Trade, investment and corporate sustainability

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1. Introduction

In this chapter, we observe that corporate sustainability is affected by over-arching rules determining trade and investment relations. These rules purportedly set terms of fair competition which can affect the capacity of states to take positive measures that would require companies to respect sustainability standards. Ostensibly, states are the primary holders of rights and duties under international economic law. We recognise that the state-centric trade rules at the World Trade Organisation (WTO) offer limited scope for corporate voice to promote sustainability in the multilateral context. Conversely, we identify that corporations can exert greater influence in investor-state dispute settlement, where their capacity to undermine or promote sustainability objectives is more significant.

The rules operating in the WTO mediate import and export of goods, including corporate management of supply chain arrangements which relate to multi-site manufacture and service delivery. Supply chains entail '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'.[1] They are 'global value chains' to the extent that value is added at each stage (and in each country), which has the capacity to fuel development in lower income countries..[2] Such development should be sustainable in economic, social and environmental terms.

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[1] ILO, Report IV: Decent Work in Global Supply Chains, ILC, 105th Session (Geneva: ILO, 2016), at 2. This chapter draws on research in the ongoing project Sustainable Market Actors for Responsible Trade (SMART). SMART (2016-2020) receives funding from the European Union's Horizon 2020 research and innovation programme under Grant Agreement No 693642, and we gratefully acknowledge its support.

[2] See D. Taglioni and D. Winkler, 'Making Global Value Chains Work for Development' (2014) *The World Bank – Economic Premise*, Number 143, especially at 1-2 and 8. See also T. Novitz, 'Supply Chains and Temporary Migrant Labour: The Relevance of Trade and Sustainability Frameworks?' in D. Ashiagbor (ed.), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Oxford: Hart/Bloomsbury, 2018, forthcoming.)

Formal rules relating to non-discrimination (or most-favoured nation status for every Member of the WTO), national treatment and quantitative restrictions set out the formal parity of terms of trade. Nevertheless, exceptions are made for the special and differential treatment of 'developing countries'[3] and States do possess some exceptional powers to take measures to pursue environmental or other social objectives. Further, both the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) have enabled ever more expansive 'free trade agreements' (FTAs), which also cover such matters as investment, competition law and procurement sustainability (environmental and labour) clauses. These give states some discretion to regulate corporate actors but, while corporations can exert some influence on aspects of policy-making, their voice within these systems is limited. In other words, the and the impact on corporations in the WTO setting going forward very much depends on the workings of the dispute settlement body in the years to come when applying and interpreting these instruments.

The more anarchic treatment of investment, which is not regulated in a consistent way under international law, presents challenges to the promotion of 'sustainable' investment. The majority of States are members of the International Centre for the Settlement of Investment Disputes (ICSID) within the World Bank, but even members are not necessarily obliged to use ICSID services or even to make transparent investor-State dispute settlement (ISDS). The sole exception is services-related investment measures which come within the frame of GATS and the WTO dispute settlement. In this setting, corporations have considerable powers as investors, which can be used to promote but more commonly obstruct sustainability objectives. We will be examining new proposals for reform, which could lead to greater inclusion of sustainability-related provisions in investment agreements (whether bilateral or as part of a multilateral free trade agreement), as well as more uniform and predictable forms of arbitration.[4] Such changes could again shape the contours of corporate sustainability.

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[3] See for the usage of this term 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 available at: www.wto.org/english/docs_e/legal_e/enabling1979_e.htm.

[4] See R. Howse, 'Designing a Multilateral Investment Court: Issues and Options' (2017) 36(1) *Yearbook of European Law,* 209; and C. Gammage, 'Investment Facilitation for Development: A Rights Perspective' (2018) *Indian Journal of International Economic Law* forthcoming.

2. What is 'corporate sustainability' and how could trade and investment law potentially aid or detract from such an objective?

The idea of 'corporate sustainability' is multifaceted. Our starting point lies in the two strands of international legal history that led to the current Sustainable Development Goals (SDGs).[5] One is the powerful idea of environmental (often described as inter-generational) sustainability.[6] The second is the increasing significance of an intra-generational economic and social 'development' agenda.[7] These facets of sustainable development have been given a more concrete form by Kate Raworth in her recent book on 'Doughnut Economics' in which she posits that collectively there is a need to live within the planetary boundaries of the globe (an 'environmental ceiling'), while respecting each person's entitlement to the resources they need for a 'social foundation' of rights to be respected. [8]

Sustainability has also been linked to participation at local, national, regional and international levels. For example, Principle 10 of the 1992 Rio Declaration of Principles,[9] stressed 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 adopted in 2000 were criticised as target-ridden and donor-centric rather than qualitative and participatory,[10] this talisman of participation was again recognised in the Johannesburg Declaration of 2002,[11] and the 2015 SDGs.[12]

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[5] Resolution adopted by the UN General Assembly on 25 September 2015 - Transforming our world: the 2030 Agenda for Sustainable Development A/Res/70/1 available at: sustainabledevelopment.un.org/post2015/transformingourworld/publication.

[6] See Report of the World Commission on Environment and Development: Our Common Future (1987), especially ch.s. 2 and 3, available at sustainabledevelopment.un.org/post2015/transformingourworld/publication.

[7] See the 1972 Stockholm Declaration under Principles 1 and 8 at www.un-documents.net/unchedec.htm; and the UN Declaration on Right to Development 1986 GA Resolution 41/128 4 December 1986 available at: www.unhchr.ch/html/menu3/b/74.htm.

[8] K. Raworth, *Doughnut Economics: Seven Ways to Think Like a 21st Century Economist* (London: Cornerstone Books, 2017).

[9] See www.un.org/documents/ga/conf151/aconf15126-1annex1.htm/

[10] See www.unmillenniumproject.org/goals/gti.htm; J. Vandemoortele, 'The MDG Conundrum: Meeting the Targets without Missing the Point' (2009) 27(4) *Development Policy Review* 355 and J. 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.

[11] See para. 26. Available at www.un-documents.net/jburgdec.htm.

[12] See SDG 16, discussed below.

In terms of substantive norms, the SDGs recognise emerging concerns regarding trade and investment. For example, SDG 2.B sets a target for the WTO to 'correct and prevent trade restrictions and distortions in world agricultural markets'. SDG 14.6 calls for the prohibition of fish subsidies that contribute to the over-fishing of ocean resources.[13] Under SDG 3.B, the WTO is to promote, through better utilisation of the agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs), 'research and development of vaccines and medicines … that primarily affect developing countries'. SDG 8.A includes a reminder to: 'Increase Aid for Trade support for developing countries, in particular least developed countries…' including through technical assistance. Partnering financial aid with trade, but also providing expertise for managing such aid, is considered to build capacity at national level to foster achievement of sustainability.

SDG 10.8 acknowledges that implementation of special and differential treatment in the WTO could have significant economic benefits, but also enable greater social and political inclusion in the global economy. Of obvious additional relevance is foreign direct investment, namely the 'financial flows' in SDG 10.9. These targets can be read together with SDG 17.10 which calls for an 'equitable multilateral trading system under the World Trade Organization' and SDG 17.5 that urges 'investment promotion regimes for least developed countries'.

In this context, corporations have a potentially powerful role. While States are formally responsible under international law for promoting achievement of the SDGs, the capacity for their realisation is more likely to lie in private commercial hands. The concrete power dynamics in global value chains profoundly affect the sustainability of global corporate activity.[14] Corporations as actors in the global economy also have human rights responsibilities,[15] which involve reaching beyond a bare shareholder economic model of the

[13] See 'Ministerial Decision of 13 December 2017: Fisheries Subsidies' WT/MIN(17)/64 of 18 December 2017 and 'Ministerial Decision of 13 December 2017: TRIPS non-violation and situation complaints' WT/MIN(17)66 of 18 December 2017.

[14] F. Smith, 'Natural Resources and Global Value Chains: What role for the WTO?' (2015)11(2) *International Journal of Law in Context* 135.

[15] J. Ruggie and T. Nelson, 'Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges' *Corporate Social Responsibility Initiative Working Paper No. 66* (Cambridge, Harvard University: 2015).

company towards the broader responsibility of promoting sustainability. For example, the Preface to the 2017 OECD Guidelines for Multinational Enterprises stresses the need to 'enhance the contribution to sustainable development made by multinational enterprises'.[16] Further, the very first page of the United Nations Guiding Principles on Business and Human Rights speaks of 'contributing to a socially sustainable globalization'.[17]

We are not suggesting that corporations are always more influential than States. Rather, we see corporate private power and State public power as symbiotic, mutually capable of shaping each other. In this chapter, our contention is that the international rules of trade and investment are 'Janus faced': they can defeat states' capacity to promote sustainability or alternatively offer opportunities for them to do so. Notably, there is (as yet) no suggestion that international environmental law requires them to do so, although the SDGs may offer a new promotional impetus alongside the determination of some states and regional trading blocs to be seen to act ethically. In trade and investment mechanisms, there is also scope for corporations to exercise voice, which may also have significant effects on corporate sustainability.

3. International trade law

The longstanding GATT, which dates from 1948 and now operates under the WTO umbrella, establishes the terms on which goods are exchanged across national boundaries. The most significant rules concern 'most favoured nation' status (Article I) and national treatment (Article III). Quantitative restrictions are also barred (under Article XI). Limited exceptions are permitted to promote 'special and differential treatment' of developing countries (under Article XVIII and Part IV of the GATT) [18] and for environmental and social purposes (under Article XX of the GATT).[19] There is also scope for free trade agreements (FTAs) (under Article

[16] See www.oecd.org/corporate/mne/1922428.pdf.
[17] Available at: www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
[18] U. Ewelukwa, 'Special and Differential Treatment in International Trade Law: A Concept in Search of Content' (2003) 79 *North Dakota Law Review,* 831; and M. 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.
[19] R. 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.

XXIV), which create either customs unions or free trade areas that substantially liberalise all trade between two or more States.

Added to this legal matrix is GATS which since 1994 has governed trade in services between WTO members. GATS follows a similar structural model to the GATT (including the most favoured nation principle and national treatment), but with even greater emphasis on market access. 'General exceptions' again apply (in this respect Article XIV of GATS is comparable with Article XX of GATT) and provision is again made for special and differential treatment in relation to developing countries. Further, adaptations are in place which recognise the scope for itemisation of services broken down into four modes of provision: cross-border supply, consumption abroad, commercial presence and movement of natural persons (Article I(2)). These interact with the movement of goods under the GATT allowing for expertise and distribution on the ground. In particular, movement of natural persons has implications for social sustainability in terms of access to decent work (and economic growth) as itemised by SDG 8.[20] An FTA exception is contemplated under Article V of GATS, as well as integration of labour markets by virtue of Article Vbis. Regulation of investment usually falls outside the scope of WTO concerns, apart from the Trade-Related Investment Measures (TRIMS) Agreement and GATS Mode 3 that enables 'commercial presence' of a service provider from one Member in another Member's territory,[21] but it is increasingly common to find investment chapters in FTAs.

In relation to both GATT and GATS, the WTO dispute settlement understanding and the authoritative findings of an Appellate Body have lent force to these provisions. However, while there has been some recognition of environmental standards and the need for special and differential treatment of developing countries, this remains limited and inconsistent. In this section, we consider the scope for development and sustainability measures to be recognised within the WTO and FTAs, which may have implications for corporate activities.

[20] See Novitz, Supply Chains and Temporary Migrant Labour ; and R. Lanz and A. Maurer, 'Services and Global Value Chains: Some Evidence on Servicification of Manufacturing and Services Networks' (2015) *WTO Staff Working Paper*, No ERSD-2015-03.

[21] Available at: www.wto.org/english/docs_e/legal_e/18-trims.pdf. See also GATS, Article 1(2).

We will also consider the spaces in which corporate actors can wield influence within and beyond the formal legal WTO processes.

3.1 Facilitating economic sustainability via trade with 'special and differential treatment'?

WTO rules are intended to operate in ways that promote the economic dimension of sustainable development. By providing apparently neutral formal rules applicable to all members, setting out terms of fair competition, the aim is that freer trade can be achieved.[22] Each State sets its own tariffs in a schedule (and can publish a services schedule) according to its trading sensitivities, with the proviso that this is then applicable to all WTO members. The certainty which such schedules provide to corporate entities, who are usually the producers of goods and providers of services, enables them to cost delivery and export in ways which enable reliable profits to be made.

The system of schedules allows, at least in theory, each State to develop at their own pace, opening markets as they see fit. The difficulty, of course, is that 'developing countries' , are under considerable pressure to make certain concessions before they are ready to do so. This can lead to longstanding imbalances in global trade, and increasing levels of poverty and indebtedness.[23] Specific provision is made for a principle of 'special and differential treatment' to address such concerns.[24] So Article XVIII enables developing countries to protect and even subsidise their infant industries, as well as take special measures to address balance of payments crises.[25] Nevertheless, the technicalities and procedures associated with its operation, which require negotiation of compensation for other (even higher income) States affected, have cast doubt on its efficacy.[26]

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[22] H. Horn and P. Mavroidis, 'Economic and legal aspects of the Most-Favored-Nation clause' (2001) 17(2) *European Journal of Political Economy,* 233.

[23] O. Sibanda, 'Towards a Revised GATT/WTO Special and Differential Treatment Regime for Least Developed and Developing Countries' (2015) 50 *Foreign Trade Review,* 31.

[24] See the GATT, Part IV.

[25] T. Ademola Oyejide, 'Development Dimensions in Multilateral Trade Negotiations' in M. Moore (ed.), *Doha and Beyond: The Future of the Multicultural Trading System* (Cambridge: Cambridge University Press, 2004), Chapter 5, at 79; and E.C. Ezeani, The WTO and its Development Obligation (Anthem Press, 2012) at 26 – 33.

[26] *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* Appellate Body Report and Panel Report WT/DS90/14, 13 October 1999.

The so-called developed (or high income) States also have the opportunity under an 'Enabling Clause' to make provision for redistribution to developing countries through non-reciprocal tariff preferences, but there is no obligation to do so.[27] If a Generalized System of Preferences (GSP) is established, the WTO Appellate Body has found that it must operate transparently and fairly.[28] The EU makes additional preferential access to these lower tariffs (GSP+) conditional on ratification and compliance with international key instruments relating to sustainable development and good governance.[29] These tariff preferences offer incentives for corporate entities to invest in developing countries and export from these. However, once the product originating in the developing country is deemed to be competitive on the international market there can be 'graduation' from the GSP (and GSP+) system, so that the product and corporation involved in its production no longer benefits from the preferential tariff.[30] Such short-lived benefits can damage corporate plans and further exacerbates the vulnerabilities of many developing countries; and conversely there are indications that promotion of social and environmental sustainability under GSP+ can have positive developmental effects that are good for developing countries and for business.[31]

The WTO framework focusses on State action, limiting the role of private actors, even though the Gross Domestic Product of a developing State may be less than annual profits of a multinational enterprise.[32] In this sense the participatory governance promised in SDG 16 has not been fully realised or, with this, the transformation promised in SDG 17.10. Nor have developing countries and least developed countries been able to achieve the bolder special

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[27] See n.3 above.

[28] 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 by R. 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.

[29] Although compliance with the Enabling Clause has been questioned: L. Bartels, 'The WTO Legality of the EU's GSP+ Arrangement' (2007) 10 *Journal of International Economic Law,* 869; and B. Wardhaugh, 'GSP+ and Human Rights: Is the EU's Approach the Right One?' (2013) 16 *Journal of International Economic Law,* 827.

[30] G. Siles-Brügge, 'EU Trade and Development Policy beyond the ACP: Subordinating developmental to commercial imperatives in the reform of GSP' (2014) 20(1) *Contemporary Politics,* 49; E. Blanchard and S.Hakobyan, 'The US Generalised System of Preferences in Principle and Practice' (2015) 38(3) *The World Economy*, 399.

[31] See for e.g. the longstanding view of the OECD dating from their report on *Trade, Employment and Labour Standards* (Paris: OECD, 1996).

[32] See World Economic Forum analysis available at: www.weforum.org/agenda/2016/10/corporations-not-countries-dominate-the-list-of-the-world-s-biggest-economic-entities/.

and differential treatment objectives set via the Doha Round of negotiations.[33] It is evident that more needs to be done to promote sustainable economic development outside formal WTO processes and that corporate engagement will be significant in achieving this goal.

3.2 Exceptions for environmental and social sustainability

The WTO is not only concerned with economic development. Environmental and social sustainability can operate as 'exceptions' to standard trade rules and are set out in Article XX of the GATT and Article XIV of GATS.[34]

There is an exhaustive list of exceptions in Article XX of GATT. Those most relevant to environmental and social protections include measures that are 'necessary' to (a) protect public morals or (b) to protect human, animal or plant life or health. Measures may also be taken 'relating' to (e) 'the products of prison labour' and (g) 'the conservation of exhaustible natural resources…' The 'necessity' test places a limit on exceptions (a) and (b)[35] with further limits being placed by the panels and Appellate Body on extraterritoriality or process and production methods.[36] Even if these criteria are met, protection under Article XX is conditional on compliance with the preliminary paragraph, the 'chapeau'. This provides that measures are not to be 'applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade'. Article XX is to be interpreted 'in accordance with customary rules of interpretation of public international law' (under Article 3(2) of the Dispute Settlement Understanding).[37] To date, despite a number of attempts to rely on Article XX as

[33] See the Nairobi Ministerial Declaration (2015), para. 32: 'Many Members want to carry out the work on the basis of the Doha structure, while some want to explore new architectures.'; B. Mercurio and A. Martin, 'Doha Dead and Buried in Nairobi: Lessons for the WTO' (2017) 16(1) *Journal of International Trade Law and Policy*, 49.

[34] C. Gammage, *North-South Regional Trade Agreements as Legal Regimes: A Critical Assessment of the EU-SADC Economic Partnership Agreements* (Cheltenham: Edward Elgar: 2017), Chapter 4.

[35] D. H. Regan, 'The Meaning of "Necessary" in GATT Article XX and GATS Article XIV: The myth of cost–benefit balancing' (2007) 6(3) *World Trade Review,* 347.

[36] L. Bartels, 'Article XX of GATT and the Problem of Extraterritorial Jurisdiction' (2002) 36 *Journal of World Trade,* 353.

[37] See G. Marín Durán, 'Measures with Multiple Competing Purposes after EC–Seal Products: Avoiding a Conflict between GATT Article XX-Chapeau and Article 2.1 TBT Agreement' (2016) 19(2) *Journal of International Economic Law,* 467.

a defence, only one has been successful,[38] indicating that State measures promoting sustainability are not readily defensible. Nevertheless, Article XX has been cited as a justification for the use of otherwise prohibited quantitative restrictions in approximately 80 per cent of notifications by WTO Members.[39] These measures tend to be taken by so-called developed, rather than developing countries, such as the EU and USA.

Environmental norms, rather than social concerns, tend to receive systematic attention in current WTO litigation. An exception was the *US Gambling* case under Article XIV of GATS.[40] Here the term 'public morals' was understood in terms of factors such as 'prevailing social, cultural, ethical and religious values'. To this extent, the USA was entitled to place restrictions on gambling, but was ultimately in breach of GATS obligations under the chapeau, because those same controls were not placed on US based internet gambling facilities. Furthermore, in *China-Publications and Audiovisual Products,* the panel stated that the protection of public morals 'ranks amongst the most important values or interests pursued by the members as a matter of public policy'.[41] Otherwise, there is evolving case law on the relevance of environmental protections under Article XX culminating in litigation on the *EC Seals* case, where the objective was regarded as coming within the public morals exception, although the measure was not found to be proportionate. [42]

Sustainable development relating to environmental objectives is recognised and plays a role in 'balancing' competing issues in WTO litigation. This occurred under the GATT system,[43] but has been consolidated subsequently through the WTO system.[44] International instruments

[38] *EC – Measures Affecting Asbestos and Products Containing Asbestos* WT/DS135/AB/R (12 March 2001).
[39] WTO, 'Quantitative Restrictions: Factual Information on Notifications Received' Report by the Secretariat of 22 May 2015, G/MA/W/114.
[40] United States-Measures Affecting the Cross-Border Supply of Gambling and Betting Services Panel Report WT/DS285/AB/R (10 November 2004).
[41] *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products* WT/R/DS363 of 12 August 2009, para 7.817.
[42] See Appellate Body Reports, European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, 2014, 174; discussed by D. Szabo, 'Sustainable Trade Renewable Energy and the WTO', paper delivered at Oslo SMART Conference on Trade and Investment May 2017; Durán, 'Measures with Multiple Competing Purposes after EC–Seal Product':; and B. McGivern, 'The WTO Seal Products Panel: The Public Morals Defense' (2014) 9(2) *Global Trade and Customs Journal* at 73.
[43] *United States-Restrictions on Imports of Tuna* GATT Report 33 I.L.M 839 (1994) (*Tuna/Dolphin II*), para 5.42
[44] Report of the Appellate Body, *US-Shrimp* WT/DS58/AB/R (12 October 1998), para. 185; and at para. 155 note the statement that the objective of sustainable development 'gives *colour, texture* and *shading* to the rights and obligations of Members under the WTO Agreement generally, and under the GATT 1994, in particular'.

addressing State implementation of environmental standards receive increasing recognition as a legitimate source of exceptions to standard WTO principles, , although it remains vital that they do not lead to arbitrary discrimination or disproportionate treatment of particular groups, such as indigenous peoples.[45] In this limited sense, social sustainability issues enter again, but only tangentially to environmental concerns. In this context, the participation of non-State actors remains limited, although the Appellate Body has welcomed the submission of *amicus curiae* briefs from civil society.[46]

From a corporate perspective, the 'general exceptions' under GATT and GATS indicate that States can (at least in theory) unilaterally place conditions on imports regarding environmental and even social standards, which may affect corporate sale of products and provision of services. As a result, there can be a negative impact on corporate profits if such state action is taken and justified. In the alternative, corporations which wish to promote higher environmental and social sustainability standards within a particular sector of production or services could lobby government to take such unilateral action to change the terms of competition, so as not to be undercut by less scrupulous producers using prison labour or violating environmental standards. However, as we have seen, when such state measures are challenged as a breach of WTO rules, an Article XX justification is almost never accepted in WTO dispute settlement.

3.3 Free Trade Agreements and the potential for 'sustainable development' chapters

FTAs are permitted by virtue of Article XXIV of the GATT and Article V (and Vbis) of GATS. Whether as a 'customs union' (such as the EU) with common external tariffs and trade policies or as a 'free trade area', the State parties agree to substantially liberalise trade between them. FTAs should not 'raise barriers to the trade of other contracting parties with such territories' (see Article XXIV.4 of the GATT). FTAs can cover matters regulated under WTO auspices, such as goods and services, but also a wider range of issues over which the WTO has less regulatory

[45] See McGivern ''The WTO Seal Products Panel: The Public Morals Defense' at 71-72.
[46] For a full list of the amicus curiae briefs received by the Dispute Settlement Body, see: WTO, 'Repertory of the Appellate Body Reports: Amicus Curiae Briefs' [undated] available at: www.wto.org/english/tratop_e/dispu_e/repertory_e/a2_e.htm.

influence, such as environmental and labour matters, alongside competition law, public procurement and investment. Regulatory reach can thereby be extended beyond that possible at the multilateral WTO level.

FTAs have expanded exponentially in a 'spaghetti bowl' effect with a range of cross-cutting connections.[47] Their link to 'sustainable development' has largely been forged by the EU since the early 1990s. EU-FTAs used to include 'social clauses', but now the norm is a 'sustainable development chapter'.[48] For example, the Comprehensive Economic Trade Agreement (CETA) concluded between the EU and Canada, contains a chapter on 'Trade and Sustainable Development' (Chapter 22) which is linked to provisions on 'Trade and Labour' (Chapter 23) and 'Trade and Environment (Chapter 24). The reframing of labour standards from human rights to 'sustainable development' has raised some concern,[49] largely due to the more discursive approach to monitoring implementation of sustainable development chapters when compared with essential elements clauses for protection of human rights.[50]

Nevertheless, implementation procedures for EU-FTA sustainable development chapters are more embracing than WTO processes of participation. An example is the 'Domestic Advisory Group' mechanism, reflecting broadly environmental, labour and business interests, which advises on domestic concerns relating to the impact of the FTA on sustainable development. Also envisaged is 'Civil Society Dialogue', which enables EU civil society representatives to meet with their counterparts in the other State parties for discussion of implementation. These mechanisms offer progressive corporate actors more access to voice, as prompted by SDG 16.

While such an approach has benefits, there are also risks. One is that local domestic actors lack the capacity to perform the role given. Such a concern has recently been highlighted by

[47] J. Bhagwati, 'US Trade policy: The infatuation with Free trade agreements' (1995) discussion paper available at: www.columbia.edu/cu/libraries/inside/working/Econ/ldpd_econ_9495_726.pdf.
[48] See: S. Velluti, 'The Promotion and Integration of Human Rights in EU External Relations' (2016) 31 *Utrecht Journal of International and European Law,* 41.
[49] L. van den Putte and J. 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 at 281.
[50] L. 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 18-19.

Franz Ebert in relation to the Domestic Advisory Group under the EU-Korea FTA, the longest in operation, which has been plagued by 'concerns regarding the independence of civil society representatives, and reluctance of the Korea Government to engage with civil society'. Domestic capacity building will be vital.[51] Comparable difficulties have arisen in relation to Economic Partnership Agreements concluded between the EU and groups of African Caribbean and Pacific States, which are combined trade *and* development cooperation agreements.[52] Substantial financial assistance is provided by the EU under these Agreements to create 'a [transnational] political environment guaranteeing peace, security and stability, respect for human rights, democratic principles and the rule of law, and good governance', which is regarded as 'part and parcel of long-term development'.[53] There is also a shift toward Grant and Loan Blending Facilities, which draw on development aid from EU Member States and financial assistance from private sector actors.[54] The management of these lines of financial support has effects for corporate ethical engagement and also for civil society voice, as well as that of African Caribbean and Pacific States in line with SDG16.

3.4 Corporate action and supply chains

In the state-centric models of international trade law that we have outlined above, what scope is there for corporations to influence the rules affecting and concerning sustainability objectives? There is evidence that corporate interests have played an important role in treaty production and the engagement of business in the construction of treaties can affect their success and failure.[55] Furthermore, and in the absence of intergovernmental regulation, non-state actors have assumed a more proactive role in influencing social, environmental, and private standards through global value chains. Although corporate codes are not created by governments so lack judicial enforcement, they can have 'law-like effects'. [56] If standards are

[51] F.C. Ebert, 'Labour provisions in EU trade agreements: What potential for channelling labour standards-related capacity building?' (2016) 155(3*) International Labour Review,* 407.
[52] As discussed in Gammage, *North-South Regional Trade Agreements as Legal Regimes* above.
[53] Recital in the Preamble to the Cotonou Partnership Agreement 2014.
[54] J.N. Ferrer and A. Behrens, 'Innovative Approaches to EU Blending Mechanisms for Development Finance' CEPS Special Report (18 May 2011) available online at: www.cps.eu.
[55] M. Durkee, 'The Business of Treaties' (2016) *UCLA Law Review* 63, 264-320.
[56] J. Reinecke, S. Manning and O. van Hagen, 'The Emergence of a Standards Market: Multiplicity of Sustainability Standards in the Global Coffee Industry' (2012) 33 *Organization Studies,* 793.

certified by a third party, become adopted through domestic legislation or contracts, they can become legally binding.[57]

At the multilateral level, corporate influence is perhaps most significant in the context of non-tariff barriers to trade,[58] for example in relation to the emergence of standards regulating food quality and safety. The WTO Agreement on Sanitary and Phytosanitary Measures provides that 'no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health' provided that the adoption of such measures 'is only to the extent necessary' to pursue the legitimate objective and is not applied in a manner that constitutes a 'disguised restriction on international trade'. [59] To adopt a measure a state must show that the food safety measure is either 'based on' an international standard or a scientific risk assessment, which may have private origins, although there is no explicit reference to 'private standards'.[60] Businesses, then, through the promotion of (sustainability and other) standards or their evasion, can potentially influence, affect, and distort markets.

In this way, one benchmark for Sanitary and Phytosanitary Measures may be codes for corporate conduct designed at the multilateral international level, even though their practical implementation remains uneven.[61] Further, the individual codes designed by larger corporate entities (or even norms agreed to through an international or global framework agreement concluded with a global union federation) have the potential to steer norms for conduct throughout cross-border supply and value chains.[62] Certification schemes may operate to

[57] Ibid.
[58] The term 'non-tariff barriers to trade' refers to any measure that is not a tariff. At the WTO level, the Agreement on Technical Barriers to Trade (TBT) addresses a wide range of standards while the Agreement on Sanitary and Phytosanitary (SPS) Measures relates to standards regulating food, plant, and consumer safety.
[59] Article 2 Agreement on Sanitary and Phytosanitary Measures.
[60] See: Article 5 Agreement on Sanitary and Phytosanitary Measures. Where a standard is based on an international standard the measure will not be subject to the jurisdiction of the WTO's Dispute Settlement Body.
[61] See the UN Global Compact, the OECD Guidelines for Multinational Enterprises, the International Labour Organisation Tripartite Declaration of Principles concerning Multinational Enterprises and the UN Guiding Principles. Discussed in I. Martin, 'Corporate Governance Structures and Practices: From ordeal to opportunities and challenges for transnational labour law' in A. Blackett and A. Trebilcock, *Research Handbook on Transnational Labour Law* (Cheltenham: Edward Elgar, 2015).
[62] O. Herrnstadt, 'Are International Framework Agreements a path to corporate social responsibility?' (2007-8) 10 *University of Pennsylvania Journal of Business and Employment Law,* 187; H-W Platzer and S. Rüb,

demonstrate a corporation conforms to such standards,[63] while management through due diligence can promote these policies.[64] At their best, these codes shape norms of fair competition and, when research-informed, even shape the environmental and labour standards recognised in the WTO and sustainable development chapters of FTAs.[65]

In practice, the potential for sustainability policies to raise domestic production costs, and thereby affect the viability of export, may prevent their adoption at company board level where the aim may be to preserve shareholder value in purely economic terms. Corporate codes can also be adopted for the worst reasons, such as mere publicity purposes, or even because they have the capacity to shield commercial entities from State scrutiny and that of the international community.[66] The best scenario is that corporations proactively and genuinely seek to promote 'voluntary sustainability standards' including processes for due diligence, that can then be rolled out for inclusion in FTAs.[67] For this reason, a blend of private and public regulatory engagement and meaningful dialogue is vital (as SDG16 indicates) to determine the content and enforcement of codes. More research is needed to identify what factors might incentivise private actors to promote sustainability and comply with multilateral rules.[68]

4. International investment law

As noted above, international investment law is an autonomous sub-system of international law, which generally falls outside the reach of WTO jurisdiction. A coherent global international investment regime has yet to be achieved. Rather, there exist complementary

'International Framework Agreements: An instrument for enforcing social human rights?' (2014) *Friedrich Ebert Stiftung Working Paper*.

[63] For example, the Fair Labour Association at www.fairlabor.org/ and Workers' Rights Consortium at www.workersrights.org/ produce reports on complaints and investigations.

[64] A. Trebilcock, 'Due Diligence on Labour Issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights' in Blackett and Trebilcock (eds.) *Handbook on Transnational Labour Law*.

[65] A. Marx, N. Brando and B. Lein, 'Strengthening Labour Rights Provisions in Bilateral Trade Agreements: Making the Case for Voluntary Sustainability Standards' (2017) 8(3) *Global Policy*, 78.

[66] Trebilcock, 'Due Diligence on Labour Issues'.

[67] See Marx et al., 'Strengthening Labour Rights Provisions in Bilateral Trade Agreements'.

[68] P. Mavroidis and R. Wolfe, 'Private Standards and the WTO: Reclusive no More' (2017) 16 *World Trade Review,* 17; cf. K. Kolben, 'Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes' (2007) 48 *Harvard International Law Journal,* 203.

and even conflicting systems for governance of international investment treaties and investor-State dispute settlement (ISDS) mechanisms. There has been a proliferation of bilateral and multilateral investment treaties, which set terms to protect investors (usually corporate entities) from discriminatory treatment or expropriation (that is, confiscation) by the State of the investor's assets. Each investment instrument has the potential to set up its own arbitral mechanisms. There are overarching institutions established to assist in regulation of ISDS. From 1965, the World Bank Group has included an International Centre for Settlement of Investment Disputes (ICSID) which specialises in dispute resolution (including conciliation and arbitration) between States that are signatories and the international investors with which they engage.[69] This is a method to reassure investors of the security of investments; they often prefer reliable arbitration through ICSID panels as opposed to a hearing in domestic courts (which may favour a State's interests) or ad hoc arbitration where the credentials of the arbitrators are less certain.[70] The United Nations Commission on International Trade Law (UNCITRAL) has adopted its own Arbitration Rules (dating from 1976 and revised in 2010 and 2013), which have included UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (the 'Rules on Transparency') since 2013.[71] Another source of international influence is the WTO. Under GATS Mode 3, a crucial aspect of the ability to deliver services can be investment in another State, so that WTO dispute settlement can regulate, in this precise context, compliance with requirements regarding most favoured nation status, national treatment, market access and transparency.[72] In other words, there are multiple overlapping regimes, which leads to complex and unreliable outcomes. Further, while WTO dispute settlement is transparent and published on the website, ICSID and other forms of ad hoc arbitration can be entirely private.

[69] There are 162 State signatory and contracting parties. See icsid.worldbank.org/en/.

[70] J.C. Thomas and H. K. Dhillon, 'The Foundations of Investment Treaty Arbitration: The ICSID Convention, Investment Treaties and the Review of Arbitration Awards (2017) 32(3) *ICSID Review-Foreign Investment Law Journal,* 459.

[71] See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2010Arbitration_rules.html. See also J. Levine, 'Navigating the Parallel Universe of Investor-State disputes under the UNCITRAL Rules' (2017) 14(1) *Transnational Dispute Management* (TDM) available at: www.transnational-dispute-management.com/article.asp?key=2434.

[72] D. 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.

FTAs may also regulate investment relations, bringing trade and investment issues together in a large bilateral or multilateral instrument containing several discrete chapters. CETA, as noted above, has its own distinctive Chapter 8 regarding investment flows (which apart from deference to the right to regulate, is entirely distinct from Chapters 22 – 24 relating to sustainable development, labour and the environment). What is arguably more distinctive regarding CETA is Section F which contemplates establishment of a standing international investment tribunal and appellate court. This would overcome a variety of practical obstacles for current litigant investors and respondent States, whereby 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.[73] However, the Court of Justice of the European Union seems likely to be hostile to such an initiative, which detracts from its powers. The matter is currently the subject of a reference to the Court by Belgium, which is seeking to challenge the legitimacy of the proposed new 'investment court'.[74]

In the context of investment, we identify at least two specific concerns which arise from the perspective of corporate sustainability. The first is the notion of 'legitimate expectations' of an investor and the notion of 'indirect expropriation'. The second is the process of investment arbitration itself and the extent to which it is fair, reliable and participatory.

4.1 Environmental, social and economic sustainability measures as a cost for investors

Investment treaties seek to attract investors by offering certain guarantees. They usually recognise that investors have certain 'legitimate expectations' of State regulation of matters relevant to the investment, such as lease of land, labour standards and taxation. Changes to the regulatory environment, even if this is to promote environmental, social and economic sustainability objectives (in line with the SDGs), can be regarded as a cost to investors and as such a potential breach of their legitimate expectations – or even indirect expropriation of corporate assets. The *Bilcon* case demonstrates how environmental protections can be

[73] A. 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.
[74] Requested 6 September 2017 – see hsfnotes.com/arbitration/2017/09/12/belgium-asks-for-the-cjeus-opinion-on-the-compatibility-of-the-investment-court-system-with-european-law/.

challenged under investment treaties.[75] The NAFTA arbitral panel observed that the State was entitled to reject the investor's environmental report relating to a mining and marine project, but reference to 'community values' was called into question. Moreover, the State had to respect the 'legitimate expectations' of the investor (as there had been official endorsement at the outset of the mining project) or expect to compensate accordingly.[76] If a State engages in expropriatory measures for sustainability reasons, the investor must be compensated.[77] This approach enables corporations to bring claims against States which voice the sustainability concerns of their citizens. As a result, many have called for reform of the terms included in investment instruments and the ways in which such norms are applied.[78]

Some attempts by a corporate investor to prevent a State acting on sustainable development goals have not succeeded. For instance, in the *El Paso* case, the ICSID tribunal stated that 'if the circumstances change completely, any reasonable investor should expect that the law also would drastically change'.[79] There will be a residual right to regulate, since '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'.[80] Philip Morris filed a complaint seeking $US 25 million on the basis that legislation introduced in Uruguay enabling anti-smoking advertising constituted an expropriation of Philip Morris' investment, a breach of fair and equitable treatment, as well as interference with its trade mark. This action ultimately failed, given the strength of evidence presented on the effects of smoking and the usefulness of the measures taken, with Philip Morris required to pay $US 7 million to Uruguay.[81] Further, the proclamation of the

[75] *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, see: www.italaw.com/sites/default/files/case-documents/italaw4212.pdf (*Bilcon*).
[76] Ibid at 531 – 3.
[77] *Compania del Desarrollode Santa Elena, S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Final Award of 17 February 2002, paras. 71-72 15 ICSID Rev. 167 (2000): 'where property is expropriated, even for environmental purposes, whether domestic or international, the State's obligation to pay compensation remains.' See also *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*).
[78] On *Bilcon* see for example www.globaljustice.org.uk/blog/2015/apr/30/eyes-wide-shut-isds-implications-bilcon-vs-canada-case.
[79] *El Paso Energy Co. v. Argentina*, ICSID Case No. ARB/03/15, Award of 31 October 2011, at para. 363.
[80] Ibid., para. 374.
[81] *Philip Morris Brands Sàrl (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award of 8 July 2016. See www.italaw.com/sites/default/files/case-documents/italaw7428.pdf.

SDGs may yet shift the boundaries of what is considered acceptable State conduct in an investment arbitration setting. This would be consistent with the finding of the *Lemire* tribunal in Ukraine's favour when applying Article 5.1.4 of the 2004 UNIDROIT Principles, which 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.'[82]

4.2 Participation and procedural issues in ISDS

A substantial difficulty is that other cases are brought to which we may never discover the outcome. For example, *Veolia v Egypt* was a dispute raised in 2012 concerning a rise of the monthly minimum wage; it does not seem to have reached the award stage, and we do not know if it will be made public.[83] The lack of transparency in ISDS has posed considerable difficulties for the legitimacy of the system, prompting mass protests particularly in relation to CETA and the proposed Transatlantic Trade and Investment Partnership.[84] In this respect, the European Commission is seeking to be proactive, and promote the creation of a multilateral investment court,[85] but it remains to be seen whether the Court of Justice of the EU and other potential State parties will be so persuaded.

In the meantime, an initiative taken within the ICSID framework has made a difference to the potential achievement of SDG16 objectives. In the case brought by *Foresti v South Africa,*[86] for the first time an ICSID panel gave non-disputing parties access to proceedings. These consisted of a coalition of four non-governmental organizations. At issue was the design of post-apartheid compensatory measures, regarding which these civil society organisations had considerable expertise. Corporations should therefore be aware, as investors, that they may

[82] Discussed ibid., paras 154 and 159.
[83] See *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15.
[84] P.R. Hugg and S.M. Wilkinson, 'The 2014 European Parliament Elections and the Transatlantic Trade and Investment Partnership: Economics and Politics Collide' (2014) 24 *J. Transnat'l L. & Pol'y* 117; T. Ziegler, 'TTIP and Its Public Criticism: Anti-Globalist Populism Versus Valid Dangers' (2016) available at: https://tdziegler.wordpress.com/2017/03/10/new-article-ttip-and-its-public-criticism-anti-globalist-populism-versus-valid-dangers/.
[85] See the DG Trade Factsheet 'A Multilateral Investment Court' available at: http://trade.ec.europa.eu/doclib/docs/2017/september/tradoc_156042.pdf.
[86] *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award of 4 August 2010.

not be able to use ISDS to evade broader consultations with NGOs and other interested parties.

5. Conclusion

We have sought to consider the impact of international trade and investment regimes upon the pursuit of corporate sustainability. Concerns regarding the economic sustainable development needs of developing countries are acknowledged in the terms of trade set by the WTO, but the ground rules operate in ways which can render 'special and differential treatment' ineffective. Corporate sustainability entails considering how to plug these gaps; so that short term gains are not the focus of corporate activity but rather the creation of longer-term business connections. This might be achieved by corporate engagement in civil society capacity building through funding aid; but also through the dissemination of evidence based guidelines for appropriate corporate conduct. Codes and global framework agreements can also set standards which apply throughout a supply chain. These may have normative effects later concretized in FTAs and even the shaping of norms adopted in multilateral institutions, such as the WTO regarding matters such as food safety. Further, there is scope for States to place reciprocal pressures on corporations as international private actors to comply with their own standards and adhere to sustainable process and productions methods (including environmental and social standards) required under unilateral measures imposed under Article XX of GATT and Article XIV of GATS, or by virtue of sustainability chapters in FTAs.

The SDGs now offer a point of reference in WTO dispute settlement, but also in investment disputes under ISDS. Even without the qualifications and transparency of a multilateral investment court (as proposed by the EU), corporate investors need to be aware that while they may claim compensation for consequent losses, they cannot usually under ICSID arbitration ultimately obstruct the sovereign right of the State to regulate. Nor can they necessarily prevent civil society organisations being heard on matters of interest.

The interlocking global trade and investment regimes remain under pressure to change. Corporations can block this change or, preferably, lobby States to participate in meaningful reform of trade and investment regimes so as to achieve the SDGs agreed by the global

community. As they currently stand, these regimes do not enable effective regulation of corporate behaviour. In this, they stand in contrast to EU mechanisms which govern private actor conduct and enable broader participation in policy-making. And, yet, they do allow scope for legitimate state action to promote corporate sustainability. There is a regulatory space to be seized here, should states and corporations take up the challenge, which may yet be possible.