

Lodging the Sustainable Development Goals in the International Trade Regime: From Trade Rhetoric to Trade Plethoric

Nasser Alreshaid

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/sdlp>

 Part of the [Agriculture Law Commons](#), [Constitutional Law Commons](#), [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Food and Drug Law Commons](#), [Health Law and Policy Commons](#), [Human Rights Law Commons](#), [Intellectual Property Law Commons](#), [International Law Commons](#), [International Trade Law Commons](#), [Land Use Law Commons](#), [Law and Society Commons](#), [Law of the Sea Commons](#), [Litigation Commons](#), [Natural Resources Law Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Public Law and Legal Theory Commons](#), and the [Water Law Commons](#)

Recommended Citation

Alreshaid, Nasser (2017) "Lodging the Sustainable Development Goals in the International Trade Regime: From Trade Rhetoric to Trade Plethoric," *Sustainable Development Law & Policy*: Vol. 16 : Iss. 2 , Article 3.
Available at: <http://digitalcommons.wcl.american.edu/sdlp/vol16/iss2/3>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Sustainable Development Law & Policy by an authorized editor of Digital Commons @ American University Washington College of Law. For more information, please contact kclay@wcl.american.edu.

LODGING THE SUSTAINABLE DEVELOPMENT GOALS IN THE INTERNATIONAL TRADE REGIME: FROM TRADE RHETORIC TO TRADE PLETHORIC*

Nasser Alreshaid**

ABSTRACT

While the international community is stimulated by the new Sustainable Development Goals' impetus, the global trade regime lives through its 40's mid-life crisis and anticipates what it does not know what to anticipate. Views of the multilateral trading system being stalled by a proliferation of other preferential trade agreements signal a deep inquiry into this policy trend. This Article intends to highlight how these global trade challenges could be mere air turbulence if lessons are drawn from the new Sustainable Development Goals. By introducing the very needs of states and their constituents through these Goals, an inclusive and more representative international trade regime could be achieved. This does though pose a challenge of how soft and hard norms, or formal and informal rules, may have to interact within a cooperative diversified manner.

I. INTRODUCTION

"The worry was that globalization might be creating rich countries with poor people"¹

Joseph Stiglitz

An ongoing worrisome debate persists as to the connection trade has with the idea of development where the very aims of international trade are questioned in terms of an applicable universal notion. Who is trade to prosper when consideration to the capacity and goals of states within the international community is at stake? Constituents of state governments have been central to this debate today, anticipating a better future for them and future generations.

Extensive literature may have continuously approached the connection of trade liberalization and state regulation. Developing countries started to doubt the international trade regime and their bargaining power to shape their own internal policies. Nevertheless, the added narrative here is how much this debate has evolved today from the immense social and political capital on the international level. This capital acknowledges a shared aim that leaves some flexibility for states to tailor what best fits each country's societies and further prospers the whole human race as an outcome.

What we see today are the Millennium Development Goals (MDGs) transforming into an ambitious sustainable development agenda, with 17 attentive goals paving the road until 2030. A global consensus is highlighted as to the acceptance these goals seemed to generate. This does not at all imply that

implementation of internal development policies within the context of international trade isn't contentious in a globalized world.

What this study aims to do is track the development agenda within the international trade regime to see how its evolution signals the inevitable adoption of the Sustainable Development Goals (SDGs) to make its future more realistic and predictable. The utmost importance of this attempt is to reveal to what extent international legal norms are in harmony when different international regimes link the same term to their agendas. When referring to the international trade regime, it primarily includes the multilateral trading system, but would still highlight regional and bilateral trends in this regard. This is not to undermine the complexities that would come with adopting such an idea, but what could nevertheless be accomplished is a middle ground where international trade constituents will have to give up some of their privileges and powers for a greater and common good.

This Article will first briefly discuss how the term sustainable development came to being. When standing on what this notion would refer to, the study will attempt to contrast this concept with what the international trade regime holds as sustainable development, and how it may have evolved. To conclude, solutions to reconcile the past with the future concerns as to how to make the SDGs part of the multilateral trading system, and perhaps inevitably regional and bilateral trade, will be addressed.

II. DEVELOPMENT QUALIFIED BY SUSTAINABILITY

When lawyers engage in litigation, in many instances they engage in challenging the meaning of legal terms within the context of legal provisions, such as those based on the interpretation principles in international law. These principles stem from the Vienna Convention on the Law of Treaties (VCLT), by ascertaining the "ordinary meaning" of the term, in light of the "object and purpose" of the treaty.²

The point here is that the interpretation of certain terms may shape the future course of action of treaty provisions. Now, this certainly applies to terms that may seem so ambiguous,

* The original version of this article was published in the *Journal of Environmental and Sustainable Law*, Volume 22, No. 2 in Spring 2016.

** Nasser Alreshaid is an SJD Candidate at American University Washington College of Law. He received his LL.M. from NYU School of Law (ILHR Fellow), LL.M. Kuwait University, and LL.B. University of Sharjah, U.A.E. The Mr. Alreshaid is a consultant at the World Bank Group, and in no way does this Article reflect the views of this institution. The author would also like to thank Professor Frank Upham for his insight on this Article.

perhaps even intentionally, that their ultimate application would be questioned, unless some sense of flexibility is left to respect differentiating treaty parties' intentions. One of such terms could without a doubt be "sustainable development." This term in and of itself has evolved in such a dynamic way that attributing an actual meaning to it might not be attainable, such as is the case with terms like "justice", "right", and "freedom."

A. THE EVOLUTION OF THE TERM SUSTAINABLE DEVELOPMENT

The term "development" can be approached from multiple angles as to the inference that could be extracted from it. It could be broadly viewed in terms of human freedoms it sets to prosper, or even as a right to survival.³ On the other hand, a narrow view of development refers to the rise of personal incomes as a result of an increase in the gross national product (GNP), in addition to technical and industrial advancements.⁴ While there could be some added value to look into the origins and evolution of this self-standing term, the aims of this research go beyond that. What is important however, is how the term has been qualified by the term "sustainability".⁵

The international community has played a significant role in ascertaining shared aims as to what the term sustainable development may be perceived as. The evolution of the term could be broken down into two stages, the period preceding the transition into the MDGs, and the phase representing today's SDGs. The two stages will be approached separately.

1. DEVELOPING THE WAY TO THE MDGS

In the early stages of fostering the term sustainable development, the World Commission on Environment and Development, or Brundtland Commission, published a report called *Our Common Future* in 1987, which defined the term as, "development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs."⁶ Perhaps, adding an "altruistic" value to development would ensure that present generations would act in a way that ensures future generations would not be burdened by past decisions that would interfere with the environment, health, and economy and thus the capacity of the future generations to continue this development.⁷

Who needs sustainable development? Developing countries? Developed? The idea is that people are the main subjects of this agenda, as is the case with other human rights generally.⁸ If it makes it clearer, from a rights-based approach, no certain category of people monopolizes this term. People living in developed countries are considered to fall under this term in their own capacity in as much as constituents of developing countries. The

idea is not who is most in need of utilizing this term, rather, the aim of this term seems to highlight the global consensus that the agenda's duty-bearers, predominantly states, are burdened with such commitments that best serves the sustainable development goals of the people of that certain society.⁹

As was highlighted in the earlier initiatives to qualify development with sustainability, the efforts persisted in other forums to link this term to their agendas. The UN Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992 reached a general consensus amongst 176 states on the term sustainable development as being a major aim for the international community.¹⁰ The European Union, and both the UN General Assembly and Security Council Resolutions also followed this route.¹¹

During the Millennium Summit, held from Wednesday, September 6, to Friday, September 8 in New York, and attended by 149 heads of states and high-ranking officials from another 40 countries, the attendees adopted the Millennium Declaration.¹²

The result of the adopted Declaration was a systematic move towards soft but widespread international consensus to elaborate on these sustainable development goals.¹³ It is some sort of aspirational mission creep if put in another way. Some described these goals as being "all-encompassing concepts, if not a mantra."¹⁴ The MDG agenda included eight goals to be achieved by 2015: 1) eradicate extreme

hunger and poverty, 2) achieve universal primary education, 3) promote gender equality and empower women, 4) reduce child mortality, 5) improve maternal health, 6) combat HIV/Aids, Malaria and other diseases, 7) ensure environmental sustainability, and 8) global partnership for development, with eighteen related specific targets, and forty-four quantifiable indicators.¹⁵ And so the issue of possible implementation in light of this over motivated attitude is worrisome on the domestic level, which continues into the new stage.

2. TODAY'S SDGS

The journey of sustainable development creeping into new venues continued after the MDGs, but this time the horizon was pretty vast. On September 25, 2015, leaders from all over the world met in New York and adopted U.N. General Assembly Resolution 70/1 embracing 17 goals with 169 targets for the period running until 2030.¹⁶ A sense of what sustainability meant in terms of development to these states went as far as including clean water and sanitation, affordable and clean energy, decent work and economic growth, industry innovation and infrastructure, sustainable cities and communities, responsible consumption and production, life below water, life on land, and peace,

*"What we see today are the
Millennium Development Goals
(MDGs) transforming into an
ambitious sustainable development
agenda, with 17 attentive goals
paving the road until 2030."*

justice, and strong institutions.¹⁷ Mentioning the vast amount of targets go beyond the scope of this Article and demand more elaborate and in depth discussion. Nevertheless, what accompanies this broad consensus is a high cost.¹⁸ It is estimated that implementing such an agenda would be valued at \$5-7 trillion.¹⁹

The SDGs are part of a global structure that questions the very role local communities have in their implementation in a way that best fits their conditions. What these SDGs sum up to, as was the case with their predecessors, is that they are soft in their establishment through Resolution 70/1 ("Resolution").²⁰ Even in the language of the Resolution, with all the commitments the state members took upon themselves, it is intended to guide the participating governments in implementing a national framework within the context of a generalized versus contextualized development goals debate.²¹ Nevertheless, a broad and flexible tone is evident throughout the Resolution and in the Goals themselves, which implies that governments have some space to implement their content.

It is only clear how unclear the future of this agenda is. But, what these states have done through the General Assembly is set the bar high for other venues. If there is something that stands out from all seventeen goals is that almost any forum on the international level could be a stakeholder. For an international body to omit acknowledging this new agenda would counter a new era of flexible general consensus.

III. WHAT'S TRADE GOT TO DO WITH IT?

The relationship international trade has with the previously mentioned SDGs is mentioned in this chapter. International trade in the context of this study refers mainly to the multilateral trading system, i.e. the World Trade Organization (WTO),²² in addition to other preferential trade agreements (PTAs) on the regional, multi-regional, and bilateral level, in order to contrast what these latter agreements may have done differently from the WTO.

The recent proliferation of PTAs is certainly alerting, but what remains is that this proliferation is not completely in discontent from the WTO provisions, including their plurilateral agreements.²³ What the WTO mainly did for these other agreements is structure their main features.²⁴ The issue that remains essential for a collective progressive and successful international trade regime is the extent to which these sustainable development policies have a role.

What this chapter therefore sets to discuss is the current structure of sustainable development within the WTO. After this, a theoretical discussion on how the new SDGs could be linked to the current WTO provisions would be attempted. When the WTO correlation to the SDGs is reviewed, bilateral, regional, and multi-regional PTAs will be highlighted as to their trend towards the SDGs.

A. A "SUSTAINABLE" DEVELOPMENT OBJECTIVE IN THE TRADE REGIME?

*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.*²⁵

The main aspects of sustainable development emerge from the abovementioned 1994 WTO Marrakesh Agreement

Preamble's first paragraph. This sets the primary objective of the multilateral trading system. What is important to point out is that this provision only came into being with the Marrakesh Agreement establishing the WTO. What the multilateral trading system represented

before was a different version of what global trade meant, a General Agreement on Tariffs and Trade (GATT) version.²⁶

GATT preceded the WTO as an agreement where parties collaborated their efforts in order to facilitate the liberalization of trade amongst them.²⁷ What ended up being the main objective or free trade ideology of the parties relied on mainly two dimensions, (1) market access on the one hand, which implied eliminating trade barriers that included tariffs, quotas, and subsidies; and (2) non-discrimination between the parties of GATT was an aim that attracted global consensus.²⁸ These two features have persisted in the WTO.²⁹ What proceeded was the push by developing countries to address more development needs, which were raised during the four-year Kennedy Round from 1963-1967, with minimal results.³⁰ The structure of GATT remained, but a GATT Committee on Trade and Development was established. Institutionally, the United Nations Conference on Trade and Development (UNCTAD) was also created in Geneva in 1964 to address the North-South divide.³¹

The negotiation of the Preamble of the previously mentioned WTO Agreement may have likely been influenced by 1992's UNCED, but this is not undisputable.³² Another major reason for this negotiated Preamble would be the rise of the regulatory state and the proliferation of non-tariff barriers (NTB), such as environmental, labor related, consumer protection, and health and safety.³³ The objective of sustainable development seems to be qualified by the optimal use of resources.³⁴ However, there is nothing that implies that it does not have broader inference

"It is estimated that implementing such an agenda would be valued at \$5-7 trillion."

when also connected to the ensuing sentence mentioning environmental protections and preservations, and enhancements to economic development conditions.³⁵

The problem with this objective is that what Robert Howse refers to as “meta-structures” of the WTO, leave but minimal space for state members to engage their sustainable development policies in the midst of over-obligation.³⁶ These meta-structures refer to the formal WTO rules and informal ones on different topics, possessing normative value, which eventually guide the negotiation table in terms of what is prioritized.³⁷ This raises many issues of inclusiveness and transparency when such meta-structures are results of bargaining power.³⁸ The Preamble’s language anticipates the role states retain to shape their internal policies within the meaning of economic growth, precisely with the phrase “to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”³⁹ The main debate remains as to whether trade liberalization is an end in itself rather than a means, and whether it is acceptable for a number of state members to lag behind, as long as their contribution to the global economy is minimal.⁴⁰

To be fair, progress towards recognizing the difficulties certain countries face in implementing different trade obligations at the expense of what is perceived as local sustainable development policies fought its way through to ultimate recognition, minimal though, as there is much to be done. Special and Differential treatment (S&D) for instance, were reserved for developing countries.⁴¹

One point that has to be brought up in order to proceed with this Article is the 2001 Doha Development Round (DDR) Agenda. The intent is not to discuss its detailed failure, which it seems to have generally incurred until this day; rather, the intent to underscore sustainable development even more was certainly present.⁴² In the Doha Ministerial Declaration in Paragraph 6, stated:

We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We take note of the efforts by members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade,

and are otherwise in accordance with the provisions of the WTO Agreements.⁴³

There is clear emphasis in this Declaration that environmental preservation and protection, in addition to social development, are just as important to the WTO as any perceived mere economic aim.⁴⁴ What global trade should aim to do in the language of the Declaration is far more broad, and this implies that developing countries realized first, the implications of their lack of capacity, and second, that the dynamics of domestic input has changed to demand more inclusiveness.

WTO Jurisprudence:

The WTO Appellate Body in the *Shrimp-Turtle* case interpreted GATT 1994 Article XX in light of the WTO Preamble, and in accordance with the Dispute Settlement Understanding (DSU) and VCLT.⁴⁵ GATT Article XX discusses what’s called “General Exceptions”, acknowledging other policy objectives, including the protection of human, animal, and plant life, the conservation of exhaustible natural resources, and the protection of public morals.⁴⁶ These reasons lead to circumventing the goals of free trade that denote market access and non-discrimination.

In this case, the Appellate Body stressed the transformation of the scope of Article XX.⁴⁷ The basis for this was the evolution of the Preamble of the WTO from GATT.⁴⁸ The original objectives of GATT were qualified by the new Preamble, in which other provisions of the WTO are no longer confined to.⁴⁹ The Appellate Body reports:

We note once more 144 that this language demonstrates a recognition by WTO negotiators that optimal use of the world’s resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.⁵⁰

There should be consideration as well to the fact that the Appellate Body did urge a more balanced approach between the different provisions of the WTO Agreements and its Preamble. However, such balancing could be perceived as referring to procedural fairness, including transparency, rather than the substance of the issue.⁵¹

A broad substantively unqualified term of sustainable development could mean states would be able to interpret their measures in light of what they perceive the objective to encompass. But then again, too much flexibility would also serve little to assist other states with legitimate expectations.

B. THE ISSUE OF LINKAGE: READING THE NEW SDGs INTO INTERNATIONAL TRADE RELATED PROVISIONS

The dilemma of the implications of an outreaching SDG agenda is of utmost importance, not only to international trade

itself, but also to the whole international law framework we live in today. U.N. Department of Economic and Social Affairs (DESA) Under-Secretary General Mr. Wu Hongbo said, when addressing U.N. General Assembly Second Committee earlier this fall, “[t]his year could well be remembered as the year when policy integration for sustainable development truly became a common global vision.”⁵² and, “[w]e have seen unprecedented global cooperation to address some of the most challenging issues of our time.”⁵³

A proliferation of different forums and venues on the international level may have been guided by establishing specialized organizations to accompany the cooperative needs of states. Easier said than done is what this proved in our current day. In today’s world, are issues really disintegrated when it comes to acknowledging state regulatory policies?

As Joost Pauwelyn puts it in his book *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, when referring to “nobler goals” that trade should pursue, “[w]hen genuinely pursued, that is, when not abused as a disguise restriction to trade, such goals must trump the instrument of trade, even if they are not set out in the WTO treaty itself”⁵⁴ and, “WTO law is not a secluded island but part of that territorial domain of international law.”⁵⁵ His point being, the aim is achieving unity in international law, not fragmentation.⁵⁶

This brings back the idea of “rights as trumps”, in the sense late Ronald Dworkin tried to emphasize, as an analogy for the international sphere of relationships.⁵⁷ Or as international law might know it, a sort of *jus cogens* for individual states that overcome what utilitarian goal has been adopted by a number of states, such as restricting trade barriers.⁵⁸

1. A PUBLIC INTERNATIONAL LAW LINKED FRAMEWORK: HARD V. SOFT LAW DICHOTOMY NO MORE

The discussion at this point should not simply imply that debates on whether the presence of an international legislature is of central importance, albeit, its shaping the discourse of international law. There is much to talk about on that topic, and this Article can bare no such extensive task. Nevertheless, the issue of the normative value of international legal rules, if it was accurate to say so, will begin from the end of this debate, and engage instead in newly developed treatises on the international level.⁵⁹

The International Law Commission, after setting up a study group on the topic of “Fragmentation of International Law”, has opted for a more coherent approach when it comes to the different norms on the international level.⁶⁰ It has adopted a strong presumption against normative conflict in one of its reports.⁶¹

Within this debate on conflict of norms, inconsistencies of obligations could subsist as another category of such conflict.⁶² When different obligations by different sources occasionally collide, or appear to at least, states seem to be left with a “cherry picking” scenario.⁶³ When shared goals incite parties to different multilateral treaties through “treaty-based sub-systems” to inflict obligations on their parties, or even members, when the

end product is an organization, there exists norms that states may favor differently within dissimilar situations.⁶⁴

Now, within the hierarchical context of international legal norms, different stages can be approached to resolve conflicts between norms.⁶⁵ Perhaps a *lex posterior* attitude would first be attempted as between supposedly conflicting treaty provisions.⁶⁶ However, when a “living treaty” exists, such as the WTO, this method of conflict resolution could be of minimal effect.⁶⁷ Hence, resorting to a *lex specialis* technique to disentangle conflicting debates would be more relevant, as is the case with environmental issues being dealt with by Multilateral Environmental Agreements (MEAs) as opposed to a purely trade-based treaty.⁶⁸

In this regard, Gregory Schaffer & Mark Pollack discuss conditions in which the relationship between soft and hard law is of an “antagonistic” nature, and the interaction of hard and soft law regimes:

[C]an lead to the hardening of soft law regimes, resulting in more strategic bargaining and reducing their purported advantages of consensus-building through information-sharing and persuasion, and the softening of hard law regimes, resulting in reduced legal certainty and predictability. This result is more likely where there is distributive conflict between powerful states.⁶⁹

This underscores the reality of how states themselves actually employ a hard or soft law approach in the context of these two sets interacting, instead of the norms being classified as such.⁷⁰

2. A WTO INDUCED APPROACH TO LINKING THE SDGs

The Director-General of the WTO Roberto Azevedo commented on the new SDGs by ensuring that trade has and always will support development goals.⁷¹ That recent jurisprudence of the Organization’s Dispute Settlement Body, on issues related to the relationship between trade and renewable energy and preservation and management of exhaustible natural resources could help instigate trade rule amendments.⁷² Moreover, the fresh WTO Public Forum, commemorating 20 years of the Organization’s establishment, reiterated this discourse within its program.⁷³ This elicits a sort of *lex lata* version of what the SDGs see international trade as.

In his speech during the United Nations summit to endorse the “2030 Agenda for Sustainable Development”, Azevedo ensured, “ I am pleased to join you today, and to pledge that the WTO will play its full role in delivering the Sustainable Development Goals.”⁷⁴ When elaborating, he explained how his Organization has been playing a role in:

- Goal 2 looks at reforming agricultural markets to end hunger—which is a key element of our agenda at the WTO.
- Goal 3 reaffirms the flexibilities offered by the WTO’s rules on intellectual property to protect public health.
- Goal 8 calls for the increased support for the poorest countries to participate in global trade, particularly through the WTO’s Aid for Trade initiative.

- Goal 14 calls for action on fisheries subsidies to tackle over-capacity and over-fishing, which again is an important element of our work.
- And Goal 17 calls for the conclusion of negotiations on the WTO's Doha Development Agenda.⁷⁵

The last goal specifically, is of relevance to the issue of linkage when it comes to the multilateral trading system in particular. This system would have to push for a "universal rule-based, open, non-discriminatory, and equitable system."⁷⁶ Goal 17 of the New SDGs aims to "strengthen the means of implementation and revitalize the global partnership for sustainable development."⁷⁷ This Goal is thus, an exploration of what the WTO provisions set to achieve in relation to other international legal norms.

Rather than an "integral type" agenda, the WTO provisions are of a "reciprocal" nature when it comes to its member states.⁷⁸ As such, its provisions meet the diversity needs of its members within a larger international law framework.⁷⁹ What should be underlined, as Joost Pauwelyn stressed, is that the WTO is but a component of what is known as international law.⁸⁰

In the face of non-WTO norms, it is the WTO Panel and Appellate Body who are left with a reconciliatory situation. The WTO is obliged to apply WTO provisions, referring to its constituted agreements.⁸¹ What is nonetheless at stake here is that when these non-WTO norms represent the "common interests" of WTO members, it is these WTO quasi judicial bodies who have to live up to these other conceding commitments when interpreting their very own agreements.⁸² The VCLT supports this contention in the context of the General Rules of Interpretation in Article 31/3, where, "There shall be taken into account, together with the context: (c) any relevant rules of international law applicable in the relations between the parties."⁸³ The process may extend from an interpretive one to an actual application of non-WTO rules.⁸⁴ This should not affect the members' relationships with third parties though. What is crucial here is that the SDGs shouldn't be seen as contradicting trade-related provisions within the WTO, in this context. They are actually both on par and aligned to work for a common goal, allowing some flexibility in the means in which this can be achieved.

What is as important in order to implement, or perhaps empower, the content of the SDGs within the multilateral trading system, is the notion of "good governance".⁸⁵ It is only fair that the emphasis be not only on the outcome consensus where sustainable development is "sustained" in the policies and practices of international forums, like the WTO.⁸⁶ States themselves have to contribute to this balancing effort in trying to shape their policies. This should be done in a way that would adhere to

development goals of utmost importance locally, but still minimally affects liberalized trade relationships with other trading counterparts with the multilateral trading system. A significantly complex balance is expected from states, which is by far no easy task, and should ensure that states do not ultimately externalize their internal policies.⁸⁷

There remains much to be done on the multilateral level when it comes to implementing the SDGs within the existing legal framework. The legal structure of certain departments in this organization must allow for the presence of other stakeholders, who oversee the very implementation of the SDGs.⁸⁸ These counterparts would include UNDP, UNCTAD, and UNHCHR, in addition to other NGOs too.⁸⁹ This reform to WTO Committees allows first of all, for a transparent process, and secondly, for a sort of inevitable interdisciplinary assistance in drawing on international legal norms that mirror the concerns of states exemplified by the SDGs.⁹⁰

The WTO has been facing problems as to concluding negotiations related to key trade issues, one of which is agriculture.⁹¹ When the current multilateral trading system represents

161 member states, in which about 98% of the global market is covered, negotiations without a doubt become more complex.⁹² Not only is the South widely represented in this Organization, but also the North faces competing perspectives.⁹³ The BRICs is fully represented in this system, and so key global market stakeholders are included, such as China and Russia.⁹⁴ The final bargaining

word may not be exclusive to the West after all when it comes to today's international trade policies.

C. REGIONALISM AND BILATERALISM WHEN MULTILATERALISM FAILS: REDEFINING TRADE BARGAINING POWER ON THE INTERNATIONAL LEVEL

Today's phenomenon of a proliferation of PTAs is under high scrutiny.⁹⁵ In its *World Investment Report 2015*, UNCTAD discusses the global foreign direct investment dimension, which necessarily shares many of the characteristics of today's international trade regime, especially where agreements regulate both trade and investment.⁹⁶ This Report highlights the stable conclusion of international investment agreements (IIAs), whereas the number bilateral investment agreements (BITs) declined than the previous year.⁹⁷ There is an additional 31 IIAs, which raises the number of total IIAs to 3,271, in which 2,926 are BITs and 345 are other IIAs, by the end of 2014.⁹⁸ And while BITs decline, more regional and sub-regional negotiations take place, including the Trans-Atlantic Trade and Investment Partnership (TTIP), the Trans-Pacific Partnership (TPP), Regional Comprehensive Economic Partnership (RCEP), Tripartite, and

"They are actually both on par and aligned to work for a common goal, allowing some flexibility in the means in which this can be achieved."

Pacific Agreement on Closer Economic Relations (PACER) Plus negotiations involving 90 countries.⁹⁹

The report noted that main incentives for countries to review their model investment and trade policies are SDG related objectives.¹⁰⁰ Twelve countries in Africa, ten in Europe and North America, eight in Latin America, seven in Asia, six economies in transition, and four regional organizations engaged in this trend.¹⁰¹ At least one provision of these newly reviewed agreements include ensuring the right of states to regulate for public interest purposes, mainly, to meet sustainable development targets, which included health and safety policies, and environmental standards.¹⁰² Perhaps, displaying some of these recent trends would clarify the situation more.

1. TRENDS AND FIGURES

Revealing some of the contents of the most recent different model agreements, and concluded agreements themselves, would supplement the results the previous 2015 World Investment Report reached. The trend towards bilateralism, regionalism, and multi-regionalism is not unique to a certain region.¹⁰³ Interestingly, it is not really even a continuum of the North-South divide, or a developed *vis-à-vis* developing country tension.¹⁰⁴ Both developed and developing countries have adopted SDG oriented agreements.¹⁰⁵

High-income Organization of Economic Cooperative and Development (OECD) member Norway is one example of this shift of policies to meet the needs of sustainable development.¹⁰⁶ Its 2015 Model BIT is evidence of the state's intentions to meet the sustainable development needs of its citizens.

This Model BIT initiated its text by emphasizing the aim of investments geared to serve sustainable development needs in their economic, social, and environmental dimensions.¹⁰⁷ This included "high levels" of environmental, health, safety, and labor protections.¹⁰⁸ The Preamble reiterated the importance of sustainable development objectives that fit national and global standards.¹⁰⁹

The Norwegian Model BIT went further to include sustainable development safeguards within the contents of its provisions. Article 11/1, under "Not Lowering Standards", mentioned:

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, human rights, safety or environmental measures or labour standards. 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 of an investment of an investor.¹¹⁰

What followed in Article 12, entitled "Right to Regulate" was:

Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity is undertaken in a

manner sensitive to health, safety, human rights, labour rights, resource management or environmental concerns.¹¹¹

This is one of the most recent model BITs that provides strong support for sustainable development objectives.¹¹² High income Norway sets a clear example on how the SDGs are shared interests amongst the different countries across the globe. The language of the Norwegian Model BIT provisions are pretty firm on trade and investment serving sustainable development, which gives states flexibility to implement policies in this regard. The Preamble itself, after mentioning the objective of investments being sustainable development, and including examples of such, pressed for local policies to be congeal to this aim by the phrase "in accordance with relevant internationally recognized standards and agreements in these fields to which they are parties."¹¹³ This concluding sentence adds much leverage to the new SDGs, where they can guide local policies and ensure they fall within the scope of a global consensus with the adoption of the SDGs.

The 2012 U.S. Model BIT in comparison omitted mentioning the term "sustainable development" from its Preamble.¹¹⁴ It instead included the substance of this term, referring to the aim to "maximize effective utilization of economic resources and improve living standards," and drawing on investor-state dispute related requisites of the term "investment."¹¹⁵ Where, as in the *Salini* test, the International Center for the Settlement of Investment Disputes (ICSID) Tribunal concluded that an investment infers, "contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. The Conventions Preamble of the ICSID Convention may add the contribution to the economic development of the host state of the investment as an additional condition."¹¹⁶ In this case, the Tribunal, considered infrastructure construction in Morocco, and the technical expertise, referred to as "know-how," which the Italian company offered to the host state Morocco, as constitutive of the economic development element of the investment.¹¹⁷ The U.S. Model BIT is not really an outlier because it appears to have engaged in identifying sustainable development components reserved for state regulation without mentioning the magic word, "sustainable development."¹¹⁸

On a regional note, and in the context of the African nation, the Southern African Development Community (SADC) Model BIT template of 2012 represents a "southern" shared perspective on implementing sustainable development. The Preamble set the intentions of the parties' investments to fulfill sustainable development objectives in a similar manner as the Norwegian Model BIT.¹¹⁹ The extensive template, however, leaves the term sustainable development undefined, following the trend of other comparative approaches.¹²⁰

The SADC Model BIT includes environmental and social impact assessments provisions, and it sets the threshold to the highest standard, be it the national standard or that of the International Finance Corporation's (IFC) Performance Standards on Environmental and Social Impact Assessment.¹²¹ The international standards are invoked once more to ensure that

some sort of technically screened efforts monitor local policies, although it may not be confined to this particular IFC source.¹²² This Model BIT particularly highlights the precautionary principle as being a pre-requisite for any investment.¹²³

After stressing the right of host states to regulate in the name of sustainable development objectives in Article 20 of the SADC Model BIT, it went further to stress the possibility of addressing past racial injustices in the African region within new investments.¹²⁴ The South African Investment Treaty language influenced the wording of this article as the Commentary put it.¹²⁵ This would be aligned with SDG goal 10, “reducing inequality within and among countries.” Further, perhaps the newly introduced goal 16 would embody this as well by “promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels.”¹²⁶ The interdisciplinary sensation in Article 21/3 and SDG’s produce, an inclusive only process, results in sustainable development intersecting with transitional justice goals where trade, sustainable development and transitional justice serve certain communities, such as post-conflict South Africa.¹²⁷

The extensive Eurasian Economic Union-Vietnam PTA offers a whole Chapter entitled “Sustainable Development.”¹²⁸ It defined the term’s components as, “The Parties recognize that economic development, social development and environmental protection are interdependent and mutually supportive components of sustainable development.”¹²⁹ This Agreement gave consideration, as it did in its Preamble, to the different levels of development of its parties, and it considered policies in this direction as part of the sovereignty of states, with the obligation on its parties not to abuse their policies in order to discretely adopt protectionist measures.¹³⁰ The Agreement consequently illustrated a framework for cooperation amongst its parties to achieve sustainable development objectives.¹³¹

The mega-regional agreement mentions the term sustainable development in the context of environmental protection.¹³² This seems to imply that sustainable development has been ultimately confined to environmental development, but the ensuing provisions below counter this intuition with economic and even cultural development avenues. This certainly signals though the strength of environmental concerns within this agreement. The Agreement’s Preamble provides the aim to, “*promote* high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices.”¹³³

A rather distinct cultural blend or preservation was also included in the text of the TPP.¹³⁴ An insinuation of a rather sustainable perspective on the maintenance of local ownership over trade rules seem to be protected through their participation, where Article 29.8 mentions, “Subject to each Party’s international obligations, each Party may establish appropriate measures to respect, preserve and promote traditional knowledge and traditional cultural expressions.”¹³⁵

Furthermore, Chapter 23 of the TPP is devoted fully to the idea of “development.”¹³⁶ It elaborates development on many of its aspects, and is used sometimes interchangeably with the term “economic growth.”¹³⁷ The Agreement, nevertheless, emphasizes the joint role in achieving development objectives in Article 23.6, including working with bilateral partners, private companies, academic institutions, and non-governmental organizations (NGOs).¹³⁸

Chapter 20 stands out when it comes to environmental concerns under the rhetoric of sustainable development.¹³⁹ This Chapter offered extensive support to environmental concerns, linking many other agreements, i.e. Multilateral Environmental Agreements (MEAs), and empowering other actors, such as private partners.¹⁴⁰ The Chapter emphasizes through Article 20.2 that environmental protections are of a cooperative nature, thus, local environmental laws or measures shouldn’t be used to disguise protectionism or restriction on trade and investments between the parties. Policy or standard “coherence” in another sense is what the Agreement appears to be pushing for, although this delicate balance could prove more complex in practice.¹⁴¹ This is especially true when considering that ensuing Article 20.3, “General Commitments,” stresses the importance of state owned and initiated environmental policies as recognition of state’s sovereignty.¹⁴²

What captivates this idea of a qualified type of regulatory practice in the TPP is the whole chapter on “Regulatory Coherence.”¹⁴³ The idea within this Chapter evolves around a harmonized status quo, in which “sovereign” states would draw on good practices in “planning, designing, issuing, implementing, and reviewing” their domestic regulatory policies to achieve their objectives, while still maintaining a cooperative cross-border relationship to further the main objectives of the TPP.¹⁴⁴ The same Chapter steers states to the means for reaching such coherence, and further establishes the Committee for Regulatory Coherence to oversee parties’ regulatory activity, and more broadly, global best practices.¹⁴⁵

The idea of a coherent structure that the TPP seems to have struck may just be a restatement that harmonized complementarity between trade agreements remains desirable. The bilateral, regional, and multi-regional trade phenomenon is not completely disintegrated from WTO provisions. State members’ rights and obligations under WTO provisions are referred to when establishing the foundations of other recent PTAs.¹⁴⁶ The TPP, for instance, ensured that it draws on the WTO members’ rights and obligations in the Preamble itself.¹⁴⁷ And in Article 1.2 of the TPP Agreement, entitled “Relation to other Agreements,” the TPP reiterates the connection of its parties to their WTO commitments.¹⁴⁸

D. ARE WE GOING TOO FAR?

With seventeen goals and one hundred sixty-nine targets, are the new SDGs too much for global trade to bear? Perhaps not, when taking into consideration that the global trade regime is not expected to act solely upon the SDGs. The proposal of inter-agency collaboration is only logical when it comes to this gigantic undertaking in the name of the new SDGs.¹⁴⁹ The idea

of a collaborative effort would anticipate the role of all key actors, whether private actors in the form of multinational enterprises (MNEs), small and medium enterprises (SMEs), civil society, or governments themselves. Private standard setting may be just as important as governmental or inter-governmental standard setting, as is the case with global value chains (GVCs). This may encompass a debate between a rule-based global trade regime as opposed to a power-based one.¹⁵⁰ It is quintessential to comprehend informal means of standard setting to complement hard provisions.¹⁵¹ It is the plot where states take a firm position with hard treaty provisions when the compliance of other treaty parties is crucial. Whereas, when states are faced with a scenario that requires more flexibility to take certain actions, it would opt for softer provisions “without institutional teeth.”¹⁵² The very idea of a vast array of goals and targets within the SDGs makes this perhaps necessary.

Late John Jackson discussed the importance of institutional structures to regulate global norms,¹⁵³ where he refers to this institutional feature as the “constitution” of the world trading system.¹⁵⁴ He emphasized this structure, in an analogy to domestic constitutions; goes further to even include informal mechanisms and “practices”.¹⁵⁵ He followed up with this idea in the aftermath of the Seattle riots, challenging the institutional structure of the WTO, and further stresses thus far a “rule-oriented system” approach.¹⁵⁶ Jackson accentuates the importance of an international organization, while not able to directly implement technical or non-technical measures for the market economy itself, establishes rules that are necessarily “effective, reasonably efficient to implement, and credible enough” to allow domestic policies to build upon them in different business state of affairs.¹⁵⁷ And although this seems reasonable and credible in and of itself, the problem today is that states debate the flexibility they have in implementing technically complex rules, which is why this has partially been acknowledged through (S&D) provisions.¹⁵⁸

One major explanation for considering informal means of standard setting is the fact that when it comes to multilateral and mega-regional trade agreements, reaching an agreement amongst a vast array of members or parties is extremely thorny.¹⁵⁹ In terms of incorporating the SDGs into international trade, since they are so dynamic when tracing their history and passing through the MDGs, a dynamic and flexible means of living up to an this accelerating agenda, would better fit this condition, and this is where informal standard setting can play a role.¹⁶⁰

As for the issue of compliance with this informal standard-setting approach, there are many elements that incite, or even force states to comply.¹⁶¹ Reputation cost, reciprocity, and obtaining certain international benefits, by first meeting a certain threshold, such as the case of the International Monetary Fund and its Articles of Agreement, and the World Bank and its development aid dimensions, can play a crucial role.¹⁶²

To clarify this informal international standard approach in international trade, there is evidence from the Technical Barriers to Trade (TBT) Agreement.¹⁶³ This Agreement aims to ensure that technical regulations, standards, and conformity assessment

procedures, are non-discriminatory and do not restrict trade, but on the other hand allow for some policy objectives to be achieved, such as the protection of human health and safety or the environment, where state member measures are based on “international standards.”¹⁶⁴ What has been established within the WTO as a result is the TBT Committee, which functions in mainly two areas, reviewing member specific measures, and strengthening the implementation of the TBT Agreement.¹⁶⁵ The TBT Committee highlighted six major principles in its 2000 Decision that should guide WTO members in adopting international standards that lead state regulations and measures.¹⁶⁶ The Principles are (1) transparency, (2) openness, (3) impartiality and consensus, (4) effectiveness and relevance, (5) coherence, and (6) addressing the concerns of developing countries.¹⁶⁷ These six principles swim in the sea of transparency and participation amongst WTO TBT Agreement parties.¹⁶⁸ It stressed the importance that local governments, non-governmental standardizing bodies, and regional standardizing bodies, of which they are members, also accept these standards, as in the Code of Good Practice for the Preparation, Adoption, and Implementation of Standards (“the Code”), Annex 3 of the TBT Agreement.¹⁶⁹

The WTO Dispute Settlement Body acknowledges this friendly shift towards soft international standard setting. The 2012 Appellate Body Report in the *US-Tuna II* case undertook the task of examining the international standards that were adopted by Mexico in order to justify its measure.¹⁷⁰ But the Appellate Body denied international standard status to the adopted measure. The reason was because the process through the Agreement on the International Dolphin Conservation Program did not fulfill the “soft” TBT Committee Principles of transparency and participation precisely, although they also overlapped with the other principles, where open contribution for other WTO members is respected.¹⁷¹

As for follow-up mechanisms to sustainable development objectives in international trade, taking into consideration the “aspirational” nature of the SDGs for states, the review mechanisms would perhaps fit a “gentle”, but effective approach towards trade policies.¹⁷² In Alice Tipping and Robert Wolf’s Working Draft on *Trade and Sustainable Development: Options for Follow-up and Review of the Trade-related Elements of the Post-2015 Agenda and Financing for Development*, they propose this review mechanism, and trace the components of this mechanism to the different international forums, including the WTO, UNCTAD, the World Bank, and other regional organizations such as OECD, Association of Southeast Asian Nations (ASEAN), Asia Pacific Economic Cooperation (APEC), SADC, and both United Nations Economic Commission for Europe (UNECE) and United Nations Economic Commission for Latin America and the Caribbean (ECLAC).¹⁷³

The previous Working Paper identified categories, or “clusters,” of SDG topics of which international trade intersects.¹⁷⁴ The six categories underlined comprised of the issue of reforms of subsidies to agriculture, fisheries, fossil fuels, and enhancing market access for small enterprises in this regard.¹⁷⁵ Another category was international cooperation related to technology for

water and sanitation, clean energy, infrastructure, and access to medicines.¹⁷⁶ A third cluster was the role of economic diversification, trade facilitation, and empowering global value chains.¹⁷⁷ The following category was related to illegal extraction and trade in natural resources and chemicals.¹⁷⁸ The fifth category was connected to DDR structural aims of empowering developing countries; including least developed countries LDCs' market access.¹⁷⁹ Lastly, the sixth group referred to policy coherence at the different levels, a framework that would embrace multilateral, regional, and local trade rules.¹⁸⁰

It is also worth raising in this regard that concerted efforts have already began taking place to implement such review mechanisms in the face of the complex SDGs task in its association to trade.¹⁸¹ The United Nations Secretary-General has established the *United Nations System Task Team on the Post-2015 United Nations Development Agenda* (Task Team), not only to prepare for this agenda, but also to follow up with its implementation.¹⁸² This Task Team is co-chaired by the UN Department on Economic and Social Affairs, United Nations Development Program (UNDP), and further accumulates more than 60 different UN agencies and international organizations, of which UNCTAD is one.¹⁸³

IV. CONCLUSION

Lodging the SDGs into international trade is no easy task, but it is nevertheless unavoidable. The SDGs may be teaching us a lesson about how elaborate the issue of "linkage" has evolved to be, and the importance of concerted cooperative solutions

in this manner.¹⁸⁴ Even when shifting to international trade, purely national regulatory measures don't seem to easily fit into this logic of shared values, which might explain alternations towards regionalism in an interdependent economic world.¹⁸⁵ Nonetheless, states do have their own worries and interests in which the SDGs took into account when setting an elaborate framework, coated with several technical guidelines.¹⁸⁶

This Article has attempted to illustrate how the sustainable development agenda has evolved into what it has become today. This agenda has encompassed a vast array of topics that the international community agreed represents their respective diverse needs today. In parallel to this agenda, or perhaps from

within, exists an international trade regime struggling to prove that domestic development needs are apprehended within a global framework, and as a result, a substantial number of PTAs emerge in response to a multilateral trading system. What has been addressed in these dif-

ferent PTAs, whether of a bilateral, regional, or multiregional nature, are that sustainable development needs must be embarked upon by any international trade agenda.

The burdensome task of taking into account the new SDGs within the international trade regime requires taking "linkages" a step further. Linking the new SDGs agenda would mean a comprehensive, interrelated, interagency consideration, where soft and hard law, formal and informal rules, would shape a common end and redefine contemporary boundaries. The process is certainly costly, technically challenging, and politically multifaceted, but possible.



ENDNOTES: LODGING THE SUSTAINABLE DEVELOPMENT GOALS IN THE INTERNATIONAL TRADE REGIME: FROM TRADE RHETORIC TO TRADE PLETHORIC

¹ JOSEPH STIGLITZ, MAKING GLOBALIZATION WORK 8-9 (W.W. Norton & Co., 2006) (further noting that that even in developed countries, the rich were getting richer and the poor were being faced with doubtful futures).

² Vienna Convention on the Law of Treaties art. 31 ¶ 7, May 23, 1969 [hereinafter "VCLT"] (indicating that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.")

³ See AMARTYA SEN, DEVELOPMENT AS FREEDOM 3 (Anchor Books, NY 1st ed., 1999); see also Upendra Acharya, *The Future of Human Development: The Right to Survive as a Fundamental Element of the Right to Development*, 42 DENV. J. INT'L L. & POL'Y 345, 360-65 (2014) (providing examples of freedom of development regarding financial and corporations).

⁴ See SEN, *supra* note 3, at 3.

⁵ See generally Timothy W. Luke, *Neither Sustainable nor Development: Reconsidering Sustainability in Development*, 13 SUSTAINABLE DEV. 228, 228-38 (2005) (attempting to critically analyze the evolution and rhetoric of 'sustainable' development, in which neither leads to sustainability nor development).

⁶ World Comm. on Env't and Dev., *Our Common Future: Report of the World Commission on Environment and Development* 43, U.N. Doc. A/42/427 (1987).

⁷ See NICO SCHRIJVER, THE EVOLUTION OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW: INCEPTION, MEANING AND STATUS 23-24 (Hague Acad. of Int'l L., 2008).

⁸ See Declaration to the Right of Development, G.A. Res. 41/128, U.N. Doc. A/Res/41/128, at art. 1 (Dec. 4, 1986) (reiterating that "peoples" are the central subjects of this right on the premises of it being an "inalienable human right").

⁹ See generally Jeremy Waldron, *Duty Bearers for Positive Rights* (N.Y.U. Sch. of L. Pub. L. Research Paper Series, Working Paper No. 14-58, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2510506 (elaborating on how duty-bearers of social and economic rights could change with the change of particular interests that are protected, and even become multiple duty-bearers).

¹⁰ See SCHRIJVER, *supra* note 7, at 24.

¹¹ See *id.* (citing G.A. Res. 1483, at ¶ 8(e), UN Doc. S/RES/1483 (May 22, 2003) related to the economic reconstruction of Iraq and the conditions for sustainable development).

¹² See *Millennium Summit (6-8 September 2000)*, U.N., http://www.un.org/en/events/pastevents/millennium_summit.shtml (last visited Apr. 17, 2016).

ENDNOTES: LODGING THE SUSTAINABLE DEVELOPMENT GOALS IN THE INTERNATIONAL TRADE REGIME: FROM TRADE RHETORIC TO TRADE PLETHORIC

continued from page 13

¹³ See DEEPAK NAYYAR, THE MDGs AFTER 2015: SOME REFLECTIONS ON THE POSSIBILITIES 5-6, 11 (2012), available at http://www.un.org/millenniumgoals/pdf/deepak_nayyar_Aug.pdf.

¹⁴ See SCHRIJVER, *supra* note 7, at 25.

¹⁵ See generally *Millennium Development Goals and Beyond 2015: Background*, U.N., <http://www.un.org/millenniumgoals/bkgd.shtml> (last visited Apr. 17, 2016) (listing each goal with its accompanying hyperlink).

¹⁶ See *Transforming Our World: The 2030 Agenda for Sustainable Development*, G.A. Res. 70/1, ¶ 18 U.N. Doc. A/RES/70/1 (Oct. 21, 2015).

¹⁷ See *Sustainable Development Goals*, U.N., <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (last visited Apr. 17, 2016).

¹⁸ See ZACHARY RICE ET AL., LISTENING TO LEADERS: WHICH DEVELOPMENT PARTNERS DO THEY PREFER AND WHY? 83 (2015), available at http://aiddata.org/sites/default/files/publication_full_2.pdf (noting that in a joint effort, the World Bank's Development Committee described the process of financing the SDGs as meeting "the investment needs of the Sustainable Development Goals, the global community needs to move the discussion from "Billions" in ODA to "Trillions" in investments of all kind: public and private, national and global, in both capital and capacity." (citing AFRICAN DEV. BANK ET AL., FROM BILLIONS TO TRILLIONS: TRANSFORMING DEVELOPMENT FINANCE, POST-2015 FINANCING FOR DEVELOPMENT: MULTILATERAL DEVELOPMENT FINANCE 1 (2015), available at <http://issuu.com/copcutbrasil/docs/55a513bf6b19a>)).

¹⁹ See RICE ET AL., *supra* note 18, at 83.

²⁰ The nature of U.N. General Assembly resolutions is discussed in art. 10 of the U.N. Charter, where the Assembly "may make recommendations to the members of the United Nations or to the Security Council or to both on any such matters of questions." See U.N. Charter art. 10.

²¹ See NAYYAR, *supra* note 13, at 11.

²² See *Understanding the WTO: Basics*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Apr. 17, 2016).

²³ Roberto Azevêdo, Director-General, World Trade Org., Speech at the Peterson Institute (Sept. 24, 2015) (transcript available at https://www.wto.org/english/news_e/spra_e/spra81_e.htm) (elaborating that "What we have found so far is that WTO rules provide the basis for many RTAs. When RTAs deal with issues covered by WTO disciplines, those disciplines are maintained. This is mostly the case in anti-dumping provisions, safeguards, technical barriers to trade, sanitary and phytosanitary measures, and rules of origin in services.").

²⁴ See generally *id.* (noting that Azevedo referred to the success of the WTO as "part of the architecture of global economic governance").

²⁵ Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, at Preamble, 1994, 1867 U.N.T.S. 154 [hereinafter "Marrakesh Agreement"].

²⁶ See generally General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (Preamble) [hereinafter GATT] (mentioning "Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.").

²⁷ See Padideh Ala'i, *Trade and Sustainable Development*, 4 SUNGKYUNKWAN J. OF SCI. & TECH. L. 63, 65 (2010).

²⁸ *Id.*

²⁹ See GATT, *supra* note 26, at 1 (noting that its language pertains to raising standards of living, full employment, economic growth, and full use of resources is similar to the one found in the Marrakesh Agreement Preamble).

³⁰ See Marie-Claire Cordonier Segger & Markus W. Gehring, *Introduction* in *SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW*, 1, 7 (2005).

³¹ *Id.* at 7-8

³² *Id.* at 9-10. See also Appellate Body Report, *United States-Import Prohibition of Certain Shrimps and Shrimp Products*, ¶ 154 WT/DS58/AB/R (Oct. 12, 1998) [hereinafter *Shrimp-Turtle*] (quoting the Appellate Body in the *Shrimp-Turtle* case where it stressed "We also note that since this preambular language was negotiated, certain other developments have occurred which help to elucidate the objectives of WTO Members with respect to the relationship between trade and the environment. The most significant, in our view, was the Decision of Ministers at Marrakesh to establish a permanent Committee on Trade and Environment (the "CTE")... In this Decision, Ministers took "note" of the Rio Declaration on Environment and Development 147, Agenda 21 148, and "its follow-up in the GATT, as reflected in the statement of the Council

of Representatives to the CONTRACTING PARTIES at their 48th Session in 1992...").

³³ Ala'i, *supra* note 27, at 65.

³⁴ See Segger & Gehring, *supra* note 30, at 10.

³⁵ *Id.* at 11.

³⁶ See generally Robert Howse, *Mainstreaming the Right to Development into the World Trade Organization*, in *REALIZING THE RIGHT TO DEVELOPMENT, ESSAYS IN COMMEMORATION OF 25 YEARS OF THE UNITED NATIONS DECLARATION ON THE RIGHT TO DEVELOPMENT* 249, 252-253 (2013), available at <http://www.ohchr.org/Documents/Issues/Development/RTDBook/PartIIIChapter18.pdf> (noting that Howse quotes both Kevin Davis and Benedict Kingsbury's take on the implications of over-burdening fragile states with obligations imposed on them by global governance institutions).

³⁷ See *id.* at 252.

³⁸ See *id.* at 252 (inferring that because of the inclusiveness indicative of the meta-structures, there is an aspect of seclusion and lack of transparency).

³⁹ See Marrakesh Agreement, *supra* note 25, at Preamble.

⁴⁰ See Howse, *supra* note 36, at 253.

⁴¹ See JOHN H. JACKSON ET AL., *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIAL, AND TEXT* 1281 (West 6th ed. 2013) (noting that Special and Differential treatment includes exempting LDCs from export subsidy ban, increased participation of developing countries in the General Agreement on Trade in Services (GATS), in addition to elongated transition periods to fulfill new commitments).

⁴² Howse, *supra* note 36, at 253 (providing a background on the Doha Development Round).

⁴³ World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter *Doha Declaration*].

⁴⁴ See Segger & Gehring, *supra* note 30, at 20-21.

⁴⁵ See Ala'i, *supra* note 27, at 67.

⁴⁶ See GATT, *supra* note 26, at art. XX.

⁴⁷ See generally *Shrimp-Turtle*, *supra* note 32, at ¶ 128, 153 (noting that Article XX is a living and breathing).

⁴⁸ See *id.* at ¶ 153.

⁴⁹ See Ala'i, *supra* note 27, at 67.

⁵⁰ *Shrimp-Turtle* case ¶ 153.

⁵¹ Ala'i, *supra* note 27, at 77.

⁵² *UNGA Second and Third Committees kick off in New York*, DESA NEWS (Nov. 2015), <https://www.un.org/development/desa/newsletter/feature/2015/11/#18476>. See generally *Second Committee*, GEN. ASSEMBLY OF THE UNITED NATIONS (Oct. 19, 2015) <http://www.un.org/en/ga/second/index.shtml>, (indicating that the Second Committee is the Economic and Financial Committee, and it is tasked with issues relating to economic growth and development, such as macroeconomic policy questions, financing for development, sustainable development, human settlements, poverty eradication, globalization and interdependence, operational activities for development, and information and communication technologies for development).

⁵³ DESA News, *supra* note 52.

⁵⁴ JOOST PAUWELYN, *Preface* to *CONFLICTS OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW*, at xi (2003).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See RONALD DWORKIN, *Introduction* to *TAKING RIGHTS SERIOUSLY*, at xi (Harvard University Press, 1977).

⁵⁸ See generally Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 61 AM. J. INT'L L. 55, 55-56, 58 (providing the typical characteristics of *jus cogens*).

⁵⁹ See JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS*, (Oxford University Press 2005) (noting that it is unclear to what extent the hierarchy in Art. 38 of the International Court of Justice Statute can resolve the creative legislative methods that today's international law witnesses, including international organizations' law-making roles).

⁶⁰ Howse, *supra* note 36, at 249.

⁶¹ See *id.* (citing Int'l L. Comm. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶ 37, U.N. Doc. No. A/CN.4/L.682 (Apr. 13, 2006).

- ⁶² See PAUWELYN, *supra* note 54, at 9-10.
- ⁶³ See *id.*
- ⁶⁴ See *id.* at 18-19.
- ⁶⁵ See *id.* at 19-20.
- ⁶⁶ See *id.*
- ⁶⁷ See *Id.* at 488-90.
- ⁶⁸ See *id.* at 489, 491.
- ⁶⁹ Gregory C. Schaffer & Mark A. Pollack, *Hard v. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 709 (2010).
- ⁷⁰ See *id.* at 708-09.
- ⁷¹ See Azevêdo, *supra* note 23.
- ⁷² See *id.*
- ⁷³ See *Public Form 2015*, WTO, https://www.wto.org/english/forums_e/public_forum15_e/public_forum15_e.htm (last visited Apr. 17, 2016).
- ⁷⁴ See Roberto Azevêdo, Director-General, World Trade Org., Speech at the United Nations Headquarters (Sept. 25, 2015) (transcript available at https://www.wto.org/english/news_e/news15_e/dgra_25sep15_e.htm).
- ⁷⁵ *Id.*
- ⁷⁶ *Id.*
- ⁷⁷ Sustainable Development Goals, *supra* note 17.
- ⁷⁸ PAUWELYN, *supra* note 54, at 491.
- ⁷⁹ *Id.*
- ⁸⁰ *Id.* at 490.
- ⁸¹ *Id.*
- ⁸² *Id.*
- ⁸³ See VCLT, *supra* note 2, at art. 31(3)(c).
- ⁸⁴ See PAUWELYN, *supra* note 54, at 490.
- ⁸⁵ See generally Henning Jessen, *Trade and Development Law in Sustainable Development in World Trade Law* 77, at 84-86 (discussing how although development is not recognized as a right by the industrial world, it is recognized as soft law).
- ⁸⁶ See *id.*
- ⁸⁷ See JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* 224 (Harvard University Press 2008).
- ⁸⁸ See Howse, *supra* note 36, at 254 (discussing the different kinds of individuals in the WTO who oversee the implementation of s).
- ⁸⁹ See *id.* at 255-56.
- ⁹⁰ See *id.* at 250, 256.
- ⁹¹ See Jackson, *supra* note 41, at 254.
- ⁹² *Members and Observers*, WTO, available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 17, 2016); see also Azevêdo, *supra* note 23.
- ⁹³ Perhaps this could be illustrated by the different government procurement concerns between the U.S. on the one hand, and the E.U. on the other, within the context of the Transatlantic Trade and Investment Partnership Agreement negotiations. Where state sovereignty within the U.S. federal system could prove problematic to these negotiations, while still drawing on the WTO Government Procurement Agreement as amended in 2012.
- ⁹⁴ See *Brazil, Russia, India, and China –BRIC*, INVESTOPEDIA, available at <http://www.investopedia.com/terms/b/bric.asp> (last visited Apr. 23, 2015) (explaining BRIC members are Brazil, Russia, India, and China).
- ⁹⁵ Richard Baldwin & Caroline Freund, *Preferential Trade Agreements and Multilateral Liberalization in Preferential Trade Agreement Policies for Development: A Handbook* 123, 134-37 (Jean-Pierre & Jean-Christophe Mau eds. World Bank, 2011) (highlighting that there has been literature on the issue of the proliferation of preferential trade agreements in comparison with the multilateral trading system approaching it from different angles. Paul Krugman looked into the rational choice and prisoner's dilemma aspect pushing states to opt for a regionalism or bilateralism. While others like Richard Baldwin and Caroline Freund discuss whether empirical research could explain if and how one option is better than the other.).
- ⁹⁶ *World Investment Report 2015*, UNCTAD, available at <http://www.worldinvestmentreport.org/wir2015/wir2015-ch3-investment-policy-trends/> (last visited Apr. 28, 2016).
- ⁹⁷ See *id.* at 106.
- ⁹⁸ See *id.*
- ⁹⁹ See *id.* at 107.
- ¹⁰⁰ See *id.* at 112.
- ¹⁰¹ See *id.* at 108.
- ¹⁰² See *id.* at 112.
- ¹⁰³ See *id.* at 108.
- ¹⁰⁴ See *Model Agreements*, Investment Policy Hub, UNCTAD, available at <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIRResults> (last visited Apr. 28, 2016) [hereinafter *Model Agreements*] (providing an example of the Preambles of the Norway Model BIT (2015), Austria Model BIT (2010), and Canada Model BIT (2004) and article 11 thereof).
- ¹⁰⁵ See *id.*
- ¹⁰⁶ See *Norway Data*, WORLD BANK, available at <http://data.worldbank.org/country/norway> (last visited Apr. 28, 2016).
- ¹⁰⁷ See *Model Agreements*, *supra* note 104 (highlighting the preamble of the Norway Model BIT 2015).
- ¹⁰⁸ See *id.*
- ¹⁰⁹ *Id.*
- ¹¹⁰ See *id.* (quoting the Norway Model BIT 2015 art. 11/1).
- ¹¹¹ See *id.* (quoting the Norway Model BIT 2015 art. 12).
- ¹¹² See *id.*
- ¹¹³ See *id.* (quoting Preamble of the Norway Model BIT 2015).
- ¹¹⁴ UNCTAD, 2012 U.S. Model Bilateral Investment Treaty (2012) [hereinafter *Model Bilateral Investment Treaty*], available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2870> (last visited Apr. 28, 2016).
- ¹¹⁵ See *id.* (noting Art. 1 of the U.S. Model BIT 2012 provides a definition of the term “investment”, and provides a list that may fall under that scope).
- ¹¹⁶ *Salini Costruttori S.p.A. & Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 52 (2003), 42 ILM 609 (2003).
- ¹¹⁷ *Id.* at 57.
- ¹¹⁸ See *Model Bilateral Investment Treaty*, *supra* note 114 (“Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards . . . Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration . . . Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights.”).
- ¹¹⁹ UNCTAD, Southern African Development Community (SADC) Model Bilateral Investment Treaty Model Template with Commentary (2012) [hereinafter “SADC Model BIT”], available at <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIRResults> (last visited April 28, 2016).
- ¹²⁰ See *Model Agreements*, *supra* note 104 (concerning the previously mentioned Preambles of the Norway Model BIT, Austria Model BIT, and Canada Model BIT).
- ¹²¹ See SADC Model BIT, *supra* note 119, at art. 13.1; see also *Sustainability at IFC*, INT’L FIN. CORP., available at <http://www.ifc.org/wps/wcm/connect/topics> (last visited Apr. 19, 2016).
- ¹²² See *Model Agreements*, *supra* note 104 (noting the closing sentence of the Norway Model BIT 2015).
- ¹²³ SADC Model BIT, *supra* note 119, at art. 13.4.
- ¹²⁴ See *id.* at art. 21.3.
- ¹²⁵ See *id.* (referencing Commentary on art. 21 of the SADC Model BIT).
- ¹²⁶ Sustainable Development Goals, *supra* note 17.
- ¹²⁷ See generally Pablo de Greiff, *Transitional Justice and Development in Transitional Justice and Development: Making Connections* (Pablo de Greiff and Roger Duthie eds., 2009).
- ¹²⁸ See UNCTAD, Eurasian Economic Union-Vietnam FTA Model Agreement (2012) [hereinafter *EEU-Vietnam FTA*], available at <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIRResults> (last visited Nov. 4, 2015); see also UNCTAD, GCC-EFTA FTA-Kuwait: Other IIAs, INV. POLICY HUB, (2009) available at <http://investmentpolicyhub.unctad.org/IIA/CountryOtherIIAs/112#iiaInnerMenu> (last visited Apr. 28, 2015) (noting the term sustainable development was also mentioned within the context of the Preamble of the GCC-EFTA FTA, between the member states of the Gulf Cooperation Council and the European Free Trade Association –composed of the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation).
- ¹²⁹ EEU-Vietnam FTA, *supra* note 128, at art. 12.1.
- ¹³⁰ See *id.* at art. 12.3-12.4.
- ¹³¹ See *id.* at art. 12.5-12.6, 12.8.
- ¹³² See generally Office of the U.S. Trade Representative, *TPP Full Text* [hereinafter “TPP Agreement”], available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/TPP-Full-Text> (last visited Apr. 19, 2016) (noting the preamble of the TPP).
- ¹³³ *Id.*
- ¹³⁴ See generally *id.* at 230-35.
- ¹³⁵ *Id.* at 230.

- ¹³⁶ See generally *id.* at 201-26.
- ¹³⁷ *Id.* at 233.
- ¹³⁸ See *id.* at 203.
- ¹³⁹ See *id.*
- ¹⁴⁰ See *id.* at 209-10.
- ¹⁴¹ See *id.* at 251.
- ¹⁴² *Id.* at 254. (noting that other chapters of the TPP would supersede the Regulatory Coherence Chapter in case of inconsistency, and there is no recourse to the Agreement's dispute settlement mechanism for matters arising from later in this chapter.)
- ¹⁴³ *Id.*
- ¹⁴⁴ EEU-Vietnam FTA, *supra* note 128, at 1; SADC Model BIT, *supra* note 119, at 5; Australian Gov. Dep't of Foreign Aff. and Trade, Free Trade Agreement Between the Government of Australia and the Government of the People's Republic of China, <http://dfat.gov.au/trade/agreements/chafta/official-documents/Documents/chafta-agreement-text.pdf> [hereinafter ChAFTA].
- ¹⁴⁵ See TPP Agreement, *supra* note 132, at 1 (noting other chapters of the TPP would supersede the Regulatory Coherence Chapter in case of inconsistency, and there is no recourse to the Agreement's dispute settlement mechanism for matters arising from this latter Chapter.)
- ¹⁴⁶ See Alice Tipping & Robert Wolfe, *Trade and Sustainable Development: Options for Follow-up and Review of the Trade-related Elements of the Post-2015 Agenda and Financing for Development i*, (Int'l Inst. for Sustainable Dev., Working Draft, 2015), <http://www.iisd.org/sites/default/files/publications/trade-sustainable-development-options-post-2015-agenda.pdf>
- ¹⁴⁷ See EEU-Vietnam FTA, *supra* note 128, (highlighting the preamble); see ChAFTA, *supra* note 144 (noting the preamble); see SADC Model BIT, *supra* note 119 (noting the preamble).
- ¹⁴⁸ TPP Agreement, *supra* note 132, at 1.
- ¹⁴⁹ See Tipping, *supra* note 146.
- ¹⁵⁰ See Joost Pauwelyn, *Rule-based Trade 2.0: The Rise of Informal Rules and International Standards and How they may Outcompete WTO Treaties*, 14 J. INT'L ECON. L. 1, 1-2 (2014).
- ¹⁵¹ See *id.* (describing this as moving away from "thin state consent" to a "thick stakeholder consensus.").
- ¹⁵² Niels Peterson, *How Rational is International Law?*, 20 EUR. J. INT'L L. 1247, 1254-55 (2008).
- ¹⁵³ John Jackson, *Perils of Globalization and the World Trading System*, 24 FORDHAM INT'L L. J. 371, 375 (2000).
- ¹⁵⁴ *Id.*
- ¹⁵⁵ *Id.*
- ¹⁵⁶ See *id.* at 376 (explaining civil society perhaps alerted the international community on how their interests may not always be aligned with those of their governments. And as such, they demand a more direct way to participate in more flexible policies where they can pressure their governments in fulfilling in a certain manner).
- ¹⁵⁷ *Id.*
- ¹⁵⁸ World Trade Organization, *Development: Trade and Development Committee: Special and Differential Treatment Provisions*, https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm (last visited Apr. 19, 2016).
- ¹⁵⁹ *Id.*
- ¹⁶⁰ *Id.*
- ¹⁶¹ *Id.*
- ¹⁶² See Benedict Kingsbury, Nico Kirsch, & Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 58 (2005).
- ¹⁶³ Agreement on Technical Barriers to Trade, Uruguay Round of Trade Negotiations 1994, WTO, available at https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm (last visited Apr. 28, 2016).
- ¹⁶⁴ World Trade Organization, *Technical Barriers to Trade*, https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm (last visited Apr. 28, 2016).
- ¹⁶⁵ *Id.*
- ¹⁶⁶ See WTO Committee on Technical Barriers to Trade, *Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 of January 1995: Note by the Secretariat*, WTO Doc. G/TBT/1/Rev.12 (Jan. 21, 2015) [hereinafter TBT Committee Decisions & Recommendations]; see also WTO Committee on Technical Barriers to Trade, *Annex 2 to TBT Committee Decisions & Recommendations*, WTO Doc. G/TBT/1/Rev.12 (Jan. 21, 2015).
- ¹⁶⁷ See *id.*
- ¹⁶⁸ See *id.*
- ¹⁶⁹ See TBT Committee Decisions & Recommendations, *supra* note 166.
- ¹⁷⁰ Pauwelyn, *supra* note 150, at 15-18.
- ¹⁷¹ See *id.*
- ¹⁷² See Tipping, *supra* note 146, at 7.
- ¹⁷³ *Id.* at 14-19.
- ¹⁷⁴ *Id.* at 9-14.
- ¹⁷⁵ *Id.* at 9-10.
- ¹⁷⁶ See *id.* at 10.
- ¹⁷⁷ See *id.* at 10-11.
- ¹⁷⁸ See *id.* at 11.
- ¹⁷⁹ See *id.* at 11-12.
- ¹⁸⁰ See *id.* at 12-13.
- ¹⁸¹ The UN System Task Team, UN DEV. POLICY & ANALYSIS DIV, http://www.un.org/en/development/desa/policy/untaskteam_undf/index.shtml (last visited Apr. 28, 2016).
- ¹⁸² See *id.*
- ¹⁸³ See *id.*
- ¹⁸⁴ ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 162 Oxford University Press (2008) (explaining the state circumstantial alteration towards broad based treaties for instance, which drags on a number of different topics –what he called “complex treaty mechanisms.” The reasons included, 1) Effectiveness that comes with interrelated topics under one regime. 2) Compensating over different issues with diverse interests. 3) And using existing infrastructure by economies of scope).
- ¹⁸⁵ John Jackson, *Perspectives on Regionalism in Trade Relations*, 27 LAW & POL'Y INT'L BUS. 873, 873 (1996).
- ¹⁸⁶ See Sustainable Development Goals, *supra* note 17 (demonstrating the topics range from issues connected to employment, forced labor, tourism, and strong banking institutions. These targets are soft, and they serve soft goals. This is susceptible to debates on how much “teeth” they have).

ENDNOTES: A NORTH-SOUTH STRUGGLE: POLITICAL AND ECONOMIC OBSTACLES TO SUSTAINABLE DEVELOPMENT *continued from page 25*

- ² See GARY C. BRYNER, FROM PROMISES TO PERFORMANCE: ACHIEVING GLOBAL ENVIRONMENTAL GOALS 260-61 (1997) (inferring that due to developed nations not imposing controls to prevent pollution, developing countries are being treated unjustly when developed nations prevent developing nations from trying to develop).
- ³ See *id.* at 261.
- ⁴ President Barack Obama, Remarks by the President on Climate Change (June 25, 2013) (transcript available at <https://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>) [hereinafter “Obama Remarks on Climate Change”].
- ⁵ See BLACK, *supra* note 1, at 96 (stating “the lack of willingness from the North, particularly the US, to regulate its own energy consumption, does little to encourage Southern governments to take resource conservation seriously.”).
- ⁶ BRYNER, *supra* note 2, at 261.
- ⁷ NAOMI KLEIN, THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE 409 (2014).
- ⁸ See BLACK, *supra* note 1, at 93.
- ⁹ See MAGGIE BLACK, NO NONSENSE INTERNATIONAL DEVELOPMENT: ILLUSIONS AND REALITIES 105 (3d. ed. 2015) (“Blocks on resource use would fix the world in permanent inequality between haves and have nots.”).
- ¹⁰ See Peter Ørebech & Fred Bosselman, *The Linkage between Sustainable Development and Customary Law*, in THE ROLE OF CUSTOMARY LAW IN SUSTAINABLE DEVELOPMENT 13 (2005). See generally FRIEDRICH SOLTAU, FAIRNESS IN INTERNATIONAL CLIMATE CHANGE LAW AND POLICY 7-8 (2009) (providing an overview of the critiques developing countries have of developed countries).