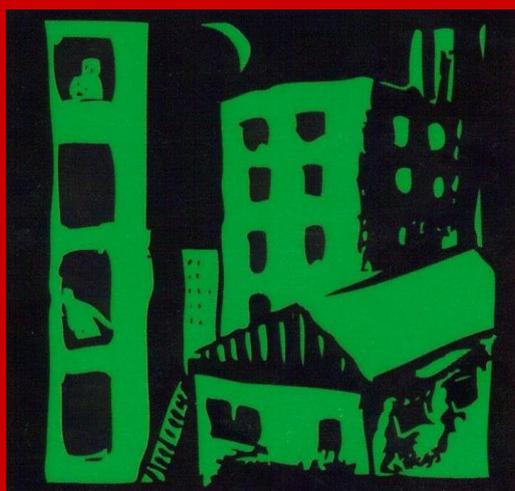


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Sustainable development and international economic law in Africa

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ABSTRACT

Sustainable development has been advocated by the developed world as a means to ensure that the most widely beneficial type of development occurs. This has resulted in a body of rules, which though well intended, does not adequately address the developmental needs of developing countries. It has become a source of tension between developing and developed countries. Developing countries fear that it can be used to frustrate their prospects of development. Hence the adoption of sustainable development provisions by African countries has largely been controversial. This article explores the concept of sustainable development and its level of acceptance in international economic law instruments involving African countries. This article argues that

African countries should adopt a more intentional position with regards to sustainable development to ensure that each agreement creates an opportunity for economic transformation and sustainability.

Key words: Sustainable development, international economic law, African agreements.

1 INTRODUCTION

Sustainable development has gained a level of acceptance in international economic law, which is evidenced by its inclusion in the Marrakesh Agreement establishing the World Trade Organisation (WTO) and other agreements.¹ Sustainable development seeks to reform international economic law through the provision of guidelines for the processes and priorities of development.² Its purpose is to ensure that States are more resilient and better able to maintain the development achieved.³ Whilst it is generally regarded as the most suitable concept to facilitate development, its inclusion in international economic law agreements has been controversial.⁴ This is due to the fact that sustainable development treaty provisions have the potential to limit the policy space of countries.⁵ This restriction of policy space has been lauded as beneficial for developing countries since it will ensure that the most optimal type of development is pursued.⁶ However, there is no agreement on the benefits of such restrictions, as

¹ See the preamble to the Marrakesh Agreement establishing the WTO available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201867/volume-1867-I-31874-English.pdf> (accessed 27 January 2019). Since 2012, over 150 countries have undertaken at least one action in the pursuit of sustainable development oriented international investment agreements. See further UNCTAD “Recent developments in the international investment regime” (2018) available at https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d1_en.pdf (accessed 27 January 2019).

² Garcia FJ “Trade and inequality: economic justice and the developing world” (2000) 21 *Mich J Int'l L* 975.

³ Schrijver NJ & Weiss F “Forward” in Schrijver NJ & Weiss F (eds) *International law and sustainable development: principles and practice* (Leiden: Martinus Nijhoff (2004) at xii.

⁴ Sampson GP “The WTO and sustainable development: a reply to Robertson” (2008) *World Trade Review* 467 available at <https://doi:10.1017/S1474745607003539> (accessed 27 January 2019).

⁵ The ability of international agreements to impinge on the policy options available for State action is known as the reduction of policy space. It restricts the options available for the State to pursue national development policies, without interfering with their international obligations. Policy space refers to the fact that nations need space for development to occur. Policy space is defined by the United Nations Conference on Trade and Development (UNCTAD) as “the scope for domestic policies, especially in the areas of trade, investment and industrial development” which might be “framed by international disciplines, commitments and global market considerations”. See Mayer J “Policy space: what, for what, and where?” (2009) 27(4) *Development Policy Review* 373.

⁶ Harrison A Vitalis V & Upton S “Sustaining whose development? Analysing the international effect of national policies on sustainable development” (2003) OECD background paper available at <http://www.oecd.org/sd-roundtable/papersandpublications/39360733.pdf> (accessed 27 January 2019).

developing countries believe that it hampers their freedom to pursue the most effective economic development options.⁷

The concerns about sustainable development restricting development options are not new, and can be traced to the inception of the concept.⁸ Since sustainable development arose out of concerns about the effects of unrestrained economic development on the environment, predictably it restricts the development options available to States.⁹ More recently, sustainable development has embraced the more contentious aspects in international economic law, such as, labour and human rights issues. These have all contributed to concerns that sustainable development is a mechanism to preserve the *status quo* between developed and developing countries.¹⁰ This article explores sustainable development provisions in international economic law agreements involving African countries. The article is divided into five parts. First, there is a discussion of the concept of sustainable development, followed by part two which discusses the legal nature of sustainable development provisions. Part three describes the approaches to the concept of sustainable development, part four analyses specific instruments in international economic, and part five provides the recommendation and conclusion.

2 CONCEPTUAL FRAMEWORK

While there is no universally accepted definition of sustainable development, the most widely quoted definition thereof appears in the Brundtland Report, namely: “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”¹¹

Drawing upon this definition, sustainable development has been interpreted as development which fulfils three criteria : economic, social and environmental.¹² The use

⁷ Lee Y-S “General theory of law and development” (2017) 50 *Cornell International Law Journal* 416.

⁸ Its inception can be traced to 1972, when the Club of Rome published a report “The limits to growth”. This was the first report which recognised the relationship between the environment and socio-economic development. See Meadows DH et al *The limits to growth: a report to The Club of Rome’s project on the predicament of mankind* (1972) available at <http://www.donellameadows.org/wp-content/userfiles/Limits-to-Growth-digital-scan-version.pdf> (accessed 20 January 2019).

⁹ Fuentes X “International law-making in the field of sustainable development: the unequal competition between development and the environment” (2002)2 *International Environmental Agreements: Politics, Law and Economics* 109 available at <https://doi.org/10.1023/A:1020990026398> (accessed 20 January 2019).

¹⁰ Agbor-Baiyee BA “Can Africa compete in a global economy” in House-Soremekun B & Folola T (eds) *Globalisation and Sustainable Development in Africa* Rochester: University of Rochester Press (2011) 43.

¹¹ Brundtland GH *Our common future* (20 March 1987) United Nations Report available at <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> (accessed 30 January 2019).

¹² United Nations Sustainable Development “United Nations Conference on Environment and Development 3-14 June 1992 Rio de Janeiro, Brazil Agenda 21” available at <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (accessed 18 August 2019).

of these three pillars is the most widely accepted definition of sustainable development.¹³ Having three separate elements, makes the concept nebulous and multi-faceted. It is capable of different permutations, depending on the emphasis placed on each element.¹⁴ The pillars of sustainable development are also quantitatively different, overlap and conflict.¹⁵ Therefore, crafting the most suitable definition of sustainable development requires compromises and trade-offs.¹⁶ This process is guided by its principles which are used to guide the process of structuring the most suitable definition.¹⁷ The core principles are interrelationship, integration, equity, sustainable use, and eradication of poverty.¹⁸ Whilst this flexibility allows for the most suitable definition to be crafted for the parties, it also makes the concept susceptible to abuse for unscrupulous reasons which may undermine the concept of sustainable development.¹⁹

2019); Harris JM "Overview essay" in Harris JM et al (eds) *Survey of sustainable development, social and economic dimensions, frontier issues in economic thought* Washington: Island Press (2001) 3.

¹³ These principles are an elaboration of the concept. The International Law Association, at a conference in New Delhi in 2002, adopted the Declaration on the Principles of International Law Relating to Sustainable Development. The Declaration identified seven legal principles relating to sustainable development: The duty of States to ensure the sustainable use of natural resources; The principle of equity and eradication of poverty; The principle of common but differentiated responsibilities; The principle of the precautionary approach to human health, natural resources and ecosystems; The principle of public participation and access to information and justice; The principle of good governance; and The principle of interrelationship, in particular in relation to human rights and social, economic and environmental objectives. See Schrijver & Weiss (2004) at xii.

¹⁴ Wilkins H "Integrating the pillars of sustainable development: a work in progress" (2008) 4 *McGill J Sustainable Dev L* 163.

¹⁵ Peck A "Sustainable development and the reconciliation of opposites" (2012) 57 *St Louis U LJ* 151.

¹⁶ See Wilkins (2008) at 163.

¹⁷ The core principles are interrelationship, integration, equity, sustainable use, and eradication of poverty. See Schrijver & Weiss (2004) xii.

¹⁸ These are supplemented by principles of development law, such as, the common but differentiated obligations of countries, the recognition of the special needs and interests of countries, and the common heritage of humans. Finally, there are periphery principles of intergenerational equity, limited sovereignty over natural resources, public participation, and good governance. Common but differentiated responsibility is part of international economic law recognising the special status of developing countries. Common responsibility stems from a recognition of the fact that the earth is our common home and all parties need to contribute to its preservation. Differentiated responsibility recognises that whilst we all need to contribute, we do not have the same capacity to contribute; Matsui Y "The principle of 'common but differentiated responsibilities'" in Schrijver NJ & Weiss F (eds) *International law and sustainable development principles and practice: developments in international law* (2004) 73; See also Emas R "The concept of sustainable development: definition and defining principles" Brief for GGDR 2015 available at https://sustainabledevelopment.un.org/content/documents/5839GSDR%202015_SD_concept_definition_rev.pdf (accessed 06 June 2019).

¹⁹ See Agbor-Baiyee (2011) at 45.

2.1 Sustainable development provisions in international economic law

It is generally accepted that sustainable development and international economic law are compatible.²⁰ There is already some convergence between sustainable development goals and those of conventional international economic law.²¹ However, there are concerns that the inclusion of more specific and obligatory sustainable development provisions may interfere with the core mandate of international economic law, which is liberalisation.²² Such sustainable development provisions may lead to the introduction of protectionist measures.²³ This is particularly concerning for developing countries, because their economic growth is dependent on access to wealthier markets.²⁴ Developed country markets are already relatively inaccessible for developing

²⁰ The Doha Round is concerned with the facilitation of development. It is known as the Doha Development Agenda. See World Trade Organisation “The Doha Round” available at https://www.wto.org/english/tratop_e/dda_e/dda_e.htm (accessed 13 April 2019). The WTO within the Doha Agreement recognises that sustainable development and trade are compatible. It even calls for cooperation with other international bodies, such as the United Nations; Lee Y-S “World Trade Organisation and developing countries” in Lee Y-S et al (eds.) *Law and development perspective on international trade law* (2011) 105.

²¹ This convergence is evident in the work of the Committee on Trade and Environment (CTE) and the Committee on Trade and Development (CTD). The WTO established the CTE and was charged with identifying the relationship between trade measures and sustainable development. The CTD was established under the general council, with a mandate to handle trade and development. Its mandate is to address related issues, such as, implementation of preferential provisions for developing countries, guidelines for technical cooperation, increased participation of developing countries in the trading system, Least Developed Country issues, and notification of a generalised system of preferences programs and preferential trade arrangements among developing countries. WTO “World Trade Organisation development: committees and working groups” available at https://www.wto.org/english/tratop_e/devel_e/d3ctte_e.htm (accessed 13 April 2019). WTO “Implementation of special and differential treatment provisions in WTO agreements and decisions” available at https://www.wto.org/english/tratop_e/devel_e/w77_e.doc (accessed 30 January 2019).

²² Van den Bossche P *The law and policy of the World Trade Organisation: text, cases and materials* 2nd ed Cambridge: Cambridge University Press (2008) at 17.

²³ These are disputes which relate to the sustainable environmental policies of members which are lodged at the WTO. In these instances the environmental policies of a developed country come into conflict with the economic development needs of a country and at times the sustainable development policy of a developing country is under scrutiny ; see Broude T “Development disputes in international trade” in Lee Y-S et al (eds) *Law and development perspective on international trade law* (2011) 61; Ogutu M “New horizons for international investment and sustainable development” (2002) 3 *Journal of World Investment* 455.

²⁴ WTO “Understanding the WTO: basic principles of the trading system” available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (accessed 04-09-2019); WTO “Regional trade agreements” available at https://www.wto.org/english/tratop_e/region_e/region_e.htm (accessed 04 September 2019).

countries.²⁵ It is feared that sustainable development provisions may add another layer of restrictions by permitting largely arbitrary discrimination between physically similar products on the basis of economically, environmentally and socially unsound production methods.²⁶ Unfortunately, such limitations are already starting to emerge, as there have been cases which have led to restrictions on market access on the basis of sustainable development.²⁷

Sustainable development appears in many international economic law agreements, such as, the more recent regional trade agreements and the new generation bilateral investment agreements (BITs).²⁸ In these agreements, the scope and breadth of sustainable development provisions have increased over time. The most common type of sustainable development provisions are declaratory, non-binding provisions which refer to sustainable development generally. These tend to appear in the preambles and the objectives clauses of agreements. These provisions are either confirmations or statements by the parties that they shall promote or take measures for sustainable development under their domestic law or international rules. Often, there is reference to international agreements which justify the importance of sustainable development.²⁹ While preambles and declaratory provisions have interpretive value, they do not, however, confer any rights and obligations on the contracting parties.³⁰ The binding sustainable development provisions appear in two forms. They can either be obligatory or exemptive provisions. Obligatory provisions require contracting parties to take affirmative measures or to refrain from committing certain conduct contrary to sustainable development. Exemptive provisions preserve the regulatory rights of the

²⁵ The types of goods which developing countries export are regulated through the WTO by agreements, such as, the Technical Barriers to Trade and The Sanitary and Phytosanitary (SPS) Agreements. The former permits discrimination between physically similar goods and the latter allows WTO members to set their own food safety standards. These measures are relatively arbitrary and have been used to disadvantage agricultural produce from developing countries, by allowing for the application of standards which are higher than those accepted. See also Adibe ENA “World Trade Organisation (WTO): trade rules/agreements and developing countries” (2013) 4 *UJ Int'l L & Juris* at 121-135.

²⁶ WTO “WT/DS 58 United States - Import prohibition of certain shrimp and shrimp products” available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (accessed 22-07-2019).

²⁷ WTO “WT/DS 332 Brazil - Measures affecting imports of retreaded tyres” available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm (accessed 22 July 2019) ; WTO “WT/DS2 United States - Standards for reformulated and conventional gasoline” available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm (accessed 22 July 2019).

²⁸ Baker P *Handbook on negotiating sustainable development provisions in preferential trade agreements, ESCAP and ARTNeT* (2018) available at <https://artnet.unescap.org/publications/books-reports/handbook-negotiating-sustainable-development-provisions-preferential> (accessed 22 July 2019).

²⁹ See generally Aseeva A “(Un)sustainable development(s) in international economic law : a quest for sustainability” (2018) *Environmental Law for Sustainability* available at <https://www.mdpi.com/2071-1050/10/11/4022/htm> (accessed 13 April 2019).

³⁰ Fitzmaurice G “The law and practice in the International Court of Justice 1951-1954” (1957) 33 *British Year Book of International Law* 229.

parties to take measures for sustainable development which are inconsistent with their treaty obligations.

The scope of sustainable development provisions also varies in the agreements. The most common type are provisions which refer to sustainable development generally. In such provisions sustainable development is not disaggregated to address specific pillars of the concept. When sustainable development provisions are disaggregated and specified, the most common provisions are those which are consistent with the generally accepted three pillars of sustainable development.³¹ These are the environmental provisions and social provisions. Sustainable development provisions have four variations. The first type are declaratory provisions which make reference to the concept generally, whilst not creating specific measures for its protection. Such provisions sometimes make reference to international standards without incorporating these into the agreement. The second type are non-derogation provisions which create obligations on States not to lower their domestic protection provisions. The third type of provision obliges States to take necessary measures to protect that aspect of sustainable development under national and international law. The fourth type allows contracting States to be exempted from State responsibility for taking sustainable development measures which are inconsistent with their obligations under international investment agreements.

Obligatory sustainable development provisions may interfere in three ways with the ability of developing States to guide development.³² First, they limit the options available to the State to provide regulatory intervention. This is particularly disturbing because developing countries are only able to provide legislative and regulatory assistance, since they cannot afford to provide subsidies or other financial incentives.³³ Secondly, these requirements may erode the limited competitive advantage of developing countries, such as, lower labour and environmental standards. Thirdly, the cost of compliance requires that developing States relinquish existing revenue streams, yet bridge funding to allow for the transition to sustainable development is not provided.³⁴

2.2 Environmental sustainable development provisions

³¹ Chi M “Sustainable development provisions in investment treaties: an empirical exploration of the sustainable development provisions in BITs of Asia-Pacific LDCs and LLDCs” (2018) UNESCAP available at <https://www.unescap.org/sites/default/files/Sustainable%20Development%20Provisions%20in%20Investment%20Treaties.pdf> (accessed 22 July 2019).

³² Overseas Development Agency, Briefing Paper 14, 2007 “Policy space: are WTO rules preventing development?” available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/106.pdf> (accessed 30 July 2019); UNCTAD available at <https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/106.pdf> (accessed 30 July 2019).

³³ Lee YS (2017); see also Hess PN & Ross CG *Economic Development: theories, evidence, and policies* Fort Worth, TX: Dryden Press (1997) at 213.

³⁴ Clunies-Ross A “Development finance: beyond budgetary official development assistance” (2004) 26 *Mich J Int'l L* 389.

Environmental provisions are the most common type of specific sustainable development provisions. The inclusion of obligatory environmental protection provisions in international economic law treaties has given rise to tension between developed and developing countries.³⁵ The implementation of environmental regulations may interfere with existing international economic law obligations.³⁶ Environmental regulations have led to five areas of tension. First, developing countries perceive it as a form of regulatory dumping by developed countries.³⁷ Regulatory dumping occurs when high environmental protection standards, which are unattainable for developing countries, are included in international economic law treaties.³⁸ Secondly, there is no agreement on the purpose of the environmental aspect. Developed countries seek to ensure that the environment is not destroyed in the pursuit of economic development³⁹, whereas developing countries regard economic development as necessary to prevent environmental degradation, which is caused by poverty.⁴⁰ Thirdly, developing countries believe that environmental regulation in sustainable development treaties largely embodies the concerns of developed countries.⁴¹ This is due to their ability to shape the concept in international law.⁴² Fourthly, the scope of environmental regulation in development is contested.⁴³ Developing countries believe that such regulation should be limited to obligations meant to solve specific environmental problems.⁴⁴ They argue that there is no general obligation to protect the environment, as developed countries insist.⁴⁵

The fifth area of divergence pertains to the financial and opportunity cost implications of environmental standards.⁴⁶ Developing countries have sought and obtained

³⁵ Pinto C “Some thoughts on the making of international environmental law: a cautionary tale” in Schrijver NJ & Weiss F (eds) *International law and sustainable development: principles and practice* Leiden: Martinus Nijhoff (2004) 39. See also French DA “The role of the state and international organisations in reconciling sustainable development and globalisation” in Schrijver NJ & Weiss F (eds) *International law and sustainable development: principles and practice* Leiden: Martinus Nijhoff (2004) 135.

³⁶ *Metalclad Corp v United Mexican States* ICSID Case No ARB (AF)/97/1.

³⁷ Fuentes (2002) at 109.

³⁸ Fuentes (2002) at 109.

³⁹ Principle 7 of the Rio Declaration on Environment and Development 1992.

⁴⁰ Anderson TL & Kosnik LR “Sustainable skepticism and sustainable development” (2002-2003) 53 *Case W Res L Rev* 439.

⁴¹ Walde TW “Natural resources and sustainable development: from good intentions to good consequences” available at DOI: <https://doi.org/10.12957/rbdp.2006.5738> (accessed 20 January 2019).

⁴² Pinto (2004) at 39.

⁴³ Harrison, Vitalis & Upton (2003).

⁴⁴ Anderson & Kosnik (2002-2003) at 439.

⁴⁵ Adelman S “Between the Scylla of sovereignty and the Charybdis of human rights: the pitfalls of development in pursuit of justice” (2008) 2 *Hum Rts & Int'l Legal Discourse* 17.

⁴⁶ Love JL “Raul Prebisch and the origins of the doctrine of unequal exchange” (1980) *Latin American Research Review* 45.

preferential treatment which includes exemptions, differences in performance requirements, and delayed timelines for compliance.⁴⁷ In some treaties developing countries have also received needs based financial assistance for compliance with environmental standards. The more contentious issue is the opportunity cost aspect, in which developing countries assert that they should be compensated for not exploiting their environmental resources. In addition, whenever obligatory environmental provisions are implemented, these regulations are viewed as either expropriation or as disguised market protection mechanisms.⁴⁸ Developing countries have been subjected to expropriation rulings when they introduce environmental regulations.⁴⁹ Developed countries introduce environmental protection measures which restrict market access to developing countries.⁵⁰

2.3 The social aspect of sustainable development

There are differences between developing and developed countries with regards to the role of the social pillar in sustainable development. In agreements entered into by developing countries, poverty eradication is prioritised.⁵¹ Many of these objectives have been subsumed into human rights discourse.⁵² They also require that the investments be socially responsible. Developing countries fear that the social pillar will be used as a mechanism to influence and control their domestic policymaking processes. This pillar may be used to introduce high labour standards. The social pillar may also be used to allow developed countries to participate in their domestic policies through transparency and cooperation provisions. Such provisions are invasive and interfere with the sovereignty of States.

3 APPROACHES TO SUSTAINABLE DEVELOPMENT

The approaches towards sustainable development are largely determined by the level of economic development which the State has achieved.⁵³ There are differences between

⁴⁷ Matsui (2004) at 73.

⁴⁸ Kentin E “Sustainable development and international investment dispute settlement: the ICSID and NAFTA experience” in Schrijver NJ & Weiss F (eds) *International law and sustainable development: principles and practice* Leiden: Martinus Nijhoff (2004) 309.

⁴⁹ Kentin (2004) at 309.

⁵⁰ WT/DS 58 United States - Import prohibition of certain shrimp and shrimp products available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm (accessed 22 July 2019).

⁵¹ Whitfield S “Environmental and social sustainability in Africa” (Papers delivered at Conferenza Ministeriale Italia – Africa, Roma, 18 Maggio 2016) available at <https://www.ispionline.it/DOC/ENVIRONMENTAL-AND-SOCIAL-SUSTAINABILITY-IN-AFRICA.pdf> (accessed 13 April 2019).

⁵² Cassimatis AE “Developing countries, trade and human rights; Free Trade Agreements, development needs and the EU’s generalised system of preferences” in Lee Y-S et al (eds) *Law and development perspective on international trade law* Cambridge: Cambridge University Press (2011) 277.

⁵³ Daly HE *Beyond growth: the economics of sustainable development* Boston: Beacon Press (1996) at 158.

developed and developing countries with regard to the scope and purpose of sustainable development.⁵⁴ Developing countries are primarily concerned with economic growth and poverty eradication. Developed countries are primarily concerned with environmental protection and intergenerational equity.⁵⁵ Whilst both developing and developed countries support intergenerational equity, they are concerned with different parts of it. Developing countries focus on their present development, and argue that developed countries exploited the environment in past generations. Developed countries generally argue that States should not be solely concerned with the immediate improvement of the lives of their citizens. The approach of developing countries restricts the options available to achieve immediate relief from poverty and may prolong it.⁵⁶

Another difference pertains to the types of sustainable development provisions. Developed countries advocate for a broad based universal approach through the establishment of specific minimum obligatory standards, which require all countries to take affirmative measures or to refrain from conduct, for sustainable development.⁵⁷ Developing countries believe that obligatory minimum standards should be narrow and limited to solving specific problems.⁵⁸ The establishment of universal obligatory standards is viewed by developing countries as prescriptive and overbearing.⁵⁹ Developing countries prefer declaratory provisions which are not binding on them. These allow for nuance, flexibility and individual State response, which they prefer. Developing countries have continuously resisted giving sustainable development too much legal weight.⁶⁰ Their sustainable development provisions refer to sustainable development generally, and rarely make reference to any specific pillars of sustainable development. Whenever there are specific pillars, these are limited to the generally accepted three pillars of sustainable development.

⁵⁴ Anderson & Kosnik (2002-2003) at 439

⁵⁵ Baker (2018); Gaines SE "Triangulating sustainable development: international trade, environmental protection, and development" (2002) *Environmental Law Reporter News & Analysis* 10318; Megersa DF "The international responsibilities of developed countries in adaption to and mitigation of climate change: an ethical mandate" (2018) 5 *BRICS LJ* 100; Tladi D "Strong sustainability, weak sustainability, inter-generational equity and international law: using the Earth Charter to redirect the environmental ethics debate" (2003) 28 *South African Yearbook of International Law* 200; Das R "Compensation as equity in context of common heritage of mankind: a key to sustainability and inter-generational & inter-regional equity"(2009) *NUJS Law Review* 267.

⁵⁶ Dernbach JC & Cheever F "Sustainable development and Its discontents" (2015) 4 *TEL* 247.

⁵⁷ Garcia (2000) at 975.

⁵⁸ Ellison K "Rio+20: how the tension between developing and developed countries influenced sustainable development efforts" (2014) 27 *Pac McGeorge Global Bus & Dev LJ* 107.

⁵⁹ England P "Problems and prospects for the implementation of sustainable development in developing countries: a critique of the Brundtland Report" (1993) 2 *Griffith L Rev* 147.

⁶⁰ See generally Aseeva (2018).

4 SPECIFIC INSTRUMENTS IN INTERNATIONAL ECONOMIC LAW

In this review of instruments entered into by African countries concerning sustainable development, three types of agreements are examined. The first agreement analysed is the Marrakesh Agreement establishing the WTO. This Agreement establishes the most important international economic institution in which African States participate as a large constituency. Its provisions are explored as a touchstone. The second types of agreements are those which are comprised exclusively of African States. These are the Charter establishing the African Union (AU), and the Agreement Establishing the African Continental Free Trade Area (AfCFTA). There will also be a review of one of the recognised regional economic communities of the AU, namely, the Southern African Development Community (SADC) Treaty and its Trade and Investment Protocols.⁶¹ In agreements between African countries only, these States are generally at similar levels of development, and are better able to articulate and prioritise their development goals.⁶² These agreements are also motivated by a desire for mutual benefit and further regional integration, and they are thus a more accurate reflection of their development needs.⁶³ The third type of agreements analysed are those entered into with a developed region, namely, the European Union (EU). The agreements entered into with developed countries are motivated by the need to retain market access to these countries.⁶⁴ These provisions may be influenced by the partner that is a developed country.

4.1 The WTO

Sustainable development appears in the preamble of the Marrakesh Agreement establishing the WTO.⁶⁵ There is no attempt in this document to define the scope of the concept through the inclusion of specific sustainable development clauses. Therefore, the generally accepted definition of sustainable development is considered applicable. Since no specific meaning has been given to the concept, the members can provide their

⁶¹ Robertson D "EU-ACP Economic Partnership Agreements: modern colonialism disguised in violation of the WTO" (2017) 50 *VAND. J. TRANSNAT'L L.* at 463.

⁶² Ukaga O "General introduction: sustainable development in Africa an introduction" in Ukaga O & Afoaku OG (eds) *Sustainable development in Africa: a multifaceted challenge* Asmara: Africa Word Press (2005) at 3.

⁶³ Hirsch M "North-south regional trade agreements: prospects, risks and legal regulation" in Lee Y-S et al (eds) *Law and development perspective on international trade law* Cambridge : Cambridge University Press (2011) 225.

⁶⁴ Heron T "Trading in development: norms and institutions in the making/unmaking of European Union-African, Caribbean and Pacific trade and development cooperation" (2014) *Contemporary Politics* 10.

⁶⁵ The preamble of the Marrakesh Agreement establishing the WTO. The first paragraph of the preamble provides : "The Parties to this Agreement, 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."

own content. Sustainable development is referred to generally in a declaratory provision. In this text, reference to sustainable development is restrained and limited. These limited provisions have led to the use of Article XX of the General Agreement on Tariffs and Trade (GATT) to enforce sustainable development.

4.2 The Constitutive Act of the African Union

The objectives clause of the Constitutive Act of the African Union makes reference to sustainable development.⁶⁶ There is specific application of the concept of sustainable development, namely, the economic, social and cultural levels. In this agreement, the generally accepted definition of sustainable development is modified. There is mention of the social aspect, but without a definition or context as to its use. These specifications indicate which elements of this concept are important to African States. It is notable that the environment is not listed among the areas of sustainability, yet other elements have been specifically mentioned. It is a largely declaratory provision, yet there is an attempt to define and the limit the scope of the conventional concept of sustainable development.

Interestingly, the term appears unaltered in Agenda 2063, which is the implementation plan of the AU.⁶⁷ In this instrument the term “sustainable development” is unmodified because implementation plans have limited legal enforceability. This is consistent with the desire by developing countries not to give this concept too much legal weight.⁶⁸ Even in this document, with limited enforceability, the environmental provision is declaratory and circumscribed, and tied to the communities. It has been limited to solve existing community problems, suggesting intra-generational application. All these modifications have the cumulative effect of depriving the concept of its standard conceptual meaning.

4.3 African Continental Free Trade Area

In the AfCFTA there is reference to sustainable development in the objectives clause. It provides for sustainable and inclusive socio-economic development, gender equality and structural transformation.⁶⁹ In this declaratory provision the concept of sustainable development is also modified. The addition of the words “inclusive socio-

⁶⁶ The objectives clause of the Constitutive Act of the African Union provides in Art 3(j) for “sustainable development at the economic, social and cultural levels as well as the integration of African economies”. Constitutive Act of the African Union available at https://au.int/sites/default/files/pages/34873-file-constitutiveact_en.pdf (accessed 14 September 2019).

⁶⁷ Agenda 2063 “Aspiration 1: A prosperous Africa based on inclusive growth and sustainable Development” available at <https://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf>. (accessed 14 September 2019).

⁶⁸ Ukaga (2005) at 1-7.

⁶⁹ Article 3(e) of the Agreement Establishing the African Continental Free Trade Area provides: “promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties;” available at https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (accessed 14 September 2019).

economic” development, points towards the overarching importance of economic growth. Other concepts, such as structural transformation, are used simultaneously, which suggest equal importance. Interestingly, a specific environmental provision was not added to the document, which reflects the lack of importance which is accorded to this concept. This general non-binding reference to sustainable development in the AfCFTA, which is the newest and largest free trade area (FTA) on the continent, is telling, and indicative of the continental position with regards to this concept. This goes against the international trend of more detailed sustainable development provisions and the move towards more obligatory provisions.

4.4 The SADC and sustainable development

In the SADC Treaty, there is general reference to sustainable development in the objects clause. It is a largely declaratory provision which refers to sustainable economic growth and development. The overarching importance of economic growth is evident and specifically mentioned, to reflect the needs of the region.⁷⁰ In this agreement, a separate environmental provision is included. It provides for the sustainable utilisation of natural resources and effective protection of the environment.⁷¹ This is also a declaratory provision which refers to the environment in general terms. In this agreement the terms pertaining to sustainable development are modified in three ways. First, by the addition of terms to elucidate the meaning. Secondly, sustainable economic growth is decoupled from the environmental aspect. Thirdly, the protection of the environment is tied to its utilisation. Such changes reflect the interpretation and application of the concept of sustainable development in the SADC context. These modifications suggest a conceptual matrix which is heavily tilted towards economic growth and significantly different to the generally accepted definition.

The SADC has three regional economic law agreements, namely, the Protocol on Trade, the Protocol on Finance and Investment, and the Protocol on Trade in Services. The Protocol on Trade does not make any reference to sustainable development, but to the need to comply with the rules of the WTO.⁷² Sustainable development also does not appear in the annexures.⁷³ Therefore, in the SADC Protocol on Trade, the only applicable sustainable development provisions are those in the WTO Agreements. In the Protocol on Finance and Investment, the preamble makes reference to increased economic growth and sustainable development.⁷⁴ In this Protocol, economic growth and

⁷⁰ Article 5(a) of the Treaty of the Southern African Development Community provides: “promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;”

⁷¹ Article 5(g) of the Treaty of the Southern African Development Community provides: “achieve sustainable utilisation of natural resources and effective protection of the environment;”

⁷² See the preamble of the Protocol on Trade in the Southern African Development Community available at https://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf (accessed 14 September 2019).

⁷³ Annexure V of the Protocol on Trade, which provides for trade and development.

⁷⁴ The preamble of the SADC Protocol on Finance and Investment, available at https://www.sadc.int/files/4213/5332/6872/Protocol_on_Finance_Investment2006.pdf (accessed

sustainable development often appear as a pair.⁷⁵ Its addition, as a separate additional clause it demonstrates the greater importance of economic growth. Other references to sustainable development are in the annexures to the Protocol which provide for sustainable development in the community.⁷⁶

The scope of sustainable development is circumscribed and is subject to community goals, which suggests intra-generational application. In this Protocol sustainable development is referred to generally in declaratory provisions. The Protocol on Trade in Services makes similar reference to sustainable economic growth and development in the objects clause.⁷⁷ This is also a declaratory provision. All these modified references to sustainable development suggest that there is a desire for sustainability but not necessarily an appetite for the conventional conceptual matrix which is sustainable development. In addition, these provisions are declaratory with limited legal enforceability.

4.5 The EU-SADC EPA and sustainable development

The EU-SADC Economic Partnership Agreement (EPA) is a framework for economic integration and development between developed and developing countries.⁷⁸ The preamble and the objectives clauses of the EU-SADC EPA make a general reference to sustainable development.⁷⁹ There is also reference to the millennium development

14 September 2019). The preamble provides: “CONVINCED of the need to accelerate growth, investment and employment in the SADC Region through increased cooperation, coordination and management of macroeconomic, monetary and fiscal policies and to establish and sustain macroeconomic stability as a precondition to sustainable economic growth and for the creation of a monetary union in the Region”.

⁷⁵ The Preamble of Annex 1 to the Protocol also makes reference to economic growth and sustainable development. One of the provisions in the preamble provides: “COMMITTED to achieving the broad objectives of the SADC as set out in the Treaty and specifically to achieving economic growth and sustainable development through regional integration and working through IPAs in the Region.”

⁷⁶ The preamble of Annex 5 to the Protocol on Finance and Investment provides “that the main objective of SADC is to achieve sustainable development in the Community”.

⁷⁷ Article 2(2) of the SADC Protocol on Trade in Services provides: “promote sustainable economic growth and development thereby raising the standard and quality of life of the people of Southern Africa, supporting the socially disadvantaged and alleviating poverty through regional integration in the area of services;”

⁷⁸ The agreement was finalised on 10 June 2016, The SADC- EU EPA agreement members are Botswana, Eswatini, Lesotho, Namibia, Mozambique and South Africa The other members of SADC, namely, Comoros, Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, Tanzania, Zambia and Zimbabwe, negotiated the EPA under different regional groupings: see <http://ec.europa.eu/trade/policy/countries-and-regions/regions/sadc/> (accessed 14 August 2019); Sharpston AG “The power to conclude the new generation of EU FTAs” (2017) available at <https://www.iisd.org/itn/2017/03/13/the-power-to-conclude-the-new-generation-of-eu-ftas-ag-sharpston-in-opinion-2-15-laurens-ankersmit/> (accessed 14 August 2019).

⁷⁹ Article 1(a) of the EU- SADC EPA. The stated aim of the EU- SADC EPA, as appears in the preamble, is to create a partnership agreement which is consistent with the objectives of sustainable development; Zondi S & Mulaudzi C “SADC integration and poverty eradication in southern Africa, an appraisal” (2010) 39(4) *Africa Insight* 35.

goals.⁸⁰ These initial provisions are largely declaratory and are aligned with core SADC goals of poverty eradication.⁸¹ These provisions suggest that the generally accepted conceptual matrix, of sustainable development is applicable.

There is a chapter which is dedicated to trade and sustainable development which has specific and comprehensive sustainable development provisions.⁸² This chapter provides the context and objectives for sustainable development. Sustainable development is contextualised with reaffirmation of international agreements of sustainable development, such as the United Nations agreements.⁸³ The parties also confirm their commitment to the generally accepted three pillars of sustainable development.⁸⁴ However, the generally accepted definition of sustainable development is immediately expanded through the addition of culture and health to the conventional description of sustainable development.⁸⁵ There is also a specific provision committing the parties to intergenerational equity. Its inclusion is in recognition of the fact that developing countries have consistently insisted that they are not bound by this principle.⁸⁶

There are specific provisions which align with the generally accepted pillars of sustainable development, namely, the environmental and social provisions.⁸⁷ Commitment to the International Labour Organisation (ILO) agreements and

⁸⁰ Article 1(a) of the EU-SADC EPA provides: “contribute to the reduction and eradication of poverty through the establishment of a trade partnership consistent with the objective of sustainable development, the MDGs and the Cotonou Agreement”.

⁸¹ Article 3(3) of the EU-SADC EPA provides for regional integration consistent with sustainable development strategies : “The Parties support, in particular, the integration processes based on the SACU Agreement, the SADC Treaty, and the Constitutive Act of the African Union adopted on 11 July 2000, as well as the development policies and political objectives related to such processes. The Parties aim at implementing this Agreement in a mutually supportive manner with those instruments, taking into account the respective levels of development, needs, geographical realities and sustainable development strategies.”

⁸² Chapter II of the EU-SADC EPA.

⁸³ Article (1) of the EU- SADC EPA.

⁸⁴ Article 6(2) of the EU- SADC EPA.

⁸⁵ Article 6(2) and Art 7(2) (a) of the EU-SADC EPA. Article 7(2) provides: “(2) The Parties understand this objective to apply in the case of this Agreement as a commitment that: (a) the application of this Agreement shall fully take into account the human, cultural, economic, social, health and environmental best interests of their respective populations and of future generations; and (b) the decision-making methods embrace the fundamental principles of ownership, participation and dialogue.”

⁸⁶ Oppong DY & Boateng W “Intergenerational versus intragenerational equities and the development of resource-rich but poor countries: the case of Ghana” (2014) 28 *JL Pol’y & Globalization* 155; Ntambirweki J “The developing countries in the evolution of an international environmental law” (1991) 14 *Hastings Int’l & Comp L Rev* 905.

⁸⁷ Article 8(1) of the EU-SADC EPA, which provides for multilateral environmental and labour standards and agreements, states: “The Parties recognise the value of international environmental governance and agreements as a response of the international community to global or regional environmental problems as well as decent work for all as a key element of sustainable development for all countries and as a priority objective of international cooperation.”

multilateral environmental agreements is professed by the parties.⁸⁸ There are also catch-all provisions affirming labour and environmental agreements acceded to at different forums.⁸⁹ All these affirmed international agreements are not incorporated into the Agreement. They are largely declaratory provisions. In addition, there are enforceable provisions in which the parties also agree not to derogate from their domestic laws pertaining to the environment and labour in order to attract investment.⁹⁰ These obligatory provisions restrict the policy space of the States, and limit their ability to provide regulatory assistance.

Interestingly, this Agreement also goes beyond the generally accepted three pillars of sustainable development.⁹¹ It does so through the inclusion of transparency provisions which require that the parties cooperate and consult with regard to sustainable development.⁹² The cooperation provisions allow for the exchange of information concerning sustainable development.⁹³ The areas of cooperation include encouraging corporate social responsibility by investors.⁹⁴ The consultation provisions are more invasive. These require the parties to consult with regard to policies pertaining to sustainable development. A committee is established for consultation purposes.⁹⁵ This provision allows the EU to participate in and influence the regulatory processes of the SADC EPA States, which interferes with the sovereignty of the parties.

There are concerns that all these provisions have created a working definition of sustainable development for the region. Other treaties merely mentioned sustainable

⁸⁸ See Art 6 of the EU-SADC EPA.

⁸⁹ Article 8(2) of the EU-SADC EPA provides : “Taking into account the Cotonou Agreement, and in particular its Articles 49 and 50, the Parties, in the context of this Article, reaffirm their rights and their commitment to implement their obligations in respect of the Multilateral Environmental Agreements (‘MEAs’) and the International Labour Organisation (‘ILO’) conventions that they have ratified respectively.”

⁹⁰ Increasingly, FTA and GSP schemes issued by the US and the EU link trade to human rights. These human rights provisions include requirements for countries to enact ILO standard labour laws. These are detrimental for developing countries with export processing zones which rely on lax labour conditions. See also “WT/DS246 EC conditions for the granting of tariff preferences to developing countries” available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm (accessed 14 August 2019); See Cassimatis (2011) at 277.

⁹¹ This is consistent with agreements entered into with a developed region. See Chi (2018).

⁹² Articles 10 and 11 of the EU-SADC EPA provide for trade and investment favouring sustainable development, and working together on trade and sustainable development, respectively.

⁹³ Article 10(2) of the EU- SADC EPA provides: “The Parties may exchange information and share experience on their actions to promote coherence and mutual supportiveness between trade, social and environmental objectives, and shall strengthen dialogue and cooperation on sustainable development issues that may arise in the context of trade relations.”

⁹⁴ Article 10(1) of the EU-SADC EPA provides: “The Parties reconfirm their commitment to enhance the contribution of trade and investment to the goal of sustainable development in its economic, social and environmental dimensions”.

⁹⁵ Article 10(3) of the EU-SADC EPA provides: “Dialogue and cooperation on this Chapter by the Parties, through the Trade and Development Committee, may involve other relevant authorities and stakeholders.”

development. It is notable that the labour and environmental obligations are not new obligations, but existing ones which the countries have already acceded to in various treaties. However, some of these treaties were acceded to precisely because of low enforcement levels in these forums, and as a form of virtue signalling. The precise definitions of sustainable development made in the context of power asymmetry have allowed the EU to spread its normative preferences.⁹⁶ Such an expansive definition of sustainable development is not suitable for an economically vulnerable region, such as the SADC, as it may lead to the loss of its key competitive advantage of lax labour and environmental standards. In addition, granting such importance to sustainable development is premature, and may derail economic growth initiatives.

The Agreement recognises that implementing sustainable development has cost implications for developing countries. There are provisions for financial and technical compliance assistance to implement sustainable development.⁹⁷ The assistance provided is the generally accepted financial assistance which developed countries normally provide in such agreements. However, there is no funding for the loss of revenue. Unfortunately, the provision of funding for the implementation of the EU-SADC EPA also has the effect of skewing the development objectives of the region and replacing them with those of the EU-SADC EPA. Since the SADC is largely dependent on aid, development objectives which can attract funding are the ones which get implemented.

5 SUSTAINABLE DEVELOPMENT AND THE STATE

Sustainable development provisions are notorious for their low enforcement levels.⁹⁸ In some of the agreements, such as the EPA, there are institutional provisions for the implementation of sustainable development.⁹⁹ In this Agreement, the joint committee on trade and development is tasked with the implementation of sustainable development.¹⁰⁰ However, the cooperation is limited to dialogue and communication regarding sustainable development.¹⁰¹ In addition, sustainable development provisions are generally excluded from dispute settlement mechanisms.¹⁰² Even the obligatory provisions are qualified by the recognition of the parties' right to adopt their own levels of environmental protection, and are thus subject to domestic laws.¹⁰³ This is

⁹⁶ Hart SR "The EU SADC Economic Partnership Agreement negotiations; 'locking in' the neoliberal development model in Southern Africa" (2012) *Third World Quarterly* 495.

⁹⁷ Article 12 of the EU-SADC EPA provides for development cooperation.

⁹⁸ See generally Baker (2018).

⁹⁹ Article 10 of the EU-SADC EPA.

¹⁰⁰ Article 10(2) of the EU-SADC EPA.

¹⁰¹ Article 10(3) of the EU-SADC EPA.

¹⁰² Article 6(3) of the EU-SADC EPA provides: "The provisions of this Chapter shall not be subject to the provisions of PART III, with the exception of Article 7." Part III contains the Dispute Avoidance and Settlement provisions of the Agreement.

¹⁰³ Article 9 of the EU-SADC EPA. Article 9(1) provides: "The Parties recognise the right of each Party to establish its own levels of domestic environmental and labour protection, and to adopt or modify

compounded by the fact that the SADC region has little appetite for the domestic enforcement of judgements from supra-national tribunals.¹⁰⁴ Therefore the possibility of enforcement of sustainable development is dependent on the provisions in the domestic legislation of these States, and their capacity to implement these.¹⁰⁵

6 CONCLUSION

From the agreements reviewed, it is evident that in international economic law instruments between and amongst African countries, there is a preference for sustainable economic growth. The sustainable development provisions are largely declaratory, with sustainable development mentioned in general terms. The instruments usually limit and minimise reference to sustainable development. However, African States are also entering into agreements with developed regions in which specific and enforceable sustainable development provisions are included. The next phase of sustainable development discourse for African countries requires the creation of a new template for sustainable development provisions to be used in international economic law agreements.

The following issues need to be considered in the creation of the template. First, the use of declaratory provisions should be retained to maintain regulatory freedom. Secondly, these provisions should be limited to the generally accepted three pillars. There is also need for specificity in the elements which constitute the individual pillars of sustainable development. In addition, when States venture beyond the generally accepted three pillars there needs to be clarity on which sort of provisions should be included. Thirdly, African States should maintain their position on inter-generational equity and not bind themselves to it, since it comes with a potential for prolonging poverty. Fourthly, there is also need for agreement on the proper sequencing of sustainable development and economic growth. Certain levels of economic development need to be achieved before enforceable provisions may be implemented. Economically developed countries would provide the funding for sustainable development to be pursued. Fifthly, sustainable development provisions need to incorporate capacity

accordingly its relevant laws and policies, consistently with internationally recognised standards and agreements to which they are a party.”

¹⁰⁴ The SADC gutted the SADC Tribunal and the States have been unwavering in their unwillingness to be held to account by supra-national tribunals. See Phooko MR "No longer in suspense - clarifying the human rights jurisdiction of SADC Tribunal" (2015) 18 *Potchefstroom Electronic Law Journal* 531. This is also compounded by the fact that the judgements of these tribunals are not enforceable domestically unless these have been ratified by the domestic courts. See the Zimbabwean case of *Gabriel Shumba & 2 Others v Minister of Justice Legal and Parliamentary Affairs and 3 Ors* CCZ/4/18.

¹⁰⁵ South Africa, is one of the few States in the region to provide for sustainable development in its constitution, in provisions such as s 24(b)(iii) of the South African Constitution. In the recent judgement of *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* (CCT67/06) [2007] ZACC 13; 2007 (6) SA 4 (CC) the concept of sustainable development was endorsed, yet the judgment was made based on the environmental legislation in place. The protection of sustainable development is thus dependent on the robustness of the legislation in place and the willingness of the State organs to enforce it.

building clauses which go beyond assistance for the implementation of sustainable development. These may be expanded to include compensation for the non-use of their resources.

Sixthly, sovereignty needs to be maintained. Any participation in the decision making process needs to be limited to AU Member States. Therefore transparency provisions with other States need to be limited to provisions for the publication of rules and procedures pertaining to sustainable development. Furthermore, whenever States enter into agreements with transparency provisions, there needs to be clarity on what participation entails. Seventhly, the encouragement of corporate social responsibility is commendable: investors need to comply with national laws. However, these issues can be best addressed in the investment chapter of the BITs and Free Trade Agreements. Sustainable development provisions are not best suited to discuss investor-State responsibility.

If sustainable development is pursued too early, it will choke the development potential of African States. Early adoption of binding sustainable development provisions pushes an unachievable narrative for development. All binding sustainable development has to be subject to the availability of resources. Furthermore, whilst sustainable development is important, it is still unclear as to whether international economic law agreements are the property forum to address such concerns. However, the potential of these provisions should not be overstated since the practical effectiveness of sustainable development provisions relies on the effectiveness of national institutions. Nevertheless, caution is still necessary when entering into sustainable development provisions in international economic law.

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