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Strengthening Sustainable Development through Preferential Trade Agreements

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Abstract

This chapter presents an analysis of sustainable development goals in the context of two mega-regional trade agreements: the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP). These preferential trade agreements present a more efficient vehicle by which to promote sustainable development than the multilateral trading platform. The chapter discusses sustainable development and energy within the proposed TTIP. The TTIP aims to further economic growth, investment and trade between the United States and the European Union (EU), and could potentially have a very large impact as the U.S.–EU trade and investment flows are sizeable and a critical element in global commerce. The chapter argues that the TTIP has the potential to foster sustainable development, energy efficiency, and energy security.

The chapter explores the topic of sustainable development, reporting the stated trade and TTIP-specific goals of both the United States and the EU, which generally includes the promotion of sustainable development. An examination of the three pillars of sustainable development—environmental protection, economic sustainability, and social sustainability—follows, discussing ways in which the TTIP could integrate terms ensuring protection and support of these elements. The chapter then focuses on the role that energy could play for the TTIP. It discusses support schemes and initiatives it could include to increase trade in raw materials and natural resources such as natural gas, and in energy efficiency and renewable energy technologies. The chapter finally examines the Environment Chapter of the TPP and explores how sustainable the TPP is by analyzing the various provisions of the TPP's Environment Chapter.

Keywords: Transatlantic Trade and Investment Partnership, Trans-Pacific Partnership, mega-regionals, sustainable development, energy, trade and investment, energy security, energy efficiency, trade in raw materials and natural resources

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I. THE TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP	3
A. An Introduction	3
1. Timeline	3
2. Goals	4
3. Importance	4
B. The TTIP and Sustainable Development	5
1. Central Sustainability Goals	5
a. Environmental Protection	5
b. Economic Sustainability	7
c. Social Sustainability	7
2. The European Union	8
C. The TTIP and Energy	9
1. Raw Materials and Natural Resources	9
2. Energy Efficiency and Renewable Energy Generation	11
D. Looking Forward	11
II. THE TRANS-PACIFIC PARTNERSHIP	12
A. An Introduction	12
1. A 21 st -century Agreement	13
2. THE NEED FOR THE TRANS-PACIFIC PARTNERSHIP	15
B. The Environment Chapter	15
1. THE NEED FOR AN ENVIRONMENT CHAPTER	16
2. THE ENFORCEMENT OF THE ENVIRONMENT CHAPTER	17
a. Domestic Regulations	17
b. Corporations and Sustainability	18
C. How Sustainable is the Trans-Pacific Partnership?	18
1. Essentially a Trade Agreement	18
2. Backward Looking Agreement	19
3. Trade and Biodiversity	20
4. Trade and Climate Change	21
5. Marine Fisheries	21
6. Trade and Conservation	22
D. Comparing the TPP with the TTIP on Sustainable Development	22
E. Conclusion	23

This chapter provides an analysis from the broader perspective of sustainable development of two mega-regional trade agreements currently under negotiation: the Transatlantic Trade and Investment Partnership (TTIP) and the Trans-Pacific Partnership (TPP). In Part I of this chapter, we examine the TTIP in the context of sustainable development. After some introductory remarks in the first section, Section two deals with the main sustainability goals, whereas in section three, we look specifically at the role of the TTIP in addressing issues such as raw materials, energy efficiency, and renewable energy generation. In Part II, we discuss how particular provisions of the TPP's Environment Chapter have affected the parties to the TPP. The first section introduces the TPP as a 21st-century trade agreement. The second section deals with the TPP's Environment Chapter and its enforcement. The third section deals the Articles on sustainable development of the TPP's leaked Environment Chapter. The fourth section compares the TPP with the TTIP and the published report of the European Union (EU) with regard to trade and sustainable development. The last section makes some recommendations regarding some Articles in the draft text of the TPP that need improvement.

I. The Transatlantic Trade and Investment Partnership

A. An Introduction

The Transatlantic Trade and Investment Partnership (TTIP) is a proposed free trade agreement between the United States and the EU and its member states. The United States and the EU have discussed the idea of a transatlantic free trade area for decades.¹ The TTIP was first conceived in November 2011, following a U.S.–EU Summit and the sixth meeting of the Transatlantic Economic Council.² Leaders requested that the U.S.–EU High Level Working Group on Jobs and Growth identify ‘policies and measures to increase U.S.–EU trade and investment to support mutually beneficial job creation, economic growth, and international competitiveness.’³ The High Level Working Group concluded that the development of a comprehensive bilateral trade and investment agreement would provide the most benefits for the parties.⁴

1. Timeline

The time is right for the aperture of trade between these two global powerhouses. Both economies have stagnated somewhat in the wake of the global recession and the financial and the Eurozone crises.⁵ Increased transatlantic exchange of investment, goods, and services would strengthen the economies, create jobs, and help to solidify the old guard as emerging markets continue to carve out increasing shares of global commerce.⁶ The TTIP would be a way for both sides of the Atlantic to boost their economies without occurring additional national debt.⁷

¹ Tyson Barker and Garrett Workman, ‘The Transatlantic Trade and Investment Partnership: Ambitious but Achievable’ (2013) 1, (Atlantic Council and the Bertelsmann Foundation) <www.bfna.org/sites/default/files/TTIPReport_web.pdf> accessed 21 March 2014.

² ‘Fact Sheet: United States to Negotiate Transatlantic Trade and Investment Partnership with the European Union’ (Office of the United States Trade Representative, 13 February 2013) <www.ustr.gov/about-us/press-office/fact-sheets/2013/february/US-EU-TTIP> accessed 21 March 2014.

³ ‘Final Report: High Level Working Group on Jobs and Growth’ 1, (United States-European Union High Level Working Group on Jobs and Growth, 11 February 2013) <www.ustr.gov/sites/default/files/02132013%20FINAL%20HLWG%20REPORT.pdf> accessed 21 March 2014 (internal citations omitted).

⁴ *ibid.*

⁵ Barker and Workman (n 1) 1.

⁶ *ibid.*

⁷ *ibid.*

Development of the TTIP is under way. As of March 2014, four rounds of negotiations had taken place: the first round occurred in July 2013, and the fourth round completed in March 2014. The issues and areas under consideration in the TTIP are complex and have wide-ranging implications for both parties; as expected, talks have so far cautiously progressed.

2. Goals

The goal of the TTIP is to further economic growth, investment and trade between the United States and the EU. There are two main routes to achieving an expansion of trade: cutting or eliminating tariffs, and removing so-called ‘behind-the-border’ technical barriers to export.⁸ Additionally, the TTIP will aim to open markets for services, investment, and public procurement.⁹ ‘Behind-the-border’ barriers that impede U.S.–EU trade are mostly national regulations, standards, and approval procedures.¹⁰ Although the two regions have similarly high-quality standards, they are not yet understood to be aligned or to be parallel; thus, national authorization and qualification of trade products can be expensive and time-consuming, hampering trade.¹¹ The harmonization in the TTIP of these elements would foster increased trade, and the EU has estimated that up to 80% of the benefits will come from the ‘elimination of bureaucratic duplication, greater regulatory alignment, and increased access to services and procurement markets.’¹²

Primary elements in the agreement to achieve these goals include the elimination of tariffs and other technical barriers to trade; improvement of market access for goods and services; the reduction of costs by aligning regulations and standards; the strengthening of cross-border financial investment; and the development of approaches to modern issues such as intellectual property and state-owned enterprises.¹³ Ancillary aims for the promotion of transparency and cooperation will help support the strength and effectiveness of the TTIP. In addition, strong implementation, monitoring, and enforcement structures will be needed to ensure effective implementation of its policies.

3. Importance

The U.S.–EU trade and investment relationship is already a sizeable and critical element in the global commercial scene. The total trade in goods between the two regions in 2011 was worth €455 billion.¹⁴ The United States was the EU’s third-largest supplier, selling €192 billion in goods (about 11% of total imports), and was the EU’s main export market, purchasing €264 billion in goods (about 17% of total exports).¹⁵ In 2011, trade in commercial services between the two regions was worth €282.3 billion. The United States was the EU’s top trade partner in this category, sending €138.4 billion (about 29% of total EU imports) and receiving €143.9 billion (about 24% of total EU exports) in commercial services.¹⁶ Lastly, investment activity between the United States and the EU is substantial: ‘In 2011, U.S. companies invested around €150 billion in the EU and EU firms some €123 billion in the U.S.’¹⁷ In the same year, the total stock of bilateral investments was around €1.3 trillion in each direction.¹⁸

⁸ ‘About TTIP’ (European Commission) <<http://ec.europa.eu/trade/policy/in-focus/ttip/about-ttip/>> accessed 21 March 2014.

⁹ *ibid.*

¹⁰ *ibid.*

¹¹ *ibid.*

¹² *ibid.*; Barker and Workman (n 1) 1.

¹³ ‘White House Fact Sheet: Transatlantic Trade and Investment Partnership (T-TIP)’ (Office of the United States Trade Representative) <www.ustr.gov/about-us/press-office/fact-sheets/2013/june/wh-ttip> accessed 21 March 2014.

¹⁴ ‘Independent Study Outlines Benefits of EU-US Trade Agreement’ (European Commission) <http://europa.eu/rapid/press-release_MEMO-13-211_en.htm> accessed 21 March 2014.

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ *ibid.*

The TTIP is estimated to have large and multifaceted benefits. The European Commission anticipates a boost to the EU economy by more than €119 billion annually, the U.S. economy by more than €95 billion annually, and the rest of the world by almost €100 billion. It also may potentially create hundreds of thousands of jobs.¹⁹

There is great potential for the TTIP to foster sustainable development, energy efficiency, and energy security through the agreement's terms and the hopefully resultant increase in trade. However, the degree to which this potential is realized will depend largely on the quality of the environmental and energy elements and the transparency, implementation, and enforcement and monitoring provisions.

B. The TTIP and Sustainable Development

1. Central Sustainability Goals

In its Final Report, the High Level Working Group suggested that the United States and the EU should explore opportunities to maintain a high level of protection for the environment.²⁰ While developing the TTIP, both economies should keep in mind advancements made in the Sustainable Development Chapter of EU trade agreements and in the Environment Chapter of U.S. trade agreements.²¹ The United States and the EU have each set forth a number of sustainable development goals in statements regarding the TTIP and as general trade goals.²² Additionally, as members of the World Trade Organization (WTO), the United States, the EU, and its 28 member states are committed to sustainable development as stated in the Preamble to the Agreement Establishing the World Trade Organization, signed in 1994.²³

The United Nations 2005 World Summit Outcome document introduces three pillars of sustainable development: (1) environmental protection; (2) economic development; and (3) social development.²⁴ This definition of sustainable development provides a useful framework for analysis of the potential for the topic within the TTIP.

a. Environmental Protection

Environmental protection should be enshrined in the TTIP. Both economies have expressed a desire to include and enforce preexisting commitments made in multilateral environmental agreements. The United States named some of these agreements in its 2014 Trade Policy Agenda and 2013 Annual Report, which cover areas including trade in endangered species, maritime and fishery issues, ozone-depleting substances, biological diversity, hazardous wastes, biosafety, and organic pollutants.²⁵ The EU named many of the same international agreements as having particular importance for trade negotiations.²⁶

¹⁹ *ibid.*

²⁰ 'Final Report: High Level Working Group on Jobs and Growth' (n 3) 5.

²¹ *ibid.*

²² The United States has mentioned sustainable development as a goal and element of its trade program in the '2014 Trade Policy Agenda and 2013 Annual Report of the President of the United States on the Trade Agreement Program.' The EU has similarly produced a 'Trade and Sustainable Development Initial EU Position Paper' for the TTIP negotiations.

²³ 'Recognizing that their relations in the field of trade and economic endeavour should be conducted [. . .] allowing for the optimal use of the world's resources in accordance with the objective of sustainable development[.]' Agreement Establishing the World Trade Organization, 15 April 1994, <www.wto.org/english/docs_e/legal_e/04-wto.pdf> accessed 21 March 2014.

²⁴ '2005 World Summit Outcome' (United Nations General Assembly, 25 October 2005), para 48 <www.un.org/womenwatch/ods/A-RES-60-1-E.pdf> accessed 21 March 2014.

²⁵ 'Additional examples of [multilateral environmental agreements] MEAs where [the United States Trade Representative] USTR contributed to U.S. policy development include the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the International Convention for the Conservation of Atlantic Tunas, International Maritime Organization conventions, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Transboundary

As mentioned above, one of the most essential elements for success of the TTIP is unifying standards and regulations. Multilateral environmental agreements that have already been concluded by the United States and the EU would be a good source of developed assessments and agreed-upon standards. Their content, protections, and guidelines should be integrated into the TTIP to the degree that they are relevant.

In recent trade agreements concluded by the United States and the EU, both entities have taken a number of steps to support environmental standards and sustainable development concerns. For example, in the Environment Chapter of its Free Trade Agreement with South Korea, the United States encouraged high levels of protection for the environment and the application and enforcement of environmental laws; it outlined procedures to investigate alleged violations; it developed mechanisms and institutional arrangements to enhance environmental performance; and it created opportunities for cooperation and public participation.²⁷ The EU covered many of the same issues and goals in its free trade agreement with Korea, and stated that trade should promote sustainable development.²⁸ In an Annex, the U.S.–Korea agreement also specifically listed multilateral environmental agreements to which both signatories were a party.²⁹ The integration of these agreements is useful for referencing specific environmental standards that have already been agreed upon, which would not likely be enumerated in the free trade agreement itself.

Climate change is additionally a large issue that falls under the purview of environmental protection. The EU named the United Nations Framework Convention on Climate Change (UNFCCC) one of the central multilateral environmental agreements that should underlie the environmental protection element of the TTIP,³⁰ and the United States has continued to remain involved in negotiations on the UNFCCC.

The TTIP should replicate the Environment Chapter and Trade and Sustainable Development Chapter of recent U.S. and EU free trade agreements discussed above. The terms in each of these strongly promote environmental standards and the enforcement of environmental protections. Additionally, the TTIP should specifically reference standards laid out in the multilateral environmental agreements listed above and should make them enforceable by parties. The United States and the EU should consider inclusion of the UNFCCC into this group of agreements, as it would help to address the growing issue of climate change mitigation and adaptation.³¹

Movements of Hazardous Wastes and their Disposal, the Convention on Biological Diversity and the Cartagena Protocol on Biosafety, and the Stockholm Convention on Persistent Organic Pollutants.’ ‘2014 Trade Policy Agenda and 2013 Annual Report of the President of the United States on the Trade Agreement Program’ (Office of the United States Trade Representative, March 2014) 157 <www.ustr.gov/sites/default/files/2014%20Trade%20Policy%20Agenda%20and%202013%20Annual%20Report.pdf> accessed 21 March 2014.

²⁶ ‘EU - US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development: Initial EU Position Paper’ (European Commission) 2 <http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151626.pdf> accessed 21 March 2014.

²⁷ Free Trade Agreement Between the United States and the Republic of Korea, Chapter 20 <www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> accessed 21 March 2014.

²⁸ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part [2011] OJ L127/6, Chapter 13.

²⁹ Free Trade Agreement Between the United States and the Republic of Korea (n 27) Annex 20-A.

³⁰ ‘EU - US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development: Initial EU Position Paper’ (n 26) 2.

³¹ For further discussion on the link between trade and climate change, see Leal-Arcas, R. *Climate Change and International Trade*, Edward Elgar, 2013.

b. Economic Sustainability

Economic sustainability and development encompasses the idea that business, practices, and operations occur in such a way that they efficiently and responsibly use resources while avoiding the creation of environmental concerns and continuing to make a profit. One central part in creating an economically sustainable business climate in the United States and the EU is facilitating trade in sustainable and green goods, technologies, information, and services. Sustainability assurance schemes are a second tool mentioned by the EU in its Initial Policy Paper that would encourage economic sustainability.³² Voluntary tools on the topic and fair and ethical trade initiatives could encourage these important goals while making them a desirable element in transatlantic business practices. The TTIP could have a potentially large role to play in encouraging trade in green goods and services, and could help develop and protect sustainability schemes.

In its Free Trade Agreement with South Korea, the EU specifically highlighted the economic side of sustainable development: ‘The Parties shall strive to facilitate and promote trade and foreign direct investment in environmental goods and services, including environmental technologies, sustainable renewable energy, energy efficient products and services and eco-labelled goods, including through addressing related non-tariff barriers.’³³ The areas described above are of the sort that would allow businesses to operate profitably and in a sustainable manner, and are central to economic sustainability. The Agreement also includes a term on sustainability structures and schemes that further economic sustainability: ‘The Parties shall strive to facilitate and promote trade in goods that contribute to sustainable development, including goods that are the subject of schemes such as fair and ethical trade and those involving corporate social responsibility and accountability.’³⁴ The recent U.S. Environmental Chapter of free trade agreements has no parallel term.

The TTIP should include an economic development term similar to the one discussed above in order to promote sustainable operations and development for businesses in both regions. Green goods, technologies, and services are essential to responsible growth and environmental protection. The term should also cover structures such as fair and ethical trade and corporate social responsibility as they encourage businesses to operate and produce goods that are in line with sustainable development goals.

c. Social Sustainability

Lastly, social sustainability is a core part of sustainable development. This pillar represents the idea that the policies, processes, and systems supporting sustainable development also improve social goals such as equality, diversity, and quality of life, among others. Although a number of areas could fall under this heading, including human rights agreements, of particular focus in discussions relating to environmental protection and sustainable development are labor standards. Both parties have named the protection of labor standards as important in trade talks, and they can be considered an important element of social sustainability.

The Trade and Sustainable Development Chapter of recent EU free trade agreements highlights the value of multilateral agreements on labor standards and the goal of increasing employment.³⁵ It also outlines four major principles concerning fundamental rights: (1) freedom of association and collective bargaining; (2) elimination of forced or compulsory labor; (3) abolition of child labor; and (4) elimination of

³² *ibid* 3.

³³ Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part (n 28) Art. 13.6.2.

³⁴ *ibid*.

³⁵ *Ibid*, Article 13.4.

discrimination.³⁶ All of these concepts are also tied within the agreement to the standards of the International Labor Organization (ILO).³⁷ Recent U.S. free trade agreements also include a chapter on labor recognizing the same principles of fundamental rights and the applicability of the ILO and its policies; encouraging enforcement of labor laws and public awareness of them; and creating institutions and mechanisms for cooperation and consultation.³⁸ It is clear that both parties have made labor protections an important part of free trade agreements in recent years.

The TTIP should include a term much like that in previous EU and U.S. free trade agreements, recognizing the importance of labor standards and principles of fundamental rights. It should reference the ILO, of which the United States and all EU countries are members. The ILO has issued non-binding resolutions, guidelines, and codes of practice on a number of topics, as well as standards ratified by some member states, including the measurement of working time; safety and health in various fields of work; freedom of association; wages; working time; employment security; and child labor, among others.³⁹ Publications and other documents produced by the ILO could form the basis for labor standards encouraged and enforced by the TTIP if the ILO is integrated into the TTIP.

2. The European Union

As an international institution with agreements in its own right, it is worth examining the policies of the EU on the environment that ought to guide its TTIP negotiations. Sustainable development is an explicitly stated goal of the EU within the Treaty of Lisbon.⁴⁰ The EU has its own Sustainable Development Strategy, aiming to identify and help develop actions that allow the EU to attain its sustainable development goals through efficient resource use, realizing ecological and social innovation potential, environmental protection and, in the end, achieving prosperity.⁴¹ The Strategy emphasizes that global solidarity will be needed to meet the challenges of sustainable development, and that it is important for the EU to work in partnership with other nations of the world.⁴² One operational objective within the Strategy is to ‘[i]nclude sustainable development concerns in all EU external policies . . . by making it an objective of multilateral and bilateral development cooperation.’⁴³ Thus, it is clear that the EU is internally obligated to include policies to promote sustainable development in the TTIP.

The EU has stated that its practice is to include a chapter on ‘Trade and Sustainable Development’ in the free trade agreements that it concludes,⁴⁴ and examples of such a chapter have been discussed above. It has also

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ Free Trade Agreement Between the United States and the Republic of Korea (n 27) Chapter 19.

³⁹ See ‘International Labour Organization’ (International Labor Organization) <www.ilo.org/global/lang--en/index.htm> accessed 21 March 2014.

⁴⁰ ‘The Union . . . shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.’ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1, para 4. The EU has a similar goal for its relations with external regions: ‘The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: . . . help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development.’ *ibid* para 24.

⁴¹ ‘Renewed Sustainable Development Strategy’ (European Commission, 15/16 June 2006) <<http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=ST%2010917%202006%20INIT>> accessed 21 March 2014.

⁴² *ibid* 3.

⁴³ *ibid* 21.

⁴⁴ ‘EU - US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development: Initial EU Position Paper’ (n 26)

released Initial Position Papers on trade and sustainable development and raw materials and energy within the TTIP specifically.⁴⁵ Position papers state that any such chapter in the TTIP ought to cover: trade of sustainable and climate-friendly goods, services, and technologies; sustainability assurance schemes; and corporate social responsibility standards.⁴⁶ The EU will likely push to include a ‘Trade and Sustainable Development’ chapter that addresses these areas; alternatively, it will ensure that the same safeguards and protections are put into place in a similar term appearing in the TTIP.

C. The TTIP and Energy

1. Raw Materials and Natural Resources

In its Final Report, the US-EU High Level Working Group on Jobs and Growth identified the raw materials and energy sector as a trade area that deserves particular attention in developing rules and modes of cooperation.⁴⁷ Energy has become a pressing issue: the increase in the world’s population and the improvement of living standards have contributed to an increase in energy demand.⁴⁸ Governments are in turn thinking more strategically about energy control: how to secure a supply of raw materials and energy resources, and how to emphasize generation methods that further this goal and that protect the environment.⁴⁹

However, the trade of raw materials and energy has not been fully covered by the international trade and investment rules that have developed.⁵⁰ The EU has argued that the rules in the various WTO agreements do not adequately address international trade in energy and raw materials. The WTO has strong rules regarding import barriers, but weaker rules addressing export barriers, which tends to be the complicating factor in energy trading.⁵¹ Additionally, there is no definition of ‘energy services’ in the General Agreement on Trade in Services, and an absence of rules governing international trade in energy goods.⁵² Finally, other complications include trade and distribution monopolies in some countries; local content requirements; and lack of transparency in licenses for exploitation or trade.⁵³ Thus, there is an opportunity for the TTIP to address some of these gaps and issues regarding trade between the EU and the United States, facilitating the movement of energy goods and services and potentially providing a model for energy trade liberalization by other international actors.

One of the already-anticipated benefits of the TTIP, should it successfully liberalize trade in energy and raw materials, is increased exports by the United States of liquefied natural gas (LNG) to the EU. A supply of American LNG to Europe would greatly benefit the region’s energy strategy. Trade in LNG would lessen the

⁴⁵ *ibid.*; ‘EU - US Transatlantic Trade and Investment Partnership: Raw Materials And Energy: Initial EU Position Paper’ (European Commission) <http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151624.pdf> accessed 21 March 2014.

⁴⁶ ‘EU - US Transatlantic Trade and Investment Partnership: Trade and Sustainable Development: Initial EU Position Paper’ (n 26) 2–3.

⁴⁷ ‘Final Report: High Level Working Group on Jobs and Growth’ (n 3) 6.

⁴⁸ ‘EU - US Transatlantic Trade and Investment Partnership: Raw Materials And Energy: Initial EU Position Paper’ (n 44) 1. See also Leal-Arcas, R. and Filis, A. “The Fragmented Governance of the Global Energy Economy: A Legal-Institutional Analysis,” *Journal of World Energy Law and Business*, Vol. 6, Issue 4, pp. 1-58; Leal-Arcas, R. and Filis, A. “Conceptualizing EU Energy Security through an EU Constitutional Law Perspective,” *Fordham International Law Journal*, Vol. 36, No. 5, pp. 1225-1301, 2013.

⁴⁹ See generally Abu-Gosh, E. and Leal-Arcas, R. “The Conservation of Exhaustible Natural Resources in the GATT and WTO: Implications for the Conservation of Oil Resources,” *The Journal of World Investment and Trade* Vol. 14, No. 3, pp. 480-531, 2013.

⁵⁰ ‘EU - US Transatlantic Trade and Investment Partnership: Raw Materials And Energy: Initial EU Position Paper’ (n 44) 1.

⁵¹ *ibid.*

⁵² *ibid.*

⁵³ *ibid.*

EU's dependence on Russian gas,⁵⁴ thereby diversifying its portfolio of external raw materials sources. Currently, the U.S. Department of Energy must approve each export of LNG abroad; however, the process is nearly automatic when the LNG is being shipped to a country with which the United States has concluded a free trade agreement.⁵⁵ This is an example of a 'behind-the-border' barrier discussed above. Becoming a preferential partner with a free trade agreement may satisfy the EU, and no change may be needed in the U.S. regulatory scheme to open trade. Alternatively, negotiations may encourage the United States to reduce or eliminate this permitting scheme or other existing tariffs or licensing programs, along with other barriers to export, so that energy products and raw materials may cross borders more freely.⁵⁶

Market conditions may mean that the benefits in LNG trade that the EU expects may not materialize. However, since energy prices are higher in Asia, it is possible that substantial exports to the EU would only occur when Asian demand is weak.⁵⁷ Additionally, the American Henry Hub pricing system for LNG differs markedly from the current way that natural gas is priced in the EU, which is on a local market basis.⁵⁸ This may make European suppliers less interested in contracting for LNG, especially if the Henry Hub price rises above the price the European market would mandate.⁵⁹ However, it would allow European suppliers to leverage the U.S. LNG prices in negotiations with other suppliers, and some may be willing to pay a premium for the LNG if it means a preferable security of supply.⁶⁰ The TTIP has great potential to open trade in energy and raw materials, particularly LNG, but the resulting economic benefits are not guaranteed.

The EU would like to see the inclusion of elements of the Extractive Industries Transparency Initiative (EITI) in the TTIP, arguing that it reflects the domestic legislation of the EU and the United States.⁶¹ The EITI is an international standard of transparency for oil, gas, and mineral resources, and is developed and overseen by a coalition of actors, including governments.⁶² The EITI has two tiers of participation: countries that are EITI compliant and have met all the requirements of the EITI standard; and countries that are EITI candidates and are implementing EITI, but have not yet met all of its requirements.⁶³ The United States is an EITI candidate country, while European countries are much less active in EITI activities and only a few are showing an interest in the EITI.⁶⁴ It is possible that the EITI may be integrated into the TTIP, but with the current lack of commitment to the EITI by the parties, it may not be an easy point for negotiators to agree upon.

⁵⁴ Leal-Arcas, R. "The EU and Russia as Energy Trading Partners: Friends or Foes?" *European Foreign Affairs Review*, Vol. 14, Issue 3, pp. 337-366, 2009.

⁵⁵ Andreas Walstad, 'Transatlantic trade negotiations reach second stage' (14 November 2013) 3 (221) *Natural Gas Daily E1*.

⁵⁶ On this point, see the pertinent remarks made by Mark Kantor to the OGEMID/Transnational Dispute Management community on 26 March 2014: "Under current U.S. law there is blanket approval for the export of U.S. natural gas to countries with which the US has a free trade agreement. Otherwise, [...] U.S. export licenses for natural gas must be granted on a case-by-case basis. Currently, the U.S. does not have a full-fledged free trade agreement with any EU Member State. One consequence of the TTIP [...] would be to eliminate the existing US requirement of case-by-case natural gas export approvals for the 28 EU Member States." In this sense, the TTIP would be greatly beneficial for EU energy security enhancement by minimizing the EU's dependency on Russian energy.

⁵⁷ Andreas Walstad, 'Transatlantic trade negotiations reach second stage' (14 November 2013) 3 (221) *Natural Gas Daily E1*.

⁵⁸ *ibid.*

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ 'EU - US Transatlantic Trade and Investment Partnership: Raw Materials And Energy: Initial EU Position Paper' (n 44) 2.

⁶² 'What is the EITI?' (Extractive Industries Transparency Initiative) <<http://eiti.org/eiti>> accessed 21 March 2014.

⁶³ 'EITI Countries' (Extractive Industries Transparency Initiative) <<http://eiti.org/countries>> accessed 21 March 2014.

⁶⁴ 'Other Countries' (Extractive Industries Transparency Initiative) <<http://eiti.org/countries/other>> accessed 21 March 2014.

2. Energy Efficiency and Renewable Energy Generation

Energy efficiency and the promotion of renewable energy are central energy policy goals for both the United States and the EU. Because these technologies and product standards are closely related to the trade in green technologies, goods, and services discussed above as a form of economic sustainable development,⁶⁵ the analysis and conclusions drawn in that subsection are relevant to the goal of supporting energy efficiency and renewable energy.

One way in which the TTIP could support these goals would be to build upon the work of the Asia-Pacific Environmental Cooperation (APEC) Forum's list of environmental goods. The purpose of the List is to compile categories of products that ought to receive reduced tariffs because they are environmentally responsible.⁶⁶ One such example is renewable energy technology, such as solar panels and wind turbines; the list also includes pollution control and environmental monitoring technologies.⁶⁷ Including a term in the TTIP that specifically sets a goal to eliminate or reduce tariffs on and behind-the-border barriers covering a particular list of renewable energy and other green technologies inspired by the APEC's list would greatly further the goal of promoting energy efficiency and renewable energy generation.

D. Looking Forward

The parties initially set a loose goal to conclude the TTIP by the end of 2014; the current leadership of the European Commission, the Barroso Commission, is set to end in the same year, and there is a compelling reason for EU leadership to conclude a successful TTIP by that time as part of its legacy.⁶⁸ However, this goal may be unrealistic, and allowances have been made for negotiation talks to continue past that date.⁶⁹ A more likely timeline may be by the U.S. presidential election in 2016. The results of trade talks and a signed free trade agreement may affect Barack Obama's legacy as president, thus setting one feasible deadline for U.S. signature.

In its report 'The Transatlantic Trade and Investment Partnership: Ambitious but Achievable,' the Atlantic Council and the Bertelsmann Foundation put forth three potential scenarios for the end result of TTIP negotiations.⁷⁰ The first speculated outcome is a moderate agreement that would remove a large number of barriers to trade and investment, but that would avoid resolving the most contentious issues, such as genetically modified organisms and hormone-treated agricultural products.⁷¹ The second possible end result may be no agreement, as negotiations could stall due to a distracted focus on problematic issues, instead of upon the low-hanging fruit.⁷² Lastly, with the right political momentum and mindset, the parties could reach a broad-ranging agreement that would cover most or all of the issues and policy goals.⁷³ The report concludes

⁶⁵ See for instance Leal-Arcas, R. and Filis, A. "Certain legal aspects of the multilateral trade system and the promotion of renewable energy," in Lim, C.L. and Mercurio, B. (eds.) *International Economic Law after the Crisis: A Tale of Fragmented Disciplines*, Cambridge University Press, forthcoming.

⁶⁶ 'APEC List of Environmental Goods: Promoting Exports, Creating Jobs, and Advancing Green Growth and Sustainable Development' (Office of the United States Trade Representative) <www.ustr.gov/about-us/press-office/fact-sheets/2012/september/apec-environmental-goods> accessed 21 March 2014.

⁶⁷ *ibid.*

⁶⁸ Barker and Workman (n 1) 3.

⁶⁹ 'EU Trade Ministers Pledge T-TIP Support as Talks Enter Next Stage' (International Centre for Trade and Sustainable Development) <<http://ictsd.org/i/news/bridgesweekly/185023/>> accessed 21 March 2014.

⁷⁰ Barker and Workman (n 1) 2.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ *ibid.*

that which outcome occurs will depend largely on the dedication, focus, and interest of the governments and negotiators, their willingness to compromise, and the degree of political pressure exerted by leadership.⁷⁴

One of the complaints as negotiation talks have progressed is that the process is not sufficiently transparent, and does not satisfactorily include public comment. Various elements have been built into the development of the TTIP to assuage these grievances, including: the publication of negotiating objectives prior to each round; on the U.S. side, the creation of a Public Interest Trade Advisory Committee to provide expert input; and on the EU side, public comment periods.⁷⁵

The leading German newspaper *Die Zeit* leaked an alleged EU July 2013 draft text of the TTIP in February 2014.⁷⁶ Although the draft included sections specifically covering electronic communications and financial services, it made no mention of sustainable development, energy efficiency, or other environmental concerns. The TTIP, however, has the potential to become a highly successful and influential free trade agreement, with its terms possibly becoming a model structure for future trade negotiations. The United States and the EU have a great opportunity to encourage and facilitate sustainable development, green technologies, renewable energy, and an increased trade in raw materials and energy, and this chapter has discussed ways in which the TTIP can do so. It has yet to be seen whether the parties will prioritize these environmental and energy goals, whether such terms could be successful, or whether the TTIP can be successfully concluded at all.

II. The Trans-Pacific Partnership

A. An Introduction

Following the premise that preferential trade agreements (PTAs)⁷⁷ are the building blocks of multilateralism,⁷⁸ creating PTAs with sustainable growth mechanisms is a key contemporary challenge. As things stand, PTAs can either contribute or undermine sustainable development efforts. Factors such as greater negotiating power, greater regulatory co-operation and smaller numbers of parties help in regional negotiations. For example, countries that aim to include sustainable development in all their policy aspects would find greater success pursuing it through PTAs as opposed to multilaterally.⁷⁹ Furthermore, PTAs with environmental standards may help level the playing field. They can nullify competitive advantages gained from weaker environmental legislations, help environmental capacity building, and enable better understanding of environmental problems.

⁷⁴ *ibid* 6–7.

⁷⁵ ‘EU Trade Ministers Pledge T-TIP Support as Talks Enter Next Stage’ (n 64).

⁷⁶ ‘EU will laut Geheimdokument Sonderrechte für Konzerne’ (Zeit Online, 27 February 2014) <www.zeit.de/wirtschaft/2014-02/freihandelsabkommen-eu-sonderrechte-konzerne> accessed 21 March 2014.

⁷⁷ Regarding the international trade terminology to refer to preferential trade agreements as regional trade agreements (RTAs), it is interesting to note that Jagdish Bhagwati prefers to use the term PTA instead of RTA “because the PTAs are not always regional in any meaningful sense. For example, the U.S.-Israel FTA is not regional.” I share his views. Bhagwati, J. *Termites in the Trading System: How Preferential Agreements Undermine Free Trade*, New York: Oxford University Press, 2008, p. xi.

⁷⁸ See for instance Leal-Arcas, R. “Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism?” *Chicago Journal of International Law*, Vol. 11, No. 2, pp. 597-629, 2011.

⁷⁹ New Zealand Ministry of Foreign Affairs & Trade, ‘Framework for Integrating Environment Issues into Free Trade Agreements,’ available at <http://www.mfat.govt.nz/Trade-and-Economic-Relations/NZ-and-the-WTO/Trade-Issues/0-environment-framework.php>.

Arguendo, PTAs ensure greater environmental protection than multilateral environmental agreements (MEAs).⁸⁰ Concessions granted while negotiating a trade deal may address sustainable development concerns.⁸¹ As a result, PTAs can effectively fulfill many objectives of MEAs. Most importantly, PTAs often contain binding dispute resolution clauses which can prove very effective in dealing with environmental disputes.

However, for developing countries, environmental commitments under PTAs may be considered akin to new barriers for exports. They also lead to regulatory fragmentation and conflicts.⁸² Further, there is a fear that PTAs and sustainable development may not be compatible either because they may prejudice countries' positions in multilateral trade negotiations or because sustainable development and environmental concerns are simply not appropriately discussed in trade agreements.⁸³

If indeed PTAs are to become building blocks for ensuring climate change mitigation and meet sustainable development objectives under MEAs,⁸⁴ negotiations would need to carefully balance trade, development and sustainable growth.⁸⁵ Further, the design of strategic PTAs is vital for sustainable development. This would require them to be of a relatively large size, composed of some prominent economies. The TPP fits this bill well.

1. A 21st-century Agreement

The Trans-Pacific Partnership is a free trade agreement which is being currently negotiated amongst 12 Asia-Pacific nations, namely the United States, Japan, Mexico, Canada, Australia, Malaysia, Chile, Singapore, Peru, Vietnam, New Zealand and Brunei Darussalam. The parties to the treaty account for 40% of global GDP.⁸⁶ The TPP has been described as a “comprehensive and high standard” free trade agreement which aims to liberalize trade in mostly all goods and services and includes commitments beyond those established in the World Trade Organization (WTO).⁸⁷ The first formal round of TPP negotiations was held in Melbourne in March 2010 with 200 officials from Australia, the US, New Zealand, Chile, Singapore, Brunei, Peru and Vietnam.⁸⁸ Since then, several rounds of secretive negotiations have taken place, the proposed environment chapter of the TPP was leaked and there has not been much public involvement. The US entered into TPP negotiations in March 2008.⁸⁹

⁸⁰ The Organisation for Economic Co-operation and Development (OECD), ‘Environment and Regional Trade Agreements’, OECD, (2007), p. 42.

⁸¹ Ibid.

⁸² T. Sugiyama and J. Sinton, ‘Orchestra of Treaties: A Future Climate Regime Scenario with Multiple Treaties Among Like-Minded Countries,’ *International Environmental Agreements*, Vol. 5, Issue 1, (2005), pp. 65-88.

⁸³ The Organisation for Economic Co-operation and Development (OECD), ‘Environment and Regional Trade Agreements’, OECD, pp. 42-45 (15 June 2007).

⁸⁴ Leal-Arcas, R. “Climate Change Mitigation from the Bottom Up: Using Preferential Trade Agreements to Promote Climate Change Mitigation,” *Carbon and Climate Law Rev*, Vol. 7(1), pp. 34-42, 2013.

⁸⁵ For proposals in this respect, see Leal-Arcas, R. “Trade Proposals for Climate Action,” *Trade, Law and Development*, Vol. 6, No. 1, 2014, forthcoming.

⁸⁶ WikiLeaks, “Secret Trans-Pacific Partnership Agreement (TPP) – Environment Consolidated Text,” available at <http://wikileaks.org/tpp-enviro>.

⁸⁷ Fergusson, I *et al.*, “The Trans-Pacific Partnership (TPP) Negotiations and Issues for Congress,” *Congressional Research Service*, Summary, December 2013, available at <https://www.fas.org/sgp/crs/row/R42694.pdf>.

⁸⁸ See Organization of American States, Foreign Trade Information System, available at http://www.sice.oas.org/TPD/TPP/Negotiations/Reports/Round_I_update_e.pdf.

⁸⁹ <http://tppinfo.org/>.

The TPP is the successor of the Trans-Pacific Strategic Economic Partnership Agreement, also known as the P4 Agreement, which was being negotiated by Brunei Darussalam, Chile, New Zealand and Singapore.⁹⁰ The P4 Agreement negotiations essentially matured into the TPP to accommodate the US interest of bringing in like-minded countries. The P4 is the first multiparty PTA connecting countries in Asia, Latin America and North America who aim to create a high standard template for an ultimate free trade agreement.⁹¹ It also pursued total liberalization in trade in goods and services.⁹² While the TPP is a separate agreement, it essentially builds upon the P4 Agreement.

The TPP is touted as providing “a new standard of global trade and incorporating next-generation issues,”⁹³ making it a landmark ‘21st-century trade agreement.’⁹⁴ To validate this, the TPP seeks to not exclude sensitive sectors such as agriculture, unlike other trade agreements, and aims for zero tariffs.⁹⁵ It also has a docketing provision to progressively include like-minded members who, however, will not take part in the negotiating process.⁹⁶ It also promotes next generation reforms in areas such as the environment and labor standards.⁹⁷

The TPP represents an example of a mega PTA, dwarfed only by the WTO. It represents 40% of the world’s Gross Domestic Product (GDP) or one third of world trade.⁹⁸ This, along with greater liberalized trade, makes it a major attraction. Robert Stumberg calls the negotiations over the TPP a roadmap towards a trading bloc other than the WTO.⁹⁹

However, the TPP negotiations are being conducted with a level of secrecy not witnessed in any previous trade agreement.¹⁰⁰ No official draft of the TPP exists in the public domain, including all of its 29 other chapters (in addition to the intellectual property chapter), attracting widespread complaints. Even US

⁹⁰ Ching-Wen Hsueh, ‘A Greener Trade Agreement: Approaches to Environmental Issues in the TPP Negotiations’, *Asian Journal of WTO & International Health Law & Policy*, Vol. 8. No. 2, pp. 521-542, at 522 (2013).

⁹¹ Meredith Kolsky Lewis, ‘The Trans-Pacific Partnership: New Paradigm or Wolf in Sheep’s Clothing?’ *Boston College International & Comparative Law Review*, Vol. 34:27, pp. 32-34 (2011).

⁹² *Ibid.* pp. 32-33.

⁹³ United States Trade Representative (USTR), “Outlines of the Trans-Pacific Partnership Agreement,” (November 2011), available at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement>.

⁹⁴ The USTR explains a 21st-century trade agreement as one which ‘addresses new and emerging issues, incorporates new elements reflecting our values and priorities, and responds to the 21st century challenges our citizens face.’ Among these challenges, a sustainable and healthy environment is a principal concern of the present century. See USTR, ‘Trans-Pacific Partnership: Frequently Asked Questions,’ p. 1, available at <http://www.ustr.gov/sites/default/files/TPPFAQ.pdf>.

⁹⁵ Ching-Wen Hsueh, ‘A Greener Trade Agreement: Approaches to Environmental Issues in the TPP Negotiations,’ *Asian Journal of WTO & International Health Law & Policy*, Vol. 8. No. 2, pp. 521-542, at 523 (2013).

⁹⁶ Michele Nash-Hoff, ‘The Trans-Pacific Partnership Would Destroy our National Sovereignty’, Huffingtonpost Business, The Blog, (3 January 2013), available at http://www.huffingtonpost.com/michele-nashhoff/the-transpacific-partners_b_2766729.html.

⁹⁷ See remarks by Miriam Sapiro, ‘U.S. Trade Policy: Levelling the Playing Field,’ Remarks at the National Association of Business Economists (25 February 2014), available at <http://iipdigital.usembassy.gov/st/english/texttrans/2014/02/20140226294123.html#axzz2wrsJHNKa>.

⁹⁸ Office of the United States Trade Representative, “Trans-Pacific Partnership Ministers Chart Path Forward on Key Issues and Confirm Next Steps on Japan’s Entry,” Joint Statement of TPP Ministers, (30 April 2013), available at www.ustr.gov/about-us/press-office/press-releases/2013/april/joint-statement-tpp-ministers.

⁹⁹ See Bill Waren, ‘TPP trade negotiations in San Diego: a dagger through the heart’, (10 July 2012), referring to Robert Stumberg’s views. Available at <http://www.foe.org/news/archives/2012-07-tpp-trade-negotiations-in-san-diego-a-dagger-through>.

¹⁰⁰ WikiLeaks, “Secret Trans-Pacific Partnership Agreement (TPP) - IP Chapter,” available at <https://wikileaks.org/tpp/pressrelease.html>.

Congress has been critical about the opaqueness surrounding it.¹⁰¹ Concerns exist on how a ‘21st-century agreement’ shapes up on issues such as biodiversity, environment, labor standards, and, broadly, sustainable development. Moreover, approximately only 600 ‘cleared advisors’ representing corporations and trade blocs are privy to the negotiating process at the expense of the general public and civil society.¹⁰²

In this context, the whistle blower web site WikiLeaks released four draft chapters of the TPP, including the Environment Chapter. In the next section, we analyze whether the Environment Chapter of the TPP manages to introduce sustainable 21st-century environmental standards.

2. THE NEED FOR THE TRANS-PACIFIC PARTNERSHIP

The goal of the TPP negotiation process is to create a platform for economic integration across the Asia-Pacific region. The aim is to design a high-quality agreement so as to establish a foundation for economic growth for the development and creation of employment in the member countries.¹⁰³ However, the agreement has been criticized deeply by the public for various reasons, especially for lack of transparency. The leaked text of the TPP’s environment chapter deals with what the 12 parties to the TPP propose in negotiations with regard to fisheries, biodiversity, climate change, as well as trade and investment in environmental goods and services.

B. The Environment Chapter

The importance of conserving the environment for well-being on Earth has been universally recognized and various agreements have been concluded to curb environmental harm. These agreements are also created with a view to limit damage caused to future generations. In this context, the TPP also includes an environment chapter, which WikiLeaks released before it was finalized. Article SS.1 of the Environment Chapter reads as follows:

“Article SS.1: Definitions

For purposes of this Chapter:

environmental law means any statute or regulation of a Party, or provision thereof, including any that implement its obligations under a multilateral environmental agreement, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health, through:

- (a) the prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
- (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas^{104, 105},

¹⁰¹ Public Citizen, ‘Congressional Democrats Escalate Criticism of Substance, Process of Obama’s First Trade Pact – the Trans-Pacific Partnership,’ (27 June 2012), available at <http://www.citizen.org/documents/release-congressional-democrats-escalate-criticism-6-27-12.pdf>.

¹⁰² William Mauldin, “U.S Says Not ‘Rushing’ Asia-Pacific Trade Deal,” *The Wall Street Journal*, 26 September 2013, available at <http://online.wsj.com/news/articles/SB10001424052702303796404579099632713091994>.

¹⁰³ Organization of American States, Foreign Trade Information System, available at http://www.sice.oas.org/TPD/TPP/TPP_e.ASP.

¹⁰⁴ “specially protected natural areas” – as defined by the Party in its legislation.

¹⁰⁵ The Parties recognize that such protection or conservation may include the protection or conservation of biological diversity.

but does not include any statute or regulation, or provision thereof, directly related to worker safety or health, nor any statute or regulation, or provision thereof, is the primary purpose of which managing the subsistence or aboriginal harvesting of natural resources.”¹⁰⁶

The definition notably excludes sensible management of existing natural resources and aboriginal management of resources, including traditional knowledge, culture and genetic resources. Furthermore, it also excludes environmental regulations at the local body and state level.¹⁰⁷

“Environmental law” is a vast term and the above definition does not do it justice. The United Nations Environment Programme provides a brief summary of issues which could be covered under environmental law.¹⁰⁸ It states that it is “a system of complex and interlocking statutes, common law, treaties, conventions, regulations and policies which seek to protect the natural environment which may be affected, impacted or endangered by human activities.”¹⁰⁹ It also states that environmental law as a distinct system arose in the 1960s in major industrial economies and that it has been “seen as a critical means of promoting sustainable development.”¹¹⁰ Moreover, environmental policy principles such as the polluter-pays principle, the precautionary principle, and environmental justice have played a major role in environmental law reforms.

While trade is important and inevitable, it cannot come at the cost of sustainable development. Sustainable development touches upon all aspects of human well-being, including the social, economic and environmental aspects. Sustainable development has been defined in various ways; however, the landmark definition is the following, which first appeared in 1987: “Development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.”¹¹¹

1. THE NEED FOR AN ENVIRONMENT CHAPTER

The leaked environment chapter of the TPP consists of 18 articles which deal with various issues such as multilateral environmental agreements, corporate social responsibility, mechanisms to enhance environmental performance, cooperation frameworks, trade and climate change, and trade and biodiversity *inter alia*. Various articles deal with environment, trade and sustainable development. According to the first paragraph of Article SS.2 of the draft TPP, the objectives of the environment chapter are to promote mutually supportive trade and environment policies, implement a high level of environmental protection, enforce environmental laws, and enhance the capacities of the parties to address trade-related environmental issues through cooperation. The second paragraph states that cooperation among the parties to the TPP to protect the environment and manage their natural resources in a sustainable manner strengthens their environmental governance. The third paragraph expressly mentions that it is inappropriate to use environmental legislation to restrict trade or investment between the parties to the TPP. This seems to suggest that environmental protection should not come at the cost of economic growth.

¹⁰⁶ Secret Trans-Pacific Partnership Agreement, Environment Chapter Consolidated Text (November 24, 2013), available at <http://wikileaks.org/tpp-enviro>.

¹⁰⁷ Jane Kelsey, ‘TPPA Environment Chapter & Chair’s Commentary Posted by WikiLeaks: Issues for NZ’ (16 January 2014), available at <https://wikileaks.org/tppa-environment-chapter.html>.

¹⁰⁸ http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Core/Environmental_Law_Definitions_rev2.pdf.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ The World Commission on Environment and Development’s report, *Our Common Future*, Oxford: Oxford University Press, 1987.

Article SS.3 refers to general commitments and emphasizes the importance of the protection of the environment in a way that it mutually supports both trade and the environment in the context of sustainable development. According to Article SS.3.4, all parties to the TPP must enforce their environmental laws in a manner so as to not affect trade or investment between the parties. On a careful reading of this paragraph, it can be seen that the drafters of the agreement have emphasized trade and investment over the environment and the effect that trade can have on the environment.

The Montreal Protocol is mentioned in Article SS.4 of the draft text. The depletion of the ozone layer has been an alarming cause of concern since the first hole in the ozone layer was found in 1985 in Antarctica.¹¹² This discovery startled the world and triggered the enforcement of many international treaties and national laws upholding the need for sustainable development.

2. THE ENFORCEMENT OF THE ENVIRONMENT CHAPTER

The TPP provides certain procedural measures to enforce the protection of the environment.¹¹³ It also talks about the establishment of arbitral tribunals to decide matters of dispute that may arise.¹¹⁴ Furthermore, the TPP dictates that each party shall make use or establish consultative mechanisms, such as national advisory committees, so as to regulate the proper implementation of the TPP's environment chapter.¹¹⁵ Article SS.10 deals with the importance of cooperation so as to strike a balance between sustainable development, on the one hand, and trade and investment, on the other. Yet, this provision, though useful, does not mention the ways and means in which one can strike the balance. The agreement is also not strong enough on the enforcement mechanism. For parties to take this agreement seriously, there should be certain stringent provisions. The TPP draft text does not mention the consequences parties may suffer if they breach any article in the environment chapter.

a. Domestic Regulations

Article SS.9 of the draft TPP states various voluntary mechanisms to enhance environmental performance, which should be designed in a way that maximizes the environmental benefits of the parties and avoids unnecessary technical barriers to trade. However, terms such as 'voluntary' and 'avoidance of unnecessary barriers to trade' dilute the entire process. Firstly, 'voluntary' mechanisms would lead to a regulatory race to the bottom. The voluntary mechanisms include auditing and reporting, information sharing, and sharing expertise.¹¹⁶ These mechanisms help to educate and ensure transparency and help in capacity building, essential for any new-age trade agreement. Furthermore, none of the 12 countries negotiating the agreement classifies as a least-developed country. Therefore, they would be in a position to introduce such measures over a progressive time-bound period. These mechanisms can also be helpful for potential investors. A constant fear among investors is arbitrary penalization in the garb of public policy legislation, including environmental. Audit reports from independent and reliable organizations can be a real asset for future dispute settlements.

Article SS.11 states that each party shall designate senior government representatives as a national contact point responsible for the implementation of the TPP's Environment Chapter. Article SS.12 deals with consultation and dispute resolution in case of any conflict between the parties. These obligations on the parties to formulate committees and enforce either direct or indirect laws may bring slight changes in the

¹¹² Andre, C. and Velasquez, M. "Ozone Debate: Environmentalists and Business Collide—Again," available at <https://www.scu.edu/ethics/publications/ie/v3n1/ozone.html>.

¹¹³ Article SS.5 of the draft TPP.

¹¹⁴ Article SS.12.4 of the draft TPP.

¹¹⁵ Article SS.6 of the draft TPP.

¹¹⁶ Article SS.9(1) of the draft TPP.

domestic regulation of the parties to the agreement. However, if the domestic regulations are framed in such a way so as to pursue trade and investment while keeping the environment and sustainability in mind, this particular chapter will prove to be beneficial to society as a whole, in spite of its placing a burden on the parties to introduce new domestic laws and regulations.

b. Corporations and Sustainability

Sustainability is an important consideration for corporations when dealing with trade and investment. Corporations play an important role in economic and social development. They should use natural resources with utmost care and generate less waste so as to provide for present and future generations. In the TPP's environment chapter, trade and investment have been mentioned several times as has the notion of corporate social responsibility in Article SS.8. According to this Article, parties to the TPP should encourage enterprises operating within its territory or jurisdiction to adopt voluntarily their policies and principles of corporate social responsibility related to the environment, in accordance with internationally recognized standards and guidelines.¹¹⁷ The wording of Article SS.8 is important to achieve sustainable development. Moreover, Articles SS.2 and SS.3 regarding the objectives and general commitments of the TPP emphasize the importance of mutually supportive trade and environment policies so as to promote sustainable development.

However, there is no mention of any particular stringent actions regarding the failure to implement these provisions. Moreover, Article SS.4, paragraphs 1 and 2 on multilateral environmental agreements emphasize the importance of "mutual supportiveness between trade and environment laws and policies" between the parties to the TPP on trade and environment issues, whereas the third paragraph offers any TPP party whose trade or investment is affected as a result of another TPP party not being in compliance with its treaty obligations under a multilateral environmental agreement the possibility to request the establishment of a Committee to consider the matter.

C. How Sustainable is the Trans-Pacific Partnership?

1. Essentially a Trade Agreement

The TPP is fundamentally a trade agreement with a mollifying environmental chapter. Article SS.2(1) states that the objective of the Environment Chapter is to 'promote mutually supportive trade and environment policies; promote high levels of environmental protection and effective enforcement of environmental laws; and enhance the capacities of the Parties to address trade-related environmental issues [...]'.¹¹⁸ The Chapter also recognizes the perils of encouraging trade and investments at the expense of weak environmental provisions.¹¹⁹

However, in practice this enlightenment remains merely aspirational. Article SS.2(3) proscribes using environmental legislations as a disguised restriction on trade and investment. The provision appears to be vague and broad in the absence of determining tests for 'disguised restrictions.' Further, in order to have a healthy co-existence of trade and environmental provisions, a sound enforcement mechanism is essential, which is completely absent across the Agreement. For example, under Article SS.4(3), any non-compliance by Parties who are signatories of any MEA will be scrutinized only where such non-compliance affects their trade and investments. Various other provisions of the Environment Chapter also reiterate trade promotion as

¹¹⁷ Article SS.8 of the draft TPP.

¹¹⁸ WikiLeaks, Environment Chapter of the TPP, Consolidated Text (24 November 2013), available at <https://wikileaks.org/tpp2/static/pdf/tpp-treaty-environment-chapter.pdf>.

¹¹⁹ Article SS.3(6) the draft TPP. Accordingly, no retrospective dilution of environmental laws is encouraged to strengthen trade and investments.

the ultimate objective of the TPP, in spite of recognition of urgent environmental challenges that the parties face.¹²⁰

Consider this in comparison with the United States-Peru Trade Promotion Agreement (PTPA), where parties have an obligation to enforce listed MEAs¹²¹ and ensure no violation of obligations provided under that Treaty.¹²² Since there is an obligation to enforce environmental provisions, environmental rules are not considered an exception to trade rules. The TPP missed a vital opportunity in this regard.

2. Backward Looking Agreement

The TPP was touted as a 21st-century trade agreement. A major requirement under such an agreement is having strong enforceable environmental provisions.¹²³ In fact, this has been a recognized position under previous bi-party agreements between some TPP members, especially those involving the US. Resulting from a bipartisan consensus between US Congress and President G.W. Bush signed in 2007, all US trade agreements were supposed to have an enforceable environmental chapter. Therefore, the Korea-US free trade agreement (KORUS) provided for binding obligations to meet commitments under MEAs, failing which disputes would be settled through arbitration.¹²⁴

Under the TPP, however, parties have no obligations to enforce any environmental commitments under the Environment Chapter. While the dispute resolution process is a multi-layered process,¹²⁵ including having an arbitral tribunal,¹²⁶ the arbitration report is merely recommendatory in value, as is the case in commercial arbitration.¹²⁷ In fact, parties 'shall endeavor' to agree on a 'mutually satisfactory action plan' following the report.¹²⁸ Therefore, even if a recourse is agreed to, a requesting party may have to agree on a compromise with a serious environmental violator. If indeed a 'satisfactory' solution was all that is to be gained from the dispute settlement, spending time and money over arbitration is utterly unnecessary. In any case, where such recourse is refused, there are no other avenues to turn to.

Additionally, while Article SS.4(1) considers the implementation of MEAs critical, it does not insist on a binding dispute resolution system for such non-compliance,¹²⁹ it merely notes that each Party 'affirms its commitment to implement' the MEAs to which it is a party.¹³⁰ Furthermore, a major challenge under the TPP is the absence of a list of MEAs to which parties affirm commitment. This is a conscious abstinence, considering the divergent interests across the board in respect of signed MEAs. For example, it is well known that the US opposes the current commitments under the Kyoto Protocol to reduce greenhouse gas emissions as they stand; the Americans are also not party to the Convention on Biological Diversity, which grants indigenous people the right over their genetic resources and biodiversity, neither have they, along with Australia, New Zealand, and Canada signed the United Nations Declaration on the Rights of Indigenous Peoples. These positions are in tune with the political and economic compromises that such MEAs represent.

¹²⁰ Article SS.15.3.

¹²¹ Article 18.2 of the United States-Peru Trade Promotion Agreement (PTPA).

¹²² Articles 18.3.2 and 18.3.3 of the PTPA.

¹²³ Natural Resource Defence Council, 'Green Groups: Leaked Trans-Pacific Partnership Environment Chapter Unacceptable', Press Release available at <http://www.nrdc.org/media/2014/140115.asp>.

¹²⁴ Korea-US free trade agreement, Article 20.9.3(a)-(b), Article 20.9.6(a)-(c). See also Articles 21(2) and 21(4) of the PTPA.

¹²⁵ Article SS.12(1) (Environment Consultations); Article SS.12(2) (Senior Representative Consultations); Article SS.12(3) (Ministerial Consultation) of the draft TPP.

¹²⁶ Article SS.12(4) of the draft TPP.

¹²⁷ Article SS.12(5) of the draft TPP.

¹²⁸ Article SS.12(12) of the draft TPP.

¹²⁹ Article SS.4(3), footnote 4 of the draft TPP.

¹³⁰ Article SS.4.1 of the draft TPP.

Another challenge of a 21st-century agreement is the leeway given to sovereign determination, while enacting environmental laws.¹³¹ It is essential to understand that the rhetoric of developed-developing countries has not progressed. At the same time, in the absence of any such limitations in the Investment Chapter of the TPP, any environmental legislation conferring a higher standard of protection compared to existing international standards may be deemed to be too restrictive with respect to a 21st-century agreement. This may invite the attention of the dreaded investor-State dispute settlement process under the Investment Chapter. Therefore, some clarification would be required with respect to interpretation of the Environment and Investment Chapters. What is apparent is that any high level of environmental protection contemplated under Article 3(3) of the draft TPP would become redundant on current reading of the Chapter. However, unlike trade liberalization, which can be progressively realized, environmental protection and sustainable growth is already running on borrowed time.

3. Trade and Biodiversity

While the role of conservation and sustainable use of biological diversity in achieving sustainable development is recognized,¹³² the Environment Chapter is only committed to promote and encourage such sustainable use, including fair and equitable sharing of benefits without making binding commitments. A major weakness of the provision is the fact of not requiring the consent of, and including in the benefit-sharing mechanisms, local communities who are engaged in the preservation of biodiversity and genetic resources. Presently, only the Parties' consent is required.¹³³ This seems to be against the United Nations Declaration on Rights of Indigenous People (UNDRIP).¹³⁴ Moreover, any co-operation in the preservation of biodiversity is not absolute, but only in areas of mutual interest of the Parties.¹³⁵ This cherry picking, however, does not seem to be a sustainable model.

These provisions are weak when compared with rules in other Chapters of the TPP, including Intellectual Property, which would enable commercial exploitation of biodiversity.¹³⁶ Reports suggest that four countries (Malaysia, Peru, Vietnam and Brunei) want to extend the gains from using derivatives of the genetic materials to the local communities.¹³⁷ This, however, faces opposition from the US and New Zealand.¹³⁸ Another concern is that, while parties to the TPP have the sovereign right to determine access to their genetic resources¹³⁹ and to share the gains from their utilization,¹⁴⁰ a US counterproposal seeks to remove these provisions.¹⁴¹ Furthermore, the US proposal also attacks the rights of indigenous and local communities to maintain their traditional knowledge and practices by substituting 'commitment,' as it appears in Article

¹³¹ Article SS.3(2) of the draft TPP.

¹³² Article SS.13(1) of the draft TPP.

¹³³ Article SS.13(5) of the draft TPP.

¹³⁴ Article 31 UNDRIP.

¹³⁵ Article 13(7) of the draft TPP.

¹³⁶ Jane Kelsey, 'TPPA Environment Chapter & Chair's Commentary Posted by WikiLeaks: Issues for NZ' (16 January 2014), available at <https://wikileaks.org/tppa-environment-chapter.html>.

¹³⁷ This request is consistent with Article 5 of the Nagoya Protocol.

¹³⁸ Jane Kelsey, 'TPPA Environment Chapter & Chair's Commentary Posted by WikiLeaks: Issues for NZ' (16 January 2014), available at <https://wikileaks.org/tppa-environment-chapter.html>.

¹³⁹ Article SS.13(4) of the draft TPP.

¹⁴⁰ Article SS.13(2) of the draft TPP.

¹⁴¹ Christine Taverner, "A Low Standard of Ambition at TPP Talks: Corporations Oust Environmentalists from the Negotiating Table," *Georgetown International Environmental Law Review Blog*, (6 March 2014), available at <http://gielr.wordpress.com/2014/03/06/a-low-standard-of-ambition-at-tpp-talks-corporations-oust-environmentalists-from-the-negotiating-table/>.

SS.13(3) of the draft TPP, with ‘recognize the importance.’¹⁴² However, on a positive note, the US proposal makes conservation and sustainable biological diversity use mandatory.¹⁴³

4. Trade and Climate Change

Considering the presence of the US (which is the only country that has not ratified the Kyoto Protocol), it is significant that the leaked draft text recognizes climate change as a global concern and the importance of implementing commitments under the UNFCCC/Kyoto Protocol.¹⁴⁴ However, the various mitigation and adaptation measures identified under Article SS.15(3) would only be in the form of “cooperation on the complementary, trade-related, aspects of these efforts in areas of mutual interest,” subject to domestic capabilities.¹⁴⁵ Strikingly, the locution ‘areas of mutual interest’ curtails cooperation significantly, and no clarification or interpretation of its ambit exists. Furthermore, while it is agreed that multiple economic and environmental policy measures exist when dealing with climate change, the draft text limits the discussion to only ‘relevant and appropriate’ occasions, instead of making it a continuous process.¹⁴⁶ Significantly, under Article SS.15(6), the Parties agree to take cooperative and capacity building measures to implement their Asia-Pacific Economic Cooperation commitments, including crucial discussions on reducing fossil fuel subsidies. It is to be noted that the US counterproposal has attempted to even forgo the term ‘climate change’ by substituting it with the locution ‘low-emissions economy.’¹⁴⁷ Moreover, it has removed any reference to the UNFCCC. Furthermore, the term ‘adaptation’ is no longer found in the US draft, meaning that anticipation and acting upon future climate change effects would not be within the purview of the TPP, if the US draft were to be accepted.

5. Marine Fisheries

Provisions in the TPP regulating fishing are littered with half-hearted measures such as the fact that parties ‘shall seek’ the set-up of a fishing management system¹⁴⁸ and affirm commitment towards preventing maritime pollution.¹⁴⁹ This is in spite of the recognition that parties are the major consumers, producers and traders of fisheries¹⁵⁰ and that overfishing is a global problem. Depletion of fishing stocks will also have an immediate impact on their livelihood and on the economies of these countries, and therefore non-binding obligations are futile.

Furthermore, fishing subsidies are prohibited only for ‘overfished’¹⁵¹ stocks and vessels listed for illegal, unreported or unregulated (IUU) fishing,¹⁵² instead of for *all* stocks, where parties shall make ‘best efforts’, a legally vague and unenforceable term. Such prohibition may not be effective, as most subsidies will most likely not be specifically targeted to overfished species.¹⁵³ The US has proposed that the subsidies that target

¹⁴² Article SS.X(4) of the draft text of the TPP Environment Chapter of 14 February 2014, not to be confused with the 23 November 2013 Environment Chapter consolidated text of the TPP. The text of 14 February 2014 is available at <http://www.redge.org.pe/sites/default/files/20140218%20biodiversity%20climate%20change%20TPP.pdf>.

¹⁴³ Article SS.X(2) of the draft text of the TPP Environment Chapter of 14 February 2014.

¹⁴⁴ On the position of the US regarding the Kyoto Protocol, see generally Leal-Arcas, R. *Climate Change and International Trade*, Edward Elgar, Chapter 5, 2013.

¹⁴⁵ Article SS.13(3) of the draft TPP.

¹⁴⁶ Article SS.15(4) of the draft TPP.

¹⁴⁷ See US counterproposal to the TPP Environment Chapter (14 February, 2014), available at <http://www.redge.org.pe/sites/default/files/20140218%20biodiversity%20climate%20change%20TPP.pdf>.

¹⁴⁸ Article SS.16(3) of the draft TPP.

¹⁴⁹ Article SS.16(5) of the draft TPP.

¹⁵⁰ Article SS.16(1) of the draft TPP.

¹⁵¹ Article SS.16(6)(a) of the draft TPP.

¹⁵² Article SS.16(6)(b) of the draft TPP.

¹⁵³ Sierra Club *et al.*, ‘Analysis of Leaked Environment Chapter Consolidated Text’, p. 3, 15 January 2014, available at http://action.sierraclub.org/site/DocServer/TPP_Enviro_Analysis.pdf?docID=14842.

the fishing of fish stocks that are overfished (Article SS.16(6)(a)) be framed in a way so that *all* overfished stocks are targeted.¹⁵⁴ Furthermore, subsidies are also allowed for fishing capacity building of non-overfished stocks. While developmental considerations influence this, a better solution would be to restrict such subsidies only to small-scale industries.¹⁵⁵

It is surprising that in relation to IUU fishing, TPP parties are merely required to “endeavor to improve cooperation.”¹⁵⁶ In the absence of binding dispute resolution mechanisms, no remedy exists where fishes are sourced using IUU methods.

6. Trade and Conservation

Article SS.17 deals with international trade in forest, wildlife and living marine resources. The text in Article SS.17(2) says the each party to the TPP ‘affirms its commitment’ to ensure that international trade in flora and fauna does not harm other species by implementing its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora¹⁵⁷ but, with the exception of the US, no other country agrees to any enforceable dispute resolution system on this issue.¹⁵⁸ Neither is trade done in violation of laws designed to protect flora, fauna and lumber obligatorily curtailed.¹⁵⁹

D. Comparing the TPP with the TTIP on Sustainable Development

The EU makes it clear that it “wants its trade policy to support economic growth, social development, and environmental protection. Coherence and mutual supportiveness [...] are the basis for achieving sustainable development.”¹⁶⁰ On a close look at the Environment Chapter of the TPP, there seem to be no provisions regarding enforcement, while in the case of the TTIP, both economies have shown a clear interest in having provisions aim at the enforcement of laws and regulations in a coherent manner.

On the 26th of June 2006, the Council of the European Union launched its Renewed Sustainable Development Strategy.¹⁶¹ This particular strategy puts forth the regulations with regard to sustainable development that shall govern all the EU’s policies and activities. The strategy further states that the main challenge is to gradually change the “current unsustainable consumption and production patterns and the non-integrated approach to policy-making.”¹⁶² On a close inspection of the TPP, it can be seen that sustainable development has been given little importance in comparison, in spite of its inextricable link to the environment.

The EU report further emphasizes the reduction of environmental pollution and promotes sustainable development so as to break the link between economic growth and environmental degradation.¹⁶³ It further puts forth policy guidelines to make better laws and regulations with regard to sustainable development, including involvement of individuals and businesses in designing laws, ways to make the polluter pay, and

¹⁵⁴ Ibid.

¹⁵⁵ Mulgan, A.G., ‘Why Japan is lagging on the TPP,’ *East Asia Forum*, 30 May 2012, available at <http://www.eastasiaforum.org/2012/05/30/why-japan-is-lagging-on-the-tpp>.

¹⁵⁶ Article SS.16(14) of the draft TPP.

¹⁵⁷ 12 ILM 1085 (1973).

¹⁵⁸ Sierra Club *et al.*, ‘Analysis of Leaked Environment Chapter Consolidated Text’, p. 4, 15 January 2014, available at http://action.sierraclub.org/site/DocServer/TPP_Enviro_Analysis.pdf?docID=14842.

¹⁵⁹ Article SS.17(5) of the draft TPP.

¹⁶⁰ European Commission, “Sustainable development,” available at <http://ec.europa.eu/trade/policy/policy-making/sustainable-development/>.

¹⁶¹ Council of the European Union, ‘Review of the EU Sustainable Development Strategy,’ 10917/06, 26 June 2006.

¹⁶² Ibid, p. 2.

¹⁶³ Ibid, p. 3.

the need to adopt the precautionary principle.¹⁶⁴ It also talks about the Lisbon Strategy,¹⁶⁵ whose aim is to make Europe “the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion.”¹⁶⁶ In contrast, the TPP has not included many provisions in its Environment Chapter, and there is scope for the Chapter’s development, as its enforcement will affect the wider public.

E. Conclusion

The TPP is an agreement between 12 Asia-Pacific countries. Upon a close inspection of the abovementioned articles of the TPP’s environment chapter, the emphasis seems to have been given to trade and investment above environmental considerations. To enforce laws and regulations properly, stringent laws should bind the parties to the TPP, which this agreement currently lacks.

Article SS.3, paragraphs 1, 2, and 3 deal with general commitments and have placed importance on mutually supportive trade and environmental policies as well as the protection of the environment with a view to sustainable development. Further, the Article states that the parties’ domestic laws shall be for the betterment of the environment. However, upon an examination of paragraphs 4 and 6, it becomes apparent that there is a contradiction, as at first it mentions that environmental law must not be drafted in such a way as to hamper trade and investment, while paragraph 6 states the opposite.

The insertion of the “Montreal Protocol” in Article SS.4.4 is important with respect to sustainability. Article SS.6 deals with setting up national advisory committees for the implementation of the environment chapter. For the set-up of the committee, certain changes have to be made in the domestic laws of respective countries. Setting up a committee also requires funds and resources, which would definitely affect developing countries, since they are economically less healthy than developed economies. Even Article SS.11 talks about establishing an “Environment Committee” comprising senior government representatives, or their designees, of the relevant trade and environmental authorities of each party to the TPP responsible for the implementation of the chapter. This again places an additional burden on the parties.

The TPP’s environment chapter has demonstrated a lack of clarity with regard to the environment and sustainability. Even though the TPP’s main purpose is trade liberalization and investment protection, there has been less focus on environment and sustainability in the chapter that was especially drafted to protect the environment.

Moreover, Julian Assange, WikiLeaks’ publisher, observes that ‘the fabled TPP environmental chapter turns out to be a toothless public relations exercise with no enforcement mechanism.’¹⁶⁷ This appears to be a correct analysis. While the TPP’s Environment Chapter has touched upon crucial areas of environmental protection that can pave the way for future talks, it does not inspire. Furthermore, the fate of the TPP has been thrown a spanner. The parties still seem indecisive on crucial matters and no date has been set for future date of the negotiating talks. It therefore seems that preferential trade agreements, while conducive to greater trade liberalization, face the same concerns as multilateral trade agreements when it comes to the environment and sustainable development. It is hoped that the human race as a whole will eventually learn to

¹⁶⁴ Ibid, p. 6.

¹⁶⁵ Idem.

¹⁶⁶ Lisbon European Council, Presidency Conclusions, 23 and 24 March 2000.

¹⁶⁷ See WikiLeaks, “Press release: Secret Trans-Pacific Partnership Agreement (TPP) - Environment Chapter,” available at <https://wikileaks.org/tpp-enviro/pressrelease.html>.

move beyond short-term gains. In the meanwhile, prepare to buy your gas masks or posh properties in foreign lands.¹⁶⁸

¹⁶⁸ Yang Jingjie, 'Smog pushes emigration', *Global Times*, 27 February 2014, available at <http://www.globaltimes.cn/content/845032.shtml#.UzBII6iSwiw>.