cps.eu>>, i.

line with the World Bank's vision of country ownership, the blending of financial instruments 'guarantee a voice and ownership on the part of the beneficiaries by drawing them into the strategic decision-making body'.²³⁹ The partner country works with the financial institution to develop the strategic operations of the proposed project to ensure that appropriate financial forecasts are made and adequate support is provided for the realisation of the project.²⁴⁰ For some, the positive effects of the blending mechanism have to date been uncontroversial.²⁴¹ There are concerns that as development finance becomes more targeted toward certain initiatives and sectors of trade, the citizens in the recipient country could lose out. However, the relative youth of this programme of financing has meant that effective monitoring of their implementation is yet to be established. In addition to the funding made available through the EDF and blended finance facilities, Aid for Trade (Aft) may also be directed toward recipient countries under FTAs. Taking the EPAs as an example, the EU Commission has stated that €30.5 billion will be available to ACP countries for the period 2014-2020 under the 11th EDF. In theory, the ACP States will also be eligible to receive a substantial amount of financing outside the EDF, through the Aft programmes. However, in 2011 it was reported that the only EU Member States to have committed financial assistance through Aft were the UK, under its CARTfund, and Germany.²⁴² CARTfund committed €10million for capacity building in the Caribbean region while Germany has funded the creation of the CARIFORUM EPA Implementation Network (CAFEIN) which is a platform for information sharing with all stakeholders. Aft is by its nature uncertain, and the total amount of funding that might be challenged through for EPA implementation is not known. These uncertainties, coupled with the lack of a link to trade-connected redistributive agencies such as UNCTAD, results in the fragmentation of systems whereby other forms of aid and security are kept distinct from trade. This seems likely to pose problems for unified pursuit of the SDGs.²⁴³

The shifts in development finance outlined above signifies the increasingly important role of private actors in defining both trade and development objectives. Transnational actors are now in a pivotal position to shape and influence governance structures through FTAs. As a new form of transnational

²³⁹ Ibid, ii.

²⁴⁰ The financing facilities typically comprise a strategic board, an operational board and a financiers group in which the partner country participates at all levels.

²⁴¹ Ibid.

²⁴² E. Humphrey & M. Cossy, 'Implementing the Economic Partnership Agreement: Challenges and Bottlenecks for the CARIFORUM Region' ECDPM Discussion Paper No. 117 of June 2011.

²⁴³ See Joyeeta Gupta and Courteney Vegelin, 'Sustainable Development Goals and Inclusive Development' (2016) 16(3) *International Economic Agreements: Politics, Law and Economics* 433, who discuss SDG 17 at 443 – 444.

governance emerges, the democratic process becomes further removed from the citizen. It is this unprecedented intrusion of private actors that disturbs democratic processes and has resulted in civil society mobilising against the negotiation of new generation FTAs like CETA, TTIP, TPP, and the EPAs. The revised Cotonou Partnership Agreement offers an interesting insight into the balancing of interests between private and non-state actors in the negotiation process. Private actors are afforded a more significant role in the trade negotiation process than ever before. Article 21 outlines the importance of ensuring that ‘cooperation’ leads to a ‘favourable environment for private investment and the development of a dynamic, viable, and competitive private sector’. Furthermore, cooperation should support the implementation of ‘structural policies designed to reinforce the role of the different actors, especially the private sector’.²⁴⁴

Similarly, the participation of civil society and non-state actors has been codified in the Cotonou Partnership Agreement under Article 4 which provides:

‘...the parties recognise the complementary role of and potential for contributions by non-state actors, ACP national parliaments, and local decentralised authorities to the development process, particularly at the national and regional levels.’

While the increasing role of NSAs, such as civil society and private firms, is a welcome intervention into the EU-ACP trade regime, it could nevertheless weaken the process of democratisation in ACP countries.²⁴⁵ Unlike governments these groups are not democratically elected and there is some concern about the legitimacy of their participation in predominantly inter-state trade relations. Moreover, there is by no means equal access to participation, so the discursive engagement of the disempowered that might be achieved, for example by ‘social dialogue’ in an EU setting, has yet to be realized in a systematic way internationally.

We argue that FTA negotiations have come to represent a discursive space of argumentation through which values, norms, and interests are shaped, contested, and reproduced. Expanding the discursive space in which deliberative and participative processes can take place increases the likelihood of a fairer bargaining environment, especially in the case of asymmetric relationships. Participation is a fundamental element of enabling a country (and the full range of interest groups within them) to ‘own’ their development process and ensure that decision-making remains close to

²⁴⁴ Article 22 Cotonou Partnership Agreement 2014.

²⁴⁵ Stephen R. Hurt, ‘Cooperation and Coercion? The Cotonou Agreement between the EU and ACP States and the end of the Lome Convention’ (2003) 24 *Third World Quarterly* 161 at 172.

the interests of the citizens. This can be viewed as consistent with a view of sustainability as essentially participatory in line with SDG16.

C. NEGOTIATIONS ON SERVICES: GATS, FTAS, LABOUR AND SOCIAL SUSTAINABILITY

In a chapter outlining ‘the evolution of international trade theory, policy and institutions’, a key text on *The Regulation of International Trade* stated that: ‘traditional trade theory has focussed on trade in goods and not international marketing of services’. However, its authors stressed that this is changing. The service sector is becoming ever-increasingly significant, now constituting an estimated 70-80 per cent of output (and employment) in high income countries of the North. It is evident that the consequences of such a change are under-explored and under-theorised.²⁴⁶

Article I(2) of the General Agreement on Trade in Services (GATS) – envisages four modes of supply of services –

1. cross-border supply
2. consumption abroad
3. commercial presence
4. presence of a natural person as a ‘service provider’ or as an employee posted as a service provider, i.e. migration (of sorts)

That supply is dependent on ‘service sector’ commitments made by WTO members under the GATS Schedule of Specific Commitments provided for by Article XX. These commitments are sector based. They are linked with terms of ‘Market Access’ as prescribed and defined under Art. XVI and ‘National Treatment’ (i.e. non-discrimination) under Article XVII of GATS.

There is implicit endorsement in the General Agreement on Trade in Services (GATS) of the legitimacy of a human element to trade in services, whereby temporary migrant labour is treated in a manner akin to ‘posted work’ under the trade rules of the European Union²⁴⁷ under what is known

²⁴⁶ Tonia Novitz, ‘Evolutionary Trajectories for Transnational Labour Law: Trade in Goods to Trade in Services?’ (2014) *Current Legal Problems* 239 at 240.

²⁴⁷ See Directive 96/71/EC of the European Parliament and of the Council of 16.12.96 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1 (Posted Workers Directive or PWD); and Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on

as GATS Mode 4. An Annex on Movement of Natural Persons Supplying Services under the Agreement seems to reiterate the view taken in an EU context that such persons ‘do not seek access to the labour market’ of the state to which they are posted. As such, these workers would seem to lie outside the remit of the host state’s labour laws, unless private international law principles suggest otherwise.

There is also an explicit statement in paragraph 4 of the Annex to the effect that, if these do not affect their trade commitments, a WTO member states may take ‘measures to regulate the entry of natural persons into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across, its borders’. In other words, unlike posted work within the EU, WTO states retain discretion in relation to their immigration laws in relation to trade in services even when these contribute to forms of exploitation. Arguably, this combines the worst of the EU posted workers’ regime with an international agreement that allows temporary workers to be rendered additionally vulnerable due to their insecure immigration status.

Similar concerns to those arising under the GATS schedule of commitments may arise under a free trade agreement (FTA). Free trade agreements regarding dealing with services can be regarded as authorised under WTO rules under Article Vbis and Article V of the GATS. Article Vbis GATS allows for integration of labour markets but only if the relevant agreement (a) exempts citizens of parties to the agreement from requirements concerning residency and work permits; and (b) is notified to the Council for Trade in Services. The EU EEA is one such labour integration agreement. More common are FTAs permissible under Article V of the GATS, which contemplates ‘substantial sectoral coverage’ and non-discrimination measures. An Article V GATS agreement can include movement of natural persons and indeed a chapter regarding temporary movement of natural persons, as is common in EU new generation trade agreements, such as EU-Korea, EU Singapore and the Comprehensive Economic Trade Agreement (CETA) between the EU and Canada (chapter 10).

While service providers from the North could aid development by providing infrastructure on which domestic manufacture and public governance can build, the dominance of European and US corporations could inhibit and even prevent domestic providers from entering those same service

administrative cooperation through the Internal Market Information System (‘the IMI Regulation’) Text with EEA relevance (the Enforcement Directive).

sector markets, which would also have led to enhanced economic opportunities for the South. The temporary placement of skilled workers from the North in Southern States can further (unless local training programmes are established), prevent local workers from acquiring skilled work. Training programmes for the domestic workforce have, therefore, unsurprisingly become a factor in scheduled commitments regarding 'commercial presence' and 'movement of natural persons'. In this sense, the scope of exceptions provided specifically for developing countries in GATS (under, for example, Article IV, Article XII and XV) may prove significant; it is less clear what recognition of the broad principle of 'special and differential treatment' of developing countries may entail apart from greater flexibility in relation to the implementation of their obligations.²⁴⁸

Low-income countries in the South have sought to take advantage of the opportunities that GATS offers by sending their own skilled workers abroad to high income States (and also low income States where Western multinational companies are present), in reliance on the commitments made under GATS. Such labour can be supplied via agencies or simply direct recruitment. This has the capacity to ensure that shortages in skilled labour in the domestic 'developed' or 'emergent' State labour market can be temporarily met without any (politically controversial) long term migration taking place. It can also provide benefits for the individual worker which have development aspects, insofar as it can provide a worker with a job they might have not had otherwise and also allow wages (which could be higher than those that could have been received in the domestic labour market) to be sent home to support a family or saved for the purposes of education and further training.

Commentators disagree as to whether usage of GATS mode 4 offers a 'virtuous' or 'vicious' circle for the developing countries. Philip Martin suggests that recent experience suggests caution. While Indian IT workers abroad gained relevant expertise that they could bring back to assist in building their own dynamic home economy, he also points to the brain drain caused by mass posting of African healthcare workers in Western Europe.²⁴⁹ There seem to be more costs to developing countries if it is skilled rather than unskilled workers who spend significant periods of time 'temporarily' placed in high income markets. This also explains why countries in the South agree to

²⁴⁸ Ewelukwa (2003) above; and Edwini Kessie, 'The Legal Status of Special and Differential Treatment Provisions under the WTO Agreements' in George A. Bermann and Petros C. Mavroidis (eds), *WTO Law and Developing Countries* (Cambridge University Press 2007).

²⁴⁹ Philip A. Martin, GATS, Migration and Labour Standards DP/165/2006 (ILO 2006), 4 and 11-13 at http://www.ilo.org/inst/publication/discussion-papers/WCMS_193612/lang-en/index.htm; see also re similar issues emerging in Asia, Churnrurtai Kanchanachitra et al, 'Human Resources for Health in Southeast Asia: Shortages, distributional challenges and international trade in health services' (2011) 377 *The Lancet* 769.

‘guest worker’ programmes, whereby they export their cheaper labour so as to boost the national economy through the remittances which come home.

Marion Pannizon (writing in 2010) pointed to the very limited utilisation of GATS mode 4 migration to date, estimating this at 5 per cent of world trade and 0 – 4 per cent of GATS commitments to date, with over 60 per cent of all commitments in Mode 4 ‘adjunct to foreign direct investment’. She therefore argued for expansion to include low-skilled workers and promote growth.²⁵⁰ In this respect, she rejected the legal distinction which arose *de facto* through GATS whereby States will only agree to be bound by arrangements regarding high skilled workers in particular sectors. And yet, Martin has expressed concern to the extent that downward pressure on wages brought about by such posting arrangements seem greater in respect of low-skilled workers, making workers globally more vulnerable and also suggests (given the low rates of pay which may apply) that the economic gains in terms of international remittances (what is sent home after basic living costs in the host State are met) may be negligible.²⁵¹

Clearly, developing countries (and their citizens) are willing to take the risk regarding low economic returns, as is illustrated by agreements that the Philippines has concluded with other States regarding temporary export of domestic workers and Indonesian arrangements regarding construction workers.²⁵² Indeed, what developing countries have sought through GATS is to increase access for lower income workers and, to this extent, there would seem to be overlap between the interests of ‘developing countries that are supplying labour and business communities of industrialized states that are demanding labour’.²⁵³

Emergent economies, with a mix of skilled and unskilled labour ripe for export have sought revision of GATS to enable fewer migration controls and scope to capitalise on what they see as their source of comparative advantage, namely cheaper skilled and unskilled labour, but these proposals were never likely to be agreed by States of the North for whom migration remains a sensitive political

²⁵⁰ Marion Panizzon, *Trade and Labor Migration: GATS Mode 4 and Migration Agreements* (Friedrich-Ebert-Stiftung 2010) <http://library.fes.de/pdf-files/iez/global/06955.pdf>.

²⁵¹ Martin (2006), 14.

²⁵² Rhacel Salazar Parreñas, ‘Transgressing the Nation-State: The Partial Citizenship and “Imagined (Global) Community” of Migrant Filipina Domestic Workers’ (2001) 26(4) *Signs* 1129; Bridget Anderson, *Doing the Dirty Work? The Global Politics of Domestic Labour* (Zed Books Ltd 2000), Mohammad A. Auwal, ‘Ending the Exploitation of Migrant Workers in the Gulf’ (2010) 34 *Fletcher F. World Aff.* 87.

²⁵³ Laura Ritchie Dawson, ‘Labour Mobility and the WTO: The Limits of GATS Mode 4’ (2012) 4 *Labour Migration* <<http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2435.2012.00739.x/pdf>.

issue.²⁵⁴ In this respect, as in many others, the Doha Declaration round of negotiations has failed to achieve full recognition of developing countries' interests within the WTO frame.²⁵⁵ The Least Developing Countries (LDC) services waiver adopted in 2011 was only focused on the very poorest states and has had little effect, as acknowledged in the Bali Package of December 2013 when agreement was made in principle to enhance its efficacy.²⁵⁶ Low-income States have therefore tended to enable their workers to take temporary *ad hoc* opportunities where they can find them, which are not regulated by the GATS provisions; and the exodus of healthcare workers from various countries is indicative of this.²⁵⁷ At present, we await the negotiation of the Trade in Services Agreement (TiSA) in which the EU is actively engaged under the auspices of the WTO.²⁵⁸

An example of the potential effect of an FTA on regulation of workers temporarily resident in another country comes from New Zealand (NZ), which has signed such an agreement with China.²⁵⁹ In NZ, KiwiRail Ltd, an entirely state-owned enterprise had purchased locomotives from a state-owned company in China, CNR Corporation Ltd. On arrival in NZ the locomotives were found to contain asbestos. CNR then sent forty workers, not hired directly but through two different subsidiary companies, to NZ to remove the asbestos and rebuild the locomotives, which was dangerous work. The companies refused to disclose the workers' remuneration, although one company said that the salary paid was what was paid in China, plus a daily allowance for working abroad. Insufficient disclosure was made by the subsidiaries or the workers to determine whether there was compliance with either the minimum NZ employment standards set out in relevant legislation or the terms of the multi-employer collective agreement (MECA) to which KiwiRail is a party. A NZ Ministry of Business, Innovation and Employment (MBIE) investigation revealed no answers, but found no evidence that the Chinese workers lived in cramped conditions or had

²⁵⁴ Jane Kelsey, *Serving Whose Interests? The Political Economy of Trade in Services Agreements* (Oxford, 2008) at 200-6.

²⁵⁵ Jeffrey J. Schott, Minsoo Lee, and Julia Muir, 'Prospects for Negotiations on Trade in Services' in Donghyun Park and Marcus Noland (eds), *Developing the Service Sector as an Engine of Growth for Asia* (Asian Development Bank 2013) note the failure of the Doha round but also that 'services' negotiations are prominent in the proposed multi-lateral trade agreement, the Trans-Pacific Partnership (TPP).

²⁵⁶ Waiver Decision: Preferential Treatment to Services and Service Suppliers of LDCs, Decision of 17 December 2011. See also the Bali Ministerial Declaration of 7 December 2013 with reference to Operationalization of the Waiver Concerning Preferential Treatment to Services and Service Suppliers of Least-Developed Countries – Ministerial Decision – WT/MIN(13)/43 - WT/L/918.

²⁵⁷ See again Kelsey (2008) at 213-20: 'Case Study 12 regarding Hong Kong and Fiji'.

²⁵⁸ http://ec.europa.eu/trade/policy/in-focus/tisa/index_en.htm.

²⁵⁹ <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/china-fta/>.

inadequate food, despite the allegations made by local NZ workers in this regard.²⁶⁰ Curiously, the MBIE inspectorate noted: 'it is also unclear that [New Zealand minimum employment standards law] would apply to or be enforceable against CNR in the circumstances in which the workers are working in New Zealand. Having taken advice, it is concluded that in all the circumstances of the case, it is more than likely that minimum standards law would not apply.'²⁶¹ In other words, there is an assumption that (like posted workers in the EU) the posted Chinese workers would be hired predominantly on terms set under the laws of their home state and not the host state. Further, unlike Article 3 of the Posted Workers Directive, no exceptions are envisaged in relation to this general rule.

The Rail and Maritime Transport Union (RMTU) representing the local NZ workers, however, expressed alarm at such findings. First, the RMTU was concerned that the outsourcing of labour was in breach of the MECA where it undercut the cost of NZ labour, a concern which the European Commission has identified in the EU context. Also, the RMTU argued that the work carried out by the temporarily resident Chinese workers through the supply chain should be declared to be 'subject to New Zealand minimum code legislation' and that KiwiRail was in breach of statutory duties of good faith. KiwiRail responded that, as they were not the employers of the Chinese workers, they had no legal obligations to prevent exploitation and no knowledge or control. As CNR (the Chinese parent company from which they bought the asbestos contaminated locomotives) was not party to the MECA and had no direct relationship with the RMTU, the union was precluded from seeking enforcement of the collective agreement against that commercial entity. The Employment Relations Authority in NZ subsequently refused to refer the matter for a Court to determine.²⁶² Acknowledging the seemingly perverse effects of this regulatory gap, the RMTU General Secretary put a question which in NZ (as elsewhere) remains unanswered: 'If New Zealand employment law doesn't cover workers who are working in New Zealand... Where does it begin and when does it end? What would have happened if China loco had sent out some 15 year old kids or younger? Would we say that was acceptable?'²⁶³

²⁶⁰ Ministry of Business, Innovation and Employment, *Summary of Labour Inspectorate Investigation of Alleged Breaches in Employment Standards of the Chinese Workers at KiwiRail's Workshops* 17 April 2015.

²⁶¹ Ibid., at 10.

²⁶² [2015] NZERA Wellington 105, 5560304, determination of 30 October 2015.

²⁶³ 'RMTU case against KiwiRail's use of Chinese workers heads to ERA' available at <http://stuff.co.nz/business/71462127/RMTU-case-against-Kiwirails-use-of-Chinese-workers-heads-to-ERA>.

One question is whether, in terms of social sustainability, it would be possible to rely on *jus cogens* to assert national protection from the worst abuses, perhaps focussing on ILO core labour standards as human rights (as identified in the ILO Declaration on Fundamental Principles and Rights at Work 1998) and perhaps adding in health and safety for good measure (as an asbestos case like this one suggests we should)?²⁶⁴ Or do we assert the sovereignty of States to assert a set of measures which also reflect home State workers' interests in only a limited range of matters, as the PWD does?

An alternative could be to utilise Article XIV of GATS, which would enable action to be taken by the host state on grounds of, for example, (a) 'public morality', (b) human life and health, or such matters as 'privacy', 'confidentiality' or 'health'. A further option may be to amend the Annex on Movement of Natural Persons to craft a solution particular to temporary movement of natural persons (i.e. internationally posted workers), but given the sensitivity of migration on the international stage this remains highly contentious.

D. CONCLUSION

The services scenario provides us with an example of how WTO law and regulations through FTAs overlap and inter-relate. Arguably, this reflects *the diverse forms of governance* that operate at international and regional which we highlighted at the outset. In the next section, we examine how the role of private and public governance intertwine further in the context of supply chains. This part of the Report has also highlighted issues concerning *access to justice*, which remains questionable for developing countries in a WTO frame (although some key NGOs may have access) and for the representation of those affected by FTAs under individually designed dispute mechanisms for the purpose of a given agreement. The US and EU emerge in this framing as powerful actors setting the terms of a normative debate. China is less engaged and concludes labour supply side agreements that have less content and are subject, it seems, to less scrutiny. In this context, *power imbalances*, emerge between trading entities, such as China and NZ or even the EU and a group of ACP states, which then shapes not only the content but also the outcomes of trade. This in turn, arguably, affects *accountability* on the global stage.

²⁶⁴ See the *EC – Asbestos* case (2001) above.

III. SUPPLY CHAINS AND MULTI-LEVEL REGULATION

Contemporary modes of manufacture and service provision, combined with forms of technological change, have led to significant transnational cross-border sites of production and delivery.

Multinational corporate enterprises (MNEs) subcontract across national boundaries and, in this way, utilise different legal regimes and lower costs in specific countries. In so doing, there is scope to distance the commercial enterprise which ultimately profits from the labour on which it draws and the actions of its subcontractors insofar as they affect the environment or other pillars of sustainability. In this part, we examine in a trade context how supply chains operate and examine proposals regarding their regulation. We are aware that other parts of the SMART project are investigating these issues in greater depth, so are looking towards connections with issues raised in other parts of this ‘international mapping’ exercise, rather than offering an exhaustive analysis for SMART purposes.

Supply chains may be understood as ‘the cross-border organization of the activities required to produce goods or services and bring them to consumers through inputs and various phases of development, production and delivery’.²⁶⁵ In the literature on ‘supply chains’, there is frequent reference to ‘commodity chains’ in the sphere of political economy, namely ‘networks of [labour] and production processes whose end is a finished commodity’.²⁶⁶ In this body of research, the consumption of particular services at various ‘nodes’ is given considerable attention, alongside the ways in which cheap labour can be drafted to make the production of goods profitable and skilled labour imported to satisfy supply side problems.²⁶⁷ In a more positive fashion, supply chains (operating through the cross-border production of commodities) can be understood as ‘global value chains’, to the extent that value is added at each stage (and in each country) of the process. Policy makers in the World Bank have proposed that value should not only be created in the global North where the product is designed, but should extend to (even multiple) countries in the South so as to

²⁶⁵ ILO, Report IV: Decent Work in Global Supply Chains, ILC, 105th Session (Geneva: ILO, 2016), at 2. Much of the analysis below is further taken from Tonia Novitz, ‘Supply Chains and Temporary Migrant Labour: The Relevance of Trade and Sustainability Frameworks?’ in Diamond Ashiagbor (ed.), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Oxford: Hart/Bloomsbury, 2018, forthcoming.)

²⁶⁶ Terence K. Hopkins and Immanuel Wallerstein, ‘Commodity Chains in the World Economy prior to 1800’ (1986) 10(1) *Review* 157 at 159 cited in Gary Gereffi and Miguel Korzeniewicz (eds) *Commodity Chains and Global Capitalism* (Westport, Connecticut/London: Praeger, 1994) at 2.

²⁶⁷ Stephanie Ware Barrientos, ‘“Labour Chains”: Analysing the role of labour contractors in global production networks’ (2013) 49(8) *The Journal of Development Studies* 1058.

fuel development.²⁶⁸ Beyond this, work on ‘global care chains’ tends to consider the services delivered by women across national borders relating to provision of reproductive labour, including care for the elderly, childcare and the traditional business of women’s work such as cooking and cleaning.²⁶⁹ There has been a move by Nicola Yeates and others to link ‘global care chains’ to commodity chain analysis concentrated on the commodification of care.²⁷⁰

We note also that migrant labour can, within these chains, also be a route for cheaper labour and thereby greater profits through cost-cutting in production and service delivery. The ILO, like the World Bank, sees the benefits for workers in developing and emerging countries of global ‘value’ chains that provide ‘new opportunities for employment..., including for workers who had difficulty accessing wage employment or formal jobs, such as women, young people and migrant workers.’²⁷¹ However, there are dangers for migrant workers in supply chains by virtue of the ways in which they enter another country for work, acknowledging that ‘the cross-border flows of workers have also resulted in a greater risk of forced labour and trafficking in persons’ and that while MNEs may take action to prevent such practices ‘there is a risk they may become associated with forced labour through business links to contractors and suppliers who may conceal unlawful practices’.²⁷² In this respect, a report of the ILO on Supply Chains in 2016 Report mentioned ‘enforcement gaps’, ‘fragmentation of norms’, alongside particular difficulties for those ‘in an irregular situation and in the informal economy’.²⁷³

In the Oslo conference in May 2017, SMART research findings were presented in three papers from Susan Aaronson (with Ethan Wham) which discussed the inadequacy of current transparency-based initiatives in the US,²⁷⁴ Kasey McCall-Smith and Andreas Rühmkorf who considered the significance

²⁶⁸ For a very positive view of their operation and its development potential, see Daria Taglioni and Deborah Winkler, ‘Making Global Value Chains Work for Development’ (2014) *The World Bank – Economic Premise*, Number 143, especially at 1-2 and 8.

²⁶⁹ See Arlie Hochschild, ‘Global Care Chains and Emotional Surplus Value in Will Hutton and Anthony Giddens, (eds), *On the Edge: Living with Global Capitalism* (London: Jonathan Cape) at 131: ‘a series of personal links between people across the globe based on the paid or unpaid work of caring’.

²⁷⁰ Nicola Yeates, ‘Global Care Chains’ (2004) 6:3 *International Feminist Journal of Politics* 6.3 369; and Nicola Yeates, ‘Global Care Chains: A state-of-the-art review and future directions in care transnationalization research’ (2012) 12.2 *Global Networks* 135. See also for an extension of this approach, Ann Stewart, *Gender, Law and Justice in Global Markets* (Cambridge: CUP, 2011).

²⁷¹ ILO, Report IV: Decent Work in Global Supply Chains, ILC, 105th Session (Geneva: ILO, 2016), at 17.

²⁷² Ibid. at 26.

²⁷³ Ibid, at 25 and 32.

²⁷⁴ Susan Aaronson with Ethan Wham, ‘Can Transparency in Supply Chains Advance Labor Rights?’

of moving beyond transparency to genuine promotion of ‘due diligence’ by corporate bodies in the context of supply chains,²⁷⁵ and Karin Buhmann who considered the more innovative blend of multi-level hard and soft law regulation in the EU’s Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan and its implementation.²⁷⁶ These are preliminary research findings, which will be written up and developed further, but are helpful for understanding the complexities and problems surrounding supply chain regulation.

A. THE PROBLEM WITH TRANSPARENCY INITIATIVES AND THE NEED FOR ‘DUE DILIGENCE’

There would appear to be consensus that mere exposure of corporate conduct in the supply chains that dominate world trade does not necessarily lead to any change in practices. Transparency initiatives can be regarded as motivated by at least three objectives: (1) a ‘right to know’ under international human rights law, which is essential for freedom of speech and political participation; (2) corporate governance rules which ‘increase the security of investors’ returns, guarantee disclosure, accountability, owners’ equity, and compliance with local laws’; and (3) ethical requirements regarding a growing consensus on global ‘corporate social responsibility’ (although the mechanisms for realisation of this objective remain fragmented).²⁷⁷ We might also wish to understand such efforts made towards transparency in terms of the economic aspects of sustainability (the durability of corporate norms which maintain just trade and thereby stable markets) and the social pillar of sustainable development (which seeks to ensure fair distribution of resources and benefits of markets between people and countries in an intra-generational sense). Further, transparency can enable consumers and shareholders to act where they are made aware of environmental concerns.²⁷⁸

Due diligence measures entail that ‘all reasonable precautions were taken and all due diligence was exercised to avoid the commission of the offence’ and, as such, requires the production of ‘evidence

A Mapping of Existing Efforts’ (2016) available on line at:

<https://www2.gwu.edu/~iiep/assets/docs/papers/2016WP/AaronsonIIEPWP2016-6.pdf>.

²⁷⁵ Kasey McCall Smith and Andreas Rühmkorf, ‘Sustainable Global Supply Chains: From transparency to due diligence’ delivered Oslo, 2017.

²⁷⁶ Karin Buhman, ‘Extraterritorial implementation of EU values and policy through ‘smart’ regulation connecting the law and the market: Reflections on the EU’s FLEGT scheme, pitfalls and opportunities for sustainable timber procurement, and insights for SMART’, delivered Oslo, 2017.

²⁷⁷ Aaronson (2016) at 2 – 7.

²⁷⁸ For a discussion of some of these concerns see McCall-Smith and Rühmkorf (2017) at 4.

of the system and procedures ... devised in an effort to avoid unfair practices'.²⁷⁹ The difficulty of course is that many corporate governance measures are voluntary or even just persuasive. More coercive national level measures also tend to have this flavour, such that disclosure of information rather than production of 'evidence' is what is at issue and there is seldom any question of an 'offence', that is, the commercial entity at the top of the supply chain, being subject to a criminal conviction for their 'ultimate' responsibility for environmental or social harms.

1. National level measures

Transparency initiatives are exemplified by certain national level measures in the EU and US which require disclosure by corporations of their practices in various respects. For example, the UK Modern Slavery Act 2015, section 54 contains such a transparency in supply chains clause. It stipulates that every organisation which carries on a business, or is part of a business, in any part of the United Kingdom with a total annual turnover of £36m or more must issue a slavery and human trafficking statement for each financial year. The statement must describe the organisation's steps to ensure that slavery and human trafficking does not take place in any of its supply chains and its own business or that the organisation has taken no such steps. The section then contains a list of issues that a company 'may include information about'. This list explicitly refers to the company's due diligence processes as one of the issues. There is no liability if the company issues a statement that it has taken 'no such steps' – it has then complied with its statutory reporting duty. The duty to issue a statement is enforceable by the Secretary of State through an injunction issued by the High Court. This is solely then a transparency rather than a due diligence measure, as was the California Transparency in Supply Chains Act (SB 657) on which it is based (which has comparable limitations regarding application and design).²⁸⁰

Aaronson has reported that the first laws to mandate supply chain transparency adopted by the US related to conflict minerals in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.²⁸¹ Section 1502 'requires all publicly traded companies listed on US stock exchanges to report if and where they purchased tin, tantalum, tungsten or gold mined in the Great Lakes Region of Africa. The law covers conflict zones in the Democratic Republic of the Congo (DRC), Republic of

²⁷⁹ Ibid., at 2.

²⁸⁰ For example, the Californian Act applies only to retail sellers or manufacturers doing business in the State of California with annual worldwide gross receipts in excess of \$100,000,000 and requires disclosure rather than that measures be taken.

²⁸¹ 9 Pub. L. No. 109-456, § 102(14), 120 Stat. 3384.

Congo, Angola, Zambia, Tanzania, Rwanda, Burundi, Uganda, South Sudan and the Central African Republic'. This then has a wider impact than the UK Modern Slavery Act provision or the Californian legislation, covering a wider range of corporate enterprises. It was also more extensive in that 'it included requirements that mining companies make public what they paid for the rights to extract minerals, forestry, or oil'.²⁸² These provisions were complemented by the U.S. Securities and Exchange Commission (SEC) Regulations which set out the detail of these obligations, but did not do so in a clear or helpful fashion. The result, according to Aaronson, was that business association launched a constitutional challenge and even, to the extent that there was compliance, NGO scrutiny indicated a lack of care and attention to the mechanisms for adequate check and disclosure. She considers it is too early for analysis of the comparable planned EU initiative.²⁸³ As is currently being evaluated in another part of the SMART Project (on the EU level mapping and analysis), the explicit treatment of due diligence in the EU Non-Financial Reporting Directive contains potential, which requires more work to be realised.²⁸⁴

2. International measures

Due to the failure of national transparency measures to promote due diligence, a great deal would seem to turn on the coordination of international responses to supply chains. Examples include 'the principles for responsible contracts: integrating the management of human rights risks into State-investor contract negotiations: guidance for negotiators', an addendum to the more general 'Guiding Principles on Business and Human Rights: Implementing the United Nations (UN) 'Protect, Respect and Remedy' Framework'.²⁸⁵ Enrique Boone-Barrera, also speaking at the May 2017 event, considered that this instrument could offer states the opportunity to warn major corporate and business actors that when engaged in investment (and related activities) their economic interests

²⁸² Aaronson (2016) at 10.

²⁸³ Ibid., at 11. For progress at the time of writing, see EU Parliament and EU Commission (2017) Draft Regulation laying down supply chain due diligence by importers of minerals and metals originating in conflict-affected and high-risk areas, at <http://www.europarl.europa.eu/sides/getDoc.do?type=AMD&format=PDF&reference=A8-0141/2015&secondRef=156-156&language=EN>.

²⁸⁴ Directive 2014/95/EU of the European Parliament and The Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, topic of the SMART conference in Brussels on 19 Sep 2017, see the report here: <http://www.smart.uio.no/news/--we-can-t-tell-companies-to-be-sustainable-we-nee.html>

²⁸⁵ United Nations Human Rights Council (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework. UN Doc. A/HRC/17/31.

will be reconciled with the human rights (and in that they are connected, the social and environmental aspects of sustainable development).²⁸⁶

We note that there are already instances in which international organisations take account of supply chain due diligence when considering applications for funding. An example is the International Finance Corporation (IFC) in the World Bank Group. In 2006, the International Finance Corporation (IFC), which is the private lending arm of the World Bank group, adopted its first *Policy and Performance Standards on Social and Environmental Sustainability*. In 2012 these were updated and revised.²⁸⁷ It has been suggested that these measures are indicative of a rebalancing away from the current economic-led model towards a broader social consensus concerning the terms of fair trade.²⁸⁸ Others are more sceptical, noting that more intricate corporate forms and modes of subcontracting can be used to try to evade these obligations.²⁸⁹

For example, the Global Unions' statement to the World Bank remains critical of PS2 which focuses on the labour and social dimensions of social sustainability and good governance. The ITUC has asked for more direct reference to the ILO standards on which core labour standards are based and more effective means for implementing its general safeguards policy. In respect of PS2 in particular, the ITUC and Global Unions are asking for implementation of 'a May 2015 investigation report issued by its Compliance Advisor Ombudsman'. 'The CAO report, which concerned a loan made to a Colombian borrower, found fault with IFC for proceeding with loan disbursements despite having corroborated evidence it received more than a year before from trade unions and the ILO showing that the firm's labour practices were in clear violation of PS2. The CAO also criticised IFC for not compelling the firm to divulge assessments and action plans regarding its labour practices, thus contravening disclosure obligations that are part of IFC's social and environmental policy.'²⁹⁰

²⁸⁶ Enrique Boone Barrera, 'Human rights obligations in investor-state contracts: Reconciling the investors' legitimate expectations with the public interest' (2017).

²⁸⁷ Available at:

http://www1.ifc.org/wps/wcm/connect/115482804a0255db96fbfd1a5d13d27/PS_English_2012_Full-Documents.pdf?MOD=AJPERES.

²⁸⁸ Hannah Murphy, 'The World Bank and Core Labour Standards: Between flexibility and regulation' (2014) 21(2) *Review of International Political Economy* 399.

²⁸⁹ See Franz C. Ebert, 'The Integration of Labour Standards Concerns into the Environmental and Social Policy of the International Finance Corporation' in VRÜ *Verfassung in Recht und Übersee*, Seite 229; and Tonia Novitz, 'Core Labour Standards Conditionality: A Means by which to Achieve Sustainable Development?' in Julio Faundez and Celine Tan (eds), *International Law, Economic Globalization And Developing Countries* (London: Edward Elgar, 2010).

²⁹⁰ IUR Report, 'Global Unions statement to the IMF and World Bank' in (2016) 23(1) *International Union Rights* 23. See also <http://www.ituc-csi.org/statement-by-global-unions-to-the-17170>.

However, recent research by Franz Ebert does suggest that the few complaints triggered by NGOs and workers organisations which have led to interventions by IFC staff are beginning to lead to some favourable outcomes. His proposal is that this initiative continues to be examined as a potential model for bridging the current gap between economic and social systems.²⁹¹ In this respect, there may be options not only for international financial agencies, but also for the EU to pursue due diligence as a normative power actor. This possibility was examined at our May 2017 event by Karin Buhmann in the context of FLEGT.

B. THE EU'S FOREST LAW ENFORCEMENT, GOVERNANCE AND TRADE (FLEGT) ACTION PLAN AND ITS IMPLEMENTATION

What is exciting about the FLEGT initiative is that it blends hard and soft law so as to achieve globally recognised environmental objectives at the EU and national levels. There is a hard law basis to FLEGT to be found in two European Regulations.²⁹² The 2005 Regulation awarded privileged access to the EU market for states that entered into a specific 'Voluntary Partnership Agreement' (VPA), entailing creation of an assurance system that the timber had been felled lawfully. The subsequent 2010 Regulation addressed the limited number of VPAs which required market actors placing timber on the EU market to undertake due diligence to ascertain the legality of the timber.²⁹³ As Buhmann reports, the 'smart mix' regulation approach which is reflected in FLEGT 'was recommended by the United Nations Guiding Principles (UNGPs) as a regulatory approach by states to promote business respect for human rights'²⁹⁴ and has been embraced explicitly by the EU Commission.²⁹⁵

²⁹¹ Franz C. Ebert, 'The Integration of Labour Standards Concerns into the Environmental and Social Policy of the International Finance Corporation' in *VRÜ Verfassung in Recht und Übersee*, Seite 229 – 249.

²⁹² Council Regulation 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ 2005 L 347/1; and Regulation (EU) 995/2010 of the European Parliament and of the Council of 20th October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ 2010 L 295/23.

²⁹³ See Buhmann (2017) draft research findings.

²⁹⁴ United Nations Human Rights Council (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework. UN Doc. A/HRC/17/31, Principle 3, commentary.

²⁹⁵ Commission Communication of 25 October 2011, 'A renewed EU Strategy 2011-2014 for Corporate Social Responsibility', COM(2011)681.

Buhmann has observed that FLEGT follows from the realisation that: (1) illegal logging undermines many essential elements of the EU (and international) development objectives, such as public sector financing for development targeted at the poor, peace, security, good governance, the fight against corruption, and sustainable environmental management; (2) illegal exploitation of natural resources, including forests, is closely associated with corruption and organized crime; and (3) in some forest-rich countries corruption fueled by profits from illegal logging is undermining the rule of law, principles of democratic governance and respect for human rights.²⁹⁶ As she says, ‘addressing those problems is in line with TEU and TFEU obligations of the EU and Member States’ (see Section I.A above). To avoid conflict with WTO law, the EU’s FLEGT-related requirements apply to intra- as well as extra-EU timber and commercial actors, but for practical purposes the Action Plan and its implementing instruments targets forest governance and law in tropical timber-producing countries.

The EU does not dictate what will be the standards which apply regarding the lawful felling of timber, but rather requires processes undertaken in partner states to elaborate on timber legality definitions and verification. These processes are to involve stakeholders and thereby promote civil society empowerment in partner states.²⁹⁷ In this way the participatory aspects of sustainability recognised under SDG16 can be realised. However, thus far the VPA (and accompanying Legal Assurance System (LAS) approved by the EU has only been adopted by Indonesia, with other states (such as Vietnam) currently in the process of negotiation. This has, then, been a relatively slow and unwieldy process, although ultimately it may have the benefit of flexibility in line with the concerns of each third country with whom the EU contracts.

²⁹⁶ European Commission, Communication from the Commission to the Council and the European Parliament: Forest Law Enforcement and Trade (FLEGT) – Proposal for an EU Action Plan, COM(2003)251, at 4.

²⁹⁷ EU FLEGT facility, ‘How are VPAs negotiated’, <http://www.euflegt.efi.int/the-process>.

IV. CONTENT OF INVESTMENT TREATIES AND CONDUCT OF INVESTMENT ARBITRATION

A further way in which the EU may exercise normative influence regarding sustainability objectives is as an investor (or investment partner). In this section we outline research findings from the May 2017 conference regarding the negotiation of the content of investment treaties by the EU and other key actors such as the US and China. We also consider the scope for sustainability objectives to receive attention in the context of arbitration where investment disputes arise. Further, we consider the access and outcomes for developing countries in the context of such arbitration. In so doing, we draw on the research findings presented to the May 2017 SMART conference in Oslo by the following academics from across the globe: Enrique Boone Barrera, Shamila Dawood, Ahmad Ghouri, Ying-Jun Lin, Amy Man, as well as Daniel Behn and colleagues at the Oslo PluriCourts Institute who presented on 'Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration'. We also draw, in this context, of another of the SMART academic partners, Wei Shen who is a professor based in Shanghai at Shanghai Jiao Tong University KoGuan Law School. Our analysis takes place in two stages. First, we explore the drafting of investment treaties and the extent to which they can and do incorporate sustainability objectives. Second, we consider the extent to which the three pillars of sustainability receive attention in investment arbitration. In both settings, we are concerned with issues concerning participation of stakeholders, the relative balance of power between states, and (insofar as these are affected) issues of accountability and access to justice.

A. THE DRAFTING AND NEGOTIATION OF INVESTMENT TREATIES

Gradually, over time, there has been greater number of investment treaties (over 3,300 by 2015) and greater inclusion of human rights provisions (including core labour standards discussed above in relation to FTAs at Section II.B). But also we find more clauses directed towards the environmental dimensions of sustainability. This attention to concerns other than those which are wholly economic would seem to be welcome. In this respect, we tend to find a more demanding approach undertaken by the EU than by other actors (as the FLEGT scheme arguably demonstrates in the context of timber felling, treatment and sale supply chains in Part III.C above). Other examples cited by Dawood include the South African Development Community (SADC) Model Bilateral Investment Treaty Template with Commentary, 2012; USA Model BIT, Canadian Model BIT; IISD Model International

Agreement on Investment for Sustainable Development, (2005). Investment chapters are prevalent in the new mega-regional free trade agreements (FTAs) being concluded, such as the TPP (chapter 9) and CETA (chapter 8). (See above Part II.B.)

In some ways, these provisions must be welcome because they arguably create scope for a 'right to regulate' on matters concerning social and environmental pillars of sustainability, which might otherwise be seen to place unfair regulatory burdens on an investor. The difficulty arises where such provisions, involving the implementation of international legal norms, such as those under the Kyoto Protocol are implemented without attention to the specific circumstances of developing countries and their need for time if transitions are to be made, but also potentially technical and material assistance for the achievement of those objectives. In this context, Shamila Dawood, writing from the perspective of an Indonesian experience, estimates that (according to UNCTAD sources) there is an annual funding shortfall of approximately \$US 2.5 trillion for the achievement of SDG objectives in developing countries.

At present, Dawood in her paper on 'Principle of "Common but Differentiated Responsibilities" in Investment Treaties to Combat Environmental Degradation: A Developing Country Perspective' delivered in May 2017 observed that investment treaties have primarily given importance to the protection of investment-related non-commercial risks by including numerous clauses (which inhibit forms of environmental and social norms unless explicitly included in the document). Thus, investment treaties involving developing countries need reforms that emphasise not only the traditional approaches of protecting investments but also the non-economic objectives, primarily to protect environmental sustainability while promoting SDGs by narrowing the gap between the contracting parties. In this respect, she notes that while the main purpose of investment agreements is to promote, protect, and liberalise foreign investment between countries, these instruments can be and are used simultaneously formulating agreements to promote green technologies and challenge the host state's regulatory measures for reducing emissions. This cannot however be realistically done through the imposition of objectives which are insensitive to the development capacity and needs of the given state. Therefore, she argues for a principle akin to that operating in the WTO of 'special and differential treatment' (SDT) to apply to environmental and other social commitments undertaken by developing countries in the context of investment treaties. She therefore draws on a literature arguing for 'common but differentiated responsibilities' (CBDR).²⁹⁸

²⁹⁸ Duncan French, 'Developing States and International Environmental Law: the Importance of Differentiated Responsibilities' (2000) 49 *International Law and Comp. Law Quarterly* 35; and

Ideally, that principle would (like the FLEGT scheme) allow scope for democratic debate internal to a contracting state on relative priorities for measures to be taken.

A powerful aspect of Dawood's analysis is her understanding of CBDR as linked to the idea of equity (inter- and intra-generational justice) which is a crucial feature of sustainable development (see Part I.A above). She comments that: 'The underlining element of the CBDR principle is the acknowledgement of inequalities. The equity aspects of sustainable development are key to sharing benefits among generations, encompassing justice and fairness. Current discussions on climate change argue for equity-based participation of developing countries in international treaties. The involvement of developing countries in drafting international treaties, and identifying strategies required to mitigate environmental impacts is crucial. In the meantime, equity firmly applies not only to mitigation but also to adaptation and support. Equity is about fairness and impartiality in all aspects of economy, development, and environmental sustainability. The international law recognises that sovereign states are equal; however, when it comes to the establishing of the norms of SDGs, they are unequal with regard to the implementation of such goals.' For this reason, she advocates full disclosure of environmental-related issues at the negotiation stage to be addressed in a balanced manner sensitive to the capacities and needs of the investor and state parties (as would be consistent with Para. 24 of the 1972 Stockholm Declaration).

Amy Man when delivering her research findings on 'New Players and Old Rules: A Critique of the China-Ethiopian and China-Tanzanian Bilateral Investment Treaties' considered the claim that the international investment law (IIL) system emanates from a Western need to protect and control capital, assets and resources, drawing on the analysis of various commentators.²⁹⁹ She sees most species of international investment treaties, therefore, as 'premised on the importance of, and designed to protect, the interests of capital-exporting states, which are traditionally those based in the West'. Her observation is that China has to some extent departed from these norms in its investment treaties with Ethiopia and Tanzania.

Christopher D. Stone, 'Common But Differentiated Responsibilities in International Law' (2004) 98(2) *American Journal of International Law* 276. See also for contemporary perspectives, Freya Baetens (ed), *Investment Law within International Law: Integrationist Perspective* (Cambridge University Press, 2013).

²⁹⁹ Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, 2008) at for e.g. at 13; Jeswald Salacuse and Nicholas Sullivan, 'Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46(1) *Harvard International Law Journal* 67 at 81; and Uché Ewelukwa Ofodile, 'Africa-China Bilateral Investment Treaties: A Critique' (2013) 35(1) *Michigan Journal of International Law* 131, 183.

The investment agreement with Ethiopia in 1998 was concluded in the second stage of China's international trade ambitions when there was growing integration into the global economy, but China was predominantly a capital importing state. As one would expect, the term of the agreement with Ethiopia, despite the poverty of the latter, expressed a parity of treatment which reflects China's own sense of its vulnerability. The standard provisions regarding fair and equitable treatment of investors are present, as is the MFN principle, but notably not that of national treatment. It may also be noteworthy that while the agreement refers restrictively to expropriation, nationalisation or similar measures, it does not prohibit explicitly 'indirect expropriation' which has been used to challenge environmental and social policy regulations introduced by states which create indirect costs for investors. What is arguably distinctive about China's conduct in negotiations with Ethiopia at this stage is that the representatives of the state do not necessarily see themselves as inevitably the investor as compared to the target of investment. It is interesting that in a Germany-China BIT (2003), there was only a one-sided national treatment clause to be observed by Germany rather than China.³⁰⁰ It is also noteworthy, that while provisions on indirect expropriation feature in Chinese bilateral investment treaties (BITs) with states like Germany, the China-ASEAN investment agreement again contains no such clause.³⁰¹

The investment agreement concluded with Tanzania some time subsequently is more elaborate, but not necessarily any less favourable towards Tanzania as the more likely recipient state. An example is Article 10 which specifically recognises that abiding by investment obligations should not come at the expense of other societal obligations. Another example is the inclusion of a provision on national treatment, which provides scope for considerable exceptions in the context of development, namely that under Article 3.2, the parties are permitted to 'grant incentives or preferences to its nationals' on the basis of promoting local entrepreneurship. Both are interesting normative developments and precedents, which the EU and US as the dominant actors in the sphere of investment might do well to observe, if there is a desire to ensure that justice is seen to be served in the sphere of investment.

³⁰⁰ See Wei Shen, 'Leaning Towards a More Liberal Stance? — An Evaluation of Substantive Protection Provisions under the New ASEAN–China Investment Agreement in Light of Chinese BIT Jurisprudence' (2010) 26(4) *Arbitration International* 549 at 557 and Shen also notes that national treatment clauses tend to be subject to 'grandfather clauses'.

³⁰¹ *Ibid.*, at 576. But Shen comments that it remains uncertain whether the failure to mention indirect expropriation explicitly means it is not intended to be included.

The TPP and CETA, as noted above, both set out a distinctive chapter regarding investment flows between the parties. Arguably, both break new ground insofar as they contemplate greater scope for what has been termed ‘indirect expropriation’ than was previously the case. They both, for example, contemplate a right to regulate and implicitly restrictions on compensation,³⁰² but it seems that each set of provisions (when in force) will require individual case-based examination and determinations in case of a dispute. What is arguably more distinctive regarding CETA is the provision which contemplates establishment of an International Investment Court. This would overcome a variety of practical obstacles for current litigant investors and respondent states, where by there can be dispute over the appropriate venue for arbitration, the appointment of appropriate arbitrators and the norms that will determine the outcome of any dispute.³⁰³ However, there seems likely to be hostility by the Court of Justice of the European Union (CJEU) to such an initiative which detracts from the powers of the former. The matter is currently the subject of a reference by Belgium.³⁰⁴

B. INVESTMENT ARBITRATION PROBLEMS

Boone Barrera has identified the *Bilcon* case as emblematic of the ways in which environmental protections can be challenged under investment treaties.³⁰⁵ In that situation, the arbitral panel observed that the state was entitled to take steps to protect the environment, but in so doing had to respect the ‘legitimate expectations’ of the investor or expect to compensate accordingly.³⁰⁶ There is therefore a tension between the right to regulate and the need to prevent expropriation (whether direct or indirect). Further, in the sphere of development objectives, there can be a tension between promotion of infant industries at the national level and formal legal obligations towards an investor regarding ‘fair and equitable treatment’ or even ‘national treatment’. Much depends, as noted above, on how the investment instrument in question is drafted. So the different wording of BITs that China has concluded with Germany versus Tanzania will be determinative. However, a more

³⁰² Caroline Henckels, ‘Protecting Regulatory Autonomy through Greater Precision in Investment Treaties: The TPP, CETA, and TTIP’ (2016) 19(1) *Journal of International Economic Law* 27.

³⁰³ August Reinisch, ‘Will the EU’s proposal concerning an investment court system for CETA and TTIP lead to enforceable awards?—the limits of modifying the ICSID Convention and the nature of investment arbitration’ (2016) 19(4) *Journal of International Economic Law* 761.

³⁰⁴ Requested 6 September 2017 – see <http://hsfnnotes.com/arbitration/2017/09/12/belgium-asks-for-the-cjeus-opinion-on-the-compatibility-of-the-investment-court-system-with-european-law/>.

³⁰⁵ *Clayton/Bilcon v. Government of Canada*, (PCA) Case No. 2009-04 (17 March 2015) Award on Jurisdiction and Liability at paras. 595-598, 602, 734-738, online: <http://www.italaw.com/sites/default/files/case-documents/italaw4212.pdf> (<*Bilcon*>).

³⁰⁶ *Ibid* at 531 – 3.

fundamental issue is how more standard economic entitlements of an investor are to be balanced against the concerns of the local population on such matters and environmental and social issues.

The standard approach is one in which the investor's economic interests, as in *Bilcon*, have prevailed. For example, in previous cases decided in the International Centre for Settlement of Investment Disputes (ICSID) within the World Bank group, it has been observed that:

'While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference. Expropriatory environmental measures - no matter how laudable and beneficial to society as a whole - are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains.'³⁰⁷

While BITs can subject disputes to the laws of host states they tend not to do so and the particular jurisprudence which has evolved under ICSID tends to be followed. Customary international law and other aspects of public international law (e.g. labour standards) can be made an express aspect of a BIT/FTA but do not have to be. However, it can be observed that under Article 42(1) of the ICSID Convention, when the applicable law has not been agreed by the parties and there is a conflict between public international and domestic law, public international law shall prevail – but this does not necessarily respect a right to regulate above bare minimum international standards.³⁰⁸

Various contributors to the SMART event argued, on a variety of different bases, that for sustainability purposes it might be possible to depart from this standard arbitral approach. For example, Boone Barrera preferred a soft law approach with reference to the Addendum to Ruggie's 'UN Guiding Principles' (discussed above in Part III.A above). Further options are presented by

³⁰⁷ *Compania del Desarrollo de Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award, paras. 71-72 (Feb. 17, 2000), 15 ICSID Rev. 167 (2000).

³⁰⁸ Cf. the jurisprudence evolving under Article XX of the GATT discussed above in Part II.A.3.

researchers in this field, Ahmad Ghouri and Yin-Jun Lin, who offer approaches based on an understanding of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT).

The VCLT, elaborated within the framework of the UN, sets out rules on the interpretation of international treaties (in Section 3, 'Interpretation of Treaties'). Of particular relevance for our purposes are Articles 31 and 32, which read as follows:

'Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.'

‘Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.’

These provisions are often viewed as a codification of customary international law, insofar as they indicate that a treaty’s meaning should be discernible on its face. A literal interpretation can and should however be supplemented by reference to context, including pertinent agreements, practice and rules of international law. Further, the object and purpose of the instrument at issue is also relevant, allowing scope for consultation of other preparatory documentation especially if the literal meaning is ambiguous or obscure or would lead to absurdity or an unreasonable outcome.

1. Scope for reference to human rights and environmental international instruments

Ghouri presenting his findings on ‘Interaction and Conflict of Treaty Conflicts in Investor-State Arbitration’ in May 2017 considered that recourse to Article 31 of the Vienna Convention on the Law of Treaties (VCLT) would provide scope for application of the norms set out in the UN Charter and, connected to this the International Covenants of 1966.³⁰⁹ In doing so, he follows the recommendations of a report by a Study Group of International Law Commission for an approach promoting ‘systemic integration’.³¹⁰ He observes how, in ICSID arbitration in the *Tecmed* case,³¹¹ recourse to human rights jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights has been helpful. He identifies in this respect a ‘cross-fertilisation’

³⁰⁹ The International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966.

³¹⁰ Report of the Study Group of the International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ (hereinafter the ‘ILC Study Group Report’), finalized by Professor Martti Koskenniemi, UN Doc. A/CN.4/L.682 (2006), para. 413.

³¹¹ *Técnicas Medioambientales Tecmed, S.A. v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award of 29 May 2003, at 20, para. 63 (‘*Tecmed*’).

whereby the understanding of property rights under human rights instruments can assist in determining whether there has been unlawful and disproportionate expropriation under an investment treaty. Such an approach was notably followed in the *Azurix* award, when another ICSID tribunal utilised the same case law.³¹² However, the environmental obligations of Mexico under other international instruments was not considered relevant in the *Tecmed* arbitration, which Ghouri continues to see as a matter for concern; there being scope for reform of arbitral processes in this respect in line with Article 42 of the ICSID Convention (discussed above).

2. Reference to the development objectives of ICSID and the BIT at issue

Further, Ghouri considers that Article 32 can be helpful in terms of directing tribunals to the development objectives operating in relation to North-South BITs through reference to the *travaux préparatoires* of the ICSID Convention or the BIT at issue. In this context, drafting history and the objects and purposes of the ICSID Convention assist in explaining the meaning of ‘investment’ as was argued by Prosper Weil (a prominent dissenting arbitral panel member).³¹³ The first sentence of the preamble to ICSID Convention clarifies that party States concluded the Convention in response to ‘the need for international cooperation for economic development and the role of private international investment therein’. This statement, together with the *travaux préparatoires*, arguably indicates that contribution towards the development of host State constitutes one of the objects and purposes of the ICSID Convention, making such contribution an essential characteristic to fulfil the ICSID Convention’s requirements for a covered investment. Many BITs, in one way or another, also include contribution to the economic development of party States in their preambles. Accordingly, many ICSID tribunals have insisted that, to qualify as an investment, the alleged activity

³¹² *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Award of 23 June 2006, paras. 311–312. In a later case, *Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award of 7 December 2011 at para. 312, the arbitral tribunal was reluctant to give further protections to an investor through reference to other international instruments since more detailed protections were available under the BIT.

³¹³ See *Tokios Tokelés v Ukraine*, ICSID Case No. ARB/02/18, Dissenting Opinion of the President of the Tribunal, Prosper Weil of 29 April 2004, paras 2–4. On such a basis it is also possible to challenge whether ‘sovereign debt’ instruments are investments properly speaking, regarding which see *Abaclat and Others (Case formerly known as Giovanna A Beccara and Others) v The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, Dissenting Opinion of Professor Georges Abi-Saab, 28 October 2011 (*‘Abaclat’*).

must satisfy what has come to be known as ‘the double-barrelled test’.³¹⁴ However, while this may be ‘best’ practice it is still not uniform.³¹⁵

3. Balancing with reference to the ‘reasonable’ person

An interesting reconceptualization of the arbitration process was offered by Ying-Jun Lin in her May 2017 paper on ‘Towards A Sustainable Development-Oriented Interpretation? Some Suggestions to Integrating Sustainable Development in International Investment Law and Investor - State Arbitration State Arbitration State’. Again, utilising the VCLT, she advocated a ‘balancing’ approach which she sees as inimical to ‘sustainable development’ and the ongoing need to give adequate weight to all three pillars (economic, social and environmental). She also cites Katharine Berner’s observation that not all clauses in an investment treaty are necessarily for the benefit of the investor, but could be for the benefit of the state in question.³¹⁶ Integral to Lin’s analysis of balancing is the idea of a ‘reasonable person’ test. She cites a number of arbitral decisions where the reasonableness of the investor’s expectations was reviewed, with reference to whether there had indeed been fair and equitable treatment.

For instance, in the *El Paso* case, the tribunal stated that ‘if the circumstances change completely, any reasonable investor should expect that the law also would drastically change’.³¹⁷ It indicated that there will be a residual right to regulate, because this is indeed reasonable: ‘no reasonable investor can have such an expectation [of a freeze of the legal system] unless very specific commitments have been made towards it or unless the alteration of the legal framework is total’.³¹⁸ Further, the reasonableness test can be taken to operate in relation to whether the state in question is acting reasonably. An example was the *Lemire* award.³¹⁹

³¹⁴ See, for example, *Fedax N.V. v Republic of Venezuela*, ICSID Case No. ARB/96/3, Decision on Jurisdiction of 11 July 1997, para. 43; *Salini Costruttori S.p.A. and Italstrade S.p.A. v Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction of 23 July 2001, paras. 55–56; *Phoenix Action v Czech Republic*, ICSID Case No. ARB/06/5, Award 15 April 2009, paras. 82–114.

³¹⁵ For example, see the majority finding in the *Abaclat* case (2011) discussed above.

³¹⁶ Katharina Berner, ‘Reconciling Investment Protection and Sustainable Development: A Plea for An Interpretive U-Turn’, in Steffen Hindelteffen and Markus Krajewski (eds.), *Shifting Paradigms in International Investment Law: More balanced, less isolated, increasingly diversified* (OUP 2016).

³¹⁷ *El Paso Energy Co. v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, at para. 363.

³¹⁸ *Ibid.*, para. 374.

³¹⁹ *Lemire v. Ukraine II*, ICSID Case No. ARB(AF)/98/1, Decision on jurisdiction and liability, 14 Jan 2010.

The *Lemire* tribunal applied the Article 5.1.4 of the 2004 UNIDROIT Principles as the legal ground for the reasonable person test. The provision states that ‘to the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstances.’³²⁰ On the facts of the case, the tribunal concluded that the Ukrainian measures taken were ‘reasonable’ in relation to the dispute of licenses.³²¹ The finding led the *Leimire* tribunal to reach a conclusion in favour of Ukraine. Lin also regards the *Tecmed* arbitration as illustrative of the potential for use of a reasonable person standard, referring to the extent to which a state’s action would be regarded as arbitrary by a reasonable and impartial man, the question being ‘what a reasonable and unbiased observer would consider fair and equitable...’.³²² The difficulty, however, is a failure of subsequent arbitral tribunals to provide more detailed analysis of how such an assessment can be made. This is all the more problematic given recent research by the Oslo PluriCourts team of the outcome of investment arbitration for developing countries of the South.

4. Outcomes of investment arbitration

While we might all prefer to see the outcomes of investment arbitration as being concerned with the content of BITs (or mega-regional agreements) and the principles which determine their interpretation, the outcomes of investment arbitration suggest that there may be more at issue. In a paper delivered at the 2017 Oslo conference titled ‘Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration’, Daniel Behn, Tarald Laudal Berge and Malcolm Langford have analysed the results of this form of litigation. Their findings are discouraging.

Current wisdom holds that investment arbitration tends to favour investors rather than states; and that where states are successful, they tend to be developed as opposed to developing states.³²³ Others contest these theories suggesting the outcomes depend on the investment state’s conduct

³²⁰ Ibid., para. 154.

³²¹ Ibid., para. 159.

³²² *Tecmed* (2003) above, at para. 166.

³²³ Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ (2012) 50 *Osgoode Hall L.J.* 211 and Thomas Schultz and Cedric Dupont, ‘Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study’ (2014) 25 *European Journal of International Law* 1147.

and modes of regulation rather than innate bias.³²⁴ Behn and his fellow researchers highlight the following issues:

- The difficulty that developing states have funding the costs of the arbitration which average \$US4.5 million (and may exceed \$US30 million);
- Developing states may have difficulty compensating an investor for the costs of their exercise of a right to regulate on environmental and social matters, so that the investor will still bring an arbitration claim in which the investment state's response will inevitably be weak;
- Developing states are the weaker parties in negotiation of BITs (and mega-regional agreements with investment clauses) such that they may be bound by provisions which favour the investor rather than national level democracy or promotion of economic development nationally;
- Existing research regarding International Court of Justice decisions suggest that judges tend to favour disputing parties at a similar level of development to those from which they originate, such that given the origins and wealth of most investment arbitration panel members one might also expect bias in their case.³²⁵

The PluriCourts findings are more complex. In part, they conclude that success for investors turns on whether the state in question provides meaningful protection of property rights and the extent to which there are impartial bureaucracies which guide state action regarding management of resources and administrative action. However, looking at win rates, they have found that foreign investors win in only 17 per cent of the ITA cases brought against high-income respondent states, but in 62 per cent of ITA cases brought against low-income respondent states and they comment 'that foreign investors either win or settle close to 80 per cent of all ITA cases against low-income states remains striking'. They conclude by pointing to the enormous significance of the payment of an award by a low income country to an investor, citing the case of Ecuador where a recent payment was equivalent to the size of the country's health budget.³²⁶

³²⁴ Susan Franck and Linsey Wylie, 'Predicting Outcomes in Investment Treaty Arbitration' (2015) 65 *Duke L.J.* 459.

³²⁵ Eric Posner & Miguel de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 *Leg. Stud.* 599.

³²⁶ *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador (II)*, ICSID Case No. ARB/06/11, 5 October 2012.

E. CONCLUSION

Boone Barrera has observed that ‘there has been a sustained attempt to improve the wording of international investment agreements (IIAs) so that they are more responsive to human rights considerations’. This is not altogether true of other environmental objectives, but we have seen some experimentation with standard forms of wording in South-South agreements concluded by China, which also allow for forms of national treatment that could boost national level sustainable development. An interesting question is whether arbitral tribunals are ready to protect sustainability standards in the context of allegations by investors of breaches of fair and equitable treatment or of direct or indirect expropriation. There are indications, as there were in WTO litigation, of a journey towards recognition of human rights standards as constitutive of the parameters of property rights and even potential reference to the objective of ‘development’ in determining the applicability of the ICSID Convention or BIT (as to whether ‘investment’ is at stake). Additionally, the kinds of balancing of economic, social and environmental objectives that a sustainability approach demands could be furthered by considering whether the expectations of an investor are ‘reasonable’ (contributing to an assessment in this way of ‘legitimacy’) and also whether the regulatory objectives and means of a given state are ‘reasonable’ also. Yet, while steps may be being taken in this direction, developing states remain systematically disadvantaged in investment arbitration. This may be due to their internal systems of governance but also other ways in which they are positioned in terms of wealth and power. We consider these issues of content and process will have to be addressed by the EU in its own negotiations and advocacy in order to achieve policy coherence objectives.

V. FUNDING, FINANCE AND TAX: LINKS BETWEEN STATE AND NON-STATE ACTORS

It is self-evident that international financial markets have a considerable effect on the capacity of states to engage in forms of trade. Finance affects the ability of states to pursue various social and economic programmes that promote development and the well-being of citizens. The experience of sovereign debt has the capacity to reduce democratic sovereignty and independent regulatory

design of a country's autonomy.³²⁷ Indeed, there is an increasing blurring of the line between investment and sovereign debt bonds and other forms of so-called indirect investment, which cause dilemmas for regulation.³²⁸ In this context, there has been considerable criticism by UN experts of the ways in which structural adjustment, particularly in its new forms of austerity entailing reduction of public spending, impacts upon development and the broader economic, social and environmental pillars of sustainability.³²⁹

A. DIVESTMENT, TRUSTS AND CORPORATE CONDUCT

There remain also a variety of ways in which private funding entities can act ethically in their investments globally, for example by virtue of the ways in which trust deeds are drafted or can be interpreted, there may be potential for fossil fuels divestment.³³⁰ There can also be incentives to avoid complicity in environmental harms by virtue of potential exposure to reputational harms.³³¹ While drawing on national laws for their force, such corporate initiatives can also be reinforced through international initiatives, such as the UN Guiding Principles.³³² These arguably encourage corporations to reflect on their ethical obligations to exercise their considerable 'leverage' in trade, investment and even supply chain management. Ben Richardson has observed how 'when a major lender does act, it can wield considerable influence. Such occurred when Australian's ANZ Bank declined the AUD\$1.5 billion loan sought by Gunns for its controversial Tasmanian pulp mill, as previously mentioned. Yet, in a competitive credit market, lenders also have incentives not to be too

³²⁷ Yuri Biondi, 'Sovereign Debt Restructuring, Refinancing and the Financial Market' (2016) 6(3) *Account Econ Law* 179, responding to the analysis of Odette Lienau, *Rethinking Sovereign Debt: Politics, reputation and legitimacy in modern finance* (Harvard University Press, 2014).

³²⁸ See the majority opinion in *Abaclat* (2011) discussed above; also the issue of EU competence in relation to 'indirect investment' discussed in the EU-Singapore Free Trade Agreement Opinion 2/15 ON 16 May 2017 (available at <http://curia.europa.eu/juris/document/document.jsf?docid=190727&mode=lst&pageIndex=1&dir=&occ=first&part=1&text=&doclang=EN&cid=309331>)

³²⁹ For concern expressed by the Independent Expert on the effects of foreign debt and other financial obligations of States, see the reports issued in 2017 available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/57 and on the EU http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/34/57/Add.1

³³⁰ Benjamin Richardson, 'Fossil Fuels Divestment: Can It Work?' paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

³³¹ *Ibid.*

³³² United Nations Human Rights Council (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect, Remedy' Framework. UN Doc. A/HRC/17/31.

picky for risk of losing clients to less scrupulous financiers.³³³ There may also be temptations to keep investment connections with fossil fuel companies so as to slowly promote change, but this may be labour-intensive and ultimately less effective than a boycott, while also suggesting to more naive investors that processes are ‘safe’.³³⁴ One difficulty however remains the emphasis that current structures of corporate management place on short term rather than longer term gains from finance and investment.³³⁵

What is arguably significant here however are the incentives to avoid complicity in environmental harms by virtue of potential exposure to reputational harms.³³⁶ While drawing on national laws for their force, such corporate initiatives can also be reinforced through international initiatives, such as the UN Guiding Principles.³³⁷ On the EU level, initiatives are taken in this area of divestment, notably through the recent reform of the Shareholder Rights’ Directive and the ongoing work on Sustainable Finance. This is currently under evaluation in the SMART EU level mapping and analysis.³³⁸

B. ISSUES CONCERNING BLENDED FINANCE

Attention should also be paid to the ways in which finance channeled by international institutions such as the World Bank group and the EU, which in the form of ‘blended finance’ is progressively dominated by private financial capital. While providing a rich vein of much needed funding to build capabilities, as note in relation to FTAs above (see II.B.2), difficulties arise in separating out the accountability of public and private actors, especially regarding the imposition of conditionality for lending.³³⁹ As Celine Tan has observed, the engagement of commercial financial sector actors in

³³³ Richardson (2017) citing evidence from Marian Wilkinson and Ben Cubby, ‘ANZ Exit From Pulp Mill Project Confirmed’ (2008) Melbourne Age May 28: 3.

³³⁴ Richardson (2017).

³³⁵ Benjamin Richardson, *Socially Responsible Investment Law: Regulating the Unseen Polluters* (New York: Oxford University Press, 2008), 120 – 158.

³³⁶ Ibid.

³³⁷ United Nations Human Rights Council (2011) Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect, Remedy’ Framework. UN Doc. A/HRC/17/31.

³³⁸ This will be included in the SMART Report bringing together the international, EU and jurisdiction-specific level mapping and analysis, to be submitted by 31 August 2018.

³³⁹ Blended Finance Innovators (2016), ‘Improving Impact: Increasing Blended Finance to achieve the Sustainable Development Goals’, Discussion Draft, 1 October 2016, <http://www.meda.org/investment-publications/286-improving-impact-increasing-blended-finance-to-achieve-the-sustainable-development-goals/file> – analysed as an emergent trend by Celine Tan, Creative Cocktails or Toxic Brews? Blended Finance and the Regulatory Framework For Sustainable Development’ paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

international development finance focuses on ‘asset clauses’ designed to secure financial returns to investors while de-prioritising non-commercial objectives. Further, the underlying policy framework of blended finance privileges private solutions over public approaches (by democratically elected governments) to a range of global and national public goods.³⁴⁰ These are potential threats to the achievement of SDGs, especially in terms of their participatory dimensions.

C. TAX AND SUSTAINABILITY

Finally, in constructing reliable sources of domestic state revenue, there may well be a case for transnational agreement. Otherwise, without external funding, the ability of EU states (let alone third country low income states) to self-regulate sustainability initiatives will be doubtful. We note, in this context, the significance of the European Commission finding that Ireland gave illegal tax benefits to Apple of over Euro 13 billion,³⁴¹ and the importance of multilevel action beyond the EU on tax-related issues.³⁴² Ireland currently offers a low corporate tax rate (of 12.5% per cent) as part of a national strategy to attract foreign direct investment into Ireland and thereby ‘create jobs’. However, the curious apportionment of Apple Inc management across the Ireland, the US and other states enabled (as the Commission observed) Apple Inc. ‘to pay an effective corporate tax rate of 1 per cent on its European profits in 2003 down to 0.005 per cent in 2014’. This kind of situation has been address by international institutions, such as the OECD, which has launched a Base Erosion and Profit Shifting Project (BEPS-Final Report 2015). Likewise the EU Anti-Tax Avoidance measures in January 2016 to address legal loopholes which are central to these activities. However, the resistance which Irene Lynch-Fannon has observed to EU regulation on this issue suggests that complex issues of sovereignty and economic policy remain at issue.

D. CONCLUSION

We observe that issues of finance and tax remain connected to issues of national development (and other economic) policies. They are intricately linked to the governance of world trade, transnational

³⁴⁰ Tan (2017), *ibid*.

³⁴¹ See the European Commission finding that Ireland gave illegal tax benefits to Apple of over Euro 13 billion: http://europa.eu/rapid/press-release_IP-16-2923_en.htm.

³⁴² Discussed by Irene Lynch-Fannon, ‘Core Issues Around Apple Tax’ paper delivered at Oslo SMART Conference on Trade and Investment May 2017.

supply chains and investment. There is significant global competition between states to attract foreign direct investment through financing of certain commercial operations and also between the private actors who service them. The complexity of these relationships is multiplied in the context of 'blended finance' where public international and regional funding initiatives (for example in the IFC and EU EPAs) rely on private financial backing to be operational. There are significant challenges here yet again for transparency, due diligence, access to justice and other forms of accountability.

VI. RECOMMENDATIONS FOR POLICY COHERENCE: WHAT THE EU COULD DO

Our recommendations address the four themes we identified at the outset, which have been relevant throughout the report and this summary:

1. Diverse forms of governance

- a. It is important to recognise that the apparently discrete legal regimes relating to trade, corporate governance, investment and finance interact. Policy coherence requires looking across these formally discrete 'systems' to map connections. This may involve extensive communication between ostensibly different EU DGs.
- b. The UNSDGs and the UN Guiding Principles on Business and Human Rights provide at present an international consensus alongside the instruments which the EU has identified as inimical to sustainable development and good governance (for e.g. in GSP+). These need to be the sustained focus of attention to ensure coherence of approach.
- c. It may be preferable to build multilateral versus EU initiatives. While the FLEGT scheme and the proposals for a CETA international investment court system are innovative and in many ways laudable, multilateral consensus may be preferable. This makes negotiations in the planned Trade in Services Agreement (TiSA) important.
- d. The regulatory consequence of greater engagement of private actors on the world stage, for e.g. as investors through blended finance, needs to be examined more rigorously. Voice for democratic institutions and citizens of all countries will need to be protected through such initiatives as stakeholder forums, corporate structures and in various forms of scrutiny and litigation.
- e. South-South agreements must be respected, so that conflicting obligations are not placed in EU-South FTAs or mega-regional agreements which would diminish trade flows and capacity

for independent determination of trade relations between parties of equal bargaining power.

2. Access to justice

There remain significant difficulties regarding access to justice in a variety of forums for dispute resolution on the international stage. In particular, issues arise regarding:

- The access of developing (low-income) states to adequate legal advice and representation in WTO dispute settlement, especially when contrasted to the expertise of expert environmental and other NGOs which can present submissions as *amicus curiae*
- The scope for interested stakeholders (e.g. environmental groups, but also employer and worker representatives) to bring complaints under fair trade agreements (FTAs)
- The capacity to raise sustainability (especially social, human rights and environmental) concerns in investment disputes, with again developing low income states being at a significant disadvantage in terms of outcomes.

There are also difficulties in citizens being able to use democratic processes to challenge funding conditionality which affects decision-making concerning sustainability and public goods. Similarly, the scope to enforce due diligence (as opposed to mere transparency) in corporate structures remains minimal.

Accordingly, there remains scope for the EU to:

- a. Reconsider its own rules regarding standing at the CJEU for third country states, NGOs and nationals affected by EU trade, investment and finance activities.
- b. Campaign internationally for greater support and initiate further funding for assistance to developing low income states currently disadvantaged within WTO, ICSID and other structures. An important development has been the UN Commission on International Trade Law (UNCITRAL) 2014 Convention on Transparency in Treaty-based Investor-State Arbitration applied in CETA, but which could be further elaborated and developed.
- c. Negotiate for new instruments (and/or amendment to existing international instruments) supporting access to justice or migrant workers caught in supply chains generated by global trade.

3. Roles of different actors

Within the EU, in terms of internal market trade and investment, the significant role of private actors is acknowledged and regulated. This is absent in the international legal treatment of trade, investment and finance. The EU might seek to:

- a. Encourage, through multilateral negotiations and FTAs, greater engagement with multinational enterprises and financial institutions, so that they cannot evade sustainability obligations at the expense of states and their citizens. Voluntary mechanisms are failing.
- b. Set up substantive norms for investment treaties (rather than the procedural norms being incrementally established through UNCITRAL) which ensure sustainability concerns commensurate to the capacities of states are placed in such agreements.
- c. Consider diversification of approach to the content of investment treaties depending on the capacity of partner states, following in this respect an example set by China.
- d. Build capacity within states with weaker bargaining power in terms of civil society institutions, but also social welfare and legal know-how.
- e. Systematize the engagement of private sector financial actors in blended finance and ensure safeguards to prevent their ability to affect democratic decision-making on public goods and achievement of sustainability objectives.

4. Accountability

In this report (and the accompanying executive summary), it emerges that transparency is of considerable importance, but will not alone deliver accountability. More detailed requirements of state and corporate due diligence are required. The EU must be clear as to the relative hierarchy of certain international instruments (for e.g. UN human rights and labour standards, as well as environmental conventions) over the economic entitlements of private market actors. Ethical accountability entails a holistic study of the interaction of trade, investment and finance.