

Trade and Sustainable Development: A Complex Relationship

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Outline

- Multilateral trade regime and sustainable development: traditional approach ('do no harm')
- Regional trade agreements (RTAs) and sustainable development: novel approach (imposing positive SD obligations)
- Recent evolution strengthening sustainable development obligations in RTAs?

Multilateral trade regime: GATT/WTO

- Why trade liberalisation? International trade increases economic growth/ wealth
 - Greater efficiency through specialization (comparative advantage theory)
- International obligations to eliminate/reduce trade barriers (such as tariffs, quotas, discriminatory & unnecessary regulations, export subsidies, etc)
- Exceptions provides for flexibility > for countries to adopt measures contrary to liberalisation commitments in order to pursue limited list of legitimate policy objectives, such as public morals, public health (ie., Art XX GATT)
 - but no reference to ‘sustainable development’ (or ‘environmental protection’ or ‘labour protection’)

Sustainable development

- What is 'sustainable development'? > Three interrelated key components:
 - *inter-generational equity* (to preserve natural resources for the benefit of future generations)
 - *intra-generational equity* (to ensure that all people within the current generation are able to meet their basic needs)
 - *integrative decision-making* (to integrate economic growth, environmental protection and social development at all levels of decision-making)
- Popularity of the concept: broad understanding of equity spanning over time and space as well as the realization of the complexity and interconnectedness of our economic, environmental and social challenges

World Trade Organization (WTO) 1995



Goals and objectives of the WTO

- Express reference to *sustainable development* within a 'traditional approach'
 - *Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development [...]
 - Preamble to *Marrakesh Agreement Establishing the WTO*

Integrating SD into the trade regime

- Even simply allowing WTO Members to adopt measures to pursue sustainable development goals (such as greater environmental protection) was controversial
 - On one hand, developed countries claimed that, say environmental measures were aimed at legitimate public policy objectives and international trade law should permit such measures even if they had an adverse impact on international trade
 - On the other hand, developing world argued that such measures were simply hidden protectionism and particularly detrimental to the developing world as it would reduce their comparative advantage (ie., the ability to produce/export cheaper products to the developed world)
- Particularly problematic the case of so called ‘non-product related (NPR) process and production methods’ (PPMs) regulation (trade restrictive + extraterritorial impact)

Examples of NPR PPMs



United States set out certain parameters for when **tuna products** could be labelled as 'dolphin-safe' (which differed from a similar label recognized in Mexico) in order to protect dolphins



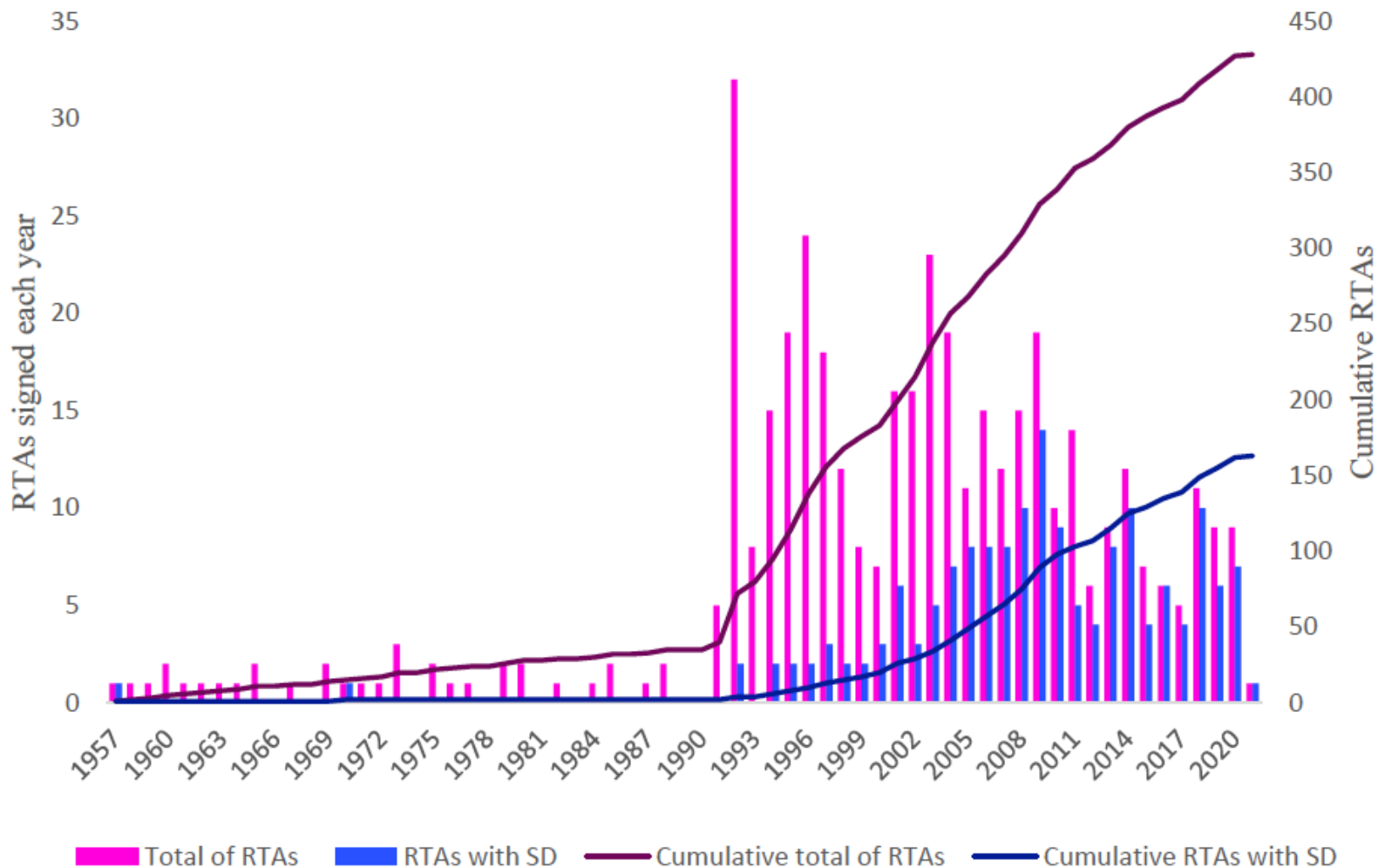
European Union prohibited the placing of **seal products** in the EU market, in order to protect seals (and uphold European morals) unless, inter alia, they result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence (ie., 'indigenous hunting', IC)

- No treaty changes in the WTO
- Balancing exercise (obligation v exception) left in the hand of the dispute settlement organs (particular the AB) > see cases regarding national treatment, general exceptions, technical barriers to trade

Regional Trade Agreements (RTAs)

- Sustainable development in RTAs really began in the 1990s and accelerated after 2000, to the extent that two-thirds of RTAs signed after 2005 include at least one reference to sustainable development

Figure 2: RTAs mentioning "sustainable development" at least once



Regional Trade Agreements (RTAs)

- Two main strategies:
 - Traditional strategy: elaboration of general exceptions > allowing countries to violate trade measures in order to pursue environmental and social objectives)
 - however leaving each country discretion to do so or not and to do so to their preferred extent
 - Innovative strategy: imposing positive obligations on countries directly aimed at environmental & labour protection; due in part from
 - ability of certain countries to include these obligations as a condition for concluding such bilateral/plurilateral agreements, which may not have been possible in a multilateral setting
 - growing perception of the importance of other values, which are worth pursuing

'Non-regression' obligations in RTAs regarding labour and environmental policies

- "not lowering the level of protection"
 - to prevent possible future weakening of 'general' policy (including through changes or amendments to the underlying labour or environmental laws) ('general non-regression')
- "not derogating from its standards"
 - to prevent possible future non-application of legislation in 'specific' cases (including the case of waivers, derogations and non-enforcement of existing labour or environmental laws) ('specific non-regression')

‘Non-regression’ obligations in RTAs regarding labour and environmental policies

- **1992 North America Free Trade Agreement (NAFTA), Article 1114.2:**
 - “The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor.”
- **2010 EU-Korea FTA, Article 13.7.2:**
 - “A Party shall not weaken or reduce the environmental or labour protections afforded in its laws to encourage trade or investment, by waiving or otherwise derogating from, or offering to waive or otherwise derogate from, its laws, regulations or standards, in a manner affecting trade or investment between the Parties.”

‘High level of protection’ obligations in RTAs regarding labour and environmental policies

- Non-regression provisions are accompanied by additional provisions aimed at encouraging or requiring contracting parties to
 - (i) achieve “high levels of” environmental or labour protection and/or
 - (ii) ensure that their domestic laws are consistent with internationally recognised standards/rights (ie, ILO Conventions and Multilateral Environmental Agreements)

'High level of protection' obligations in RTAs regarding labour (and environmental) policies

- **Labor Cooperation Agreement, signed in conjunction with NAFTA:**
 - “Article 2: Levels of Protection
 - Affirming full respect for each Party's constitution, and recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall ensure that its labor laws and regulations provide for high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards in that light.”
- **2016 EU-Canada CETA, Article 23.3:**
 - 1. Each Party shall ensure that its labour law and practices embody and provide protection for the fundamental principles and rights at work which are listed below. The Parties affirm their commitment to respect, promote and realise those principles and rights in accordance with the obligations of the members of the International Labour Organization (the "ILO") and the commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up of 1998 adopted by the International Labour Conference at its 86th Session [...].”

Limitations of positive SD obligations in RTAs

- Early obligations were drafted in **soft or best endeavour language** > recent ‘hardening’ of these obligations
- **Not subject to general dispute settlement system** (see for example recent EU FTAs with Korea, Canada, Japan) but see recent US FTAs
- Many of these SD obligations (ie., non-regression provisions) are **conditioned on/limited to** the fact that the regression is
 - aimed at ‘encouraging’ trade or foreign investment or
 - has an ‘effect on’ trade or foreign investment
- See 2017 *United States v Guatemala* dispute (based on United States-Central America and DC FTA) > the panel rejected the complaint as the US failed to establish that the non-enforcement of domestic labour laws had an effect on international trade
- See 2021 *EU v Korea* dispute (based on EU-Korea FTA) > panel of experts found violation but respondent is free to ignore the decision as no sanctions are envisioned

Recent evolution strengthening SD obligations

1. Expanding scope and depth of SD positive obligations, ie., 2020 EU-UK TCA (Artt 401-406)

- Trade and climate change
- Trade and biological diversity
- Trade and forests
- Trade and sustainable management of marine biological resources and aquaculture
- Trade and investment favouring sustainable development
- Trade and responsible supply chain management

Recent evolution strengthening SD obligations

2. Making the general arbitration procedure applicable to SD obligations/disputes (ie., labour-related), ie., 2022 UK-Australia FTA

- First of all, while the UK-Australia FTA still provides for a labour-specific consultation procedure (Article 21.16), it makes the general arbitration procedure (in Chapter 31) applicable also in the case the contracting parties fail to resolve, through consultation, their labour-related matter (Article 21.16.11). In other words, in the UK-Australia FTA there is no special procedure revolving around the Panel of experts as one finds in the EU FTAs
 - > final report of the panel established to hear a complaint based on any of the obligations in the labour chapter of the UK-Australia FTA “shall be binding on the Parties” (Article 30.12.5)
 - > sanctions (in the form of temporary remedies, including the suspension of concessions or other obligations) are available with regard to disputes concerning all labour-related obligations

Recent evolution strengthening SD obligations

3. 2019 USMCA Rapid Response Labour Mechanism (RRLM)

- Innovative and ‘expedited’ mechanism for the enforcement of workers’ free association and collective bargaining rights at specific facilities
 - The rapid response labour mechanism (RRLM) envisages, first, for a country to submit a ‘request for review’ to the other country to determine whether there is a denial of rights and attempt to remediate any issues it finds. In certain situations, the mechanism also provides for panelists to assess complaints about conditions at specific facilities, and, in cases of non-compliance with key labour obligations, provides for the suspension of USMCA tariff benefits or the imposition of other penalties, such as denial of entry of goods from businesses that are repeat offenders. The time frame for the various steps is accelerated, for example, the initial consultation following the request for review is 10 days (Article 31-A.4.10) and the Panel shall make a determination within 30 days (Article 31-A.8.1)
 - According to US implementation, such mechanism can be activated by petitions from ‘any person of a Party’ (several instances where such mechanism has been used)

Recent evolution strengthening SD obligations

4. European Commission's new approach to Trade and Sustainable Development (TSD) chapters in FTA (June 2022)

- Leveraging FTAs for sustainability, including support and incentivise reform processes and capacity building in trade partner countries through technical and financial assistance, when needed
- Empowering broader civil society, including Ensure an inclusive consultation process with civil society through all stages of the lifecycle of FTAs
- Strengthening enforceability of environmental and social commitments, including by:
 - (a) extending the general dispute settlement to the TSD Chapter
 - (b) extending the possibility to apply trade sanctions in cases of failure to comply with obligations that materially defeat the object and purpose of the Paris Agreement or in serious instances of non-compliance with the ILO fundamental principles

Recent evolution strengthening SD obligations?

5. 2020 Regional Comprehensive Economic Partnership (RCEP) Agreement (including China, Japan, Korean and ASEAN countries)

Preamble of the RCEP Agreement recognizes that “the three pillars of sustainable development are interdependent and mutually reinforcing, and that economic partnership can play an important role in promoting sustainable development”

BUT, the core of the agreement is essentially **silent** on the subject (with the exception of chapter 18, which envisages future creation of a Committee on Sustainable Growth suggesting that sustainable development is a matter for the future)



Conclusions

- At the multilateral level, still traditional, ‘do no harm’ approach
- At the bilateral/regional level, new approach, imposing positive SD obligations is strengthening (wider, more binding and enforceable obligations)
- But still no widespread agreement
 - to use ‘trade’ agreements to impose SD obligations &
 - to de-link SD obligations to the aim of providing a ‘level playing field’ among various partners countries (ie., the ‘trade effects’ requirements)
- Overall, ‘direction of travel’ is clear (greater role of SD in trade agreements), albeit pace appears very slow