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

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

Nasser Alreshaid\*

I.	Introduction.....	2
II.	Development Qualified by Sustainability.....	4
	a. The Evolution of the Term Sustainable Development.....	5
	1. Developing the Way to the MDGs.....	6
	2. Today's SDGs.....	8
III.	What's Trade got to do with it? .....	10
	a. A "Sustainable" Development Objective in the Trade Regime?.....	11
	b. The Issue of Linkage: Reading the New Sustainable Development Goals into International Trade Related Provisions.....	17
	1. A Public International Law Linked Framework: Hard v. Soft Law Dichotomy no More.....	18
	2. A WTO Induced Approach to Linking the SDGs...	21
	c. Regionalism and Bilateralism when Multilateralism Fails: Redefining Trade Bargaining Power on the International Level.....	25
	1. Trends and Figures.....	26
	d. Are we going too far? .....	34
IV.	Conclusion.....	39

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**Abstract:**

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

## LODGING SUSTAINABLE DEVELOPMENT GOALS

### I. INTRODUCTION

“The worry was that globalization might be creating rich countries with poor people.”<sup>1</sup>

*Joseph Stiglitz*

An ongoing, worrisome debate persists about the connection between trade and development, where the aims of international trade are questioned in terms of an applicable universal notion. Who is trade to prosper when consideration to the capacity and goals of states within the international community are at stake? Constituents of state governments have been central to this debate, attempting to secure a better future for themselves and future generations.

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

Today, we see the Millennium Development Goals (“MDGs”) transforming into an ambitious sustainable development agenda, with 17 attentive goals paving the road through 2030. The global consensus these goals have generated is noteworthy. This does not, at all though, suggest that implementation of internal development policies within the context of international trade is not contentious in a globalized world.

This article aims to track the development agenda within the international trade regime to see how its evolution signals the inevitable adoption of the Sustainable Development Goals (“SDGs”). The most important objective is to reveal to what extent international legal norms are in harmony when different international regimes link the same term to their

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<sup>1</sup> JOSEPH STIGLITZ, MAKING GLOBALIZATION WORK 9 (W.W. Norton and Company, 2006). Joseph Stiglitz further emphasizes that even in developed countries, the rich were getting richer and the poor were being faced with doubtful futures. *Id.* at 8.

agendas. This international trade regime primarily includes the multilateral trading system, but still highlights regional and bilateral trends. This is not to undermine the complexities that come with adjusting international trade rules to become more SDG lenient, but what could nevertheless be accomplished is a middle ground where international trade constituents give up some of their privileges and powers for a greater and common good.

First, this article briefly discusses how the term “sustainable development” came into being. Next, it discusses the evolution of what the international trade regime holds as sustainable development. To conclude, this article proposes solutions to reconcile the past and future concerns as to how to make the SDGs part of the multilateral trading system, and perhaps, inevitably, regional and bilateral trade.

## II. DEVELOPMENT QUALIFIED BY SUSTAINABILITY

When lawyers engage in litigation, they often challenge the meaning of legal terms within the context of certain provisions, such as those based on the interpretation principles in international law. These interpretation principles stem from the Vienna Convention on the Law of Treaties (“VCLT”).<sup>2</sup> Under the VCLT, lawyers are tasked with ascertaining the “ordinary meaning” of a term, in light of the “object and purpose” of the treaty.<sup>3</sup>

As such, the interpretation of certain terms may shape the future course of action of treaty provisions. This certainly applies to terms that may seem so ambiguous, perhaps even intentionally, that their ultimate application would be questioned, unless some sense of flexibility is left to respect differentiating treaty parties’ intentions. One such term is “sustainable development.” This term has evolved in such a dynamic way that attributing an actual meaning to it may not be possible, such as is the case with terms like “justice,” “right,” and “freedom.”

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<sup>2</sup> Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331. (Art. 31 of the Vienna Convention on the Law of Treaties [hereinafter “VCLT”] on “General rule of interpretation” states in ¶ 1, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”) *Id.*

<sup>3</sup> *Id.*

## LODGING SUSTAINABLE DEVELOPMENT GOALS

### A. *The Evolution of the Term Sustainable Development*

The term “development” can be approached from multiple angles. It could be broadly viewed in terms of human freedoms it sets to prosper,<sup>4</sup> or even as a right to survival.<sup>5</sup> On the other hand, a narrow view of development refers to the rise of personal incomes as a result of an increase in the gross national product (“GNP”), in addition to technical and industrial advancements.<sup>6</sup> While there could be some added value in looking to the origins and evolution of this self-standing term, the aims of this article go beyond that. What is important, however, is how development has been qualified by the term “sustainability.”<sup>7</sup>

The international community has played a significant role in ascertaining shared aims as to what the term sustainable development may be perceived as. The evolution of the term can be broken down into two stages: (1) the period preceding the transition into the MDGs, and (2) the phase representing today’s SDGs.

#### 1. *Developing The Way To The MDGs*

In the early stages of fostering the term “sustainable development,” the World Commission on Environment and Development (“Brundtland Commission”), published a report titled *Our Common Future* in 1987, which defined the term as, “development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.”<sup>8</sup> Perhaps, adding an “altruistic” value to development would encourage present generations to act in a way that ensures future generations will not be burdened by past decisions that would interfere with

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<sup>4</sup> AMARTYA SEN, *DEVELOPMENT AS FREEDOM*, 3 (Anchor Books, NY 1st ed., 1999).

<sup>5</sup> Upendra Acharya, *The Future of Human Development: The Right to Survive as a Fundamental Element of the Right to Development*, 42 *DENV. J. INT’L L. & POL’Y* 345, 360-65 (2014).

<sup>6</sup> *Id.* at 350.

<sup>7</sup> See generally, Timothy W. Luke, *Neither Sustainable Nor Development: Reconsidering Sustainability in Development*, 13 *Sustainable Dev.* 228, 228-38 (2005). Timothy W. Luke attempts to critically analyze the evolution and rhetoric of ‘sustainable’ development, in which he deems would neither lead to sustainability nor development. *Id.*

<sup>8</sup> *Our Common Future*, Rep. of the, World Commission on Environment and Development, annex, U.N. Doc. A/42/427- Development and International Cooperation: Environment (1987).

the capacity of the future generations to continue the development of the environment, health, and economy.<sup>9</sup>

But who exactly is worried more about sustainable development, developing or developed countries? As is the case with other human rights generally, people are the main subjects of this agenda.<sup>10</sup> From a rights-based approach, no certain category of people or country monopolizes this term. People living in developed countries, as much as constituents of developing countries, are considered to fall under this term. However, it is not who is most in need of utilizing this term, rather, the aim is to highlight the global consensus that the agenda's duty-bearers, which are predominantly states, are burdened with commitments that best serve the sustainable development goals of the people.<sup>11</sup>

As emphasized in earlier initiatives, to qualify development with sustainability, efforts persisted to underscore this qualification in other forums. The United Nations Conference on Environment and Development ("UNCED") in Rio de Janeiro in 1992, reached agreement amongst 176 states that sustainable development is a major aim for the international community.<sup>12</sup> The European Union, and the United Nations General Assembly and Security Council Resolutions also followed this consensus.<sup>13</sup>

During the September 2000 Millennium Summit, in New York, the attendees, 149 heads of states and high-ranking officials from 40 countries,

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<sup>9</sup> Nico Schrijver, *Introduction, in THE EVOLUTION OF SUSTAINABLE DEVELOPMENT IN INTERNATIONAL LAW: INCEPTION, MEANING AND STATUS*, 23, 23-24 (Hague Acad. of Int'l L., 2008).

<sup>10</sup> See, G.A. Res. 41/128, annex, Declaration of the Right to Development, at Preamble & art. 1, (Dec. 4, 1986). U.N.G.A.'s Declaration of the Right to Development reiterates several times in its preamble and defining provision –Art. 1- peoples being the central subjects of this right on the premises of it being an "inalienable human right." *Id.*

<sup>11</sup> See, Jeremy Waldron, *Duty Bearers for Positive Rights* (New York Sch. of Law Pub. Law & Legal Theory Research Paper Series Working Paper No. 14-58, 2014) (further elaborating on how duty-bearers of social and economic rights could change with the change of particular interests that are protected, and even become multiple duty-bearers).

<sup>12</sup> Schrijver, *supra* note 9, at 24.

<sup>13</sup> Schrijver, *supra* note 9, at 24. (citing UN Doc. S/RES/1483 (2003), May 22, 2003, ¶ 8 (e) related to the economic reconstruction of Iraq and the conditions for sustainable development).

## LODGING SUSTAINABLE DEVELOPMENT GOALS

adopted the Millennium Declaration.<sup>14</sup> The result was a systematic move towards soft guidelines, as opposed to strict treaty obligations, but nevertheless, there was widespread, international consensus to elaborate on these sustainable development goals.<sup>15</sup> It is some sort of aspirational mission to link many different topics under one umbrella. Some attendees described these goals as being “all-encompassing concepts, if not a mantra.”<sup>16</sup> The MDG agenda included eight goals to be attained by 2015: (1) eradicate extreme hunger and poverty, (2) achieve universal primary education, (3) promote gender equality and empower women, (4) reduce child mortality, (5) improve maternal health, (6) combat HIV/Aids, malaria and other diseases, (7) ensure environmental sustainability, and (8) develop global partnerships, with 18 related specific targets, and 44 quantifiable indicators.<sup>17</sup> With this ambitious attitude, there is a significant amount of fear about implementing these development goals on a domestic level, which continues into the new stage.

### 2. *Today's SDGs*

After the MDGs, the term “sustainable development” continued to find new venues to address; but this time, the horizon was vast. On September 25, 2015, leaders from all over the world met in New York and adopted United Nations General Assembly Resolution 70/1, which included 17 goals and 169 targets from 2015 until 2030.<sup>18</sup> The Resolution included sustainability and, in terms of development, clean water and sanitation; affordable and clean energy; decent work and economic growth; industry innovation and infrastructure; sustainable cities and communities; responsible consumption and production; life below water life on land; and peace, justice,

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<sup>14</sup> *Conference, Meetings and Events Millennium Summit (6-8 September 2000)*, UN.ORG, [http://www.un.org/en/events/pastevents/millennium\\_summit.shtml](http://www.un.org/en/events/pastevents/millennium_summit.shtml) (last visited Nov. 9, 2015).

<sup>15</sup> See, DEEPAK NAYYAR, *THE MDGS AFTER 2015: SOME REFLECTIONS ON THE POSSIBILITIES*, 5-6, 11 (UN System Task Team on the Post-2015 UN Development Agenda Report, 2012).

<sup>16</sup> Schrijver, *supra* note 9, at 24.

<sup>17</sup> *Millennium Development Goals and Beyond 2015: Background*, UN.ORG, <http://www.un.org/millenniumgoals/bkgd.shtml> (last visited Oct. 27, 2015).

<sup>18</sup> G.A. Res. 70/1, at ¶ 18 (Oct. 21, 2015), adopting the outcome document of the UN Summit for the adoption of the post-2015 development agenda, *Transforming Our World: The 2030 Agenda for Sustainable Development* (Oct. 21, 2015).



and strong institutions.<sup>19</sup> Discussing the content of all the different targets goes beyond the scope of this article and demands more elaborate and in-depth discussion. Nevertheless, what accompanies this broad consensus is a high cost.<sup>20</sup> It is estimated that implementing such an agenda would be valued at \$5 to 7 trillion.<sup>21</sup>

The SDGs are part of a global structure, yet the role local communities play in the implementation of the SDGs is critical. What these SDGs sum up, as was the case with their predecessors, is that they are soft in their establishment through Resolution 70/1, but defer to state domestic constituents to further contextualize them.<sup>22</sup> Even in the language of the Resolution, with all the commitments the state members took upon themselves, it is intended to guide the participating governments in implementing a national framework within the context of a generalized versus contextualized development goals debate.<sup>23</sup> Nevertheless, a broad and flexible tone is evident throughout the Resolution and in the Goals themselves, which implies that governments have some flexibility in implementing the SDGs.

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<sup>19</sup> SUSTAINABLE DEVELOPMENT GOALS, UN.ORG, <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (last visited Oct. 27, 2015).

<sup>20</sup> Samantha Custer, Zachary Rice, Takaaki Masaki, Rebecca Latourell & Bradley Parks. LISTENING TO LEADERS: WHICH DEVELOPMENT PARTNERS DO THEY PREFER AND WHY? 83 (Williamsburg, VA: AidData) (2015) <http://aiddata.org/listening-to-leaders>. In a joint effort, the World Bank's Development Committee described the process of financing the SDGs as, "To meet the investment needs of the Sustainable Development Goals, the global community needs to move the discussion from "Billions" in ODA to "Trillions" in investments of all kind: public and private, national and global, in both capital and capacity." FROM BILLIONS TO TRILLIONS: TRANSFORMING DEVELOPMENT FINANCE, POST-2015 FINANCING FOR DEVELOPMENT: MULTILATERAL DEVELOPMENT FINANCE, Development Committee Discussion Note, ISSUU at 1 (2015). <http://issuu.com/copcutbrasil/docs/55a513bf6b19a> (last visited Nov. 7, 2015).

<sup>21</sup> CUSTER ET AL., *supra* note 20.

<sup>22</sup> The nature of U.N. General Assembly resolutions is discussed in art. 10 of the U.N. Charter, where the Assembly "may make recommendations to the members of the United Nations or to the Security Council or to both on any such matters of questions." U.N. Charter art 10, ¶ 1.

<sup>23</sup> Nayyar, *supra* note 15, at 11.

## LODGING SUSTAINABLE DEVELOPMENT GOALS

In regards to this agenda's future, it is only clear how unclear its future is. But, what these states have done through the General Assembly is set the bar high for other forums, i.e. international organizations or non-governmental organizations ("NGOs"). If there is something that stands out from all 17 goals, it is that almost any forum on the international level could be a stakeholder. An international body omitting acknowledging this new agenda would counter a new era of flexible general consensus.

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

International trade in the context of this study refers to the multilateral trading system, i.e. the World Trade Organization ("WTO"),<sup>24</sup> and to other preferential trade agreements ("PTAs") on the regional, multi-regional, and bilateral level. The recent proliferation of PTAs is certainly alerting, but what remains is that this proliferation is not completely disintegrated from WTO provisions, including their plurilateral agreements.<sup>25</sup> The WTO mainly structured the agreements' primary features.<sup>26</sup> The issue that remains essential for a collective, progressive, and successful international trade regime is the extent to which these sustainable development policies have a role.

#### A. A "Sustainable" Development Objective in the Trade Regime?

Recognizing that their relations in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development,

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<sup>24</sup> *Understanding the WTO: Basics*, WTO.ORG, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm) (last visited Jan. 20, 2016).

<sup>25</sup> *Azevedo: "Our Record in Recent Years Shows that we can Deliver,"* WTO NEWS: SPEECHES -DG ROBERTO AZEVEDO (Oct. 27, 2015, 11:50 PM) [https://www.wto.org/english/news\\_e/spra\\_e/spra81\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra81_e.htm).

<sup>26</sup> WTO Director-General Roberto Azevedo referred to the success of the WTO as "part of the architecture of global economic governance." *Id.*

seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.<sup>27</sup>

The main aspects of sustainable development emerge from the abovementioned 1994 WTO Marrakesh Agreement Preamble. This also sets the primary objective of the multilateral trading system. It is important to point out that this provision only came into being with the Marrakesh Agreement establishing the WTO.<sup>28</sup> What the multilateral trading system represented before was a different version of global trade.<sup>29</sup>

The General Agreement on Tariffs and Trade (“GATT”) preceded the WTO as an agreement where parties collaborated their efforts to facilitate the liberalization of trade.<sup>30</sup> The main objective of free trade ideology of the parties relied on two dimensions: (1) market access, which implied eliminating trade barriers that included tariffs, quotas, and subsidies; and (2) non-discrimination between the parties of GATT, which attracted a global consensus.<sup>31</sup> These two features have persisted in the WTO.<sup>32</sup> What proceeded was a push by developing countries to address more development needs, which were raised during the four-year Kennedy Round from 1963-1967, with minimal results.<sup>33</sup> The structure of GATT remained, but a GATT Committee on Trade and Development was established. Institutionally, the United Nations Conference on Trade and Development (“UNCTAD”) was also created in Geneva in 1964 to address the North-South divide between

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<sup>27</sup> Marrakesh Agreement Establishing the World Trade Organization, Preamble, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter “Marrakesh Agreement”].

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

<sup>29</sup> General Agreement on Tariffs and Trade, *approved* Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (Preamble) [hereinafter “GATT”].

<sup>30</sup> Padideh Ala’i, *Trade and Sustainable Development*, 4 SUNGKYUNKWAN J. OF SCIENCE & TECHNOLOGY L. 63, 65 (2010).

<sup>31</sup> *Id.*

<sup>32</sup> *See* GATT, *supra* note 28, ¶ 3. The same language of the Marrakesh Agreement Preamble of raising standards of living, full employment, economic growth, and full use of resources remained.

<sup>33</sup> The Kennedy Round was named after President John F. Kennedy upon his death in 1963 as one of the strong proponents of this Round. Marie-Claire Cordonier Segger & Markus W. Gehring, *Introduction* in SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW, 1, 7 (2005).

what is perceived as the wealthy developed states and the developing poor states.<sup>34</sup>

The negotiation of the Preamble of the WTO Agreement may have been influenced by 1992's UNCED, but this is not undisputable.<sup>35</sup> Additional major reasons for this negotiated Preamble are the rise of the regulatory state and the proliferation of non-tariff barriers ("NTB"), which include environmental, labor-related, consumer protection, and health and safety related NTBs.<sup>36</sup> The objective of sustainable development seems to be qualified by the optimal use of resources.<sup>37</sup> However, this objective implies broader inferences because the ensuing sentence mentions environmental protections and preservations, and enhancements to economic development conditions.<sup>38</sup>

The problem with this objective is what Robert Howse<sup>39</sup> refers to as "meta-structures" of the WTO, which leave but minimal space for state members to engage their sustainable development policies in the midst of burdensome trade commitments that limit trade barriers.<sup>40</sup> These meta-structures refer to the formal and informal WTO rules on different topics, possessing normative value, which eventually guide negotiation priorities.<sup>41</sup> This raises many issues of inclusiveness and transparency when such meta-

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<sup>34</sup> *Id.* at 7-8

<sup>35</sup> *Id.* at 9-10. The Appellate Body in the *Shrimp-Turtle* case stresses this influence. Appellate Body Report, United States-Import Prohibition of Certain Shrimps and Shrimp Products [hereinafter "*Shrimp-Turtle* case"], WT/DS58/AB/R (adopted Nov. 6, 1998), ¶ 154.

<sup>36</sup> *Ala'i*, *supra* note 30.

<sup>37</sup> *Id.* at 10.

<sup>38</sup> *Id.* at 11.

<sup>39</sup> Lloyd Nelson Professor of International Law at NYU School of Law and expert in international trade law.

<sup>40</sup> Robert Howse, *Mainstreaming the Right to Development into the World Trade Organization in Realizing the Right to Development*, Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development 249, 252-253 (2013). (In this Chapter, Howse quotes both Kevin Davis and Benedict Kingsbury's take on the implications of over-burdening fragile states with obligations imposed on them by global governance institutions.); Kevin Davis & Benedict Kingsbury, "*Obligation overload: adjusting the obligations of fragile or failing States*", (Paper prepared for the Hauser Globalization Colloquium, Fall 2010, New York University School of Law) available at [www.iilj.org](http://www.iilj.org) (last visited Nov. 5, 2015).

<sup>41</sup> *Id.*

structures are results of bargaining power.<sup>42</sup> The Preamble's language anticipates the role states retain to shape their internal policies within the meaning of economic growth, precisely with the phrase "to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development."<sup>43</sup> The main debate remains as to whether trade liberalization is an end in itself rather than a means, and whether it is acceptable for a number of state members to lag behind, as long as their contributions to the global economy are minimal.<sup>44</sup>

To be fair, progress fought its way through to ultimate recognition in recognizing the difficulties certain countries face in implementing different trade obligations at the expense of what is perceived as local sustainable development policies. This progress has been minimal though, as there is much to be done. Nonetheless, Special and Differential treatment ("S&D"), for instance, was reserved for developing countries, and is one way of acknowledging difficulties some states confront.<sup>45</sup>

One remaining essential point is the 2001 Doha Development Round ("DDR") Agenda. The intent is not to discuss its detailed failure, which it seems to have generally incurred until this day; rather, the intent is to underscore sustainable development even more.<sup>46</sup> Paragraph 6 of the Doha Ministerial Declaration provides:

We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 253.

<sup>45</sup> Special and Differential treatment includes exempting LDCs from export subsidy ban, increased participation of developing countries in the General Agreement on Trade in Services (GATS), in addition to elongated transition periods to fulfill new commitments. John H. Jackson et. al, *Legal Problems of International Economic Relations: Cases, Material, and Text*, 1281 (6th ed, West 2013).

<sup>46</sup> Howse, *supra* note 39, at 253-54.

## LODGING SUSTAINABLE DEVELOPMENT GOALS

of sustainable development can and must be mutually supportive. We take note of the efforts by members to conduct national environmental assessments of trade policies on a voluntary basis. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, and are otherwise in accordance with the provisions of the WTO Agreements.<sup>47</sup>

There is clear emphasis in this Declaration that environmental preservation and protection, in addition to social development, are just as important to the WTO as any perceived economic aim.<sup>48</sup> The language of the Declaration is far more broad, where where if developing countries realized the implications of their lack of capacity and that the dynamics of domestic input have changed, they should demand more inclusiveness.

### A. *WTO Jurisprudence:*

The WTO Appellate Body, in the *Shrimp-Turtle* case, interpreted GATT 1994 Article XX in light of the WTO Preamble, and in accordance with the Dispute Settlement Understanding (“DSU”) and VCLT.<sup>49</sup> GATT Article XX discusses what are called “General Exceptions,” acknowledging other policy objectives, including the protection of human, animal, and plant life, the conservation of exhaustible natural resources, and the protection of public morals.<sup>50</sup> This led to circumventing the goals of free trade that denote market access and non-discrimination.

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<sup>47</sup> World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 ILM 746 (2002) [hereinafter “Doha Declaration”].

<sup>48</sup> Segger & Gehreng, *supra* note 33, at 20-1.

<sup>49</sup> Ala’i, *supra* note 30, at 65.

<sup>50</sup> GATT, *supra* note 29, art. XX.

In this case, the Appellate Body stressed the transformation of the scope of Article XX<sup>51</sup> based on the evolution of the Preamble of the WTO from GATT.<sup>52</sup> The original objectives of GATT were qualified by the new Preamble, in which other provisions of the WTO are no longer confined.<sup>53</sup> The Appellate Body reports:

We note once more that this language demonstrates a recognition by WTO negotiators that optimal use of the world's resources should be made in accordance with the objective of sustainable development. As this preambular language reflects the intentions of negotiators of the WTO Agreement, we believe it must add colour, texture and shading to our interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994. We have already observed that Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.<sup>54</sup>

It should be noted that the Appellate Body did urge a more balanced approach between the different provisions of the WTO Agreements and the Preamble. However, such balancing could be perceived as referring to procedural fairness, including transparency, rather than the substance of the issue.<sup>55</sup>

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

*B. The Issue of Linkage: Reading The New SDGs Into International Trade Related Provisions*

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<sup>51</sup> *WTO case Nos. 58 and 61 (Shrimp-Turtle case)* ¶ 128, 153, [https://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm).

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

<sup>53</sup> *Ala'i*, *supra* note 30, at 67.

<sup>54</sup> *WTO case Nos. 58 and 61 (Shrimp-Turtle case)* ¶ 153, [https://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm).

<sup>55</sup> *Ala'i*, *supra* note 30, at 77.

## LODGING SUSTAINABLE DEVELOPMENT GOALS

The dilemma over the implications of an outreaching SDG agenda is of utmost importance, not only to international trade, but also to the international law framework today. The United Nations Department of Economic and Social Affairs (“DESA”) Under-Secretary General, Mr. Wu Hongbo, said, when addressing United Nations General Assembly Second Committee earlier this fall, “[t]his year could well be remembered as the year when policy integration for sustainable development truly became a common global vision.<sup>56</sup> . . . We have seen unprecedented global cooperation to address some of the most challenging issues of our time.”<sup>57</sup>

Establishing specialized organizations to accompany the cooperative needs of states may guide a proliferation of different forums and venues on the international level. However, this is easier said than done. In today’s world, are issues really disintegrated when it comes to acknowledging state regulatory policies? As international economic law scholar Joost Pauwelyn puts it, when referring to “nobler goals:”

[w]hen genuinely pursued, . . . not abused as a disguise restriction to trade, such goals must trump the instrument of trade, even if they are not set out in the WTO treaty itself.<sup>58</sup> . . . WTO law is not a secluded island but part of that territorial domain of international law.<sup>59</sup>

The aim is achieving unity in international law, not fragmentation.<sup>60</sup>

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<sup>56</sup> *UNGA Second and Third Committees kick off in New York*, DESA News, (Nov. 2015) <https://www.un.org/development/desa/newsletter/feature/2015/11/#18476>. (The Second Committee is the Economic and Financial Committee, and it is tasked with issues relating to economic growth and development, such as macroeconomic policy questions, financing for development, sustainable development, human settlements, poverty eradication, globalization and interdependence, operational activities for development, and information and communication technologies for development.). *Economic and Financial- Second Committee*, UNGA, (Nov. 7, 2015, 9:57 AM), <http://www.un.org/en/ga/second/index.shtml>.

<sup>57</sup> *Id.*

<sup>58</sup> JOOST PAUWELYN, *CONFLICTS OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW*, xi Preface (CUP 2003).

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

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



This brings back the idea of “rights as trumps,” an analogy the late Ronald Dworkin emphasized for the international sphere of relationships.<sup>61</sup> Or as international law may know it, a sort of *jus cogens* for individual states who overcome adopted utilitarian goals, such as restricting trade barriers.<sup>62</sup>

1. *A Public International Law Linked Framework: Hard v. Soft Law Dichotomy No More*

The issue of the normative value of international legal rules begins at the end of the debate of whether the presence of an international legislature is of central importance and unfolds in newly developed treaties on the international level.<sup>63</sup> The International Law Commission, after setting up a study group on the topic of fragmentation of international law, has opted for a more coherent approach to the different norms on the international level.<sup>64</sup> Specifically, the Commission has adopted a strong presumption against normative conflict.<sup>65</sup>

Within this debate, inconsistent obligations could subsist as another category of conflict.<sup>66</sup> When obligations by different sources collide, or at least appear to, states are left with a “cherry picking” scenario.<sup>67</sup> When shared goals invite parties to different multilateral treaties through “treaty-based sub-systems” and inflict obligations on the parties, states may favor differing norms within dissimilar situations.<sup>68</sup>

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<sup>61</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, xi (Harv. Univ. Press 1977)

<sup>62</sup> Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 61 *Am. J. Int'l L.* 55, 57-8.

<sup>63</sup> It is perhaps unclear to what extent the hierarchy in Art. 38 of the International Court of Justice Statute can resolve the creative legislative methods that today's international law witnesses, including international organizations' law-making roles. An attempted detailed account of this evolution could be retrieved from: JOSE E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS*, (Oxford University Press 2006).

<sup>64</sup> Howse, *supra* note 40, at 249.

<sup>65</sup> Int'l Law Comm'n, *Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. No. A/CN.4/L.682, at ¶ 37 (2006).

<sup>66</sup> Pauwelyn, *supra* note 58, at 9-10.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 19.

## LODGING SUSTAINABLE DEVELOPMENT GOALS

Within the hierarchical context of international legal norms, different stages can be utilized to resolve conflicts between norms.<sup>69</sup> Perhaps a *lex posterior* attitude should first be attempted between any conflicting treaty provisions.<sup>70</sup> However, when a “living treaty” exists, such as the WTO, this method of conflict resolution would be of minimal effect.<sup>71</sup> Hence, resorting to a *lex specialis* technique to disentangle conflicting debates is more relevant, as is the case with resolving environmental issues through Multilateral Environmental Agreements (“MEAs”) as opposed to a purely trade-based treaty.<sup>72</sup>

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

The interaction of hard and soft law regimes can lead to the hardening of soft law regimes, resulting in more strategic bargaining and reducing their purported advantages of consensus-building through information-sharing and persuasion; and it can lead to the softening of hard law regimes, resulting in reduced legal certainty and predictability, especially where there is distributive conflict between powerful states.<sup>73</sup>

This underscores the reality of how states actually employ a hard or soft law approach, instead of the norms being classified as such.<sup>74</sup>

### *2. A WTO Induced Approach to Linking the SDGs*

The Director-General of the WTO, Roberto Azevedo, commented on the new SDGs by ensuring that trade has and always will support

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<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 488-89.

<sup>72</sup> *Id.*

<sup>73</sup> Gregory C. Schaffer & Mark A. Pollack, *Hard v. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 709, 747-48 (2010).

<sup>74</sup> *Id.* at 708-09.

development goals.<sup>75</sup> The recent jurisprudence of the Organization's Dispute Settlement Body on issues related to the relationship between trade and renewable energy, and preservation and management of exhaustible natural resources, could help instigate trade rule amendments.<sup>76</sup> Moreover, the fresh WTO Public Forum, commemorating 20 years of the organization's existence, reiterated this discourse within its program.<sup>77</sup> This elicits a sort of *lex lata* version of how the SDGs see international trade.

In his speech during the United Nations summit to endorse the "2030 Agenda for Sustainable Development," Azevedo stated, "I am pleased . . . to pledge that the WTO will play its full role in delivering the Sustainable Development Goals."<sup>78</sup> Elaborating, Azevedo explained how his organization played a role in:

- Reforming agricultural markets to end hunger.
- Reaffirming the flexibilities offered by the WTO's rules on intellectual property to protect public health.
- Increasing support for the poorest countries to participate in global trade, particularly through the WTO's Aid for Trade initiative.
- Calling for action on fisheries subsidies to tackle over-capacity and over-fishing.
- Concluding negotiations on the WTO's Doha Development Agenda.<sup>79</sup>

The last goal, specifically, is of relevance to linking multilateral trading systems. This would required a push for a "universal rule-based,

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<sup>75</sup> WTO, *Azvedo: "Our Record in Recent Years says that we can Deliver"* (Sep. 24, 2015), [https://www.wto.org/english/news\\_e/spra\\_e/spra81\\_e.htm](https://www.wto.org/english/news_e/spra_e/spra81_e.htm).

<sup>76</sup> *Id.*

<sup>77</sup> *See* WTO, [https://www.wto.org/english/forums\\_e/public\\_forum15\\_e/public\\_forum15\\_e.htm](https://www.wto.org/english/forums_e/public_forum15_e/public_forum15_e.htm) (last visited Oct. 7, 2015).

<sup>78</sup> WTO, *Azvedo Highlights Key Role of Trade in Achieving Sustainable Development Goals* (Sep. 25, 2015), [https://www.wto.org/english/news\\_e/news15\\_e/dgra\\_25sep15\\_e.htm](https://www.wto.org/english/news_e/news15_e/dgra_25sep15_e.htm).

<sup>79</sup> *Id.*

## LODGING SUSTAINABLE DEVELOPMENT GOALS

open, non-discriminatory, and equitable system.”<sup>80</sup> The new SDGs aim to “strengthen the means of implementation and revitalize the global partnership for sustainable development.”<sup>81</sup> This goal is, thus, an exploration of what the WTO provisions are set to achieve in relation to other international legal norms. Rather than an “integral type” agenda, the WTO provisions are of a “reciprocal” nature when it comes to its member states.<sup>82</sup> As such, its provisions meet the diverse needs of its members within a larger international legal framework.<sup>83</sup> What should be emphasized is that the WTO is but one component of international law.<sup>84</sup>

In the face of non-WTO norms, it is the WTO Panel and Appellate Body who are left with a reconciliatory situation and role. The WTO is obliged to apply WTO provisions, referring to its constituted agreements.<sup>85</sup> What is nonetheless at stake is that when these non-WTO norms represent the “common interests” of WTO members, it is WTO quasi-judicial bodies who must live up to these other conceding commitments when interpreting their very own agreements.<sup>86</sup> The VCLT supports this contention in the context of the General Rules of Interpretation in Article 31/3, where, “[t]here shall be taken into account, together with the context ... any relevant rules of international law applicable in the relations between the parties.”<sup>87</sup> The process may extend from an interpretive one to an application of non-WTO rules.<sup>88</sup> This should not affect the members’ relationships with third parties. What is crucial here is that SDGs should not be seen as contradicting with WTO trade-related provisions. They are actually both in par and aligned to work towards a common goal, allowing for flexibility in the means by which these goals can be achieved.

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<sup>80</sup> *Id.*

<sup>81</sup> Sustainable Development Goals, *supra* note 19.

<sup>82</sup> Pauwelyn, *supra* note 58, at 491.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 490.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> Vienna Convention on the Law of Treaties art. 31, *approved* May 23, 1969, 1155 U.N.T.S. 331.

<sup>88</sup> Pauwelyn, *supra* note 58, at 490.

To implement the content of the SDGs within the multilateral trading system, the notion of “good governance” is especially important.<sup>89</sup> It is only fair that the emphasis be on the outcome consensus where sustainable development is “sustained” in the policies and practices of international forums, like the WTO.<sup>90</sup> States must contribute to this balancing effort in trying to shape their individual policies. This should be done in a way that adheres to the development goals of utmost importance locally, yet still minimally affects liberalized trade relationships with other trading counterparts. A significantly complex balance is expected from states, which is no easy task, and should ensure that states do not ultimately externalize their internal policies.<sup>91</sup>

There remains much to be done on the multilateral level to implement the SDGs within the existing legal framework. The legal structure of certain departments in this organization must allow for the presence of other stakeholders, who oversee the implementation of the SDGs.<sup>92</sup> The counterparts include United Nations Development Program, United Nations Conference on Trade and Development, the United Nations Higher Commissioner for Human Rights (“UNHCHR”), and other nongovernmental organizations.<sup>93</sup> This reform to WTO Committees allows for a transparent process and an inevitable interdisciplinary assistance in drawing international legal norms that mirror the states’ concerns exemplified by the SDGs.<sup>94</sup>

The WTO has been facing problems in concluding negotiations related to key trade issues, one of which is agriculture.<sup>95</sup> When the current multilateral trading system represents 161 member states, covering about 98 percent of the global market, negotiations without a doubt become more complex.<sup>96</sup> Not only is the global South widely represented in this

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<sup>89</sup> Henning Jessen, *Trade and Development Law*, SUSTAINABLE DEVELOPMENT IN WORLD TRADE LAW 77, at 84-6.

<sup>90</sup> *Id.*

<sup>91</sup> Joel P. Trachtman, *The Economic Structure of International Law*, 224 (Harvard University Press 2008).

<sup>92</sup> Howse, *supra* note 38, at 254.

<sup>93</sup> *Id.* at 255-56.

<sup>94</sup> *Id.* at 250, 256.

<sup>95</sup> Jackson, *Legal Problems*, *supra* note 44, at 254.

<sup>96</sup> *Members and Observers*, WTO, *available* at

organization, but the North also faces competing perspectives.<sup>97</sup> BRIC nations are fully represented in this system, and so are key global market stakeholders.<sup>98</sup> As such, when it comes to modern international trade policies, the bargaining power may not be exclusive to the West.

*C. Regionalism and Bilateralism When Multilateralism Fails: Redefining Trade Bargaining Power on the International Level*

Today's phenomenon of a proliferation of Preferential Trade Agreements ("PTAs") is under high scrutiny.<sup>99</sup> In its *World Investment Report 2015*, the United Nations Conference on Trade and Development ("UNCTAD") discusses the global foreign direct investment dimension, which shares many of the characteristics of today's international trade regime, especially that agreements regulate both trade and investment.<sup>100</sup> The report highlights the consistent growth of international investment agreements ("IIAs"), even as bilateral investment agreements ("BITs") continue to decline.<sup>101</sup> By the end of 2014, there were an additional 31 IIAs, raising the total number of IIAs to 3,271. Of these, 2,926 are BITs and 345

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[https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Nov. 2, 2015). Also see Azevedo, *Our Record*, *supra* note 75.

<sup>97</sup> Perhaps this could be illustrated by the different government procurement concerns between the U.S. on the one hand, and the E.U. on the other, within the context of the Transatlantic Trade and Investment Partnership Agreement negotiations. Where state sovereignty within the U.S. federal system could prove problematic to these negotiations, while still drawing on the WTO Government Procurement Agreement as amended in 2012.

<sup>98</sup> BRIC members are Brazil, Russia, India, and China. See *Brazil, Russia, India, and China –BRIC*, INVESTOPEDIA, available at <http://www.investopedia.com/terms/b/bric.asp> (last visited Nov. 2, 2015).

<sup>99</sup> There has been literature on the issue of the proliferation of preferential trade agreements in comparison with the multilateral trading system approaching it from different angles. Paul Krugman looks into the rational choice and prisoner's dilemma aspect pushing states to opt for a regionalism or bilateralism. While others like Richard Baldwin and Caroline Freund discuss whether empirical research could explain if and how one option is better than the other. Richard Baldwin & Caroline Freund, *Preferential Trade Agreements and Multilateral Liberalization*, Preferential Trade Agreement Policies for Development: A Handbook 123, 134-37 (Jean-Pierre & Jean-Christophe Mau eds. World Bank, 2011).

<sup>100</sup> *World Investment Report 2015*, UNCTAD [hereinafter *World Investment Report 2015*] available at <http://www.worldinvestmentreport.org/wir2015/wir2015-ch3-investment-policy-trends/> (last visited Nov. 2, 2015).

<sup>101</sup> *Id.* at 106.

are other IIAs.<sup>102</sup> While BITs have declined, more regional and sub-regional negotiations continue to take place, with up to 90 countries as parties, including the Trans-Atlantic Trade and Investment Partnership (“TTIP”), the Trans-Pacific Partnership (“TPP”), Regional Comprehensive Economic Partnership (“RCEP”), Tripartite, and the Pacific Agreement on Closer Economic Relations (“PACER”).<sup>103</sup>

The United Nations report noted that the main incentives for countries to review their model investment and trade policies relate to the Sustainable Development Goals (“SDGs”).<sup>104</sup> Twelve countries in Africa, ten in Europe and North America, eight in Latin America, seven in Asia, six economies in transition, and four regional organizations are following this trend.<sup>105</sup> At least one provision of these newly reviewed agreements ensures the rights of states to regulate for public interest purposes, and to meet sustainable development targets, including health and safety policies, and environmental standards.<sup>106</sup>

### 1. *Trends and Figures*

The most recent model agreements, as well as finalized agreements, supplement the results and conclusions of the *2015 World Investment Report*. The trend towards bilateralism, regionalism, and multi-regionalism is not unique to a certain region.<sup>107</sup> Interestingly, it is not really even a continuum of the North-South divide, or a developed *vis-à-vis* developing country tension.<sup>108</sup> Both developed and developing countries have adopted SDG-oriented agreements.<sup>109</sup>

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<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 107.

<sup>104</sup> *Id.* at 112.

<sup>105</sup> *Id.* at 108.

<sup>106</sup> *Id.* at 112.

<sup>107</sup> *Id.* at 108.

<sup>108</sup> See for instance, the Preambles of the Norway Model BIT (2015), Austria Model BIT (2010), and Canada Model BIT (2004) and article 11 thereof. *Model Agreements*, Investment Policy Hub, UNCTAD, available at <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIResults>, (last visited Nov. 3, 2015).

<sup>109</sup> *Id.*

## LODGING SUSTAINABLE DEVELOPMENT GOALS

Norway is one example of this shift in policies to meet the needs of sustainable development.<sup>110</sup> Its 2015 Model BIT is evidence of the state's intent to meet the sustainable development needs of its citizens. Norway's Model BIT begins by emphasizing the aim of investments geared towards serving sustainable development needs in economic, social, and environmental dimensions.<sup>111</sup> This includes "high levels" of environmental, health, safety, and labor protections.<sup>112</sup> The Preamble reiterates the importance of sustainable development objectives that fit national and global standards.<sup>113</sup>

The Norwegian Model BIT further includes sustainable development safeguards within the contents of its provisions.<sup>114</sup> Article 11/1, "Not Lowering Standards," mentions:

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, human rights, safety or environmental measures or labour standards. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention of an investment of an investor.<sup>115</sup>

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

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

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<sup>110</sup> World Bank Data, Norway, *available* at <http://data.worldbank.org/country/norway> (last visited Nov. 3, 2015).

<sup>111</sup> Preamble of the Norway Model BIT 2015.

<sup>112</sup> *Id.*

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

<sup>114</sup> Norway Model BIT 2015 art. 11/1.

<sup>115</sup> *Id.*



rights, labour rights, resource management or environmental concerns.<sup>116</sup>

This is one of the most recent model BITs that provides strong support for sustainable development objectives.<sup>117</sup> As a high income nation, Norway sets a clear example on how the SDGs are shared interests amongst the different countries across the globe. The language of the Model BIT is firm on the fact that trade and investment should serve sustainable development, which grants states flexibility to implement policies. The Preamble itself presses for local policies to fulfill the BIT's purpose "in accordance with relevant internationally recognized standards and agreements in these fields to which they are parties."<sup>118</sup> This concluding sentence adds leverage to the new SDGs, so that they can guide local policies and ensure they fall within the scope of a global consensus with the adoption of the SDGs.

In comparison, the 2012 United States Model BIT omitted mentioning the phrase "sustainable development" in its Preamble.<sup>119</sup> Instead, it included the substance of the phrase, referring to "maximize[ing] effective utilization of economic resources and improve[ing] living standards," and drawing on investor-state dispute related requisites of the term "investment."<sup>120</sup> As in the *Salini* test,<sup>121</sup> the International Center for the Settlement of Investment Disputes ("ICSID") Tribunal states that an investment infers "contributions, a certain duration of performance of the contract and a participation in the risks of the transaction. The ICSID Convention's Preamble, may add the contribution to the economic development of the host state of the investment as an additional condition."<sup>122</sup> In this case, the ICSID Tribunal found that an

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<sup>116</sup> Norway Model BIT 2015 art. 12.

<sup>117</sup> UNCTAD Model Agreements, *supra* note 106.

<sup>118</sup> Preamble of the Norway Model BIT 2015.

<sup>119</sup> U.S. Model BIT, drafted 2012, *Model Agreements*, Investment Policy Hub, UNCTAD, available at <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIResults> (last visited Nov. 4, 2015).

<sup>120</sup> *Id.*; Art. 1 of the U.S. Model BIT 2012 provides a definition of the term "investment", and provides a list that may fall under that scope.

<sup>121</sup> The *Salini et. al v. Morocco* case. *Salini et. al v. Morocco*, ICSID Case, (Decision on Jurisdiction), 42 ILM 609 (2003), Case No. ARB/00/4, at 622.

<sup>122</sup> *Salini et. al v. Morocco*, at 622.

## LODGING SUSTAINABLE DEVELOPMENT GOALS

Italian company's offer of its technical expertise to a infrastructure construction project in Morocco met the economic development element of the investment.<sup>123</sup> However, the U.S. Model BIT is not an outlier, as it appears to have identified sustainable development components reserved for state regulation despite failing to mention the magic words, "sustainable development."

From a regional angle, the 2012 Southern African Development Community ("SADC") Model BIT template represents a "southern" shared perspective on implementing sustainable development. The Preamble of this Model structured the fulfillment of sustainable development objectives in a similar manner to that of the Norwegian Model BIT.<sup>124</sup> The extensive template, however, leaves the term "sustainable development" undefined, which follows the trend of other comparable approaches.<sup>125</sup>

The SADC Model BIT includes environmental and social impact assessments provisions, and it sets the threshold to the highest standard, whether it is the national standard or that of the International Finance Corporation's ("IFC") Performance Standards on Environmental and Social Impact Assessment.<sup>126</sup> The international standards are invoked to ensure that some sort of technically screened efforts monitor local policies.<sup>127</sup> This Model BIT particularly highlights the precautionary principle as a prerequisite for any investment.<sup>128</sup>

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<sup>123</sup> *Id.* at 623.

<sup>124</sup> Southern African Development Community (SADC) Model Bilateral Investment Treaty Model Template with Commentary [hereinafter "SADC Model BIT"], drafted 2012, *Model Agreements*, Investment Policy Hub, UNCTAD, available at <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIResults> (last visited Nov. 4, 2015).

<sup>125</sup> See Preambles of the Norway Model BIT, Austria Model BIT, and Canada Model BIT, *supra* note 106.

<sup>126</sup> Southern African Development Community (SADC) Model Bilateral Investment Treaty Model Template with Commentary [hereinafter "SADC Model BIT"], drafted 2012, *Model Agreements*, Investment Policy Hub, UNCTAD, available at <http://investmentpolicyhub.unctad.org/IIA/AdvancedSearchIRIResults> (last visited Nov. 4, 2015).

<sup>127</sup> See the closing sentence of the Norway Model BIT 2015.

<sup>128</sup> SADC Model BIT art. 13.4

After stressing the right of host states to regulate in the name of sustainable development objectives, the SADC Model BIT touches on the possibility of addressing past racial injustices in the African region with new investments.<sup>129</sup> The South African Investment Treaty influenced the wording of this provision.<sup>130</sup> Such an objective is aligned with SDG's Goal 10, "reducing inequality within and among countries."<sup>131</sup> The newly introduced Goal 16 may embody this objective as well by "promoting peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels."<sup>132</sup> The interdisciplinary sensation in Article 21/3<sup>133</sup> combined with the SDG's produce an inclusive process, resulting in sustainable development intersecting with transitional justice goals where trade, sustainable development and transitional justice serve local communities, such as post-conflict South Africa.<sup>134</sup>

The extensive Eurasian Economic Union-Vietnam PTA ("EEUV") has an entire chapter entitled "Sustainable Development."<sup>135</sup> Specifically, it

<sup>129</sup> SADC Model BIT art. 21.3

<sup>130</sup> *SADC Model Bilateral Investment Treaty Template with Commentary*, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY 41 (2012), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2875>.

<sup>131</sup> *Sustainable Development Goals*, UN, <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (last visited Mar. 6, 2016).

<sup>132</sup> Sustainable Development Goals, *supra* note 19.

<sup>133</sup> SADC Model BIT art. 21.3 provides, "Notwithstanding any other provision of this Agreement, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement."

<sup>134</sup> For more on this nexus between development and transitional justice, see *Transitional Justice and Development: Making Connections*, ADVANCING TRANSITIONAL JUSTICE SERIES (2009), [http://www.ssrc.org/workspace/images/crm/new\\_publication\\_3/%7B1ed88247-585f-de11-bd80-001cc477ec70%7D.pdf](http://www.ssrc.org/workspace/images/crm/new_publication_3/%7B1ed88247-585f-de11-bd80-001cc477ec70%7D.pdf).

<sup>135</sup> See *Free Trade Agreement Between the Eurasian Economic Union and Its Member State, of the once part, and The Socialist Republic of Vietnam, of the other part* 91 (2012), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3455>. The term sustainable development was also mentioned within the context of the Preamble of the GCC-EFTA FTA, between the member states of the Gulf Cooperation Council and the European Free Trade Association –composed of the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway and the Swiss Confederation. See *Free Trade Agreement Between The EFTA States and The Member States of the Co-Operation Council for the Arab States of*

## LODGING SUSTAINABLE DEVELOPMENT GOALS

recognizes “that economic development, social development and environmental protection are interdependent and mutually supportive components of sustainable development.”<sup>136</sup> The EEUV, as reflected in its Preamble, considered the different development levels of its parties. It considered internal policies as part of the sovereignty of states, with the obligation for parties not to abuse their policies in order to discretely adopt protectionist measures.<sup>137</sup> The EEUV consequently illustrated a framework for cooperation among its parties to achieve sustainable development objectives.<sup>138</sup>

The mega-regional EEUV mentions the term sustainable development in the context of environmental protection.<sup>139</sup> This seems to imply that sustainable development is ultimately confined to environmental development, but the ensuing provisions counter this intuition with economic and cultural development avenues. Nevertheless, this signals the strength of environmental concerns within the Agreement. The EEUV’s Preamble provides the aim to, “promote high levels of environmental protection, including through effective enforcement of environmental laws, and further the aims of sustainable development, including through mutually supportive trade and environmental policies and practices.”<sup>140</sup>

The text of the Trans-Pacific Partnership (“TPP”) also includes a distinct cultural blend, or preservation.<sup>141</sup> An insinuation of a sustainable perspective on the maintenance of local ownership over trade rules seem to be protected in the agreement. As Article 29.8 states, “subject to each Party’s international obligations, each Party may establish appropriate measures to

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*the Gulf* (2009), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2582>.

<sup>136</sup> See *Free Trade Agreement Between the Eurasian Economic Union and Its Member State, of the one part, and The Socialist Republic of Vietnam, of the other part* 91 (2012), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3455>.

<sup>137</sup> *Id.* at 91-2.

<sup>138</sup> *Id.* at 92-4.

<sup>139</sup> *Preamble*, TRANS-PACIFIC PARTNERSHIP, <https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf>.

<sup>140</sup> *Id.*

<sup>141</sup> *Chapter 29 Exceptions and General Provisions*, TRANS-PACIFIC PARTNERSHIP 29-9, <https://ustr.gov/sites/default/files/TPP-Final-Text-Exceptions-and-General-Provisions.pdf>.

respect, preserve and promote traditional knowledge and traditional cultural expressions.”<sup>142</sup>

Furthermore, Chapter 23 of the TPP is fully devoted to the idea of “development.”<sup>143</sup> It elaborates development in many aspects, and sometimes uses it interchangeably with the term “economic growth.”<sup>144</sup> The agreement further emphasizes the joint role in achieving development objectives in Article 23.6,<sup>145</sup> including working with bilateral partners, private companies, academic institutions, and NGOs.<sup>146</sup>

Chapter 20 stands out when it comes to environmental concerns under the rhetoric of sustainable development.<sup>147</sup> This chapter offers extensive support to environmental concerns, linking many other agreements, i.e. Multilateral Environmental Agreements (“MEAs”), and empowering private partners.<sup>148</sup> Through Article 20.2, the agreement emphasizes that environmental protections are of a cooperative nature, and as such, local environmental laws or measures should not be used to disguise protectionism

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<sup>142</sup> *Id.*

<sup>143</sup> *Chapter 23 Development*, TRANS-PACIFIC PARTNERSHIP 23-1, <https://ustr.gov/sites/default/files/TPP-Final-Text-Development.pdf>.

<sup>144</sup> *Id.*

<sup>145</sup> TPP art. 26.3.1 provides, “The Parties recognise that joint activities between the Parties to promote maximisation of the development benefits derived from this Agreement can reinforce national development strategies, including, where appropriate, through work with bilateral partners, private companies, academic institutions and non- governmental organisations.”

<sup>146</sup> *Id.* at art. 23.3.

<sup>147</sup> *Chapter 20 Environment*, TRANS-PACIFIC PARTNERSHIP 20-1, <https://ustr.gov/sites/default/files/TPP-Final-Text-Environment.pdf>.

<sup>148</sup> *Id.* Art. 20.4.1 provides, “The Parties recognise that multilateral environmental agreements to which they are party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, each Party affirms its commitment to implement the multilateral environmental agreements to which it is a party.” And art. 20.8.1 states, “Each Party shall make use of existing, or establish new, consultative mechanisms, for example national advisory committees, to seek views on matters related to the implementation of this Chapter. These mechanisms may include persons with relevant experience, as appropriate, including experience in business, natural resource conservation and management, or other environmental matters.”

## LODGING SUSTAINABLE DEVELOPMENT GOALS

or restriction on trade and investments between the parties.<sup>149</sup> Policy or standard “coherence” is what the agreement appears to be pushing for, although this delicate balance could prove more complex in practice.<sup>150</sup> This is especially true when considering that the ensuing Article 20.3, “General Commitments,” stresses the importance of state-owned and initiated environmental policies as recognition of state sovereignty.<sup>151</sup>

What captivates this idea of a qualified type of regulatory practice in the TPP is the chapter on “Regulatory Coherence.”<sup>152</sup> This concept evolved around a harmonized status quo, in which sovereign states draw on good practices in “planning, designing, issuing, implementing, and reviewing” their domestic regulatory policies to achieve their objectives, while still maintaining a cooperative cross-border relationship to further the main objectives of the TPP.<sup>153</sup> This chapter steers states to the means for reaching such coherence by establishing the Committee for Regulatory Coherence to oversee parties’ regulatory activity, and more broadly, global best practices.<sup>154</sup>

The idea of a coherent structure that the TPP seems to have struck remains desirable and may be a restatement that harmonized complementarity between trade agreements. The bilateral, regional, and multi-regional trade phenomenon is not completely disintegrated from WTO provisions. State members’ rights and obligations under WTO provisions are referred to when establishing the foundations of other recent PTAs.<sup>155</sup> The TPP, for instance, draws on the WTO members’ rights and obligations in the Preamble itself.<sup>156</sup> In Article 1.2 of the TPP Agreement, entitled “Relation to

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<sup>149</sup> TPP art. 20.2.3 provides, “The Parties further recognise that it is inappropriate to establish or use their environmental laws or other measures in a manner which would constitute a disguised restriction on trade or investment between the Parties.”

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at art. 20-3.

<sup>152</sup> *Chapter 25 Regulatory Coherence*, TRANS-PACIFIC PARTNERSHIP 25-1, <https://ustr.gov/sites/default/files/TPP-Final-Text-Regulatory-Coherence.pdf>.

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

<sup>154</sup> *Id.* at art. 25-4.

<sup>155</sup> Refer to the PTAs mentioned above.

<sup>156</sup> See *Free Trade Agreement Between the Eurasian Economic Union and Its Member State, of the one part, and The Socialist Republic of Vietnam, of the other part*, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3455>; *Free Trade Agreement Between the Government of Australia and the Governemntnt of the People’s Republic of*

other Agreements,” the TPP reiterates the connection of its parties to their WTO commitments.<sup>157</sup>

#### D. *Are We Going Too Far?*

With seventeen goals and 169 targets, are the new SDGs too much for global trade to bear? Perhaps not, especially when taking into consideration that the global trade regime is not expected to act solely upon the SDGs. The proposal of inter-agency collaboration is only logical when it comes to this gigantic undertaking in the name of the new SDGs.<sup>158</sup> The idea of a collaborative effort would anticipate the role of all key actors, whether private actors in the form of multinational enterprises (“MNEs”), small and medium enterprises (“SMEs”), civil society, or governments. Private standard setting may be just as important as governmental or inter-governmental standard setting, as is the case with global value chains (“GVCs”). This may encompass a debate between rule-based global trade regimes as opposed to power-based ones.<sup>159</sup> It is quintessential to comprehend informal means of standard setting to complement hard provisions.<sup>160</sup> States may take a firm position with hard treaty provisions when the compliance of other treaty parties is crucial. On the other hand, when a state is faced with a scenario that requires more flexibility to take certain actions, it would likely opt for softer provisions “without institutional

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*China*, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3454>; *SADC Model Bilateral Investment Treaty Template with Commentary*, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY 5 (2012), <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2875>.

<sup>157</sup> *Chapter 1 Initial Provisions and General Definitions*, TRANS-PACIFIC PARTNERSHIP 1-1, <https://ustr.gov/sites/default/files/TPP-Final-Text-Initial-Provisions-and-General-Definitions.pdf>.

<sup>158</sup> Alice Tipping & Robert Wolfe, *Trade and Sustainable Development: Options for follow-up and review of the trade-related elements of the Post-2015 Agenda and Financing for Development*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (2015), <https://www.iisd.org/sites/default/files/publications/trade-sustainable-development-options-post-2015-agenda.pdf>.

<sup>159</sup> See Joost Pauwelyn, *Rule-based Trade 2.0: The Rise of Informal Rules and International Standards and How they may Outcompete WTO Treaties*, 14 J. INT’L ECON. L. 1, 1-3 (2014).

<sup>160</sup> Joost Pauwelyn describes this as moving away from “thin state consent” to a “thick stakeholder consensus.” *Id.* at 2.

teeth.”<sup>161</sup> The very idea of a vast array of goals and targets within the SDGs makes this necessary.

As one of the leading authorities on international trade law, the late John Jackson discussed the importance of institutional structures to regulate global norms,<sup>162</sup> where he referred to this feature as the “constitution” of the world trading system.<sup>163</sup> He emphasized that institutional structures, in an analogy to domestic constitutions, include informal mechanisms and “practices.”<sup>164</sup> He followed up with this idea in the aftermath of the Seattle riots, challenging the institutional structure of the WTO, and further stressing a “rule-oriented system” approach.<sup>165</sup> Jackson accentuated the importance of an international organization, and although such an international organization would not be able to directly implement technical or non-technical measures for the market economy itself, it would establish rules that are necessarily “effective, reasonably efficient to implement, and credible enough” to allow domestic policies to build upon in different business affairs.<sup>166</sup> Although this seems reasonable and credible in and of itself, the problem today is that states doubt the flexibility they have in implementing technically complex rules, which is why this has partially been acknowledged through (S&D) provisions.<sup>167</sup>

One major explanation for considering informal means of standard setting is the fact that when it comes to multilateral and mega-regional trade agreements, reaching an agreement amongst a vast array of members is extremely thorny.<sup>168</sup> A characteristic to bear in mind when incorporating the

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<sup>161</sup> Niels Peterson, *How Rational is International Law?*, 20 EUR. J. INT’L L. 1247, 1254-55.

<sup>162</sup> John Jackson, *Perils of Globalization and the World Trading System*, 24 FORDHAM INT’L L. J. 371, 373-74 (2000).

<sup>163</sup> *Id.* at 375.

<sup>164</sup> *Id.*

<sup>165</sup> 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.* at 376.

<sup>166</sup> *Id.* at 376.

<sup>167</sup> *Development: Trade and Development Committee Special and Differential Treatment Provisions*, WORLD TRADE ORG., [https://www.wto.org/english/tratop\\_e/devel\\_e/dev\\_special\\_differential\\_provisions\\_e.htm](https://www.wto.org/english/tratop_e/devel_e/dev_special_differential_provisions_e.htm) (last visited Nov. 7, 2015).

<sup>168</sup> John Jackson, *Perils of Globalization and the World Trading System*, 24 FORDHAM INT’L



SDGs into international trade is that the goals are vibrant when tracing their history and passing through the MDGs. As a result, a dynamic and flexible means of living up to this accelerating agenda would better fit this condition, and this is where informal standard setting can play a role.<sup>169</sup>

As for the issue of compliance with this informal standard-setting approach, there are many elements that incite, or even force states to comply.<sup>170</sup> Reputation cost, reciprocity, and obtaining certain international benefits requires meeting a certain threshold.<sup>171</sup> The development aid dimensions of the International Monetary Fund and its Articles of Agreement, and the World Bank present examples of such cases.<sup>172</sup>

To clarify this informal international standard approach in international trade, there is evidence in the Technical Barriers to Trade (“TBT”) Agreement.<sup>173</sup> This Agreement aims to ensure that technical regulations, standards, and conformity assessment procedures are non-discriminatory and do not restrict trade.<sup>174</sup> It also allows for some policy objectives to be achieved, such as the protection of human health and safety or the environment, where state member measures are based on “international standards.”<sup>175</sup> As a result, the TBT Committee has been established, which functions in mainly two areas: (1) reviewing member specific measures and (2) strengthening the implementation of the TBT Agreement.<sup>176</sup> The TBT Committee highlighted six major principles in its 2000 Decision to guide WTO members in adopting international standards.<sup>177</sup> The principles include:

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L. J. 371, 373-74 (2000) (discussing the need for international organization).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> See Benedict Kingsbury, Nico Kirsch, & Richard Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROB. 1, 23-4 (2005).

<sup>172</sup> *Id.*

<sup>173</sup> URUGUAY ROUND OF TRADE NEGOTIATIONS: AGREEMENT ON TECHNICAL BARRIERS TO TRADE, available at [https://www.wto.org/english/docs\\_e/legal\\_e/17-tbt\\_e.htm](https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm) (last visited Jan. 25, 2016).

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> Committee on Technical Barriers to Trade, *Note by the Secretariat: Decisions and Recommendations Adopted by the WTO Committee on Technical Barriers to Trade Since 1 of January 1995* [hereinafter “TBT Committee Decisions & Recommendations”], Annex 2 to

## LODGING SUSTAINABLE DEVELOPMENT GOALS

(1) transparency, (2) openness, (3) impartiality and consensus, (4) effectiveness and relevance, (5) coherence, and (6) addressing the concerns of developing countries.<sup>178</sup> These six principles swim in the sea of transparency and participation amongst TBT Agreement parties.<sup>179</sup> The Decision stressed the importance that local governments, non-governmental standardizing bodies, and regional standardizing bodies to also accept these standards, including the Code of Good Practice for the Preparation, Adoption, and Implementation of Standards (“the Code”), and Annex 3 of the TBT Agreement.<sup>180</sup>

The WTO Dispute Settlement Body acknowledges this friendly shift towards soft international standard setting. The 2012 Appellate Body Report in the *US-Tuna II* case undertook the task of examining the international standards that were adopted by Mexico.<sup>181</sup> But the Appellate Body denied the adopted measure international standard status because the process through the Agreement on the International Dolphin Conservation Program did not precisely fulfill the “soft” TBT Committee Principles of transparency and participation.<sup>182</sup>

As for follow-up mechanisms to sustainable development objectives in international trade, taking into consideration the “aspirational” nature of the SDGs for states, the review mechanisms fit a gentle, but effective approach towards trade policies.<sup>183</sup> In Alice Tipping and Robert Wolf’s Working Draft on *Trade and Sustainable Development: Options for Follow-up and Review of the Trade-related Elements of the Post-2015 Agenda and Financing for Development*,<sup>184</sup> they propose this review mechanism and trace the components to the different international forums, including the WTO, UNCTAD, the World Bank, and other regional organizations such as OECD,

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*TBT Committee Decisions and Recommendations*, at 47-49, WTO Doc. G/TBT/1/Rev.12 (Jan. 21, 2015).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 47.

<sup>180</sup> *Id.* at 27.

<sup>181</sup> Joost Pauwelyn, *Rule-Based Trade 2.0? The Rise of Informal Rules and International Standards and How they May Outcompete TWO Treaties*, 17 J. INT’L ECON. L. 739, 740, 750 (2014).

<sup>182</sup> *Id.*

<sup>183</sup> Tipping & Wolf, *supra* note 152, at 7.

<sup>184</sup> *Id.*

Association of Southeast Asian Nations (“ASEAN”), Asia Pacific Economic Cooperation (“APEC”), SADC, the United Nations Economic Commission for Europe (“UNECE”) and the United Nations Economic Commission for Latin America and the Caribbean (“ECLAC”).<sup>185</sup>

Their previous working paper identified categories, or “clusters,” of SDG topics that intersect with international trade.<sup>186</sup> The six categories underlined were comprised of the issues on reforms of subsidies, agriculture, fisheries, and fossil fuels, and enhancing market access for small enterprises.<sup>187</sup> Another category was international cooperation related to technology for water and sanitation, clean energy, infrastructure, and access to medicines.<sup>188</sup> A third cluster was the role of economic diversification, trade facilitation, and empowerment of global value chains.<sup>189</sup> The fourth category was related to illegal extraction of and trade in natural resources and chemicals.<sup>190</sup> The fifth category was connected to Doha Development Round (“DDR”) structural aims of empowering developing countries.<sup>191</sup> Lastly, the sixth group referred to policy coherence at the different levels, a framework that would embrace multilateral, regional, and local trade rules.<sup>192</sup>

It is also worth noting that concerted efforts have already begun to implement such review mechanisms in the face of the SDGs complex task in its association to trade.<sup>193</sup> The United Nations Secretary-General has established the United Nations System Task Team on the Post-2015 United Nations Development Agenda (“Task Team”), not only to prepare for this agenda, but also to follow up with its implementation.<sup>194</sup> This Task Team is co-chaired by the United Nations Department on Economic and Social Affairs and the United Nations Development Program (“UNDP”), and further

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<sup>185</sup> *Id.* at 14-9.

<sup>186</sup> *Id.* at 10.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 11.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 12.

<sup>191</sup> *Id.* at 13.

<sup>192</sup> *Id.*

<sup>193</sup> *The UN System Task Team*, DEVELOPMENT POLICY AND ANALYSIS DIVISION, available at [http://www.un.org/en/development/desa/policy/untaskteam\\_undf/index.shtml](http://www.un.org/en/development/desa/policy/untaskteam_undf/index.shtml) (last visited Nov. 6, 2015).

<sup>194</sup> *Id.*

## LODGING SUSTAINABLE DEVELOPMENT GOALS

incorporates more than sixty different United Nations agencies and international organizations.<sup>195</sup>

### IV. CONCLUSION

Lodging the SDGs into international trade is no easy task, but it is unavoidable. The SDGs may be teaching us a lesson about how elaborate the issue of “linkage” has evolved to be, and the importance of concerted cooperative solutions in this manner.<sup>196</sup> Even when shifting to international trade, purely national regulatory measures do not seem to easily fit into this logic of shared values, which might explain adjusting towards regionalism in an interdependent economic world.<sup>197</sup> Nonetheless, states have their own worries and interests which the SDGs took into account when setting an elaborate framework, coated with several technical guidelines.<sup>198</sup>

This article has attempted to illustrate how the sustainable development agenda has evolved by encompassing a vast array of topics that the international community agree represents their respective diverse needs today. In parallel to this agenda, or perhaps inherent to it, exists an international trade regime struggling to prove that domestic development needs are apprehended within a global framework. As a result, a substantial number of PTAs have emerged in response to a multilateral trading system. What these different PTAs have addressed - whether of a bilateral, regional, or multiregional nature - is that sustainable development needs must be encompassed by an international trade agenda.

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<sup>195</sup> *Id.*

<sup>196</sup> Andrew Guzman attempts to explain 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; and (3) using existing infrastructure by economies of scope. ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 162 (Oxford University Press 2008).

<sup>197</sup> John Jackson, *Perspectives on Regionalism in Trade Relations*, 27 *L. & POL’Y INT’L BUS.* 873, 873 (1996).

<sup>198</sup> *Goal 8: Promote inclusive and sustainable economic growth, employment and decent work for all*, UN SUSTAINABLE DEVELOPMENT GOALS, available at <http://www.un.org/sustainabledevelopment/economic-growth/> (last visited February 28, 2016).

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