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Imrana Iqbal

Charles Pierson

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# A NORTH-SOUTH STRUGGLE: POLITICAL AND ECONOMIC OBSTACLES TO SUSTAINABLE DEVELOPMENT

By Imrana Iqbal\* and Charles Pierson\*\*

## I. INTRODUCTION

Do developing countries have a future?<sup>1</sup> At least, a future that anyone would want to live in? We propose that the international law of sustainable development can guide developing countries in their attempts to raise their standard of living. This assertion comes with a caveat. Despite the current trend of linking issues of the environment and economic development, the developed countries have clung to their historical tendency of placing economics above concerns over equity and poverty, and the environment. This Article argues that a struggle between developed and developing countries explains the fitful progress towards global sustainability. The developed nations pay lip service to norms of sustainable development but compliance remains poor as the international system has not been given the law-enforcement machinery to compel developed countries to alter environmentally unfriendly economic practices.

### WHAT SUSTAINABLE DEVELOPMENT IS AND WHY IT'S NEEDED

The developing countries aspire to achieve the same level of economic development and standard of living as developed countries. The West developed without paying heed to the environment. From the beginning of the Industrial Revolution in the second half of the eighteenth century until roughly the 1960s, developed countries either ignored or were not yet conscious of environmental concerns. A clean environment became a priority only after they achieved a certain advanced level of development. States of the global South ask why they should not have the opportunity to follow the same path.<sup>2</sup> The developing states thus assert their right to have their coal and burn it too and to harvest their tropical rain forests in pursuit of economic growth.<sup>3</sup>

The South's position has been well articulated in President Barak Obama's 2013 speech on climate change at Georgetown University:

Developing countries are using more and more energy, and tens of millions of people entering a global middle class naturally want to buy cars and

air-conditioners of their own just like us. Can't blame them for that. And when you have conversations with poor countries, they'll say, well, you went through these stages of development—why can't we?<sup>4</sup>

The developing countries correctly point out that the West consumes most of the world's natural resources.<sup>5</sup> Therefore, the West should make a majority of the reductions in natural resource use. For instance, although it is home to no more than five percent of the world's population, the United States consumes 25% of the world's fossil fuels,<sup>6</sup> while producing about 14% of global carbon emissions.<sup>7</sup> Researcher Maggie Black notes the "resentment

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*"The developing countries correctly point out that the West consumes most of the world's natural resources."*

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from the developing world: a regime of international ecological regulation—not in place during Western industrialization—would deny them a 'developed' future."<sup>8</sup> By implementing blocks, there would be a significant shift in the social and economic inequality between developed and developing countries.<sup>9</sup>

Developing countries think that the West has reached the top of the ladder of development and wants to push the ladder out from under poorer states.<sup>10</sup>

The South has a right to be angry, but emulating the West's historical path of development is not possible. An estimated ninety percent of all future population growth is expected to take place in developing countries which requires a significantly different approach to ensuring a habitable environment as industrialization occurs.<sup>11</sup> The concept of sustainable development was formulated to reconcile the conflict between economic growth and environmental protection.<sup>12</sup> The sustainable development idea regards both economic growth and environmental protection as genuine goods.<sup>13</sup> Under sustainable development, growth is not sacrificed for the environment, nor is the environment sacrificed for economic growth.<sup>14</sup> By implementing sustainable

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\* Associate Professor, University of Maryland University College; teaches courses in government and law; J.D., Duquesne University School of Law, 2007; LL.M., University of London, 2013; M.S. Environmental Science and Management, Duquesne University, 2007.

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development goals, developing countries can enjoy sustainable growth while protecting the natural environment.<sup>15</sup>

Developing states will not abandon development practices that degrade the environment merely because developed states exhort them to. These states must commit themselves to changing their own habits and provide technical and financial assistance to poor states for clean sustainable development. In theory this concept seems easy; accomplishing this is another story.

This Article begins by tracing the origins and growth of sustainable development in international conferences and organizations such as the United Nations ("UN") and in the writings of scholars (section II). However, the history of sustainable development has not been one of unqualified success. There has been extensive state practice of opposition to sustainable development. Section III focuses on the United States' resistance and obstruction to sustainable development. Lest anyone incorrectly conclude that it is only the United States that is opposed to sustainable development, Section IV examines how the world trading system clashes with sustainable development. Section V examines structural and other obstacles to sustainable development

## II. SUSTAINABLE DEVELOPMENT: THE HISTORY OF AN EMERGING NORM?

Sustainable development emerged as a new approach to ensuring economic growth while protecting the environment with the publication in 1987 of the Brundtland Report.<sup>16</sup> Although the law had not been entirely indifferent to the concept prior to this publication, the Brundtland Report is generally regarded as setting international environmental law on the path of sustainable development.<sup>17</sup>

The Brundtland Commission rejected the despairing thesis that environmental problems were past repair, spiraling out of control, and could only be averted by arresting development and economic growth: a policy of no growth. Instead, it argued that economic growth was both desirable and possible within a context of sustainable development.<sup>18</sup>

The current direction of international environmental law owes much to the definition of sustainable development presented in the Brundtland Report: "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>19</sup> The report emphasized the concepts of "needs," particularly those of the world's poor, and "limitations" imposed by social organizations and the current level of technological development to meet those needs.<sup>20</sup> These two concepts of needs and limitations now delineate international sustainability concerns and provide broad guidance to encourage state practices for sustainable development in both developing and developed countries.<sup>21</sup>

The Brundtland Report galvanized changes in global policy objectives. Since the Brundtland Report, the law of sustainable development informs international environmental law and includes within its purview both environmental and developmental issues and their social and economic dimensions, including implementation concerns.<sup>22</sup>

Following the Brundtland Report, the concept of sustainable development appears in several international and national legal instruments, reflecting concerns that go beyond economic growth and charting goals that follow a wide range of objectives, including protection of the natural environment, promotion of sustainable economic growth, and achievement of social development. In 1992, the United Nations Conference on Environment and Development (UNCED), also called the Earth Summit or the Rio Conference, outlined the profile of sustainable development in a set of principles that sought to balance the priorities of developed and developing countries.<sup>23</sup>

According to the Rio Declaration, sustainable development comprises intergenerational equity (Principle 3); the integration of environmental protection into the development process (Principle 4); intragenerational equity<sup>24</sup> and the alleviation of poverty (Principle 5); consideration of countries' special development and environmental needs (Principle 6); reduction of unsustainable production and consumption (Principle 8); reductions in population (Principle 8); and effective environmental legislation (Principle 11).

In the years following the Earth Summit, the concept of sustainable development was sharpened in major UN summits. Paragraph 6 of the 1995 Copenhagen Declaration, for instance, features the interconnections between sustainable and social development:

We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people . . .<sup>25</sup>

Paragraph 6 of the Copenhagen Declaration further underscores the importance of achieving environmentally sustainable economic activity through practices that promote social development, particularly for the poor.

Equitable social development that recognizes empowering the poor to utilize environmental resources sustainably is a necessary foundation for sustainable development. We also recognize that broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice.<sup>26</sup>

In 1997, the International Court of Justice looked at sustainable development for the first time. Judge Weeramantry concluded that sustainable development is "a principle with normative value" whether one looks at "multilateral treaties, international declarations, the foundation documents of international organizations, the practices of international financial institutions, regional declarations and planning documents, or State practice."<sup>27</sup>

A 1999 Seminar of the Organization for Economic Co-operation and Development (OECD), on *Social and Environmental Interfaces*, accorded a place of centrality to the quality of human life now and in the future by seeking to

promote developmental practices that are socially responsible, that is, practices which strive to alleviate poverty by ensuring that basic needs are met.

If the primary goals of environmentally sustainable development are freedom from poverty, secure livelihoods, good health and quality of life, then socially responsible development has to deal with such needs as food, basic housing, access to good water, health care (especially for children and older members of society), sanitation, education, energy in the form of fuel, transport, etc.<sup>28</sup>

The World Conservation Union concluded that sustainable development means achieving a standard of living that can be maintained for many generations. Sustainable development is socially desirable because it meets people's cultural, material, and spiritual needs in equitable ways; is economically viable because it pays for itself; and is ecologically sustainable because it protects the viability of ecosystems.<sup>29</sup>

The broadest and most detailed instrument so far in the development of the international law norm of sustainable development has been Agenda 21 adopted at the 1992 Earth Summit.<sup>30</sup> Agenda 21 represents a verbal commitment by nations around the world to take actions to further sustainable development.<sup>31</sup> Agenda 21 is a global affirmation of the premise of the Rio Declaration that the "right of development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations."<sup>32</sup> Although non-binding, Agenda 21 is an action plan for the international community to integrate environmental and development concerns for a sustainable future.<sup>33</sup> It places the responsibility for implementing sustainable development principles on governments—of both developing and developed states—in coordination with the UN, other international, regional, and sub-regional organizations; non-governmental organizations; and the public.<sup>34</sup> Agenda 21's recommendations and proposals provide an agreed upon framework for the development and implementation of international law and policy related to global sustainable development. As Professors Birnie and Boyle declare, Agenda 21 manifests the understanding that sustainable development now "makes a state's management of its own domestic environment a matter of international concern in a systematic way."<sup>35</sup>

#### THE MILLENNIUM DECLARATION AND MILLENNIUM DEVELOPMENT GOALS

Scott Wisor, Deputy Director of the Centre for the Study of Global Ethics at the University of Birmingham, provides this background:

In the late 1990s, Kofi Annan sought a way to keep development and poverty eradication on the agenda in an era of declining concern for global issues. His answer was the Millennium Declaration, a striking document ratified by the world's governments that declared a set of shared values and commitments to a range of goals, which themselves built on previous international summits.<sup>36</sup>

Crafted at the September 2000 UN Millennium Summit, a third of the Declaration addresses sustainable development and eradication of poverty.<sup>37</sup> The Millennium Declaration calls for measures including debt relief, "more generous development assistance," the end of "the unsustainable exploitation of water resources," passage of the Kyoto Protocol, and reaffirms support for Agenda 21.<sup>38</sup>

The Millennium Development Goals ("MDGs"),<sup>39</sup> which followed a year later in Summer 2001, were a "codification of the Declaration's development related objectives."<sup>40</sup> Scott Wisor writes: "[d]rafted in the backrooms of the UN by a small number of high level bureaucrats from several multilateral organizations, the MDGs were a set of eight goals, each with specific targets and indicators against which to track the world's progress."<sup>41</sup>

Goal 7, "Ensure Environmental Sustainability," explicitly references sustainable development in its title, but all the MDGs address matters which scholars now consider to be components of sustainable development.<sup>42</sup>

September 2015 was the deadline for achieving the MDGs. Doyle and Stiglitz concluded: "[T]he MDG record has been mixed. Some goals, such as halving the proportion of people living in extreme poverty, have been met at the global level, but none have been fulfilled in all countries."<sup>43</sup>

#### POST-2015 DEVELOPMENT AGENDA

Well before the 2015 expiration of the MDGs, the United Nations began considering what would follow the MDGs.<sup>44</sup> Planning has been taking place under the rubric of the Post-2015 Development Agenda.<sup>45</sup>

The UN Conference on Sustainable Development ("Rio+20") held in June 2012 established an intergovernmental working group, the Open Development Group, to formulate the unimaginatively named Sustainable Development Goals (SDGs) to succeed the 2001 Millennium Development Goals.<sup>46</sup>

On July 19, 2014, the Open Development Group released a draft set of Sustainable Development Goals ("SDGs").<sup>47</sup> The SDGs cover much of the same ground as the MDGs.<sup>48</sup> However, unlike the MDGs, the SDGs divide sustainability into several goals.<sup>49</sup>

### III. U.S. PRACTICE: A HISTORY OF OBSTRUCTION

Donald Brown maintains that the United States has consistently blocked global environmental treaty-making efforts and in doing so relinquished its past position of leadership on international issues.<sup>50</sup> For years, the United States hid behind a smokescreen of pretended scientific uncertainty over climate change.<sup>51</sup> The United States argued that scientific evidence does not justify corrective actions and that too little is known about the problem of global warming to justify the costs of stabilizing greenhouse gas emissions.<sup>52</sup> One of the last products of the Carter Administration was a report from the President's Council on Environmental Quality urging the government to act responsibly on climate.<sup>53</sup> The Reagan Administration ignored the report.<sup>54</sup> Instead, the Reagan Administration (1981-89) marshaled supposed scientific uncertainty to validate its unconcern over global warming.<sup>55</sup>

The U.S. government's unwillingness to adopt a principled stance on climate change continued into the Administration of George H. W. Bush (1989-93). During the negotiations on what was to become the UN Framework Convention on Climate Change (UNFCCC),<sup>56</sup> the United States—historically the greatest emitter of greenhouse gases—refused to submit to a formula that would require it to reduce the amount of greenhouse gas emissions in proportion with its past contribution to greenhouse gas buildup.<sup>57</sup> Instead, the United States demanded that developing nations accept responsibility greater than their due share.<sup>58</sup> Owing to this U.S. hardline position, the FCCC contained no enforceable targets and timetables.<sup>59</sup> Donald Brown writes: “The United States reluctantly agreed to make a good-faith effort to reduce greenhouse gas emissions to 1990 levels by 2000.”<sup>60</sup> Additionally, the United States conceded that developed nations should make progress in reducing emissions before expecting commitments from the developing world.<sup>61</sup> Even these watered-down assurances succumbed to Congress’ fierce resistance, impelled by coal and petroleum industry lobbying groups.

This course of inaction continued during the Clinton Administration, which, despite its own inclination to act more conscientiously, found itself helpless before a hostile Congress.<sup>62</sup> In 1995, the new IPCC report concluded that it was now possible to discern the human-induced climate change.<sup>63</sup> Thereafter, the Clinton Administration expressed subdued willingness to accept internationally enforceable targets and binding national emissions reductions timetables.<sup>64</sup> These were negotiated in Kyoto, Japan in 1997.<sup>65</sup>

Negotiations at Kyoto were tense. Congress exerted its weight to impede agreement on the principle of “common but differentiated commitments and responsibilities.”<sup>66</sup> The international community, by contrast, clamored for the United States to make a meaningful and legally binding pledge to reduce its emissions levels.<sup>67</sup> The United States finally agreed to a 7% reduction below 1990 levels by 2008-2012 while other nations agreed to the United States’ proposed “flexibility mechanisms.”<sup>68</sup> Yet, after Kyoto, the Clinton Administration announced that it would not seek ratification of the Kyoto Protocol until “China and other developing nations agreed to limit their emissions, something that they had objected to doing before the developed world acted.”<sup>69</sup>

The Administration of President George W. Bush (2001-09) achieved a new low in shunning responsible action on climate change. The Bush Administration pressured federal agencies and scientists working for the federal government to exaggerate the degree of uncertainty over the existence of anthropogenic climate change.<sup>70</sup> The Bush Administration also trotted out other old excuses: cost to the American economy in terms of lost jobs and reduced GDP<sup>71</sup> and the failure of the developing world to make commitments.<sup>72</sup> In 2001, the Bush Administration renounced the Kyoto Protocol, regarding it as inimical to U.S. economic interests.<sup>73</sup> Later, in the same year, when a National Academy of Sciences report confirmed that global warming was getting worse, President Bush acknowledged the report but insisted that there was too much scientific uncertainty to justify the economic

costs of committed action.<sup>74</sup> In this President Bush proved himself the faithful servant of coal and petroleum groups.<sup>75</sup>

George W. Bush did not deny the reality of climate change; he merely did nothing about the problem.<sup>76</sup> In April 2008, with less than a year remaining before he would leave office, Bush proposed his boldest climate initiative: *voluntary caps*.<sup>77</sup> “[T] here is a wrong way and a right way to approach reducing greenhouse gas emissions,” Bush said, not adding that he was committed to the wrong way.<sup>78</sup>

## THE OBAMA ADMINISTRATION, 2009 TO THE PRESENT

The environmental movement had great hopes for Barack Obama.<sup>79</sup> During his 2008 Presidential campaign, candidate Obama promised to make addressing climate change a priority;<sup>80</sup> however, President Obama has consistently disappointed environmentalists. Disillusion with Obama set in early. December 2009 saw the Copenhagen Climate Conference. Copenhagen resulted in what Naomi Klein calls a “pitiful deal.”<sup>81</sup> Under the Copenhagen Accord, Klein writes:

the major polluting governments—including the United States and China—signed a non-binding agreement to keep temperatures from increasing more than 2 degrees Celsius above where they were before we started powering our economies with coal.<sup>82</sup>

The trouble is, keeping world temperatures below 2°C is only the bare minimum threshold for preventing runaway warming.<sup>83</sup> 2°C represents a tipping point beyond which rapidly rising temperatures are irreversible.<sup>84</sup> We aren’t at 2°C yet, but even if the world does not break through the 2°C ceiling, our planet will likely experience a catastrophic rise in sea levels which will inundate major cities from Mumbai to Miami.<sup>85</sup> Millions of human beings are already living in a post 2°C world of rising tides, dying crops, and more and more record hot days.<sup>86</sup> The climate groups who attended Copenhagen hoped to limit world temperature rise to no more than 1.5°C.<sup>87</sup> Instead, environmental activist Bill McKibben estimates that the “commitments” made at Copenhagen will result in a devastating 3°C temperature increase.<sup>88</sup>

Environmental groups had also hoped that the attendees at Copenhagen would agree to cuts in world carbon emissions of 80% by 2050, but that goal was eliminated from the final agreement.<sup>89</sup> The United States pledged to reduce carbon emissions by only 17% below 2005 levels by 2020.<sup>90</sup> The emissions cuts were to have been achieved by a cap-and-trade plan, part of the ill-fated Waxman-Markey bill.<sup>91</sup> Under cap and trade, tradable “carbon credits”—permits to pollute—would be assigned to corporate polluters in the United States.<sup>92</sup> A polluter could obtain additional credits by purchasing from other polluters or by participating in “offsets”: projects, such as planting trees, which would soak up carbon in the atmosphere.<sup>93</sup> In theory, cap and trade would raise the cost of emissions to corporate polluters and spur development of renewable alternatives.<sup>94</sup>

The bill passed the House of Representatives, 219–212.<sup>95</sup> However, Senate Majority Leader Harry Reid (D), decided not

to introduce Waxman-Markey into the Senate because Reid calculated that there were insufficient votes there for the bill to pass.<sup>96</sup> By late July 2010, Waxman-Markey was dead.<sup>97</sup>

Waxman-Markey failed even though it was a strongly pro-corporate bill.<sup>98</sup> Waxman-Markey “[gave] billions of dollars in handouts to fossil fuel companies and practically a license to print money from carbon offsets and credits.”<sup>99</sup> Trading of carbon credits promised a bonanza for Wall Street traders.

Cap-and-trade failed, but Obama did not abandon the goal of reining in carbon emissions. Speaking at Georgetown University on June 25, 2013, President Obama announced a major new initiative to address climate change.<sup>100</sup> Obama proposed setting federal limits on carbon emissions on both new and existing coal-fired power plants, which would cut 2005 emissions levels 30% by 2020.<sup>101</sup> He promised that the cuts would not sacrifice strong economic growth and job creation.<sup>102</sup> The Clean Power Plan, as it is called, has met strong Republican opposition and resulted in two pending federal lawsuits: *West Virginia v. EPA*<sup>103</sup> and *Murray Energy Corp. v. EPA*.<sup>104</sup>

One significant success for the President is the November 2014 bilateral carbon agreement with China.<sup>105</sup> The United States and China produce 45% of the world’s GHG emissions.<sup>106</sup> China does much of its polluting on behalf of U.S. businesses. Much of China’s emissions come from factories owned by U.S. corporations operating in China, such as General Electric, General Motors, Apple, Johnson Controls, and Caterpillar.<sup>107</sup> Thanks to outsourcing, U.S. corporations now vicariously pollute in China.<sup>108</sup> By shifting its emissions overseas, the United States gets to take credit for cutting its carbon emissions more than it actually has.<sup>109</sup> Curbing China’s carbon emissions will be impossible without reigning in U.S. corporations.<sup>110</sup> The two countries agreed to jointly reduce their GHG emissions.<sup>111</sup> The US will cut its emissions 26% to 28% below 2005 levels by 2025,<sup>112</sup> while China pledges that its emissions will cease to grow by 2030.<sup>113</sup> However, it should be noted that the agreement is non-binding.<sup>114</sup>

Much less successful was the Paris Climate Summit held from November 30, 2015 to December 11, 2015.<sup>115</sup> In a different world, a binding international agreement to cut greenhouse gas emissions would have come out of the Paris Summit. Each of the more than 190 countries participating submitted an Intended Nationally Determined Contribution (“INDC”), setting out the amount by which each nation was willing to cut its greenhouse gas emissions.<sup>116</sup> The United States submitted an INDC promising to cut GHG emissions nearly 30% from 2005 levels by the year 2025.<sup>117</sup>

The process had two fatal flaws. The first is arithmetical. The 2015 Paris Summit had the same goal as the 2009 Copenhagen Climate Summit (“COP 15”): to prevent average temperatures from rising more than 2°C from where they stood at the

beginning of the Industrial Revolution.<sup>118</sup> But the participating states’ commitments did not add up. Even if all INDCs were faithfully adhered to (a huge “if”), global temperatures would increase to approximately 3°C by the end of the century.<sup>119</sup> The second fatal flaw is that the Paris Accord, like the Copenhagen Accord before it, is non-binding.<sup>120</sup> “A fraud” is how former NASA scientist and climate change pioneer James Hansen summed up the Paris Summit.<sup>121</sup>

#### IV. DOES TRADE TRUMP ENVIRONMENT?

Professor Philippe Sands has remarked that there are two principal challenges to the development of international sustainable development law.<sup>122</sup> The first is to develop rules that recognize “the need to reconcile the inherent and fundamental interdependence of the world environment with the sovereign world of independent states.”<sup>123</sup> The second challenge is “defin[ing] the relationship between international environmental law and other areas of international law, particularly in the economic and social domain.”<sup>124</sup> This section attempts to address the second challenge. We argue that there is a very simple relationship between international environmental law and the economic domain, specifically international trade law. When trade clashes with environmental protection, trade always trumps environment.<sup>125</sup>

Tariffs are not the only barriers to free trade.<sup>126</sup> There are also non-tariff barriers (NTBs), including, but not limited to, import quotas, import licensing, subsidies, and restrictions on goods’ distribution and sale.<sup>127</sup> Like tariffs, NTBs are regarded

as protectionist.<sup>128</sup> Disastrously for the environment, free trade regimes too often treat states’ attempts to protect the environment as covert protectionism.<sup>129</sup> The idea is that a state may enact a measure on the ostensible grounds that it is designed to protect the environment when the actual aim is to benefit domestic producers at the expense of imports.<sup>130</sup> On occasion, this is a fair criticism.<sup>131</sup>

We can see trade trumping environmental protection in the latest free trade pact, the Trans-Pacific Partnership Trade and Globalization Agreement (TPP). The TPP has been described as “NAFTA on steroids.”<sup>132</sup> The TPP will include twelve Pacific Rim countries representing 40% of global GDP.<sup>133</sup> The text of the agreement was finally made public on November 5, 2015.<sup>134</sup> Up to that time, the text of the TPP was wrapped in the sort of secrecy surrounding plans for military invasions.<sup>135</sup> The general public would have remained in the dark about the TPP’s contents if Wikileaks had not leaked portions of the text.<sup>136</sup>

The TPP states as an objective to “promote high levels of environmental protection and effective enforcement of environmental laws.”<sup>137</sup> That’s the promise; what’s the reality? An earlier draft of the TPP contained an article on climate change.<sup>138</sup> But the final text makes no reference to climate change.<sup>139</sup> As with NAFTA, the TPP’s environmental guarantees lack teeth.<sup>140</sup> As if to

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dispel any doubt of this, TPP contains an article titled, “*Voluntary Mechanisms to Enhance Environmental Performance*.”<sup>141</sup>

Where we do find teeth is in the TPP’s investor protection provisions which the TPP’s drafters have set out in loving detail. Under the TPP, alleged violations of investor protection are subject to Investor-State Dispute Settlement (ISDS).<sup>142</sup> ISDS empower foreign investors, chiefly multinational corporations (MNCs), to pursue arbitration against states for damages resulting from violation of any of the TPP’s investor protection provisions.<sup>143</sup> Disputes are heard before supranational arbitral tribunals, bypassing national courts.<sup>144</sup> Damages, when awarded, come out of the pockets of the host nation’s taxpayers.<sup>145</sup>

The Trans-Pacific Partnership contains four principal investor protection provisions addressing expropriation, fair and equitable treatment, national treatment and most favored nation status.

#### EXPROPRIATION<sup>146</sup>

A foreign investor may recover damages for direct or indirect expropriation of its property, including lost profits.<sup>147</sup> The most obvious instance of direct expropriation is nationalization.<sup>148</sup> However, it is indirect expropriation that is more likely to disrupt environmental regulations directed at climate change mitigation.<sup>149</sup> Indirect expropriation is defined broadly in the TPP.<sup>150</sup> Any environmental regulation that impinges on an investor’s profits or reduces the value of the investor’s property or investments may conceivably be challenged as an indirect expropriation.<sup>151</sup> Thus, an investor may claim that an environmental protection regulation diminishes the value of its investment or property. For instance, rising sea levels caused by warming may prompt bans on building on coastlines.<sup>152</sup> A setback regulation of this sort could conceivably be challenged as an indirect expropriation by a foreign-owned hotel chain planning to build a hotel near the ocean.<sup>153</sup> A recent example of an indirect expropriation claim comes from Germany. After the devastating nuclear meltdown in Fukushima, Japan in 2011, Germany decided to phase out its nuclear reactors.<sup>154</sup> Germany’s decision is being challenged as an indirect expropriation by the Swedish energy giant Vattenfall.<sup>155</sup>

#### FAIR AND EQUITABLE TREATMENT (FET)<sup>156</sup>

States are required to accord foreign investors a minimum standard of fair treatment.<sup>157</sup> What does this mean? That’s hard to say.<sup>158</sup> Answering is complicated by the fact that some WTO panels see FET as a rising bar which demands more of host countries over time.<sup>159</sup> Another difficulty FET puts in the way for environmental protection is the finding of some tribunals that FET requires safeguarding a foreign investor’s “legitimate expectations” of profit.<sup>160</sup> “In its most expansive form,” Wilensky writes, “the principle of legitimate expectations has been interpreted to require a stable [*i.e.*, unchanging] legal and business framework.”<sup>161</sup> The petitioner in *Tecmed* operated a hazardous waste facility under a one-year permit from the Mexican government.<sup>162</sup> Mexico was held liable when it refused to renew the permit for the hazardous waste facility even though Mexico cited public health concerns as the reason for its decision.<sup>163</sup>

Other tribunals *have* required an express promise from the host state made with the intention of inducing the investor’s reliance.<sup>164</sup> Other tribunals have only required that the investor reasonably rely on representations made by the host country regardless of the host country’s intent.<sup>165</sup> In reality, all these approaches turn what the law ought to be upside down. An investor who does not expect states to take steps to address climate change is the one acting unreasonably.<sup>166</sup>

#### NONDISCRIMINATION

The final two investor protections both guarantee that a host state will not discriminate against foreign investors.<sup>167</sup> Under the *National Treatment* obligation a host country is not permitted to treat its own investors more favorably than foreign investors.<sup>168</sup> Under the *Most Favored Nation* obligation (MFN), a host country must treat all foreign investors alike.<sup>169</sup>

Any critic of free trade agreements must come to grips with one apparently strong objection. If free trade agreements are so damaging to the environment why have there been so few ISDS challenges to U.S. environmental laws, and even fewer successful challenges?<sup>170</sup> President Obama himself called attention to this fact while he was promoting passage of the TPP.<sup>171</sup> In a conference call with news reporters on April 24, 2015, the President said that the United States was party to over 3,000 international agreements containing ISDS provisions and that “[u]nder these various ISDS provisions, the U.S. has been sued a total of 17 times. Thirteen of those cases have been decided so far. We’ve won them all. They have no ability to undo U.S. laws.”<sup>172</sup> Obama’s last sentence is technically correct, but is misleading. If a host state loses a challenge to one of its environmental laws, it is likely to abandon that law rather than pay further damages (in the case of the TPP or NAFTA) or face trade sanctions (under the WTO).<sup>173</sup> After the WTO Appellate Body ruling against the United States in the *Venezuela Gas Dispute*, the US rewrote its standards for imported gasoline rather than pay Venezuela an annual \$150 million in fines.<sup>174</sup>

Ontario removed the local content provisions from its Green Energy and Green Economy Act after the provisions were successfully challenged before the WTO.<sup>175</sup> In a third example, the U.S. Congress is poised to abandon country-of-origin meat labeling after the WTO held that the labeling requirement discriminates against livestock from Canada and Mexico.<sup>176</sup>

The very first dispute brought to the WTO involved environmental pollution. In the *Venezuela Gas* dispute,<sup>177</sup> Venezuela challenged an EPA regulation that required imported gasoline to meet stricter pollution standards than gasoline from U.S. producers.<sup>178</sup> Venezuela alleged that this was discrimination in violation of GATT’s national treatment obligation. The United States, however, argued that clean air was an exhaustible natural resource; thus, the anti-pollution EPA Gasoline Rule fell under an exception to GATT’s national treatment obligation: GATT Article XX(g) relating to conservation of natural resources.<sup>179</sup>

The DSB agreed with the United States that clean air was an exhaustible natural resource within the meaning of GATT Article XX(g),<sup>180</sup> a holding which the Appellate Body did not



disturb. However, the Appellate Body said that the EPA Gasoline Rule was not permitted under the Article XX(g) exception because the United States could have chosen non-discriminatory means of preserving air quality.<sup>181</sup> The United States subsequently changed the EPA Rule in order to make it consistent with GATT.<sup>182</sup> The perverse result brought about by the WTO decision was that Venezuela was allowed to sell dirtier gasoline in the United States after the WTO decision than it had before the decision.<sup>183</sup>

The WTO Agreement does not contain an ISDS feature.<sup>184</sup> However, investors can still take action against states indirectly.<sup>185</sup> An aggrieved investor can persuade his or her home country to bring an action in the WTO.<sup>186</sup> The result will be trade sanctions, not an award of damages to the investor. The host country will be motivated to lift the complained of restriction in order to avoid sanctions.<sup>187</sup> So, President Obama is correct that the United States has not lost ISDS challenges. However, the United States has lost challenges before the WTO.<sup>188</sup> NAFTA, GATT, and TTP provide most of the same trade protections.<sup>189</sup> In our opinion, all three of these agreements are relevant to assessing the vulnerability of environmental protection laws to challenges utilizing ISDS.

The ISDS winning streak enjoyed by the United States may come to an end. On February 23, 2016<sup>190</sup> President Obama vetoed the Keystone Pipeline Approval Act.<sup>191</sup> The proposed Keystone XL oil pipeline has been contentious because environmentalists contend the pipeline would do severe harm to the environment.<sup>192</sup> On January 6, 2016, TransCanada, the company contracted to construct and operate the pipeline, filed a challenge against the United States under NAFTA.<sup>193</sup> TransCanada alleged that the cancellation of Keystone XL breached United States' obligations under NAFTA Article 1102 (National Treatment), Article 1103 (Most-Favored-Nation Treatment), Article 1105 (Minimum Standard of Treatment), Article 1110 (Expropriation).<sup>194</sup> TransCanada alleges that the United States rejected the Keystone application for political reasons, not environmental considerations.<sup>195</sup> The United States had approved three similar oil pipelines while TransCanada's application was pending.<sup>196</sup> In addition, several federal environmental impact reviews had all concluded that the Keystone pipeline would not cause significant damage to the natural environment.<sup>197</sup> If TransCanada prevails in its suit, it will provide ammunition for attacking other state measures to mitigate climate change.

## RENEWABLES

To establish a low-carbon economy, use of high-carbon fossil fuels must give way to renewable energy sources such as wind and solar. The first dispute on renewable energy to come before the WTO involved the Canadian province of Ontario.<sup>198</sup> In 2009, the Ontario enacted a Green Energy and Green Economy Act.<sup>199</sup> This "climate action plan" was meant to encourage the growth of renewables, such as wind and solar, and get Ontario, "Canada's most populous province completely off coal by 2014."<sup>200</sup> Under the Act, producers of renewable energy would be entitled to sell to Ontario at guaranteed premium prices under

long-term contracts, an arrangement known as a "feed-in tariff" ("FIT Program").<sup>201</sup> To qualify for the subsidies, producers must meet local content requirements (LCRs) for materials and services.<sup>202</sup> The local content requirements are intended to spur employment in the province.<sup>203</sup> Not just business corporations, but "local municipalities, co-ops, and Indigenous communities" are encouraged to participate.<sup>204</sup>

The WTO Appellate Body held the local content requirements to be inconsistent with national treatment.<sup>205</sup> "National treatment" forbids a host nation from giving preferential treatment to "goods produced by local companies and goods produced [in the host nation] by foreign firms."<sup>206</sup> The FIT Program's Minimum Required Domestic Content Levels were a subsidy available only to producers (foreign or domestic) operating in Ontario.<sup>207</sup> The Appellate Body held that a subsidy offered under these conditions is discriminatory and inconsistent with the national treatment provisions of GATT 1994 and the TRIMs Agreement.<sup>208</sup> Ontario removed the local content requirement so as to comply with the WTO decision.<sup>209</sup> Ontario also cancelled the feed-in tariff for most projects.<sup>210</sup> The authors draw this conclusion from the Appellate Body's decision: a host state cannot promote the growth of renewable energy through subsidies available only to its own citizens. This restriction may hobble measures to promote renewables. Without the promise of Green Jobs, initiatives like Ontario's may not be politically feasible,<sup>211</sup> and local content rules are necessary if Green Jobs are to be created.<sup>212</sup>

Local content rules—or, rather, their analog: domestic content rules—were the subject of a recently decided challenge by the United States against India.<sup>213</sup> In August 2015, a WTO dispute settlement panel ruled that the domestic content requirements (DCR) attached to India's Jawaharlal Nehru National Solar Mission violated national treatment.<sup>214</sup> India required that solar cells and solar modules (and, later, thin film technologies) be manufactured in India.<sup>215</sup> The same sort of LCR had been successfully challenged in Ontario by Japan and the European Union.<sup>216</sup>

## ILLEGITIMATE EXPECTATIONS

Legitimate expectations claims derive from the FET obligation. Environmental lawyer Meredith Wilensky writes:

In the context of climate change, [legitimate expectations] claims are particularly concerning because where climate regulators increase costs or frustrate investments, foreign investors may argue that the regulations violate their legitimate expectations of profit. For example, such suits may arise where emissions standards result in early retirement of coal-fired power plants because they are unable to achieve newly imposed GHG emissions standards. If such a claim is successful, a host state would be required to compensate the investor for the expected profits had the plant continued to operate.<sup>217</sup>

As an example of how the sort of lost profits claims Wilensky has in mind may frustrate regulations meant to address climate change, consider the following troubling scenario. The Obama Administration's Clean Power Plan, discussed above,<sup>218</sup> will



require carbon emissions cuts at existing coal-burning electricity generating plants throughout the United States.<sup>219</sup> In Kentucky alone there are 57 such units located in 21 plants.<sup>220</sup> Two firms own sixteen of these units: Kentucky Utilities Company and Louisville Gas & Electric.<sup>221</sup> These two companies are owned by German energy giant E.ON AG.<sup>222</sup> Germany is one of the countries currently negotiating TPP's clone, the Transatlantic Trade and Investment Partnership (TTIP) which will apply to the US and Europe in the same way as the TPP applies to the Pacific Rim countries.<sup>223</sup> Assume that the TTIP contains the same investor protections as the TPP, including the FET obligation (a fair assumption). Assume further that the Clean Power Plan not only cuts emissions from coal-burning power plants, but, in doing so, cuts into coal plants' profits. Under those circumstances, will E.ON AG be able to challenge the Clean Power Plan on the grounds that it deprives E.ON AG of its legitimate expectations of profit in running its US plants and thus is inconsistent with the TTIP's FET obligation? The answer may hinge on how Vattenfall's arbitration against Germany resolves. If Germany does not have the right to shutter nuclear plants in Germany, even given the very strong health and safety concerns involved, why should the Clean Power Plan be allowed to cut into the profits (or force the closing) of coal plants in the United States?

## DEFENDING ISDS

Scholarly attempts are sometimes made to argue that international trade regimes do not threaten environmental protection.<sup>224</sup> Dr. Alhaji B. M. Marong points out that the U.S. Congress enacted NAFTA only after "side agreements" on labor and the environment were concluded.<sup>225</sup> He does not mention that these side agreements have no teeth—no enforcement mechanisms.<sup>226</sup> The TPP does contain a carve-out for environmental and health regulations in Article 9.15.<sup>227</sup> However, Article 9.15 requires that health and environmental regulations be "consistent with" the TPP's Investment Chapter which contains the investor protections we have been discussing.<sup>228</sup> The investor protections of TPP's Investment Chapter trump regulations meant to protect the environment and human health.<sup>229</sup>

Marong also cites favorable mentions of sustainable development made in ministerial meetings of the WTO.<sup>230</sup> He emphasizes that the WTO has established two bodies to consider environmental and development concerns.<sup>231</sup> Yet, writing in 2003, Marong is forced to acknowledge the "less than satisfactory progress in international trade regimes, vis-à-vis environmental protections and sustainable development" although this admission does not prevent him from concluding that the points he has raised "do show that there is some movement towards the integration of economic and non-economic concerns."<sup>232</sup>

## REMEDIES

Meredith Wilensky contends that simple revisions to the TPP can make the agreement effective in protecting the environment.<sup>233</sup> We agree. She suggests that an environmental exception clause be added for good faith environmental regulations.<sup>234</sup> She also suggests the addition of a provision to allow compliance with environmental treaties.<sup>235</sup> The present authors suggest the

following reform: delegations negotiating free trade agreements should include representatives from environmental NGOs and labor unions. NGOs and other non-state actors are routinely present at UN environmental conferences.<sup>236</sup> Their presence makes it much more likely that their views will be part of the resulting declarations, development goals, and treaties.<sup>237</sup> At present, the only "NGOs" who have the ear of trade negotiators are multinational corporations. How much different or better would the TPP be if members of the AFL-CIO and the Sierra Club had been at the negotiating table?

Reforms such as these may prevent trade from trumping environmental protection.

## V. OTHER OBSTACLES TO THE FORMATION OF A NORM OF SUSTAINABLE DEVELOPMENT

### A. STRUCTURAL OBSTACLES

Structural impediments—technological and scientific—to sustainable development plague the developing world.<sup>238</sup> Inducing developing nations to pursue sustainable development is challenging because developing countries are "beset by basic economic, social, and political problems that appear to many of their residents and government leaders more urgent than environmental concerns."<sup>239</sup> These include armed conflict,<sup>240</sup> exploding populations, and dwindling natural resources. Such enormous challenges make the goals of conservation and pollution reduction less critical than the immediate<sup>241</sup> problem of survival.<sup>242</sup> Today's urgent needs overwhelm planning for the future,<sup>243</sup> even though when developing countries do want to implement sustainable development most of these countries simply lack the needed regulatory infrastructure.<sup>244</sup> Developing nations typically have few resources, including money, to mitigate the effects of environmental degradation, such as ozone depletion, water pollution, or climate change.<sup>245</sup> Developed countries, on the other hand, are able to cushion the negative effects of temperature increases such as rising sea levels.<sup>246</sup>

Additionally, the goals of sustainable development are not well served by the poor example set by the developed world.<sup>247</sup> Researcher Maggie Black observes:

[T]he North's dilatory efforts to regulate energy consumption, particularly US reluctance to take climate change seriously, does little to encourage Southern governments to control carbon emissions or conserve natural resources.<sup>248</sup>

### B. NORMATIVE UNCERTAINTY

Some commentators ascribe the difficulty in implementing sustainable development to normative uncertainty.<sup>249</sup> In this view, sustainable development is simply too amorphous for states to implement. Sustainable development lacks clear parameters and criteria which can be used to measure whether any particular activity is sustainable.<sup>250</sup> This uncertainty is apparent in the conflicting meanings which states attach to fundamental terms in the sustainable development discourse such as intergenerational equity, sustainable use, intragenerational

equity<sup>251</sup> and integration of environmental, economic, social, and other considerations.<sup>252</sup> If only all actors would agree to use these terms in the same way, then everyone would be moving in the same direction and in time we would all arrive together at the Promised Land of sustainability. Maggie Black captures the deficiency of this argument:

The proliferating international circus—the conferences, summits, commissions, and their magisterial inquiries into the state of the world’s this or that—too often imply that, if only the world can reach consensus around key policy principles, the obstacles to development will crumble. \* \* \* They have a tendency to describe what needs to be done about forests, nutrition, child prostitution, dams, mining, or public health as if its articulation could bring about a *fait accompli*.<sup>253</sup>

Black is rightly dismissive of is the notion that the world needs to formulate a new, better definition of sustainable development or come up with the right set of sustainable development goals or targets. States have spent the past forty-five years fleshing out the content of sustainable development in treaties, declarations, resolutions, and reports.<sup>254</sup> Part of this work of normative clarification has consisted in parsing the broad concept of sustainable development into its constituent elements, *e.g.*, inter- and intragenerational equity, common but differentiated responsibilities, the precautionary principle, etc.<sup>255</sup> The content of sustainable development becomes less uncertain with each passing year.<sup>256</sup>

So states do know what the terms of the sustainable development discourse mean. More importantly, we contend that states know what the states which disagree with them mean by these terms. There are not 190 different meanings given to “sustainable use,” “intragenerational equity,” etc., one for each country in the world. Instead, the North has one understanding of what needs to be done and that conflicts with what the South believes has to be done. What prevents sustainable development isn’t failure to communicate. The North understands perfectly well what the South wants from it. The South asks the North to emit less greenhouse gases, consume less non-renewable resources, particularly fossil fuels, and transfer funds and technology to the South so that the South can develop. The North simply refuses to—thus, the position taken in this article that a struggle between North and South explains the fitful progress towards global sustainability.

## C. A FUNDAMENTAL CLASH BETWEEN NORTH AND SOUTH ON INTRAGENERATIONAL EQUITY

In particular, North and South attach sharply opposed meanings to the concept of intragenerational equity. The North understands what the South means by intragenerational equity, and the South understands what the North means. Yet North and South have been unable to resolve their disagreement.

The North insists that the South must conserve resources, emit less carbon, and limit its population growth. The South’s rejoinder is that such measures are unnecessary because as per capita income increases, environmental quality improves after a period of increasing environmental degradation.<sup>257</sup> Focus on economic development and the environment will look after itself.<sup>258</sup> The South’s argument is encouraging, optimistic, and wrong. The reality is that as environmental amenities in the form of environmental legislation and institutions to support and enforce them become affordable, the inverted-U shape relationship described by the environmental Kuznets curve holds good

only with respect to some, not all, environmental problems.<sup>259</sup> It does not “appl[y] to environmental quality generally.”<sup>260</sup> There will be improvement with respect to “a selected set of pollutants only,” ones with “local short-term costs,” such as “sulfur, particulates, and local coliforms.”<sup>261</sup> The curve is not valid for “the accumulation of stocks of waste or for pollutants involving long-term and more dispersed costs (such as CO<sub>2</sub>).”<sup>262</sup> Nor does

this purported mathematical relationship give us any reason to believe that indefinite economic growth is possible.<sup>263</sup> Instead, overdrawing from the earth’s limited resource stocks can irreversibly damage its productive capacities, risking the economic activity itself.<sup>264</sup> Yet, clearly, the poverty of most developing countries does not justify blanket no-growth policies either.<sup>265</sup> These countries desperately need economic development.

While the rosy argument of the developing countries is empirically flawed, the position of the developed countries is flawed ethically. Here we confront the problem of intragenerational equity. Rather than curb its own environmental excesses, the developed world prefers policies, which place the burden of environmental protection on the already overburdened developing nations.<sup>266</sup> The developed countries seek to impose restrictions on the poor countries’ use of their natural resources; expansion of their industrial base, and growth of their populations.<sup>267</sup> These policies keep the world’s poor countries poor.<sup>268</sup> The South sees these policies as rooted in the same pursuit of dominance that has historically given rise to Western colonialism, economic exploitation, and economically-motivated military interventions.<sup>269</sup> It is small wonder that the South sees

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*“The South asks the North to emit less greenhouse gases, consume less non-renewable resources, particularly fossil fuels, and transfer funds and technology to the South so that the South can develop.”*

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environmentalism as just the latest in a long string of Northern tactics to keep the South down.

Intragenerational equity is also implicated in Northern demands with respect to population growth in the South. The North demands that the South reduce its population without the North offering reciprocal commitments to reduced consumption, equitable distribution of wealth and resources, and provision of developmental assistance to the countries of the South.<sup>270</sup>

Developing countries resent the fact that the developed countries do not attach the same importance that the developing countries do to issues related to poverty, such as polluted water, air pollution in urban areas, and erosion of topsoil.<sup>271</sup>

Inequity is also apparent in the ways the North saps the South's resources. One way is through expanding the definition of the global commons. The global commons used to be limited to earth's atmosphere, oceans, Antarctica, and Outer Space.<sup>272</sup> More recently, the North has redefined the global commons to also include tropical rain forests and biodiversity.<sup>273</sup> The developing countries rightly regard the expansion of the global commons as a means to encroach on the South's sovereign right to the use of its own natural resources.<sup>274</sup> The North continues to formulate ingenious new ways of stealing the South's resources.<sup>275</sup>

In international negotiations, the George W. Bush Administration dug in its heels over the need for the United States to reduce its carbon emissions, arguing that China and India must do so to the same degree.<sup>276</sup> Not surprisingly, the North and South have diametrically opposed views on what fairness requires.<sup>277</sup> The Bush Administration argued that it was only fair that all countries observe the same standards.<sup>278</sup> Readers will be forgiven for thinking that this was merely a stratagem for the Bush Administration to avoid cutting U.S. emissions.

Sincere or not, Bush's understanding of fairness was flawed. Economically, the developing countries have long lagged behind the West. For many years, the United States has consumed a

disproportionate share of the world's oil, other natural resources, and the atmosphere's carbon sink.<sup>279</sup> Since the industrialized countries have consumed the lion's share of the world's resources for so long it would not be fair to expect North and South to cut back equally. The point is illustrated by a hypothetical proposed by Massachusetts Institute of Technology economist Lester Thurow.<sup>280</sup> Thurow posits a footrace where half of the runners are burdened with heavy weights.<sup>281</sup> Even if the runners

are relieved of their weights midway through the race that does not transform the race into a fair one.<sup>282</sup> The race only becomes fair when the previously burdened runners are allowed to catch up with those in the lead.<sup>283</sup> It is the same with the developed and developing countries. Peter Singer concludes that fairness demands that the developed countries should shoulder the

burden of the heaviest cut-backs in carbon emissions.<sup>284</sup> In fact, the developed countries had agreed to do just that in the 1992 United Nations Framework Convention on Climate Change.

## VI. CONCLUSION

Despite general acceptance of the principles of sustainable development, the countries of the global North have remained unmotivated to forgo excessive economic self-interest. A vast, perhaps unbridgeable, divide separates the priorities of the North and the South. As intensely debated during negotiations at Rio in 1992, the South wants the North to curb its consumption, curb its emissions, place intragenerational equity above intergenerational equity, and ensure food security and access to fresh water. In contrast, the North expects the South to limit its population and forgo development in the name of sustainability.

We all know what needs to be done. The human race cannot continue to spew carbon emissions into the atmosphere, deplete natural resources, and allow global population growth to go unchecked. The problem is getting the international community, particularly the United States, to make concessions and sacrifices. But no one has figured out how to compel states to do so.



## ENDNOTES: A NORTH-SOUTH STRUGGLE: POLITICAL AND ECONOMIC OBSTACLES TO SUSTAINABLE DEVELOPMENT

<sup>1</sup> See Lynge Nielsen, *Classifications of Countries Based on Their Level of Development: How it is Done and How it Could be Done* 3-4 (INT'L MONETARY FUND, Working Paper No. WP/11/31), available at <https://www.imf.org/external/pubs/ft/wp/2011/wp1131.pdf> (highlighting that the UN Development Programme, International Monetary Fund, World Bank, and the Human Development Reports employ different schema based on income for differentiating developed from developing countries); see MAGGIE BLACK, *THE NO NONSENSE GUIDE TO INTERNATIONAL DEVELOPMENT* 23 (2d ed. 2007) (indicating that developing countries are members of the Group of 77). There is a world of difference

between, say, impoverished and war-torn South Sudan and the so-called BRICS countries (Brazil, Russia, India, China, and South Africa). Countries like South Sudan and Somalia fall under the sub-category "Least Developed Countries" (LDCs) set out by the UN General Assembly in 1971. See Nielsen, *supra*, at 7; see *Least Developed Countries: UN Classification*, WORLD BANK, <http://data.worldbank.org/region/LDC> (last visited Apr. 14, 2016) (listing Least Developed Countries).

- <sup>136</sup> See generally *id.* at 201-26.
- <sup>137</sup> *Id.* at 233.
- <sup>138</sup> See *id.* at 203.
- <sup>139</sup> See *id.*
- <sup>140</sup> See *id.* at 209-10.
- <sup>141</sup> See *id.* at 251.
- <sup>142</sup> *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.)
- <sup>143</sup> *Id.*
- <sup>144</sup> 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].
- <sup>145</sup> 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.)
- <sup>146</sup> 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>
- <sup>147</sup> 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).
- <sup>148</sup> TPP Agreement, *supra* note 132, at 1.
- <sup>149</sup> See Tipping, *supra* note 146.
- <sup>150</sup> 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).
- <sup>151</sup> See *id.* (describing this as moving away from "thin state consent" to a "thick stakeholder consensus.").
- <sup>152</sup> Niels Peterson, *How Rational is International Law?*, 20 EUR. J. INT'L L. 1247, 1254-55 (2008).
- <sup>153</sup> John Jackson, *Perils of Globalization and the World Trading System*, 24 FORDHAM INT'L L. J. 371, 375 (2000).
- <sup>154</sup> *Id.*
- <sup>155</sup> *Id.*
- <sup>156</sup> 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).
- <sup>157</sup> *Id.*
- <sup>158</sup> 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](https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm) (last visited Apr. 19, 2016).
- <sup>159</sup> *Id.*
- <sup>160</sup> *Id.*
- <sup>161</sup> *Id.*
- <sup>162</sup> See Benedict Kingsbury, Nico Kirsch, & Richard Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 58 (2005).
- <sup>163</sup> 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](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm) (last visited Apr. 28, 2016).
- <sup>164</sup> World Trade Organization, *Technical Barriers to Trade*, [https://www.wto.org/english/tratop\\_e/tbt\\_e/tbt\\_e.htm](https://www.wto.org/english/tratop_e/tbt_e/tbt_e.htm) (last visited Apr. 28, 2016).
- <sup>165</sup> *Id.*
- <sup>166</sup> 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).
- <sup>167</sup> See *id.*
- <sup>168</sup> See *id.*
- <sup>169</sup> See TBT Committee Decisions & Recommendations, *supra* note 166.
- <sup>170</sup> Pauwelyn, *supra* note 150, at 15-18.
- <sup>171</sup> See *id.*
- <sup>172</sup> See Tipping, *supra* note 146, at 7.
- <sup>173</sup> *Id.* at 14-19.
- <sup>174</sup> *Id.* at 9-14.
- <sup>175</sup> *Id.* at 9-10.
- <sup>176</sup> See *id.* at 10.
- <sup>177</sup> See *id.* at 10-11.
- <sup>178</sup> See *id.* at 11.
- <sup>179</sup> See *id.* at 11-12.
- <sup>180</sup> See *id.* at 12-13.
- <sup>181</sup> The UN System Task Team, UN DEV. POLICY & ANALYSIS DIV, [http://www.un.org/en/development/desa/policy/untaskteam\\_undf/index.shtml](http://www.un.org/en/development/desa/policy/untaskteam_undf/index.shtml) (last visited Apr. 28, 2016).
- <sup>182</sup> See *id.*
- <sup>183</sup> See *id.*
- <sup>184</sup> 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).
- <sup>185</sup> John Jackson, *Perspectives on Regionalism in Trade Relations*, 27 LAW & POL'Y INT'L BUS. 873, 873 (1996).
- <sup>186</sup> 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*

- <sup>2</sup> 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).
- <sup>3</sup> See *id.* at 261.
- <sup>4</sup> 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”].
- <sup>5</sup> 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.”).
- <sup>6</sup> BRYNER, *supra* note 2, at 261.
- <sup>7</sup> NAOMI KLEIN, THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE 409 (2014).
- <sup>8</sup> See BLACK, *supra* note 1, at 93.
- <sup>9</sup> 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.”).
- <sup>10</sup> 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).

<sup>11</sup> See BLACK, *supra* note 1, at 96; see also, BLACK, *supra* note 9, at 104 (“If all the world’s people were to live like North Americans, a planet four times as large would be needed.”).

<sup>12</sup> See MARIE-CLAIRE CORDONIE SEGGER & ASHFAQ KHALFAN, SUSTAINABLE DEVELOPMENT LAW: PRINCIPLES, PRACTICES, AND PROSPECTS 47 (2011); SUSTAINABLE JUSTICE: RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW 1-3 (Marie-Claire Cordonie Segger & Judge C.G. Weeramantry eds., 2005).

<sup>13</sup> See generally *id.*, at 1-3 (providing a discussion of how sustainable development is dependent on a coexisting and balanced economy and environment).

<sup>14</sup> See *id.* at 47.

<sup>15</sup> *Id.* at 1-3.

<sup>16</sup> Report of the World Commission on Environment and Development, March 1987, *Our Common Future*, U.N. Doc. A/42/427 (March 1987) [hereinafter “Brundtland Report”].

<sup>17</sup> See PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 10 (2d ed. 2003).

<sup>18</sup> See LAKSHMAN GURUSWAMY & BRENT HENDRICKS, INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL 11 (1997). The “despairing thesis” is well illustrated by two notorious neo-Malthusian works from the 1970s. See generally DONELLA H. MEADOWS ET AL., THE LIMITS TO GROWTH: A REPORT FOR THE CLUB OF ROME’S PROJECT ON THE PREDICAMENT OF MANKIND (1973); see generally PAUL R. EHRLICH, THE POPULATION BOMB (1971).

<sup>19</sup> See Brundtland Report, *supra* note 16, at 41. This concept, called “inter-generational equity,” is Principle 3 of the Rio Declaration. See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev. 1, 31 I.L.M. 874 (1992).

<sup>20</sup> See Brundtland Report, *supra* note 16, at 41

<sup>21</sup> See DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 181 (2d ed. 2002) (indicating that “sustainable development requires meeting the basic needs of all and extending to all the opportunity to satisfy their aspirations for a better life.”) (emphasis added).

<sup>22</sup> See SANDS, *supra* note 17, at 11 (noting five objectives to promote sustainable development).

<sup>23</sup> See generally Rio Declaration, *supra* note 19. See generally PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 43 (2nd rev. ed. 2002) (discussing the use of the UNEP’s General Council to encourage nations to come together to brain storm ways to improve the “world environment situation.”).

<sup>24</sup> See section V.C *infra*.

<sup>25</sup> Report of the World Summit on Social Development, Copenhagen, Den., March 6-12, 1995, *Copenhagen Declaration*, U.N. Doc. A/CONF.166/7/ ¶ 6 (1996).

<sup>26</sup> *Id.* at ¶ 6.

<sup>27</sup> Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 88, 93 (Sept. 25) (separate opinion of Judge Weeramantry); see also Virginie Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 EUR. J. INTL. L. 377, 384 (2012) (noting there are references to sustainable development “in over 300 [bilateral]” and 112 multilateral treaties and concluding that sustainable development has widely penetrated treaty law).

<sup>28</sup> M. Lucien Royer, *Trade Unions and Environmentally Sustainable Development*, in WORKING PARTY ON ENVIRONMENTAL PERFORMANCE PREPARATION OF SECOND CYCLE OF OECD ENVIRONMENTAL PERFORMANCE, Paris, Fr., Sept. 22-24, 1999, *OECD Seminar, Social and Environmental Interface Proceedings*, ENV/EPOC/GEP (99) 13, 1, 169 (September 22-24, 1999).

<sup>29</sup> International Union for Conservation of Nature-World Conservation Union, *Guide to Preparing and Implementing National Sustainable Development Strategies and Other Multi-sectoral Environment and Development Strategies*, prepared by the IUCN’s Commission on Environmental Strategies Working Group on Strategies for Sustainability, the IUCN Secretariat and the Environmental Planning Group of the International Institute for Environment and Development, pre-publication draft, 1993.

<sup>30</sup> See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Agenda 21*, U.N. Doc. A/CONF.151/26 [hereinafter “Agenda 21”].

<sup>31</sup> See generally *id.*

<sup>32</sup> Rio Declaration, *supra* note 19, at Principle 3.

<sup>33</sup> Agenda 21, *supra* note 30. The UN General Assembly endorsed the Rio Declaration and Agenda 21 and called for implementation of their commitments and recommendations. Rep. of the U.N. Conference on Env’t & Dev. Dec. 22,

1992, U.N. Doc. A/RES/47/19; G.A. Res. 47/191, ¶ 2, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/191 (Jan. 29, 1993).

<sup>34</sup> See Agenda 21, *supra* note 30.

<sup>35</sup> See BIRNIE & BOYLE, *supra* note 23, at 85.

<sup>36</sup> See Scott Wisor, *The Impending Failure of the Sustainable Development Goals*, ETHICS & INT’L AFFAIRS (Sept. 30, 2014), <http://www.ethicsandinternationalaffairs.org/2014/the-impending-failure-of-the-sustainable-development-goals/>; KOFI ANNAN & NADER MOUSAVIZADEH, INTERVENTIONS: A LIFE IN WAR AND PEACE 222-225 (2012) (providing an overview of how various international meetings for the UN developed the agenda that exists).

<sup>37</sup> See United Nations Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/res/55/2 (Sept. 20, 2000).

<sup>38</sup> *Id.* at ¶ 15, 23.

<sup>39</sup> See generally *Millennium Dev. Goals & Beyond 2015*, UNITED NATIONS, <http://www.un.org/millenniumgoals/> (noting that there are eight total millennium goals in addition to news and background on the goals) (last visited Apr. 14, 2016); see generally ANNAN, *supra* note 36, at 226-50 (describing MDG’s according to Kofi Annan’s time at the United Nations).

<sup>40</sup> Michael W. Doyle & Joseph E. Stiglitz, *Eliminating Extreme Inequality: A Sustainable Development Goal, 2015-2030*, ETHICS & INT’L AFFAIRS (Mar. 20, 2014), <http://www.ethicsandinternationalaffairs.org/2014/eliminating-extreme-inequality-a-sustainable-development-goal-2015-2030/>.

<sup>41</sup> See Wisor, *supra* note 36.

<sup>42</sup> See generally *Millennium Dev. Goals & Beyond 2015*, *supra* note 39 (addressing the following matters relating to sustainable development: education, gender equality, child mortality, maternal health, combatting malaria, AIDS, and other infectious diseases, debt relief, and, most importantly, elimination of “extreme” hunger and poverty).

<sup>43</sup> Doyle & Stiglitz, *supra* note 40; see also ANNAN & MOUSAVIZADEH, *supra* note 36, at 248.

<sup>44</sup> See *The U.N.’s Post-2015 Development Agenda*, U.N. ASS’N OF THE U.S., <http://www.unausa.org/advocacy/post-2015-development-agenda> (last visited Apr. 14, 2016).

<sup>45</sup> See *id.*

<sup>46</sup> See John H. Knox, *Human Rights, Environmental Protection, and the Sustainable Development Goals*, 24 WA. INT’L L. J. 517, 518 (2015).

<sup>47</sup> See *Open Working Group Proposal for Sustainable Development Goals*, U.N. DEP’T OF ECON. & SOC. AFFAIRS (July 19, 2014), <https://sustainabledevelopment.un.org/focussdgs.html> [hereinafter “Sustainable Development Goals”].

<sup>48</sup> See *Millennium Dev. Goals & Beyond 2015*, *supra* note 39 (noting that the MDG goal of eradicating world poverty remains Goal 1 under the SDGs); *Sustainable Development Goals*, *supra* note 47 (SDG 1). Guaranteed education is MDG 2 and SDG 4. See *Millennium Dev. Goals & Beyond 2015*, *supra* note 39 (MDG 2); *Sustainable Development Goals*, *supra* note 47 (SDG 4). Ensuring gender equality is MDG 3 and SDG 5. See *Millennium Dev. Goals & Beyond 2015*, *supra* note 39 (MDG 3); *Sustainable Development Goals*, *supra* note 47 (SDG 5). A global partnership for development is MDG 8 and SDG 17. See *Millennium Dev. Goals & Beyond 2015*, *supra* note 39 (MDG 8); *Sustainable Development Goals*, *supra* note 47 (SDG 17). MDG 5, guaranteeing maternal health, has been expanded in SDG 3 to encompass health assurance for everyone: men, women, and children. See *Millennium Dev. Goals & Beyond 2015*, *supra* note 39 (MDG 5); *Sustainable Development Goals*, *supra* note 47 (SDG 3).

<sup>49</sup> Thus, Millennium Goal 7 (“Ensure Environmental Sustainability”) is spread among six Sustainable Development Goals, to wit: SDG 2 (sustainable agriculture), 6 (clean water and sanitation), 7 (cheap sustainable energy for all), 8 (sustainable economic growth), 9 (infrastructure and sustainable industrialization), 11 (sustainable cities and settlements). Commitment to addressing climate change has been made an express SDG: Goal 13. See *MILLENNIUM DEVELOPMENT GOALS*, *supra* note 39 (MDG 7); *SUSTAINABLE DEVELOPMENT GOALS*, *supra* note 47 (SDGs 2, 6, 7, 8, 9, and 11). The only brand new goal the SDGs add is a commitment to fighting inequality. See *SUSTAINABLE DEVELOPMENT GOALS*, *supra* note 47 (SDG 10).

<sup>50</sup> See DONALD BROWN, AMERICAN HEAT: ETHICAL PROBLEMS WITH THE UNITED STATES’ RESPONSE TO GLOBAL WARMING xv-xix, 13, 19 (2002).

<sup>51</sup> *Id.* at 16, 18.

<sup>52</sup> *Id.* at 16.

<sup>53</sup> *Id.* at 15-16 (citing *Global Energy Future and the Carbon Dioxide Problem*, U.S. COUNCIL ON ENVTL. QUALITY (1981)).

<sup>54</sup> *Id.* at 16. (noting that Reagan also removed the solar panels which President Carter had installed on the roof of the White House).

<sup>55</sup> For an early retrospective on the Reagan environmental record, see Philip Shabecoff, *Reagan and Environment: To Many, A Stalemate*, N.Y. TIMES (Jan. 2, 1989), <http://www.nytimes.com/1989/01/02/us/reagan-and-environment-to-many-a-stalemate.html?pagewanted=all> (indicating that “[c]ritics also complain of the Administration’s persistent demand for scientific certainty before acting on problems like acid rain and global warming.”).

<sup>56</sup> See Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, April 30, 1992 – May 9, 1992, U.N. Framework Convention on Climate Change, U.N. Doc. A/AC.237/18 (1992) [hereinafter “FCCC”]. The Framework Convention on Climate Change was signed by President George Herbert Walker Bush on October 15, 1992. It was ratified by the U.S. Senate on March 21, 1994. art. 4(2)(a), (b).

<sup>57</sup> See BROWN, *supra* note 50, at 20, 23.

<sup>58</sup> *Id.* at 22.

<sup>59</sup> *Id.* at 23.

<sup>60</sup> *Id.* at 24.

<sup>61</sup> *Id.* at 25.

<sup>62</sup> *Id.* at 27 (noting that the Republican Party had taken control of Congress following the 1994 mid-term elections).

<sup>63</sup> *Id.* at 28.

<sup>64</sup> *Id.* at 29.

<sup>65</sup> See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, U.N. Doc FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998) [hereinafter “Kyoto Protocol”].

<sup>66</sup> “Common but differentiated responsibilities” is a core concept in sustainable development. The phrase was inserted into the Rio Declaration at the behest of the IBSA states: India, Brazil, and South Africa. See VIJAY PRASHAD, THE POORER NATIONS: A POSSIBLE HISTORY OF THE GLOBAL SOUTH 191-92 (2012). “Common but differentiated responsibilities” means that all countries must take action to halt climate change, but not necessarily the same action or to the same extent. The developed states bear the bulk of the responsibility for reducing carbon emissions. The developing states bear the bulk of the responsibility for arresting population growth.

<sup>67</sup> See BROWN, *supra* note 50, at 186.

<sup>68</sup> The FCCC includes three “flexibility mechanisms.” They are explained by Donald Brown, thusly “Emissions trading. An international trading mechanism that would allow developed nations with Kyoto targets to purchase emissions allowances from developed countries that have more permits than they need [Kyoto Protocol art. 17]. Joint Implementation. An international trading mechanism that allows developed nations with emissions targets to obtain credit toward the target by funding emission reduction projects [such as planting forests] in other developed nations that have targets [Kyoto Protocol art. 6].” See BROWN, *supra* note 48, at 187. The third flexibility mechanism, “the Clean Development Mechanism,” is the same as Joint Implementation except that it covers emissions reduction projects in developing countries (Kyoto Protocol art. 12). See LAURENCE BOISSON DE CHAZOURNES, KYOTO PROTOCOL TO THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 2, available at <http://legal.un.org/avl/ha/kpccc/kpccc.html> (highlighting that parties to the Kyoto Protocol may “achieve compliance through climate friendly investments in other countries and through emission trading.”). Norway proposed Joint Implementation, and Brazil proposed the clean development mechanism. See BROWN, *supra* note 50, at 187.

<sup>69</sup> See Quinn Schiermeier, *The Kyoto Protocol: Hot Air*, NATURE (Nov. 28, 2012), <http://www.nature.com/news/the-kyoto-protocol-hot-air-1.11882>; see also BROWN, *supra* note 50, at 186.

<sup>70</sup> See TIMOTHY DONAGHY ET AL., ATMOSPHERE OF PRESSURE: POLITICAL INTERFERENCE IN FEDERAL CLIMATE SCIENCE 7 (Feb. 2007), available at [http://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific\\_integrity/atmosphere-of-pressure.pdf](http://www.ucsusa.org/sites/default/files/legacy/assets/documents/scientific_integrity/atmosphere-of-pressure.pdf).

<sup>71</sup> See Armin Rosencranz, *U.S. Climate Change Policy under G. W. Bush*, 32 GOLDEN GATE U. L. REV. 479, 482 (2002).

<sup>72</sup> See Section V *infra*.

<sup>73</sup> See JAMES MANN, GEORGE W. BUSH 48, 55 (2015); Maurice Strong, *Facing Down Armageddon: Our Environment at a Crossroads*, 26.2 WORLD POL’Y J. 25, 26 (2009). During his 2000 Presidential campaign Bush promised that he would institute mandatory limits on CO<sub>2</sub> emissions from fossil fuel-burning power plants—a promise he would soon break. See ROBERT S. DEVINE, BUSH VERSUS THE ENVIRONMENT 174-75, 204 (2004).

<sup>74</sup> See Katherine Q. Seelye & Andrew C. Revkin, *Panel Tells Bush Global Warming Is Getting Worse*, N.Y. TIMES (June 7, 2001), <http://www.nytimes.com/2001/06/07/science/07WARM.html?pagewanted=all>; see also Katherine Q.

Seelye, *President Distances Himself from Global Warming Report*, N.Y. TIMES (June 5, 2002), <http://www.nytimes.com/2002/06/05/us/president-distances-himself-from-global-warming-report.html> (noting that a similar report from the EPA the next year also met with Bush Administration indifference).

<sup>75</sup> See JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 212 (2016) (“The George W. Bush years, meanwhile, proved a bonanza for the fossil fuel industry.”); Suraje Dessai, *The Climate Regime from The Hague to Marakech: Saving Or Sinking the Kyoto Protocol* 5 (Tyndal Centre for Climate Change Research Working Paper No. 12, 2001), available at <http://tyndall.ac.uk/sites/default/files/wp12.pdf>.

<sup>76</sup> See MAYER, *supra* note 75, at 204 (noting that the conservative party was off-put in assisting with environmentally necessary tactics to reduce global warming); see also Emily Atkin, *Jeb Bush and George W. Bush Have Drastically Different Views on Climate Change*, THINKPROGRESS (May 22, 2015, 12:19 P.M.), <http://thinkprogress.org/climate/2015/05/22/3661732/jeb-vs-george-bush-climate-change/>.

<sup>77</sup> See Juliet Eilperin, *Bush Seeks Voluntary Curb on Greenhouse Gas Emissions*, WASH. POST (Apr. 17, 2008), <http://www.washingtonpost.com/wp-dyn/content/story/2008/04/17/ST2008041700037.html>.

<sup>78</sup> George W. Bush, *Bush Remarks on Climate*, Apr. 16, 2008 (transcript available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/04/16/AR2008041603084.html>). Section V *infra* of this article discusses the George W. Bush Administration’s faulty understanding of intragenerational equity expressed in the Administration’s refusal to reduce its own carbon emissions unless China and India did so to the same degree.

<sup>79</sup> See generally CHRIS WILLIAMS, ECOLOGY AND SOCIALISM 80 (2010).

<sup>80</sup> See John M. Broder, *Obama Affirms Climate Change Goals*, N.Y. TIMES (Nov. 18, 2008), <http://www.nytimes.com/2008/11/19/us/politics/19climate.html>.

<sup>81</sup> KLEIN, *supra* note 7, at 12.

<sup>82</sup> *Id.*

<sup>83</sup> See Stephen Lacey, *As Global CO<sub>2</sub> Emissions Rise, Scientists Warn 2-Degree Target Is Nearly Out of Reach: ‘We Need a Radical Plan’*, THINK-PROGRESS (Dec. 3, 2012), <http://thinkprogress.org/climate/2012/12/03/1270911/as-global-co2-emissions-rise-scientists-warn-2-degree-target-is-nearly-out-of-reach-we-need-a-radical-plan/>.

<sup>84</sup> See Johann Hari, *After the Catastrophe in Copenhagen, It’s Up to Us*, INDEP., <http://www.independent.co.uk/voices/commentators/johann-hari/johann-hari-after-the-catastrophe-in-copenhagen-its-up-to-us-1846366.html> (Dec. 21, 2009) (“The world’s climate scientists have shown that man-made global warming must not exceed 2C. When you hear this, a natural reaction is – that’s not much; how bad can it be if we overshoot? If I go out for a picnic and the temperature rises or falls by 2C, I don’t much notice. But this is the wrong analogy. If your body temperature rises by 2C, you become feverish and feeble. If it doesn’t go back down again, you die. The climate isn’t like a picnic; it’s more like your body.”).

<sup>85</sup> See Fram Dinshaw, *Two-Degree Target May Still Cause Catastrophic Sea Level Rise, James Hansen Warns*, NAT’L OBSERVER (July 20, 2015), <http://www.nationalobserver.com/2015/07/20/news/two-degree-target-may-still-cause-catastrophic-sea-level-rise-james-hansen-warns>.

<sup>86</sup> See Justin Gillis, *2015 Was Hottest Year in Historical Record, Scientists Say*, N.Y. TIMES (Jan. 21, 2016), <http://www.nytimes.com/2016/01/21/science/earth/2015-hottest-year-global-warming.html>.

<sup>87</sup> See John Vidal et al., *Low Targets, Goals Dropped: Copenhagen Ends in Failure*, GUARDIAN (Dec. 18, 2009), <http://www.theguardian.com/environment/2009/dec/18/copenhagen-deal>; see also Bill McKibben, *Things Fall Apart and an Uncertain Future Looms*, YALE ENV’T 360 (Dec. 21, 2009), [http://e360.yale.edu/feature/copenhagen\\_things\\_fall\\_apart\\_and\\_an\\_uncertain\\_future\\_looms/2225/](http://e360.yale.edu/feature/copenhagen_things_fall_apart_and_an_uncertain_future_looms/2225/) (noting that some regions will experience higher temperature increases than the world average).

<sup>88</sup> See McKibben, *supra* note 87.

<sup>89</sup> See generally *id.* (providing a discussion of the events leading up to and after Copenhagen).

<sup>90</sup> See Michael Levi, *The Obama-China Climate Deal Can’t Save the World. So What?*, THE WASH. POST (Nov. 21, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/11/21/the-obama-china-climate-deal-cant-save-the-world-so-what/>. Note that the United States had moved the goalposts since Kyoto. See WILLIAMS, *supra* note 79, at 81. At Kyoto, the United States agreed to reduce emissions 7 per cent below 1990 levels by 2008-2012. *Id.* at 108. But in 2009 at Copenhagen, the United States moved the baseline year for measuring from 1990 to 2005. *Id.* at 81. Carbon had, of course, continued to build up



in earth's atmosphere during those fifteen years. So measuring from 1990, the US pledge at Copenhagen actually only amounted to a 4% reduction in US emissions—not 7%. *Id.*

<sup>91</sup> See WILLIAMS, *supra* note 79, at 81.

<sup>92</sup> See *id.* at 82-83.

<sup>93</sup> See *id.*

<sup>94</sup> See *Putting a Price on Carbon: An Emissions Cap or a Tax?*, YALE ENV'T 360 (May 7, 2009), [http://e360.yale.edu/feature/putting\\_a\\_price\\_on\\_carbon\\_an\\_emissions\\_cap\\_or\\_a\\_tax/2148/](http://e360.yale.edu/feature/putting_a_price_on_carbon_an_emissions_cap_or_a_tax/2148/).

<sup>95</sup> See WILLIAMS, *supra* note 65, at 81.

<sup>96</sup> See Stephen Power, *Senate Halts Effort to Cap CO<sub>2</sub> Emissions*, WALL ST. J., (last updated July 23, 2010), <http://www.wsj.com/articles/SB10001424052748703467304575383373600358634>.

<sup>97</sup> Cf. WILLIAMS, *supra* note 79, at 83-84 (discussing the failure of cap and trade in Europe due to corporate cheating and the excessive issuance of carbon credits).

<sup>98</sup> *Id.* at 21.

<sup>99</sup> *Id.*

<sup>100</sup> See Obama Remarks on Climate Change, *supra* note 4.

<sup>101</sup> *Id.* (emphasizing that there are no federal limits to the amount of carbon pollution that [power] plants can pump into our air, currently 40 percent of America's carbon pollution); see Coral Davenport, *McConnell Urges States to Help Thwart Obama's 'War on Coal'*, N.Y. TIMES (Mar. 20, 2015) (calling carbon pollution from coal-fired power plants "the nation's largest source of greenhouse gas emissions.").

<sup>102</sup> See Obama Remarks on Climate Change, *supra* note 4 (highlighting "a low-carbon clean energy economy can be an engine of growth for decades to come" and that there is no "contradiction between a sound environment and strong economic growth.").

<sup>103</sup> *West Virginia v. EPA*, 362 F.3d 861, 873 (D.C. Cir. 2004) (noting that the United States District Court for the District of Columbia denied the State of West Virginia's argument on the basis that the EPA was not given an opportunity to provide feedback to the NODA docket).

<sup>104</sup> *In re Murray Energy Corp. v. EPA*, 788 F.3d 330, 336 (D.C. Cir. 2015) (deciding that because the EPA's proposed rule was not final, it did not have an immediate effect on Murray Energy Corp. and the State of West Virginia).

<sup>105</sup> See Levi, *supra* note 90.

<sup>106</sup> David Nakamura & Steven Mufson, *China, U.S. agree to limit greenhouse gases*, WASH. POST (Nov. 12, 2014), [https://www.washingtonpost.com/business/economy/china-us-agree-to-limit-greenhouse-gases/2014/11/11/9c768504-69e6-11e4-9fb4-a622dae742a2\\_story.html](https://www.washingtonpost.com/business/economy/china-us-agree-to-limit-greenhouse-gases/2014/11/11/9c768504-69e6-11e4-9fb4-a622dae742a2_story.html).

<sup>107</sup> See Roger Bybee, *Scapegoating China: Framing China as an Environmental Villain Only Serves to Excuse American Inaction*, JACOBINMAG (Mar. 27, 2015), <https://www.jacobinmag.com/2015/03/china-united-states-climate-change-agreement/>; see KLEIN, *supra* note 7, at 69, 81 (discussing how China's manufacturing exports during the 1990s created significant amounts of pollution globally in doing so).

<sup>108</sup> See Bybee, *supra* note 107.

<sup>109</sup> See KLEIN, *supra* note 7, at 69-70, 81.

<sup>110</sup> Professor Kirk Junker observes that a mechanism already exists for resolving the problem of vicarious polluting. The Pennsylvania Air Pollution Control Act imposes penalties on both owners and operators of pollution sources. 35 P.S. §§4001-4015. Were a similar plan to be instituted at the global level, the United States and China could both be penalized for carbon emissions from US plants operating in China. Professor Junker urged that this mechanism be part of whatever agreement was reached at the Paris Climate Summit in December 2015. Professor Kirk Junker in a private communication to the authors, June 19, 2015 (on file with authors).

<sup>111</sup> See Nakamura & Mufson, *supra* note 106.

<sup>112</sup> Bybee, *supra* note 107.

<sup>113</sup> *Id.*

<sup>114</sup> See Levi, *supra* note 90.

<sup>115</sup> The Paris Summit was formally known as the 21st Conference of the Parties to the UN Framework Convention on Climate Change ("COP 21"). See Justin Worland, *Why the Paris Summit Is All About the Money*, TIME (Dec. 7, 2015), <http://time.com/4138150/finance-paris-climate-conference/> (providing a broad overview of the goals of COP 21).

<sup>116</sup> See Brian Palmer, *INDC: The Acronym Standing between Us and Disaster*, NATURAL RES. DEF. COUNCIL (Oct. 29, 2015), <https://www.nrdc.org/onearth/indc-acronym-standing-between-us-and-disaster>; Tim Profeta, *The Climate Post: United States, Europe Announce Emissions Reductions Pledges*,

HUFFINGTON POST, [http://www.huffingtonpost.com/tim-profeta/the-climate-post-united-s\\_b\\_6995244.html](http://www.huffingtonpost.com/tim-profeta/the-climate-post-united-s_b_6995244.html) (last updated June 2, 2015); see also *INDCs as communicated by Parties*, UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, [www.unfccc.int/submissions/INDC/Submission%20Pages/submissions.aspx](http://www.unfccc.int/submissions/INDC/Submission%20Pages/submissions.aspx) (last visited Apr. 23, 2016) (listing the INDCs submitted by the nations participating in COP 21).

<sup>117</sup> See United States, UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, <http://www.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf> (last visited Apr. 23, 2016).

<sup>118</sup> See *supra* notes 69-72 and accompanying text.

<sup>119</sup> See Brad Plumer, *The Paris Climate Talks Won't Solve Global Warming. Here's What They'll Do Instead*, VOX (Nov. 30, 2015, 2:00 PM), <http://www.vox.com/2015/11/30/9818582/paris-cop21-climate-talks>.

<sup>120</sup> See generally Paris Climate Change Conference—Nov. 2015, COP 21, Nov. 30, 2015–Dec. 11, 2015, Adoption of the Paris Agreement, Proposal by the President, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015), available at <http://unfccc.int/resource/docs/2015/cop21/eng/109r01.pdf> [hereinafter "Paris Accord"] (indicating that since it is not a treaty, the Paris Accord does not have to go before the U.S. Senate). See Colleen McCain Nelson, *GOP Weighs How to Undercut Obama's Climate Talks*, WALL ST. J. (Apr. 26, 2015, 7:03 PM) [http://www.wsj.com/articles/gop-weighs-how-to-undercut-obamas-climate-talks-1430089435?mod=rss\\_Politics\\_And\\_Policy](http://www.wsj.com/articles/gop-weighs-how-to-undercut-obamas-climate-talks-1430089435?mod=rss_Politics_And_Policy) (noting that GOP Senators warn that President Obama is not going to deliver on the promise that emissions are cut because the agreement is not binding); Emily Atkin, *Mitch McConnell Undermines Obama's Climate Plan with Other Countries*, THINKPROGRESS, (Apr. 1, 2015, 10:49 PM), <http://thinkprogress.org/climate/2015/04/01/3641594/mcconnells-inner-tom-cotton/> (reporting that the Senate's Republican majority had advised foreign leaders well in advance of COP21 that any binding agreement would have to be ratified by the US Senate); John Bolton & John Yoo, *Paris Climate Conference: Without Congress' Support, Obama's Deal-making Powers Are Limited*, L.A. TIMES (Dec. 1, 2015, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-boltonyoo-paris-climate-deal-not-binding-20151201-story.html> (emphasizing that the March 31 statement by Senate Majority Leader Mitch McConnell, a Kentucky Republican, also told the world that any climate agreement the US entered in Paris could be revoked with the swipe of a pen by Obama's successor).

<sup>121</sup> See Oliver Milman, *James Hansen, Father of Climate Change Awareness, Calls Paris Talks 'a Fraud'*, GUARDIAN (Dec. 12, 2015, 7:30 AM), <http://www.theguardian.com/environment/2015/dec/12/james-hansen-climate-change-paris-talks-fraud>.

<sup>122</sup> See Philippe Sands, *Environmental Protection in the Twenty-first Century: Sustainable Development and International Law*, in ENVIRONMENTAL LAW, THE ECONOMY AND SUSTAINABLE DEVELOPMENT: THE UNITED STATES, THE EUROPEAN UNION AND THE INTERNATIONAL COMMUNITY 369, 369 (Richard L. Revesz, Philippe Sands & Richard B. Stewart, eds., 2000).

<sup>123</sup> *Id.* at 370.

<sup>124</sup> *Id.*

<sup>125</sup> The phrase "trade trumps environment" derives from Naomi Klein. See KLEIN, *supra* note 3, at 69.

<sup>126</sup> A tariff is "a tax on imports imposed...at...an international border." See RAJ BHALA, *MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE* 176 (2005).

<sup>127</sup> See MITSUO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 262 (3d ed. 2015); BHALA, *supra* note 126, at 342 (discussing in depth quotas).

<sup>128</sup> See BHALA, *supra* note 126 at 344-45; MATSUSHITA ET AL., *supra* note 127, at 216-17.

<sup>129</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 188, Art. XX (prohibiting "disguised" restrictions on trade) [hereinafter "GATT"]; see ANUPAM GOYAL, *THE WTO AND ENVIRONMENTAL LAW: TOWARDS CONCILIATION* 11 (2006) (discussing how developed countries reduced environmental threats in their own countries, while abusing the environment of developing countries); C. Ford Runge, *Trade Protectionism and Environmental Regulations, The New Nontariff Barriers*, 11 NW. J. INT'L L. & BUS. 47, 47 (1990); Thomas Waelder & Abba Kolo, *Environmental Regulation, Investment Protection and 'Regulatory Taking' in International Law*, 50 INT'L L. & COMP. L. Q. 811, 812 (2001) (arguing that developing countries' concern for the natural environment are a "Trojan House" meant to foil globalization and economic liberalization).



<sup>130</sup> See FCCC, *supra* note 56, art. 3.5 (providing *inter alia* “[m]easures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.” This language applies not just to trade agreements, but some climate treaties prohibit economic protectionism also.) See International Law Association, New Delhi, India, Apr. 2-6, 2002, *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, ¶ 4.4 U.N. Doc. A/CONF.199/8 (Aug 9, 2002), available at <http://cisdl.org/tribunals/pdf/NewDelhiDeclaration.pdf> (“[p]recautionary measures should be based on up-to-date and independent scientific judgment and be transparent. They should not result in economic protectionism.”).

<sup>131</sup> See *S.D. Myers, Inc. v. Canada*, UNCITRAL Doc. No. 742416:01, Partial Award, at 3 (Nov. 13, 2000) (explaining that Canada banned the export of PCB waste although transporting it to a facility across the border in the United States would have been geographically more convenient and would not have occasioned additional safety hazards); Waelde & Kolo, *supra* note 129, at 836 n. 107, 838 (“the tribunal found manifest discrimination and protectionist purpose”).

<sup>132</sup> Lori Wallach, *NAFTA on Steroids*, THE NATION (July 27, 2012), <http://www.thenation.com/article/nafta-steroids/>.

<sup>133</sup> See *Trans Pacific Partnership Trade Deal Signed in Auckland*, BBC (Feb. 4, 2016), <http://www.bbc.com/news/business-35480600>.

<sup>134</sup> *TPP Full Text*, OFFICE OF THE U.S. TRADE REPRESENTATIVE, available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpa-full-text> [hereinafter “*TPP Final Text*”] (last visited Apr. 23, 2016).

<sup>135</sup> See Wallach, *supra* note 132; Jana Kasperkevic, *Obama Defends Controversial TPP Deal and dismisses Secrecy Concerns*, GUARDIAN (Oct. 10, 2015, 11:29 PM), <http://www.theguardian.com/business/2015/oct/10/obama-defends-tpa-deal-dismisses-secrecy-concerns>; Eric Bradner, *How Secretive Is the Trans-Pacific Partnership?*, CNN (June 12, 2015), <http://www.cnn.com/2015/06/11/politics/trade-deal-secrecy-tpa/> (reporting that Members of Congress were permitted to read the TPP text only in two designated reading rooms in the Capitol, under guard, and were not permitted to take notes or reveal the contents of the agreement).

<sup>136</sup> See *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, WIKILEAKS (Jan. 15, 2014), <https://wikileaks.org/tpa-enviro/> (noting the release of draft chapters of the TPP in 2014) [hereinafter “*Environmental Consolidated Text*”]; *Secret Trans-Pacific Partnership Agreement – Environment Chairs Report*, WIKILEAKS (Jan. 15, 2014), <https://wikileaks.org/tpa-enviro-chairsreport/> (highlighting that on the same day as the leak of the *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text*, Wikileaks released the Chairs’ Report, which is made up of state negotiators’ comments on and disagreements with the Consolidated Text together with their suggested revisions to the Chapter).

<sup>137</sup> See *TPP Final Text*, *supra* note 134, art. 20.2.

<sup>138</sup> See *Environmental Consolidated Text*, *supra* note 136, at art. SS.15; *TPP Final Text*, *supra* note 134, at art. 20.15 (determining that the final text of the TPP replaces the article on climate change with some anodyne language on the importance of member states transitioning to a “low emissions economy.”).

<sup>139</sup> See Ben Norton, *No Mention of Climate Change in the TPP: Sierra Club Report Shows “Dirty Deal” Means Environmental Disaster*, SALON, (Dec. 2, 2015, 7:06 PM), [http://www.salon.com/2015/12/02/no\\_mention\\_of\\_climate\\_change\\_in\\_the\\_tpp\\_sierra\\_club\\_report\\_shows\\_dirty\\_deal\\_means\\_environmental\\_disaster/](http://www.salon.com/2015/12/02/no_mention_of_climate_change_in_the_tpp_sierra_club_report_shows_dirty_deal_means_environmental_disaster/).

<sup>140</sup> See Press Release: *Secret Trans-Pacific Partnership Agreement (TPP) – Environment Chapter*, Wikileaks (Jan. 15, 2014), <https://wikileaks.org/tpa-enviro/pressrelease.html>, Jan. 15, 2014 (according to Wikileaks’ press release accompanying release of the leaked documents “[w]hen compared against other TPP chapters, the Environment Chapter is noteworthy for its absence of mandated clauses or meaningful enforcement measures. The dispute settlement mechanisms it creates are cooperative instead of binding: there are no required penalties and no proposed criminal sanctions.”).

<sup>141</sup> See *TPP Final Text*, *supra* note 134, art. 20.11 (emphasis added).

<sup>142</sup> See Meredith Wilensky, *Potential Liability for Climate-Related Measures under the Trans-Pacific Partnership*, COLUM. CTR. FOR CLIMATE CHANGE L. 4 (2014), available at [http://web.law.columbia.edu/sites/default/files/microsites/climate-change/wilenskytranspacificpartnership8-7-14\\_-revised.pdf](http://web.law.columbia.edu/sites/default/files/microsites/climate-change/wilenskytranspacificpartnership8-7-14_-revised.pdf).

<sup>143</sup> See Henry Farrell, *People Are Freaking Out about the Trans Pacific Partnership’s Investor Dispute Settlement System. Why Should You Care?*, WASH. POST (Mar. 16, 2015), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2015/03/26/>

people-are-freaking-out-about-the-trans-pacific-partnerships-investor-dispute-settlement-system-why-should-you-care/ (reporting that the TPP ISDS mechanism is set out in Chapter 28 Dispute Settlement. ISDS is a common feature of international trade agreements. According to Professor Rachel L. Wellhausen, ISDS arrangements appear in some 3000 trade treaties and bilateral investment treaties.).

<sup>144</sup> See Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), [https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9\\_story.html](https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html). Elizabeth Warren is the Senior U.S. Senator from Massachusetts.

<sup>145</sup> See *id.*

<sup>146</sup> See *TPP Final Text*, *supra* note 134, at art. 9.8.

<sup>147</sup> *Id.* at art. 9.8.2; see Wilensky, *supra* note 142, at 5.

<sup>148</sup> See Wilensky, *supra* note 142, at 5.

<sup>149</sup> *Id.*

<sup>150</sup> See *Leaked TPP Investment Chapter Provides Greater Rights for Foreign Investors than U.S. Constitution* 1, available at [http://webiva-downton.s3.amazonaws.com/877/0c/9/5477/FOE\\_analysis\\_WikiLeaks\\_release\\_TPP\\_investment\\_chapter\\_text.pdf](http://webiva-downton.s3.amazonaws.com/877/0c/9/5477/FOE_analysis_WikiLeaks_release_TPP_investment_chapter_text.pdf) (last visited Apr. 23, 2016) [hereinafter “*Leaked TPP*”]; *TPP Final Text*, *supra* note 134, at Annex 9-B (attempting to set out guidelines for indirect expropriation).

<sup>151</sup> See *Leaked TPP*, *supra* note 150.

<sup>152</sup> See Wilensky, *supra* note 142, at 5.

<sup>153</sup> *Id.*

<sup>154</sup> See Tim Smedley, *Goodbye Nuclear Power: Germany’s Renewable Energy Revolution*, GUARDIAN (May 10, 2013, 12:58 PM), <http://www.theguardian.com/sustainable-business/nuclear-power-germany-renewable-energy>.

<sup>155</sup> See *Vattenfall AB et al. v. Federal Republic of Ger.*, ICSID Case No. ARB/12/12, <http://www.italaw.com/cases/documents/1655>;

Wilensky, *supra* note 142, at 2; Clare Provost and Matt Kennard, *The Obscure Legal System That Lets Corporations Sue Countries*, GUARDIAN (June 10, 2015), <http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttp-icsid>.

<sup>156</sup> *TPP Final Text*, *supra* note 134, at art. 9.6.

<sup>157</sup> *Id.*

<sup>158</sup> See Wilensky, *supra* note 142, at 9; see Lise Johnson & Lisa Sachs, *The TPP’s Investment Chapter: Entrenching, Rather than Reforming, a Flawed System*, COLUM. CTR. ON SUSTAINABLE INV. 2 (2015), available at <http://ccsi.columbia.edu/files/2015/11/TPP-entrenching-flaws-21-Nov-FINAL.pdf> (referencing “the infamously vague and problematic fair and equitable treatment (FET) obligation”).

<sup>159</sup> Wilensky explains that most tribunals have regarded the FET standards as expanding; however, the WTO Appellate Body need not render consistent decisions because it is an ad hoc body not bound by *stare decisis*. See Wilensky, *supra* note 142, at 8, 9-10 (contrasting *Glamis Gold*’s static standard (citation omitted) with *Waste Treatment II*’s expanding standard (citation omitted)).

<sup>160</sup> *Id.* at 11 (“Legitimate expectation claims are based on the principle that where government actions create expectations in the minds of investors, it is unfair for a state to change laws in such a way that frustrates the expectations it helped to create.”) (quoting JESWALD SALACUSE, *THE LAW OF INVESTMENT TREATISES* 218, 232 (2010)). Tribunals have not been consistent in their determinations of what sort of representations made by states create legitimate expectations. The tribunal in *Técnicas Medioambientales* found liability where a state (Mexico) *made no representation at all*. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 153-154 (May 29, 2003), available at <http://www.italaw.com/sites/default/files/case-documents/ita0854.pdf> [hereinafter “*Tecmed*”].

<sup>161</sup> See Wilensky, *supra* note 142, at 12 (quoting *Tecmed*, *supra* note 160, at ¶ 153-154).

<sup>162</sup> See *id.*

<sup>163</sup> See *id.*

<sup>164</sup> See *id.* at 12-13 n. 91 (“A claimant cannot have a legitimate expectation that the host country will not pass legislation that will affect it.”) (quoting *Glamis Gold* (citation omitted)).

<sup>165</sup> *Id.* at 13. In *Bilcon v. Canada*, the Permanent Court of Arbitration found reasonable expectations were created by non-binding statements by Canadian officials and government advertising meant to spur mining operations in the region. Johnson & Sachs, *supra* note 158, at 5 (citing *Bilcon v. Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015).

<sup>166</sup> See Wilensky, *supra* note 142, at 14 (explaining the trend towards supporting host country measures to defeat climate change).

<sup>167</sup> See *id.* at 15-17.

<sup>168</sup> See *TPP Final Text*, *supra* note 134, at art. 9.4.2.

<sup>169</sup> *Id.* art. 9.5.; see also Wilensky, *supra* note 142, at 17.

<sup>170</sup> See *Table of Foreign Investor-State Cases and Claims under NAFTA and Other U.S. "Trade" Deals*, PUBLIC CITIZEN (June 2015), <http://www.citizen.org/documents/investor-state-chart.pdf>.

<sup>171</sup> See Greg Sargent, *Is TPP Trade Deal a Massive Giveaway to Major Corporations? An Exchange between Obama and Sherrod Brown*, WASH. POST (April 27, 2015), <http://www.washingtonpost.com/blogs/plum-line/wp/2015/04/27/is-tpp-trade-deal-a-massive-giveaway-to-major-corporations-an-exchange-between-obama-and-sherrod-brown/>.

<sup>172</sup> *Id.*; see Gary Clyde Hufbauer, *Senator Warren Distorts the Record on Investor-State Dispute Settlements*, PETERSON INST. FOR INT'L ECON. (March 2, 2015), <http://blogs.piie.com/trade/?p=137> ("Over the decades, only 13 ISDS cases have been brought to judgment against the United States. The United States has not lost a single case."); Joseph Stiglitz, *The Secret Corporate Takeover*, GUARDIAN (May 13, 2015), <http://www.theguardian.com/business/2015/may/13/the-secret-corporate-takeover-of-trade-agreements> ("American supporters of such agreements point out that the US has been sued only a few times so far, and has not lost a case.").

<sup>173</sup> See Johnson & Sachs, *supra* note 158, at 15 n. 49.

<sup>174</sup> See, *infra* note 179-82 and accompanying text.

<sup>175</sup> See, *infra* note 191-202 and accompanying text.

<sup>176</sup> See Appellate Body Report, *United States—Country of Origin Labelling (COOL) Requirements*, WT/DS384/386 (May 18, 2015), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds384\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds384_e.htm); Tennifer Tracy, *U.S. Meat Labels Face Another WTO Decision*, WALL ST. J., May 18, 2015, at A5; Mary Clare Jalonick, *Congress Considering Repeal of Meat Labeling Law*, BOSTON GLOBE (June 10, 2015), <https://www.bostonglobe.com/business/2015/06/10/congress-considering-repeal-meat-labeling-law/dWf3Iz4M-wolJgIdxBbLkK/story.html#>.

<sup>177</sup> Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996), available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/2-9.pdf](https://www.wto.org/english/tratop_e/dispu_e/2-9.pdf) [hereinafter "Venezuela Gas Dispute"].

<sup>178</sup> See *id.* at 5, ¶¶ 3.1-3.2 (emphasizing that this is a necessary simplification. The EPA imposed on each producer, foreign and domestic alike, a formula for determining the formulation of its gasoline based on how "clean" their gasoline had been in 1990. Gasoline producers whose records did not go back to 1990 (as was the case with Venezuela) were required to match the average quality of gasoline in 1990); *id.* at 10, ¶ 3.24 (noting that Venezuela's claim was that under this approach Venezuela would be forced to meet a higher standard for "clean" gasoline than some US producers. Venezuela argued that, hypothetically, a U.S. producer might be producing dirtier gas than Venezuela, yet be allowed to sell without improving the environmental quality of its gas. Venezuela, however, would have to improve the environmental quality of its gas.).

<sup>179</sup> See Report of the Panel, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996) ¶¶ 3.59, 3.62; see also GATT, *supra* note 129, at art. XX(g) (stating "Subject to the requirement that such measures 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, nothing in this Agreement [i.e., GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures...relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.").

<sup>180</sup> See Report of the Panel, *supra* note 179, at ¶ 6.37.

<sup>181</sup> See *Analytical Index of the GATT, Article XX, General Exceptions*, available at [https://www.wto.org/english/res\\_e/booksp\\_e/gatt\\_ai\\_e/art20\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf) (recalling that GATT Article XX allows measures provided that they are "not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination.").

<sup>182</sup> See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 (noting that the Agreement establishing the WTO requires states to make their laws conform to WTO rules) [hereinafter "WTO Agreement"].

<sup>183</sup> MARTIN WAGNER & PATTI GOLDMAN, *THE CASE FOR RETHINKING THE WTO: THE FULL STORY BEHIND THE WTO'S ENVIRONMENT AND HEALTH CASES 12* (1999), available at <http://www.earthjustice.org/sites/default/files/library/reports/>

thecase.pdf. Wagner and Goldman observe that in order "[t]o comply with the WTO decision, EPA changed its regulations to allow foreign refineries to use all alternative methods of calculating their compliance with the gasoline requirements, provided the refineries' governments agree to subject the refineries to U.S. inspection and enforcement authority....The new rule will allow dirtier Venezuelan gasoline into the northeastern United States.").

<sup>184</sup> See Zach Carter & Ryan Grim, *Obama's EU Trade Deal Would Include New Political Powers for Corporations*, HUFFINGTON POST (Apr. 3, 2013), [http://www.huffingtonpost.com/2013/04/04/eu-trade-deal\\_n\\_2994410.html](http://www.huffingtonpost.com/2013/04/04/eu-trade-deal_n_2994410.html) ("the direct empowerment of corporations to unilaterally bring trade cases against sovereign countries is not part of WTO treaties").

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> See Elizabeth Becker, *U.S. Tariffs on Steel Are Illegal, World Trade Organization Says*, N.Y. TIMES (Nov. 11, 2013), <http://www.nytimes.com/2013/11/11/business/us-tariffs-on-steel-are-illegal-world-trade-organization-says.html> (noting that in 2002, President George W. Bush imposed tariffs on steel, leading to a successful WTO challenge from the European Union and that the WTO decision would allow the European Union to impose \$2 billion of retaliatory tariffs on the United States); Matt Tran, *Bush Lifts Steel Tariffs to Avert Trade War*, GUARDIAN (Dec. 4, 2003), <http://www.theguardian.com/world/2003/dec/04/usa.wto1> (noting that Bush lifted the steel tariffs); see also note 180 *supra* and accompanying text.

<sup>188</sup> See, e.g., *Venezuela Gas Dispute*, *supra* notes 179-81 and accompanying text; see also *supra* note 174.

<sup>189</sup> See GATT, *supra* note 129, at art. I, § 1 (Most Favored Nation obligation); *id.* at art. III, § 4 (National Treatment Obligation); *id.* at Art. XX (prohibition of expropriation); see JOSÉ E. ALVAREZ, *THE PUBLIC INTERNATIONAL LAW REGIME GOVERNING INTERNATIONAL INVESTMENT* 37 (2011) (noting that there is no fair and equitable treatment obligation in GATT); see *infra* note 199 and accompanying text (referencing the equivalent investor protections under NAFTA).

<sup>190</sup> See Juliet Eilperin and Katie Zezima, *Obama Vetoes Keystone XL Bill*, WASH. POST (Feb. 24, 2015) <https://www.washingtonpost.com/news/post-politics/wp/2015/02/24/keystone-xl-bill-a-k-a-veto-bait-heads-to-presidents-desk/>.

<sup>191</sup> *Ibid.*

<sup>192</sup> See Kate Sheppard, *Study Finds Keystone XL Would Have Much Larger Impact than State Department Suggests*, HUFFINGTON POST (July 9, 2014), [http://www.huffingtonpost.com/2014/03/03/keystone-xl-emissions-state-department\\_n\\_4892806.html](http://www.huffingtonpost.com/2014/03/03/keystone-xl-emissions-state-department_n_4892806.html); see also Juliet Eilperin, *Environmentalists Take Hard Line with Obama on Keystone XL*, WASH. POST (Sept. 24, 2013), <https://www.washingtonpost.com/news/post-politics/wp/2013/09/24/environmentalists-warn-obama-against-keystone-xl-even-if-canada-compromises-on-climate/>.

<sup>193</sup> See *TransCanada Corp. v. U.S.*, Notice of Intent to Submit a Claim to Arbitration Under Chapter 11 of the North American Free Trade Agreement, Jan. 6, 2016, available at <http://www.keystone-xl.com/wp-content/uploads/2016/01/TransCanada-Notice-of-Intent-January-6-2016.pdf> [hereinafter "TransCanada Notice of Intent"]; see also Todd Tucker, *TransCanada Is Suing the U.S. over Obama's Rejection of the Keystone XL Pipeline. The U.S. Might Lose.*, WASH. POST (Jan. 8, 2016), <https://www.washingtonpost.com/news/monkey-cage/wp/2016/01/08/transcanada-is-suing-the-u-s-over-obamas-rejection-of-the-keystone-xl-pipeline-the-u-s-might-lose/>.

<sup>194</sup> See *TransCanada Notice of Intent* ¶¶ 8, 12, 60; see also Complaint at ¶¶ 2, 62, *TransCanada Keystone Pipeline, LP v. Kerry*, No. 4:16-cv-00036 (S.D. Tex. Jan. 6, 2016), available at <http://www.keystone-xl.com/wp-content/uploads/2016/01/TransCanada-Complaint-January-6-2016.pdf> (noting that TransCanada is pursuing a two-track challenge against the United States. The same day that TransCanada filed its Notice of Intent under NAFTA, January 6, 2016, it filed a Complaint in U.S. District Court for the Southern District of Texas. In its Complaint, TransCanada alleged that President Obama's unilateral act of cancelling the Keystone XL pipeline was in violation of the U.S. Constitution as encroaching upon the power of Congress to regulate interstate and foreign commerce).

<sup>195</sup> See *TransCanada Notice of Intent*, *supra* note 194, at ¶ 1.

<sup>196</sup> *Id.*

<sup>197</sup> See *id.* at ¶¶ 10, 21, 23, 25, 34, 43, 45-46, 59.

<sup>198</sup> See Steve Charnovitz & Carolyn Fischer, *Canada—Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies*, RES. FOR THE FUTURE 2 (Oct. 2014) <http://www.rff.org/RFF/Documents/RFF-DP-14-38.pdf>.  
<sup>199</sup> See generally *Green Energy and Green Economy Act*, S.O. 2009, c. P. 12 (Can.) (cited in KLEIN, *supra* note 7, at 475-76 n.3.)

- <sup>200</sup> See KLEIN, *supra* note 7, at 57.
- <sup>201</sup> *Id.* at 113.
- <sup>202</sup> *Id.* at 205 (noting that in the Green Energy and Green Economy Act LCRs are called Minimum Required Domestic Content Levels).
- <sup>203</sup> See *id.* at 58.
- <sup>204</sup> *Id.* at 57.
- <sup>205</sup> Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector; Canada—Measures Relating to the Feed-In Tariff Program*, WT/DS412/AB/R, WT/DS426/AB/R (May 6, 2013), [http://www.wto.org/english/tratop\\_e/dispu\\_e/412\\_426abr\\_e.pdf](http://www.wto.org/english/tratop_e/dispu_e/412_426abr_e.pdf) [hereinafter “*Canada—Renewable Energy Dispute*”].
- <sup>206</sup> KLEIN, *supra* note 7, at 60; see also Wilensky, *supra* note 142, at 15-16.
- <sup>207</sup> See KLEIN, *supra* note 7 at 57-58 (noting that Naomi Klein profiles an Italian company, Silfab, which was manufacturing solar panels inside Ontario and was thus receiving the benefits of the GEA’s feed-in tariff).
- <sup>208</sup> See *Canada—Renewable Energy Dispute*, *supra* note 205, at ¶¶ 5.85, 6.1(b) (v); GATT 1994, Art. III, § 4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter “GATT 1994”]; Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 U.N.T.S. 186 (1994) [hereinafter “TRIMS Agreement”].
- <sup>209</sup> See Scott Sinclair & Stewart Trew, *Keeping Green Energy Local and Public*, HAMILTON SPECTATOR (Dec. 18, 2013), <http://www.thespec.com/opinion-story/4276197-keeping-green-energy-local-and-public/> (noting the LCRs were removed in stages between 2013 and 2014).
- <sup>210</sup> See Thomas J. Timmins & Leslie Blumer, *Canada: Ontario’s Minister Of Energy Announces Changes To Feed-In Tariff Program*, MONDAQ (June 19, 2013), <http://www.mondaq.com/canada/x/245550/Renewables/Ontarios+Minister+Of+Energy+Announces+Changes+To+FeedIn+Tariff+Program>; see also Paul Gipe, *Two Steps Forward, One Back: Ontario Cancels Feed-in Tariffs for Large Projects*, RENEWABLE ENERGY WORLD (June 10, 2013), <http://www.renewableenergyworld.com/articles/2013/06/two-steps-forward-one-back-ontario-cancels-feed-in-tariffs-for-large-projects.html>.
- <sup>211</sup> See Aaron Cosbey, *Renewable Energy Subsidies and the WTO: The Wrong Law and the Wrong Venue*, INT’L INST. FOR SUSTAINABLE DEV. (June 19, 2011), <https://www.iisd.org/gsi/news/renewable-energy-subsidies-and-wto-wrong-law-and-wrong-venue>.
- <sup>212</sup> *Id.* (noting that Ontario’s is not the only approach to reducing carbon and that other approaches to controlling or reducing carbon may also be jeopardized by national treatment provisions); Wilensky, *supra* note 142, at 15 (“National treatment provisions may be invoked to challenge climate-related measures that limit the import or export of carbon intensive fuels or favor domestic energy sources because of lower associated GHG emissions.”); see Tim Worstall, *Naomi Klein’s Quite Extraordinary Logical Ignorance*, FORBES (Sept. 20, 2014), <http://www.forbes.com/sites/timworstall/2014/09/20/naomi-kleins-quite-extraordinary-logical-ignorance/#392f6481a673> (noting “The WTO has just increased the installation rate of solar in Ontario, making climate change that infinitesimal bit less bad”). Furthermore indicating that challenges can also be anticipated should import bans be imposed on goods manufactured using fossil fuels. Business writer Tim Worstall contends that Ontario is better off without the LCRs. The FIT and the LCRs made possible the sale of higher priced solar panels so long as they were manufactured in Ontario. Eliminating the LCRs makes solar panels cheaper. This means that more solar panels are purchased and installed.).
- <sup>213</sup> See generally Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456 (Oct. 24, 2014), [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds456\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds456_e.htm); KLEIN, *supra* note 7, at 56.
- <sup>214</sup> See Charles Pierson, *How the US and the WTO Crushed India’s Subsidies for Solar Energy*, COUNTERPUNCH (Aug. 28, 2015), <http://www.counterpunch.org/2015/08/28/how-the-us-and-the-wto-crushed-indias-subsidies-for-solar-energy/>.
- <sup>215</sup> See *US Challenges India’s Renewable Energy Incentives at WTO*, INT’L CTR. FOR TRADE AND SUSTAINABLE DEV. (Feb. 13, 2013), <http://www.ictsd.org/bridges-news/biores/news/us-challenges-indias-renewable-energy-incentives-at-wto>.
- <sup>216</sup> *Id.* (noting for its part, India has considered taking action against US renewable energy subsidies at both state and federal levels); see KLEIN, *supra* note 7, at 65 (noting that to date, however, India has not filed a challenge with the WTO).
- <sup>217</sup> See Wilensky, *supra* note 142, at 11-12.
- <sup>218</sup> See *supra* notes 86-90 and accompanying text.
- <sup>219</sup> *Id.* Coal is the dirtiest fossil fuel. See Michelle Nijhuis, *Can Coal Ever Be Clean*, NAT’L GEOGRAPHIC (Apr. 2014), <http://ngm.nationalgeographic.com/2014/04/coal/nijhuis-text>.
- <sup>220</sup> See *Existing Coal Plants in Kentucky*, SOURCEWATCH, [http://www.sourcewatch.org/index.php/Category:Existing\\_coal\\_plants\\_in\\_Kentucky](http://www.sourcewatch.org/index.php/Category:Existing_coal_plants_in_Kentucky) (last modified Aug. 28, 2012).
- <sup>221</sup> See *Cane Run Station*, SOURCEWATCH, [http://www.sourcewatch.org/index.php/Cane\\_Run\\_Station](http://www.sourcewatch.org/index.php/Cane_Run_Station) (last modified Feb. 12 2016) (referencing that Cane Run Station has three units owned by Louisville Gas & Electric); *Mill Creek Station*, SOURCEWATCH, [http://www.sourcewatch.org/index.php/Mill\\_Creek\\_Station](http://www.sourcewatch.org/index.php/Mill_Creek_Station) (last modified Sept. 4, 2012) (referencing that Mill Creek Station has four units owned by Louisville Gas & Electric); *E.W. Brown Generating Station*, SOURCEWATCH, [http://www.sourcewatch.org/index.php/E.W.\\_Brown\\_Generating\\_Station](http://www.sourcewatch.org/index.php/E.W._Brown_Generating_Station) (last modified Feb. 16, 2016) (referencing that E.W. Brown Generating Stations has three units owned by Kentucky Utilities Co.); *Ghent Generating Station*, SOURCEWATCH, [http://www.sourcewatch.org/index.php/Ghent\\_Generating\\_Station](http://www.sourcewatch.org/index.php/Ghent_Generating_Station) (last modified Aug. 24, 2012) (referencing that Ghent Generating Station has four units owned by Kentucky Utilities Co.); *Green River Generation Station*, SOURCEWATCH, [http://www.sourcewatch.org/index.php/Green\\_River\\_Generating\\_Station](http://www.sourcewatch.org/index.php/Green_River_Generating_Station) (last modified Feb. 16, 2016) (referencing that Green River Generating Station has two units owned by Kentucky Utilities Co.).
- <sup>222</sup> See *E.ON*, SOURCEWATCH, <http://www.sourcewatch.org/index.php/E.ON> (last modified on Nov. 14, 2012).
- <sup>223</sup> See Stuart Jeffries, *What Is TTIP and Why Should We Be Angry about It?*, GUARDIAN (Aug. 3, 2015, 1:15 PM), <http://www.theguardian.com/business/2015/aug/03/ttip-what-why-angry-transatlantic-trade-investment-partnership-guide>.
- <sup>224</sup> See Alhaji B. M. Marong, *From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development*, 16 GEO. INT’L ENVTL. L. REV. 21, 24 (2003).
- <sup>225</sup> See North American Agreement on Environmental Cooperation, 32 I.L.M. 1480 (1993); North American Agreement on Labor Cooperation, 32 I.L.M. 1499 (1993); Marong, *supra* note 224, at 63.
- <sup>226</sup> See Patricia Isela Hansen, *Dispute Settlement in the NAFTA and Beyond*, 40 TEXAS INT’L L. J. 417, 422 (2005) (“[T]he side agreements have also produced significant criticism from environmental and labor organizations, which tend to view the agreements as toothless and ineffective.”).
- <sup>227</sup> *TPP Full Text*, *supra* note 134, at art. 9.16.
- <sup>228</sup> See Johnson & Sachs, *supra* note 158, at 2.
- <sup>229</sup> *Id.* (noting Article 9.15 “provides no real protection. Rather, it simply notes that the government can regulate in the public interest as long as, when doing so, the government complies with the Investment Chapter’s requirements regarding treatment of foreign investors and investments”).
- <sup>230</sup> See Marong, *supra* note 224, at 63.
- <sup>231</sup> *Id.* (referencing that these are the WTO’s Committee on Trade and the Environment and its Committee on Trade and Development); see also GATT 1994, *supra* note 208, at pmb1. (noting that the preamble of the WTO’s founding instrument establishes sustainable development as a goal of the organization).
- <sup>232</sup> See Marong, *supra* note 224, at 63.
- <sup>233</sup> See Wilensky, *supra* note 142, at 18-20.
- <sup>234</sup> Compare Wilensky, *supra* note 142, at 18-20 with GATT, art. XX, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (laying out environmental exception where environmental protection laws are acceptable unless they constitute disguised restrictions on trade). An effective environmental exception clause would, however, have to be phrased more strongly than Article XX. Even with Article XX in place WTO tribunals have held several environmental laws inconsistent with WTO agreements.
- <sup>235</sup> See Wilensky, *supra* note 142, at 17.
- <sup>236</sup> See CORDONIER SEGGER & KHALFAN, *supra* note 12.
- <sup>237</sup> *Id.*
- <sup>238</sup> See BIRNIE & BOYLE, *supra* note 23, at 46.
- <sup>239</sup> See BRYNER, *supra* note 2, at 258; Justice N. J. McNally, *Human Rights in the Context of Sustainable Development*, in SUSTAINABLE JUSTICE: RECONCILING ECONOMIC, SOCIAL AND ENVIRONMENTAL LAW, *supra* note 12, at 80-88 (“It is difficult to effectively give moral lessons to hungry people. It is difficult to insist on the preservation of the elephant population to villagers whose whole year’s crop may be destroyed in a single night by animals coming out of the neighboring game preserve. It is difficult to require the forests to be preserved if these resources are needed daily for cooking and housing.”).
- <sup>240</sup> See EDWARD MIGUEL, *AFRICA’S TURN?* 31-36 (2009) (noting development imperiled by armed conflict).

- <sup>241</sup> See BRYNER, *supra* note 2, at 258.
- <sup>242</sup> As Ayn Rand put it: “When the house is on fire you don’t run back inside to dust.”
- <sup>243</sup> See BRYNER, *supra* note 2, at 258.
- <sup>244</sup> See ANITA MARGRETHE HALVORSEN, EQUALITY AMONG UNEQUALS IN INTERNATIONAL ENVIRONMENTAL LAW: DIFFERENTIAL TREATMENT FOR DEVELOPING COUNTRIES 5 (1999); BRYNER, *supra* note 2, at 258. Regarding regulatory infrastructure: sustainable development is impossible without laws and enforcement mechanisms; access to sophisticated, clean technologies along with sufficient numbers of educated personnel who know how to use them; and effective honest governments and bureaucracies. See HALVORSEN, *supra* note 244, at 5.
- <sup>245</sup> See BRYNER, *supra* note 2, at 258-60.
- <sup>246</sup> See MIGUEL, *supra* note 240, at 39-40; NICHOLAS STERN, THE GLOBAL DEAL 9 (2009) (noting that Asia is in the greatest danger from flooding, with immense coastal areas and population subject to inundation. Bangladesh with its low-lying coast is in great danger. Flooding and crop failure spur mass migration which may spark violent conflict between populations displaced by environmental failures “climate refugees” and a region’s existing population. Drought is another cause of poverty and civil conflict.); MIGUEL, *supra*, at 240, 38-39 (noting that drought as a product of climate change caused by carbon emissions); Salman Masood, *Starved for Energy, and Bracing for a Water Crisis*, N.Y. TIMES, Feb. 13, 2015, at A12 (“A combination of global climate change and local waste and mismanagement have led to an alarmingly rapid depletion of Pakistan’s water supply, said the minister for water and energy. . .”); Nadia Prupis, *Death Toll Soars in ‘Unbelievable’ Pakistan Heat Wave*, COMMON DREAMS (June 24, 2015), <http://www.commondreams.org/news/2015/06/24/death-toll-soars-unbelievable-pakistan-heat-wave> (discussing how climate change may have contributed to Pakistan’s catastrophic heat wave in Summer 2015. “A former director of the Pakistan Environmental Protection Agency, Asif Shuja, said earlier this week that the soaring temperatures are an impact of climate change, fueled by rapid urbanization, deforestation, and car use.”); Adil Jawad, *Heat Wave Subsides in Pakistan as Death Toll Reaches 860*, WORLD POST (June 25, 2015, 3:09 PM), [http://www.huffingtonpost.com/huff-wires/20150625/as-pakistan-heat-wave/?utm\\_hp\\_ref=world&ir=world](http://www.huffingtonpost.com/huff-wires/20150625/as-pakistan-heat-wave/?utm_hp_ref=world&ir=world) (noting how hundreds in Pakistan died as the temperature reached a high of 113° F).
- <sup>247</sup> See BLACK, *supra* note 1, at 100.
- <sup>248</sup> *Id.*
- <sup>249</sup> See BIRNIE & BOYLE, *supra* note 23, at 125-26.
- <sup>250</sup> *Id.* at 125.
- <sup>251</sup> See section V.C. *infra*.
- <sup>252</sup> See SANDS, *supra* note 17, at 253.
- <sup>253</sup> See BLACK, *supra* note 1, at 142.
- <sup>254</sup> See section II *infra*.
- <sup>255</sup> See MARONG, *supra* note 224, at 59 (suggesting that sustainable development should be considered to be, not a customary international law norm, but a broad, overarching principle couched in general terms from which several international law rules such as the precautionary principle flow).
- <sup>256</sup> We draw a lesson from US Constitutional law. Sustainable development is no more inherently normatively uncertain than concepts such as “Equal Protection” or “Due Process of Law.” There is plenty of disagreement over what measures Equal Protection and Due Process require but no one suggests that such disagreement renders these concepts meaningless. However, in constitutional matters there is a final authoritative arbiter to say what Equal Protection and Due Process are. In our globally anarchic system there is no entity which has the final say on the meaning of intergenerational equity or any other component of sustainable development, much less an entity which has the power to force states to comply with sustainable development norms. Contrast international trade law with its authoritative transnational tribunals rendering binding decisions carried out by powerful enforcement mechanisms. See section IV *infra*.
- <sup>257</sup> This relationship is called the environmental Kuznets curve. See David I. Stern, *The Rise and Fall of the Environmental Kuznets Curve*, 32 WORLD DEV. 1419, 1419 (2004), [http://steadystate.org/wp-content/uploads/Stern\\_KuznetsCurve.pdf](http://steadystate.org/wp-content/uploads/Stern_KuznetsCurve.pdf).
- <sup>258</sup> See Kenneth Arrow, et al., *Economic Growth, Carrying Capacity, and the Environment*, 268 SCIENCE 520, 520 (1995), [http://www.precaution.org/lib/06/econ\\_growth\\_and\\_carrying\\_capacity.pdf](http://www.precaution.org/lib/06/econ_growth_and_carrying_capacity.pdf).
- <sup>259</sup> *Id.*
- <sup>260</sup> *Id.*
- <sup>261</sup> *Id.*
- <sup>262</sup> *Id.*
- <sup>263</sup> *Id.*
- <sup>264</sup> *Id.*
- <sup>265</sup> See HUNTER, *supra* note 21, at 180.
- <sup>266</sup> See Ørebech & Bosselman, *supra* note 10, at 13.
- <sup>267</sup> See BRYNER, *supra* note 2, at 260.
- <sup>268</sup> *Id.*
- <sup>269</sup> *Id.*
- <sup>270</sup> See BRYNER, *supra* note 2, at 261-63 (noting that what is being described here is the notion of common but differentiated responsibilities); see *supra* note 60. The Framework Convention on Climate Change obligates the North to provide technical and financial assistance to the South. See FCCC, *supra* note 56, arts. 4(3) and 4(7).
- <sup>271</sup> See BRYNER, *supra* note 2, at 263.
- <sup>272</sup> IEG of the Global Commons, UNITED NATIONS ENV’T PROGRAM, <http://www.unep.org/delc/GlobalCommons/tabid/54404/> (last visited Apr. 27, 2016).
- <sup>273</sup> UNITED NATIONS SYSTEM TASK TEAM ON THE POST-2015 UN DEVELOPMENT AGENDA, GLOBAL GOVERNANCE AND GOVERNANCE OF THE GLOBAL COMMONS IN THE GLOBAL PARTNERSHIP FOR DEVELOPMENT BEYOND 2015 5-6 (Jan. 2013), [http://www.un.org/en/development/desa/policy/untaskteam\\_undf/thinkpieces/24\\_thinkpiece\\_global\\_governance.pdf](http://www.un.org/en/development/desa/policy/untaskteam_undf/thinkpieces/24_thinkpiece_global_governance.pdf).
- <sup>274</sup> The South’s position is set out in the Charter of the Economic Rights and Duties of States: “Every State has and shall freely exercise full permanent sovereignty \* \* \* over all its wealth, natural resources and economic activities.” See Charter of the Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 2 (Jan. 15, 1975).
- <sup>275</sup> One way is through intellectual property law. Western pharmaceutical corporations patent drugs based on the fauna of Southern countries, the folk medicine of indigenous peoples, and even the genetic sequences of indigenous peoples. See YASH TANDON, TRADE IS WAR: THE WEST’S WAR AGAINST THE WORLD 105-09 (2015). The patents taken out by Western pharmaceutical firms bar the South from producing low-price generic drugs impoverished people desperately need in order to treat conditions such as HIV, malaria, and cancer. *Id.* at 108-12.
- <sup>276</sup> See generally PETER SINGER, ONE WORLD: THE ETHICS OF GLOBALIZATION (2nd ed. 2004). In his first year in office, President Bush sent a letter to a group of US Senators explaining his reasons for rejecting the Kyoto Protocol. See George W. Bush, *Text of a Letter from the President to Senators Hagel, Helms, Craig, and Roberts*, (Mar. 13, 2001) <http://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010314.html>. After stating that “My Administration takes the issue of global climate change very seriously,” Bush continued by stating “[A]s you know, I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance and would cause serious harm to the U.S. economy.” *Id.*
- <sup>277</sup> See discussion *supra* at text accompanying notes 2-16 and 269-276.
- <sup>278</sup> See Singer, *supra* note 276, at 44.
- <sup>279</sup> *Id.* at 31-33.
- <sup>280</sup> See LESTER C. THUROW, THE ZERO SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE 188 (1980).
- <sup>281</sup> *Id.*
- <sup>282</sup> *Id.*
- <sup>283</sup> *Id.* Thurow makes this analogy in the context of racial discrimination and affirmative action. *Id.* It applies equally well to the inequities which currently exist between the rich and poor countries.
- <sup>284</sup> See SINGER, *supra* note 276, at 33-34, 43. Singer believes that steep reductions in carbon emissions need not trigger economic depression if a system of carbon trading is adopted. *Id.* at 45-46. This was written in 2004, years before the failure of President Obama’s proposed cap and trade scheme. See *supra* notes 57-64 and accompanying text.