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

By Imrana Iqbal* and Charles Pierson**

II. INTRODUCTION

Do developing countries have a future? 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. 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.

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?

The developing countries correctly point out that the West consumes most of the world's natural resources. 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, while producing about 14% of global carbon emissions. Researcher Maggie Black notes the "resentment from the developing world: a regime of international ecological regulation—not in place during Western industrialization—would deny them a 'developed' future." By implementing blocks, there would be a significant shift in the social and economic inequality between developed and developing countries.

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.

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. The concept of sustainable development was formulated to reconcile the conflict between economic growth and environmental protection.

The sustainable development idea regards both economic growth and environmental protection as genuine goods. Under sustainable development, growth is not sacrificed for the environment, nor is the environment sacrificed for economic growth. By implementing sustainable

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** J.D., Duquesne University School of Law, 1998. The authors extend warm thanks to Kirk W. Junker, J.D., Ph.D., Professor of Law, University of Cologne for his invaluable comments on this article.
development goals, developing countries can enjoy sustainable growth while protecting the natural environment.\footnote{15}{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.}

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.\footnote{16}{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.\footnote{17}{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.\footnote{18}{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.”\footnote{19}{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.\footnote{20}{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.}}}}

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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.\footnote{22}{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.\footnote{23}{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\footnote{24}{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 . . . .\footnote{25}{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.\footnote{26}{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.”\footnote{27}{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.

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.

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. Agenda 21 represents a verbal commitment by nations around the world to take actions to further sustainable development. 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.” Although non-binding, Agenda 21 is an action plan for the international community to integrate environmental and development concerns for a sustainable future. 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. 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.”

**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.

Crafted at the September 2000 UN Millennium Summit, a third of the Declaration addresses sustainable development and eradication of poverty. 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.

The Millennium Development Goals (“MDGs”), which followed a year later in Summer 2001, were a “codification of the Declaration’s development related objectives.” Scott Wisor writes: “[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.”

**POST-2015 DEVELOPMENT AGENDA**

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

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.

On July 19, 2014, the Open Development Group released a draft set of Sustainable Development Goals (“SDGs”). The SDGs cover much of the same ground as the MDGs. However, unlike the MDGs, the SDGs divide sustainability into several goals.

**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. For years, the United States hid behind a smokescreen of pretended scientific uncertainty over climate change. 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. 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. The Reagan Administration ignored the report. Instead, the Reagan Administration (1981-89) marshaled supposed scientific uncertainty to validate its unconcern over global warming.
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), 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. Instead, the United States demanded that developing nations accept responsibility greater than their due share. Owing to this U.S. hardline position, the FCCC contained no enforceable targets and timetables. Donald Brown writes: "The United States reluctantly agreed to make a good-faith effort to reduce greenhouse gas emissions to 1990 levels by 2000. Additionally, the United States conceded that developed nations should make progress in reducing emissions before expecting commitments from the developing world. 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. In 1995, the new IPCC report concluded that it was now possible to discern the human-induced climate change. Thereafter, the Clinton Administration expressed subdued willingness to accept internationally enforceable targets and binding national emissions reductions timetables. These were negotiated in Kyoto, Japan in 1997.

Negotiations at Kyoto were tense. Congress exerted its weight to impede agreement on the principle of "common but differentiated commitments and responsibilities." The international community, by contrast, clamored for the United States to make a meaningful and legally binding pledge to reduce its emissions levels. 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." 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."

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. The Bush Administration also trotted out other old excuses: cost to the American economy in terms of lost jobs and reduced GDP and the failure of the developing world to make commitments. In 2001, the Bush Administration renounced the Kyoto Protocol, regarding it as inimical to U.S. economic interests. 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. In this President Bush proved himself the faithful servant of coal and petroleum groups.

George W. Bush did not deny the reality of climate change; he merely did nothing about the problem. In April 2008, with less than a year remaining before he would leave office, Bush proposed his boldest climate initiative: voluntary caps. "[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.

The Obama Administration, 2009 to the Present

The environmental movement had great hopes for Barack Obama. During his 2008 Presidential campaign, candidate Obama promised to make addressing climate change a priority, 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." 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.

The trouble is, keeping world temperatures below 2°C is only the bare minimum threshold for preventing runaway warming. 2°C represents a tipping point beyond which rapidly rising temperatures are irreversible. 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. 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. The climate groups who attended Copenhagen hoped to limit world temperature rise to no more than 1.5°C. Instead, environmental activist Bill McKibben estimates that the "commitments" made at Copenhagen will result in a devastating 3°C temperature increase.

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. The United States pledged to reduce carbon emissions by only 17% below 2005 levels by 2020. The emissions cuts were to have been achieved by a cap-and-trade plan, part of the ill-fated Waxman-Markey bill. Under cap and trade, tradable "carbon credits"—permits to pollute—would be assigned to corporate polluters in the United States. 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. In theory, cap and trade would raise the cost of emissions to corporate polluters and spur development of renewable alternatives.

The bill passed the House of Representatives, 219–212. 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.96 By late July 2010, Waxman-Markey was dead.97 Waxman-Markey failed even though it was a strongly pro-corporate bill.98 Waxman-Markey “[gave] billions of dollars in handouts to fossil fuel companies and practically a license to print money from carbon offsets and credits.”99 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.100 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 2020.101 He promised that the cuts would not sacrifice strong economic growth and job creation.102 The Clean Power Plan, as it is called, has met strong Republican opposition and resulted in two pending federal lawsuits: West Virginia v. EPA103 and Murray Energy Corp. v. EPA.104 One significant success for the President is the November 2014 bilateral carbon agreement with China.105 The United States and China produce 45% of the world’s GHG emissions.106 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.107 Thanks to outsourcing, U.S. corporations now vicariously pollute in China.108 By shifting its emissions overseas, the United States gets to take credit for cutting its carbon emissions more than it actually has.109 Curbing China’s carbon emissions will be impossible without reigning in U.S. corporations.110 The two countries agreed to jointly reduce their GHG emissions.111 The US will cut its emissions 26% to 28% below 2005 levels by 2025,112 while China pledges that its emissions will cease to grow by 2030.113 However, it should be noted that the agreement is non-binding.114

Much less successful was the Paris Climate Summit held from November 30, 2015 to December 11, 2015.115 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.116 The United States submitted an INDC promising to cut GHG emissions nearly 30% from 2005 levels by the year 2025.117

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.118 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.119 The second fatal flaw is that the Paris Accord, like the Copenhagen Accord before it, is non-binding.120 “A fraud” is how former NASA scientist and climate change pioneer James Hansen summed up the Paris Summit.121

IV. DOES TRADE TRUMP ENVIRONMENT?

Professor Philippe Sands has remarked that there are two principal challenges to the development of international sustainable development law.122 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.”123 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.”124 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.125

“Curbing China’s carbon emissions will be impossible without reigning in U.S. corporations.”

Tariffs are not the only barriers to free trade.126 There are also non-tariff barriers (NTBs), including, but not limited to, import quotas, import licensing, subsidies, and restrictions on goods’ distribution and sale.127 Like tariffs, NTBs are regarded as protectionist.128 Disastrously for the environment, free trade regimes too often treat states’ attempts to protect the environment as covert protectionism.129 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.130 On occasion, this is a fair criticism.131

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.”132 The TPP will include twelve Pacific Rim countries representing 40% of global GDP.133 The text of the agreement was finally made public on November 5, 2015.134 Up to that time, the text of the TPP was wrapped in the sort of secrecy surrounding plans for military invasions.135 The general public would have remained in the dark about the TPP’s contents if Wikileaks had not leaked portions of the text.136

The TPP states as an objective to “promote high levels of environmental protection and effective enforcement of environmental laws.”137 That’s the promise; what’s the reality? An earlier draft of the TPP contained an article on climate change.138 But the final text makes no reference to climate change.139 As with NAFTA, the TPP’s environmental guarantees lack teeth.140 As if to
dispel any doubt of this, TPP contains an article titled, "Voluntary Mechanisms to Enhance Environmental Performance."\(^{141}\)

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).\(^{142}\) 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.\(^{143}\) Disputes are heard before supranational arbitral tribunals, bypassing national courts.\(^{144}\) Damages, when awarded, come out of the pockets of the host nation’s taxpayers.\(^{145}\)

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

**EXPROPRIATION\(^{146}\)**

A foreign investor may recover damages for direct or indirect expropriation of its property, including lost profits.\(^{147}\) The most obvious instance of direct expropriation is nationalization.\(^{148}\) However, it is indirect expropriation that is more likely to disrupt environmental regulations directed at climate change mitigation.\(^{149}\) Indirect expropriation is defined broadly in the TPP. 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.\(^{150}\) 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.\(^{152}\) 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.\(^{153}\) 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.\(^{154}\) Germany’s decision is being challenged as an indirect expropriation by the Swedish energy giant Vattenfält.\(^{155}\)

**FAIR AND EQUITABLE TREATMENT (FET)\(^{156}\)**

States are required to accord foreign investors a minimum standard of fair treatment. What does this mean? That’s hard to say.\(^{158}\) Answering is complicated by the fact that some WTO panels see FET as a rising bar which demands more of host countries over time.\(^{159}\) 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.\(^{160}\) "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.”\(^{161}\) The petitioner in *Tecmed* operated a hazardous waste facility under a one-year permit from the Mexican government.\(^{162}\) 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.\(^ {163}\)

Other tribunals have required an express promise from the host state made with the intention of inducing the investor's reliance.\(^ {164}\) Other tribunals have only required that the investor reasonably rely on representations made by the host country regardless of the host country’s intent.\(^ {165}\) 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.\(^ {166}\)

**NONDISCRIMINATION**

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

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?\(^ {170}\) President Obama himself called attention to this fact while he was promoting passage of the TPP.\(^ {171}\) 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.”\(^ {172}\) 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).\(^ {173}\) 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.\(^ {174}\)

Ontario removed the local content provisions from its Green Energy and Green Economy Act after the provisions were successfully challenged before the WTO.\(^ {175}\) 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.\(^ {176}\)

The very first dispute brought to the WTO involved environmental pollution. In the *Venezuela Gas dispute*, Venezuela challenged an EPA regulation that required imported gasoline to meet stricter pollution standards than gasoline from U.S. producers.\(^ {178}\) 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.\(^ {179}\)

The DSB agreed with the United States that clean air was an exhaustible natural resource within the meaning of GATT Article XX(g),\(^ {180}\) 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.\textsuperscript{181} The United States subsequently changed the EPA Rule in order to make it consistent with GATT.\textsuperscript{182} 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.\textsuperscript{183}

The WTO Agreement does not contain an ISDS feature.\textsuperscript{184} However, investors can still take action against states indirectly.\textsuperscript{185} An aggrieved investor can persuade his or her home country to bring an action in the WTO.\textsuperscript{186} 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.\textsuperscript{187} So, President Obama is correct that the United States has not lost ISDS challenges. However, the United States has lost challenges before the WTO.\textsuperscript{188} NAFTA, GATT, and TPP provide most of the same trade protections.\textsuperscript{189} 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\textsuperscript{190} President Obama vetoed the Keystone Pipeline Approval Act.\textsuperscript{191} The proposed Keystone XL oil pipeline has been contentious because environmentalists contend the pipeline would do severe harm to the environment.\textsuperscript{192} On January 6, 2016, TransCanada, the company contracted to construct and operate the pipeline, filed a challenge against the United States under NAFTA.\textsuperscript{193} 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).\textsuperscript{194} TransCanada alleges that the United States rejected the Keystone application for political reasons, not environmental considerations.\textsuperscript{195} The United States had approved three similar oil pipelines while TransCanada’s application was pending.\textsuperscript{196} In addition, several federal environmental impact reviews had all concluded that the Keystone pipeline would not cause significant damage to the natural environment.\textsuperscript{197} 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.\textsuperscript{198} In 2009, the Ontario enacted a Green Energy and Green Economy Act.\textsuperscript{199} 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.”\textsuperscript{200} 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”).\textsuperscript{201} To qualify for the subsidies, producers must meet local content requirements (LCRs) for materials and services.\textsuperscript{202} The local content requirements are intended to spur employment in the province.\textsuperscript{203} Not just business corporations, but “local municipalities, co-ops, and Indigenous communities” are encouraged to participate.\textsuperscript{204}

The WTO Appellate Body held the local content requirements to be inconsistent with national treatment.\textsuperscript{205} “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.”\textsuperscript{206} The FIT Program’s Minimum Required Domestic Content Levels were a subsidy available only to producers (foreign or domestic) operating in Ontario.\textsuperscript{207} 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.\textsuperscript{208} Ontario removed the local content requirement so as to comply with the WTO decision.\textsuperscript{209} Ontario also cancelled the feed-in tariff for most projects.\textsuperscript{210} 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,\textsuperscript{211} and local content rules are necessary if Green Jobs are to be created.\textsuperscript{212}

Local content rules—or, rather, their analog: domestic content rules were the subject of a recently decided challenge by the United States against India.\textsuperscript{213} 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.\textsuperscript{214} India required that solar cells and solar modules (and, later, thin film technologies) be manufactured in India.\textsuperscript{215} The same sort of LCR had been successfully challenged in Ontario by Japan and the European Union.\textsuperscript{216}

**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.\textsuperscript{217}

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,\textsuperscript{218} will
require carbon emissions cuts at existing coal-burning electricity generating plants throughout the United States. In Kentucky alone there are 57 such units located in 21 plants. Two firms own sixteen of these units: Kentucky Utilities Company and Louisville Gas & Electric. These two companies are owned by German energy giant E.ON AG. 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. 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. 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. He does not mention that these side agreements have no teeth—no enforcement mechanisms. The TPP contains a carve-out for environmental and health regulations in Article 9.15. 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. The investor protections of TPP’s Investment Chapter trump regulations meant to protect the environment and human health.

Marong also cites favorable mentions of sustainable development made in ministerial meetings of the WTO. He emphasizes that the WTO has established two bodics to consider environmental and development concerns. 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.”

**REMEDIES**

Meredith Wilensky contends that simple revisions to the TPP can make the agreement effective in protecting the environment. We agree. She suggests that an environmental exception clause be added for good faith environmental regulations. She also suggests the addition of a provision to allow compliance with environmental treaties. 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. Their presence makes it much more likely that their views will be part of the resulting declarations, development goals, and treaties. 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. 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.” These include armed conflict, exploding populations, and dwindling natural resources. Such enormous challenges make the goals of conservation and pollution reduction less critical than the immediate problem of survival. Today’s urgent needs overwhelm planning for the future, even though when developing countries do want to implement sustainable development most of these countries simply lack the needed regulatory infrastructure. Developing nations typically have few resources, including money, to mitigate the effects of environmental degradation, such as ozone depletion, water pollution, or climate change. Developed countries, on the other hand, are able to cushion the negative effects of temperature increases such as rising sea levels.

Additionally, the goals of sustainable development are not well served by the poor example set by the developed world. 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.

**B. NORMATIVE UNCERTAINTY**

Some commentators ascribe the difficulty in implementing sustainable development to normative uncertainty. 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. 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 and integration of environmental, economic, social, and other considerations. 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.

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. 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. The content of sustainable development becomes less certain with each passing year.

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 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.”

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

In particular, North and South attack 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. Focus on economic development and the environment will look after itself. 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. It does not “apply” to environmental quality generally. 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.” The curve is not valid for the accumulation of stocks of waste or for pollutants involving long-term and more dispersed costs (such as CO2). Nor does this purported mathematical relationship give us any reason to believe that indefinite economic growth is possible. Instead, overdrawing from the earth’s limited resource stocks can irreversibly damage its productive capacities, risking the economic activity itself. Yet, clearly, the poverty of most developing countries does not justify blanket no-growth policies either. 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 ethnically. 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. 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. These policies keep the world’s poor countries poor.

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. It is small wonder that the South sees
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. 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.

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. More recently, the North has redefined the global commons to also include tropical rain forests and biodiversity. 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. The North continues to formulate ingenious new ways of stealing the South's resources.

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. Not surprisingly, the North and South have diametrically opposed views on what fairness requires. The Bush Administration argued that it was only fair that all countries observe the same standards. 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. 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. Thurow posits a footrace where half of the runners are burdened with heavy weights. Even if the runners are relieved of their weights midway through the race that does not transform the race into a fair one. The race only becomes fair when the previously burdened runners are allowed to catch up with those in the lead. 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. 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

1 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 developing countries); see Magaret 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, https://data.worldbank.org/region/LDC (last visited Apr. 14, 2016) (listing Least Developed Countries).
See generally id. at 201-26.

Id. at 233.

Id. at 203.

See id. at 251.

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).

Id.


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.)


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).

TPP Agreement, supra note 132, at 1.

See Tipping, supra note 146.


See id. (describing this as moving away from “thin state consent” to a “thick stakeholder consensus.”).


Id.

Id.

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).

Id.


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).

See id.

See id.

See TBT Committee Decisions & Recommendations, supra note 166.

Pauwelyn, supra note 150, at 15-18.

See id.

See Tipping, supra note 146, at 7.

Id. at 14-19.

Id. at 9-14.

Id. at 9-10.

See id. at 10.

See id. at 10-11.

See id. at 11.

See id. at 11-12.

See id. at 12-13.


See id.

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).


See Sustainable Development Goals, supra note 17 (demonstrating the topics range from issues connected to employment, forced labor, tourism, and strong banking institutions. These targets are soft, and they serve soft goals. This is susceptible to debates on how much “teeth” they have).

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

2 See Gary C. Brenner, From Promises to Performance: Achieving Global Environmental Goals 260-61 (1997) (inferring that due to developed nations not imposing controls to prevent pollution, developing countries are being treated unjustly when developed nations prevent developing nations from trying to develop).

3 See id. at 261.

4 President Barack Obama, Remarks by the President on Climate Change (June 25, 2013) (transcript available at https://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change) [hereinafter “Obama Remarks on Climate Change”].

5 See Black, supra note 1, at 96 (stating “the lack of willingness from the North, particularly the US, to regulate its own energy consumption, does little to encourage Southern governments to take resource conservation seriously.”).
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.").


12 See generally id., at 1-3 (providing a discussion of how sustainable development is dependent on a coexisting and balanced economy and environment).

13 See id. at 47.

14 Id. at 1-3.


19 See Brundtland Report, supra note 16 at 41.

20 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).

21 See Sands, supra note 17, at 11 (noting five objectives to promote sustainable development).

22 See generally Rio Declaration, supra note 19. See generally Patricia Brine & 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.”).

23 See section VC infra.


25 Id. at ¶ 6.


29 See generally id.

30 Rio Declaration, supra note 19, at Principle 3.


32 See Agenda 21, supra note 30.

33 See Boone & Boyle, supra note 23, at 85.


36 Id. at ¶ 15, 23.

37 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).


39 See generally Millennium Devel. 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).

40 Doyle & Stiglitz, supra note 40; see also Annan & Mousavizadeh, supra note 36, at 248.


42 Id.


45 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).

46 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).


48 Id. at 16, 18.

49 Id. at 16.

50 Id. at 15-16 (citing Global Energy Future and the Carbon Dioxide Problem, U.S. Council on Envtl. Quality (1981)).

51 Id. at 16. (noting that Reagan also removed the solar panels which President Carter had installed on the roof of the White House).


57 See Brown, supra note 50, at 20, 23.

58 Id. at 22.

59 Id. at 23.

60 Id. at 24.

61 Id. at 25.

62 Id. at 27 (noting that the Republican Party had taken control of Congress following the 1994 midterm elections).

63 Id. at 28.

64 Id. at 29.


66 “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 Vidy Prakash, The Poorer Nations: A Possible History of the Global South 191-92 (2002). “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.

67 See Brown, supra note 50, at 186.

68 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 Bouillon de Chazennes, Kyoto Protocol to the United Nations Framework Convention on Climate Change 2, available at http://legal.un.org/avl/halkepc/kpcc/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.


72 See Section V infra.


76 See Mayer, supra note 75, at 204 (noting that the conservative party was off-in-assisting with environmentally necessary tactics to reduce global warming); see also Emily Atkin, Jeb Bush and George W. Bush Have Drastically Differing 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/.


78 George W. Bush, Bush Remarks on Climate, Apr. 16, 2008 (transcript available at http://www.washingtonpost.com/wp-dyn/content/article/2008/04/16/AR200804160304.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.

79 See generally CHERIS WILLIAMS, ECOLOGY AND SOCIALISM 80 (2010).


81 KLEIN, supra note 7, at 12.

82 Id.


84 See Johan 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.")


87 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 a Uncertain Future Looms, YALE ENV’T 360 (Dec. 21, 2009), http://e360.yale.edu/feature/copenhagen_things_fall_apart_and_ an_une certain_future_looms/2225/ (noting that some regions will experience higher temperature increases than the world average).

88 See McKibben, supra note 87.

89 See generally id (providing a discussion of the events leading up to and after Copenhagen).

90 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 percent 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.

91 See WILLIAMS, supra note 79, at 81.
92 See id. at 82-83.
93 See id.
94 See Putting a Price on Carbon: An Emissions Cap or a Tax?, YALE ENVT’L 360 (May 7, 2009), http://e360.yale.edu/feature/putting-a-price-on_carbon_an_emissions_cap_or_a_tax/2148/.
95 See WILLIAMS, supra note 65, at 81.
97 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).
98 Id. at 21.
99 Id.
100 See Obama Remarks on Climate Change, supra note 4.
101 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 Drought 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.”).
102 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.”).
103 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).
104 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).
105 See Levi, supra note 90.
107 See Roger Bybee, Scapegoating China: Framing China as an Environmental Villain Only Serves to Excuse American Inaction, JACOBIN (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).
108 See Bybee, supra note 107.
109 See KLEIN, supra note 7, at 69-70, 81.
110 Professor Kirk Junker observed 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).
111 See Nakamura & Mufson, supra note 106.
112 Bybee, supra note 107.
113 Id.
114 See Levi, supra note 90.
115 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).
117 See United States, UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20Dec0%20America%1/U.S.%20Cover%20Note%20INDC%20Announcing%20Information.pdf (last visited Apr. 23, 2016).
118 See supra notes 69-72 and accompanying text.
119 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.
120 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/09r01.pdf [hereinafter “Paris Agreement”] (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-1436089435?mod=vs_Politics_Agenda_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 Dealmaking 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 could be revoked with the swipe of a pen by Obama’s successor).
123 Id. at 370.
124 Id.
125 The phrase “trade trumps environment” derives from Naomi Klein. See KLEIN, supra note 3, at 69.
127 See MITSUO MATSUISHITA ET AL., THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 262 (3d ed. 2015); BHALA, supra note 126, at 342 (discussing in depth quotas).
128 See BHALA, supra note 126 at 344-45; MATSUISHITA ET AL., supra note 127, at 216-17.
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.)


130 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 https://cisd.org/tribalustrials/pdfs/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.”).

131 See S.D. Myers, Inc. v. Canada, UNCITRAL Doc. No. 74246:01, 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”).


135 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-tpp-deal-dismisses-secret-concerns; Eric Bradner, How Secretive Is The Trans-Pacific Partnership?, CNN (June 12, 2015), http://www.cnn.com/2015/06/11/politics/trade-deal-secret-tpp- (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).


137 See TPP Final Text, supra note 134, art. 20.2.

138 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.”).


140 See Press Release: Secret Trans-Pacific Partnership Agreement (TPP)— Environment Chapter, Wikileaks (Jan. 15, 2014), https://wikileaks.org/ppp-environ/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 meagerly 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.”).

141 See TPP Final Text, supra note 134, art. 20.11 (emphasis added).


See Wilensky, supra note 142, at 14 (explaining the trend towards supporting host country measures to defeat climate change).

See id. at 15-17.

See TPP Final Text, supra note 134, at art. 9.4.2.

Id. art. 9.5.; see also Wilensky, supra note 142, at 17.


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.”).

See Johnson & Sachs, supra note 158, at 15 n. 49.

See, infra note 179-82 and accompanying text.

See, infra note 191-202 and accompanying text.


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 US 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.).

See Report of the Panel, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/R (Jan. 29, 1996) ¶¶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.”).


See Analytical Index of the GATT, Article XX, General Exceptions, available at https://www.wto.org/english/res_e/booksp_e/gatt_e/artxx_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.”)

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”].

MARTIN WAGNER & PATI GOLMAN, 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/the-case.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.”

See Zach Carter & Ryan Grim, Obama’s EU Trade Deal Would Include New Political Powers for Corporations, HUFFINGTON POST (Aprt. 3, 2013), http://www.huffingtonpost.com/2013/04/04/eu-trade-deal_n_3994410.html (“the direct empowerment of corporations to unilaterally bring trade cases against sovereign countries is not part of WTO treaties”).

Id.

Id.


See, e.g., Venezuela Gas Dispute, supra notes 179-81 and accompanying text; see also supra note 174.

See GATT, supra note 129, at art. 1, § 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).


Ibid.


See TransCanada Notice of Intent ¶¶ 8, 12, 60; see also Complaint at ¶¶ 2, 62, TransCanada Keystone Pipeline, I.P. 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).

See TransCanada Notice of Intent, supra note 194, at ¶1.

Id.

See id. at ¶¶ 10, 21, 23, 25, 34, 43, 45-46, 59.


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.)
217 See KLEIN, supra note 7, at 57.
218 See KLEIN, supra note 7, at 113.
219 Id. at 205 (noting that in the Green Energy and Green Economy Act LCRs are called Minimum Required Domestic Content Levels).
220 See id. at 58.
221 Id. at 57.
223 See KLEIN, supra note 7, at 60; see also Wilensky, supra note 142, at 15-16.
224 See KLEIN, supra note 7 at 57-58 (noting that Naomi Klein profiles an Italian company, Sifas, which was manufacturing solar panels inside Ontario and was thus receiving the benefits of the GEAs feed-in tariff).
229 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 also Tim Worstall, Naomi Klein's Quite Extraordinary Logical Ignorance, FORBES (Sept. 20, 2014), http://www.forbes.com/sites/timworstall/2014/09/20/namoi-kleins-quite-extraordinary-logical-ignorance/#3926485a673 (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.
233 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).
234 See Wilensky, supra note 142, at 11-12.
235 See supra notes 86-90 and accompanying text.
236 Id. Coal is the dirtiest fossil fuel. See Michelle Nijhuis, Can Coal Ever Be Clean, NAT’S GEOGRAPHIC (Apr. 2014), http://ngm.nationalgeographic.com/2014/04/coal/nijhuis-text.
243 See Patricia Isela Hansen, Dispute Settlement in the NAFTA and Beyond, 40 TEXAS INT’L L. REV. 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.").
244 TPP Full Text, supra note 134, at art. 9.16.
245 See Johnson & Sachs, supra note 158, at 2.
246 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").
247 See Marong, supra note 224, at 63.
248 Id. (reiterating 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 pmbl. (noting that the preamble of the WTO’s founding instrument establishes sustainable development as a goal of the organization).
249 See Marong, supra note 224, at 63.
250 See Wilensky, supra note 142, at 18-20.
251 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.
252 See Wilensky, supra note 142, at 17.
253 See CORDONIER SEGGER & KHALFAN, supra note 12.
254 Id.
255 See BRENIE & BOYLE, supra note 23, at 46.
256 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.").
sions carried out by powerful enforcement mechanisms.


[252] See Ayn Rand Put it: “When the house is on fire you don’t run back inside to dust.” See BRYNER, supra note 2, at 258.

[253] As Ayn Rand put it: “When the house is on fire you don’t run back inside to dust.”

[254] See AYN RAND, supra note 2, at 258.

[255] 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 infra-structure: 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.

[256] See BRYNER, supra note 2, at 258-60.


[264] 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.

[265] 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.

[266] See discussion supra at text accompanying notes 2-16 and 269-276.

[267] See Singer, supra note 276, at 44.

[268] Id. at 31-33.


[270] Id.

[271] Id.

[272] Id. Thurov 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.

[273] See SINGER, supra note 276, at 33-34. 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.