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Reassessing the trade-development nexus in international economic law: The paradigm shift in Asia-Pacific regionalism

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REASSESSING THE TRADE-DEVELOPMENT NEXUS: THE PARADIGM SHIFT IN ASIA-PACIFIC REGIONALISM

PASHA L. HSIEH*

Abstract

This article reassesses the trade-development nexus in international economic law and provides the first examination of the approach to realize the United Nations Sustainable Development Goals through regional integration. It argues that the emerging New Regional Economic Order in the multi-polar system will fortify the coalition of the developing countries in structuring the legalization of pro-development trade policy. For decades, the misconceived concept of special and differential treatment has ignored the reality of the North-South Grand Bargain and disconnected the World Trade Organization from its development objectives. The development crisis of the Doha Round requires a feasible “Plan B” for the Global South.

By making interrelated theoretical and substantive claims, the article opens an inquiry into the assertive role of developing countries that prompted the paradigm shift in Asia-Pacific regionalism. The realist and dependency theories are utilized to decipher the geopolitical complexity of the rapidly evolving South-South free trade agreements. As a timely case study, the analysis is based on the creation of the Association of Southeast Asian Nations Economic Community and its implications for economic powers such as the United States and China. It provides an account of the bloc’s services trade-oriented development policy under the balance of power strategy. Finally, the article offers regulatory reform proposals on how to integrate development assistance and remove trade barriers. Transnational legal harmonization and human rights protection in line with international labor principles are also indispensable. Such reforms will strengthen the best practices for global regionalism and reinvigorate the trade-development connection in the multilateral trading system.

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I. Introduction

The convergence of economic liberalization and development policy has formed the cornerstone of multilateral trade negotiations and international economic law for decades. Geopolitical challenges remain when it comes to reconciling the mercantilist concept of enhancing market access with the principle of redistributive justice that demands preferential treatment.¹ More fundamentally, the legalization of the trade-development nexus reflects the global North-

¹ For mercantilist and distributive justice concepts in international trade, see J. Michael Finger, *The Uruguay Round North-South Bargain: Will the WTO Get over It?* in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC* 301, 303-05 (Daniel L. M. Kennedy & James D. Southwick eds. 2002); Chantal Thomas, *The Death of Doha? Forensics of Democratic Governance, Distributive Justice, and Development*, in *GLOBAL JUSTICE AND INTERNATIONAL ECONOMIC LAW: OPPORTUNITIES AND PROSPECTS* 185, 185-205 (Chi Carmody et al. eds. 2014).

South conflicts that underpin divergent national interests between developed and developing countries.²

Unanimously adopted by the United Nations (UN) in 2015, the 2030 Agenda for Sustainable Development seeks to transform such long-standing conflicts to cooperation.³ With the aim to eradicate poverty and reinforce inclusive economic growth, the new Sustainable Development Goals (SDGs) perceive international trade as the essential development apparatus.⁴ The SDGs mandate the revitalization of development by completing the negotiations of the Doha Round of the World Trade Organization (WTO).⁵ Yet, states' irreconcilable stances on liberalizing restrictions on agriculture, non-agricultural market access (NAMA) and services trade led the Doha Round talks to an unresolved standstill.⁶ From Seattle to Nairobi, the WTO Ministerial Conferences have generated more frustrations than achievements.⁷

The fate of the Doha Round hinges on whether it can achieve the aspirational commitment to development in tandem with liberalizing trade under the WTO and free trade agreements (FTAs).⁸

² See Deniz Altınbaş, *South-South Cooperation: A Counter-Hegemonic Movement? in THE RISE OF THE GLOBAL SOUTH: PHILOSOPHICAL, GEOPOLITICAL AND ECONOMIC TRENDS OF THE 21ST CENTURY* 29, 29 fn 1 (Justin Dargin ed. 2013) (explaining the North-South divide in global politics).

³ UN Adopts New Global Goals, Charting Sustainable Development for People and Planet by 2030, Sept. 25, 2015, <http://www.un.org/apps/news/story.asp?NewsID=51968#.VkJue7crLrc>. The Sustainable Development Goals that took effect January 1, 2016 were built upon Millennium Development Goals that governed the development agenda from 2000 to 2015. Draft Outcome Document of the United Nations Summit for the Adoption of the Post-2015 Development Agenda, A/69/L.85, Aug. 12, 2015, at 3-7.

⁴ Sustainable Development Goals (2015), Goals 1 & 8.

⁵ *Id.* Goal 17.

⁶ Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT'L L.J. 573, 577-83 (2010); LDC Group Outlines Priorities ahead of WTO MC10, Oct. 20, 2015, <http://www.ictsd.org/bridges-news/bridges-africa/news/ldc-group-outlines-priorities-ahead-of-wto-mc10>.

⁷ For the implications of the trade-development disconnect in the Doha Round, see Tomer Broude, *The Rule(s) of Trade and the Rhetos of Development: Reflections on the Functional and Aspirational Legitimacy of the WTO*, 45 COLUM. J. TRANSNAT'L L. 221, 246-61 (2006); Meredith Kolsky Lewis, *WTO Winners and Losers: The Trade and Development Disconnect*, 39 GEO. J. INT'L L. 165, 168-77 (2007); *Stalemate Continues at WTO Meet in Nairobi*, HINDU, Dec. 20, 2015, <http://www.thehindu.com/business/Economy/stalemate-continues-at-wto-meet-in-nairobi/article8005357.ece>.

⁸ Doha Ministerial Declaration, WT/MIN(01)/DEC/1, Nov. 2001, paras. 1-6.

To understand the role of trade politics in shaping today's global economic governance, it is pivotal to trace back to the origin of the North-South clash in the UN and the WTO. The WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), and the Bretton Woods institutions emerged as the integral framework that governs postwar economic order.⁹ The most-favored-nation (MFN) treatment and national treatment of the GATT crystalized the guiding principles for legalism of trade rule-making.¹⁰ Developing countries' demands that their development needs be met by making exceptions to the West-dominated mechanism were predominantly ignored in the 1940s.¹¹

The South decided to shift the battle to the UN. The proliferation of newly independent states in the post-colonial era bolstered developing countries' political power to divert the GATT's attention to "special and differential treatment" (SDT) for the South.¹² The culmination of the movement was the 1974 UN declaration calling for a New International Economic Order (NIEO).¹³ The NIEO principles combine the Westphalian concept and affirmative action in international economic law.¹⁴ On one hand, the South asked for recognition of its sovereignty over trade policy; on the other hand, it requested an increase in financial and technological assistance from the North.¹⁵

⁹ Bretton Woods Institutions refer to monetary institutions, including the International Monetary Fund and the World Bank.

¹⁰ General Agreement on Tariffs and Trade (GATT) (1994), arts. I & III.

¹¹ See e.g., Nicholas Lamp, *The "Development" Discourse in International Trade Lawmaking*, Queen's University Faculty of Law Research Paper Series, No. 2015-057 (2015), at 8-10 (indicating the US negotiators' negative perception of "development" in the 1940s).

¹² Alexander Keck & Patrick Low, *Special and Differential Treatment in the WTO: Why, When, and How? in ECONOMIC DEVELOPMENT & MULTILATERAL TRADE COOPERATION* 147, 148-49 (Simon J. Evenett & Bernard M. Hoekman eds. 2006).

¹³ Declaration on the Establishment of a New International Economic Order (NIEO), A/RES/S-6/3201, May 1, 1974.

¹⁴ See *id.* art. 4 (stressing the countries' "full permanent sovereignty"); ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT LEGAL SYSTEM* 101-02 (1987) (explaining developing countries' request to rectify global economic inequalities and their emphasis on equality).

¹⁵ Declaration on the Establishment of a NIEO, *supra* note 13, art. 4.

The NIEO soon failed because of the unified trans-Atlantic alliance vis-à-vis the erosion of the South's political solidarity due to the disparate economic developments and the debt crisis.¹⁶ The rising Washington Consensus that imposed neoliberal liberalization reform as a prerequisite for aid assistance from the Bretton Woods institutions further weakened the NIEO's momentum.¹⁷ Arguably, the legacy of the NIEO resulted in the subsequent codification of SDT provisions during the Tokyo and Uruguay Rounds.¹⁸ To "pay back" the developing countries for their sacrifice under the WTO's single undertaking modality, the current Doha Development Agenda committed to making SDT "precise, effective and operational."¹⁹ Nonetheless, the *realpolitik* of WTO negotiations has rendered this promise unpromising.

Contrary to the South's expectations, the 148 current SDT provisions of the WTO agreements contain predominantly "best endeavor" language and are rarely enforced as binding obligations in WTO disputes.²⁰ The perceived failure to meet the development commitments inevitably undermines the legitimacy of the WTO and the implementation of the SDGs. To some extent, such failure is due to developing countries' erroneous presumption of the trade-development nexus. In essence, the policy space created under SDT arrangements hinders their meaningful participation in multilateral trade negotiations.²¹ Without the "Grand Bargain" negotiations

¹⁶ Nils Gilman, *The New International Economic Order: A Reintroduction*, 6:1 HUMANITY 1, 8 (2015); Trade and Development Report (2014), at 67-68.

¹⁷ SONIA E. ROLLAND, DEVELOPMENT AT THE WORLD TRADE ORGANIZATION 51 (2012); Chantal Thomas & Joel P Trachtman, *Editors' Introduction, in DEVELOPING COUNTRIES IN THE WTO LEGAL SYSTEM* 1, 9 (Chantal Thomas & Joel P Trachtman eds. 2009).

¹⁸ Keck & Low, *supra* note 12, at 149-152; ROLLAND, *supra* note 17, at 72.

¹⁹ Doha Ministerial Declaration, *supra* note 8, para. 44.

²⁰ Special and Differential Treatment Provisions in WTO Agreements and Decisions, TN/CTD/W/33, June 8, 2010, at 3-5; Edwini Kessie, *The Legal Status of Special and Differential Treatment Provision under the WTO Agreements, in WTO LAW AND DEVELOPING COUNTRIES* 12, 14-30 (George A. Bermann & Petro C. Mavroidis eds. 2007).

²¹ Michael Trebilcock, *Between Theories of Trade and Development: The Future of the World Trading System*, University of Toronto Law Working Paper Series No. 2014-10 (2014), at 3; Paul Collier, *Why the WTO is Deadlocked: And What Can Be Done about It?* 29:10 WORLD ECO. 1423, 1434 (2006).

between the North and South, the restricted trade gains simply nullify the economic goal of pro-poor development and the human rights-oriented “right to development.”²²

Facing the global development crisis of the Doha Round and international economic law, this article provides the first examination of how the SDGs can be achieved through regional integration. It argues that the emerging New Regional Economic Order (NREO) in multi-polar governance will strengthen the ability of the coalition of developing countries to reinforce the legalization of trade-development policy.²³ The article thus shifts the conventional trade-development debate centered on the WTO’s SDT to a related but new dimension – the development role of the South in the age of global regionalism. Distinct from the NIEO, the NREO derived from the power shifts to the Asia-Pacific does not aspire to challenge the normative foundation of WTO principles. Rather, it opens an inquiry into how developing countries utilize the assertive balance of power strategy to alter the embedded hub-and-spoke architecture for development purposes.²⁴

Geopolitical changes have propelled the paradigm shift in international economic law. First, the NREO aligns with the global movement from the US-centric “unipolar moment” to multi-polar trade governance.²⁵ America’s hegemonic economic power has declined. Asia’s emerging powers,

²² See Sylvia Ostry, *The Uruguay Round North-South Grand Bargain: Implications for Future Negotiations*, in *THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT E. HUDEC* 285, 285-89 (Daniel L. M. Kennedy & James D. Southwick eds. 2002) (illustrating the “Grand Bargain” negotiations); Declaration on the Right to Development, A/RES/41/128, Dec. 4, 1986, arts. 2-3 (mandating the duty to formulate development policies).

²³ Some authors used the term, “New Regional Economic Order.” Nevertheless, none of them substantiate the claim or explain the nexus between development dimensions and contemporary Asia-Pacific regionalism. *E.g.*, Adriano R. Garcia, *Toward a New Regional Economic Order in Asian and the Pacific*, X:1-b *J. PHIL. DEV.* 45, 45-53 (1983); Greg Fry, “Pooled Regional Governance” in *the Island Pacific: Lessons from History*, in *PACIFIC ISLANDS REGIONAL INTEGRATION AND GOVERNANCE* 89, 92 (Satish Chand ed. 2005); KUNIKO ASHIZAWA, *JAPAN, THE US, AND REGIONAL INSTITUTION-BUILDING IN THE NEW ASIA: WHEN IDENTITY MATTERS* 66 (2013).

²⁴ See Richard Baldwin, *Preferential Trading Arrangements*, in *THE OXFORD HANDBOOK ON THE WORLD TRADE ORGANIZATION* 632, 640 (Amrita Narlikar et al. eds. 2012) (discussing regionalism and hub-and-spoke bilateralism).

²⁵ For the unipolar and multi-polar political analyses, see generally Charles Krauthammer, *The Unipolar Moment*, 70 *FOREIGN AFF.* 23 (1990-91); William W. Burke-White, *Power Shifts in International Law: Structure Realignment and Substantive Pluralism*, 56:1 *HARV. INT’L L.J.* 1 (2015). For recent changes to international investment law in the Asia-

including China and the Association of Southeast Asian Nations (ASEAN), have galvanized the United States' new agenda on its "Pacific Century."²⁶ The inking of the Trans-Pacific Partnership (TPP) in 2015 forms an indispensable part of the Obama administration's "pivot to Asia" strategy.²⁷

Second, compared with the economic slowdown in the United States and European Union (EU), the evolution of South-South trade cooperation in Asia has ascended to a new level and strengthened the multi-polar moment in the international economic order. The ASEAN Economic Community (AEC) and the Regional Comprehensive Economic Partnership (RCEP) are the most ambitious initiatives currently launched by developing countries. As innovative models for South-South FTAs, the AEC and the RCEP incorporate major Asia-Pacific powers and half of the world's population.²⁸ These blocs consolidate currently fragmented FTAs in Asia-Pacific regionalism. Lastly, regional developing countries, including least developed countries (LDCs), have engaged in the Grand Bargain expediting the shift from the import substitution policy to the export-oriented growth model. Regardless of different national strategies, the NREO's pro-development

Pacific, see Julien Chasse, *The Shifting Tectonics of International Investment Law – Structure and Dynamics of Rule and Arbitration on Foreign Investment in the Asia-Pacific Region*, 47:3 GEO. WASH. J. INT'L L. REV. 563 (2015).

²⁶ Hillary Clinton, *America's Pacific Century*, 189 FOREIGN POLICY 56, 60-61 (2011).

²⁷ The 12-member Trans-Pacific Partnership (TPP) was finalized in October 2015. *Id.* at 62; Jane Perlez, *U.S. Allies See Trans-Pacific Partnership as a Check on China*, N.Y. TIMES, Oct. 6, 2015, http://www.nytimes.com/2015/10/07/world/asia/trans-pacific-partnership-china-australia.html?_r=0; David Nakamura, *Obama Turns on Personal Appeal while Trying to Bolster His Pivot to Asia*, WASH. POST, Nov. 20, 2015, https://www.washingtonpost.com/politics/obama-tries-to-land-his-pivot-to-asia/2015/11/20/e2222e62-8e8b-11e5-ae1f-af46b7df8483_story.html.

²⁸ The Regional Comprehensive Economic Partnership (RCEP) expects to consolidate the existing five free trade agreements (FTAs) that Association of Southeast Asian Nations (ASEAN) concluded with China, Korea, Japan, India, Australia and New Zealand. The ASEAN Community, including the ASEAN Economic Community (AEC), was established in 2015 and the RCEP will be concluded in 2016. Shujiro Urata, *Constructing and Multilateralizing the Regional Comprehensive Economic Partnership: An Asian Perspective*, ADBI Working Paper Series, No. 449 (2013), at 3-13; 2015 Kuala Lumpur Declaration on the Establishment of the ASEAN Community (2015) [Kuala Lumpur Declaration (2015)]; Joint Statement on the RCEP Negotiations, Nov. 2, 2015.

liberalization has prompted an emerging realization among the developing countries that they should transform from the North-South conflicts to collaboration in line with the SDGs.

Built upon Jagdish Bhagwati's commentary on First and Second Regionalism in the WTO context, this article answers the question of the trade-development paradigm in Third Regionalism with both theoretical and substantive claims.²⁹ Theoretically, I will apply realist and dependency theories to decipher the NREO and advance the understanding of South-South FTAs, which the existing literature barely examines. While realism addresses the transition from the pessimistic political rivalry to cooperation based on mutual interests, the new dependency theory sheds light on the economic transformation of neo-colonial states.³⁰

Substantively, I will focus on the legal framework of ASEAN's trade liberalization as a timely case study for the NREO. As part of the Global South, Southeast Asia has become a political hot spot due to the South China Sea disputes and Myanmar's democratization.³¹ The proliferation of FTAs is also integral to this geopolitical configuration. From the development perspective, the liberalization of services trade significantly reduces poverty and helps avoid the "middle income trap."³² However, it is politically challenging to liberalize trade in services in the WTO and FTA arenas because of the behind-the-border barriers. This research demonstrates how ASEAN states have incrementally liberalized the service sector for development goals on the basis of the

²⁹ Bhagwati explains the first two waves of regionalism beginning in the 1960s and 1980s, respectively. Jagdish Bhagwati, *Regionalism versus Multilateralism*, 15 *WORD ECO.* 535, 538-42 (1992). I propose that "Third Regionalism" from the 2000s to the present reflects the rapid development of Asia-Pacific regionalism, including the emergence of mega FTAs.

³⁰ See generally Charles L. Glaser, *Realists as Optimists: Cooperation as Self-Help*, 19:3 *INT'L SECURITY* 50, 50-53 (1990); Theotonio Dos Santos, *The Structure of Dependence*, 60:2 *AM. ECO. REV.* 231, 231-33 (1970).

³¹ The South China Sea disputes are not only between ASEAN claimant states and China, but also involve conflicting national interests between the United States and China. E.g., James R. Holmes, *China's Monroe Doctrine*, *Diplomat*, June 22, 2012, <http://thediplomat.com/2012/06/chinas-monroe-doctrine/>. Aung San Suu Kyi's party recently won the presidential election in Myanmar. Jonah Fisher, *Myanmar Election: Suu Kyi's NLD Wins Landslide Victory*, *BBC*, Nov. 13, 2015, <http://www.bbc.com/news/world-asia-34805806>.

³² ASEAN Integration Monitoring Report (2013), at 93; ASEAN Services Integration Report (2015), at 1-2.

“interlocked mechanism” between internal and external region-based FTAs.³³ As part of the South-South approach to implement the SDGs, the ASEAN experience provides developing countries a feasible “Plan B” by which to fortify the trade-development connection amid the Doha Round impasse.

The article proceeds as follows. After this introduction, Part II provides the historical and geopolitical context of North-South conflicts and trade-development debates in international economic law. It reassesses the misconception of SDT that led to the disconnect between the Doha Round negotiations and the SDGs. Based on the corollaries of realist and decency theories, it argues that the NREO, which emerged in the context of Third Regionalism, revitalizes pro-development trade liberalization for developing countries. Part III substantiates the paradigm shift by analyzing new trends among South-South FTAs in Asia-Pacific regionalism and focusing on the creation of the AEC as a key case study. It explains the evolution of ASEAN’s legal structure that galvanizes regional economic integration across diverse countries and examines the rationale for the services trade-oriented policy as a development model.

Part IV details the first efforts to provide a roadmap for realizing the SDGs through the legalization of trade-development policy in regional integration and highlights regulatory reform proposals for the post-2015 agenda. To utilize the assertive balance of power strategy, ASEAN FTAs should operationalize multilateral development assistance and remove domestic barriers to services trade. Essential actions also include the transnational legal harmonization on mutual recognition and immigration regulations and the legalization of human rights that incorporate international labor principles. Finally, the conclusion draws together these theoretical and

³³ In my view, the “interlocked mechanism” refers to how the liberalization effects of ASEAN’s internal and external FTAs (ASEAN+1 FTAs) are mutually reinforcing.

substantive arguments and offers legal and policy advice for reinvigorating the trade-development nexus at the global stage.

II. The Theoretical Framework for the Trade-Development Nexus

The trade-development nexus has been acutely contested since the inception of the Bretton Woods system. This issue remains at the core of multilateral trade negotiations and implicates the fundamental differences in national interests between developed and developing countries. Before proceeding to the analysis of present challenges to global regionalism, it is vital to establish the theoretical framework for the trade-development debates in the context of North-South conflicts in international economic law. This article does so by reassessing the transformative concept of development in multi-polar trade governance.

A. Unrealistic Promises in the Multilateral Trading System

The SDGs established the post-2015 UN targets for development on the basis of the Millennium Development Goals (MDGs). The SDGs' mandate to implement development goals through the Doha Round underscores the status of the WTO in the global development agenda.³⁴ However, the meaning and implementation of development in the WTO have been controversial, as it does not intend to be a development organization. The concept of development in the WTO discourse is often confined to special and differential treatment. Politically oriented SDT measures constitute an excuse for non-compliance with WTO principles and contravene the mercantilist premise of trade liberalization.

1. The Misconceived Concept of Special and Differential Treatment

³⁴ Sustainable Development Goals (2015), Goal 17.

The misconceived notion of SDT has led to unrealistic development promises in multilateral trade negotiations. Structuring a sustainable trade-development nexus requires a holistic understanding of development in the historical and geopolitical context. In contrast with the quantitative concept of trade, the multifaceted definition of development has been a subject of rife debate. Various postwar theorists understood development as industrialization, modernization, or economic growth.³⁵ Since the 1980s, the human rights approach to development has been gathering momentum.³⁶

Following the universal movement for the “right to development” and “sustainable development,” Nobel laureate Amartya Sen’s *Development as Freedom* laid the new groundwork for development.³⁷ Sen’s capability approach explains development as progress for removing “unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency.”³⁸ This perception expanded the prevailing view of development from the parochial definition of economic performance such as gross domestic product (GDP) per capita to multiple factors that influence development.³⁹ Sen’s theoretical framework contributed to the creation of measurable development parameters in the UN Human Development Index and the MDGs.⁴⁰

³⁵ See JAN NEDERVEEN PIETERSE, *DEVELOPMENT THEORY: DECONSTRUCTIONS/RECONSTRUCTIONS* 5-8 (2d ed. 2010) (detailing theories and meanings of development from the 1800s to 2000).

³⁶ Paul J. Nelson, *At the Nexus of Human Rights and Development: New Methods and Strategies of Global NGOs*, 31: 12 *WORLD DEV.* 2013, 2014-15 (2003); ROLLAND, *supra* note 17, at 25-26.

³⁷ See generally Declaration on the Right to Development, *supra* note 22; Report of the World Commission on Environment and Development: Our Common Future (1987); Human Rights Approaches to Sustainable Development, *NGLS Roundup* 90 (2002), at 1-2; AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999).

³⁸ SEN, *supra* note 37, at xii.

³⁹ See Amartya Sen, *Human Rights and Capabilities*, 6:2 *J. HUMAN DEV.* 151, 153-54 (2005) (discussing the capability approach); Faizel Ismail, *Mainstreaming Economic Development in the Trading System*, in *ECONOMIC DEVELOPMENT & MULTILATERAL TRADING COOPERATION* 213, 214 (Simon J. Evenett & Bernard M. Hoekman eds. 2016) (explaining Sen’s definition of development).

⁴⁰ The Real Wealth of Nations: Pathways to Human Development, *Human Development Report* (2010), at 16-28.

To eliminate what Sen called “unfreedoms,” the trade-development linkage concerns the implementation of development through international trade that maximizes economic growth and reduces poverty. From a broader perspective, the urge for development in the multilateral trading system seeks to compromise the North-South conflicts in international economic law. SDT provisions that accord developing countries proportional equality represent the political compromise on such conflicts. In the GATT era, the creation of the United Nations Conference on Trade and Development (UNCTAD) symbolized the collective power of the South in shaping trade norms dominated by developed nations.⁴¹ With the support of the developing countries known as the “Group of 77” (G77), Raúl Prebisch, the UNCTAD’s secretary general, pushed for the NIEO movement that demanded a “just and equitable” economic order.⁴²

In essence, the South demanded absolute sovereignty and requested justified exceptions to principal trade norms, including the MFN principle. The UNCTAD did contribute to the enactment of “Part IV: Trade and Development” of the GATT in 1965.⁴³ As a paramount SDT doctrine, the non-reciprocity principle requires developed countries not to “expect reciprocity for commitments made by them” in trade negotiations with less developed countries.⁴⁴ The other landmark decision to codify SDT rights was the GATT’s adoption of the 1979 Enabling Clause that provided for preferential market access.⁴⁵ This decision permanently authorized members to

⁴¹ See A Brief History of UNCTAD, <http://unctad.org/en/Pages/About%20UNCTAD/A-Brief-History-of-UNCTAD.aspx> (last visited Nov. 18, 2015) (“The first United Nations Conference on Trade and Development (UNCTAD) was held in Geneva in 1964”).

⁴² Keck & Low, *supra* note 12, at 149; Gilman, *supra* note 16, at 3-5; Declaration on the Establishment of a NIEO, *supra* note 13, arts. 4(j) & 5.

⁴³ Keck & Low, *supra* note 12, at 149; ROLLAND, *supra* note 17, at 70.

⁴⁴ General Agreement on Tariffs and Trade (GATT) (1994), art. XXXVI:8.

⁴⁵ Differential and More Favorable Treatment of Reciprocity and Fuller Participation of Developing Countries, GATT Doc. L/4903, Nov. 28, 1979 [Enabling Clause]. General Agreement on Tariffs and Trade (GATT) contracting parties of the adopted the permanent Enabling Clause after the 1971 decision that granted a ten-year waiver allowing generalized system of preferences (GSP) to depart from GATT norms. Generalized System of Preferences, Decision of 25 June 1971, L/3545, June 28, 1971.

grant developing countries preferential treatment under the generalized system of preferences (GSP) schemes.⁴⁶

Notwithstanding the UNCTAD achievements in advancing the agenda of the South, the NIEO movement waned as a result of the G77's diverging economic interests and the Thatcher-Reagan alliance's refusal to accede to the NIEO demands.⁴⁷ The NIEO gave way to the neoliberal Washington Consensus that imposed free market reform on developing countries.⁴⁸ The Uruguay Round, which established the WTO, sharply diverted from previous negotiations by adopting the "take it or leave it" modality, known as the single undertaking approach. Absent bargaining power, developing countries were compelled under multiple WTO agreements to assume daunting obligations in various areas ranging from services to intellectual property. The implementation problem, which resulted in a strong sense of betrayal, could not be overcome by additional SDT provisions that allowed technical assistance and longer transition periods.⁴⁹

2. *The WTO-Sustainable Development Goals Disconnect*

The trade-development convergence is presumed to have entered a new stage during the Doha Round. However, the SDT-focused agenda disconnected the WTO from the SDGs. Economically, the Doha Development Agenda was expected to rectify the unfairness of the Uruguay Round and

⁴⁶ See generally Gene M. Grossman & Alan O. Sykes, *A Preference for Development: The Law and Economics of GSP*, 4:1 WORLD TRADE REV. 41, 41-43 (2005).

⁴⁷ Trade and Development Report (2014), at 67-68; JAMES M. CYPHER, THE PROCESS OF ECONOMIC DEVELOPMENT 238 (4th ed. 2014).

⁴⁸ The neoliberal package of the Washington Consensus includes ten points such as the liberalization of trade and foreign direct investment. John Williamson, *A Short History of the Washington Consensus*, in THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE 14, 16-17 (Narcis Serra & Joseph E. Stiglitz eds. 2008).

⁴⁹ See Don McRae, *Developing Countries and 'The Future of the WTO'*, 8 J. INT'L ECON. L. 603, 603 (2005) ("The Uruguay Round is often portrayed as a betrayal"); J. Michael Finger & Philip Schuler, *Implementation of Uruguay Round Commitments: The Development Challenge*, 24:4 WORLD ECON. 511, 514 (2000) (stating the South has "taken on bound commitments to implement in exchange for unbound commitments of assistance"); Chantal Thomas & Joel P Trachtman, *supra* note 17, at 8-10 (discussing the emergence of new special and differential treatment (SDT) in the Uruguay Round).

facilitate the conclusion of current negotiations. Politically, after the September 11 terrorist attacks, fostering development and eliminating poverty were perceived to be effective responses for fighting extremism.⁵⁰ Moreover, the UN has constantly stressed the WTO's role in realizing the MDGs and SDGs.⁵¹

Given the proliferating SDT measures, the central question is whether Doha development targets can be achieved. The answer is in the negative. First, WTO development goals remain unachievable promises as a result of the mismatch of expectations. The non-reciprocity principle ignores the political reality and ultimately undermines developing countries' participation in multilateral trade negotiations. Without the Grand Bargain, the South only garnered limited market access to developed markets and thus restricted export-led growth.⁵²

Second, GSP preferences are often eroded by economic and political considerations. In theory, the Enabling Clause provides a deviation from the MFN principle.⁵³ *EC-Tariff Preferences*, in which India challenged the European GSP scheme, raised a fundamental issue.⁵⁴ As the Enabling Clause merely stipulates that donor countries "may" grant preferential treatment to developing countries, it imposes "no legal obligation" for providing the GSP.⁵⁵ Furthermore, GSP benefits may unilaterally differ in order to "respond positively" to developing countries' development needs and such needs are subject to the sole discretion of the developed countries.⁵⁶ In practice, the US and EU GSP systems exclude eligible countries that crossed the economic benchmarks

⁵⁰ Raj Bhala, *Resurrecting the Doha Round: Devilish Details, Grand Themes, and China Too*, 45:1 TEX. INT'L L.J. 1, 8-9 (2009); Cho, *supra* note 6, at 574.

⁵¹ Millennium Development Goals (2000), Goal 8; Sustainable Development Goals (2015), Goal 17.

⁵² See generally Ostry, *supra* note 22, at 285-289; HUDEC, *supra* note 14, at 179-85.

⁵³ Enabling Clause (1979), para. 1.

⁵⁴ Panel Report, European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, WT/DS246/R, adopted Apr. 20, 2004, as modified by Appellate Body Report WT/DS246/AB/R, DSR 2004:III [EC – Tariff Preferences], at 1009.

⁵⁵ *Id.* at para. 7.38.

⁵⁶ Appellate Body Report, EC – Tariff Preferences, para. 165; Grossman & Sykes, *supra* note 46, at 51-52.

under the graduation method and restrict their market access owing to domestic protectionist demands.⁵⁷

Third, Uruguay Round-created SDT measures suffer from inherent weaknesses in their design. These measures predominantly neglect the link between countries' technical assistance needs and their capacity to implement WTO obligations.⁵⁸ The transition periods under WTO agreements are also arbitrarily determined.⁵⁹ Most technical assistance projects increase awareness of WTO law by offering educational courses, but fail to advise WTO members how to conduct trade reform, which requires knowledge beyond WTO rules.

Finally, most SDT provisions encourage developed countries to “give every effort” or “particular attention” to the needs of developing countries.⁶⁰ Such hortatory obligations are rarely enforced in WTO disputes. For example, in *China-Raw Materials*, China invoked the development argument in justifying its export constraints on raw materials such as bauxite and zinc.⁶¹ The legal basis on which Beijing relied was Article XXXVI:5, one of the trade and

⁵⁷ For the explanations of the US and European Union (EU) GSP schemes, see Caf Dowlah, *Trade Preferences and Economic Growth: An Assessment of the U.S. GSP Schemes in the Context of Least Developed Countries*, in LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW 334, 337-50 (Yong-Shik Lee et al. eds. 2011); Grossman & Sykes, *supra* note 46, at 44-47.

⁵⁸ The only exception is Section II of the Agreement on Trade Facilitation (2014). See Azevêdo Launches New WTO Trade Facilitation Agreement Facility to Deliver Support to LDCs and Developing Countries, July 22, 2014, https://www.wto.org/english/news_e/news14_e/fac_22jul14_e.htm (“For the first time in WTO history, the requirement to implement the Agreement was directly linked to the capacity of the country to do so.”).

⁵⁹ For instance, longer transition periods were granted to developing countries under the Agreement on the Application of Sanitary and Phytosanitary Measures, the Technical Barriers to Trade (TBT) Agreement, and the Agreement on Trade-Related Investment Measures. World Trade Report 2014 – Trade and Development: Recent Trends and the Role of the WTO (2014) [World Trade Report (2014)], at 194-95.

⁶⁰ *E.g.*, GATT (1994), art. XXXVII:3(a) & the TBT Agreement (1995), art. 12.2. Among the 148 SDT provisions in WTO agreements, the GATT and the TBT Agreement include most SDT provisions. Special and Differential Treatment Provisions in WTO Agreements and Decisions, *supra* note 20, at 5.

⁶¹ Panel Reports, China – Measures Related to the Exportation of Various Raw Materials, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted Feb. 22, 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, DSR 2012:VII, at 3501, para. 7.275-404.

development provisions in Part IV of the GATT.⁶² Nevertheless, the panel rejected the argument, explaining that Article XXXVI:5 does not assist in the interpretation of Article XI and Article XX(g).⁶³

The rare incidences in which SDT has been recognized relate only to non-substantive issues. In *Indonesia-Autos*, the arbitrator noted the “interests of developing country Members” requirement under Article 21.2 of the Dispute Settlement Understanding.⁶⁴ The “reasonable period of time” for Indonesia to implement the WTO decision was therefore extended by six months.⁶⁵ To the dismay of developing countries, it is impractical to transform the promises of the Doha Ministerial Declaration to operationalize SDT provisions into making them mandatory.⁶⁶ The far-reaching redistributive transformation of according all SDT provisions binding authority will damage the legitimacy of the WTO dispute settlement system that underpins the rule-based trading system.

B. Power Shifts in the Age of Global Regionalism

The unrealistic promises of development in the Doha Round are the result of the SDT-centered approach. This flawed approach, underpinned by an erroneous assumption of developing countries, is politically correct but unrealistic in multilateral trade negotiations. The Doha Round deadlock entrenched by agriculture and NAMA issues has crippled the expected realization of the SDGs through the WTO. At this juncture, a “Plan B” for accomplishing development goals is becoming

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Award of the Arbitrator, *Indonesia – Certain Measures Affecting the Automobile Industry – Arbitration under Article 21.3(c) of the DSU*, WT/DS54/15, WT/DS55/14, WT/DS59/13, WT/DS64/12, Dec. 7, 1998, DSR 1998:IX, at 4029, para. 23-24.

⁶⁵ *Id.* para. 25.

⁶⁶ See generally Doha Ministerial Declaration, *supra* note 8, para. 44.

an urgent global matter. Against this background, I argue that the emerging New Regional Economic Order serves as a feasible alternative for strengthening pro-development trade policy. Based on realist and dependency theories, the contemporary South-South cooperation in Asia-Pacific regionalism signifies a paradigm shift in the trade-development nexus. The legal experiments, intertwined with geopolitical complexities, provide valuable lessons for the Global South such as Africa and Latin America.

1. *Geopolitical Dimensions in the Doha Round*

This article thus shifts the traditional trade-development debate to a new dimension related to the role of developing countries in global regionalism. Traditionally, developing countries have favored multilateralism, as regionalism strengthens the power of the developed nations due to their “divide and conquer” strategy in bilateral negotiations. The NREO is changing the paradigm. Sharing the aspiration of the NIEO, the NREO fortifies the collective power of developing countries. However, distinct from the NIEO, the NREO does not challenge the normative principles of trade norms by requesting SDT exceptions. Instead, the NREO pursues development goals through deep integration in FTAs and reconstructs the neo-colonial dependency of the South on the North. Bhagwati coined the term “First Regionalism” in reference to the proliferation of FTAs in the 1960s and explained their collapse as a result of the nations’ having unduly placed political considerations ahead of trade liberalization.⁶⁷ In “Second Regionalism” in the 1980s, Bhagwati observed the relative success of the EU’s single market and the North American Free Trade Agreement (NAFTA) because of their strong economic motivations.⁶⁸

⁶⁷ Bhagwati, *supra* note 29, at 538-39. For the elaboration on the First Regionalism, refer to Sungjoon Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42: 2 HARV. INT’L L.J. 419, 426-57 (2001).

⁶⁸ Bhagwati, *supra* note 29, at 540-42. Other examples in the Asia-Pacific include ASEAN Free Trade Area and the

In my view, the NREO has surfaced in “Third Regionalism,” which has coincided with the Doha Round since the 2000s.⁶⁹ The five-fold growth of trade pacts in the past two decades leading to 406 FTAs in 2015 demonstrates the significance of global regionalism.⁷⁰ Third Regionalism encompasses distinct characteristics. Representing 75% of FTAs worldwide, the FTAs between developing countries (South-South FTAs) have substantially outpaced the agreements between developed countries and developing countries (North-South FTAs).⁷¹

In contrast with the first two waves of regionalism, almost 80% of South-South FTAs expedite liberalization through WTO-plus components in the absence of the North’s political pressure.⁷² Also notably, the mega FTAs that focus on the Asia-Pacific are becoming a game changer in international economic law.⁷³ By solving the balkanization of bilateral FTAs, the mega FTAs have established new global norms and rendered the decline of the WTO in political discourse.

Structural geopolitical transitions led to the NREO in Third Regionalism. Emerging Asian regionalism transformed the world to multi-polar economic governance.⁷⁴ Following FTAs with Singapore and Australia, the “pivot to Asia” policy reinforces America’s rebalance towards the economic power of the Asia-Pacific by concluding the FTA with Korea and the TPP.⁷⁵ The EU,

Asia-Pacific Economic Cooperation (APEC). World Trade Report 2011 – The WTO and Preferential Trade Agreements: From Co-existence to Coherence (2011) [World Trade Report (2011)], at 52-53.

⁶⁹ Again, what I called “Third Regionalism” refers to the development of Asia-Pacific FTAs from the 2000s to the present.

⁷⁰ The number of FTAs increased from approximately 50 in the 1990s to more than 250 in 2010. World Trade Report (2011), *supra* note 68, at 55; Evolution of Regional Trade Agreements in the World, 1948-2015, https://www.wto.org/english/tratop_e/region_e/regfac_e.htm (last visited Nov. 19, 2015).

⁷¹ South-South FTAs represented only 20% of FTAs in the 1970s and North-North FTAs currently represent barely 10%. World Trade Report (2011), *supra* note 68, at 55-56.

⁷² See Richard Baldwin & Masahiro Kawai, *Multilateralizing Asian Regionalism*, ADBI Working Paper Series, No. 431 (2013), at 8-9 (concluding that 77% of surveyed Asian FTAs are WTO-plus, including some or all Singapore issues).

⁷³ In addition to Asia-Pacific focused mega FTAs, including the TPP and the RCEP, the US and the EU are currently negotiating the Transatlantic Trade and Investment Partnership.

⁷⁴ For the development of Asian regionalism, see generally Asian Development Bank, *Emerging Asian Regionalism: A Partnership for Shared Prosperity* (2008).

⁷⁵ See generally William H. Cooper, *Free Trade Agreements: Impact on U.S. Trade and Implications for U.S. Trade*

which forms a trans-Atlantic alliance for global trade, also followed the trend by signing FTAs with Asian partners.⁷⁶ Consequently, Washington and Brussels moved from their antagonistic stance on the NIEO to a more receptive posture of the emerging NREO.⁷⁷

In the new multi-polar structure, developing countries have maneuvered a balance of power policy by augmenting their collective power through a new hub-and-spoke system. South-South cooperation consolidates the bloc by cementing internal and external FTAs, mutually reinforcing their levels of trade liberalization. The notion of “ASEAN centrality” exemplifies the convergence of the inward economic integration and outward agreements with regional powers such as China, Japan and India.⁷⁸ Moreover, divergent from their pessimistic requests focusing on SDT in the WTO, selected developing countries, including LDCs, have engaged in the market access-based Grand Bargain and benefited from South-centered regionalism. The impressive poverty reduction of Cambodia and Vietnam epitomizes the resultant trade-led growth.⁷⁹ The elevation of ASEAN’s aggregated economic power, in turn, reinforces the blocs’ bargaining capacity with the North in global negotiations.

2. *Realist and Dependency Theories*

Policy, Congressional Research Service Report (2014), at 1-8; Morton H. Halperin et al., *South Korea and the U.S. Rebalance Toward Asia*, Apr. 3, 2013, <https://www.wilsoncenter.org/event/south-korea-and-the-us-pivot-to-asia> (last visited Dec. 2, 2015).

⁷⁶ The EU concluded FTAs with South Korea, Singapore and Vietnam. European Commission, *Trade for All: Towards a More Responsible Trade and Investment Policy* (2015), at 30-32.

⁷⁷ See Fact Sheet: U.S.-ASEAN Relations, Nov. 21, 2015, <https://www.whitehouse.gov/the-press-office/2015/11/21/fact-sheet-us-asean-relations> (“The United States supports ASEAN’s central role in many of the region’s key institutions and works closely with ASEAN to strengthen Asia’s regional architecture.”).

⁷⁸ See Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership (2012) (“Negotiations for the RCEP will recognize ASEAN Centrality in the emerging regional economic architecture and the interests of ASEAN’s FTA Partners . . .”). The RCEP will materialize ASEAN+3 and ASEAN+6 initiatives. Urata, *supra* note 28, at 1-8.

⁷⁹ Southeast Asian Economic Outlook 2013 – With Perspectives on China and India: Narrowing Development Gap (2013), at 246-48; Sok Siphana, *Mainstreaming Trade for Poverty Alleviation: A Cambodian Experience*, 5:2 DEV. OUTREACH 7, 8-9 (2003).

To respond to these contemporary challenges to international economic law, I offer theoretical explanations for the trade-development nexus in the NREO. Political theorists have conventionally stressed the development dimensions of North-South trade.⁸⁰ This research enriches the existing literature by examining the latest development of South-South trade.⁸¹ The realist and dependency theories will be utilized to explain the comparison between the NREO that prompts South-South cooperation and the NIEO, which hinges on North-South conflicts.

Represented by Hans Morgenthau and Kenneth Waltz, realism is one of the oldest theories of political science.⁸² Realists define the international system as an anarchy that makes self-help essential for the survival of the countries.⁸³ As rational actors, states pursue their power according to their national interests in the hegemonic world.⁸⁴ Realism also influences mercantilism in international political economy by perceiving global trade as a zero-sum game that compels nations to maximize their economic benefits.⁸⁵

The dependency school shares the realist angle of national interests, but interprets the international system from a South-based perspective.⁸⁶ According to Theotonio Dos Santos and

⁸⁰ Trade-development debates on North-South trade, which focuses on the relations between the EU and African, Caribbean and Pacific (ACP) countries, will be discussed below.

⁸¹ The existing literature on South-South trade is either outdated or fails to analyze the development dimensions from a theoretical perspective. *E.g.*, David Greenaway & Chris Milner, *South-South Trade: Theory, Evidence, and Policy*, 5:1 WORLD BANK OBSERVER 47 (1990); James Scott, *South-South Trade and North-South Politics: Emerging Powers and the Reconfiguration of Global Governance*, BWPI Working Paper, No. 131 (2010).

⁸² Realism is primarily based on HANS MORGENTHAU, *POLITICS AMONG NATIONS* (1954) and KENNETH WALTZ'S *THEORY OF INTERNATIONAL POLITICS* (1979). William C. Wohlforth, *Realism*, in *THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS* 131, 132-37 (Christian Reus-Smit & Duncan Snidal eds. 2008).

⁸³ *Id.*

⁸⁴ *Id.*; Anne-Marie Slaughter & Thomas Hale, *International Relations, Principal Theories*, in *Oxford Public International Law: Max Planck Encyclopedia of Public International Law*, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e722?rskey=X2BUQa&result=1&prd=EPIIL> (last visited Nov. 22, 2015); Robert Keohane, *Theory of World Politics: Structural Realism and Beyond*, in *NEOREALISM AND ITS CRITICS* 198-99 (Robert O. Keohane ed. 1986).

⁸⁵ *INTERNATIONAL POLITICS: POWER AND PURPOSE IN GLOBAL AFFAIRS* 194 (Paul D'Anieri ed. 2011).

⁸⁶ ALAN GILBERT, *MUST GLOBAL POLITICS CONSTRAIN DEMOCRACY? GREAT-POWER REALISM, DEMOCRATIC PEACE, AND DEMOCRATIC INTERNATIONALISM* 32-33 (1999); ALVIN Y. SO, *SOCIAL CHANGE AND DEVELOPMENT: MODERNIZATION, DEPENDENCY, AND WORLD-SYSTEM THEORIES* 91-98 (1990).

Prebisch, the NIEO forerunner, the “underdevelopment” dilemma is due to the unequal neo-colonial trade relationship between dominant and subordinate economies.⁸⁷ Dependency theorists contended that the ongoing external unfairness has subjected the development of developing countries to the interests of developed countries.⁸⁸ International trade only aggravates such dependency and the inequality among nations by escalating the flow of the South’s economic surplus to the North.⁸⁹

As the significant model for North-South trade-development relations, the 1975 Lomé Convention was signed between the EU and former colonies, collectively known as the African, Caribbean and Pacific (ACP) countries.⁹⁰ The Lomé Convention responded to the NIEO demands by incorporating SDT that granted preferential treatment to ACP exports.⁹¹ Fundamental changes galvanized the EU’s policy shift. First, the EU lost the “banana war” in the GATT and the WTO in which non-ACP countries challenged the legality of the EU’s preferential banana quotas for ACP countries.⁹² These cases mandated the revision of the WTO-incompatible policy. Second, the fact that ACP countries could not “even maintain market share in the EU” evidences the futility of development goals of the Lomé Convention.⁹³ Development thinking of major EU countries,

⁸⁷ Dos Santos, *supra* note 30, at 232-34; FERNANDO HENRIQUE CARDOSO & ENZO FALETTO, DEPENDENCY AND DEVELOPMENT IN LATIN AMERICA 16-17 (Marjory Mattingly Urquidi trans.1979); GAVIN FRIDELL, FAIR TRADE COFFEE: THE PROSPECTS AND PITFALLS OF MARKET-DRIVEN SOCIAL JUSTICE 31 (2007).

⁸⁸ SO, *supra* note 86, at 95-102.

⁸⁹ *Id.*

⁹⁰ See generally Ole Elgström, *Lomé and Post-Lomé: Asymmetric Negotiations and the Impact of Terms*, 5 EURO. FOREIGN AFF. REV. 175, 175-77 (2000); Maurizio Carbone & Jan Orbie, *Beyond Economic Partnership Agreements: The European Union and the Trade-Development Nexus*, 20:1 CONTEMP. POL. 1, 1-2 (2014).

⁹¹ Tony Heron, *Trading in Development: Norms and Institutions in the Making/Unmaking of European Union-African, Caribbean and Pacific Trade and Development Cooperation*, in THE TRADE-DEVELOPMENT NEXUS IN THE EUROPEAN: DIFFERENTIATION, COHERENCE AND NORMS 10, 12-13 (Maurizio Carbone & Jan Orbie eds. 2015).

⁹² For the introduction to Banana cases, see Simi T.B. & Atul Kauship, *The Banana War at the GATT/WTO*, TRADE L. BRIEF, No. 1 (2008), at 1-4; *Banana War Ends after 20 Years*, BBC, Nov. 8, 2012, <http://www.bbc.com/news/business-20263308>. See also Alasdair R. Young & John Peterson, *‘We Care about you, but . . .’: The Politics of EU Trade Policy and Development*, 26:3 CAM. REV. INT’L AFF. 497, 501-02 (detailing the impact of the 1994 GATT case on the EU’s ACP policy).

⁹³ European Commission, *Green Paper on Relations between the European Union and the ACP Countries on the Eve of the 21st Century: Challenges and Options for a New Partnership*, Nov. 20, 1996, at Ch. 2.

including Germany and the United Kingdom, also changed from attaching ties with former European colonies to stressing the needs of the LDCs and alleviating global poverty.⁹⁴ For these reasons, the EU revolutionarily replaced the non-reciprocity policy with the reciprocal Cotonou Agreement and its related Economic Partnership Agreements in the 2000s.⁹⁵

From the viewpoints of realist and dependency theories, the failure of the EU scheme illustrates the structural weaknesses of development policy in North-South trade agreements. The asymmetry of the bargaining power between the EU and ACP countries allowed the former to dictate the terms of the agreements based on European national interests.⁹⁶ Preferential trade relations with the EU magnified its normative power rather than addressing the development needs of the South. In essence, the Europe-centric “development-friendly” regime distorted ACP countries’ effective resource allocation and hindered industrialization. The economic flow to Europe was expedited because the value of industrial imports substantially outweighed that of agricultural exports, thus exacerbating ACP countries’ dependency on Europe.

The evolution of the NREO is based on the changing nature of South-South trade. Prebisch argued for South-South trade as a means to end developing countries’ dependency on developed countries, but this position waned following the NIEO’s failure.⁹⁷ The economic rationale for

⁹⁴ For positions of major EU countries, see Elgström, *supra* note 90, at 188-89; Young & Peterson, *supra* note 92, at 501.

⁹⁵ Information on the Utilisation of Special and Differential Treatment Provisions, WT/COMTD/W/77/Rev.1/Add.4, Feb. 7, 2002, at 13. Even the new Economic Partnership Agreements resulted in limited welfare gains in the Caribbean Community where only the Dominican Republic expanded exports to the EU because of relative competitive products. Sheldon McLean et al., *Trade and Development Nexus: Reflections on the Performance of Trade in Goods under the CARIFORUM-European Union Partnership Agreement: A CARIFORUM Perspective*, LC/CAR/L.458, Dec. 16, 2014, at 7 & 23.

⁹⁶ See Katharina Serrano, *The Trade-Development Nexus in EU-Pacific Relations: Realism, Dependence or Interdependence*, 23:1 GLOBAL CHANGE, PEACE & SECURITY 89, 107-09 (2011) (analyzing the EU’s bargaining power and self-interests).

⁹⁷ Adekeye Adebajo, *Two Prophets of Regional Integration: Prebisch and Adedeji*, in INTERNATIONAL DEVELOPMENT: IDEAS, EXPERIENCE, AND PROSPECTS 323, 328 (Bruce Currie-Alder et al. eds. 2014).

South-South trade includes decreasing the dependency on the North by diversifying risks and increasing self-reliance through the import substitution policy.⁹⁸ Given limited domestic markets, it became essential for developing countries to expand the suitable overseas market, where they would not suffer from a weaker comparative advantage.⁹⁹ Commentators have criticized the development potential in South-South trade on the ground that the validity of such arrangements is confined by economies of scale and the prevalent use of non-tariff-barriers (NTBs).¹⁰⁰ The NREO development refutes this pessimistic contention.

The NREO emerged in Third Regionalism with different geopolitical complexities. South-South trade grew from 8% to 25% of international trade, and the proliferation of Asia-Pacific FTAs in the Doha Round reflects this trend.¹⁰¹ The paradigm shift in a high degree of Asia-Pacific regionalism provides an impetus for the trade-development linkage. Realism posits that competition necessitated by “self-help” makes it difficult for countries to cooperate on trade liberalization.¹⁰² Nevertheless, cooperation can be a salient way of self-help when national interests overlap.¹⁰³ Driven by geographic proximity and comparable economic levels, South-South trade likely involves less of the economic conflict inherent in North-South trade. The convergence of trade and development interests has prompted the conclusion of a new generation WTO-plus South-South FTAs. The inclusion of emerging markets in the Asia-Pacific improves economies of scale and consolidates the regional supply chains.

⁹⁸ Bhagwati, *supra* note 29, at 539; Greenaway & Milner, *supra* note 81, at 49-50; South-South Regionalism and Trade Cooperation in the Asia-Pacific Region (2008), at 5-7.

⁹⁹ Greenaway & Milner, *supra* note 81, at 49-50. *Cf.* South-South Regionalism and Trade Cooperation in the Asia-Pacific Region (2008), at viii & 5-8.

¹⁰⁰ ROLLAND, *supra* note 17, at 267-68; Greenaway & Milner, *supra* note 81, at 49-50.

¹⁰¹ *See* World Trade Report (2014), *supra* note 59, at 42 (stating that “South-South trade . . . has grown from 8 per cent of world trade in 1990 to around 25 per cent today, and is projected to reach 30 per cent by 2030”); World Trade Report (2011), *supra* note 68, at 59 (indicating the increase of Asia-based FTAs).

¹⁰² *See* Glaser, *supra* note 30, at 50-51 (discussing the realist view of cooperation in security issues).

¹⁰³ *Id.* at 53; Serrano, *supra* note 96, at 111.

The dependency theory may not fully explain the progression of North-South relations in the NREO. The classical dependency school suggests that as dominant-subordinate relations perpetuate underdevelopment of the South, the only “way out” is to sever trade ties with developed countries.¹⁰⁴ Albeit structural weaknesses in North-South trade, the development impact of capital and technology from developed nations cannot be utterly disregarded. The isolation stance also contradicts the evolution of export-oriented Asian economies and their trans-regional FTAs with the United States and the EU.

Fernando Henrique Cardoso and Thomas Gold propounded the “new dependency theory,” which acknowledges the co-existence of dependency and development.¹⁰⁵ Unlike the classical theory, which is preoccupied with the external unequal condition, the new theory focuses on the impact of evolving internal structures on altering the South’s relations with the North.¹⁰⁶ Dependency is dynamic, as developing countries can effectively transform dependent capitalism to a neo-liberal export-oriented economy.¹⁰⁷ The South’s high value-added exports, such as information technology (IT) products, have helped reverse the traditional North-bound economic flow. The supply chain adjusted in accordance with South-South FTAs also increases the cost competitiveness in developed markets. Hence, the new dependency theory offers a theoretical response to the NREO, as developing countries collectively reconstruct the conventional dominant-subordinate relations by formulating a pro-development trade scheme.

¹⁰⁴ SO, *supra* note 86, at 104-05.

¹⁰⁵ See generally FERNANDO HENRIQUE CARDOSO, *REINVENTING DEMOCRACY IN BRAZIL* (1999); THOMAS BARON GOLD, *STATE AND SOCIETY IN THE TAIWAN MIRACLE* (1986); SO, *supra* note 86, at 164-65.

¹⁰⁶ Serrano, *supra* note 96, at 104; SO, *supra* note 86, at 137-42.

¹⁰⁷ Gold examined Taiwan’s development model and explained how the country transformed its dependent relations with Japan and the United States to become a neoliberal export-oriented economy. See generally GOLD, *supra* note 105, at 21-90; SO, *supra* note 86, at 157-64.

III. The Paradigm Shift: In Search of the New Regional Economic Order

The Doha Round has failed to cement the trade-development nexus in the WTO. The flawed approach to development through SDT overlooks the reality of the Grand Bargain in the multilateral trading system. The NREO that surfaced in Third Regionalism provides a feasible “Plan B” for developing countries. By legalizing pro-development policy in FTAs, South-South cooperation reflects the latest development in Asia-Pacific FTAs and signifies the developing countries’ changing position from rule-takers to rule-makers in international economic law. The case study of ASEAN will substantiate the expectations of realism and the new dependency theory. The creation of the AEC reinforces a paradigm shift in Asia-Pacific regionalism and provides the Global South with critical lessons to implement the SDGs through regional integration.

A. The Creation of the ASEAN Economic Community

As a crucial pillar of the ASEAN Community, the establishment of the AEC in 2015 marked a milestone for South-South FTAs and global regionalism.¹⁰⁸ The AEC fortifies the multi-polar structure in international economic law, since the bloc moves toward forming one of the world’s four largest economies, following the United States, the EU and China.¹⁰⁹ Tellingly, a vast development gap exists between the six original nations (ASEAN-6) and the four newer LDC members – Cambodia, Laos, Myanmar and Vietnam (CLMV countries).¹¹⁰ It is therefore crucial

¹⁰⁸ See Kuala Lumpur Declaration (2015), *supra* note 28 (“D[e]claring] the formal establishment of the ASEAN Community on 31 December 2015.”). The ASEAN Community consists of the AEC, the ASEAN Political-Security Community and the ASEAN Socio-Cultural Community. *Id.*

¹⁰⁹ See Lord Davies, *UK-ASEAN Business Council*, in *INVESTING IN ASEAN* 11, 11 (2013-14) (“The ten ASEAN member states currently have a combined [Gross Domestic Product (GDP)] similar to the UK’s, and by 2030, the ASEAN economy is predicted to be the fourth largest single market after the EU, US and China.”).

¹¹⁰ “ASEAN-6” countries include Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand. GDP per capita of Singapore is 44 times that of Myanmar in 2014. Table 7: Gross Domestic Product Per Capita in ASEAN, at Current Prices (Nominal), in US Dollars (2015), http://www.asean.org/images/2015/september/macroeconomics-indicator/T7_Aug15.pdf (last visited Nov. 2, 2015).

to design a legal framework that implements the SDGs in economic integration balanced with diverse development needs.

The founding of ASEAN in 1967 was primarily driven by political rather than economic considerations to form solidarity against the spread of communism and to peacefully settle territorial disputes.¹¹¹ The post-colonial mindset energized the “ASEAN way” of alliance that emphasizes non-intervention and consensus-based principles.¹¹² ASEAN’s soft-law approach based on horizontal integration features its significant difference from the EU, which has followed a hard-law, top-down approach to achieve the economic union.¹¹³ In 1992, faced with global regionalism and the rise of China and India, ASEAN countries switched their focus to economic integration by forging the ASEAN Free Trade Area (AFTA).¹¹⁴ Nonetheless, the effectiveness of the AFTA was undermined by the low rate of utilization because of insignificant margins of preferences and complex procedures to qualify the rules of origin.¹¹⁵

In 2007, ASEAN bolstered the integration by approving the ASEAN Economic Community Blueprint (AEC Blueprint), which set 2015 as the target for forming “a single market and production base.”¹¹⁶ The adoption of the ASEAN Charter formally transformed the loosely connected bloc into an internal-governmental institution that accelerates the meeting of the AEC

¹¹¹ Rodolfo C. Severino, *SOUTHEAST ASIA IN SEARCH OF AN ASEAN COMMUNITY: INSIGHTS FROM THE FORMER ASEAN SECRETARY-GENERAL 1-7* (2006). For intra-ASEAN territorial disputes, see Walter Woon, *Resolving Territorial Disputes in ASEAN*, 30 CHINESE (TAIWAN) Y.B. INT’L L. & AFF. 1, 3-10 (2012).

¹¹² *Id.* at 1-37. See also Charter of the Association of Southeast Asian Nations (2007), preamble (stressing the respect for “the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity”).

¹¹³ In contrast with hard law, soft law motivates integration by peer pressure rather than enforcement. For four different types of economic integration in preferential trade arrangements, see Cooper, *supra* note 75, at 2.

¹¹⁴ See generally SEVERINO, *supra* note 111, at 16-21; Chia Siow Yue, *The ASEAN Free Trade Area*, 11:2 PAC. REV. 213, 213-17 (1998).

¹¹⁵ Ganeshan Wignaraja, *Regional Trade Agreements and Enterprises in Southeast Asia*, ADBI Working Paper Series, No. 442 (2013), at 4.

¹¹⁶ Roadmap for an ASEAN Community: 2009-2015 (2009), at 22. Note that in 2015, ASEAN also adopted the ASEAN Blueprint 2025. ASEAN Economic Community Blueprint 2025 (2015), at 1.

goals.¹¹⁷ Due to the EU's embedded problems with the euro crisis and border control, the AEC envisions becoming an FTA-plus arrangement rather than following the European model as an economic union.

The legalization of the AEC, which connects ten diverse developing countries, illustrates South-South cooperation in the NREO. The AEC framework is built upon ASEAN agreements that govern trade in goods, services, investments and dispute settlement mechanisms. The ASEAN Trade in Goods Agreement (ATIGA) eliminates NTBs and incorporates previous goods-related agreements concluded since the formation of the AFTA.¹¹⁸ Based on the incremental "package" structure, negotiations under the ASEAN Framework Agreement on Services (AFAS) led to multiple packages of services commitments.¹¹⁹

The mutual recognition arrangements (MRAs) and the ASEAN Agreement on the Movement of Natural Persons (ASEAN MNP Agreement) complement the AFAS by liberalizing the flow of intra-regional skilled labor.¹²⁰ To increase the bloc's competitiveness to attract foreign direct investment (FDI), the ASEAN Comprehensive Investment Agreement (ACIA) integrates prior agreements, thus streamlining the schedule of reservations and according benefits to ASEAN investors.¹²¹ ASEAN has also developed multi-layered dispute settlement mechanisms. Non-economic conflicts can be resolved under ASEAN's first legally binding treaty, the Treaty of

¹¹⁷ See Charter of the Association of Southeast Asian Nations (2007), art. 3 ("ASEAN, as inter-governmental organisation, is hereby conferred legal personality.").

¹¹⁸ Kanya Satyani Sasradipoera, *ASEAN Trade in Goods Agreement (ATIGA)*, in *ASEAN: LIFE AFTER THE CHARTER* 89, 90-92 (S. Tiwari ed. 2010).

¹¹⁹ ASEAN Integration in Services (2013), at 3-13.

¹²⁰ *Id.* at 15-17.

¹²¹ The new agreement integrates the 1987 Agreement for the Promotion and Protection of Investments (1987 Agreement), the 1998 Framework Agreement on the ASEAN Investment Area, and two related protocols. Yap Lai Peng, *The ASEAN Comprehensive Investment Agreement 2009: Its Objectives, Plan and Progress*, in *ASEAN: LIFE AFTER THE CHARTER* 100, 101 (S. Tiwari ed. 2010).

Amity and Cooperation (TAC), and the subsequent ASEAN Charter.¹²² Trade disputes fall within the realm of the ASEAN Protocol for Enhanced Dispute Settlement Mechanism (EDSM).¹²³ The TAC and the EDSM focus on state-to-state disputes, whereas the ACIA confers private investors the right to resort to investor-state arbitration.¹²⁴

B. Regional and Mega FTAs in the Asia-Pacific

Unlike French-German coordination that contributed to European integration, the leadership vacuum due to the China-Japan rivalry allows ASEAN to play an indispensable role in Asia-Pacific regionalism. The realist assertion that mutual interests prompt cooperation is demonstrated not only in the AEC that legalizes internal integration, but also in ASEAN's external FTAs. Since 2002, ASEAN concluded five ASEAN+1 FTAs with China, Korea, Japan, India, Australia and New Zealand.¹²⁵ The internal and external FTAs form an interlocked mechanism, resulting in the FTA-wide *de facto* MFN effect that mutually reinforces trade liberalization.

The ASEAN framework also validates the premise of the new dependency theory to transform the South's neo-colonial trade relations with the North. The AEC and the FTAs with China and India illustrate South-South cooperation in Third Regionalism. The "North" encompasses intra-regional developed economies such as Japan and Australia and extra-regional powers, including

¹²² SEVERINO, *supra* note 111, at 11-12; Locknie Hsu, *The ASEAN Dispute Settlement System*, in THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS 380, 383-386 (Sanchita Basu Das et al. eds. 2013).

¹²³ Hsu, *supra* note 122, at 386-89.

¹²⁴ *Id.* Note that the 2003 case of *Yaung Chi Oo Trading v. Myanmar* was the first and only instance where ASEAN dealt with legal disputes. The investor-state dispute concerned the interpretation of the 1987 Agreement and the Tribunal held that it lacked jurisdiction. *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1.

¹²⁵ ASEAN's first external FTA was concluded with China in 2002. ASEAN Economic Community Factbook (2011), at 81-90.

the United States and the EU.¹²⁶ These developments not only repudiate the contentions against South-South FTAs, but also buttress the analysis of the NREO.

Built on the five ASEAN+1 FTAs, the ASEAN-based RCEP will create a market that links 16 Asia-Pacific countries.¹²⁷ The two mega FTAs, the RCEP and the TPP, will form the pathways to the prospective Free Trade Area of the Asia-Pacific (FTAAP), which Asia-Pacific Economic Cooperation (APEC) leaders endorsed.¹²⁸ The RCEP is expected to increase businesses' FTA utilization by solving the "noodle bowl" syndrome because of the complex rules of origin.¹²⁹ More profoundly, the RCEP will strengthen ASEAN's assertive balance of power strategy that converges the South-South and North-South FTAs under the notion of ASEAN centrality.

In essence, both ASEAN's internal and external FTAs regionalize WTO-type special and preferential treatment. A critical feature is permitting CLMV countries to have longer transition periods to phase out tariffs and NTBs.¹³⁰ Under the AEC, the Initiative for ASEAN Integration (IAI) proposes to narrow the regional development gap and alleviate poverty by providing technical assistance to implement economic integration.¹³¹ Provisions on capacity building of ASEAN+1 FTAs that focus on the least developed CLMV countries also complement the IAI.¹³²

¹²⁶ See Clinton, *supra* note 26, at 61 (emphasizing US engagement in ASEAN); European Commission, *supra* note 76, at 32 (indicating the negotiations for the EU-ASEAN FTA).

¹²⁷ The 16 countries include ten ASEAN states and six FTA partners. For an analysis of the RCEP, see A Powerhouse Merger in RCEP, MBC Research Report, No. 110 (2013), at 2-5; Urata, *supra* note 28, at 6-9.

¹²⁸ 2015 Leaders' Declaration: The 23rd APEC Economic Leaders' Declaration - Building Inclusive Economies, Building a Better World: A Vision for an Asia-Pacific Community (2015), sec. 7(b). Currently, four ASEAN members are in both the TPP and the RCEP and seven ASEAN states are APEC members. The Trans-Pacific Partnership, <https://ustr.gov/tpp/> (last visited Nov. 22, 2015); APEC Outcomes & Outlook (2014-2015), at 51.

¹²⁹ See Richard E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism*, ADB Working Paper Series on Regional Economic Integration, No. 7 (2007), at 4 (referring the problem due to "an unorganized tangle of bilateral trade deals").

¹³⁰ Cambodia, Laos, Myanmar and Vietnam (CLMV countries) usually have five or more years to eliminate tariffs in the AEC and five ASEAN+1 FTAs. Roadmap for an ASEAN Community: 2009-2015 (2009), at 22-23; Urata, *supra* note 28, at 15.

¹³¹ Roadmap for an ASEAN Community: 2009-2015 (2009), at 95-106.

¹³² E.g., Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the People's Republic of China (2002) [ASEAN-China

In dispute settlement provisions, the ASEAN-Australia-New Zealand FTA specifically recognizes SDT.¹³³ If a given dispute involves an ASEAN LDC, other countries shall give “particular sympathetic consideration.”¹³⁴ Moreover, the arbitral tribunal is obliged to “explicitly indicate” how SDT provisions of the FTA have been taken into account.¹³⁵

C. The Services Trade-Oriented Approach to Development

As argued previously, the NREO moved beyond the SDT-centered agenda of the NIEO. What evidences the NREO is not simply the design of SDT provisions in ASEAN-based FTAs, but the Grand Bargain in which developing countries have engaged and the resultant trade-led development effect. As of 2015, Southeast Asia exceeded the target of the MDGs by halving the population living in extreme poverty.¹³⁶ Yet, to “[e]nd poverty in all its forms” under the SDGs requires a revolutionary strategy to assist 30% of ASEAN’s poor still living on less than US\$2 a day.¹³⁷ Against this backdrop, I propose a holistic services trade-oriented approach to development. The regulatory reform proposals that bridge the gap between the law and practice will invigorate the trade-development nexus and offer the best practices for South-South FTAs.

The Grand Bargain among the ten ASEAN countries has virtually achieved the zero-tariff target.¹³⁸ Compared with trade in goods, liberalizing trade in services is far more politically

Framework Agreement], art. 7; Framework Agreement on Comprehensive Economic Cooperation among the Governments of the Member Countries of the Association of Southeast Asian Nations and the Republic of Korea (2005), art. 3.2.

¹³³ Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (2009), art. 18, Ch. 17.

¹³⁴ *Id.* art. 18:1, Ch. 17.

¹³⁵ *Id.* art. 18:2, Ch. 17.

¹³⁶ Millennium Development Goals Report (2015), at 14 (showing an 84% decrease in the proportion of people living in extreme poverty in Southeast Asia between 1990 and 2015).

¹³⁷ Sustainable Development Goals (2015), Goal 1; Report of the ASEAN Regional Assessment of MDG Achievement and Post-2015 Development Priorities (2015), at 19.

¹³⁸ The ASEAN Free Trade Area requires ASEAN-6 countries and CLMV countries to eliminate tariffs on intra-ASEAN goods by 2010 and 2015, respectively. Masahiro Kawai & Kanda Naknoi, *ASEAN Economic Integration through Trade and Foreign Direct Investment: Long-Term Challenges*, ADBI Working Paper Series, No. 545 (2015), at 12; Roadmap for an ASEAN Community: 2009-2015 (2009), at 22-23.

sensitive because the service sector involves the inflow of foreign capital and labor. The behind-the-border barriers to services trade make the negotiations inherently complex. At the global level, the Doha Round standoff has stalled much-needed services trade talks. The ongoing plurilateral negotiations of the Trade in Services Agreement involve very few developing countries, including none of the ASEAN states.¹³⁹ Before demonstrating ASEAN's trade liberalization as an NREO approach to South-South regionalism, it is important to understand the oft-ignored impact of service trades on development and poverty reduction.

First, the reduction of barriers to services trade empirically leads to significant GDP gains and stipulates more economic competitiveness than mere tariff eliminations.¹⁴⁰ Development policies have traditionally centered on manufacturing rather than services.¹⁴¹ Contrary to the conventional understanding that services should only be prioritized at an advanced development stage, services are a prerequisite to inclusive development and economic modernization.¹⁴² Notably, transport, finance and Internet services constitute the backbone of trade in goods. The fact that a 10% increase in trade in services results in a 6% growth in trade in goods is evidence of the strong correlation between the two major modes of trade.¹⁴³

Second, from the global perspective of development, the services trade has outgrown agriculture and mining and helped buttress the welfare of the poor.¹⁴⁴ For example, health services

¹³⁹ There are 23 participants in the negotiations. Trade in Services Agreement List of Participants, <https://ustr.gov/tisa/participant-list> (last visited Nov. 27, 2015).

¹⁴⁰ Jeffery J. Schott et al., *Prospects for Services Trade Negotiations*, ADB Economics Working Paper Series, No. 319 (2012), at 16; Mid-Term Review of the Implementation of AEC Blueprint: Executive Summary (2012), at 30.

¹⁴¹ ASEAN 2030: Toward a Borderless Economic Community [ASEAN 2030] 120 (2014).

¹⁴² Zakariah Rashid et al., *Regional Market for Goods, Services, and Skilled Labor*, in REALIZING THE ASEAN ECONOMIC COMMUNITY: A COMPREHENSIVE ASSESSMENT 20, 44 (Michael G. Plummer & Chia Siow Yue eds. 2009); ASEAN 2030, *supra* note 141, at 120.

¹⁴³ Juan Blyde & Natalia Sinyavskaya, *The Impact of Liberalizing Trade in Services on Trade in Goods: An Empirical Investigation*, 11:3 REV. DEV. ECON. 566, 573 (2007).

¹⁴⁴ ASEAN Integration Monitoring Report 93 (2013); Joy Abrenica et al., *The Future of Trade in Services for Developing Countries*, in TRADE AND POVERTY REDUCTION IN THE ASIA-PACIFIC REGION: CASE STUDIES AND

liberalization maximizes the delivery of health care to the needy, and tourism services allow up to 25% of tourism expenditures to directly reach the poor in LDCs.¹⁴⁵ FDI in developing countries are now primarily associated with the service sector and hence augment the effect of poverty reduction through job creation.¹⁴⁶ Labor mobility in services trade results in a financial inflow of remittances and helps the poor escape poverty.¹⁴⁷ In the case of the Philippines, remittances constitute 10% of the GDP and are mostly spent on rural families' basic needs such as food and medical payment.¹⁴⁸ The amount of remittances that Cambodia receives exceeds 50% of its overseas development aid, further evidencing the compelling impact of services trade on development.¹⁴⁹

Finally, trade in services provides new sources of development that help countries escape from the “middle-income trap” that often occurs in middle-income developing countries, such as Indonesia, Malaysia and Thailand.¹⁵⁰ These countries rely on their low-cost, labor-intensive advantage as their initial development strategy.¹⁵¹ As industrialization and urbanization exhaust the pool of unskilled labor and push wage increases to their upper limit, the cost competitiveness

LESSONS FROM LOW-INCOME COMMUNITIES 341, 347-48 (Andrew L. Stoler et al. eds. 2009).

¹⁴⁵ Aaditya Mattoo & Gianni Zanini, *Services Trade Agreements and Negotiations: An Overview*, in HANDBOOK OF TRADE POLICY FOR DEVELOPMENT 661, 665 (Arvid Lukauskas et al. eds. 2013); Jonathan Mitchell, *An Unconventional but Essential Marriage: Pro-Poor Tourism and the Mainstream Industry*, PRIVATE SECTOR & DEV., No. 7 (2010), at 5.

¹⁴⁶ See Mode 3 – Commercial Presence, S/C/W/314, Apr. 7, 2010, at 9 (“[S]ervices accounted for 65 per cent of developing economies’ inward FDI stock and for 86 per cent of their outward FDI”); ASEAN Community 2015: Managing Integration for Better Jobs and Shared Prosperity (2014) [ASEAN Community 2015], at 33 (discussing the significant job creation effect of services sectors in Malaysia, Indonesia and the Philippines).

¹⁴⁷ IAN GOLDIN & KENNETH REINERT, GLOBALIZATION FOR DEVELOPMENT: MEETING NEW CHALLENGES 197 (2012).

¹⁴⁸ Building Human Capital through Labor Migration in Asia (2015), at 14 & 37.

¹⁴⁹ In 2010, Cambodia received US\$364 million in remittances and its net overseas development aid totaled US\$0.7 billion. Migration and Remittances Factbook 2011 (2d ed. 2011), at 84. See also Rupa Chanda, *Mobility of Less-Skilled Workers under Bilateral Agreements: Lessons for the GATS*, 43:3 J. WORLD TRADE 479, 479 (“[R]emittances . . . outweigh official development assistance”).

¹⁵⁰ Tran Van Tho, *The Middle-Income Trap: Issues for Members of the Association of Southeast Asian Nations*, ADBI Working Paper Series, No. 421 (2013), at 22-29.

¹⁵¹ Pierre-Richard Agénor et al., *Avoiding Middle-Income Traps*, ECO. PREMISE, No. 98 (2012), at 2-3.

is eroded and these countries become “stuck” in economic stagnation.¹⁵² The modernization of the services trade and the associated technology transformation are the essential impetus to take these countries to an elevated level of development.¹⁵³

IV. The Legalization of Trade-Development Policy

Based on ASEAN’s evolution as a timely case study, this article provides the first examination of the realization of the UN Sustainable Development Goals through regional integration. In Third Regionalism, the AEC integration through multi-layered FTAs manifests the paradigm shift toward the NREO. As realism and the new dependency theories explain, the new generation of South-South cooperation expediting trade liberalization structurally revamps Southeast Asia’s neo-colonial relationship with developed countries. Amid the Doha Round impasse, the regional approach to development serves as a feasible “Plan B.” A holistic approach to services trade liberalization illustrates the legalization of trade-development policy that consolidates services commitments and facilitates labor mobility. The roadmap for regulatory reform focuses on integrating development assistance, removing trade barriers, harmonizing domestic laws, and fortifying human rights protection under the FTA network. An assessment of ASEAN’s existing framework and reform proposals in tandem with the SDGs provides valuable lessons for the Global South.

A. Integrating and Multilateralizing Services Commitments

¹⁵² *Id.*

¹⁵³ Kenichi Ohno, *The Middle Income Trap: Implications for Industrialization Strategies in East Asia and Africa*, GRIP Development Forum (2008), at 93-112; Economic Outlook for Southeast Asia, China and India 2014: Beyond the Middle-Income Trap (2014), at 20.

Trade in services is the essential driver of development in ASEAN countries.¹⁵⁴ The service sector, which accounts for 60% of FDI inflows and 50% of total employment, has contributed to the bloc's noteworthy 76% surge in the GDP growth in recent years.¹⁵⁵ Recognizing the growing prominence of the services trade, ASEAN states commenced negotiations under the AFAS in 1995.¹⁵⁶ The goal is to achieve "a free trade area in services" that exceeds the level of the General Agreement on Trade in Services (GATS).¹⁵⁷ In the context of the SDGs, services trade energizes ASEAN's implementation of poverty reduction, economic growth and elimination of the regional inequality.¹⁵⁸ This development approach also creates employment opportunities for women and promotes gender equality.¹⁵⁹

Moreover, to avoid the political backlash that hampers liberalization in South-South FTAs, the AFAS adopted a successive package structure. Schedules of services commitments concluded under multiple rounds of negotiations cumulatively "form an integral part of" the AFAS.¹⁶⁰ Due to the AFAS's non-self-executing nature, each state is required to sign the protocol that embodies specific commitments.¹⁶¹ Each package of commitments will not take effect until the completion of domestic ratification procedures.¹⁶² The AFAS' incremental approach eases domestic protectionism and facilitates domestic reforms. In addition to the ten packages of services commitments (AFAS 1-10), ASEAN concluded separate packages of financial services and air

¹⁵⁴ See generally Asian Development Outlook 2015: Financing Asia's Future Growth (2015), at 209-47.

¹⁵⁵ ASEAN Services Integration Report (2015), at i-ii; A Blueprint for Growth – ASEAN Economic Community 2015: Progress and Key Achievements (2015), at 1.

¹⁵⁶ ASEAN Integration Report 2015 (2015), at 27.

¹⁵⁷ ASEAN Framework Agreement on Services (1995) [AFAS], art. I(c).

¹⁵⁸ Sustainable Development Goals (2015), Goals 1, 8 and 10.

¹⁵⁹ *Id.* Goal 5; Jim Redden, *Introduction*, in TRADE AND POVERTY REDUCTION IN THE ASIA-PACIFIC REGION: CASE STUDIES AND LESSONS FROM LOW-INCOME COMMUNITIES 1, 13 (Andrew L. Stoler et al. eds. 2009).

¹⁶⁰ *Id.* art. VIII.

¹⁶¹ *E.g.*, Protocol to Implement the Ninth Package of Commitments under the ASEAN Framework Agreement on Services (2014), arts. 4-5.

¹⁶² *Id.*

transport services.¹⁶³ The AFAS incorporates these general and sector-specific services commitments and thus constitutes the AEC's foundation of a single market and production base.

Modeled after the GATS, the AFAS covers four modes of the services trade: Mode 1 (cross-border supply), Mode 2 (consumption abroad), Mode 3 (commercial presence), and Mode 4 (movement of natural persons or MNP).¹⁶⁴ WTO members' Modes 3 and 4 commitments are subject to the most restrictions.¹⁶⁵ ASEAN countries' liberalization of these modes under the AFAS demonstrates the developing countries' Grand Bargain in South-based regionalism. Given the importance of increasing the free flow of intra-regional professionals, the ASEAN MNP agreement will supersede Mode 4 commitments under the existing AFAS packages.¹⁶⁶ The MRAs will further promote the movement of skilled labor by facilitating the recognition of qualifications for eight professions.¹⁶⁷ More importantly, ASEAN expects to adopt the single undertaking approach to negotiate the comprehensive ASEAN Trade in Services Agreement (ATISA), which will consolidate various forms of services commitments.¹⁶⁸

The evolution of service negotiation modalities for the AEC provides legal and policy options for the NREO approach to development. AFAS negotiations initially followed a more conservative GATS-like positive list formula.¹⁶⁹ The request-and-offer bargain obliged ASEAN

¹⁶³ As of November 2015, nine packages of AFAS commitments have been concluded. While ASEAN economic ministers negotiated and signed the packages of the general AFAS commitments, the liberalization of financial services and air transport services was carried out by finance and transport ministers, respectively. ASEAN Integration Report 2015 (2015), at xix & 29; ASEAN Integration in Services (2013), at 13-14.

¹⁶⁴ General Agreement on Trade in Services (1994), art. I:2.

¹⁶⁵ Mode 3 – Commercial Presence, *supra* note 146, at 17; Presence of Natural Persons (Mode 4), S/C/W/301, Sept. 15, 2009, at 20-25.

¹⁶⁶ ASEAN Agreement on the Movement of Natural Persons (2012) [ASEAN MNP Agreement], art. 6:2.

¹⁶⁷ ASEAN Integration Report 2015 (2015), at 33-34.

¹⁶⁸ Joint Media Statement, The 46th ASEAN Economic Ministers' (AEM) Meeting, Aug. 25, 2014, at 5. This approach follows the model of the 2009 ASEAN Trade in Goods Agreement (ATIGA). STEFANO INAMA & EDMUND W. SIM, THE FOUNDATION OF THE ASEAN ECONOMIC COMMUNITY: AN INSTITUTIONAL AND LEGAL PROFILE 127 (2015); ASEAN Economic Community Blueprint 2025 (2015), at 6.

¹⁶⁹ This approach resulted in the first two packages of AFAS commitments (AFAS 1-2). ASEAN Integration in Services (2013), at 10.

states to list the sectors and modes of supply that they wished to liberalize in binding schedules. The liberalization efforts were expedited by endorsing the common sub-sector approach, which denoted a sub-sector in which three or four ASEAN states made commitments in the GATS or previous AFAS packages.¹⁷⁰ The concessions in the sub-sector had to be multilateralized to all ASEAN countries. In other words, those countries that made no corresponding commitments could be free riders.

To effectuate the Grand Bargain that would result in pro-development trade liberalization, ASEAN implemented the ASEAN Minus X modality in 2003.¹⁷¹ Two or more states could initiate negotiations and liberalize selected sectors, permitting other states to join subsequently.¹⁷² Different from the common sub-sector approach, the concessions would only be granted on a reciprocal basis so that the free rider problem could be eliminated. Thus, ASEAN integration would not be dragged down to the pace of countries that were unwilling to cooperate and the benefits of liberalization could incentivize these states to make further commitments.¹⁷³

The year 2007 marked the adoption of the AEC Blueprint, a revolutionary change that envisioned a single market and production base by the end of 2015.¹⁷⁴ The Blueprint mandated salient reforms to eliminate “substantially all restrictions on trade in services.”¹⁷⁵ The less sensitive Modes 1 and 2 were expected to be completely liberalized.¹⁷⁶ Significantly, the AEC is

¹⁷⁰ AFAS 3-6 followed the common sub-sector approach. *Id.*

¹⁷¹ Based on the Protocol to Amend the ASEAN Framework Agreement on Services (2003), Article IV bis (ASEAN Minus X modality) was added to the AFAS. This modality can be traced back to the Framework Agreement on Enhancing ASEAN Economic Cooperation (2012). SEVERINO, *supra* note 111, at 352.

¹⁷² Framework Agreement on Enhancing ASEAN Economic Cooperation (2012), art. I:3.

¹⁷³ SEVERINO, *supra* note 111, at 352-53.

¹⁷⁴ The AEC Blueprint has governed the negotiations of AFAS 7 and subsequent packages of commitments. ASEAN Integration in Services (2013), at 19; Deunden Nikomborirak & Supunnavadee Jitdumrong, *An Assessment of Services Sector Liberalization in ASEAN*, in ASEAN ECONOMIC COMMUNITY SCORECARD: PERFORMANCE AND PERCEPTION 47, 53 (Sanchita Basu Das ed. 2013).

¹⁷⁵ For the actions of the AEC Blueprint, refer to Roadmap for an ASEAN Community: 2009-2015 (2009), at 26.

¹⁷⁶ *Id.*

not modeled after the EU due to the limited liberalization scope of Modes 3 and 4, which face strong domestic protectionism. The compromise on Mode 3 permits 70% rather than 100% of ASEAN equity participation.¹⁷⁷ Mode 4 concerns the increase of competition from foreign nationals. The AEC framework is confined to the free flow of skilled labor to the exclusion of low-skilled and unskilled labor.¹⁷⁸ Furthermore, the ASEAN Minus X formula continues to apply, and a 15% overall flexibility enables member states to carve out sensitive services industries from commitments.¹⁷⁹

These designs have formed a balance between the policy space and the regional integration under South-South FTAs. Since 1995, successive AFAS packages of commitments have transformed from marginally to substantially GATS-plus.¹⁸⁰ The level of services liberalization under ASEAN's internal FTAs mutually reinforces the same under the region-based external FTAs. The interlocked mechanism secures the certainty of domestic reform and energizes deeper liberalization based on the threshold of the most recently concluded or updated commitments. Critically, the implicit mechanism consolidates South-South cooperation and revitalizes North-South relations in line with development goals.

The sequential approach also facilitates the extra-regionalization of ASEAN-centered regionalism that buttresses the bloc's balance of power policy. With the exception of the single undertaking approach of the ASEAN-Australia-New Zealand FTA, other ASEAN+1 FTAs allow essential components of FTAs to be separately concluded under a framework agreement.¹⁸¹ The

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 26-29.

¹⁷⁹ *Id.* at 26 & n.2.

¹⁸⁰ David Chin Soon Siong, *ASEAN's Journey towards Free Trade*, in *ECONOMIC DIPLOMACY: ESSAYS AND REFLECTIONS BY SINGAPORE'S NEGOTIATIONS* 209, 216 (C. L. Lim & Margaret Liang eds. 2011); ASEAN Integration Report 2015 (2015), at 29-30.

¹⁸¹ ASEAN Integration Report 2015 (2015), at 95-102.

model was based on the significant South-South trade pact, the ASEAN-China FTA, which was built upon agreements on goods, services, investment and the dispute settlement mechanism.¹⁸² This FTA, which took eight years to complete, is critical to Beijing's "One Belt One Road" initiative and ASEAN's development target to attract FDI inflows.¹⁸³

With respect to services commitments, ASEAN FTAs with China and Korea adopted the AFAS-like package structure.¹⁸⁴ While the first package under the ASEAN-China FTA contained rare "GATS-minus" commitments, the subsequent package remedied the situation by elevating the commitments to GATS-plus.¹⁸⁵ ASEAN's most recent breakthrough was the conclusion of a services agreement with India, which has been ultraconservative about service liberalization.¹⁸⁶ The fact that the liberalization level of the AFAS surpasses that of ASEAN+1 FTAs ensures the AEC's integration and provides an impetus for RCEP and FTAAP liberalization.¹⁸⁷ In turn, the economic growth led by services trade will revitalize developing countries' external trade relations and reinforce the regional development objectives of the SDGs.

B. Accelerating Cross-Border Labor Mobility

Transnational labor mobility in services trade is a paramount development tool. Going beyond the poverty reduction effect of remittances, circular migration brings back skills and experiences

¹⁸² ASEAN Economic Community Factbook (2011), at 81-82

¹⁸³ The ASEAN-China FTA began in 2002 and was finalized in 2010. *Id.*; ASEAN Integration Report 2015 (2015), at 96; *China to Align Belt and Road with ASEAN's Development Strategies*, XINHUA, Aug. 6, 2015, http://english.gov.cn/news/international_exchanges/2015/08/06/content_281475162278714.htm.

¹⁸⁴ Yoshifumi Fukunaga & Hikari Ishido, *Assessing the Progress of Services Liberalization in the ASEAN-China Free Trade Area (ACFTA)*, ERIA Discussion Paper Series (2013), at 14.

¹⁸⁵ *See id.* at 3-17 (explaining the rationale for General Agreement on Trade in Services (GATS)-minus commitments and the comparison between two packages).

¹⁸⁶ Agreement on Trade in Services under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (2014).

¹⁸⁷ For the FTAs' various levels of services liberalization, see Fukunaga & Ishido, *supra* note 184, at 7; Yoshifumi Fukunaga & Ikumo Isono, *Taking ASEAN+1 FTAs towards the RCEP: A Mapping Study*, ERIA Discussion Paper Series (2013), at 16.

that benefit the economic development of the original countries.¹⁸⁸ Nonetheless, allowing the entry of foreign nationals is among the most sensitive issues in international economic law because it is often perceived as opening the backdoor for immigration. Not surprisingly, the WTO and FTA commitments to the temporary movement of natural persons (Mode 4) are far more restrictive than other modes of supply.¹⁸⁹ For instance, in the face of congressional objections, Washington's FTA policy turned conservative about Mode 4 commitments subsequent to the FTAs with Chile and Singapore.¹⁹⁰ Similarly, the TPP provisions on the temporary entry of business persons are expected to be contested in the US Congress and other parliaments at the ratification stage.¹⁹¹

For these reasons, ASEAN's labor mobility exemplifies an NREO approach to cement the trade-development nexus through the liberalization of Mode 4 and benefit the SDG target of "full and productive employment."¹⁹² Distinct from the EU's freedom of movement, the AEC confines the free flow of labor to skilled workers in order to reconcile political resistance with economic integration.¹⁹³ From a regional development perspective, the Mode 4 progress eases the shortage of professionals in more developed ASEAN countries.¹⁹⁴ In addition, the liberalization will

¹⁸⁸ Simon Feeny & Mark McGillivray, *The Role of ASEAN Connectivity in Reducing the Development Gap*, in *NARROWING THE DEVELOPMENT GAP IN ASEAN: DRIVERS AND POLICY OPTIONS* 84, 113 (Mark McGillivray & David Carpenter eds. 2013); Regional Conference on Services Trade Liberalization and Labor Migration Policies in ASEAN: Towards the ASEAN Economic Community (2008), at 8.

¹⁸⁹ GATS, Mode 4 and the Pattern of Commitments: Background Information, Apr. 11-12, 2002, at 3; Presence of Natural Persons (Mode 4), *supra* note 165, at 25.

¹⁹⁰ Sherry Stephenson & Gary Hufbauer, *Labor Mobility*, in *PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK* 275, 281-83 (Jean-Pierre Chauffour & Jean-Christophe Maur eds. 2011).

¹⁹¹ See generally the Trans-Pacific Partnership (2015), Ch. 12.

¹⁹² Sustainable Development Goals (2015), Goal 8.

¹⁹³ The EU concept of freedom of movement, see the consolidated version of the Treaty on the Functioning of the European Union (2012), art. 45.

¹⁹⁴ For example, Brunei and Thailand have faced a shortage of skilled labor in certain sectors. Philip Martin & Manolo Abella, *Reaping the Economic and Social Benefits of Labour Mobility: ASEAN 2015*, ILO Asia-Pacific Working Paper Series (2014), at 33; Labor Migration, Skills & Student Mobility in Asia (2014), at 31.

narrow the bloc's development gap by allowing skilled workers in CLMV countries to increase their income by 14-20%.¹⁹⁵

Recognizing these pro-development benefits, ASEAN enacted treaties that underpin the AEC's Mode 4 framework, which includes the ASEAN MNP Agreement and MRAs. Mode 3 obligations of commercial presence under the ASEAN Comprehensive Investment Agreement also complement the Mode 4 liberalization. To facilitate ASEAN enterprises' regional operation, the ACIA authorizes the entry, temporary stay and work of "investors, executives, managers and members of the board of directors" in member states.¹⁹⁶

Pursuant to the AEC Blueprint, the ASEAN MNP Agreement, which will supersede AFAS Mode 4 commitments, applies to skilled labor rather than all "natural persons."¹⁹⁷ It accelerates the movement of intra-corporate transferees, business visitors, contractual service suppliers and other professionals as defined in states' schedules of commitments.¹⁹⁸ Essentially, the agreement extends only to the service sector.¹⁹⁹ For example, an intra-regional transfer of a Singapore-based sales manager of an agricultural or manufacturing plant in Myanmar falls outside the scope of the agreement, as neither agriculture nor manufacturing belongs to the service sector. Nonetheless, the Singapore manager's entry to other ASEAN countries for business trips is guaranteed under the ACIA, which covers "services incidental to" the non-service sectors.²⁰⁰

¹⁹⁵ ASEAN Community 2015, *supra* note 146, at 72.

¹⁹⁶ ASEAN Comprehensive Investment Agreement (2009) [ACIA], art. 22. The preferential treatment under the ASEAN MNP Agreement applies to these key positions identified in the ACIA. ASEAN MNP Agreement, art. 12:2.

¹⁹⁷ ASEAN MNP Agreement, preamble.

¹⁹⁸ *Id.* art. 2:1. Intra-corporate transferees include executives, managers and specialists employed by companies.

¹⁹⁹ The Agreement stipulates that it covers persons engaged in trade in services, goods and investments, but none of the ASEAN countries made commitments in non-services sectors. *Id.* preamble & art. 1(b); Yoshifumi Fukunaga & Hirari Ishido, *Values and Limitations of the ASEAN Agreement on the Movement of Natural Persons*, ERIA Discussion Paper Series (2015), at 5.

²⁰⁰ ACIA, art. 3:3(f).

Akin to the GATS, the ASEAN MNP Agreement covers services provision on a non-permanent basis, so that intra-regional labor mobility will not become a political immigration issue that impedes the development of South-South FTAs. The agreement facilitates the “temporary” entry or stay of service providers.²⁰¹ Because of the ambiguity as to what length of time “temporary” entails, the commitments of ASEAN states vary largely across different categories of natural persons.²⁰² The agreement explicitly excludes the governments’ “measures affecting natural persons seeking access to the employment market” and “measures regarding citizenship, residence or employment on a permanent basis.”²⁰³ ASEAN states are therefore allowed to maintain visa requirements for public purposes, provided that the benefits under the agreement are not nullified or impaired.²⁰⁴ The potential for skilled worker migration within ASEAN is arguably undermined because the agreement does not authorize the permanent entry of professionals.²⁰⁵

In addition to the Mode 4 commitments under the ASEAN MNP Agreement, ASEAN’s MRAs facilitate the recognition of qualifications and advance intra-regional labor mobility. As MRAs require significant changes in domestic rules allowing for foreign talents, they are outside of the WTO framework and are rarely addressed in FTAs.²⁰⁶ ASEAN’s “à la carte” approach to profession-specific harmonization efforts signifies the implementation of regional law through a horizontal soft-law approach. Unlike what the titles may suggest, MRAs do not accord direct recognition of licenses and certifications.²⁰⁷ Instead, they provide a scheme of cooperation based

²⁰¹ ASEAN MNP Agreement, art. 2:1.

²⁰² The term “temporary” is negatively defined in the Agreement, based the model of the GATS Annex on Movement of Natural Persons Supplying Services. *See also* Stephenson & Hufbauer, *supra* note 190, at 276 (discussing the GATS approach).

²⁰³ ASEAN MNP Agreement, art. 2:2.

²⁰⁴ *Id.* art 2:3.

²⁰⁵ ASEAN 2030, *supra* note 141, at 163.

²⁰⁶ GATS only include loose requirements for mutual recognition arrangements (MRAs) in Article VII.

²⁰⁷ Presence of Natural Persons (Mode 4), *supra* note 165, at 20-21.

on member states' respective agreements that harmonize the divergence of national legislation regulating various professions.²⁰⁸

The effectiveness of MRAs is critical to ASEAN's single market and its attractiveness for global professional firms. Although the AEC Blueprint mandates that MRAs for all professional services be finalized by 2015, ASEAN has so far concluded MRAs for only eight professions.²⁰⁹ The MRA "frameworks" on accountancy services and surveying services focus on identifying major principles and facilitating information exchanges.²¹⁰ Their purpose is to build consensus for fully fledged MRAs that govern highly regulated professions in diverse jurisdictions. For the other six professions, the implementation approaches vary across MRAs. The MRAs on nursing services, medical practitioners and dental practitioners require a relatively simple process. Following certification by his or her country of origin, a medical doctor with sufficient qualification and without ethics violations may register as a foreign medical practitioner in the host country.²¹¹

As "the most visible" MRAs, the agreements on engineering services and architectural services created regional bodies.²¹² Under the regional public-private partnership, the ASEAN-level professional institutions and national regulatory bodies have established a three-step registration process. For example, an engineer who meets the MRA's educational and experience requirements should be first certified by the domestic regulatory body, which submits the application to the

²⁰⁸ AFAS, art. V.

²⁰⁹ Roadmap for an ASEAN Community: 2009-2015 (2009), at 26; ASEAN Integration Report 2015 (2015), at 33.

²¹⁰ ASEAN Mutual Recognition Arrangement Framework on Accountancy Services (2009), art. 1; Chia Siow Yue, *Free Flow of Skilled Labour in ASEAN*, in ASEAN ECONOMIC COMMUNITY SCORECARD: PERFORMANCE AND PERCEPTION 107, 118-19 (Sanchita Basu Das ed. 2013).

²¹¹ ASEAN MRA on Medical Practitioners (2009), art. 3.1.

²¹² ASEAN Integration Report 2015 (2015), at 34. The MRAs on engineering services and architectural services created the ASEAN Chartered Professional Engineer Coordinating Committee and the ASEAN Architecture Council, respectively. ASEAN MRA on Engineering Services (2005), art. 3.1; ASEAN MRA on Architectural Services (2007), art. 3.1.

ASEAN committee.²¹³ After approval as an “ASEAN Chartered Professional Engineer,” the engineer is eligible to apply to be a foreign engineer in another ASEAN state.²¹⁴

The most recent MRA on tourism professionals (MRA-TP) has important implications for development because tourism services are closely linked with GDP and employment in developing countries.²¹⁵ Unique among ASEAN MRAs, the MRA-TP governs “unregulated” professions because no international standards exist for tourism services providers.²¹⁶ The ASEAN experience sheds light on the impact of the legalization of tourism professionals. The MRA-TP will advance the regional tourism industry by developing a common curriculum and competency standards for 32 job titles, such as baker, laundry manager and travel consultant.²¹⁷ It will also create a Web-based database to assist registered tourism professionals in seeking employment in the bloc.²¹⁸

C. Regulatory Reform for the Post-2015 Agenda

The emergence of the NREO in the context of Third Regionalism demonstrates how the rise of South-South FTAs deepens regional cooperation. Having grasped the reality that the benefits of bargained concessions outweigh those of SDT measures, developing countries in the Asia-

²¹³ ASEAN MRA on Engineering Services (2005), art. 3.

²¹⁴ *Id.*; Deunden Nikomborirak & Supunnadee Jitdumrong, *ASEAN Trade in Services*, in THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS 95, 104-05 (Sanchita Basu Das ed. 2013). As of 2015, there are 1,252 engineers and 284 architects on the ASEAN Chartered Professional Engineers Register and ASEAN Architect Register, respectively. ASEAN Integration Report 2015 (2015), at 34.

²¹⁵ The revenues for the tourism sector contribute to 10% of Cambodia’s GDP and 10% of employment in the Philippines. Trade Policy Review, Report by the Secretariat, Cambodia, Revision, WT/TPR/S/253/Rev.1, Nov. 24, 2011, at 79; Trade Policy Review, Report by the Secretariat, the Philippines, Revision, WT/TPR/S/261/Rev.2, May 9, 2012, at 93.

²¹⁶ Note that in some ASEAN countries, tour guides are subject to regulatory requirements and therefore they are not covered under the MRA. Yoshifumi Fukunaga, *Assessing the Progress of ASEAN MRAs on Professional Services*, ERIA Discussion Paper Series (2015), at 26.

²¹⁷ A person who possesses a tourism certificate issued by a national agency in compliance with MRA requirements can be recognized as a “Foreign Tourism Professional” in another ASEAN state. ASEAN MRA on Tourism Professionals, arts. II-III; ASEAN Mutual Recognition Arrangement on Tourism Professionals (MRA) – Handbook (2013) [MRA-TP Handbook], at 18.

²¹⁸ *Id.* at 45-46.

Pacific have switched to a neo-liberal approach to international economic law. South-based regionalism provides these countries with a safe “playing ground” for trade liberalization. Moreover, the Doha Development Agenda stresses aid for trade to help LDCs.²¹⁹ The Bali package offers LDCs additional waivers and preferential market access as a pro-development policy.²²⁰ Ironically, these measures rarely necessitate domestic reform that energizes development. The NREO approach provides a different path. ASEAN-based regionalism has incentivized CLMV countries to pursue market reform that resulted in noteworthy growth. As part of the bloc, these LDCs benefit from the augmented negotiating power in extra-regional FTAs. The AEC integration also prevents the negative consequence of trade diversion.²²¹

Built on the original AEC Blueprint, the creation of the AEC in 2015 prompted the adoption of the AEC Blueprint 2025 with the goal of further transforming the bloc to a unified economy that is “highly integrated and cohesive” and focuses on “sustainable economic development.”²²² In particular, services liberalization indicates ASEAN’s legalization of trade-development policy in line with the SDGs. Nevertheless, it should be cautioned that the AEC should be seen as an impetus for the evolving process. To buttress the NREO argument for the benefits of the Global South, I offer the following regulatory reform proposals in ASEAN’s post-2015 agenda.

1. *Operationalizing Development Assistance*

Operationalizing ASEAN’s development assistance is integral to the services trade-oriented development policy and provides a model for South-centered regionalism. The two-tiered ASEAN problem due to member states’ economic divergences has posed formidable obstacles to the AEC’s

²¹⁹ The WTO at Twenty: Challenges and Achievements (2015), at 32-33.

²²⁰ *Id.*

²²¹ See Cooper, *supra* note 75, at 11 (explaining the economic impact of the FTAs).

²²² ASEAN Economic Community Blueprint 2025 (2015), at 3 & 19.

goal of realizing a single market and production base. As a form of development assistance, the IAI work plans are intertwined with narrowing the development gap and poverty reduction efforts.²²³ For instance, Singapore offers training on IT and tourism through its centers in CLMV countries and promotes the liberalization of these LDCs' trade in services.²²⁴ Yet, the effectiveness of fragmented IAI programs has been questionable.²²⁵

To offer WTO-plus development assistance, it is imperative to consolidate multilateral harmonization and cooperation according to the Paris Declaration on Aid Effectiveness.²²⁶ Decreasing the transaction costs of IAI programs and providing need-based advisory assistance will strengthen the services trade-oriented strategy. An important approach is to incorporate the principle of ASEAN centrality by aligning development aids rendered by intra-regional and extra-regional countries. The integrated measures will in turn achieve the SDGs' objective of revitalizing global partnership by fortifying "North-South, South-South and triangular cooperation."²²⁷

In truth, geopolitical considerations underpin respective countries' official development assistance (ODA) policies, which are linked to the implementation of FTAs and IAI efforts. Chinese foreign assistance enforces Xi Jinping's diplomatic priority over the periphery countries

²²³ ASEAN Integration Report 2015 (2015), at 80-81; Roadmap for an ASEAN Community: 2009-2015 (2009), at 96-106.

²²⁴ David Carpenter et al., *Regional Development Cooperation and Narrowing the Development Gap in AESAN*, in *NARROWING THE DEVELOPMENT GAP IN ASEAN: DRIVERS AND POLICY OPTIONS* 135, 166 (Mark McGillivray & David Carpenter eds. 2013); Overview, http://www.scp.gov.sg/content/scp/about_us/introduction.html (last visited Dec. 2, 2015). Under the Initiative for AESAN Integration (IAI), Singapore is the largest donor among ASEAN-6 countries. *Id.* at 164-65. Also note that IAI work plans focus primarily on soft infrastructure. ASEAN Economic Community Factbook (2011), at 78.

²²⁵ Helen E.S. Nesadurai, *Enhancing the Institutional Framework for AEC Implementation: Designing Institutions that Are Effective and Politically Feasible*, in *THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS* 411, 421 (Sanchita Basu Das et al. eds. 2013); Vo Tri Thanh, *ASEAN Economic Community: Perspective from ASEAN's Transitional Economies*, in *ROADMAP TO AN ECONOMIC COMMUNITY* 105, 116 (Denis Hew ed. 2005).

²²⁶ See GOLDIN & REINERT, *supra* note 147, 124 (indicating the Paris Declaration principles as "ownership, harmonization, alignment, results and mutual accountability").

²²⁷ Sustainable Development Goals (2015), Goal 17.

as an approach to increase Beijing's bargaining power to formulate the "new type of great power relations" with Washington.²²⁸ The Chinese characteristics of South-South cooperation have traditionally emphasized concessional loans for infrastructure building to facilitate the export of Chinese capital and labor.²²⁹ The private equity fund created under the ASEAN-China Investment Agreement and the China-led Asian Infrastructure Investment Bank exemplify the practice.²³⁰

The training of foreign officials in China also demonstrates a new trend of "soft" development assistance to export the Chinese development model.²³¹ Moreover, as the ASEAN-China FTA indicates, the geographic hub of Chinese aid is the Mekong River basin, which covers CLMV countries that are ideologically akin to China.²³² The Chinese economic influence over Cambodia is most noteworthy, as it prompted Phnom Penh to side with Beijing in conflict with ASEAN claimant states in the South China Sea disputes.²³³

Similar to China's focus on Southeast Asia, the Abe Doctrine of Japan drove the country to be the largest external donor to the IAI programs.²³⁴ Whereas the Fukuda Doctrine built the foundation of ASEAN-Japan relations in the 1970s, the Abe administration considers its ODA from the national security viewpoint.²³⁵ The purpose of Tokyo's assertive strategy is to provide a

²²⁸ Timothy Heath, *China's Big Diplomacy Shift*, DIPLOMAT, Dec. 22, 2014, <http://thediplomat.com/2014/12/chinas-big-diplomacy-shift/>; Dingding Chen, *Defining a "New Type of Major Power Relations,"* DIPLOMAT, Dec. 8, 2014, <http://thediplomat.com/2014/11/defining-a-new-type-of-major-power-relations/>.

²²⁹ White Paper on China's Foreign Aid (2014), at 2-8.

²³⁰ China's Foreign Assistance in Review: Implications for the United States, U.S.-China Economic and Security Review Commission Research Background (2011), at 13; Asian Infrastructure Investment Bank Articles of Agreement (2015), arts. 1-2.

²³¹ White Paper on China's Foreign Aid (2014), at 4-5.

²³² ASEAN-China Framework Agreement, *supra* note 132, art 7:1(e).

²³³ Cambodia's pro-Beijing policy has impaired the common position of ASEAN on South China Sea disputes. Kong Sothanarith, *Cambodia Publicly Endorses China Position on South China Sea*, VOICE OF AM., Mar. 25, 2015, <http://www.voanews.com/content/cambodia-publicly-endorses-china-position-on-south-china-sea/2694301.html>.

²³⁴ Carpenter, *supra* note 224, at 160-64; Narushige Michishita, *Shinzo Abe: Abe Doctrine to Remake Japan-Asean Relations*, STRAIT TIMES, Mar. 6, 2013, <http://www.straitstimes.com/asia/shinzo-abe-abe-doctrine-to-remake-japan-asean-relations>.

²³⁵ For the origin and core principles of the Fukuda Doctrine, see SUEO SUDO, JAPAN'S ASEAN POLICY: IN SEARCH OF PROACTIVE MULTILATERALISM 69-75 (2015).

counter balance to China and strengthen the US-Japan alliance, as well as consolidate Japanese enterprises' regional supply chains. The ASEAN-Japan FTA encompasses areas of economic cooperation in terms of business environment, intellectual property, and small and medium enterprises (SMEs).²³⁶ Japan's innovative development initiative includes the technical assistance of drafting Myanmar's Securities Exchange Law, which facilitates the entrance of Japanese enterprises and law firms into emerging markets.²³⁷

The conventional "North" also provides noteworthy development assistance. Obama's "pivot to Asia" policy and anti-terrorism strategy form the basis of the ASEAN-US Strategic Partnership, which strengthens US aid in trade facilitation, investment and SMEs.²³⁸ To expand ties with Asia, the EU also implements programs to enhance ASEAN's FTA negotiation capacity and the operations of the ASEAN Secretariat.²³⁹ The United States and the EU are ASEAN's dialogue partners, but they have yet to conclude region-based FTAs with ASEAN.²⁴⁰ Among ASEAN's external FTAs, the ASEAN-Australia-New Zealand FTA has the most detailed economic cooperation mechanism that directly contributes to ASEAN's integrated services market. Under the auspices of the FTA, the ASEAN Qualifications Referencing Framework, which harmonizes legal differences, advances the bloc's Mode 4 liberalization and MRAs.²⁴¹

²³⁶ Agreement on Comprehensive Economic Partnership among Member States of the Association of Southeast Asian Nations and Japan (2008), art. 53.

²³⁷ Nam Pan, *Japanese ODA to Asian Countries: "An Empirical Study of Myanmar Compared with Cambodia, Laos, and Vietnam"* (2014), at 38.

²³⁸ See generally Joint Statement on the ASEAN-U.S. Strategic Partnership, Nov. 21, 2015, <https://www.whitehouse.gov/the-press-office/2015/11/21/joint-statement-asean-us-strategic-partnership>; Activity Fact Sheet: U.S.-ASEAN Connectivity through Trade and Investment (ACTI) (2015).

²³⁹ EU-ASEAN: Natural Partners (7th ed. 2013), at 7-8; Carpenter, *supra* note 224, at 160-62.

²⁴⁰ ASEAN's dialogue partners include non-FTA partners such as the United States, Russia and the EU. ASEAN Dialogue Coordinatorship, <http://www.asean.org/asean/external-relations/asean-dialogue-coordinator> (last visited Dec. 11, 2015).

²⁴¹ Implementing Arrangement for the ASEAN-Australia-Australia-New Zealand Free Trade Area Economic Co-Operation Work Programme Pursuant to Chapter 12 (Economic Co-Operation) of the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (2009), at 12.

Multilateral development assistance associated with the changing nature of North-South relations benefits ASEAN in the multi-polar economic structure and affirms the NREO assumptions based on realism and the new dependency theory. Nevertheless, countries' "unilateral adoption" of IAI projects galvanized by divergent geopolitical goals runs the risk of undermining ASEAN's integration and the IAI's effectiveness. In practice, leaders of projects from donor countries have conducted only informal meetings for information exchange without substantive coordination to reduce overlapping programs.²⁴²

To implement the Paris Declaration principles, ASEAN should formalize development assistance coordination under the FTA framework. Some may contend that the development chapter of the TPP will fill the gap of coordination. I disagree with this contention. Although more ASEAN countries are considering joining the TPP, Cambodia, Laos and Myanmar are unlikely to join the pact due to its high standards.²⁴³ The danger of being "left out" for these LDC countries is counteractive to the AEC's objective to narrow the development gap.

Importantly, the development needs of developing countries in the TPP, such as Chile, Mexico and Peru, are different from those of ASEAN. The TPP may have a negative "development assistance diversion" effect on the ASEAN states. Under Article 23, the TPP expects to establish a Committee of Development to implement assistance programs.²⁴⁴ While such an FTA design should be acknowledged, the TPP Committee lacks the institutional memory concerning ASEAN IAI projects. Also, the TPP provisions address neither a monitoring mechanism nor resource

²⁴² Evaluation of EC Co-Cooperation with ASEAN (2009), vol. 2, at 96-97.

²⁴³ As of December 2015, Indonesia, the Philippines and Thailand indicated their intentions to join the TPP. Prashanth Parameswaran, *Indonesia Wants to Join TPP: President Jokowi*, DIPLOMAT, Oct. 27, 2015, <http://thediplomat.com/2015/10/indonesia-wants-to-join-tpp-jokowi/>.

²⁴⁴ The Trans-Pacific Partnership (2015), art. 23.7.

mobilization, which relates to the fundamental question of “where money comes from.” The additional ODA budget may further delay the ratification of the TPP in developed countries.

The proposed NREO approach to development assistance is distinguishable from the NIEO, which demanded overall redistributive justice in international economic law without taking the North-South political reality into account. The NREO proposes to translate fragmented, geopolitical interest-motivated development assistance projects into an integrated, law-based mechanism centered on the South. To operationalize development provisions under the mandate of the ASEAN Blueprint 2025, the effective coordination of development assistance should be integrated into the implementation of ASEAN+1 FTAs and the prospective RCEP.²⁴⁵ It is for the ASEAN Secretariat to formalize the consultative mechanism between ASEAN states and foreign donor countries.

To accurately address the needs of CLMV countries, the Secretariat is advised to enforce monitoring and evaluation of development assistance projects.²⁴⁶ Based on lessons learned from the WTO Enhanced Integrated Framework for Aid for Trade, a trust fund coming from the existing budget of ASEAN partners can be created.²⁴⁷ The fund will ensure the independence of projects and enhance the ASEAN Secretariat’s capacity to mobilize resources by aligning IAI work plans with AEC goals and the SDGs. These mechanisms provide a new catalyst for operationalizing development assistance under the FTA architecture.

²⁴⁵ The scope of my proposal is larger than that of proposal for the Initiative for East Asian Integration. Vo Tri Thanh, *Effectiveness of Initiative for ASEAN Integration*, in ASEAN ECONOMIC COMMUNITY SCORECARD: PERFORMANCE AND PERCEPTION 183, 200 (Sanchita Basu Das ed. 2013); ASEAN Economic Community Blueprint 2025 (2015), at 34-25.

²⁴⁶ FTA provisions should transform current ASEAN guidelines that “encourage” monitoring and evaluation to a binding nature. Guidelines for IAI Projects: For ASEAN Dialogue Partners and External Parties (2013), at Sec. III; ASEAN Economic Community Blueprint 2025 (2015), at 37.

²⁴⁷ For the introduction to the WTO Enhanced Integrated Framework and its predecessor, the Integrated Framework, see *The WTO at Twenty: Challenges and Achievements* (2015), at 74.

2. *Removing Regulatory Trade Barriers*

Effective development assistance will positively impact services trade-oriented development and benefit the SDGs to end poverty, promote economic growth and employment, and reduce the inequality among nations.²⁴⁸ Nonetheless, a prerequisite to this projection is regionalism-promoted reform that removes regulatory trade barriers in domestic law. In other words, services commitments under FTAs work for development if they are based on *de jure* and *de facto* implementation. To provide a model for South-South FTAs, ASEAN states should undergo further reform on the negotiation modality and domestic regulations.

The structural improvements to ASEAN's liberalization of trade in services need to be prioritized in its post-2015 agenda. First, the immediate priority is to enact the ATISA, which consolidates various services commitments in the general AFAS packages, sector-specific packages, and the ASEAN MNP Agreement.²⁴⁹ The incremental liberalization approach is at the point where a single schedule of commitments will further transparency and integration. The ATISA should also strengthen its linkage with the ACIA's Mode 3 commitments to prevent Mode 4 restrictions from obstructing the commercial presence of ASEAN enterprises.²⁵⁰

Second, AFAS commitments have been negotiated under the positive list modality. Switching the negotiation mode to the more aggressive negative list approach will effectively cover newly developed services and enhance transparency.²⁵¹ This approach will also solidify intra-ASEAN

²⁴⁸ See generally Sustainable Development Goals (2015), Goals 1, 8 and 10.

²⁴⁹ ASEAN Economic Community Blueprint 2025 (2015), at 6.

²⁵⁰ See Fukunaga & Ishido, *supra* note 199, at 31 (explaining the risk of disconnections between Modes 3 and 4 in ASEAN services commitments).

²⁵¹ Christopher Findlay, *Services Trade Liberalization in ASEAN*, in ROADMAP TO AN ASEAN ECONOMIC COMMUNITY 172, 186-87 (Denis Hew 2005); Aaditya Mattoo & Pierre Sauvé, *Services*, in PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK 235, 251-52 (Jean-Pierre Chauffour & Jean-Christophe Maur eds. 2011).

supply chains and avoid the TPP's potential trade diversion effect, which would undermine the AEC integration. Except for Singapore's hybrid approach to services commitments, ASEAN countries are in favor of the positive list approach to retain their regulatory space to protect infant industries.²⁵² Nevertheless, an inventive design is embedded in the Malaysia-New Zealand FTA, which currently lists services commitments on a positive list basis.²⁵³ In the FTA, Malaysia agreed to "commence re-negotiation of the specific commitments" if it concludes an agreement on a negative list with a third country.²⁵⁴ This forward-looking MFN mechanism should be multilateralized to the AEC and the RCEP to trigger progressive liberalization.

Third, the AEC allows the ASEAN Minus X formula and the 15% flexibility rule in services trade liberalization.²⁵⁵ These politically-oriented principles were designed to abate domestic protectionism and to stimulate the initial liberalization under the South-South FTA. In reality, neither principle is clear. The ASEAN Minus X formula leads to fragmented commitments at different speeds. It is unclear whether a state can opt out of the commitments to which it first agreed if it is unable to meet the commitments in the implementation stage.²⁵⁶ Furthermore, no ASEAN agreements elaborate principles governing the 15% flexibility proviso, thus making it difficult to comprehend whether and how countries should schedule their services commitments

²⁵² For example, Singapore followed the positive list approach in the Singapore-China FTA, but adopted the negative list approach in the Singapore-Peru FTA. Trade Policy Review, Report by the Secretariat, Singapore, Revision, WT/TPR/S/267/Rev.1, Oct. 18, 2012, at 56. Other ASEAN states, such as Malaysia and Indonesia, scheduled their services commitments under FTAs predominantly on a positive list basis. Trade Policy Review, Report by the Secretariat, Malaysia, WT/TPR/S/292, Jan. 27, 2014 [Trade Policy Review, Malaysia], at 104; Trade Policy Review, Report by the Secretariat, Indonesia, WT/TPR/S/278, Mar. 6, 2013, at 84 & 109-10.

²⁵³ Trade Policy Review, Malaysia, *supra* note 252, at 32 & 104.

²⁵⁴ See Malaysia-New Zealand FTA (2009), art. 8.15(2) ("The re-negotiation shall proceed on a 'negative list' basis. The Parties shall endeavour to conclude the re-negotiation on the specific commitments within 18 months from the date the negotiations commence.").

²⁵⁵ Roadmap for an ASEAN Community: 2009-2015 (2009), at 26.

²⁵⁶ SEVERINO, *supra* note 111, at 352-53; Nikomborirak & Jitdumrong, *supra* note 174, at 59-60.

based on the rule. To maximize the pro-development effect, it is pivotal to narrowly construe these SDT-like exceptions and base the intra-regional Grand Bargain on objective criteria.

Lastly, the AEC's single market depends on the further liberalization of Modes 3 and 4. Different from the EU's top-down approach, ASEAN's FTA-plus path provides an optional model for the South. The salient issue for commercial presence negotiations is the AEC's 70% ASEAN equity participation rule.²⁵⁷ While some member states have unilaterally increased the foreign equity threshold to 100%, Indonesia, the Philippines and Thailand have yet to meet the AEC target.²⁵⁸ A priority for AFAS negotiations is to minimize limitations of market access and national treatment for Mode 3, so that domestic regulation will not cripple the effectiveness of ASEAN equity commitments.²⁵⁹

The Mode 4 liberalization that facilitates cross-border labor mobility has great potential for development due to the effect of remittances and skill transfer. At the WTO, most Mode 4 horizontal commitments are related to intra-corporate transferees and business visitors, and labor mobility is thus intertwined with commercial presence.²⁶⁰ Delinking the Mode 4 commitments under the ASEAN MNP Agreement with Mode 3 will create more opportunities for independent professionals.²⁶¹ Another required improvement lies in ASEAN states' commitments regarding

²⁵⁷ Roadmap for an ASEAN Community: 2009-2015 (2009), at 26. Note that the AEC Blueprint only mandates "[n]o restrictions for Modes 1 and 2." *Id.*

²⁵⁸ Sirisena Dahanayake, *Implications of Liberalizing Professional Services: Legal, Accountancy, and Engineering Services in Lai PDR* (2012), at 12; Dionisius Narjoko, *AEC Blueprint Implementation Performance and Challenges: Services Liberalization*, ERIA Discussion Paper Series (2015), at 14.

²⁵⁹ Philippa Dee, *Does AFAS Have Bite? Comparing Commitments with Actual Practice* (2013), at 21.

²⁶⁰ 64.1% of Mode 4 entries in GATS schedules are related to intra-corporate transferees and business visitors. Presence of Natural Persons (Mode 4), *supra* note 165, at 21. The Mode 4 commitments under the ASEAN MNP Agreement follow the same trend. Sarah Huelser & Adam Heal, *Moving Freely? Labour Mobility in ASEAN*, ASIA-PACIFIC RESEARCH AND TRAINING NETWORK ON TRADE POLICY BRIEF, No. 40 (2014), at 4; Flavia Jurie & Sandra Lavenex, *ASEAN Economic Community: What Model for Labour Mobility?* NCCR Trade Regulation Working Paper, No. 2015/02 (2015), at 4.

²⁶¹ In comparison, the TPP mandates that the cross-border supply of a service not be conditioned on "a representative office or any form of enterprise." The Trans-Pacific Partnership (2015), art. 10.6.

the periods of stay for natural persons under the agreement, which should be substantially GATS-plus.²⁶²

The implicit interlocked mechanism between ASEAN intra-regional and extra-regional FTAs has prompted states to use a higher threshold for negotiations, thus making these FTAs “living” documents and ensuring the AEC’s integration and its impact on Asia-Pacific regionalism.²⁶³ The ASEAN-Australia-New Zealand FTA, which contains a separate chapter on the MNP, has the strongest GATS-plus services commitments among the ASEAN+1 FTAs.²⁶⁴ The inclusion of the MNP annex in the recent ASEAN-India Agreement on Trade in Services also indicates the direction of the RCEP towards labor mobility.²⁶⁵ The enhanced liberalization of Modes 3 and 4 will strengthen ASEAN’s strategy of services trade-oriented development.

3. *Transnational Legal Harmonization and Human Rights Protection*

Given the crisis of the Doha Round when it came to realizing the development promises, the creation of the AEC illustrates an NREO approach to South-South cooperation and offers an alternative for trade-led development. In ASEAN’s post-2015 agenda, the bloc should streamline WTO-plus matters with FTA policy. To maximize the development effect, ASEAN should promote the regional legal harmonization of mutual recognition and immigration rules and the

²⁶² Under the GATS, “while business visitors are generally allowed to stay up to 90 days, the presence of intra-corporate transferees . . . tends to be limited to periods of between two and five years.” Presence of Natural Persons (Mode 4), S/C/W/75, Dec. 8. 1998, at 1 & 28. In ASEAN, business visitors are allowed to stay in the host country from 30 to 90 days and the duration of stay for intra-corporate transferees ranges between one month and three years. Fukunaga & Ishido, *supra* note 199, at 8-9.

²⁶³ This approach reflects the practice of AFAS and ASEAN+1 services negotiations.

²⁶⁴ Razeen Sally, *ASEAN FTAs: State of Play and Outlook for ASEAN’s Regional and Global Integration*, IN THE ASEAN ECONOMIC COMMUNITY: A WORK IN PROGRESS 320, 363 (Sanchita Basu Das et al. eds. 2013); Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (2009), Ch. 9. Note that the ASEAN-Japan FTA lacks services commitments.

²⁶⁵ Agreement on Trade in Services under the Framework Agreement on Comprehensive Economic Cooperation between the Association of Southeast Asian Nations and the Republic of India (2014), Annex on Movement of Natural Persons.

legalization of human rights based on international labor law. This approach will hence extend the implementation of the SDGs from trade-led economic benefits to the protection of labor rights and fundamental freedoms.²⁶⁶

ASEAN's skilled labor-focused policy is applied through Mode 4 commitments and the MRAs. Falling short of the AEC goal to finalize MRAs for all professional services by 2015, the eight current MRAs cover less than 2% of ASEAN's workforce.²⁶⁷ In practice, the MRA provisions that mandate minimum years of experience have restricted the number of eligible professionals.²⁶⁸ Even meeting the MRA criteria does not guarantee employment due to states' additional requirements. Consequently, there is a gap between regional harmonization and domestic law.

A common obstacle is the labor market test. For instance, a Malaysian company seeking to recruit a foreign engineer bears the burden of proving the absence of local engineers for the specific project.²⁶⁹ Limitations on nationality, residency restrictions and language requirements pose additional challenges.²⁷⁰ While Thai law accepts foreign nurses, none have been admitted because the licensing examination is conducted in Thai.²⁷¹ Arguably, the implementation problem also exists in bilateral FTAs. Japan's FTAs with Indonesia, the Philippines and Vietnam accept ASEAN nurses.²⁷² The statistics show that only three ASEAN nurses passed Japan's nursing

²⁶⁶ E.g., Sustainable Development Goals (2015), Goals 8.5., 8.8 and 16.10.

²⁶⁷ Roadmap for an ASEAN Community: 2009-2015 (2009), at 26; Guntur Sugiyarto & Dovelyn Rannveig Agunias, *A 'Freer' Flow of Skilled Labour within ASEAN: Aspirations, Opportunities and Challenges in 2015 and Beyond*, IOM-MPI Issues in Brief, No. 11 (2014), at 1. See ASEAN Economic Community Blueprint 2025 (2015), at 11 (ASEAN should "[e]xpand and deepen commitments under the ASEAN Agreement on MNP where appropriate . . .").

²⁶⁸ The required length of experience ranges from three to ten years. Sugiyarto & Agunias, *supra* note 267, at 3.

²⁶⁹ Nikomborirak & Jitdumrong, *supra* note 214, at 130. The Philippines also imposes the labor market test requirement for foreign nationals in its Labor Code. Rafaelita M. Aldaba, *ASEAN Economic Community 2015: Labor Mobility and Mutual Recognition Arrangements on Professional Services*, Discussion paper Series, No. 2013-04 (2013), at 4-5.

²⁷⁰ See Aldaba, *supra* note 269, at 3-4 (explaining that the Philippines' Constitutional and the Foreign Investment Act requirements); Nikomborirak & Jitdumrong, *supra* note 214, at 130 (stating that a foreign architect must reside in Malaysia for 180 days in a year).

²⁷¹ Fukunaga, *supra* note 216, 20-21.

²⁷² See Ch. 3: Movement of Natural Persons, <http://www.meti.go.jp/english/report/downloadfiles/2010WTO/3->

examination in 2015, which is necessary for long-term residence.²⁷³ These *de jure* and *de facto* restrictions constrain the development potential for regional labor mobility.

Mutual recognition is among the most difficult FTA issues. Even the US-led TPP simply follows the GATS model by encouraging a member state to “afford adequate opportunity to another” partner for negotiating an MRA, which should be conducted in a non-discriminatory manner.²⁷⁴ In contrast with the TPP’s nascent stage of development, the AEC framework has accumulated ten years of experience in implementing regional MRAs.²⁷⁵ ASEAN MRAs possess the potential to provide a model for South-South FTAs that energize mutual recognition schemes in Asia-Pacific FTAs such as the RCEP and the FTAAP, which cover countries at diverse stages of development.

To remedy the current weaknesses, ASEAN countries should intensify the legal harmonization of domestic rules. Based on common criteria, states should narrowly apply the MRAs’ “subject to domestic laws and regulations” provisions and to enlarge the right of independent practice for professionals.²⁷⁶ To ensure regional integration, states are obliged to increase the distinction between ASEAN and other foreign professionals by according the former more preferential treatment.²⁷⁷

3Movement.pdf (last visited Dec. 2, 2015), at 775-81 (comparing Mode 4 commitments in Japan’s FTAs with seven Southeast Asian countries).

²⁷³ The Results of the National Nursing Exam for EPA-based Nurse Candidates (Past Seven Years), <http://www.mhlw.go.jp/file/04-Houdouhappyou-10805000-Iseikyoku-Kangoka/0000079084.pdf> (in Japanese) (last visited Dec. 20, 2015).

²⁷⁴ The Trans-Pacific Partnership (2015), art. 10.9; General Agreement on Trade in Services (1994), art. VII.

²⁷⁵ The first ASEAN MRA, which governs on Engineering Services, was concluded in 2005. See also ASEAN Services Integration Report (2015), at 34 (“To date, there are a total of 1,252 engineers on the ASEAN Chartered Professional Engineers Register . . .”).

²⁷⁶ *E.g.*, ASEAN Mutual Recognition Arrangement on Nursing Services (2006), arts. 3.2; ASEAN MRA on Engineering Services (2005), art. 3.3. See Fukunaga, *supra* note 216, at 16 (stating that unlike the EU, “[t]he ASEAN MRA in principle does not give a right for independent practice. Actually, Viet Nam is the only ASEAN country that allows independent practice.”).

²⁷⁷ See *id.* at 21 (observing that most ASEAN states “do not distinguish ASEAN and non-ASEAN in their respective

The legal harmonization process that will prompt the paradigm shift in Asia-Pacific regionalism is expected to link immigration rules to Mode 4 commitments and MRAs. The schemes under the EU and the Trans-Tasman Travel Arrangement between Australia and New Zealand allow freedom of movement for work purposes.²⁷⁸ The development gap and concerns of illegal immigration make visa-free mechanisms infeasible for ASEAN. Significantly, 19 APEC members, including seven ASEAN states, participate in the APEC Business Travel Card (ABTC) scheme, which permits pre-cleared business travelers short-term entry.²⁷⁹ The three-year valid ABTC also allows holders to use the express APEC lane at ports of entry, thus cutting time spent at immigration checkpoints by 52.4%.²⁸⁰

While the transplantation of the APEC-like “ASEAN lane” at customs will improve labor mobility, the region can benefit more from a visa system that extends beyond the temporary stay for business visitors. The AEC Blueprint’s implementation of facilitating “the issuance of visas and employment passes for ASEAN professionals” can be modeled after the NAFTA and the US FTA with Singapore.²⁸¹ The “Trade NAFTA” visa (known as the TN visa) for Canadians and Mexicans ties US employment with renewable visas.²⁸² The US-Singapore FTA created separate quotas for US H-1B work visas allocated to Singaporean nationals.²⁸³ Based on these models, it

regulatory frameworks”).

²⁷⁸ For the introduction to the Trans-Tasman Travel Arrangement, see Labor Migration, Skills & Student Mobility in Asia (2014), at 37.

²⁷⁹ Among the 21 APEC economies, only Canada and the United States are transitional members and have not yet joined the scheme. APEC Business Travel Card, <http://www.apec.org/About-Us/About-APEC/Business-Resources/APEC-Business-Travel-Card.aspx> (last visited Dec. 20, 2015).

²⁸⁰ APEC’s Achievements in Trade Facilitation in 2007-2010: Final Assessment of the Second Trade Facilitation Action (TFAP II) (2012), at 1.

²⁸¹ Roadmap for an ASEAN Community: 2009-2015 (2009), at 29.

²⁸² See Stephenson & Hufbauer, *supra* note 190, at 281 (“When proof of a job offer is demonstrated, the TN visa permits employment for one year, with unlimited renewal.”); Philip Martin & Manolo Abella, *supra* note 194, at 13 (“There has never been a quota on the number of TN visas available for Canadian, but there was a 5,500 a year quota on TN visas available for Mexicans between 1994 and 2005.”).

²⁸³ See USTR on Professional Workers in Chile, Singapore FTAs, July 23, 2003, <http://singapore.usembassy.gov/072303a.html> (stating that under the FTA, the number of Singaporean professionals

is recommended that ASEAN design a pan-ASEAN professional visa scheme that allocates the visa quotes subject to negotiations. The scheme will harmonize domestic immigration rules and deepen the implementation of Mode 4 commitments and MRAs.

Other than the legal harmonization efforts, ASEAN's breakthrough in Asia-Pacific FTAs lies in facilitating and managing the flow of migrant workers in the post-2015 agenda. The AEC has liberalized the movement of professionals. The legitimacy of the services trade-oriented development policy requires the expansion of "beneficiaries" of the regional integration by incorporating low-skilled labor. As in other regions, a political paradox has often arisen from the struggle between resistance to migrant workers and the shortage of labor undertaking the 3D (dirty, dangerous and demanding) jobs necessary for the economic development.²⁸⁴

From the legal perspective, the ASEAN Charter that legalizes the AEC does not exclude low-skilled labor from ASEAN's single market.²⁸⁵ The current skilled labor-centered scheme is not sustainable because it ignores the reality that more than 87% of intra-ASEAN workers are semi-skilled or unskilled.²⁸⁶ More fundamentally, facilitating the temporary movement of migrant workers will yield "the greatest absolute and poverty-related gains for developing countries" and reduce ASEAN's development gap.²⁸⁷ Given the estimated increase of low-skilled occupations by 62.4% and the urgent labor shortage problem, it is timely to construct a mechanism to manage the flow of migrant workers based on the best practices of FTAs.²⁸⁸

in the United States is limited to 5,400).

²⁸⁴ See Jason Ng, *Richer Asean Nations Resist Opening Doors to Migrant Workers*, WALL STREET J., Apr. 3, 2013, <http://www.wsj.com/articles/SB10001424127887323646604578402283145126480> (discussing the situations in Malaysia, Singapore and Thailand).

²⁸⁵ Charter of the Association of Southeast Asian Nations (2007), art. 1:5.

²⁸⁶ Sugiyarto & Agunias, *supra* note 267, at 4.

²⁸⁷ Abrenica, *supra* note 144, at 354; Feeny & McGillivray, *supra* note 188, at 117.

²⁸⁸ Laura Brewer, *Labour Mobility and Skills Recognition: Lessons for ASEAN*, PowerPoint Slides (2014), at 6; Fukunaga & Ishido, *supra* note 199, at 31; *Labor Migration, Skills & Student Mobility in Asia* (2014), at 42.

Markedly, the human rights dimension of the SDGs can also be implemented through the labor rights protection under the AEC framework. As merely 17% of GATS entries encompass low-skilled workers, ASEAN's WTO-plus mechanism will provide a new trade-development paradigm.²⁸⁹ Labor commitments are stressed in the IAI, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers, and the ASEAN Human Rights Declaration.²⁹⁰ However, the economic aim and human rights aspirations are disconnected. Although the two declarations identify the obligations of states, their soft-law nature and the absence of an enforcement mechanism limit their practical value.

As an effective approach to labor protection, ASEAN countries have concluded bilateral labor agreements (BLAs) or memoranda of understanding that incorporate paramount principles of International Labour Organization (ILO) conventions.²⁹¹ Presumably, the BLAs that provide for the movement of low-skilled labor have circumvented the MFN effect of the GATS and led to a different type of the "noodle bowl" effect.²⁹² Some may argue that domestic labor law enforcement suffices to achieve the goal. This argument neglects the practice of excluding certain categories of labor, such as domestic maids, from employment legislation and the work injury compensation scheme.²⁹³ Despite domestic courts' recognition of "a matter of public interest,"

²⁸⁹ See Arti Grover Goswami & Sebastián Sáez, *How Well Have Trade Agreements Facilitated Temporary Mobility*, in *LET WORKERS MOVE: USING BILATERAL LABOR AGREEMENTS TO INCREASE TRADE IN SERVICES* 17, 25 (Sebastián Sáez ed. 2013) (explaining the scope of Mode 4 commitments under the GATS).

²⁹⁰ Roadmap for an ASEAN Community: 2009-2015 (2009), at 107; ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007); ASEAN Human Rights Declaration (2012), para. 27.

²⁹¹ E.g., Memorandum of Understanding between Trade Unions in Cambodia and Trade Unions in Thailand on Protection of Migrant Workers' Rights (2013); Labor Migration, Skills & Student Mobility in Asia (2014), at 43.

²⁹² The feature of Asian noodle bowl or spaghetti bowl commonly refers to fragmented rules of origin under FTAs. For an analysis of the bilateral labor agreements' potential violation of the most-favored-nation clause of the GATS, see Arti Grover Goswami et al., *When and Why Should Bilateral Labor Agreements be Used*, in *LET WORKERS MOVE: USING BILATERAL LABOR AGREEMENTS TO INCREASE TRADE IN SERVICES* 39, 45-46 (Sebastián Sáez ed. 2013); Stephenson & Hufbauer, *supra* note 190, at 290.

²⁹³ For instance, "domestic workers" are excluded from Singapore's Employment Act and the Work Injury Compensation Act. Employment Act (Ch. 91), art. 2(1); Work Injury Compensation Act (Ch. 354), Fourth Schedule: Classes of Persons Not Covered.

the vulnerable status of foreign workers has contributed to prevalent incidents of labor abuses in the region.²⁹⁴

While it is not unique for South-South FTAs to include labor cooperation, the challenge is to make such cooperation operative by balancing the economic need and human rights protection.²⁹⁵ ASEAN can demonstrate the best practices for the NREO approach by incorporating labor commitments into the multilateral AEC and RCEP frameworks. Richer ASEAN countries' resistance to labor provisions cannot stand, as they are committed to the TPP's labor protection modeled after US FTAs.²⁹⁶

For development purposes, the AEC should oblige states to enforce ASEAN Declarations in domestic laws. The 1998 ILO Declaration, based on eight key conventions, requires states' compliance with fundamental labor principles.²⁹⁷ These principles, incorporated in ASEAN Declarations, include freedom of association, the right to collective bargaining, and the prohibition of forced labor, child labor and discrimination in employment.²⁹⁸ Nonetheless, only Cambodia, Indonesia and the Philippines ratified all of the fundamental ILO conventions.²⁹⁹ The

²⁹⁴ *E.g.*, ADG v. Public Prosecutor & Other Appeal, [2010] 1 SLR 874, 897, para. 55. *See also Maid to Order: Ending Abuses against Migrant Domestic Workers in Singapore*, 17: 10(c) HUM. RTS. WATCH 1, 1 (2005) (“Between 1999 and 2005, at least 147 migrant domestic workers died from workplace accidents or suicide, most by jumping or falling from residential buildings.”); Trinna Leong, ‘Forced labor’ Rife in Malaysian Electronics Factories: Report, REUTERS, Sept. 17, 2014, <http://www.reuters.com/article/us-malaysia-labour-report-idUSKBN0HC08E20140917> (“One in five immigrants were working more than the suggested 60 hours of overtime a week . . .”).

²⁹⁵ *E.g.* Free Trade Agreement between the People's Republic of China and the Government of the Republic of Chile (2005), art. 108.

²⁹⁶ These countries include Brunei, Singapore and Malaysia. For labor enforcement issues, see The Trans-Pacific Partnership (2015), Ch. 19; Mary Jane Bolle, *Overview of Labor Enforcement Issues in Free Trade Agreements*, Congressional Research Service Report (2014), at 4-6.

²⁹⁷ The Declaration requires all International Labour Organization (ILO) members, “even if they have not ratified the Conventions in question,” to comply with four core labor principles. 1998 Declaration on Fundamental Principles and Rights at Work (1998), art. 2.

²⁹⁸ *Id.*; ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007), Obligations of Receiving States; ASEAN Human Rights Declaration (2012), paras. 3, 6 and 27.

²⁹⁹ For ASEAN's countries' ratification status in the eight ILO conventions, see Martin & Abella, *supra* note 194, at 28.

transformation of regional commitments into domestic legislation will elevate human rights protection and complement the overall development of the ASEAN Community.

Built on the best practices of the BLAs, the multilateral labor cooperation under the AEC is advised to strengthen the public-private partnership to allocate visa quotas, streamline the recruitment process and ensure the embassies' assistance in labor disputes.³⁰⁰ The integrated capacity building and development assistance initiatives under FTAs that raise awareness of labor rights are also integral to ASEAN's legalization of trade-development policy. These mechanisms not only reduce the transaction costs for regional labor utilization, but also strengthen the trade-development connection in line with the SDGs.

V. Conclusion

Trade-development discourse intertwined with North-South conflicts has been at the core of multilateral trade negotiations and international economic law. The SDGs of the 2030 UN Agenda for Sustainable Development mandates the revitalization of development in the Doha Round negotiations. Nevertheless, the misconception of SDT has rendered the WTO's development promises unpromising. The crisis on the disconnection between development goals and the Doha Round requires a feasible "Plan B" for the Global South.

By reassessing the trade-development nexus, this article provided the first analysis of the approach to accomplishing the SDGs through regional integration. It argued that the NREO in the multi-polar structure will fortify the coalition of developing countries in expediting the legalization of trade-development policy. The article thus moved the conventional debate to a new dimension

³⁰⁰ See generally Chanda, *supra* note 149, at 482-192; Labor Migration, Skills & Student Mobility in Asia (2014), at 43. This process also helps eliminate undocumented workers.

on the assertive role of developing countries and responded to an inquiry of the paradigm shift in Asia-Pacific regionalism with interrelated theoretical and substantive claims. The realist and dependency theories explain the geopolitical complexity of the NREO built upon the rapidly evolving South-South FTAs. While realism justifies rare international cooperation in the arenas of overlapping national interests, the new dependency theory deciphers the transformation of neo-colonial economic ties.

As a timely case study, the research focused on the creation of the ASEAN Economic Community and its implications for global trade powers such as the United States, China and Japan. It examined the bloc's incremental process of liberalization and its balance of power strategy to alter the hub-and-spoke structure. The proposed services trade-oriented development policy encompasses integral components of intra-regional and extra-regional services commitments and transnational schemes on labor mobility. The post-2015 agenda is advised to center on the integration of development assistance and removal of domestic barriers. Moreover, essential actions should include the transnational legal harmonization of mutual recognition and immigration rules, as well as linking the FTAs with human rights protection that incorporates international labor principles. These structural movements will provide the best practices for global regionalism and reinvigorate the trade-development connection in the multilateral trading system.