

# Feature—*Brief on The World Trade Organization's Dispute Settlement Body and the Sustainable Development Goals*

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## 1. INTRODUCTION

International trade disputes have come to the fore of media, public, and, most certainly, legal attention. Indeed, they will perhaps represent one of the most enduring legacies of recent events, with strong alliances strained to new and often unimaginable places, and with the likelihood that their impacts will last far beyond any election cycle.

Although perhaps not as attention-getting historically, trade disputes have existed for many years, and handling them in a unified and organizational structure is one of the critical roles fulfilled by the World Trade Organization (WTO). Since it was founded in 1995, the WTO Dispute Settlement Body (DSB) has heard over 400 cases involving sovereigns who

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Titre en français : *Note d'information sur l'Organe de règlement des différends de l'Organisation mondiale du commerce et les Objectifs de développement durable*

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claim that the terms of fundamental WTO laws—such as the *General Agreement on Tariffs and Trade (GATT)*<sup>1</sup>—have been breached by another sovereign.<sup>2</sup>

The WTO DSB system is in itself novel in the international system, as it creates a stable forum in which to settle disputes using a known system with a set pattern of procedures and rights for all parties. Looking beyond the sense of uniformity, however, it is possible to view the panels charged with oversight of these cases as tools of social, environmental, and economic progress, as well as entities that apply trade law in a vacuum. With this in mind, the following article examines the ways in which the WTO's DSB has considered and applied—typically at a tacit level—tenets of the 2015 Sustainable Development Goals (SDGs). Further, the article identifies recently filed complaints at the WTO that will allow for further application of the SDGs and, potentially, their more overt validation as interpretive tools if not full statements of law.

In Part 2, the article sets out the basic elements and background of the WTO's DSB, including the mechanisms of its functioning and the ways in which it is charged with applying WTO laws. Once the basis for the WTO dispute settlement system has been established, Part 3 moves on to examine the creation and genesis of the SDGs, with an emphasis on the goals and targets that are most interrelated with trade topics and trade development. Based on these two background sections, Part 4 reviews and analyses cases from 2011 onward in which principles of the SDGs—or those quite similar to them—were applied, or at least incorporated, in the findings of various DSB entities. It also discusses newly filed complaints at the DSB level and the ways in which the SDGs could overtly or tacitly be used in them. Finally, the conclusion further discusses potential uses for the SDGs in the determination of trade-related complaints.

## 2. WTO DISPUTE SETTLEMENT STRUCTURE

International organizations have, over time, developed a number of options for addressing disputes between Member States. In nearly every international organization system, the first choice for dispute resolution among Member States centers on the use of the organization's good offices to prompt negotiations and dialogue between the parties involved.<sup>3</sup>

Should these initial attempts at settlement not result in a termination of the dispute, there are many other avenues available to international organizations and their Member States. In some instances, the chosen option focuses on the use of the International Court of Justice as the arbiter of such disputes.<sup>4</sup> This choice represents a determination that the disputes should be

<sup>1</sup> 30 October 1947, 58 UNTS 187, arts XX–XXI (entered into force 1 January 1948) [*GATT* 1947].

<sup>2</sup> See World Trade Organization, “Chronological list of disputed cases” (last visited 11 August 2019), online: *WTO* <[www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_status\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm)> [perma.cc/3RNS-67VV].

<sup>3</sup> See Alexandra R Harrington, *International Organizations and the Law* (London: Routledge, 2018) at 85; *Difference Relating to Immunity from Legal Process of Special Rapporteur of Commission on Human Rights*, Advisory Opinion, [1999] ICJ Rep 62 [*Immunity*]; John R Crook, “Second Circuit Finds Convention on Privileges and Immunities of the United Nations Self-Executing, Upholds Immunity of United Nations and of Former UN Officials” (2010) 104:2 AJIL 281; *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, [1989] ICJ Rep 204 [*Applicability*]. See also Patrick J Lewis, “Who Pays for the United Nations’ Torts?: Immunity, Attribution, and Appropriate Modes of Settlement” (2014) 39:2 NCJ Intl L & Com Reg 259.

<sup>4</sup> See Harrington, *supra* note 3 at 83; See e.g. *Immunity*, *supra* note 3; *Applicability*, *supra* note 3.

settled in a judicial setting that is external to the organization. However, in other instances, the international organization makes a concerted choice to settle these forms of disputes between Member States internally. This choice entails a decision to craft some form of system to evaluate the claims of the parties in an unbiased forum that is affiliated with or under the supervision of the organization. While the decision to create and implement a dispute settlement system might be a commonality between international organizations, the structures used and the procedures involved vary drastically, reflecting the nature of the constituencies served by the organization.<sup>5</sup>

At the WTO level, it was decided to craft an entirely insular and highly specialized system, the DSB, which would hear complaints between Member States and serve both quasi-arbitral and appellate functions.<sup>6</sup> The enforcement aspect of DSB decisions is tied directly to the WTO structure and system. Only the WTO General Council can approve and define the scope of retaliatory measures which may be used when a State fails to comply with a DSB decision after all the recourses of the dispute system have been exhausted.<sup>7</sup>

From a policy perspective, the choice to create an internalized dispute settlement system is logical, as the terms of the WTO treaties are technical and require a variety of skills and knowledge that would be beyond the reach of other established systems. At the same time, the use of such a system allows the WTO to develop strands of decisions that are persuasive authority within a complex environment. This is increasingly the case as the WTO transitions from a focus on trade and economy to a focus on the ways in which other vital segments of policy, such as environment, sustainable development, health concerns, and human rights, intersect with and impact on trade and economy. Indeed, the DSB system functions within international law and must observe its tenets as well as those brought into discussions by the involved States, such as the SDGs.

In the DSB system, a WTO Member State that believes another Member State is violating one of the treaties collectively constituting WTO law may bring a complaint to the DSB.<sup>8</sup> After the notice is filed, there is a mandatory cooling-off period in which the Member States involved in the dispute are encouraged to engage in dialogue to settle the subject of the complaint in a diplomatic manner.<sup>9</sup> Should this be successful, the matter is deemed closed and

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<sup>5</sup> See generally Harrington, *supra* note 3 at 83–85.

<sup>6</sup> *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 (entered into force 1 January 1995) [*DSB Rules and Procedures*].

<sup>7</sup> See *ibid.*, art 22(6).

<sup>8</sup> *Ibid.*, art 4(3)–4(4); World Trade Organization, *A Handbook on the WTO Dispute Settlement System*, 2nd ed (Cambridge: Cambridge University Press, 2017) at 2 [*WTO Handbook*]. See also Harrington, *supra* note 3 at 84–85; Bruce Wilson, “Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date” (2007) 10:2 *J Intl L Econ* 397 at 398; Julien Chaisse, “Deconstructing the WTO Conformity Obligation: A Theory of Compliance as a Process” (2015) 38:1 *Fordham Intl LJ* 57; Adam Isaac Hasson, “Domestic Implementation of International Obligations: The Quest for World Patent Law Harmonization” (2002) 25 *Boston College Intl & Comparative L Rev* 373 at 379; Julien Chaisse & Mitsuo Matsushita, “Maintaining the WTO’s Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism” (2013) 16 *J Intl Econ L* 9.

<sup>9</sup> *DSB Rules and Procedures*, *supra* note 6, art 4(3); *WTO Handbook*, *supra* note 8 at 6, 43.

the States are bound by whatever agreement they came to although it is considered outside of the WTO system and cannot be used for a subsequent appeal by either State.<sup>10</sup>

If an agreement is not reached, the complainant Member State may then go forward to the filing of official complaint papers with the DSB.<sup>11</sup> This complaint is very similar to one filed in a judicial forum and sets out the grounds of the alleged violation.<sup>12</sup> In a similar fashion to a judicial proceeding, the opposing Member State then has the opportunity to respond, followed by the ability of each Member State to submit supplemental filings.<sup>13</sup> The entity who hears the complaint is not a court *per se*, but rather a three-person Panel that incorporates elements of both arbitral panels and juridical entities.<sup>14</sup> The Panel is composed of individuals designated as experts by the WTO and agreed on by the Member States themselves.<sup>15</sup> This is an essential aspect of the proceedings, as it guarantees equality of presence and—in theory—preference amongst those deciding the matter. It also ensures that those evaluating the complaint have expertise in the legal matters involved and are therefore able to make determinations with lasting impact.

Within the confines of the DSB, interested third-party Member States may file documents and provide information to the Panel where it has potential bearing on the issues involved.<sup>16</sup> The Panel similarly has the ability to merge complaints regarding the same Member State and the same issue provided the Member States involved agree to be joined.<sup>17</sup> Following the exchange of filings and papers, the Panel is empowered to review all available information and render a decision as to the merits of the complaint and the allegations contained therein.<sup>18</sup> Throughout the proceedings, and while the complaint is pending, it is possible for the Member States to come to a separate agreement that will resolve the issues involved and will result in the matter being terminated as an active complaint.<sup>19</sup> In these instances, the matter is deemed settled and the Panel will not opine on the merits of the allegations.<sup>20</sup>

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<sup>10</sup> *DSB Rules and Procedures*, *supra* note 6, art 3(6); Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 6.

<sup>11</sup> *DSB Rules and Procedures*, *supra* note 6, art 4(4); Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 47–48.

<sup>12</sup> *DSB Rules and Procedures*, *supra* note 6, art 4(4); Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 48–49.

<sup>13</sup> *DSB Rules and Procedures*, *supra* note 6, art 12(6); Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 54.

<sup>14</sup> *DSB Rules and Procedures*, *supra* note 6, art 7(1); Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 21, 50, 56.

<sup>15</sup> *DSB Rules and Procedures*, *supra* note 6, art 8; Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 51.

<sup>16</sup> *DSB Rules and Procedures*, *supra* note 6, art 10; Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 47.

<sup>17</sup> *DSB Rules and Procedures*, *supra* note 6, art 9; Harrington, *supra* note 3 at 85, n 27; *WTO Handbook*, *supra* note 8 at 52.

<sup>18</sup> Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 21.

<sup>19</sup> Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 6, 73. See generally *WTO Handbook*, *supra* note 8 at 44.

<sup>20</sup> *DSB Rules and Procedures*, *supra* note 6, art 12(7); Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 48.

Each Member State retains the ability to appeal the Panel's decision in a given complaint to a subsequently convened Appellate Body.<sup>21</sup> The Appellate Body is composed of different experts, who are also approved by the Member States, and who have more limited jurisdiction, namely the matters complained of by a State on appeal.<sup>22</sup> Appeals are generally considered final, however, the Member States have the ability to design additional agreements, as well as steps to achieve and monitor the implementation of Panel and Appellate Body decisions.<sup>23</sup> As previously noted, should problems ensue in the implementation process, it is possible for the Member States to seek further opinions or assistance from the DSB system.<sup>24</sup> Ultimately, non-compliance with a DSB decision may result in WTO General Council issuing a decision to allow the aggrieved Member State to implement trade sanctions against the State in error.<sup>25</sup> In making these decisions, the WTO General Council is guided by the requirement that proposed sanctions be proportionate to the violations committed by the errant Member State and not be retaliatory.<sup>26</sup>

The DSB system exists to allow for skilled and cohesive evaluation of questions regarding WTO treaties and their application by Member States. It is arguably a highly technical device but one which can address any issue relating to trade—even those long-regarded as outside the realm of trade law—provided the issue is framed in the terms of WTO law.<sup>27</sup> This includes, perhaps most crucially for the purposes of this article, *GATT* articles XX and XXI, which allow for exceptions to many treaty requirements in the interest of public health, safety, and morals.<sup>28</sup>

### 3. SUSTAINABLE DEVELOPMENT GOALS AND ECONOMIC CONSIDERATIONS

In 2000, the international community crafted the Millennium Development Goals (MDGs) as a set of goals that targeted for eradication by 2015 the chief issues facing the world at the national and international levels.<sup>29</sup> The MDGs were comprised of eight goals that were in many instances difficult to achieve and quite aspirational for fulfillment by 2015.<sup>30</sup> This was, however, the first attempt by the international community to create and implement

<sup>21</sup> *DSB Rules and Procedures*, *supra* note 6, art 17(4); Harrington, *supra* note 3 at 85; *WTO Handbook*, *supra* note 8 at 63–64.

<sup>22</sup> *DSB Rules and Procedures*, *supra* note 6, arts 17(1), 17(6); *WTO Handbook*, *supra* note 8 at 77.

<sup>23</sup> *WTO Handbook*, *supra* note 8 at 74–80.

<sup>24</sup> *Ibid* at 77–80.

<sup>25</sup> *Ibid* at 81; *DSB Rules and Procedures*, *supra* note 6, art 22.

<sup>26</sup> *WTO Handbook*, *supra* note 8 at 80–81.

<sup>27</sup> Luping Zhang, “The Role of the Dispute Settlement Body (DSB) in the World Trade Organization in the Aviation Industry: In the Time of Bombardier Case” (2018) 43:2 *Air & Space L* 179.

<sup>28</sup> *GATT 1947*, *supra* note 1. See also Autar Krishen Koul, “WTO, International Trade and Human Rights” in *Guide to the WTO and GATT: Economics, Law and Politics* (Singapore: Springer, 2018) 603.

<sup>29</sup> United Nations, “Millennium Development Goals” (last visited 31 July 2019), online: *UN* <[www.un.org/millenniumgoals](http://www.un.org/millenniumgoals)> [perma.cc/4QJU-AGNW].

<sup>30</sup> These goals were 1) “eradicate extreme poverty and hunger”; 2) “achieve universal primary education”; 3) “promote gender equality and empower women”; 4) “reduce child mortality”; 5) “improve maternal health”; 6) “combat HIV/AIDS, malaria and other diseases”; 7) “ensure environmental sustainability”; and 8) “global partnership for development” (*ibid*).

an overarching set of goals to guide the practices of States, international organizations, international actors, and civil society as they acknowledged and sought to address pressing and endemic issues across global society. The SDGs replaced the MDGs following their expiration in 2015, offering a chance for the international community to reassess the nature of the key issues it faces.<sup>31</sup> Many of these issues have the potential to be implicated by trade disputes brought at the WTO level.

When crafting the SDGs, the international community was aware of the need for goals which were at once aspirational and practical in order to effect meaningful and lasting change in law, policy, and societal practice.<sup>32</sup> The international community used this awareness, gained from the MDGs, to create goals and targets for States and the international community which recognize the complexity and interconnectedness of the vital issues identified for achievement or termination. In particular, one of the linkages consistently emphasized in the SDGs is that between sustainable development and many aspects of trade and economic development. Of the 17 SDGs and over 150 targets, it is not an exaggeration to say that a significant number either overtly or covertly recognize these connections and seek to move forward on them.<sup>33</sup>

Several of the SDGs have an obvious connection with issues relating to trade and economic policies that are potentially involved in the WTO's decision-making. SDG 1, "[e]nd poverty in all its forms everywhere," has clear ideological connections to the WTO's laws and policies;<sup>34</sup> as does target 1.3, focusing on national activities to set minimum requirements that will protect impoverished and vulnerable members of society;<sup>35</sup> target 1.4, focusing on access to land and natural resources;<sup>36</sup> and target 1.5, focusing on mitigating and preventing impacts of climate change on vulnerable members of society.<sup>37</sup>

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<sup>31</sup> *Ibid.* See also United Nations Development Programme, "Sustainable Development Goals" (last visited 2 August 2019), online: *UNDP* <[www.undp.org/content/undp/en/home/sustainable-development-goals.html](http://www.undp.org/content/undp/en/home/sustainable-development-goals.html)> [perma.cc/W5JL-RM65].

<sup>32</sup> *Transforming our World: the 2030 Agenda for Sustainable Development*, GA Res 70/1, UNGAOR, 70th Sess, Agenda Items 15 and 116, UN Doc A/RES/70/1 (2015) at 6, 13, online (pdf): <[www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E)> [perma.cc/GWD4-VHHM] [UN, *2030 Agenda*].

<sup>33</sup> See *ibid.*

<sup>34</sup> *Ibid.* at 15. As is explained by the United Nations, "Goal 1 calls for an end to poverty in all its manifestations by 2030. It also aims to ensure social protection for the poor and vulnerable, increase access to basic services and support people harmed by climate-related extreme events and other economic, social and environmental shocks and disasters" ("The SDG Accord – Goal 1 – No poverty" (last visited 2 August 2019), online: *EAUC Sustainability Exchange* <[www.sustainabilityexchange.ac.uk/goal\\_1\\_end\\_poverty\\_in\\_all\\_its\\_forms\\_everywhere](http://www.sustainabilityexchange.ac.uk/goal_1_end_poverty_in_all_its_forms_everywhere)> [perma.cc/MV4G-9D7H]). See "Progress of Goal 1 in 2019" (last visited 2 August 2019), online: *UN Division on Sustainable Development* <[sustainabledevelopment.un.org/sdg1](http://sustainabledevelopment.un.org/sdg1)> [perma.cc/4HT2-LXK7].

<sup>35</sup> UN, *2030 Agenda*, *supra* note 32 at 15 ("Implement nationally appropriate social protection systems and measures for all, including floors, and by 2030 achieve substantial coverage of the poor and the vulnerable").

<sup>36</sup> *Ibid.* ("By 2030, ensure that all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance").

<sup>37</sup> *Ibid.* ("By 2030, build the resilience of the poor and those in vulnerable situations and reduce their exposure and vulnerability to climate-related extreme events and other economic, social and environmental shocks

Further, SDG 8, “[p]romote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all,” focuses on all aspects of business, labour and economic growth concerns.<sup>38</sup> It highlights the particular importance of this to vulnerable and traditionally marginalized communities as well as the protection of certain groups from working in conditions that are unhealthy or illegal, such as those associated with human trafficking.<sup>39</sup> SDG 8 also endorses an aid measure, the WTO’s Aid for Trade program, in order to assist developing Member States in achieving their responsibilities for 2030.<sup>40</sup> In order to achieve each of the SDGs, and many other legal and societal requirements for States regardless of their development status (or membership in the WTO), it is necessary to have a reliable infrastructural system in place. With this in mind, SDG 9, “[b]uild resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation,” seeks a balance in requirements for States between advancements and empowerment of society and protection of the environment, particularly against climate change and associated issues.<sup>41</sup>

At the same time, many facets of the SDGs and their targets fall within avenues that might seem tangential to the legal and policy concerns of the WTO decision-making system, yet, in fact, have the potential to generate some of the greatest contouring of it. For instance, SDG 3, “[e]nsure healthy lives and promote well-being for all at all ages,” makes a general connection to the concept of public health exceptions and allowances for deviation from WTO laws and rules, as enshrined in *GATT*.<sup>42</sup> As discussed below, health has become a key element in the findings and determinations of the WTO DSB panels since the SDGs came into effect in 2015. Energy policy is an essential area for both economic and social growth, and the implementation of sustainable development. With this in mind, SDG 7 is intended to “[e]nsure access to affordable, reliable, sustainable and modern energy for all,” particularly focusing on the encouragement and development of renewable energy industries and resources in States across the spectrum of development statuses.<sup>43</sup> This can be linked to SDG 11, “[m]ake cities and human settlements inclusive, safe, resilient and sustainable,” in that it relates to the provision of energy and other key aspects of infrastructure and growth.<sup>44</sup>

Further, in focusing on methods and mechanisms for reducing inequalities that exist between States—particularly least developed States—SDG 10 provides valuable space for the implementation of taxation and other systems that seek to assist in market access and inclusion.<sup>45</sup> Included in SDG 10—and notably target 10.6—is the requirement that developing and least developed States have the opportunity to express their views and needs in international

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and disasters”).

<sup>38</sup> *Ibid* at 19.

<sup>39</sup> See *ibid* at 19–20.

<sup>40</sup> *Ibid* at 20 (“Increase Aid for Trade support for developing countries, in particular least developed countries, including through the Enhanced Integrated Framework for Trade-Related Technical Assistance to Least Developed Countries”).

<sup>41</sup> *Ibid*.

<sup>42</sup> *Ibid* at 16; *GATT* 1947, *supra* note 1, arts XX–XXI.

<sup>43</sup> UN, *2030 Agenda*, *supra* note 32 at 19.

<sup>44</sup> *Ibid* at 21.

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

financial forums and organizations.<sup>46</sup> Particular emphasis is placed on this requirement in the context of the WTO and its policies.<sup>47</sup>

As discussed below, food is an issue occupying the attention of the DSB. In this regard, SDG 2, “[e]nd hunger, achieve food security and improved nutrition and promote sustainable agriculture,” is of importance.<sup>48</sup> Within SDG 2, target 2.4 is particularly insightful, as it relates to the promotion of food security and associated agricultural protection and promotion, in addition to providing for methods of strengthening resilience in the face of climate change and adapting to disasters of all forms.<sup>49</sup>

Overall, the themes of equality of access and opportunity for vulnerable communities, men and women, and indigenous peoples to economic and market development policies and strategies, amongst others, are important elements of the SDGs.<sup>50</sup> Additionally, the focus on environmental concerns permeates the SDGs in ways that implicate economic development, trade strategy, and business growth policies, as well as environmental law *per se*.<sup>51</sup> This is particularly notable in the context of issues relating to the regulation of oceans, which have already come to the attention of the WTO.<sup>52</sup> It is also notable in terms of SDG 13 on climate change, which encourages the development of States’ ability to undertake adaptive and resilience-based strategies to mitigate and prevent environmental damage and climate change.<sup>53</sup>

Finally, it must be highlighted that SDG 16, “[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels,” is essential because it relates to conflict and post-conflict situations in which the rule of law is seen as a tool for crafting lasting and durable national and international solutions.<sup>54</sup> Given the many intersections between economic and trade concerns and the implementation of post-conflict laws—for example, in the context of natural resource control and exploitation policy—this is an important SDG that demonstrates the potential impact of trade policy on the durability of peace.

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<sup>46</sup> *Ibid* (“Ensure enhanced representation and voice for developing countries in decision-making in global international economic and financial institutions in order to deliver more effective, credible, accountable and legitimate institutions”).

<sup>47</sup> *Ibid* (“Implement the principle of special and differential treatment for developing countries, in particular least developed countries, in accordance with World Trade Organization agreements”).

<sup>48</sup> *Ibid* at 15.

<sup>49</sup> *Ibid* (“By 2030, ensure sustainable food production systems and implement resilient agricultural practices that increase productivity and production, that help maintain ecosystems, that strengthen capacity for adaptation to climate change, extreme weather, drought, flooding and other disasters and that progressively improve land and soil quality”).

<sup>50</sup> See UN, *2030 Agenda*, *supra* note 32.

<sup>51</sup> See *ibid*.

<sup>52</sup> *Ibid* at 23–24.

<sup>53</sup> See *ibid* at 23. See especially *ibid*, target 13.1 (“Strengthen resilience and adaptive capacity to climate-related hazards and natural disasters in all countries”).

<sup>54</sup> *Ibid* at 25. See especially *ibid*, target 16.3 (“Promote the rule of law at the national and international levels and ensure equal access to justice for all”).



#### 4. RECENT WTO DECISIONS AND RELATIONSHIP TO THE SDGS

Since the SDGs came into effect in 2015, the WTO DSB has seen a number of complaints concluded and commenced, including cases commenced prior to 2015 that, nevertheless, were decided afterward and in an environment increasingly aware of the impacts of the SDGs. These cases include complaints touching on issues that are of direct importance to sustainable development and the SDGs, such as green energy policy and mining extraction. At the time of writing, there were pending complaints filed as recently as 2017 that relate to matters that are implicated by the SDGs and which implicate the SDGs.

The below review of relevant decisions and cases yet to be decided is offered to demonstrate the ways in which the DSB has acted in relation to topics that will have continued impact in the future. The discussion is centered on topics in which there are clusters of complaint and review focus related to the SDGs, and particularly those areas that are innovative in terms of topic and analysis. One of the underlying assertions of this article is that innovation in the DSB's analysis and the DSB's view of its jurisdictional capacity is essential to the development of future decision-making processes that include the SDGs.

##### 4.1. NATIONAL DEVELOPMENT POLICIES

While compliance with WTO laws and rules is an essential element of the DSB's rulings, the DSB itself has demonstrated increasing flexibility toward developing States when there is a practice that is on the margins of acceptability but is meant to function as part of a national development policy scheme. For example, in *Brazil—Certain Measures Concerning Taxation and Charges*, the WTO allowed certain contested taxation and subsidy activities that are on the margins of legality, noting “the SCM Agreement leaves policy space for WTO Members – particularly developing Members – to devise WTO-consistent programmes to grant subsidies exclusively to their domestic producers, to foster, through those subsidies, the development of their industries and to pursue other policy goals.”<sup>55</sup>

From a technical perspective, this decision perhaps most clearly implicates SDG 10,<sup>56</sup> as national development policies are, at their core, methods used by States to reduce inequalities and promote more sustainable societies. This finding, of course, must be tempered by the need of a Member State to function within WTO treaty commitments—and their exceptions—rather than working outside this framework.<sup>57</sup> In this way, the *Brazil* decision can be seen as supporting the tenets of SDG 10 while also ensuring that the terms of SDG 17 regarding the implementation of international law and legal requirements are respected and enforced.<sup>58</sup>

<sup>55</sup> *Brazil—Certain Measures Concerning Taxation and Charges (Complaint by the European Union and Japan)* (2017), WTO Doc WT/DS472/R at para 7.507 (Panel Report), online (pdf): WTO <[docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDDocuments/238459/q/WT/DS/472R.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDDocuments/238459/q/WT/DS/472R.pdf)> [perma.cc/2XNZ-2K3X] [*Brazil—Certain Measures*].

<sup>56</sup> UN, *2030 Agenda*, *supra* note 32 at 21.

<sup>57</sup> *Brazil—Certain Measures*, *supra* note 55 at paras 7.505–7.506.

<sup>58</sup> UN, *2030 Agenda*, *supra* note 32 at 26–27.

The terms of the Brazilian national development programme in this instance support SDG 1 on ending poverty,<sup>59</sup> and SDG 8 on seeking to ensure decent work and working conditions,<sup>60</sup> as well as promoting economic growth. In recognizing the validity of programmes such as those used by Brazil, the DSB opened a pathway for developing Member States to use the SDGs to construct national development programmes which allow States to function as compliant and engaged members of the international trade community while at the same time serving the needs and interests of their own domestic communities. Further, the decision directly impacts on and reflects SDG 9 since it relates to the development of key industries in States that are seeking to improve their development status and economic capacities.<sup>61</sup>

#### 4.2. HEALTH PROTECTION INVOCATION

Climate change and measures implemented ostensibly to counteract it have met with support from WTO DSB panels as public health justifications which allow for otherwise prohibited Member State conduct, provided these measures do, in fact, further the cause they claim to advance.<sup>62</sup> In making determinations as to the appropriateness of a measure under the public health exception, the DSB has established that the panels must assess how these intentions are expressed, as well as factors such as “the text of relevant legal instruments, the legislative history and evidence available on the record with respect to the design, structure and application of the challenged measure.”<sup>63</sup> As demonstrated in the *Brazil—Certain Measures* complaint, the DSB does not require that there be a high degree of certainty regarding the impacts of the measures in actuality, provided they are capable of meeting the functions specified.<sup>64</sup> In this context, necessity is critical to demonstrate as well.<sup>65</sup>

When establishing necessity, the WTO panels have relied on the findings of international organizations, particularly the World Health Organization, in order to ascertain the reasonable connection between the disputed measures and the asserted health concerns or health policy needs.<sup>66</sup> Even given this favourable standard, however, a Member State defending a measure is still required to provide qualitative or quantitative evidence to support the assertion of a valid link to public health protection and advancement in order for the DSB to uphold the measure as being in compliance with article XX.<sup>67</sup>

Following a well-known chain of natural disasters, the Fukushima Daiichi Nuclear Power Plant facility in Japan experienced a meltdown in 2011, resulting in massive environmental damage to the region and to the ocean near where the plant was located.<sup>68</sup> As was seen in

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<sup>59</sup> *Ibid* at 15.

<sup>60</sup> *Ibid* at 19–20.

<sup>61</sup> *Ibid* at 20–21.

<sup>62</sup> *Brazil—Certain Measures*, *supra* note 55 at paras 7.879–7.881.

<sup>63</sup> *Ibid* at para 7.884.

<sup>64</sup> *Ibid* at para 7.905.

<sup>65</sup> *Ibid* at para 7.906.

<sup>66</sup> *Ibid* at para 7.912.

<sup>67</sup> *Ibid* at paras 7.920–7.921.

<sup>68</sup> *Korea—Import Bans, and Testing and Certification Requirements for Radionuclides (Complaint by Japan)* (2018), WTO Doc WT/DS495/R at para 2.41 (Panel Report), online (pdf): <docs.wto.org/dol2fe/Pages/

previous nuclear disasters, such as the Chernobyl meltdown in Ukraine, the area immediately surrounding the Fukushima plant suffered immense ecological damage and will continue to for years to come. Based on the location of the nuclear plant, the damage extended further, however, and impacted marine life, including that destined to become seafood harvested in Japan and across the Pacific.<sup>69</sup> It also impacted agricultural products of the region, as certain forms of isotopes released can be transmitted through the air and into the soil and groundwater, harming crops and livestock.<sup>70</sup>

As a result, some States, including WTO Member States, began to implement restrictions on the sale of Japanese products that could have been contaminated by the nuclear fallout, as well as certain forms of fish and fish from Japanese waters. For example, in order for agricultural products from Japanese sources to be allowed on the market in the Republic of Korea, the Korean government has imposed a stringent series of tests for radionuclides.<sup>71</sup> Further, the Korean government has begun to require certificate of origin schemes for Japanese products and imposed blanket bans on selected Japanese products at different times.<sup>72</sup> These tests and certificates formed the basis for Japan's complaint in *Korea—Import Bans, and Testing and Certification Requirements for Radionuclides*.<sup>73</sup> The Panel undertook an extensive evaluation of the application of the terms of the *Agreement on the Application of Sanitary and Phytosanitary Measures*<sup>74</sup> in an attempt to balance the treaty terms with the interests of States in protecting their citizens from drastic harms such as those implicated in radioactive situations. Throughout the Panel's decision, it emphasized that the ability to determine what is appropriate in terms of regulation and risk assessment is dependent on information available at the time and can be viewed as a sliding scale.<sup>75</sup> It also noted that these assessments may change over time as new and more complete information becomes available.<sup>76</sup> At the same time, overly broad protective measures, such as the blanket bans utilized by the Republic of Korea at various points in time, were found to be discriminatory and in violation of WTO law. Taken to extreme levels,

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FE\_Search/DDFDocuments/243350/q/WT/DS/495R.pdf> [perma.cc/LSR9-Z26V] [*Korea—Import Bans*]. See also “FAQs: Fukushima Five Years On” (last visited 11 August 2019), online: WHO <www.who.int/ionizing\_radiation/a\_e/fukushima/faqs-fukushima/en/> [perma.cc/4PQ3-DRCM]; *Levels and Effects of Radiation Exposure Due to the Nuclear Accident after the 2011 Great East-Japan Earthquake and Tsunami*, UNSCEAR, 68th Sess, Annex A, UN Doc A/68/46/Corr.1 (2013) at paras 1–2, online (pdf): UNSCEAR <www.unscear.org/docs/publications/2013/UNSCEAR\_2013\_Report\_Vol.I.pdf> [perma.cc/4WKD-W6W8] [UNSCEAR, *Levels and Effects*].

<sup>69</sup> UNSCEAR, *Levels and Effects*, *supra* note 68 at para 33; See also World Health Organization & Food and Agriculture Organization, “Impact on seafood safety of the nuclear accident in Japan” (2011), online (pdf): WHO <www.who.int/foodsafety/impact\_seafood\_safety\_nuclear\_accident\_japan\_090511.pdf> [perma.cc/E793-ZE56].

<sup>70</sup> *Korea—Import Bans*, *supra* note 68 at para 2.5. See also UNSCEAR, *Levels and Effects*, *supra* note 68 at paras 40, 100–01.

<sup>71</sup> *Korea—Import Bans*, *supra* note 68 at para 2.87.

<sup>72</sup> *Ibid* at paras 2.88, 2.93.

<sup>73</sup> *Ibid* at paras 1.1–1.2.

<sup>74</sup> 15 April 1994, 1867 UNTS 493 (Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization*, entered into force 1 January 1995).

<sup>75</sup> *Korea—Import Bans*, *supra* note 68 at paras 6.18, 7.3, 7.4, 7.175.

<sup>76</sup> *Ibid* at para 7.226.

the Panel found that certain of these trade restrictions were disguised attempts at restricting international trade.<sup>77</sup>

Notably, the Panel allowed the introduction of information and advice from international organizations having specific areas of expertise to be included in its deliberations. These organizations included the International Atomic Energy Agency, the Food and Agriculture Organization (FAO), and the World Health Organization.<sup>78</sup> This was reflected in the Panel embracing the FAO's Codex guides and procedures for risk assessment in the food context.<sup>79</sup> The Panel's inclusion of these forms of information demonstrates the ways in which the WTO is willing to work with and recognize the expertise of other organizations rather than confining itself to the realm of trade policy.

Additionally, health concerns will be at the heart of the recently filed *United States—Certain Measures Concerning Pangasius Seafood Products from Viet Nam*, in which China is a concerned party.<sup>80</sup> In this instance, Vietnam has alleged a number of violations of WTO law in relation to the United States' importation restrictions on certain species of catfish.<sup>81</sup> While responses have yet to be filed by the United States, prior justifications for the measures focus on the potential for health damage from pangasius stemming from contamination from polluted waters.<sup>82</sup>

#### 4.3. PUBLIC MORALS INVOCATION

WTO law and WTO DSB rulings have recognized the place of protecting and preserving public morals as a legitimate policy objective to justify measures that might deviate from standards where there is a direct connection between the asserted aim and the actions taken.<sup>83</sup> Within this context, the necessity of the measures taken to preserve public morals is scrutinized by the DSB panels and appellate panels, involving a "process of 'weighing and balancing' a series of factors, including the importance of the objective, the contribution of the measure

<sup>77</sup> *Ibid* at para 8.2.

<sup>78</sup> *Ibid* at paras 1.19–1.20.

<sup>79</sup> *Ibid* at para 2.22.

<sup>80</sup> (*Complaint by Viet Nam*) (2018), WTO Doc WT/DS540/1 (Request for Consultations), online (pdf): [WTO <docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/243442/q/WT/DS/540-1.pdf>](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/243442/q/WT/DS/540-1.pdf) [perma.cc/CJB9-VAL7] [*United States—Certain Measures*]; *United States—Certain Measures Concerning Pangasius Seafood Products from Viet Nam (Complaint by China)* (2018), WTO Doc WT/DS540/2 (Request to Join Consultations), online (pdf): [WTO <docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/243646/q/WT/DS/540-2.pdf>](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/243646/q/WT/DS/540-2.pdf) [perma.cc/WY2T-S87W].

<sup>81</sup> *United States—Certain Measures*, *supra* note 80 at 1.

<sup>82</sup> *Ibid*. For a discussion of other potential health issues with trade implications, see Julien Chaisse, "Exploring the Confines of International Investment and Domestic Health Protections: Is a General Exceptions Clause a Forced Perspective?" (2013) 39:2/3 Am J L & Med 332.

<sup>83</sup> See Luan Xinjie and Julien Chaisse, "The WTO Seals Products Dispute: Traditional Hunting, Public Morals and Technical Barriers to Trade" (2011) 22:1 Colo J Intl Envtl L & Pol'y 79 at 109–11; Paola Conconi and Tania Voonec, "Seal Products: The Tension between Public Morals and International Trade Agreements" (2016) 15:2 World Trade Rev 211; *Brazil—Certain Measures*, *supra* note 55.

to that objective, and the trade-restrictiveness of the measure ... in most cases, a comparison between the challenged measure and possible alternatives should be undertaken.”<sup>84</sup>

In application, the public morals analysis conducted by the DSB in recent years has grown to include discussion and weighing of the MDGs, UNESCO policy documents and findings, and other internationally generated and accepted standards and findings in support of measures taken by various States. For example, in *Brazil—Certain Measures*, the panel accepted reports relating to the MDGs and their targets in support of Brazil’s imposition of certain taxation and subsidy activities.<sup>85</sup> In the Brazil complaint, the DSB panel further noted that it has become accepted wisdom that Member States must enact measures relating to the needs of its society at a given time and that these needs may change over time as well.<sup>86</sup> In this instance, Brazil argued that measures taken to close the “digital divide” in the State, to which issues in development were attributed, fell under this allowance.<sup>87</sup> Not only must a Member State claiming public morals as a justification demonstrate necessity, it must also demonstrate that the measures taken have the capacity to assist in the achievement of the public morality explanation that it claims to further.<sup>88</sup>

#### 4.4. ROLE OF LOCAL RULES AND STANDARDS

Increasingly, subnational units of government—such as provinces or states—are claiming a powerful role in regulating products and practices that impact on international trade. In these situations, the justifications proffered tend to focus on issues of public health and morals as well as regulation of the environment and imposition of more stringent environmental standards than those used at the national level.<sup>89</sup> This has been particularly evident in the complaints regarding energy policy and wine and spirits—the former highly dependent on the specific needs of local communities and the latter dependent on the moral beliefs and commercial interests of a local area—discussed below.

Energy policy is an area in which each state-level government within the United States is provided latitude to generate a number of policy innovations as long as these measures meet certain basic, national requirements. Many state governments utilize this ability to craft policies that are restrictive and nuanced, and, as a result, WTO Member States have begun to complain regarding the ways in which these policies are applied to international effect. For example, in *United States—Certain Measures Relating to the Renewable Energy Sector*, India complained of the restrictions and requirements imposed by state-level governments on actors seeking to enter their renewable energy markets, particularly by the State of Washington, State of California, State of Montana, State of Massachusetts, State of Connecticut, State of

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<sup>84</sup> *Brazil—Certain Measures*, *supra* note 55 at 7.524.

<sup>85</sup> See *ibid.*

<sup>86</sup> *Ibid* at para 7.565.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid* at para 7.583.

<sup>89</sup> See e.g. *United States—Certain Measures Relating to the Renewable Energy Sector (Complaint by India)* (2016), WTO Doc WT/DS510/1 (Request for Consultations), online (pdf): WTO <[docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/231235/q/WT/DS/510-1.pdf](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/231235/q/WT/DS/510-1.pdf)> [perma.cc/6YQS-ERR7].

Michigan, State of Delaware, and State of Minnesota.<sup>90</sup> In addition, India challenged certain requirements imposed by the City of Los Angeles, California.<sup>91</sup>

Japan and the European Union commenced formal DSB complaint proceedings against Canada in 2010 regarding the various forms of feed-in-tariffs and other green energy incentives used by the Canadian province of Ontario.<sup>92</sup> These allegations centred on discrimination in the application of a number of feed-in-tariff programs in terms of preference for domestic suppliers of goods and less favourable treatment for Japanese and European Union products as a result.<sup>93</sup> Therefore, the feed-in-tariff measures, in practice, constituted investment regimes in which there was discrimination contrary to WTO law.<sup>94</sup> Throughout each of the laws and policies challenged, the main contentions of violation focused around the requirement—common to each instrument—regarding “minimum required domestic content levels” for products used in the feed-in-tariff systems in Ontario.<sup>95</sup> It should be noted from the outset that the challenges were explicitly not brought against Ontario’s efforts to reduce carbon emissions from the energy sector and promote green energy as a policy choice.<sup>96</sup> Additionally, the Panel noted that, in general, energy is a special form of commodity which has a particular set of regulatory and practical requirements that must be borne in mind when applying and interpreting WTO laws.<sup>97</sup> It also noted that energy is a uniquely public and private commodity that is subject to certain regulations and market forces as well, requiring a balancing of these realities during any evaluation of their appropriateness.

Interestingly, and perhaps tellingly, the Panel in this complaint took extreme care to explain and review the actions of the province at each step of the energy regulation process. In this way, it inserted itself into the oversight and governance structure that is applicable to sub-units of States and did not limit itself to commenting on how these actions are regulated by the larger State itself.<sup>98</sup> This provides a space in which the provisions of SDG 7 and associated targets and indicators can function.<sup>99</sup>

Wine and spirits constitute industries that are subject to much regulation at the domestic level, and, often, the justification for these regulations is based in public health and morality constructs. However, wine and spirits also constitute areas in which there have been and

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<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*

<sup>92</sup> *Canada—Certain Measures Affecting the Renewable Energy Generation Sector (Complaint by Japan and the European Union)* (2012), WTO Doc WT/DS412/R at para 1.1 (Panel Report), online (pdf): [WTO <docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/113961/q/WT/DS/412R.pdf>](http://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/113961/q/WT/DS/412R.pdf) [perma.cc/63FX-PVEA].

<sup>93</sup> *Ibid* at paras 3.1, 3.4.

<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid* at para 7.6.

<sup>96</sup> *Ibid* at para 7.7.

<sup>97</sup> *Ibid* at para 7.279.

<sup>98</sup> For example, in discussing legislative intent behind certain provisions of the contested laws, the Panel specifically states: “In our view, these documents leave no doubt that the challenged measures are perceived by the Government of Ontario, and others in Ontario, as governmental activity that involves the procurement or purchase of electricity” (*ibid* at para 7.242).

<sup>99</sup> UN, *2030 Agenda*, *supra* note 32 at 19.

continue to be international trade disputes, most often based on allegations of discriminatory conduct at the sub-national level. In the 2016 *Colombia—Measures Concerning Imported Spirits* complaint, the European Union asserted that certain regulatory activities undertaken by particular regions in Colombia violate WTO law.<sup>100</sup> While these laws involve taxation based on alcoholic volume rather than place of origin, the EU argued that, because Colombia largely produces two forms of spirits, the law is discriminatory in practice since it applies in majority to foreign-produced spirits.<sup>101</sup> Additionally, the EU asserted that the screening process required of foreign producers prior to obtaining a license to sell spirits in the State is so onerous as to violate WTO law, and that foreign spirits are subject to discriminatory limitations on advertising in Colombia.<sup>102</sup> When a decision is made in this complaint, it will necessarily address issues of public health concerns as allowable regulatory exceptions to the international trade law system, implicating SDG 3 on health generally, and particularly target 3.5.<sup>103</sup>

As part of the complaint in *Canada—Measures Governing the Sale of Wine*, begun by Australia in January 2018, these issues have also been illuminated in the context of provincial regulation of wine and locations for its sale, regulation that allegedly results in preferential treatment for Canadian wine products.<sup>104</sup> While the Canadian response has yet to be received, the legislative policy for such regulations is centered in public health and morality justifications.<sup>105</sup> The same considerations regarding the balance between public health concerns and international trade law in the context of regulating a substance that is linked to its abuse and other societal ills, as discussed in *Colombia—Measures Concerning Imported Spirits*,<sup>106</sup> will likely be addressed by the DSB in this complaint as well.

#### 4.5. UTILIZATION OF NATURAL RESOURCES AND ENERGY

In 2012, a series of related complaints were filed at the DSB against China by the United States, the European Union, and Japan regarding exportation restrictions and associated issues relating to three specific forms of minerals—rare earths, tungsten and molybdenum—in either their natural or processed states.<sup>107</sup> Specifically, the complaint related to export duties and export quotas that were found throughout a number of different statutory systems, as well as

<sup>100</sup> *Colombia—Measures Concerning Imported Spirits (Complaint by the European Union)* (2016), WTO Doc WT/DS502/1 (Request for Consultations), online (pdf): WTO <docs.wto.org/dol2fe/Pages/FE\_Search/DDFDocuments/226264/q/WT/DS/502-1.pdf> [perma.cc/T39U-D5PR].

<sup>101</sup> *Ibid* at 1–2.

<sup>102</sup> *Ibid* at 2–3.

<sup>103</sup> UN, *2030 Agenda*, *supra* note 32 at 16.

<sup>104</sup> *Canada—Measures Governing the Sale of Wine (Complaint by Australia)* (2018), WTO Doc WT/DS537/1 (Request for Consultations), online (pdf): WTO <docs.wto.org/dol2fe/Pages/FE\_Search/DDFDocuments/241585/q/WT/DS/537-1.pdf> [perma.cc/5QNR-J2T9].

<sup>105</sup> *Ibid*.

<sup>106</sup> *Supra* note 100.

<sup>107</sup> *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum (Complaint by the United States, the European Union, and Japan)* (2014), WTO Doc WT/DS431/R at para 2.2 (Panel Report), online (pdf): WTO <docs.wto.org/dol2fe/Pages/FE\_Search/DDFDocuments/123565/q/WT/DS/431R.pdf> [perma.cc/73G4-LP96] [*China—Rare Earths*]. For a definition of “rare earths”, see *ibid* at para 2.3.

licensing requirements for the export of the targeted minerals.<sup>108</sup> The complaint challenged not only the existence of these regulations and restrictions but also the methods through which they were applied in practice.<sup>109</sup>

In response, one of China's key assertions was that it was justified in placing these restrictions on the impacted minerals since they were meant to serve an environmentally protective function that would fall within the ambit of the *GATT* exceptions.<sup>110</sup> The Panel agreed that, if the measures were indeed meant for this purpose and were the least restrictive methods available to provide these protections they would fall under the rubric of *GATT* exceptions.<sup>111</sup> Indeed, the Panel recognized environmental protection, the protection of health, and the protection of life as extremely important State functions when framed appropriately.<sup>112</sup> However, the Panel found in this dispute that the measures at issue were not the least restrictive available to protect the environment.<sup>113</sup> In essence, what was missing was an established, articulable nexus between the export restrictions put in place by the Chinese government and the environmental and health damage it was purportedly seeking to rectify and prevent.<sup>114</sup> Significantly, the Panel found that the inclusion of statements connecting these measures with policies on environment and sustainable development was insufficient to establish the nexus without a factual basis for these assertions.<sup>115</sup>

Importantly, the Panel found and acknowledged that the mining processes associated with the minerals in question could, and indeed had, caused environmental damage in China that, in turn, resulted in threats to the health of humans and other forms of life.<sup>116</sup> This finding was substantiated by the parties themselves, and by official governmental sources submitted by the parties that discussed the mining process in general, the environmental and health issues that could occur as a result, and the harms suffered in the Chinese context.<sup>117</sup>

Within the scope of the allowable *GATT* exceptions, the Panel was also called on to address the issue of how to define "exhaustible natural resources" that justify additional conservation measures. It noted that certain, specific entities had been designated as exhaustible natural resources—for example, sea turtles; however, the precise bright line at which such a designation would become overly broad and inhibit the application of WTO laws is not established.<sup>118</sup> In this instance, the Panel decided against establishing a bright line rule and instead noted that

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<sup>108</sup> See *China—Rare Earths*, *supra* note 107.

<sup>109</sup> *Ibid* at paras 2.8–2.16.

<sup>110</sup> *Ibid* at paras 7.31, 7.157.

<sup>111</sup> *Ibid* at para 7.114 (providing that "an interpretation of the covered agreements that resulted in sovereign States being legally prevented from taking measures that are necessary to protect the environment or human, animal or plant life or health would likely be inconsistent with the object and purpose of the WTO Agreement").

<sup>112</sup> *Ibid* at para 7.117.

<sup>113</sup> *Ibid* at para 7.114.

<sup>114</sup> *Ibid* at paras 7.159–7.160.

<sup>115</sup> *Ibid* at paras 7.167–7.168.

<sup>116</sup> *Ibid* at para 7.150.

<sup>117</sup> *Ibid* at paras 7.149–7.156.

<sup>118</sup> *Ibid* at paras 7.248–7.250.



“measures may ‘relate to the conservation of exhaustible natural resources’ even if they are not directly imposed on those resources ... provided that they support or contribute to the conservation of an exhaustible natural resource.”<sup>119</sup> This was applied to explain that measures that would fall into this category do not necessarily extend only to raw natural resources.<sup>120</sup>

Similar caution regarding the crafting of a bright line definition for terms relating to natural resource exceptions was used by the Panel in handling the question of how to define measures “relating to” conservation.<sup>121</sup> When discussing the relationship between conservation and the *GATT* exceptions, the Panel noted that conservation was inherent in the focus of *GATT* on sustainable development; however, it could not be invoked to violate *GATT* obligations without additional justification.<sup>122</sup>

As part of the package of challenged activities, the complainants asserted that export restrictions on the targeted minerals were in violation of *GATT*. The Panel scrutinized the Chinese arguments that these measures were meant to prevent and detect illegal mining and production of the minerals at issue.<sup>123</sup> It agreed that this was a legitimate State concern—one that was connected to the conservation aspects of the *GATT* exceptions—and was willing to accept the use of heightened border controls and shipment checks.<sup>124</sup> It was not, however, able to endorse the measures complained of because it found that China had not established a nexus between restrictions on legally mined and produced minerals and the prevention and detection of illegally mined and produced minerals.<sup>125</sup>

In 2016, the European Union filed the *China—Duties and Other Measures Concerning the Exportation of Certain Raw Materials* complaint. Unlike previous complaints, this specifically involves minerals that are not rare earth, such as copper, cobalt, and graphite.<sup>126</sup> The complaint alleges that China imposes restrictions on the quantity of these minerals exported and also imposes illegal export taxes on these minerals when they are allowed to leave the State.<sup>127</sup> Additionally, the complaint alleges that foreign traders and investors in these minerals face restrictions that are in contravention of WTO law and that there are illegal licensing restrictions on these entities.<sup>128</sup> Despite the differences in minerals covered under the complaint, unless

<sup>119</sup> *Ibid* at para 7.250.

<sup>120</sup> *Ibid*.

<sup>121</sup> *Ibid* at paras 7.279–7.290.

<sup>122</sup> *Ibid* at para 7.261.

<sup>123</sup> *Ibid* at para 7.424.

<sup>124</sup> *Ibid*.

<sup>125</sup> *Ibid* at para 7.425.

<sup>126</sup> *China—Duties and Other Measures Concerning the Exportation of Certain Raw Materials (Complaint by the European Union)* (2016), WTO Doc WT/DS509/1 (Request for Consultations), online (pdf): [WTO <docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDdocuments/230167/q/WT/DS/509-1.pdf>](http://docs.wto.org/dol2fe/Pages/FE_Search/DDFDdocuments/230167/q/WT/DS/509-1.pdf) [perma.cc/J67H-CHUV].

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid*. For additional perspectives on these forms of issues, see Glenn M Weiser, “The Clean Development Mechanism Versus the World Trade Organization: Can Free-Market Greenhouse Gas Emissions Abatement Survive Free Trade?” (1998–99) 11 *Geo Intl Envtl L Rev* 531 at 531, 553–55, 583–85.

the Chinese responses contain additional supports or have evidence which cures the defects identified in *China—Rare Earths*,<sup>129</sup> it is likely that the outcome will be the same.

#### 4.6. EXTENSIONS OF CONFLICTS AND EMERGENCIES

Traditionally, conflicts and emergencies have been the concern of entities such as the UN Security Council, UN General Assembly, WHO, or regional organizations which specialize in conflict prevention, deterrence and cessation, and emergency preparedness and response. However, as WTO membership has expanded and trade has become a key policy area for conflicts to manifest themselves in and which is impacted by emergency conditions, complaints involving these issues (and thereby SDG 16) have begun to emerge.

As an example, for more than a year, the majority of the Gulf States have been engaged in political—and frequently military—hostilities with Qatar. One of the notable ways in which this has manifested itself is in complaints by Qatar against both Saudi Arabia and Bahrain regarding measures that have been imposed by its neighbours to further its isolation.

In *Saudi Arabia—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, Qatar makes wide-ranging allegations regarding the imposition of written and unwritten laws and rules that ban and otherwise hinder the flow of Qatari goods and services within the territory of Saudi Arabia.<sup>130</sup> The harms alleged by Qatar include the inability of Qatari citizens to travel to or remain in Saudi Arabia for business purposes and, innovatively, damage to the rights of Qatari intellectual property owners whose property is used in or accessed by those in Saudi Arabia.<sup>131</sup> As an associated issue, Qatar asserts that certain Qatari websites have been blocked within the territory of Saudi Arabia in violation of WTO law.<sup>132</sup> In addition, Qatar alleges that the closure of all borders between Qatar and Saudi Arabia has resulted in further economic and trade-based losses.<sup>133</sup> In *Bahrain—Measures Relating to Trade in Goods and Services, and Trade-Related Aspects of Intellectual Property Rights*, Qatar makes similar claims, highlighting the potential for targeted attempts by multiple States to collectively impose measures that are objectionable under WTO law.<sup>134</sup>

In 2014, a brutal conflict between Ukraine and the Russian Federation began over territorial issues. While some of the contested territory has been addressed, the conflict is still ongoing and the ill will between the two States is equally potent. At the same time, State policy decisions, notably Ukraine's refusal to join the *Treaty on the Eurasian Economic Union* and overtures of interest in collaborating with the European Union, have further increased

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<sup>129</sup> *Supra* note 107.

<sup>130</sup> (*Complaint by Qatar*) (2017), WTO Doc WT/DS528/1 (Request for Consultations), online (pdf): [WTO <docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/238044/q/WT/DS/528-1.pdf>](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/238044/q/WT/DS/528-1.pdf) [perma.cc/BN76-Q3PR].

<sup>131</sup> *Ibid.*

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> (*Complaint by Qatar*) (2017), WTO Doc WT/527/1 (Request for Consultations), online (pdf): [WTO <docs.wto.org/dol2fe/Pages/FE\\_Search/DDFDocuments/238043/q/WT/DS/527-1.pdf>](https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/238043/q/WT/DS/527-1.pdf) [perma.cc/UC63-DHP3].

diplomatic and economic tensions between the States.<sup>135</sup> These sentiments have been expressed through violence and also through a number of laws in each State that are geared toward retaliation against—or self-protection from—the other.

The earliest of these complaints was brought in 2015 in *Russia—Measures Affecting the Importation of Railway Equipment and Parts Thereof*.<sup>136</sup> This was a more limited scope complaint, alleging that Ukraine was suffering harm as a result of Russian measures that imposed special safety and other requirements for Ukrainian products used in the railway industry.<sup>137</sup>

In 2017, a number of these measures appeared before the WTO DSB through mutual complaints. This process involved several linked complaints, *Russia—Measures Concerning the Importation and Transit of Certain Ukrainian Products*,<sup>138</sup> *Ukraine—Measures Relating to Trade in Goods and Services*,<sup>139</sup> and *Russia—Measures Concerning Traffic in Transit of Certain Ukrainian Products*.<sup>140</sup> In *Russia—Measures Concerning Importation*, Ukraine alleged that the Russian Federation imposed transit restrictions on a number of its products as retaliation, particularly for its decision regarding the Eurasian Economic Union and the European Union, and placed prohibitions on certain additional classes of products that originated in Ukraine.<sup>141</sup> Further to this, Ukraine claimed that these measures are not published or otherwise publicly available and that they are not consistently or transparently applied by border agents and others.<sup>142</sup> More expansive arguments regarding transit restrictions for Ukrainian goods and the impact thereof are alleged in *Russia—Measures Concerning Traffic*, which sets out the extensive tests goods must complete prior to being classified as non-Ukrainian, and allowed to travel through Russian territory.<sup>143</sup> The transit restrictions have been described as potentially crippling to the Ukrainian economy, as the State's essential trading partners are, by and large, most efficiently accessed by transit through Russian territory.<sup>144</sup>

In *Ukraine—Measures*, the Russian Federation challenged the imposition of an import ban on products from Russia into the territory of Ukraine as well as the alleged failure to

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<sup>135</sup> (*Complaint by Ukraine*) (2015), WTO Doc WT/DS499/1 (Request for Consultations), online (pdf): WTO <docs.wto.org/dol2fe/Pages/FE\_Search/DDFDocuments/135454/q/WT/DS/499-1.pdf> [perma.cc/3XK2-R9A5].

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> (*Complaint by Ukraine*) (2017), WTO Doc WT/DS532/1 (Request for Consultations), online (pdf): WTO <docs.wto.org/dol2fe/Pages/FE\_Search/DDFDocuments/239589/q/WT/DS/532-1.pdf> [perma.cc/A4B3-JUPV] [*Russia—Measures Concerning Importation*].

<sup>139</sup> (*Complaint by the Russian Federation*) (2017), WTO Doc WT/DS525/1 (Request for Consultations), online (pdf): WTO <docs.wto.org/dol2fe/Pages/FE\_Search/DDFDocuments/236627/q/WT/DS/525-1.pdf> [perma.cc/6EKD-EQSY] [*Ukraine—Measures*].

<sup>140</sup> (*Complaint by Ukraine*) (2016), WTO Doc WT/DS512/1 (Request for Consultations), online (pdf): WTO <docs.wto.org/dol2fe/Pages/FE\_Search/DDFDocuments/231300/q/WT/DS/512-1.pdf> [perma.cc/68CX-FZT4] [*Russia—Measures Concerning Traffic*].

<sup>141</sup> *Supra* note 138 at 1.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Supra* note 140.

<sup>144</sup> *Ibid.*

provide accessible information on the scope and content of the ban as applied.<sup>145</sup> Further to this, Russia contests the application of restrictions on individuals from Russia using or possessing economic interests in Ukraine.<sup>146</sup> Concomitantly, Russians have been barred from participating in the privatization of entities within Ukraine, regardless of the form or content of the participation.<sup>147</sup>

#### 4.7. IMMIGRATION

Immigration has become a contested and increasingly political topic at the national and international level, although such issues tend to focus on human rights and humanitarian law concerns. However, issues relating to immigration and the rights of immigrants—as well as the duties of States receiving them—are essential to the SDGs, found in everything from SDG 1 to 16. Indeed, the use of the WTO DSB as the site of contestation for issues regarding immigration is quite rare. However, in 2016 India changed this trend by bringing the *United States—Measures Concerning Non-Immigrant Visas* complaint.<sup>148</sup> In this complaint, India challenges the additional “fraud prevention and detection fees” required for applicants seeking certain work-related visas to the United States.<sup>149</sup> Further, it challenges the use of numerical quotas and other restrictions on those seeking work-related visas from specific States, such as India, and granting preferential treatment for citizens of other States in the same situation.<sup>150</sup>

On their own, these cases and trend areas represent important lessons for the future of the WTO, dispute settlement, and the valuation and application of the SDGs. Indeed, as the list of trend areas demonstrates, this relationship has deeply impacted the jurisprudence of the WTO DSB and will continue to do so. Taken together, these cases and trend areas demonstrate the ways in which concepts such as sustainable development, which had previously been viewed through the lens of environmental law, can become essential elements of mainstream jurisprudential findings.<sup>151</sup> At the WTO level, this allows for the opening up of trade concerns to the tenets of sustainable development and the SDGs in new and potentially unexpected ways.

## 5. CONCLUSION—IMPLICATIONS FOR THE FUTURE

This article centres on instances in which the WTO DSB has received or decided complaints since 2015 that have connections to the tenets enshrined in the SDGs. At present,

<sup>145</sup> *Ukraine—Measures*, *supra* note 139 at 1–2.

<sup>146</sup> *Ibid* at 6.

<sup>147</sup> *Ibid* at 5.

<sup>148</sup> (*Complaint by India*) (2016), WTO Doc WT/DS503/1 (Request for Consultations), online (pdf): [WT/DS/503-1.pdf](http://docs.wto.org/dol2fe/Pages/FE_Search/DDFDDocuments/227333/q/WT/DS/503-1.pdf) [perma.cc/PP5D-B4DZ].

<sup>149</sup> *Ibid* at 1.

<sup>150</sup> *Ibid* at 2–3.

<sup>151</sup> See e.g. Marie-Claire Cordonier Segger & HE Judge CG Weeramantry, eds, *Sustainable Development Principles in the Decisions of International Courts and Tribunals, 1992–2012* (New York: Routledge, 2017); Markus W Gehring, “Sustainable Development in World Trade Law: New Instruments” in Shi-Ling Hsu & Patrick A Molinari, eds, *Sustainable Development and the Law: People, Environment, Culture* (Montreal: CIAJ, 2008).

much international attention is focused on the impacts nationalistic tariffs and other trade restrictions may have on WTO law and practices. And, certainly, this is important as far as it goes; however, it only addresses what might be seen as an immediate concern.

Examining the ways in which emerging trends of analysis and framing at the WTO DSB level have been done and continue to be done in terms of guiding principles and frameworks such as the SDGs offers a more complex and illustrative mechanism for determining how the dispute settlement function has grown and the arguments which are likely to be successful before it in the future. As the SDGs become increasingly accepted on international, national, and even subnational levels, the DSB is likely to include the SDGs in its analysis on a more consistent basis, whether as the result of organic analysis or as the result of arguments asserted by the State Parties.

Thus far, the SDGs have been and are being incorporated into the DSB's findings at the Panel and Appellate Body levels in subtle ways, and indeed there is a certain delicacy to the policy of extending them to treaties crafted with economics, rather than environment, at their core. At the same time, the DSB has demonstrated its understanding of its role and function as being far more complex and sophisticated because international trade is, in itself, complex, carrying with it the potential to impact far more than economic law. Based on this, it can be extrapolated that the future will hold only more policies which may be intended for public health and safety goals but have an economic impact and vice versa. Similarly, it can be extrapolated that the WTO DSB will become the site of more numerous and more nuanced arguments over the ability of Member States to claim compliance with the SDGs and tenets of sustainable development without having dedicated themselves fully to them.