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Sustainability Provisions in Regional Trade Agreements: Can they be Multilateralised?

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Overview Paper



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Abbreviations and Acronyms

CAFTA-DR	Dominican Republic-Central America-United States Free Trade Agreement
CEC	Commission for Environmental Cooperation
CETA	Comprehensive Economic and Trade Agreement
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COMESA	Common Market for Eastern and Southern Africa
DAG	Domestic Advisory Group
EAC	East African Community
EFTA	European Free Trade Association
EGA	Environmental Goods Agreement
EU	European Union
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ILO	International Labour Organization
ISDS	investor-state dispute settlement
MARPOL	International Convention for the Prevention of Pollution from Ships
MEAs	multilateral environmental agreements
MFN	most-favoured nation
MTS	multilateral trading system
NAAEC	North American Agreement on Environmental Cooperation
NAALC	North American Agreement on Labour Cooperation
NAFTA	North American Free Trade Agreement
RCEP	Regional Comprehensive Economic Partnership
RTA	regional trade agreement
SADC	Southern African Development Community
SIA	Sustainability Impact Assessment
SPA	Strategic Partnership Agreement
TFA	Trade Facilitation Agreement
TFTA	Tripartite Free Trade Agreement
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
US	United States
WTO	World Trade Organization

Abstract

With the rise of deep-integration regional trade agreements (RTAs), the role of sustainable development has become an inevitable discussion. Recent agreements reflect a trend in favour of incorporating comprehensive sustainable development provisions, not just among developed countries, but also among some developing countries, with different countries employing different approaches to ensure the protection of social, economic, and environmental concerns. Despite the different approaches, similarities across the RTAs have emerged. The emerging homogeneity in these RTAs has opened discussions about a possible convergence between regionalism and multilateralism. Having multilateral commitments on trade and sustainable development could advance the cause of sustainability, while at the same time bolstering the multilateral, rules-based, trading system. However, there are challenges associated with convergence, particularly with the enforceability of sustainability provisions. Also, there is a general reluctance among developing countries to take on binding commitments in this area. Given the lack of progress generally in the World Trade Organization (WTO) on sustainability issues and the hesitance of developed countries to adopt enforceable obligations, a plurilateral solution seems difficult, although not impossible. A proper navigation course is required for this initiative to be successful; the paper explores several options in this respect.

1. Introduction

Sustainable development has been commonly defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs (WCED 1987). It has become a bedrock principle for policy objectives across the world, incorporating three pillars — economic development, social development, and environmental protection — that are considered interdependent and mutually reinforcing (Toubeau 2015).

Accordingly, sustainability is an important objective in regional trade agreements (RTAs),¹ and ensuring that trade effectively contributes to sustainable development remains one of the main political mandates in modern trade. The proliferation of RTAs has also seen a growing awareness of sustainable development concerns. Over time, several bilateral and regional trade agreements have incorporated explicit sustainability provisions, which have been evolving toward more comprehensive approaches as states are becoming more resourceful and creative in their efforts to address sustainability in RTAs.

To date, RTAs are characterised by a wide scope of sustainable development provisions, from innovative cooperation mechanisms, through provisions to address conflicts at the intersection of trade and sustainable development, to measures promoting compliance with international or domestic environmental and labour laws, or regulatory commitments to advance social or environmental objectives. However, the incorporation of comprehensive measures is not universal; rather, it is limited to certain countries that have sustainable development commitments as part of their political mandates. To date, many RTAs do not contain comprehensive commitments, and, in some cases, no commitments on sustainable development at all.

Accordingly, this paper focuses on so-called deep-integration RTAs. Deep integration refers to RTAs

that go beyond border protection measures and include “behind the border” measures, such as product and market regulation. These agreements are analysed on the basis that they contain the most comprehensive provisions on sustainable development and trade. To date, most of the signed deep-integration RTAs are by developed countries with some developing countries participating in the agreements, although not as demanders. The focus is primarily on deep-integration RTAs that have a global economic impact on third parties, and on trade and sustainable development. Nonetheless, some other relevant examples are discussed, including the Chilean case, which concerns a developing country that has concluded deep-integration agreements with both developed and developing countries.

Addressing sustainability issues is not only a regional concern, but also a multilateral one. There has been interest in harnessing a process of multilateralising regionalism, by which selected deeper measures incorporated in RTAs could be diffused more widely and consistently across regional negotiations, and lead to convergence at the multilateral level (Lejarraga 2014). Given the wide range of country experiences in incorporating sustainability into RTAs, and the evident lack of progress in advancing trade negotiations through the World Trade Organization (WTO), this is clearly a challenging proposition. The paper assesses the extent of the challenge and explores options for sustainable development to be incorporated into the WTO.

This paper is organised into five sections. Section 2 provides a textual analysis of the agreements focusing on the main sustainability provisions, in particular their similarities and forms of incorporation. Section 3 analyses the enforceability

¹ In this paper, RTAs include free trade agreements, customs unions, economic partnership agreements, economic integration, and cooperation agreements between states and regions.

of those provisions, and mechanisms developed to resolve disputes. Section 4 evaluates the extent to which RTA sustainability provisions are amenable to multilateralisation. Section 5 explores the options for convergence between the multilateral trade system (MTS), represented by the WTO and RTAs. It shows that there are options available to the WTO and its members that could be employed to migrate RTA provisions to multilateral provisions, but the obstacles are formidable. The final section provides concluding remarks.

2. Sustainability Provisions in RTAs

Sustainable development has always been at the heart of the WTO and part of the trading system. It is mentioned in the Preamble of the Marrakesh Agreement Establishing the WTO, and the 2001 Doha Ministerial Declaration. Other areas that cite sustainable development provisions include the terms of reference of the Committee on Trade and Environment and the WTO covered agreements, such as the General Agreement on Tariffs and Trade (GATT) under Article XX, the General Agreement on Trade in Services (GATS) under Article XIV, the Agreement on Technical Barriers to Trade (TBT), and the Agreement on the Application of Sanitary and Phytosanitary Measures. The mentioned agreements address environmental concerns that are necessary to protect human, animal, or plant life or health.

Today, sustainable development provisions are being adopted at the regional level by different states. Originally, only a handful of states recognised and incorporated sustainability provisions. The United States (US), Canada, and the European Union (EU) were forerunners that linked and integrated sustainable development and trade in their agreements. In recent years, an increasing number of states have started joining the ranks of the US, Canada, and the EU in incorporating sustainability provisions in their RTAs. For example, the European

Free Trade Association (EFTA) has adopted a new model for its RTA agreements that contains a comprehensive chapter on trade and sustainable development. Moreover, some previously negotiated agreements that do not contain a sustainable development chapter are being renegotiated, such as the EFTA-Canada RTA. However, according to Bartels (Bartels 2013), the practice is far from universal, even among developed countries. For example, Australia still retains its position on separating trade and environmental issues, while Japan has not strongly advocated for sustainable development issues in its agreements. Thus, the level of commitment to deep integration will differ across RTAs. Below is a discussion on the evolution of sustainability provisions as demonstrated by leading states and their RTAs.

2.1. European Union

The EU does not have a solid history of incorporating sustainable development provisions into its RTAs. The early references to sustainable development in EU agreements were in the form of human rights clauses in the early 1990s (Bartels 2013). Now, the EU always includes human rights clauses in its agreements. However, EU agreements did not contain any substantive provisions on sustainable development, including in its agreements with developing countries. Rather, relevant provisions called for cooperation only.

Over time, this changed, and EU law evolved to strengthen provisions related to sustainable development (EP 2017). The EU - Cariforum Economic Partnership Agreement, concluded on 30 October 2008, introduced this shift by including fully fledged, enforceable commitments with a monitoring provision. Enforceability is provided through recourse to ad hoc dispute settlement. The EU-Cariforum Agreement set the benchmark for sustainable development provisions in EU RTAs and opened avenues for other RTAs to explore, as charted in Table 1. On 25 November 2010, the EU Parliament passed a resolution on human rights, social, and environmental standards in international

trade agreements, which influenced the way sustainable development would be framed in future RTAs. It called for stronger sustainable development provisions. This is reflected in the EU-South Korea agreement, which illustrates the EU's new approach toward linking sustainable development clauses to trade. Moreover, it marked the first EU RTA to contain a separate trade and sustainable development chapter, addressing both labour and environmental issues. It further introduced an ad hoc two-stage process different from the EU-Cariforum RTA to deal with disputes under the trade and sustainable development chapter: first consultation, and then setting up a panel of experts to help to find a solution. The EU has also implemented a mechanism to aid in the process of sustainable development, known as the Sustainability Impact Assessment (SIA). This is a specific tool for supporting trade negotiations and providing an in-depth analysis of the potential economic, social, human rights, and environmental impacts of ongoing trade negotiations. To date, 26 SIAs have been conducted, and two are ongoing.

However, the trade and sustainable development chapters are not yet inserted within the scope of the state-to-state dispute settlement mechanism, and there are no sanctions for violation of the rules (EP 2017, 2). With the exclusion of sustainable development from the state-to-state dispute settlement mechanism, provisions are effectively inoperable. The opposition of the EU to the application of the normal state-to-state dispute settlement mechanism to the sustainable development chapters could be explained by the EU's fear that this could be used against its own legislation or against measures that are perceived to be restrictive (EP 2017, 10). Traditionally, the EU has always shied away from state-to-state dispute settlement mechanisms for sustainable development provisions and has always excluded it from RTAs. The EU relies on an ad hoc process established in the EU-Korea agreement as the dispute settlement mechanism. In the Comprehensive Economic and Trade Agreement (CETA), a free trade agreement between the EU and the Canada, this process is retained and is illustrated in Figure 2 below.

The EU has incorporated investor-state dispute settlement (ISDS) provisions in the CETA. The provisions contain an innovative and substantial change in that a standing tribunal is established to resolve investor-state disputes with recourse to an appellate body. To date, no ISDS mechanism contains an appeal process. However, the International Centre for Settlement of Investment Disputes (ICSID) awards may be annulled under the ICSID Convention, and awards under other arbitral rules may be set aside under the domestic law of the place of arbitration (VanDuzer 2016). But, there is no appeal process for errors of law in ISDS. It is important to note is that the dispute settlement mechanism pertaining to sustainable development is unrelated to the ISDS mechanism, which applies exclusively to commitments in the investment chapter and relates to disputes between private parties and governments. However, there are concerns about including an ISDS chapter provision in the agreement. ISDS gives foreign investors the right to sue governments in international arbitral tribunals, and some of the cases brought forward by investors concern environmental issues. There are concerns that through the ISDS chapter, private parties would challenge legitimate sustainable development measures through investment claims.

Today, EU policy incorporates labour and sustainability provisions as integral parts of RTAs under the trade and sustainable development chapters. This is replicated in the CETA. The CETA contains obligations to implement labour and environmental laws through a non-derogation clause, which entails that parties shall comply with their labour laws and standards without abandoning sustainable development provisions in favour of trade and investment. Moreover, each party is required to "effectively enforce its labour laws and environmental standards to encourage trade or investment."²

² CETA, Article 24.5.3

As the most recent agreement concluded by the EU, the CETA provides an indication of how the EU will most likely approach future negotiations, such as the Transatlantic Trade and Investment Partnership (TTIP) with the US. From the above, it does appear that EU policy has undergone a substantive transformation from a human rights clause and mere

references to sustainable development provisions, to fully incorporating chapters with substantive commitments on environmental and labour provisions. However, while substantive provisions have evolved and strengthened beyond dialogue provisions only, the EU has systematically refused to cover the trade and development chapters under

Table 1.

Sustainability in EU RTAs

Source: RTA texts

RTAs	Date of Entry into force	Reference to Environmental Provisions	Reference to Social Sustainability Provisions	Reference to Human Rights Provisions	Reference to Economic Sustainability Provisions
CARIFORUM	2008	Preamble, trade partnership for sustainable development, environment chapter, trade and trade related matters, trade in goods, TBT, SPS, services, investment intellectual property	Preamble, social aspects, trade and trade related matters, trade in goods, TBT, SPS, services, investment intellectual property	Services chapter	Preamble, trade partnership for sustainable development, trade and trade related matters, trade in goods, TBT, SPS, services, investment intellectual property
EUROPEAN PARLIAMENT RESOLUTION 2010					
Korea	2010	Preamble, chapter on trade and sustainable development	Trade and sustainable development chapter	Preamble, services chapter, trade and sustainable development chapter, transparency chapter	Foreign direct investment in environmental services, services, renewable energy and technologies
Central America	2012	Chapter on trade and sustainable development, services	Chapter on trade and sustainable development	Essential elements clause	Preamble, trade and sustainable development chapter
Australia	Not yet signed	Preamble, trade and sustainable development chapter, trade and environment chapter	Trade and sustainable development chapter	Most likely through a side agreement like CETA – SPA	Preamble, trade and sustainable development chapter
CETA	2016	Preamble, trade and sustainable development chapter, trade and environment chapter	Preamble, trade and labour chapter, Strategic Partnership Agreement	Preamble, final provisions, trade and labour chapter Strategic Partnership Agreement	Preamble, trade and sustainable development chapter
Japan	2016	Preamble, trade and sustainable development chapter, trade and environment chapter	Preamble, trade and labour chapter	Preamble, trade and labour chapter, possibly human rights clause	Preamble, trade and sustainable development chapter
TTIP	Not yet signed	Chapter on trade and sustainable development, trade and the environment	Trade and sustainable development chapter or a trade and labour chapter.	Chapter on trade and sustainable development	Mentioned as a goal by the EU and the US

the dispute settlement mechanism (EP 2017, 8). The new ISDS provisions create a new Investment Court System for investment disputes. However, firms will not be able to sue governments just because profits might be affected. Private parties are limited to well-defined cases that breach the CETA and discriminate against investors because of their nationality (EC

2017). The ISDS provisions in the CETA provide some limitation to the claims that investors may bring, which may provide some protection for sustainable development measures.

Table 1. continued

Sustainability in EU RTAs

Source: RTA texts

RTAs	Reference to international standards and agreements	Dispute settlement	Side agreements and letters	Enforceability	Enforcement mechanisms
CARIFORUM	ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions	Dispute settlement	N/A	Best endeavour provisions	Joint Council, CARIFORUM-EU Consultative Committee
EUROPEAN PARLIAMENT RESOLUTION 2010					
Korea	ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions	Dispute settlement-Consultations	Framework Agreement	Best endeavour provisions	Committee on Trade and Sustainable Development
Central America	ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions	Dispute settlement - consultations	N/A	Best endeavour provisions	Association Council
Australia	ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions	Possibility of ISDS like CETA and TPP	Framework Agreement	Best endeavour provisions	To be confirmed
CETA	ILO Conventions	Dispute settlement, ISDS	Strategic Partnership Agreement	Best endeavour provisions	The Committee on Trade and Sustainable Development
Japan	ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions	Possibility of ISDS like CETA and TPP	To be confirmed	Best endeavour provisions	To be confirmed
TTIP	ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions. Montreal Protocol on Substances that Deplete the Ozone Layer, Convention on the International Trade of Endangered Species of Wild Flora and Fauna & International Convention for the Prevention of Pollution from Ships	Dispute settlement, ISDS	Possibility of a side agreement to incorporate human rights provisions	Best endeavour provisions	Aims to have an enforcement mechanism

2.2. United States

US agreements, shown in Table 2, are unique in that they put trade and environmental issues on an equal footing with the other commercial provisions in the agreement. However, this was not always the case. The North American Free Trade Agreement (NAFTA) was the first US RTA to include sustainability provisions. It included two side agreements covering sustainability issues. This was the first ever agreement to incorporate and link trade and sustainable development. The agreement was considered groundbreaking, as it imposed binding substantive labour obligations, ensured high levels of protection of the environment, and decreed transparency through the mandatory publication of laws and public participation. It also contained an enforcement mechanism, via citizen's submission,³ ISDS,⁴ and the Commission for Environmental Cooperation (CEC).⁵ After NAFTA, the US concluded the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), using the NAFTA model.

In 2007, the US signed the Bipartisan Trade Promotion Authority Act (Bipartisan Act). This mandated a new approach to the incorporation of sustainable development provisions, notably the adoption of a template that called for partner countries to implement seven multilateral environmental agreements (MEAs), and adopt environmental and labour chapters, subject to enforcement mechanisms

governed by side agreements (for example, the Economic Cooperation Agreement). Moreover, all the environmental provisions would be on par with other commercial provisions in the agreement in relation to dispute settlement. This template was adopted in the subsequent agreements with Colombia, Korea, Panama, and Peru.

Following these agreements, the US negotiated a deep-integration agreement in the form of the Trans-Pacific Partnership (TPP). The TPP contains several binding obligations to implement select MEAs, and its overall obligations can be enforced through its broader state-to-state dispute settlement arrangements (World Economic Forum 2016). The environmental chapter in the TPP contains general environmental commitments. These general commitments do not impose substantive obligations on the parties, but the parties record their support for certain environmental objectives and principles, such as protection of the atmospheric ozone layer, marine capture fisheries, marine pollution, and conservation and trade (ICTSD 2016). The environment chapter also includes provisions that impose enforceable substantive obligations across several environmental issues. Specific articles contain other environmental commitments, such as government procurement and investments. The articles are couched in GATT Article XX language. The TPP explicitly allows the parties to adopt laws, regulations, and other rules necessary to protect the environment without violating the provisions of these chapters.

However, there is one notable difference in the TPP that distinguishes it from previous US agreements: it does not incorporate the seven MEAs stipulated in the Bipartisan Act. The MEAs incorporated in the agreement include the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol, and the International Convention for the Prevention of Pollution from Ships (MARPOL). The implementation of the three agreements creates different standards to trigger a violation. For example, a violation under the ozone protection (Montreal Protocol), and marine pollution (MARPOL) provisions requires a party to:

³ NAAEC gives private citizens and non-governmental organisations the opportunity to lodge complaints. The NAAEC investigates the claims and determine violations.

⁴ Complainants have direct access to ICSID, UNCITRAL, and the domestic court of the host state for relief. It also allows domestic courts to enforce final awards of the arbitration tribunals.

⁵ The CEC was established under the NAAEC to address regional environmental concerns by promoting the effective enforcement of environmental laws and determines whether a violation warrants a factual record.

(a) demonstrate that the other party failed to take measures to control the production and consumption of, and trade in, ozone-depleting substances and that (b) the failure to take those measures is both likely to result in adverse effects on human health and environment, and (c) done in a manner affecting trade and investment between the parties (ICTSD 2016, 5). Thus, if the violation in question does not affect trade and investment, there is no violation of the provision under the TPP. A violation under CITES requires that the challenging party must demonstrate that the failure “affects trade or investment between the parties” (ICTSD 2016). Compared with the Montreal Protocol and MARPOL provisions, the obligation here is to fulfil obligations under CITES, not merely to implement them (ICTSD 2016, 11). Moreover, parties are encouraged to exhaust measures under CITES before approaching dispute settlement. From the above, the violation of these obligations is

conditional. If the violation does not affect trade, it cannot be actionable under the TPP.

Nonetheless, looking at the RTAs signed by the US from NAFTA to date, substantive sustainable development provisions and ISDS have become part and parcel of its RTAs, which enables enforceability of sustainable development provisions.

At this stage and considering that the US has withdrawn from the TPP, it is not possible to determine whether the TPP will provide the necessary insight into how the US will negotiate its future agreements. Considering the recent approach taken by the EU in the CETA, in which it seems to roll back commitments, for example on human rights, and the one by the US in the TPP, the TTIP is likely to have provisions like these two agreements.

Table 2.

Sustainability in US RTAs

Source: RTA texts

RTAs	Date of entry into force	Reference to environmental provisions	Reference to social sustainability provisions	Reference to human rights provisions	Reference to the economic sustainability provisions
NAFTA	1994	Preamble	Preamble, body of the agreement and side agreements	Preamble, body of the agreement, side agreements	Preamble, body of the agreement and side agreements
CAFTA-DR	2006	Preamble, environmental chapter	Preamble, labour chapter	Labour chapter	Preamble
BIPARTISAN TRADE PROMOTION AUTHORITY ACT (2007)					
Peru	2009	Preamble, environmental chapter, general exceptions, investment chapter, government procurement	Preamble, labour chapter	Labour chapter	Not specifically mentioned but aligns with US trade policies
Colombia	2012	Preamble, environmental chapter, general exceptions clause, government procurement and investment	Preamble, labour chapter	Labour chapter	Preamble
Korea	2012	Preamble, environmental chapter, general exceptions clause, government procurement, investment, TBT, and intellectual property	Preamble, labour chapter	Labour chapter	Preamble
Panama	2012	Preamble, environmental chapter, investment chapter, government procurement	Preamble, labour chapter	Labour chapter	Preamble
TPP	2015	Preamble, environmental chapter, investment chapter, government procurement	Labour chapter	Labour chapter, investment chapter, government procurement	Preamble
TTIP	Unknown	Chapter on trade and sustainable development or environmental chapter	Trade and sustainable development chapter or a labour chapter	Labour chapter or side agreement like SPA	Mentioned as a goal by the EU and the US

Table 2. continued

Sustainability in US RTAs

Source: RTA texts

RTAs	Reference to international standards and agreements	Dispute settlement mechanisms	Side agreements and side letters	Enforceability	Enforcement mechanisms
NAFTA	No reference to MEAs	Dispute settlement via Citizen Suit provision (factual record) and ISDS	NAAEC (a side agreement on the environment) NAALC (a side agreement on labour)	Legally enforceable and subject to dispute resolution	The Commission for Environmental Cooperation (CEC)
CAFTA-DR	Renegotiated	Subject to dispute settlement, citizen suit provision (factual record)	Environmental Cooperation Agreement	Best endeavour provisions	Environmental Affairs Council
BIPARTISAN TRADE PROMOTION AUTHORITY ACT (2007)					
Peru	Incorporates 7 MEAs, ILO core principles	Subject to dispute settlement, citizen suit provision (factual record)	Environmental Cooperation Agreement	Creates binding and mandatory obligations	Environmental Affairs Council. Environmental Cooperation Commission, Subcommittee on Forest Sector Governance
Colombia	Incorporates 7 MEAs, ILO core principles	Subject to dispute settlement, citizen suit provision (factual record)	Environmental Cooperation Agreement	Creates binding and mandatory obligations	Environmental Affairs Council
Korea	Incorporates 7 MEAs, ILO core principles	Subject to dispute settlement in environment chapter and dispute settlement chapter	Environmental Cooperation Agreement, Confirmation Letter (Public participation), Confirmation Letter (Equivalence in Environmental laws), Confirmation Letter (Public Communication)	Creates binding and mandatory obligations	Environmental Affairs Council. Joint Fisheries Committee, Labour Cooperation Mechanism
Panama	Incorporates 7 MEAs, ILO core principles	Citizen Suit provision (factual record)	Environmental Cooperation Agreement, Agreement Establishing a Secretariat for Environmental Enforcement Matters	Creates binding and mandatory obligations	Environmental Affairs Council
TPP	ILO core principles, Montreal Protocol on Substances that Deplete the Ozone Layer, Convention on the International Trade of Endangered Species of Wild Flora and Fauna & International Convention for the Prevention of Pollution from Ships	Subject to dispute settlement, citizen suit provision (NO factual record), ISDS	Understanding Regarding Fisheries, Subsidies and Natural Disasters, Exchange letters on Committee to Coordinate Implementation of Environmental Affairs, Understanding Regarding Biodiversity and Traditional Knowledge, Understanding Regarding Conservation and Trade, Labour Consistency Plan, Plan for Enhancement of Trade and Labour Relations	Creates binding obligations	Committee on the Environment
TTIP	Countries to adopt the Convention on International Trade in Endangered species (CITES), ILO core principles, Montreal Protocol and possible agreements	ISDS, dispute settlement	It's a possibility	Unknown	Aims to have an enforcement mechanism

2.3. Canada

Following NAFTA, subsequent agreements concluded by Canada have incorporated sustainable development provisions through side agreements (Table 3). As part of the enforcement mechanism for the labour

agreement, a monetary penalty that is equal to any adverse effects resulting from the violation (the amount being adjustable in light of good faith and any aggravating factors) could be imposed in the event of non-compliance (Bartels 2017). However, in the recent RTA with the EU (CETA), Canada seems to have moved away from the NAFTA model (incorporation

Table 3.

Sustainability in Canadian RTAs

Source: RTA texts

RTAs	Date of entry	Reference to environmental provisions	Reference to social sustainability provisions	Reference to human rights provisions	Reference to economic sustainability clauses
NAFTA	1994	Preamble, body of the agreement and side agreements	Preamble, body of the agreement, side agreements	Preamble, body of the agreement, side agreements	Preamble, body of the agreement side agreements
Peru	2008	Preamble and the Chapters on Initial Provisions and General Definitions; Technical Barriers to Trade; Investment; Financial Services; Government Procurement; Dispute Settlement, Exceptions and Environmental Chapter	Preamble and the Chapters on Initial Provisions and General Definitions; Technical Barriers to Trade; Investment; Financial Services; Government Procurement; Dispute Settlement and Exceptions	Preamble and the Chapters on Initial Provisions and General Definitions; Technical Barriers to Trade; Investment; Financial Services; Government Procurement; Dispute Settlement and Exceptions	Preamble and the Chapters on Initial Provisions and General Definitions; Technical Barriers to Trade; Investment; Financial Services; Government Procurement; Dispute Settlement and Exceptions
EFTA	2009	Preamble, general exceptions	Preamble, general exceptions	Preamble, general exceptions	Preamble, general exceptions
TPP	2015	Preamble, environmental chapter, investment chapter, government procurement	Labour chapter	Labour chapter, investment chapter, government procurement	Preamble
CETA	2016	Preamble, trade and sustainable development chapter, trade and environment chapter	Preamble, trade and labour chapter	Preamble, final provisions, trade and labour chapter	Preamble, trade and sustainable development chapter

of sustainable provisions in side agreements) to the EU model by integrating sustainability provisions in the body of the agreement in the form of a trade and sustainable development chapter. Canada also does not implement its policy of penalising labour violations in the new agreement. Standard Canadian enforcement of environmental obligations, on the

other hand, is in line with that in the CETA (Bartels 2017) and so is the incorporation of ISDS provisions as a mechanism for dispute settlement similar to the TPP. However, there is one exception: the CETA provides for an Investment Court. This innovative reform differs from NAFTA-style ISDS and bilateral investment treaties (BITs) concluded by EU countries.

Table 3. continued

Sustainability in Canadian RTAs

Source: RTA texts

RTAs	Reference to international standards and agreements	Dispute settlement	Side agreements	Enforceability	Enforcements mechanisms
NAFTA	Conducted an assessment	Dispute settlement, Citizen Suit provision (factual record), contains ISDS provisions	NAAEC (a side agreement on the environment) NAALC (a side agreement on labour)	Legally enforceable and subject to dispute resolution	CEC
Peru	N/A	Dispute settlement	Labour Cooperation Agreement and Environmental Cooperation Agreement	Legally enforceable but not subject to dispute resolution	Committee on the Environment
EFTA	International Labour Organization's Declaration on Fundamental Principles and Rights at Work, United Nations Charter and Universal Declaration of Human Rights	N/A	N/A	N/A	N/A
TPP	ILO core principles, Montreal Protocol on Substances that Deplete the Ozone Layer, Convention on the International Trade of Endangered Species of Wild Flora and Fauna & International Convention for the Prevention of Pollution from Ships	Subject to dispute settlement, citizen suit provision (NO factual record), ISDS	Understanding Regarding Fisheries, Subsidies and Natural Disasters, Exchange letters on Committee to Coordinate Implementation of Environmental Affairs, Understanding Regarding Biodiversity and Traditional Knowledge, Understanding Regarding Conservation and Trade, Labour Consistency Plan, Plan for Enhancement of Trade and Labour Relations	Legally enforceable obligations	Committee on the Environment
CETA	ILO Core conventions- International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work	Dispute settlement, ISDS	Strategic Partnership Agreement	Best endeavour provisions	Committee on Trade and Sustainable Development

2.4. EFTA, Australia, Chile, and Japan

When it came to incorporating sustainability provisions in RTAs, EFTA countries have traditionally been ambivalent, allowing at times for a human rights clause but otherwise placing no great emphasis on social issues even as a matter of cooperation (Bartels 2013, 21). These EFTA agreements only incorporated sustainable development provisions through referencing in the preamble or as exceptions under GATT Article XX (Canada-EFTA Agreement) (Table 4). However, the EFTA website suggests that this position has changed. With the objective of reflecting the relevance of international environmental and labour standards for trade and economic development, the EFTA has developed a new model that includes in its RTAs provisions pertaining to trade and the environment and on social and labour standards. The new model incorporates a dedicated chapter on trade and sustainable development, supplemented by provisions (in particular clauses on general exceptions based on WTO provisions) in the sectoral chapters of the FTAs (SECO 2010). This model

has been applied in recent agreements with Georgia and Indonesia (Table 4). Another important RTA the EFTA concluded with Canada is being renegotiated to include comprehensive provisions on sustainable development. Australia's position on sustainable development appears to be ambiguous in that it "remains opposed to any link between trade and social protection (despite the existence of such provisions in its agreement with the US)" (Bartels 2013). This does not "necessarily mean that they do not consider environmental protection and international environmental cooperation to be a political priority; they may simply not consider that trade agreements are a good place to deal with these issues" (OECD 2007). As illustrated in Table 5, Australia's recent RTAs with the US and TPP countries indicate that it has included sustainable development provisions. Furthermore, the upcoming agreement with the EU indicates a possibility of having a trade and sustainable development chapter integrated into the agreement with a side agreement for the incorporation of human rights. An assessment of Japan's RTAs (Table 6) indicates that it has included sustainable development provisions in its RTAs though the inclusion has not been as comprehensive as that of the EU,

Table 4.

Sustainability in EFTA RTAs

Source: RTA texts

RTAs	Date of entry	Reference to environmental provisions	Reference to social sustainability provisions	Reference to human rights provisions
Canada	2009	Preamble, general exceptions	Preamble, general exceptions	Preamble, general exceptions
Ukraine	2012	Preamble, general exceptions	Preamble, general exceptions	Preamble, general exceptions
China	2012	Preamble, general exceptions, trade and environment chapter	Preamble	Preamble
Georgia	Pending	Preamble, trade and sustainable development	Preamble, trade and sustainable development	Preamble, trade and sustainable development
Indonesia	Pending	Preamble, trade and sustainable development	Preamble, trade and sustainable development	Preamble trade and sustainable development

the US, and Canada. Nevertheless, it is important to note that Japan has concluded two agreements with binding provisions on sustainable development —the Japan-India RTA and the TPP. Prior to the TPP, no Japanese RTAs included separate environment or labour chapters (World Economic Forum 2016, 19). Based on recent agreements, Japan’s upcoming agreement with the EU may take the TPP model (incorporating environmental and labour chapters) or the model followed by the CETA (incorporate three chapters in the EU fashion). In contrast, Chile has actively adopted sustainable development provisions. As early as 1997, Chile joined the US and Canada in adopting comprehensive provisions on trade and sustainable development. According to an International Institute for Sustainable Development (IISD) report, of the 19 agreements signed by Chile, 12 contain environmental commitments and eight contain labour clauses (IISD 2009). Chile’s main agreements have been concluded with the US, Canada, Australia, New Zealand, and the TPP. Chile has incorporated environmental and labour provisions through comprehensive chapters and side agreements in the NAFTA model. An analysis of the different families or clusters of deep-integration RTAs

indicates that sustainable development provisions have evolved overtime, particularly for the EU, which has moved from incorporating only a human rights clause to including substantive sustainable development provisions in its agreements. For its part, the US, “has comparatively a strong tradition on environmental and labour provisions in trade deals with enforceability” (IISD 2009, 18-19) as demonstrated in its provisions from NAFTA to the TPP. However, other developed countries, such as Australia and Japan, have not shown much initiative with respect to incorporating sustainable development provisions in their RTAs. An analysis of the different families or clusters of deep-integration RTAs indicates that sustainable development provisions have evolved overtime, particularly for the EU, which has moved from incorporating only a human rights clause to including substantive sustainable development provisions in its agreements. For its part, the US, “has comparatively a strong tradition on environmental and labour provisions in trade deals with enforceability” (IISD 2009, 18-19) as demonstrated in its provisions from NAFTA to the TPP. However, other developed countries, such as Australia and Japan, have not shown much initiative with respect to incorporating sustainable development provisions in their RTAs.

Table 4. continued

Sustainability in EFTA RTAs

Source: RTA texts

RTAs	Reference to economic sustainability clauses	Reference to international standards	Dispute settlement	Side agreements	Other mechanisms
NAFTA	Preamble, exceptions	International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, United Nations Charter and Universal Declaration of Human Rights	N/A	N/A	N/A
Peru	Preamble, exceptions	International Labour Organization’s Declaration on Fundamental Principles and Rights at Work, United Nations Charter and Universal Declaration of Human Rights	N/A	N/A	N/A
EFTA	Preamble and general exceptions	Stockholm Declaration on the Human Environment of 1972, the Rio Declaration on Environment and Development, Agenda 21 on Environment and Development and Johannesburg Plan of Implementation on Sustainable Development	N/A	N/A	Joint Committee
TPP	Preamble, trade and sustainable development	MEAs, ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions. CITES	N/A	N/A	Joint Committee
CETA	Preamble, trade and sustainable development	MEAs, ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions. CITES	N/A	N/A	Joint Committee

Table 5.

Sustainability in Australian RTAs

Source: RTA texts

RTAs	Date of entry	Reference to environmental provisions	Reference to social sustainability provisions	Reference to human rights provisions	Reference to economic sustainability clauses
US	2005	Preamble, environmental chapter, investment chapter, government procurement	Preamble, labour chapter	Labour chapter	Preamble
TPP	2015	Preamble, environmental chapter, investment chapter, government procurement	Labour chapter	Labour chapter, investment chapter, government procurement	Preamble
EU	Not yet signed	Preamble, trade and sustainable development chapter, trade and environment chapter	Trade and sustainable development chapter	Most likely through a side agreement like CETA - SPA	Preamble, trade and sustainable development chapter

Table 6.

Sustainability in Japanese RTAs

Source: RTA texts

RTAs	Date of entry	Reference to environmental provisions	Reference to social sustainability provisions	Reference to human rights provisions	Reference to economic sustainability clauses
Mexico	2005	Under performance Requirements and Environmental measures	Under performance requirements and environmental measures		Under performance Requirements and Environmental measures
India	2011	Preamble, environmental protection, environmental measures	Preamble		Preamble
TPP	2015	Preamble, environmental chapter, investment chapter, government procurement	Labour chapter	Labour chapter, investment chapter, government procurement	Preamble
EU	Not yet signed	Preamble, trade and sustainable development chapter, trade and environment chapter	Preamble, trade and labour chapter	Preamble, trade and labour chapter	Preamble, trade and sustainable development chapter

Table 5. continued

Sustainability in Australian RTAs

Source: RTA texts

RTAs	Reference to international standards	Dispute settlement	Side agreements	Enforceability	Other mechanisms
US	ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions	Dispute settlement	N/A	Legally enforceable and subject to dispute resolution	Joint Committee
TPP	ILO core principles, Montréal Protocol on Substances that Deplete the Ozone Layer, Convention on the International Trade of Endangered Species of Wild Flora and Fauna & International Convention for the Prevention of Pollution from Ships	Subject to dispute settlement, citizen suit provision (NO factual record), ISDS	Understanding Regarding Fisheries, Subsidies and Natural Disasters, Exchange letters on Committee to Coordinate Implementation of Environmental Affairs, Understanding Regarding Biodiversity and Traditional Knowledge, Understanding Regarding Conservation and Trade, Labour Consistency Plan, Plan for Enhancement of Trade and Labour Relations	Legally enforceable and subject to dispute resolution	Committee on the Environment
EU	ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions	Possibility of ISDS	Possibly not	Best endeavour	Possible enforcement mechanism

Table 6. continued

Sustainability in Japanese RTAs

Source: RTA texts

RTAs	Reference to international standards	Dispute settlement	Side agreements	Enforceability	Other enforcement mechanism
Mexico	N/A	N/A	N/A	Legally enforceable but excluded from dispute resolution	No enforcement mechanism
India	N/A	Dispute settlement	N/A	Mandatory obligations	No enforcement mechanism
TPP	ILO core principles, Montreal Protocol on Substances that Deplete the Ozone Layer, Convention on the International Trade of Endangered Species of Wild Flora and Fauna & International Convention for the Prevention of Pollution from Ships	Subject to dispute settlement, citizen suit provision (NO factual record), ISDS	Understanding Regarding Fisheries, Subsidies and Natural Disasters, Exchange letters on Committee to Coordinate Implementation of Environmental Affairs, Understanding Regarding Biodiversity and Traditional Knowledge, Understanding Regarding Conservation and Trade, Labour Consistency Plan, Plan for Enhancement of Trade and Labour Relations	Legally enforceable and subject to dispute resolution	Committee on the Environment
EU	ILO Declaration on Fundamental Principles and Rights at Work, Core ILO Conventions	Dispute settlement	To be confirmed	To be confirmed	Possibility of an enforcement mechanism

Table 7.

Sustainability in Chilean RTAs

Source: RTA texts

RTAs	Date of entry	Reference to environmental provisions	Reference to social sustainability provisions	Reference to human rights provisions	Reference to economic sustainability clauses
Canada	1997	Preamble, Environmental chapter	Preamble, labour chapter	Labour chapter	Preamble
EU	2003	Preamble, general exceptions, cooperation on the environment	Preamble, general exceptions	Preamble, general exceptions, general provisions	Preamble, general exceptions, cooperation on the environment
US	2004	Preamble, Environmental chapter, investment chapter, government procurement	Preamble, labour chapter	Labour chapter	Preamble
Colombia	2006	Preamble, environment chapter, general exceptions	Preamble, labour chapter, general exceptions	Preamble, labour chapter, general exceptions	Preamble
Trans-Pacific Strategic Economic Partnership	2006	General exceptions clause	General exceptions clause	General exceptions clause	N/A
Japan	2007	Preamble, environmental measures	Preamble	Preamble	Preamble, environmental measures
Australia	2009	Preamble General exceptions clause	Preamble General exceptions clause	Preamble General exceptions clause	Preamble
TPP	2015	Preamble, environmental chapter, investment chapter, government procurement	Labour chapter	Labour chapter, investment chapter, government procurement	Preamble
Pacific Alliance	2016	Preamble, general exceptions	Preamble, general exceptions	Preamble, general	Preamble, general exceptions

Table 7. continued

Sustainability in Chilean RTAs

Source: RTA texts

RTAs	Reference to international standards	Dispute settlement	Side agreements	Enforceability	Other mechanisms
Canada	ILO Declaration on Fundamental Principles and Rights at Work, Montréal Protocol on Substances that Deplete the Ozone Layer, CITES, Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal	Dispute settlement	Agreement on Environmental Cooperation Agreement on Labour Cooperation	Legally enforceable and subject to dispute resolution	Commission for Environmental Cooperation
EU	N/A	N/A	N/A	N/A	N/A
US	ILO Declaration on Fundamental Principles and Rights at Work, Montréal Protocol on Substances that Deplete the Ozone Layer	Dispute settlement	N/A	Legally enforceable and subject to dispute resolution	Environmental Affairs council
Colombia	ILO Declaration on Fundamental Principles and Rights at Work	N/A	N/A	N/A	N/A
Trans-Pacific Strategic Economic Partnership	ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up 1998	N/A	Environment Cooperation Agreement Memorandum of Understanding on Labour Cooperation Exchange letters on Environment Cooperation Agreement Exchange letters of on MOU Labour Cooperation	Legally enforceable but not subject to dispute settlement	N/A
Japan	N/A	N/A	N/A	N/A	N/A
Australia	N/A	N/A	N/A	N/A	N/A
TPP	ILO core principles, Montréal Protocol on Substances that Deplete the Ozone Layer, Convention on the International Trade of Endangered Species of Wild Flora and Fauna & International Convention for the Prevention of Pollution from Ships	Subject to dispute settlement, citizen suit provision (NO factual record), ISDS	Understanding Regarding Fisheries, Subsidies and Natural Disasters, Exchange letters on Committee to Coordinate Implementation of Environmental Affairs, Understanding Regarding Biodiversity and Traditional Knowledge, Understanding Regarding Conservation and Trade, Labour Consistency Plan, Plan for Enhancement of Trade and Labour Relations	Legally enforceable and subject to dispute resolution	Committee on the Environment
Pacific Alliance	N/A	N/A	N/A	N/A	N/A

2.5. Main Sustainability Provisions

From the preceding analysis, a growing number of RTAs now go beyond merely giving lip service to sustainability to including sustainability provisions in the body of the agreement, through detailed chapters, specific paragraphs, or side agreements. Furthermore, it should be noted that RTAs, despite being concluded by different parties, have similar provisions. Yet, only the “most ambitious agreements include a range of provisions, others focus on environmental cooperation, and a substantial number only refer to environmental issues in the preamble and in exceptions clauses” (OECD 2007, 26). See Annex 1 for detailed examples of the main sustainability provisions. In summary, these are:

- a. Environmental/labour cooperation mechanisms
- b. Environmental/labour standards — International Labour Organization(ILO) declaration, Montreal Protocol;
- c. Procedural guarantees;
- d. Enforcement mechanisms;
- e. Dispute settlement mechanisms;
- f. Preambular references;
- g. Environmental and labour chapters — issues covered range from timber (US-Peru), genetic resources (EFTA – Colombia), to fisheries (TPP); and
- h. General exceptions — GATT Article XX, SPS and TBT provisions.

As illustrated in Figure 1, cooperation mechanisms vary depending on the specific issues being addressed, such as, labour, environmental, and marine issues.

Figure 1.

Main sustainability provisions in RTAs

Source: RTA texts



Environmental cooperation provisions are included either in the body of the RTA or in the side agreements (including joint statements, arrangements, etc.) (OECD 2007). The areas of cooperation in different RTAs vary significantly and depend on a range of factors, such as whether the trade partners have comparable levels of development or not (in which case, cooperation often focuses on capacity building), or whether they have common borders (OECD 2007). Most RTAs considered above include provisions on environmental cooperation — for example, those of Canada, the EU, Japan, and the US.

Most RTAs have incorporated articles reaffirming the parties' commitments to international standards. One of the common commitments incorporated refers to the implementation of the ILO core labour standards contained in the Declaration on Fundamental Principles and Rights at Work, and the promotion of objectives included in the ILO's Decent Work Agenda. Another important provision is the enforcement obligation, which obliges parties to enforce sustainable development provisions. Other important provisions cover transparency, which calls for the publication and sharing of information with the public, and the right to regulate, which is a clause reiterating the compatibility between the parties' trade obligations and their right to adopt or maintain environmental regulations and standards.

Of course, enforceability is binding only if agreements are subjected to dispute settlement. Dispute settlement mechanisms are established within most of the agreements. However, sustainable development provisions in RTAs have mostly been excluded from the general dispute settlement mechanisms in RTAs, except for US trade agreements. The separate remedy for environmental disputes and the fact that trade sanctions are not allowed for environmental disputes, provides insight into the lingering reservations concerning the trade and environment debate (Chaytor 2009). Yet, not all US RTAs with enforcement provisions in environmental chapters allow for dispute settlement for all the provisions in the chapter. For example, Article 17:2.1 (a) of the dispute settlement process is only available

under the CAFTA-DR for a violation of terms in the environment chapter when a party is failing "to effectively enforce its environmental laws through a sustained or recurring course of action or inaction, in a manner affecting trade between parties" (CIEL 2015). Sustainable development provisions generally do not guarantee any form of protection, as they are generally excluded from binding dispute settlement.

ISDS provisions have emerged as a trend in recent RTAs, despite the controversy surrounding them. The provision on ISDS dates to NAFTA and, as demonstrated in recent agreements, has been incorporated in other agreements, such as the TPP and the CETA. The provision is most likely to be included in future agreements, such as the TTIP. Given recent agreements signed and under negotiation, it is still expected that the EU will seek to include an ISDS clause in any EU-Australia FTA (OECD 2007, 26). ISDS creates another platform to resolve disputes. Investors will no longer have to rely on their governments to bring disputes. On the one hand, this gives investors the platform to challenge sustainable development provisions that may pose a threat to the implementation of those provisions domestically. Ultimately, the EU plans to set up an investment court that moves away from the system of ISDS to a permanent body to decide investment disputes. According to the EU, the Multilateral Investment Court would have the potential to replace the dispute settlement provisions included in those older agreements.

2.6. Similarities of Sustainability Provisions across RTAs

Certain core sustainable development safeguards appear across the different RTAs that have recently been concluded. Table 8 compares social standards.

On the one hand, the EU generally inserts human rights clauses into its agreements. However, this provision is not popular with the other countries' RTAs as it is markedly absent, unless it is included in a side agreement, such as the Strategic Partnership

Agreement (SPA) of the CETA. States have been cautious in their approaches to incorporating human rights provisions, as they are perceived as separate issues from trade obligations. However, human rights provisions are usually subsumed in general clauses, such as labour and privacy rights chapters in the agreement. Another distinctive feature is that the social obligations under US agreements are subject to meaningful dispute settlement, and the other agreements have separate dispute mechanisms tailored to each separate agreement. With respect to human rights issues, most RTAs are aligned with social protections. A comparison of Table 8 with Table 9 does not reveal any significant differences between the countries, except that for Canada a violation of labour provisions will result in a monetary penalty by the infringing party.

The environmental sustainability provisions are not all similar across RTAs, as parties are generally concerned with different environmental issues. However, there is a high level of homogeneity in

other areas, such as the international standards incorporated and the enforcement mechanisms employed in various agreements. Table 10 compares the provisions mainly identified in the RTAs that have been concluded by the pioneers of trade and environmental provisions.

For example, the issues covered in the CETA and the TPP are different. In the TPP, the focus is on the protection of the ozone layer, the marine environment, and biodiversity, while the key environmental protections in the CETA are for aquaculture and forests. However, both agreements include the conservation and protection of fisheries. In the EFTA's RTAs, specific issues related to the environment are not incorporated. Rather, general references are made to conservation of the environment and sustainable development. Furthermore, the methods of incorporation differ substantially across the various RTAs. And, as illustrated in Table 10, only the US goes a step further in making its provisions subject to a dispute settlement mechanism.

Table 8.

Trends in sustainability provisions

Source: RTA texts

	US	EU	Canada	Chile	EFTA	Japan	Australia
Main social provisions	Labour rights, political participation, transparency, due process	Fisheries, aquaculture, environmental protection and forests, scientific & technical information	Privacy rights, political participation, transparency, due process, labour rights, cultural diversity	Labour rights, transparency, due process	Labour rights, transparency, due process, political participation, privacy rights	Labour rights, transparency, political participation, privacy rights, due process	Labour rights, transparency, due process, political participation, privacy rights
Incorporation	Preamble, labour chapter and side agreements	Essential elements clause, trade and labour	Preamble, side agreements, labour chapter	Preamble, side agreements, environment chapter, general exceptions	Preamble and general exceptions	Trade and labour, body of the text	Labour chapter
Enforceable via dispute settlement	Yes	No	No, except for labour provisions	Yes, but not all agreements	No	No	No
International standards	ILO	ILO	ILO	ILO	ILO	ILO	ILO

Table 9.

Trends in human rights sustainability provisions

Source: RTA texts

	US	EU	Canada	Chile	EFTA	Japan	Australia
Main human rights provisions	Labour rights, political participation, transparency, due process	Labour rights, human rights, transparency, political participation, privacy rights, due process	Labour rights, transparency, due process	Labour rights, transparency, due process	Transparency, due process, political participation, privacy rights	Labour rights, privacy rights, due process, transparency	Labour rights, political participation, due process and transparency
Incorporation	Labour chapter	Essential elements clause	Side agreements	Labour chapter, side agreements	Preamble, general exceptions	Body of the text, trade and labour	Labour chapter and preamble
Enforceable via dispute settlement	Yes	No	No. *with the exception of labour provisions	Yes, but not all agreements	No	No	No
International standards	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Table 10.

Trends in environmental sustainability provisions

Source: RTA texts

	US	EU	Canada	Chile	EFTA	Japan	Australia
Main environmental provisions	Ozone layer, marine environment, biodiversity, fisheries, endangered species, conservation of the environment	Fisheries, aquaculture, environmental protection and forests, scientific & technical information	Fisheries, and forests, ozone layer, aquaculture, endangered species, environmental protection, scientific & technical information	Ozone layer, endangered species, marine environment	Conservation of the environment	Conservation of the environment, fisheries, forests, endangered species, biodiversity, ozone layer, marine environment	Conservation of the environment, endangered species, biodiversity, ozone layer, marine environment
Incorporation	Preamble, environmental chapter	Trade and sustainable chapter	Side agreements	Preamble, side agreements, environment chapter, general exceptions	Preamble and general exceptions	Body of the text, preamble	Preamble, environmental chapter
Enforceable via dispute settlement	Yes	No	No	Yes, but not all agreements	No	No	No
International standards	MEAs	MEAs	MEAs	MEAs	MEAs	MEAs	MEAs

2.7. Mechanisms of Incorporating Sustainability Provisions in RTAs

As revealed in Tables 8 through 10, different mechanisms are employed to incorporate sustainability provisions. In some agreements, such as the Canada-EFTA agreement, sustainability provisions are limited to confirming general exceptions of the GATT (Article XX) and GATS (Article XIV), and sometimes other provisions are limited to a general reference in the preamble (EFTA agreements), while other agreements, such as US agreements with Colombia, Korea, Panama and Peru, have more substantive provisions. Our examination of the different RTAs revealed the tools favoured for incorporation. Among these are preambular references, detailed chapters dedicated to sustainability provisions (labour, environmental), side agreements, and general exceptions clauses.

Some countries, particularly developing countries, do not consider the inclusion of environmental protections in trade agreements to be a priority and include them only as preambular references and general exceptions. This type of inclusion only gives lip service to sustainable development provisions. References in the preamble fall short in that they cannot adequately address all the non-resolved issues that dominate sustainable development. Some trade agreements merely reference the general exceptions as articulated in GATT Article XX. Such incorporation cannot be fully implemented, because it does not create any binding commitments for the parties. This approach may be based on fears that sustainable development provisions could be used by some developed countries as disguised trade protectionism and a desire to preserve policy space.

In deep-integration RTAs, the norm seems to be to incorporate sustainable development provisions through dedicated chapters. In addition, these RTAs have dedicated mechanisms that deepen commitments and promote cooperation vis-à-vis sustainable development provisions and the establishment of committees and/or advisory groups.

Some RTAs have even gone further by incorporating sustainable development provisions in other chapters, such as those on government procurement and investment chapters, as in the TPP.

Dedicated chapters generally contain comprehensive sustainability provisions. However, by merely establishing best endeavour commitments, these chapters do not go beyond reiterating existing commitments. The language used is not binding, with terms such as “shall strive” or “shall seek,”⁶ effectively creating unenforceable environmental commitments. In all the recent EU agreements, there are separate dedicated chapters on trade and sustainable development, trade and labour, and trade and the environment. However, these chapters do not provide explicit prohibitions that can be adjudicated under a dispute settlement mechanism. In the CETA agreement, this position is retained.

In the US agreements, sustainable development safeguards are incorporated in chapters on the environment and labour, with recent US RTAs creating binding legal obligations enforceable under dispute settlement. In the TPP, this position is maintained, as the provisions create binding obligations on the parties. However, these provisions have been criticised for creating weaker enforcement mechanisms. Parties will only be liable for violating sustainable development provisions if the violation affects trade and investment. Thus, the failure by a party to establish this connection has no consequences at all. The probability that the TTIP will also take this format is uncertain, given the EU’s aversion to binding dispute settlement, and the TPP experience in creating binding sustainable development commitments.

Side agreements are used to incorporate separate provisions specifically not included in the main text, such as commitments undertaken by the parties to

⁶CETA, Article 24.3.

promote sustainable development measures, enforcement mechanisms for implementation, public awareness, cooperation mechanisms, and dispute resolution. The RTAs recently concluded by Canada and the US are good examples. In both the main and side agreements, the environmental obligations, and environmental cooperation mechanisms are outlined. The CETA uses a side agreement to incorporate a human rights clause, mainly a feature of EU agreements. This is a “standard ‘essential elements clause,’ with essentially the same wording that is found in all of the EU’s trade agreements since the early 1990s” (Bartels 2013, 10).

Another common mechanism of incorporation is through side letters, for example, those related to the recent RTAs concluded by the US with Korea and the TPP countries. The side letters reiterate and expand on the meaning of issues, such as public communication on labour and environment issues, and maintaining environmental laws that are equivalent to the scope of the agreement.

An alternative method of incorporation is through other chapters. This is a feature mainly found in the Canadian agreements where they incorporate and reference GATT Article XX under other chapters, such as those on government procurement (the TPP, US-Peru, US-Panama, US-Korea, and US-Colombia); intellectual property (US-Korea); investment (US-Panama, US-Korea, US-Peru, and US-Colombia); and TBT and financial services (Canada-Peru). This incorporation will be done simultaneously with separate chapters on labour and the environment and separate side agreements like the Environmental Cooperation Agreement.

Overall, from the above incorporation channels employed, the main sustainability provisions range from general preambular references to general exceptions to comprehensive environmental chapters that are accompanied by environmental or labour side agreements, or both. Not many RTAs make use of side letters as demonstrated in one RTA concluded by the US with Korea.

3. Enforceability of Sustainability Provisions in RTAs

3.1. Legal Nature of Sustainability Provisions in RTAs

While past agreements have included labour and environmental protections, these generally have not been enforceable. The language speaks for itself, as sustainability safeguards are couched in terms like endeavour, strive, maintain, or combat, which place only voluntary non-binding commitments on parties. The terminology lacks precision and makes for weaker protections. In the CETA, the parties have an obligation to “ensure that [...] laws and policies provide for and encourage high levels of protection and shall strive to continue to improve such laws and policies and their underlying levels of protection.”⁷ This is a typical example of a best endeavour provision entrenched in the RTAs.

In the TPP, the provisions differ from the CETA, in that the agreement creates binding legal obligations that impose sanctions and penalties for failure to meet sustainable development obligations and commitments. In Article 20.17.5, parties are obligated to take measures, including sanctions, penalties, or other effective measures (World Economic Forum 2016, 20). The TPP joins the league of other US agreements that contain binding sustainable development provisions, such as NAFTA.

Some commitments, particularly enforcement provisions, have more persuasive language. The US-Peru agreement states that a “party shall not fail to effectively enforce its environmental laws, and its laws, regulations, and other measures to fulfil

⁷ CETA, Articles 23.2 and 24.3.

its obligations under the covered agreements,”⁸ while other agreements, like the CETA, place a non-derogation obligation on the parties and state that “a party shall not waive or otherwise derogate from their environmental laws.”⁹ Between the two provisions, the latter is commonly found in most RTAs, while the former is used in US agreements.

3.2. Mandatory Obligations or Best-Endeavour Provisions?

Despite having persuasive language, the crunch comes when the provisions must be enforced. The US agreements (Leal-Arcas 2015), which to date have been described as some of the most comprehensive, contain sustainable development safeguards that create binding environmental and labour legal obligations subject to dispute settlement. Thus, unlike all the other agreements analysed here, any infringement of US agreements would result in substantial remedies and sanctions equal to the other commercial provisions in the agreement.

Even though US Agreements concluded after 2007, and in force, exhibit a comprehensive range of sustainable development provisions that are enforceable, incidents of unenforced sustainability safeguards have been cited. For example, the US-Peru agreement creates binding legal commitments. It imposes criminal and civil liability for illegal logging, but the practice remains rampant in Peru, and the US Trade Representative reportedly refuses to enforce this by using provisions in the Environment Chapter’s Forest Annex (CIEL 2015, 4). Nonetheless, developing countries signing RTAs with the US have been obliged to ratify certain MEAs as a precondition for ratification, which provides a measure of impact.

The TPP creates mandatory obligations enforceable through state-to-state dispute settlement.

Furthermore, it attaches sanctions to the violation of sustainable development provisions. The TPP does suggest the use of “stronger measures like sanctions to combat the illegal trade and taking of fauna and flora, but does not mandate their use; parties agreed instead on a non-binding list of options: such measures [to combat the trade of wild fauna and flora] shall include sanctions, penalties, or other effective measures [...] that can act as a deterrent to such trade” (ICTSD 2016). Some critics have argued that there are no provisions concerning enforcement, and the panel report is merely recommendatory in value, as is the case in commercial arbitration (Leal-Arcas 2015, 261-262). Parties are encouraged to reach a mutually satisfactory solution in the event of a violation.

In the CETA the sustainable provisions do not provide any real enforcement in the event of an established violation. The chapter stipulates that “parties shall engage in ‘discussions’ and ‘endeavour’ to identify an ‘appropriate measure’ or a ‘mutually satisfactory plan.’”¹⁰ It should be noted that the CETA does not provide for sanctions (labour and environmental provisions), because the EU opposed this, while Canada would have been in favour of a sanction mechanism (EP 2017, 10). The same is applicable to the human rights clause in the CETA SPA, which is incorporated in the side agreement but with no real applicability in practice, as it creates best endeavour obligations. These “provisions have been criticised as ‘aspirational and programmatic’ and because the legal obligations are merely procedural, such as consultation and review requirements” (Meyer-Ohlendorf et al. 2016). As mentioned in Section 2, the EU is opposed to the application of sanctions to sustainable development chapters apparently out of concern that this could be used against its own legislation or against sustainability measures that are more restrictive.

⁸ US-Peru Trade Promotion Agreement, Article 18.3.

⁹ CETA, Article 23.4.2.

¹⁰ CETA, Articles 23.10.12 and 24.15.11.

Many of the RTAs examined here include provisions committing the parties not to lower their labour or environmental standards. This is often accompanied by cooperation mechanisms and capacity-building mechanisms. These provisions are often supplemented by agreements to raise and enhance environmental and labour standards using voluntary instruments but without enforcement.

3.3. Other Mechanisms to Resolve Sustainable Development Disputes

Over time, states have to innovate and enhance dispute settlement mechanisms to more sophisticated forms of settling disputes. New forms of dispute settlement, ranging from state-to-state consultations (EU); to the use of expert panels (EU); to Committees or Joint Councils and the threat of penalty fees (US and Canadian agreements) have emerged. As demonstrated by past RTAs, “enforcement provisions do not necessarily lead to enforcement, so the agreements must include effective enforcement mechanisms to ensure environmental protection, for instance” (CIEL 2015, 3).

Nonetheless, many RTAs contain enforcement mechanisms dedicated to guaranteeing the protection of sustainable development provisions, despite the absence of effective remedies or sanctions for violations. As a case in point, the CETA has established a Committee on Trade and Sustainable Development to monitor the implementation of the CETA provisions on labour and environmental protection. The Committee is tasked with overseeing the implementation of the trade and environment chapters of the agreement, through regular meetings, including a session open to the public. However, while past agreements have contained similar enforcement provisions for the environment chapter, no party has ever brought a formal case based on the environmental provisions of any US FTA, despite documented violations, except for the ISDS mechanism (CIEL 2015).

State-to-state dispute settlement is based on bilateral consultations, such as the CETA and US agreements. A committee on environmental or labour issues would be established to monitor the implementation of sustainable development provisions. Parties may request consultations in relation to any matter falling under the sustainable development chapters. In the US, the consultations are a three-stage process: initial consultations, which then lead to establishment of a dispute panel, and lastly implementation. But, no case has been documented thus far based on environmental provisions.

In the EU agreements, consultation of advisory bodies is mandatory for both parties. This tool has been criticised as inadequate, as it has been applied only to non-binding obligations without concrete remedies attached to violations. Most remedies are couched in domestic frameworks. Consultations go hand in hand with the use of panels of experts. In the CETA (see Figure 3), a Panel is provided to adjudicate a matter on the violation of sustainable development provisions. If the consultations are unsuccessful, the matter is then referred to the Panel. The dispute settlement framework as established does not provide for any sanctions and the Panel needs to find a mutually agreed solution, i.e., the Panel is not there to issue a judgement on either of the parties or to determine a violation, but simply to find a shared solution to the problem (EP 2017, 8). Following the report of the Panel, “parties are encouraged to reach a ‘mutually satisfactory resolution’ (TPP) or ‘mutually satisfactory plan’ (CETA).”¹¹ It appears there would be no consequences for the violator in such circumstances; thus, it is not a proper dispute settlement framework, although the recommendations and the report are supposed to be binding (and their implementation monitored) (EP 2017, 8).

¹¹ TPP, Article Art 28.5(6) and CETA, Articles 23.10.12 and 24.15.11.

Another approach establishes institutional mechanisms explicitly aimed at promoting dialogue between civil society groups of the parties via the introduction of civil society forums and the establishment of civil society advisory groups. In the CETA, the Civil Society Forum is composed of representatives of civil society organisations established in member states' territories, which are convened once a year and are to conduct a dialogue on the sustainable development aspects of the agreement. However, there are challenges that have been identified in implementing and setting up the cooperation and joint committees. These include policy as well as resource problems in regional agreements. The composition, and representativeness of the domestic advisory group (DAG) members is often not respected by governments, and provisions in civil society forums can create confusion with parallel structures for stakeholder monitoring mechanisms included in trade chapters. Finally, there is a need for coherence between the management of association agreements and the EU's Directorate General for Trade (Jenkins 2017). In the US approach, a mechanism known as the Citizen Suit provision is incorporated. Its purpose is to provide a framework for members of the public who wish to file submissions. This mechanism originates from NAFTA and has been included in the TPP agreement. Under the NAFTA, the CEC has the authority to hear and determine any alleged violations. However, this process was ineffective, as it resulted only in a factual record. It is important to note that reaching the factual record phase of the submission process has not resulted in meaningful environmental enforcement under RTAs, and the TPP does not even allow for a factual record (CIEL 2015, 7).

The inclusion of ISDS provisions as well as the dispute settlement mechanism in the CETA, and possibly the

ongoing EU-Australia agreement, is not popular, owing to a perceived lack of independence and impartiality of the arbitrators, limited mechanisms to control arbitral tribunals and ensure correctness of their decisions, and increasing costs for the resolution of investment disputes (Schill 2015). Furthermore, ISDS has been criticised for allowing investors to sue governments directly for violations. As a result, some critics have argued that this mechanism poses a threat to legitimate environmental measures and undermines sustainable safeguards that have been implemented. For that reason, ISDS is seen by some as presenting a major threat to environmental protection and other policies necessary to safeguard the public interest (CIEL 2015, 9). Whether Australia will include this feature remains to be seen, as it has just been involved in massive litigation emanating from the ISDS mechanism related to plain packaging of cigarettes (*Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-120).

Finally, Figure 3 provides an illustration of how the dispute settlement mechanism in the CETA operates. It is a two-stage ad hoc process that starts with consultations and ends with the Panel. During consultations, parties may seek the advice of the domestic advisory committees. If parties resolve their dispute, the solution will be published. If parties fail to reach an agreement under the consultation process, the matter is then referred to the Panel, which must issue a report on its findings, which are binding on the parties. Another alternative dispute resolution mechanism entails parties having recourse to good offices, conciliation, and mediation to resolve their disputes on labour and environment issues if the ad hoc procedure in Chapters 23 and 24 fails to deliver a solution (EP 2017, 9).

Figure 2.

EU alternative dispute resolution mechanism

Source: European Parliament Research Service (EP 2017, 9).

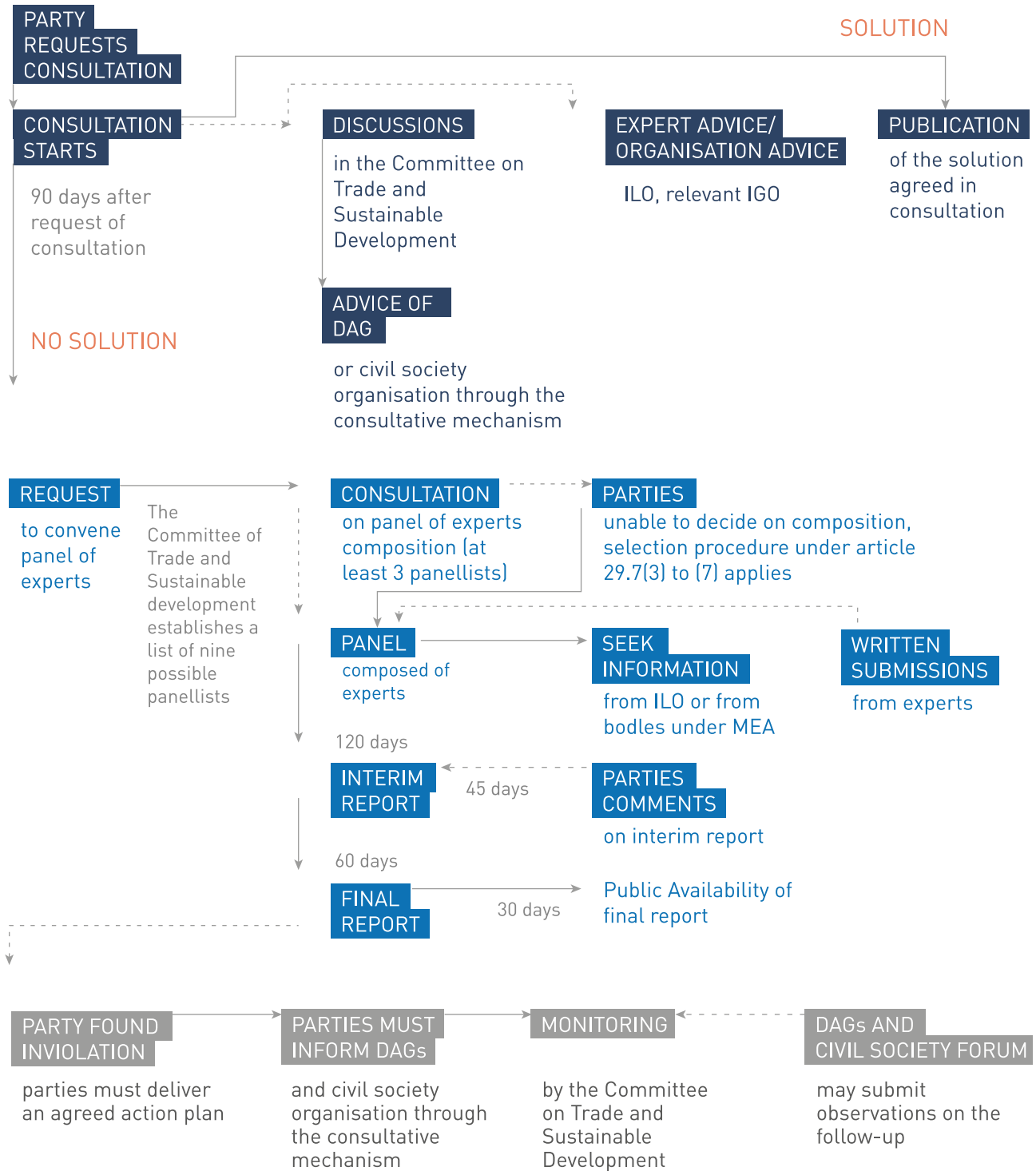
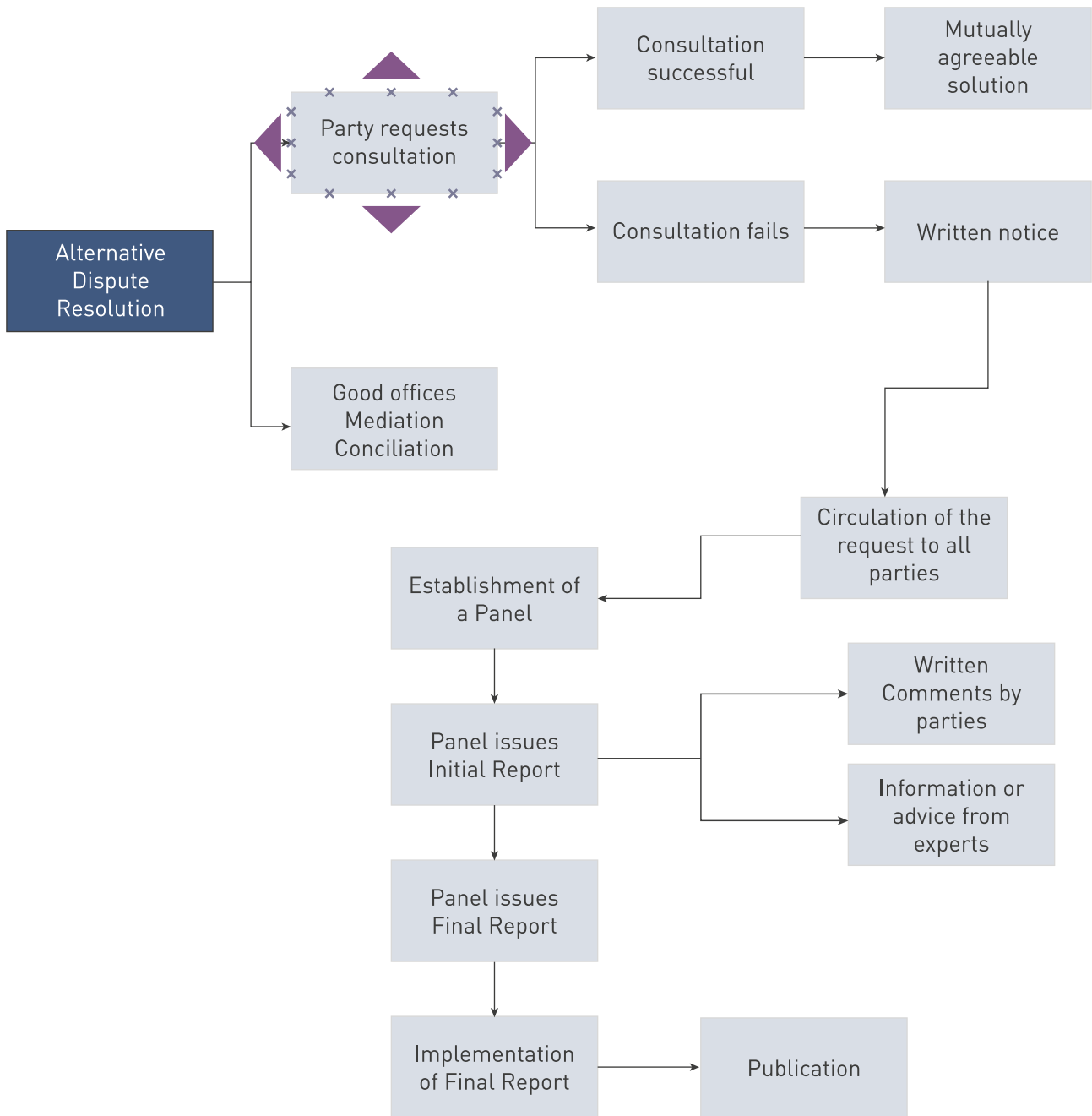


Figure 3.

TPP alternative dispute resolution mechanism

Source: TPP text



4. Multilateralisation of Regional Sustainability Provisions

The quest to ensure trade contributes to sustainable development has led to the incorporation in some RTAs of various sustainability provisions that are deep and go beyond what is available at a multilateral level. Multilateralisation of sustainable development provisions entails extending and applying existing sustainable development provisions to a wider and bigger platform, like the WTO. Using RTAs to “multilateralise” the agreed provisions is seen as a second-best option; nevertheless, it is seen as providing important building blocks for the WTO (Herman 2010). While the debate on whether RTAs are building blocks or stumbling blocks still rages on, there is acknowledgement that both regionalism and multilateralism are present realities and will cohabit in the foreseeable future. Therefore, it is important to consider how to enhance their coherence (Herman 2010, 7). Importantly, coordination between regional and multilateral levels “would reduce transaction costs for business, ease the maze of regimes for policymakers, and maximise the global welfare benefits that accrue to both instruments of globalisation” (Herman 2010). The WTO acknowledges that while RTAs might seem to compete with the WTO “often they can actually support the WTO’s multilateral trading system” and “have allowed countries to negotiate rules and commitments that go beyond what was possible multilaterally. In turn, some of these rules have paved the way for agreement in the WTO” (WTO 2017). In support of this argument, the WTO mentions services and intellectual property, among others, as examples of issues that were first raised in RTA negotiations and later brought into the WTO (WTO 2017).

4.1. The Degree of Convergence in Sustainability Provisions

A clear trend in sustainable development provisions has emerged in the recent RTAs analysed here. In the areas of human rights and social sustainability provisions, the commitments appear to be uniform, but environmental provisions reflect different areas of concern, depending on the parties to the agreement. The similarity is highest among the agreements recently negotiated by the US, EU, and Canada, all of which have included sustainable development provisions as part of their trade policy mandates. All the agreements they have negotiated incorporate chapters dedicated specifically to sustainable development provisions. The US agreements include two separate chapters on trade and the environment, while the EU sometimes includes three chapters — trade and sustainable development, trade and the environment, and trade and labour. Canada has separate provisions on labour and the environment in separate side agreements. With respect to environmental provisions, the different agreements exhibit different interests in areas of protection. The US incorporates protections for biodiversity, endangered species, marine life, and the ozone layer, and the EU incorporates protections for aquaculture and forests. Canada, incorporates a combination of the EU and US protections: biodiversity, endangered species, marine life, ozone layer, aquaculture, and forestry protection. Nonetheless, there appears to be a convergence in other areas, such as fisheries, environmental protection, international standards enforcement (except the US), and incorporation of sustainable development provisions. A trend has emerged on the need to protect the environment and fisheries. With respect to international standards enforcement, many countries opt for a non-binding approach. As such, states are required to adopt the international standards set out in the agreement at the domestic level. States are required “to adopt or modify accordingly [their] environmental laws.”¹²

¹² Chile – USA FTA, Article 19.2.

Moreover, non-waiver clauses are also prominent where parties are required not to derogate from the provisions in the agreement. For example, the Chile-US RTA states that “each party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with the other party.”¹³

Similarly, common commitments on labour issues in the RTAs include the prohibition of child labour and forced labour. These provisions are prominent in many of the RTAs analysed in this paper. In addition, all the RTAs have incorporated and made commitments to respect, implement, and ratify the ILO’s fundamental conventions. Moreover, parties have undertaken obligations to enforce their labour laws and ensure international standards at the domestic level.¹⁴ Besides the wide incorporation of ILO conventions, other international standards have gained prominence and are being incorporated in the most recent agreements.

All the agreements refer to international standards by incorporating MEAs in one form or another, and the threshold to uphold international standards is similar across different agreements. A degree of convergence has emerged in relation to international standards outlined in some of the MEAs that the states have incorporated. For example, both the TTIP and TPP incorporate the same MEAs, such as the ILO convention, the CITES, the Montreal Protocol, and the MARPOL. These MEAs have been particularly incorporated by the US, but it appears that other developed states have adopted them as well.

The other emerging similarity relates to the enforceability of sustainable development provisions.

Every deep-integration agreement analysed in this paper has incorporated some form of enforcement mechanism to promote compliance with the provisions. In the EU, it is either the Joint Council (EU-CARIFORUM) or the Committee on Trade and Sustainable Development (CETA). In the US, the Environmental Affairs Council (US-Peru, US-Korea) or the CEC (NAFTA). In Canada, it is the Committee on the Environment or the CEC. Despite having enforcement mechanisms, the levels of enforcement differ among the agreements. As a result, not all the countries analysed have sanctions for any violations of sustainable development measures. The US and Canada are the only exceptions, as they impose sanctions for labour violations. However, unlike the US, Canada does not impose sanctions for environmental violations.

Thus, in all the deep-integration RTAs analysed in this paper, there is a high level of homogeneity based on the similarities in the provisions, commitments, enforcement mechanisms, and international standards discussed.

4.2. A Critical Mass of Endorsement

It is clear from the analysis presented in Sections 2 and 3 that there is a growing consensus among some developed countries on incorporating sustainable development provisions in RTAs. However, some countries do not consider the inclusion of environmental considerations in trade agreements to be a priority (OECD 2007, 43). For example, while sustainable development and environmental protection are high on Australia’s agenda, it takes the view that environmental cooperation should generally be dealt with independently of trade negotiations (OECD 2007).

Furthermore, many developing countries have shown an unwillingness to be part of RTAs that include environmental, labour, and human rights commitments. Sustainable development measures are WTO-plus measures that developed countries have implemented along with certain developing countries,

¹³ Chile – USA FTA, Article 19.1.

¹⁴ CETA, Article 23.5.1.

such as Mexico. Most developing countries that are WTO members have so far only limited their commitments to those applicable to them because of their membership of this organisation. This position of most developing countries generally reflects their positions in the WTO on the relationships between trade and environment and trade and labour standards. Developing countries generally consider the WTO's competence is on trade matters, and other issues, albeit important, should be left to competent organisations, such as the ILO with respect to labour standards (WTO 2017). Thus, a majority of their agreements contain only preambular references and general exceptions clauses in the GATT fashion. The push for inclusion of sustainability issues, such as environmental standards, labour standards, and human rights in the WTO has come from developed countries. Developing countries have resisted the broadening of the mandate of the WTO in this respect primarily out of concern that clauses on these matters could be used for protectionist purposes as a pretext for denying market access to products from developing countries (De Wet 2002). This position with respect to the WTO seems to be the primary reason developing countries are not keen to be part of deep RTAs with WTO-plus commitments on environmental, human rights, and labour issues. Other considerations behind the lack of enthusiasm to participate in RTAs with deep commitments on sustainable development matters include concerns about limited resources, which could make it difficult for developing states to implement the ensuing obligations.

Overall, therefore, the forerunners of sustainability commitments continue to be the leaders to date pushing for deeper integration through environmental chapters, side agreements, and trade and sustainable development chapters. However, given the stalled momentum in the TTIP, and the US's withdrawal from the TPP, it is not clear whether this momentum will be sustained. The absence of a critical mass of developing countries adopting comprehensive measures leaves a gap that is essential to the multilateralisation of sustainable development provisions. Developing countries are therefore crucial to this initiative.

From the above analysis, there seems to be a growing consensus across the world for incorporating labour and environmental provisions in RTAs, as demonstrated in all the recent RTAs. Recent agreements concluded between the EU and the US, on the one hand, and certain developing countries, on the other hand, indicate that some developing countries, such as Colombia, Korea, Panama, and Peru have incorporated sustainable development chapters in their RTAs and may seek similar provisions in negotiations with other developing countries. Furthermore, positive developments with respect to other multilateral initiatives on sustainable development, such as the unanimous adoption of the Sustainable Development Goals¹⁵ by 193 UN member states in September 2015 and the conclusion of the global climate change agreement¹⁶ in Paris (Paris Agreement) in December 2015 could create a conducive environment for more multilateral cooperation on trade and sustainable development issues.

4.3. Coherence with International Arrangements

In the RTAs analysed in this paper, many regional trade agreements incorporate the list of general exceptions found in Article XX of the GATT in their preamble, body of the agreement, by mere reference, or in the different chapters. By reaffirming their commitments in the preamble, they are ensuring that the provisions will be in line with the WTO.

Most of the RTAs insert a clause under the environment or labour chapters to ensure that there is no conflict between regional commitments, the right to regulate,

¹⁵ Contains 17 Sustainable Development Goals aimed at ending poverty, fighting inequality, and protecting the environment

¹⁶ Aimed at, inter alia, preventing dangerous climate change by keeping global warming below 2 degrees above pre-industrial levels. The ratification of Paris Agreement by the US and China was hailed as a huge step in efforts to curb climate warming emissions

and existing international commitments. The clause balances the parties' right to regulate in the face of international obligations. In RTAs, such clauses typically refer to the different WTO agreements, international environmental agreements, ILO conventions, and, in some RTAs, international human rights cases.

The CETA provision states, "the parties recognise the right of each party [...] to adopt or modify its laws and policies...in a manner consistent with the multilateral environment agreements,"¹⁷ and under the labour provision it states that a party can "adopt or modify its laws and policies accordingly in a manner consistent with its international labour commitments."¹⁸ By inserting these clauses, coherence with existing international standards is guaranteed.

4.4. Non-discrimination and Most Favoured Nation (MFN)

In many of the RTAs analysed in this paper, the standard provision for non-discrimination is based on nationality, which provides that parties are required to give treatment no less favourable than that afforded to other national or foreign investors in like circumstances at the regional level. The MFN standard requires treatment to be extended automatically to every other nation.

In the RTAs analysed, there appear to be no significant preferences in the labour or environmental provisions between the trading partners. Sustainability provisions often do not discriminate de facto between trading partners, and all the RTAs have national treatment clauses. In other words, the parties to an RTA would assume agreed obligations, and the benefits are then extended to all other trading partners on an MFN basis. As such there appear to be no exclusive benefits to members of an RTA containing sustainable

development commitments. This could be another reason most developing countries do not include these issues in their RTAs — obligations apply to the parties but benefits are extended to non-parties, making such RTAs less attractive to resource constrained countries. Most developing countries lack sources of capital, and the cost of capacity building would need to be financed for the parties to take on WTO-plus obligations. In some RTAs, provisions are made for capacity building. For example, the Mexico-Japan FTA contains a specific provision determining cooperation related to capacity building to strengthen Mexico's capacity to implement sustainable development provisions.¹⁹ Therefore, to make the uptake of sustainable development disciplines palatable to other parties beyond the original RTA member states it may be necessary to provide incentives by the developed country demanders as well as multilateral bodies, such as the World Bank, regional development banks, and other institutions. Of course, such incentives could be negative as well as positive. For example, countries could link market access for developing countries under generalized system of preferences (GSP) schemes to their adoption of sustainability standards, as the EU does with its generalised scheme of preferences (GSP)-plus.

However, for those countries that have undertaken WTO-plus sustainable development commitments at an RTA level, making similar commitments at the multilateral level may not pose serious challenges. In essence, such a step would be a codification of the status quo.

¹⁷CETA, Article 24.3.

¹⁸CETA, Article 23.2.

¹⁹Mexico – Japan FTA, Article 147.

4.5. Critical Political Factors or Other Considerations that Might Facilitate or Hinder Multilateralisation

Political will is a crucial factor in determining whether the sustainability provisions currently contained in the deep RTAs could be rolled out at a multilateral level. If there is sufficient political will, multilateralisation that goes well beyond the rough and ready benchmarks that we have tentatively set forward here could be achieved (Lejárraga 2014, 5).

Another critical factor that might facilitate the multilateralisation process is the role of developing countries. Developing countries form part of the WTO; hence, their membership counts toward the critical mass of approval of WTO agreements. However, many developing countries face capacity challenges; thus, taking on commitments for sustainable development may prove overwhelming. To facilitate the multilateralisation process, attaching capacity building to sustainable development provisions could allow many developing states to adopt them.

Further, as discussed in Section 5 below, the enforceability of the provisions is important when considering their potential multilateralisation. The lesser the degree of enforceability, the higher the possibility the provisions in question would not be adopted at the multilateral level. This is an important issue considering many developing countries are of the view that sustainable development issues are best pursued through organisations other than the WTO with special mandates in specific areas and not through primarily trade liberalisation bodies. The value-added for including deep sustainability provisions in RTAs and the WTO is the expectation that this would result in enforcement of such commitments. In this sense, opting for non-binding commitments undermines the rationale for having these issues included in RTAs and the WTO in the first place.

Regional sustainable development provisions are mostly best endeavour in nature and, despite having enforcement mechanisms attached to them, they lack the backing of a strong dispute settlement mechanism. Moreover, one study shows that “RTAs have effective ‘dispute avoidance’ procedures through Committee exchanges” (Lejárraga 2014, 7). However, parties seem to favour excluding sustainability provisions from the dispute settlement mechanism as demonstrated in some of the deep RTAs, such as those of the EU. These sentiments could be shared by developing countries that prefer non-binding approaches that do not compel them to implement sustainable development provisions. This could hinder an effective and worthwhile multilateralisation process, as the best endeavour provisions reveal an incomplete commitment process. Thus, it seems the only channel for these provisions to be incorporated into the WTO and the current atmosphere in Geneva is through hortatory language buttressed with cooperative mechanisms.

However, the negotiation of model or non-binding sustainable development provisions for RTAs at a multilateral level could be workable provided the ensuing commitments are later multilateralised as binding commitments. The main purpose of such non-binding provisions would be to minimise the adoption of different or even conflicting provisions at the RTA level with a view to facilitating eventual multilateralisation. The WTO’s Telecommunications Reference paper²⁰ is a good example in this respect.

²⁰ The Reference Paper is a set of common guidelines for a telecommunications regulatory framework countries could choose to follow to achieve a competitive telecommunications sector. Upon adoption by a country, the principles of the Reference Paper become binding commitments and enforceable under the WTO dispute settlement system.

5. Options for Convergence Between the Multilateral Trade System and RTAs on Sustainability Provisions

With the surge in the number of RTAs being signed across the globe and the slow progress of the Doha Development Agenda, using RTAs as stepping stones to multilateralisation seems to be a natural process. RTAs create the opportunity to harness and adopt sustainable development provisions at the WTO. In reality, the question of whether or how much RTAs can or should be multilateralised is intensely political (Lejárraga 2014, 5). In order to limit the challenges, such as the creation of a maze of regimes that may make it more difficult for countries to agree on multilateral rules in specific policy areas, and maximise the benefits of regionalism, it is important to promote transparency in RTAs, which may make it easier for harmonisation of sustainable development rules among different RTAs and thus increase the odds for the adoption of deep sustainable development provisions at the WTO level. Several approaches could be used to promote eventual multilateralisation of sustainable development provisions in RTAs, including the following.²¹

5.1. Extension of Existing RTAs

This entails enabling non-parties to join existing RTAs and assume sustainable development obligations as part of an overall package of agreed obligations and benefits. This process allows less developed countries with capacity constraints to be included “within

RTAs of major trading countries, [...] [and] need not invest a large amount of resources where individual country benefits are not particularly high” (Herman 2010, 18). Another form of extension of RTAs could happen through parties to the agreement negotiating bilateral FTAs with third parties using the deep RTA template with respect to sustainable development provisions. In this way, though the third parties do not become part of the RTA as such, they do assume similar sustainable development provisions as those assumed by the parties. In this light, some South American countries, such as Chile, have negotiated RTAs with sustainable development obligations after having assumed such obligations as a result of an RTA with the US.

Deep, mandatory measures that can be enforced are more likely to lead to reforms within economies that have implemented the RTA, which subsequently might be more confident to undertake the reforms at the multilateral level (Lejárraga 2014, 13). Thus, enforceability within RTAs highlights the extent and level of commitment by states to substantive obligations that they are prepared to be bound to through regional dispute settlement. Thus, migrating such commitments to the multilateral level should not present serious challenges.

Challenges to multilateral convergence through the extension of existing RTAs largely relate to complications arising from potential accession. The accession clause in most RTAs, by which prospective members can join, should be readily accessible to third parties that want to accede to the particular agreement. The accession mechanism can be a useful tool to enhance convergence between regionalism and multilateralism. In the case of deep RTAs, including sustainable development commitments, allowing more members to join increases the chances that those provisions will find a critical mass of support at the WTO. If the accession process to an RTA is clear, other states may be persuaded to join the negotiations during the negotiation process. A good example of such a scenario was the case within the TPP (where new members had to obtain bilateral agreements from the existing TPP members)

²¹ This Section draws heavily from options set out in Herman, L. 2010. “Multilateralizing Regionalism: The Case of E-Commerce,” OECD Trade Policy Papers, No. 99, OECD Publishing, Paris, with respect to the e-commerce provisions.

(Lejárraga 2014, 36). However, existing RTAs rarely attract new membership after the treaty has been concluded (Lejárraga 2014). The importance of having clear protocols for accession in RTAs may increase if the current trend toward mega-regionals is sustained by the Trump Administration in the US — which is currently an unlikely prospect (Lejárraga 2014).

Despite RTAs incorporating accessions clauses and opening accessions to third parties, shortcomings have been identified when it comes to the actual accession process, including lack of clear and sufficient information concerning the accession procedures as well as the terms and conditions of accession. There is often the presumption that new members wishing to join would negotiate the details, but it has proven difficult to attract new members in practice. Other challenges associated with accession clauses appear in the form of geographical restrictions. Some accession provisions limit the membership of third parties to members emanating from the same region; thus, prospective member states outside the region are precluded from joining the agreement.

The lack of transparency concerning RTAs' negotiation processes has also been highlighted as a stumbling block. Transparency has benefits in that it allows for the free flow of information. Similarly, increasing the transparency of deep measures may sensitise non-parties to their benefits and costs, leading to a review of their own regimes and greater adoption of deep RTAs (Lejárraga 2014, 14).

5.2. Regional Consolidation

This entails creating one mega RTA out of one or two existing regional economic communities, thus providing a single umbrella and a single set of trade provisions, where prior overlap existed (Lejárraga 2014). An example of this approach is the proposed convergence of three RTAs in Africa into the Tripartite Free Trade Area (TFTA), namely the Common Market for Eastern and Southern Africa (COMESA), the East

African Community (EAC), and the Southern African Development Community (SADC). Provided the RTAs in question have deep sustainability provisions (the COMESA, the SADC, and the EAC do not), such an approach could be effective as the eventual agreement would encompass a larger number of countries, which may help create the required critical mass for the provisions to be multilateralised.

However, regional convergence has its own challenges as it requires parties to established RTAs to negotiate policies in order to consolidate them; otherwise, the super RTA — the TFTA, in this case — risks merely adding another layer of regulatory arrangements.

Further, as discussed in Section 4 above, most developing countries do not seem to be persuaded that RTAs or even the WTO are the right platform to deal with deep commitments on sustainable development. Instead, it appears these countries are only prepared to put up with obligations in exchange for market access or some other trade benefit. Those developing countries that have embraced these provisions have done so initially at the behest of a large developed country, like the US, as part of that country's negotiating template. The negotiations among mainly developing countries toward a Regional Comprehensive Economic Partnership (RCEP)²² illustrate this point. It is regarded as rivalling the TPP, and unlike the TPP whose sustainable development agenda reflects the US position, the RCEP is primarily a developing country initiative (though it does include some developed countries) and apparently does not include sustainability provisions as one of the negotiation issues (Zhou 2016). Similarly, the 54-country Continental Free Trade Agreement negotiations taking place across

²² RCEP is a proposed FTA, involving 10 member states of the Association of Southeast Asian Nations, such as Brunei, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, the Philippines, Singapore, Thailand, and Vietnam as well as 6 states with which ASEAN has existing FTAs — Australia, China, India, Japan, New Zealand, and South Korea.

Africa also do not envisage inclusion of sustainability issues. Thus, there is clearly still a gap between developed countries and developing countries in their approach to sustainable development in the context of RTAs, which needs to be gradually bridged for multilateralisation on these issues to be workable.

5.3. Conditions in Preferential Trade Agreements

Setting sustainability provisions as part of a qualification criteria for trade preferences could be another way to foster convergence. An example of a preferential scheme that included certain sustainability provisions (human rights and labour rights) is the US African Growth and Opportunity Act (AGOA). The AGOA was signed into law by President Clinton on 18 May 2000, as Title 1 of The Trade and Development Act of 2000. The AGOA is aimed at expanding US trade and investment with sub-Saharan Africa to stimulate economic growth, promote a high-level dialogue on trade and investment-related issues, encourage economic integration, and facilitate sub-Saharan Africa's integration into the global economy. Tying preferential market access to conditions is important in that developing countries would not be simply assuming obligations, but rather getting benefits that may outweigh certain challenges related to the implementation of sustainable development obligations that come with such market access.

The challenges of this approach relate mainly to concerns that developing countries could be forced to prematurely adopt high standards at the behest of a developed country preference giver that go beyond their implementation capacities and render them less competitive in areas that could be their comparative advantages, such as less rigid labour regulations.

5.4. Plurilateral Agreements

Convergence on key sustainable development provisions through plurilateral agreements is another feasible avenue. To date, the biggest and

most important plurilateral negotiation is the Trade in Services Agreement (TISA), which can be seen as harnessing and building on regional negotiation on services in existing RTAs (Lejárraga, 2014, 12). If successful, this deal will significantly consolidate, deepen, and harmonise the accumulated experiences in RTAs (Lejárraga 2014). A similar initiative with particular relevance for sustainable development is underway through the Environmental Goods Agreement, a plurilateral initiative currently being negotiated by many countries, including Australia, Canada, China, Costa Rica, Chinese Taipei, the EU, Hong Kong (China), Iceland, Israel, Japan, Korea, New Zealand, Norway, Switzerland, Singapore, Turkey, and the US. The agreement's main objective is to liberalise environmental goods and services. The objective is to have a majority of WTO members participate and, once that is accomplished, the agreement would be extended to all WTO members, using the MFN principle.

Another plurilateral avenue is the negotiation of a set of guidelines by a coalition of countries setting out best practice on what type of sustainable development provisions should be included in RTAs. Such guidelines could be used as a reference point in other RTA negotiations and help achieve convergence multilaterally.

The challenge with the plurilateral approach is that most developing countries are generally not keen to be part of initiatives that involve committing to deep provisions on sustainable development issues, preferring to leave them to specialised bodies, such as the ILO on labour matters. Therefore, they are generally unwilling to be part of such coalitions.

Part of the challenge is to ensure that the benefits of including substantive sustainable development provisions in trade agreements are clear enough for developing economies. In the case of the WTO Information Technology Agreement, many developing Asian countries have joined the initiative mainly because there are obvious gains for them, as they are important traders in technology products and

are keen not to be left out of global information technology production networks (Ezell 2012). As such, in the absence of exclusive benefits accruing only to members of such initiatives, it is hard to see how they could voluntarily be part of plurilateral agreements.

5.5. WTO Agreement on Sustainable Development

Building on commitments under various initiatives mentioned above, a WTO agreement on sustainable development could eventually be reached. Many options could be used towards this end.

In the short term, more effort should be devoted to increasing transparency with respect to existing regimes. Increased transparency can be facilitated through specialised seminars, dedicated sessions, targeted technical assistance to developing countries, and information sharing (Herman 2010, 22). Through increased transparency, levels of convergence on sustainable development provisions could be identified so that policy areas where convergence is high may be earmarked for multilateralisation, while attention is also paid to areas with low convergence with a view to securing more policy acceptance over time by resolving any contentious issues gradually.

The WTO could then adopt substantive new provisions on sustainable development, drawing from the provisions elaborated in RTAs, as analysed here. Recent RTAs that have comprehensive chapters on sustainable development could be utilised as building blocks for multilateral disciplines in this area, especially considering the definitions and concepts that have been developed in the context of these RTAs. The WTO could identify which deeper disciplines are more efficiently organised at the global level and which are best set at the regional or national level (Baldwin 2014). This way, RTAs could support multilateralisation of sustainable development disciplines by serving as a laboratory for new ideas and innovation in trade rules and liberalisation initiatives with respect to environmental goods and

services (Herman 2010, 19).

Also, the WTO could adopt what Baldwin calls a multi-tier multilateralisation. The first tier would establish voluntary best practice guidelines for new RTAs — tailored to North-North, North-South, and South-South RTAs, allowing for developmental differences (Baldwin 2014, 40). The second tier would entail parties adopting similar principles contained across the different deep-integration RTAs, such as national treatment and the principle of transparency.

In the long run, a new agreement based on sustainable development provisions along the lines of the Trade Facilitation Agreement (TFA) could be introduced in the WTO. This agreement would consolidate the best practices articulated across different RTAs. Such substantive measures would enjoy unilateral acceptance by a critical mass of states, create binding legal obligations, and would have been adopted/ implemented at the domestic legal level. Such provisions can migrate to a multilateral level.

Since sustainable development provisions generally deal with obligations instead of benefits, a scenario where the WTO establishes a ladder of commitments directly linked to a country's level of development and capacity, with aid-for-trade to support implementation through the ladder, could be workable. Thus, dispute settlement mechanisms would be applicable only to more rigorous commitments, effectively providing a bridge to existing deep RTAs wherein binding dispute settlement mechanisms are absent.

There are a number of potential stumbling blocks to multilateralisation of sustainable development provisions.

In addition to those mentioned in Sections 5.1 to 5.4 above, which could also apply to negotiation of a WTO agreement, the absence of a consensus and the inability to reach a common understanding on the enforceability of sustainable development provisions in existing agreements is a major stumbling block. The use of soft legal measures to

address sustainable development has been criticised as a potential stumbling block. There is speculation that the EU's opposition to the application to the sustainable development chapters of normal state-to-state dispute settlement mechanisms in its RTAs could be explained by the EU's fear that this could be used against its own legislation or against measures that are more restrictive (EP 2017,10). In addition, developing countries are weary of taking on onerous sustainable development obligations that may strain their capacities and finances. With soft law only creating voluntary commitments, these provisions would be unpredictable, as it would be left to the discretion of the parties, or lack the force that a mandatory provision can provide. An approach where regional deep provisions are couched in best-endeavour terms, embed flexibilities, or are explicitly carved out of regional dispute settlement procedures, seems to be informed by concerns about capacity or other constraints that can inhibit their full implementation (Lejárraga 2014, 23).

In comparison to binding obligations, which also are strong legislative tools, best endeavour provisions are weaker obligations. Parties cannot be bound and there are no real consequences if they fail on their commitments. Therefore, to multilateralise such provisions seems to be fruitless as parties cannot be held accountable. This is particularly true for sustainable development provisions where the main goal is to make these obligations binding.

6. Conclusion

Trade and sustainable development have become increasingly inextricably linked. A decade ago, only a few states acknowledged this link. To date, many RTAs have incorporated sustainable development measures either through the preamble, general exceptions, dedicated chapters, incorporation in other chapters, or side agreements. Moreover, the incorporation is no longer limited to acknowledging the relationship, but has expanded to include substantive obligations and the creation of

cooperation mechanisms for the purpose of ensuring the provisions' enforcement. However, sustainable development measures lag behind other commercial provisions found in agreements, as — except for some agreements by Japan and the US — they are not subject to dispute settlement.

On the one hand, the EU has adopted a soft law approach to sustainable development issues through cooperation mechanisms, consultations, and enforcement mechanisms. For the present, it appears the EU will retain this soft approach to sustainable development provisions in future agreements. On the other hand, the US has consistently incorporated strong sustainable development obligations in its RTAs, ranging from NAFTA to the TPP agreement. The standard of protection for both labour and environment is effectively strong through state-to-state dispute settlement.

Other developed states, such as Australia and Japan, have concluded comprehensive chapters on sustainable development in agreements with the EU and the TPP. EFTA countries have also begun to include a chapter on sustainable development in their new agreements and are renegotiating some previous agreements with a view to include sustainable development provisions. At least one developing state, Chile, has also concluded several RTAs with substantive sustainability provisions. At present, it seems highly likely that this trend of incorporating sustainable development provisions among deep-integration RTAs will continue for future agreements. However, there is no consensus to create binding sustainable development provisions that are subject to dispute settlement, with the partial exception of the TPP.

Overall, the incorporation of sustainable development is far from complete, as other countries (developing mostly) still have misgivings about including substantive sustainable development commitments both in RTAs and at the WTO, preferring to have such issues dealt with in specialised multilateral bodies. In addition, challenges related to lack of capacity to implement sustainability obligations, as well as

concerns that sustainability provisions could be used as a pretext to deny market access, need to be tackled for these countries to be able to migrate from shallow measures to comprehensive measures that can be implemented and enforced in the same manner as other commercial provisions. Nonetheless, the trend, at least with respect to environmental and labour provisions, seems to favour incorporation of sustainable development protections, and that lays down the prospects for convergence between regionalism and multilateralisation.

The same cannot be said for the incorporation of human rights provisions in RTAs. The inclusion of human rights provisions in the text or as a separate chapter is currently contentious, and most RTAs shy away from explicit human rights provisions. Human rights provisions are mainly incorporated under other chapters, such as the labour chapter. It appears that a human rights clause is only incorporated at the EU's insistence, such as in the CETA. In the earlier agreements, reciprocal obligations of the parties were premised on the human rights clause. Thus, the violation of human rights of a certain scale was a strong point that could amount to a material breach of the treaty and justify suspension or other counter measures (Hachez 2015).

With the high level of similarities in the RTAs, there are options WTO member states could employ for convergence to be feasible and successful. The WTO could gradually adopt new substantive provisions or negotiate a new agreement like the TFA and have it ratified progressively. Such a process would build upon prior work on sustainable development in deep RTAs. The WTO work programme on trade and sustainable development should promote the extension of deep RTAs containing sustainable provisions; regional consolidation of such RTAs where feasible; and the inclusion of sustainable development provisions as conditioned in preferential trade areas (PTAs) as well as the consolidation of best practice provisions in plurilateral agreements. WTO members could facilitate that process by facilitating adoption of clear accession mechanisms in RTAs and encouraging conversion of best endeavour provisions

to mandatory provisions. However, as noted in the above discussions, there are substantial challenges that, though not insurmountable, will need to be overcome for the multilateralisation process to be a success.

Multilateralisation of sustainable development is critical, as it would ensure a uniform application of the provisions, which is crucial to the achievement of the Sustainable Development Goals set out by the United Nations (UN). Enforcing the provisions would be simplified as one enforcement mechanism would be in place to ensure compliance. The inevitable link between trade and sustainable development calls for multilateralisation for trade and investment to be sustainable.

Annex 1

Examples of Sustainability Provisions in RTAs

PREAMBULAR REFERENCES:

Many RTAs contain environmental provisions in the form of the GATT Article XX language in the preamble with a view to protecting the environment. For example, in the CETA, the parties reaffirm “their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions.” In the EFTA-Georgia RTA, the parties reaffirm “their commitment to pursue the objective of sustainable development and recognising the importance of coherence and mutual supportiveness of trade, environment and labour policies in this respect”.

INTERNATIONAL STANDARDS:

Many RTAs contain environmental provisions in the form of the GATT Article XX language in the preamble with a view to protecting the environment. For example, in the CETA, the parties reaffirm “their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions.” In the EFTA-Georgia RTA, the parties reaffirm “their commitment to pursue the objective of sustainable development and recognising the importance of coherence and mutual supportiveness of trade, environment and labour policies in this respect”.

ENVIRONMENTAL AND LABOUR COOPERATION:

NAFTA set up the NAAEC and the NAALC, the side agreements for cooperative and labour efforts. In the TPP, “parties acknowledge the importance of cooperation and capacity-building activities and shall undertake and strengthen these activities to assist in implementing this Agreement.”

DISPUTE SETTLEMENT:

the TPP provides for a dispute settlement mechanism: “A party that requested consultations under Article 28.5.1 (Consultations) may request, by means of a written notice addressed to the responding party, the establishment of a panel if the consulting parties fail to resolve the matter within.”

PROCEDURAL GUARANTEES:

In the US-Australia RTA “Each Party shall ensure that judicial, quasi-judicial, or administrative proceedings for the enforcement of its environmental laws are fair, equitable, transparent, and provide for appropriate administrative and procedural protections in accordance with its law.”

ENVIRONMENTAL AND LABOUR CHAPTERS:

Issues covered range from fisheries; ozone layer; biodiversity (the TPP); scientific and information; forestry, aquaculture (the CETA); timber (US-Peru); and genetic resources (EFTA-Colombia).

ENFORCEMENT MECHANISMS:

Most of the RTAs studied contain institutional arrangements for implementing the provisions in the agreement (the CEC of NAFTA). The TPP has an enforcement mechanism in the form of sanctions, which states that “each party shall take measures to combat, and cooperate to prevent, the trade of wild fauna and flora [...] Such measures shall include sanctions, penalties, or other effective measures, including administrative measures, that can act as a deterrent to such trade.”

GENERAL EXCEPTIONS:

The Korea-US RTA states: “Article XX of GATT 1994 and its interpretive notes are incorporated into and made part of this Agreement”.

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Jointly implemented by the International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB), the RTA Exchange works in the interest of the sharing of ideas, experiences to date and best practices to harvest innovation from RTAs and leverage lessons learned towards progress at the multilateral level. Conceived in the context of the E15 Initiative, the RTA Exchange creates a space where stakeholders can access the collective international knowledge on RTAs and engage in dialogue on RTA-related policy issues.

