

Trade-Sustainable Development Relationship: The Role of WTO Adjudication in Interpreting and Operationalizing Sustainable Development

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As a preambular objective of the international trade regime, sustainable development (SD) has caused identifiable interpretative shifts in some post-WTO decisions. Yet, the shift has been negligible in situations where opposing or contesting rules, norms, or principles from other international regimes challenged the determination of boundaries between trade and trade-related rights. Depicting the incoherency in the judicial decisions, this article argues that trade-SD debate should not just focus on reorienting the adjudicatory task towards attending to SD issues, or borrowing rules, norms, or principles from other regimes, or measuring the level of adjudicators' expertise or the quality of their decisions. Rather, the focus should be on operationalizing SD in

trade regulation. In this regard, some relevant questions are whether it is possible to address the complex demands of different member states and their constituents at a judicial site, or whether the adjudicatory body can or should resolve issues that are not necessarily confined to the disputing parties. Considering multiple challenges such as regulatory diversities within and between states, the complexities in addressing the concerns of marginalized participants of the trading system, the absence of public opinion in the judicial proceedings, and the fragmented and weakened governance of social and environmental issues, this article suggests focusing on non-judicial regulatory bodies where the normative potential of SD would produce a much more beneficial and realistic outcome.

* This article is a modified version of one of the chapters of the author's doctoral thesis entitled "Trade, labour and sustainable development: an integrated perspective" submitted to the Faculty of Law at McGill University in 2017. She is indebted to Professor Adelle Blackett, doctoral supervisor, and Professor Richard Janda, doctoral committee member, for their insightful supervision and guidance. A generous financial award from the Social Sciences and Humanities Research Council facilitated the research project.

En tant qu'objectif préambulaire du régime de commerce international, le développement durable (DD) a entraîné des changements d'interprétation identifiables dans certaines décisions postérieures à l'OMC. Pourtant, le changement a été négligeable dans les situations où l'opposition ou la contestation de règles, de normes ou de principes d'autres régimes internationaux ont défié les frontières établies entre le commerce et les droits liés au commerce (la santé, l'environnement, la sécurité alimentaire, la conservation des ressources, les normes du travail, le développement). Dépeignant l'incohérence des décisions judiciaires, cet article soutient que le débat entre le commerce et le DD ne devrait pas se limiter à réorienter la tâche judiciaire de sorte qu'elle adresse les problématiques de développement durable, ou à emprunter des règles, des normes ou des principes d'autres régimes, ou à évaluer le niveau d'expertise des arbitres ou la qualité de leurs décisions. L'accent devrait plutôt être

mis sur l'opérationnalisation du développement durable dans la réglementation du commerce. À cet égard, il est pertinent de se demander s'il est possible qu'un organe judiciaire réponde aux demandes complexes des différents États membres et de leurs constituants, ou si ce même organe judiciaire peut ou devrait résoudre des questions qui ne se limitent pas nécessairement aux parties en litige. Parmi les défis qui se posent, on compte la diversité réglementaire à l'intérieur des États et entre les États, la complexité des préoccupations des acteurs marginalisés du système commercial, l'absence de l'opinion publique dans les procédures judiciaires et la gouvernance fragmentée et affaiblie des questions sociales et environnementales. En tenant compte de ces derniers, cet article suggère de se concentrer sur les organismes de réglementation non judiciaires où le potentiel normatif du développement durable produirait un résultat beaucoup plus bénéfique et réaliste.

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1. INTRODUCTION

This article discusses the potential benefits and challenges of resolving trade-sustainable development (SD) disputes through the World Trade Organization's (WTO) adjudicatory body. Section 2 analyzes the reports of the Panels and the Appellate Body (AB) of the WTO in disputes involving diverse trade-related rights (health, environment, food safety, resource conservation, labour standards, and development) and the role of SD as the preambular objective of trade regulation.¹ It describes how the WTO's adjudicatory body has resorted to a purposive method of interpretation and how it has imported rules, principles, or norms from other legal regimes. Although some of the interpretative shifts have shaped a distinctive trade-SD relationship, Section 3 of this article analyzes the limited nature of judicial inquiry, and argues for focusing on non-judicial regulatory bodies in order to operationalize SD within trade regulation.

As a concept of international law (IL), SD connects three important pillars—environmental sustainability, economic development, and social justice—which are necessary for human survival. Though originally rooted in national law and IL on the protection of forestry and fisheries, no universally accepted definition of SD can be found in the literature. However, at an international level, the UN World Commission on Environment and Development (WCED) report titled “Our Common Future” (known as the *Brundtland Report*) provides a short definition of SD as “development that meets the needs of the present without

¹ *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994, 1867 UNTS 154 Preamble (entered into force 1 January 1995) [*WTO Agreement*].

compromising the ability of future generations to meet their own needs.”² According to the report, SD contains two key concepts:

- the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.³

Bridging the aspirations of countries in the North and in the South, the SD concept is both well received and intensely criticized for its flexibility and uncertainty. Though its status as a principle or concept of IL is contested,⁴ it occupies a prominent space in international legal regimes, at national and international policy-making levels, and in the resolution of judicial disputes. With the growing interdependence of global issues (trade, environment, economic development, and the distribution of resources) and the proliferation of international, regional, and transnational institutions and governance mechanisms, the SD concept is now increasingly utilized to accommodate viewpoints of diverse actors (both state and non-state) and to manage conflicting or overlapping rights, obligations, values, and ideas.

Various aspects of SD operate within international trade rules. The General Agreement on Tariffs and Trade (GATT) permits the imposition of trade restrictions for the purpose of protecting human, animal, or plant life or health in article XX(b), and for the conservation of exhaustible natural resources in article XX(g).⁵ The Agreement on the Application of Sanitary and Phyto-sanitary Measures (SPS Agreement) regulates the way in which a member state may impose import restrictions to protect human and animal life or health (sanitary measures) and to protect plant life or health (phyto-sanitary measures).⁶ The Agreement on Technical Barriers to Trade (TBT Agreement), on the other hand, allows states to impose trade restrictions based on product standards for protecting human health or safety, animal or plant life or health, or the environment.⁷ These two agreements, annexed to the WTO Agreement, opened the possibility of invoking the precautionary principle (PP) to defend trade restrictions imposed for human, animal, or plant health or safety, or on environmental grounds.

² World Commission on Environment and Development, *Our Common Future*, UNGA, 1987, UN Doc A/42/427, ch 2 at para 1.

³ *Ibid.*

⁴ See e.g. Jaye Ellis, “Sustainable Development as a Legal Principle: A Rhetorical Analysis” (2008) 1 at 3–23, online: SSRN <ssrn.com/abstract=1319360>; Philippe Sands, “Environmental Protection in the Twenty-First Century: Sustainable Development and International Law” in Richard L Revesz, Philippe Sands & Richard B Stewart, eds, *Environmental Law, the Economy and Sustainable Development* (New York: Cambridge University Press, 2000) 369 [Sands, “Environmental Protection”].

⁵ *General Agreement on Tariffs and Trade*, 30 October 1947, 58 UNTS 187 art XX (entered into force 1 January 1948) [GATT 1947] (Article XX (a) to (j) allows member states to impose trade restriction(s) to pursue non-trade objectives).

⁶ *Agreement on the Application of Sanitary and Phytosanitary Measures*, 15 April 1994, 1867 UNTS 493 (Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization*, entered into force 1 January 1995) [SPS Agreement].

⁷ *Agreement on Technical Barriers to Trade*, 15 April 1994, 1868 UNTS 120 (Annex 1A to the *Marrakesh Agreement Establishing the World Trade Organization*, entered into force 1 January 1995) [TBT Agreement].

Within the WTO's dispute resolution process, the question of accommodating trade-related rights, most of which are covered under the broader umbrella of SD, occupies a substantial space. It is reported that within the WTO "the most high-profile and contentious disputes have concerned social regulatory issues."⁸ Disputes regarding the protection of social or environmental rights involve not only important methodological and legitimacy-related questions (such as the expertise of the members of the Panels and the AB; whether a trade adjudicatory body should decide these disputes, and if so, how far it should go; how to address problems emanating from the different priorities and concerns of diverse member states; etc.), but also deeper structural questions, such as what the limits of liberal trade should be and how to draw the line between trade and trade-related rights. These decisions encroach on domestic regulatory autonomy and require complicated balancing amongst the divergent rights and obligations of member states and their various constituents, such as traders, producers, and consumers.

With this background, Section 2 discusses whether the inclusion of the preambular objective of SD in the GATT 1994 has caused any transformation in the interpretative process of the Panels and the AB. Although I rely mostly on a descriptive analysis of the preambular objective, the relevant WTO rules, and how these have been interpreted by the adjudicators, in several places I also connect the adjudicators' importation of norms, rules, or principles from other legal regimes with the role of SD as a broader objective of the global trade regime. While discussing enforceable rules, their interpretations, and the relevant governance processes and options including dialogue-based and non-judicial mechanisms, I deliberately take a pluralistic and synthetic approach. I find that the SD objective is approached both cautiously and usefully by the adjudicators, probably because of its complexities and its inclusion of many elements. While in some decisions, the adjudicators clearly relied on a purposive route to guide their interpretation of a particular text of a treaty, in others they used a more nuanced approach where interpretations of the particular texts were tuned to accommodate a broader space for trade-related rights. Distilling from both analytical approaches, Section 2 finds that the interpretative process of the adjudicators created four distinct effects relating to the trade-SD relationship. First, while determining the WTO-compatibility of a domestic trade restriction pursuant to the exception provisions mentioned in clauses (a) to (j) of article XX of the GATT 1994, the adjudicators endorse that judicial interpretation should take into account the transformative character of norms, ideas, and principles. Second, for implementing trans-boundary environmental measures that impose trade restrictions, the adjudicators support multilateral over unilateral measures. Third, member states enjoy more regulatory space for imposing trade restrictions to implement their trade-related rights. Finally, while determining the justifiability of a trade-restrictive measure to achieve a social, environmental, or public health objective, the Panels and the AB accommodate arguments based on the differential capacity of developing countries. Despite highlighting the direct influences or indirect endorsements of SD objective, Section 2 concludes by depicting judicial incoherence and SD's limited influence. It finds that the interpretative shift has been minimal, especially in

⁸ Sylvia Ostry, "The Future of the World Trading System: Beyond Doha" in John J Kirton & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Aldershot: Ashgate, 2004) 270 at 273.

situations where norms, principles, or rules from different legal regimes “conflict” or require the “redefinition of conventional obligations.”⁹

Section 3 briefly introduces Sen’s idea of capability-based SD,¹⁰ which argues for operationalizing SD in trade regulation. I deliberately take a broader perspective to show why a focus on judicial governance might not address the bigger challenges of trade-SD disputes. I argue that it is questionable how the normative potential of SD can be utilized to address issues that reflect the divergent demands and expectations of member states and their different social groups. Challenges from the unique social, cultural, economic, and political constructs of contesting markets continue to produce diverse social and environmental impacts. These challenges create divergent demands and expectations not only for the participants of the global trade regime, but also for the different constituents of each member state, and they affect the judicial process of reaching an optimum solution for disputing parties. Also, the importation of norms, principles, or rules from related or “colliding”¹¹ legal regimes might not produce positive impacts for some low-income countries or their marginalized social groups. I ask how to deal with situations where, as a result of decisions from the adjudicatory body, companies producing life-threatening asbestos have relocated to factories in low-income countries.¹² I also ask how to deal with situations where fishing communities engaged in shrimp fishing using turtle-killing nets are displaced from their traditional livelihoods.¹³ Should the adjudicatory body of the WTO be the only or primary forum to accommodate prevalent concerns relating to market-based growth? Having regard to the fragmented and weakened governance of social and environmental matters at the global level, is it pragmatic to confine our attention to the judicial resolution of trade-SD disputes?

In describing these multiple challenges of judicial resolution, I argue that although existing scholarship mostly emphasizes “legalization”¹⁴ of the trade-SD relationship, it is better to focus on non-judicial regulatory bodies for operationalizing SD. Through regular intra-institutional and inter-institutional interactions on trade-SD issues, the non-judicial sites

⁹ Virginie Barral, “Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm” (2012) 23:2 *Eur J Intl L* 377 at 395–97. Barral argues that when norms conflict or conventional obligations need to be redefined, as a broad-based norm SD provides the adjudicators a wider interpretative space.

¹⁰ Amartya Sen, *Development As Freedom* (New York: Anchor Books, 2000) [Sen, “Development as Freedom”]; Amartya Sen, “The Ends and Means of Sustainability” (2013) 14:1 *J Human Development & Capabilities* 6 [Sen, “Sustainability”].

¹¹ I borrow the term “colliding regimes” from Fischer-Lescano and Teubner. See Andreas Fischer-Lescano & Gunther Teubner, “Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law” (2004) 25:4 *Mich J Intl L* 999 at 1017.

¹² See John Suttles, “Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry” (2002) 16:1 *Tul Envtl LJ* 1 (Suttles elaborates how asbestos production has relocated to developing countries).

¹³ See Aarthi Sridhar, *Sea Turtle Conservation and Fisheries in Orissa, India* (Chennai, India: International Collective in Support of Fish Workers, 2005).

¹⁴ Martha Finnemore & Stephen J Toope, “Alternatives to ‘Legalization’: Richer Views of Law and Politics” (2001) 55:3 *Intl Organization* 743 at 756 (the authors caution against the process of “legalization”; legalization creates a “compliance atmosphere,” where compliance with legal rules remains the main focus of participants, rather than adherence to the “spirit” of law).

are better positioned to balance and clarify diverse issues relating to operationalizing SD, to manage trade-SD conflicts, and to devise innovative case-based solutions.

2. RECONSTRUCTION OF EXCEPTION PROVISIONS AND THE INFLUENCE OF THE CONCEPT OF SUSTAINABLE DEVELOPMENT

2.1. INFLUENCE OF SUSTAINABLE DEVELOPMENT: DECISIONS UNDER ARTICLE XX

While deciding some of the hybrid disputes between trade and trade-related rights, adjudicators followed the purposive route of interpretation, i.e. they searched for the influence of the broader purpose of the treaty. There are several different manifestations of this purposive route. The Panel in *Raw Materials*¹⁵ expressly indicated that it will consider not only the exception clauses mentioned in article XX, but also the preambular words to determine the “context” of the trade restrictions. In other reports, the adjudicators imported norms, principles, or rules from related or colliding legal regimes in order to accommodate a broader space for trade-related rights, most of which are covered under the umbrella of SD.

2.1.1. TRANSFORMATIVE CHARACTER OF NORMS

Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT) prescribes that “any relevant rules of international law applicable in the relation between the parties” are considered while interpreting a treaty.¹⁶ This evolutionary method of interpretation allows adjudicators substantial discretion not only to consider contemporary developments in related legal regimes, but also to reframe issues in a way that accommodates the prevailing consensus. Endorsing this enriched method of interpretation, trade law scholar Howse argues that the “understanding and expectations” of the global community evolves and the approach in article 31 of the VCLT assures that “WTO law evolves in a manner that reduces, rather than enhances, conflict and inconsistency with evolving law in other international legal regimes.”¹⁷

The AB used the evolutionary method in *Shrimp I*¹⁸ for interpreting the term “exhaustible natural resources” mentioned in GATT article XX(g). US regulation imposed an import ban

¹⁵ *China—Measures Related to the Exportation of Various Raw Materials (Complaint by the EU, Mexico & the US)* (2011), WTO Doc WT/DS 394, 395, 398/R at para 7.373 (Panel Report) [*Raw Materials*, Panel Report]. See also *China—Measures Related to the Exportation of Various Raw Materials (Complaint by the EU, Mexico & the US)* (2012), WTO Doc WT/DS 394, 395, 398/AB/R (Appellate Body Report) [*Raw Materials*, AB Report].

¹⁶ *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS I-18232 art 31 (entered into force on 27 January 1980) [VCLT]. The meaning of the term “rules” used in Article 31(3)(c) of the VCLT is debated. See e.g. Andrew D Mitchell, *Legal Principles in WTO Disputes* (New York: Cambridge University Press, 2008) at 84.

¹⁷ Robert Howse, “Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence” in Joseph Weiler, ed, *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?* (Oxford, UK: Oxford University Press, 2000) 35 at 58.

¹⁸ *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India et al)* (1998), WTO Doc WT/DS58/AB/R (Appellate Body Report) [*Shrimp I*, AB Report]; see also *United States—Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India et al)* (1998), WTO Doc WT/DS58/R (Panel Report); *United States—Standards for Reformulated and Conventional Gasoline (Complaint by Venezuela, Brazil)* (1995), WTO Doc WT/DS2/P/R (Panel Report); *United*

on shrimp harvested with commercial fishing technology that might adversely affect sea turtles. No such ban was imposed if US-prescribed turtle excluder device (TED) technology was used for shrimp harvesting. The US regulation was challenged by India, Malaysia, Pakistan, and Thailand as violating the GATT provisions. Reversing the Panel's decision, the AB held that the US measure relates to the conservation of exhaustible natural resources as defined in article XX(g) of the GATT. In order to ascertain what is included within the term exhaustible natural resources, the AB endorsed that the term, crafted more than fifty years ago, must be "read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment"; it therefore rejected the complainants' argument that the term should be interpreted according to the understandings of the GATT 1947.¹⁹ Although the drafting history of article XX(g) referred to discussions about mineral resources and article XX was not modified in the Uruguay Round that led to the creation of the WTO, the AB noted that:

the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement—which informs not only the GATT 1994, but also the other covered agreements—explicitly acknowledges 'the objective of sustainable development'.²⁰

In order to find out whether living resources can come within the definition of exhaustible natural resources, the AB referred to some international agreements and declarations.²¹ These included the UN Convention on the Law of the Sea, the Convention on Biological Diversity, and Agenda 21. To determine the exhaustibility of sea turtles, the AB found that sea turtles are included in Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora as a species facing the threat of extinction.²² While referring to international agreements, the AB also referred to some agreements and even a convention that was not yet in force.²³

Additionally, the AB noted how the negotiators of the WTO "evidently believed, however, that the objective of 'full use of the resources of the world' set forth in the preamble of the GATT 1947 was no longer appropriate to the world trading system of the 1990's." As a result, the negotiators "decided to qualify the original objectives of the GATT 1947 with the [preambular] words."²⁴ The AB acknowledged that the preambular words "must add colour,

States—Standards for Reformulated and Conventional Gasoline (Complaint by Venezuela, Brazil) (1995), WTO Doc WT/DS2/AB/R (Appellate Body Report).

¹⁹ *Shrimp I*, AB Report, *supra* note 18 at paras 129–31, nn 109–13.

²⁰ *Ibid* at para 129 [emphasis omitted].

²¹ *Ibid* at paras 129–31.

²² *Ibid* at para 132.

²³ *Ibid* at paras 130–31, 171. The AB referred to United Nations Convention on the Law of Sea, the Convention on Biological Diversity, Agenda 21, the UN Resolution on Assistance to Developing Countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals, even though all the disputing states have not ratified these. It even referred to a regional agreement, the Inter-American Convention for the Protection and Conservation of Sea Turtles.

²⁴ *Ibid* at para 152.

texture and shading” to its interpretations, and it noted that “Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied in the above preamble.”²⁵ The AB also referred to the establishment of a permanent Committee on Trade and Environment (CTE) in 1995 and to the provisions of the Rio Declaration and Agenda 21, which require balancing multiple components of SD with special regard to the needs of developing countries.²⁶

Referring to diverse sources of information and sifting out the necessary criterion that determine what should be included within the definition of exhaustible natural resources, the AB devised a creative way to interpret a term of the treaty and it endorsed a meaning that fits both the broader purpose of the treaty and the contemporary demands. While directly endorsing the transformative character of a specific term of the treaty, the AB indirectly sanctioned that it is not unusual for a trade regulatory regime to learn from developments in the environmental regime and vice versa. This interpretative process bridged the gap between two apparently colliding regimes (trade and environment).

2.1.2. MULTILATERAL RATHER THAN UNILATERAL APPROACH IN ENVIRONMENTAL DECISION-MAKING

While reviewing trade-restrictive measures taken to manage transboundary environmental problems, the AB consistently preferred multilateral over unilateral measures. The AB expressly referred to the *consensual* character of international environmental law (IEL) and it stressed the duty to cooperate and consult before imposing transboundary measures in both the *Shrimp I* and *Shrimp II* decisions.²⁷ According to Sands, the principle of cooperation in IEL emerged from the principle of “good-neighborliness” mentioned in article 74 of the UN Charter in relation to social, economic, and commercial matters.²⁸ Borrowing the principle of cooperation and consultation from IEL, the AB paved the way for the successful handling of disputes that require the attention of multiple states.

In *Shrimp I*, the AB noted that although US authorities exchanged some documents before imposing its import ban on certain shrimp exporting countries on May 1, 1996, they did not engage in “serious” or “substantial” negotiation “with the objective of concluding bilateral or multilateral agreements.”²⁹ Criticizing the absence of multilateral negotiation and endorsing a “concerted and cooperative” method to deal with transboundary policy objectives, the AB found the US measure unjustifiably discriminatory; in support, it quoted principle 12 of the Rio Declaration on Environment and Development, which states, in part, that

²⁵ *Ibid* at para 153.

²⁶ *Ibid* at paras 129–30, 154–68, 171.

²⁷ *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 by Malaysia (Complaint by Malaysia)* (2001), WTO Doc WT/DS58/R (Panel Report) at paras 5.137, 5.71, 5.76, 6.1 [*Shrimp II*, Panel Report]; *United States—Import Prohibition of Certain Shrimp and Shrimp Products—Recourse to Article 21.5 by Malaysia (Complaint by Malaysia)* (2001), WTO Doc WT/DS58/AB/R (Appellate Body Report) at paras 122, 130, 132, 133, 153 [*Shrimp II*, AB Report].

²⁸ See Philippe Sands, *Principles of International Environmental Law* (Cambridge, UK: Cambridge University Press, 2003) at 249–51 [Sands, “IEL”] (Sands cites examples from other international and regional instruments, declarations, and international judicial decisions, where the general obligation to cooperate has been given more specific application).

²⁹ *Shrimp I*, AB Report, *supra* note 18 at paras 166–67; see also paras 167–70.

“[u]nilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on *international consensus*.”³⁰ The AB also referred to similar provisions in Agenda 21, the Convention on Biological Diversity, the Convention on the Conservation of Migratory Species of Wild Animals, and the CTE report.³¹ It proclaimed that unilateral domestic measures would be allowed only when they are based on some international or regional agreements and when they pursue some “shared goals.”³²

The *Shrimp II* report also reveals the AB’s emphasis on multilateral cooperation in good faith before the imposition of trade-restrictive measures. In order to comply with the *Shrimp I* ruling, the United States adopted new guidelines and it allowed for a more transparent process of certification for shrimp exports in 1999. Malaysia, one of the complainants in the *Shrimp I* case, complained that the revised US guidelines violated the requirements of the chapeau to article XX, which prohibits arbitrary or unjustifiable discrimination. Rejecting the Malaysian arguments, the AB allowed the restriction-imposing state to follow flexible arrangements in its conservation measures, as long as it conducted meaningful negotiation in good faith.³³ The AB clarified that although an article XX inquiry may look into the cooperative approach of the regulatory state, it is not mandatory under article 21.5 proceedings to actually conclude a treaty to justify a trade restriction.³⁴ There is no arbitrary or unjustifiable discrimination if an importing state implements a program that is “comparable in effectiveness” for all exporting countries and allows “sufficient flexibility in the application of the measure.”³⁵ For finding unjustifiable discrimination, the absence of serious good faith efforts to negotiate is more important for the AB than the “duration of the process” or “the end result.”³⁶ Finally, the AB relied on the Panel’s finding of ample evidences of good faith efforts on the part of the United States.³⁷ While the AB insisted on multilateral cooperation, it did not prescribe any particular form of negotiation; the regulatory state enjoys the necessary flexibility to adopt its own cooperative approach as long as it is framed in good faith.

The *Shrimp I* and *Shrimp II* decisions demonstrate a move towards multilateralism and the borrowing of principles from an apparently colliding legal regime. This methodology to bring two colliding regimes under a common framework is entirely different from the one employed

³⁰ *Ibid* at para 168 [emphasis added].

³¹ *Ibid*.

³² *Ibid* at paras 135, 168. See also Gabrielle Marceau, “The WTO Dispute Settlement and Human Rights” in Frederick M Abbott, Christine Breining-Kaufmann & Thomas Cottier, eds, *International Trade and Human Rights: Foundations and Conceptual Issues* (Ann Arbor: The University of Michigan Press, 2006) 180 at 180–83, 216–25.

³³ *Shrimp II*, AB Report, *supra* note 27 at paras 140–44, 146–52.

³⁴ *Ibid* at para 124. *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the *WTO Agreement*, *supra* note 2, art 21.5 (art. 21.5 allows recourse to dispute settlement procedure if there is any disagreement as to the existence or consistency of measures taken to comply with the rulings or recommendations of the Panels or of the AB).

³⁵ *Shrimp II*, AB Report, *supra* note 27 at para 144.

³⁶ *Ibid* at para 131, citing *Shrimp II*, Panel Report, *supra* note 27 at para 5.71.

³⁷ *Ibid* at para 131.

in the GATT Panel's earlier decision in *Tuna-Dolphin I*, where it proclaimed that if member states' conflicting trade-restrictive measures could determine market access, then GATT would "no longer constitute a multilateral framework for trade among all contracting parties but would provide legal security only in respect of trade between a limited number of contracting parties with identical internal regulations."³⁸ The AB's borrowing approach represents an innovative way to balance the conflicting regulatory policies of member states, and it also allows for the effective control of problems that transcend the boundaries of one state.

2.1.3. INCREASED REGULATORY AUTONOMY OF STATES

Post-WTO reports from the Panels and the AB allowed increased regulatory space for member states to pursue their trade-related rights. The reports revealed some important guidelines as to how WTO member states may achieve their health or environmental objectives through WTO-consistent trade-restrictive measures. For example, a member state enjoys improved flexibility in choosing a trade-restrictive measure, as long as it negotiates in good faith with the affected country and prescribes some flexibility while applying the measure. It is no longer necessary to base a trade-restrictive measure only on majority scientific opinion; it is possible to choose a more stringent level of protection. Also, an immediate relationship between the restrictive measure and the trade-related objective is not necessary; the potential to make a material contribution in the future is deemed sufficient to justify a trade-restrictive measure. The relevant reports, depicting different forms of regulatory autonomy, are mentioned below.

First, while designing its trade-restrictive measure, a member state enjoys necessary flexibility. In *Shrimp II*, the US certification procedure for shrimp exports was under scrutiny.³⁹ The main issue was whether the revised US guidelines were flexible enough to account for the specific conditions in Malaysia. Malaysia argued that incidental turtle catch occurs due to fish trawling and not as a result of shrimp trawling. Moreover, turtle species, like loggerheads and kemps, which suffer from high mortality and for whose protection the US law had been promulgated, rarely nest in Malaysian waters; the turtle species that do nest in Malaysian waters live close to the coast and trawling is already prohibited in these areas.⁴⁰ The AB found that the revised certification process was designed in a way that would reveal to US authorities the specific concerns of an applicant. If the certification is denied, the non-qualifying exporting state would be informed of the reason and their possible options.⁴¹ Considering these flexibilities and the fact that Malaysia had not applied for certification at the time of the dispute, the AB decided not to speculate about how US authorities would deal with the different conditions and concerns of Malaysia.⁴²

Second, while implementing a trade-restrictive measure, a regulatory state may choose its level of protection. In *Asbestos*, a French legislative ban on the importation of asbestos

³⁸ *United States—Restrictions on Imports of Tuna (Complaint by Mexico)* (1991), GATT Doc DS21/R (GATT Panel Report, not adopted, circulated on 3 September 1991) at para 5.27 [*Tuna-Dolphin I*].

³⁹ *Shrimp II*, AB Report, *supra* note 27.

⁴⁰ *Ibid* at para 145, n 106.

⁴¹ *Ibid* at para 147.

⁴² *Ibid* at para 148.

and asbestos-containing substances was challenged by Canada.⁴³ Pursuant to the French Labour Code, the legislative ban sought to protect workers by prohibiting the manufacturing, processing, sale, import, or placement of asbestos fibres in the French market.⁴⁴ Both the Panel and the AB accepted that the health risks posed by asbestos and asbestos-containing products are of “a very serious nature”,⁴⁵ and the direct link rendered it easy to invoke the justification under article XX. Relaxing the burden on the regulating state, the AB held that a member state might follow divergent scientific opinion and choose its own level of protection.⁴⁶

Third, in *Retreaded Tyres*,⁴⁷ it was deemed sufficient as a defense under article XX that a trade-restrictive measure would contribute to public health/environmental objectives in a material way; the contribution need not be immediately observable.⁴⁸ *Retreaded Tyres* is the first case in which a developing country sought to justify its trade ban by invoking environmental grounds. European Communities (EC) challenged Brazil’s import ban on retreaded tires. Raising the article XX(b) defense under the GATT, Brazil argued that disposal of these tires creates breeding grounds for mosquitoes, which ultimately pose risks towards human health by causing diseases such as dengue fever and malaria. The AB upheld the Panel ruling that the Brazilian import ban was necessary within the meaning of article XX(b). However, considering Brazilian state law, which allowed an exemption for MERCOSUR countries for the import ban, the AB held that the import ban was applied in a manner that constituted arbitrary or unjustifiable discrimination within the meaning of the chapeau to article XX.⁴⁹

The easing of the burden to defend a restrictive measure can be identified from the way in which the Panel analyzed and the AB endorsed a flexible *means-ends* analysis to find the relationship between the objective pursued (means) and the measure at issue (ends). Both the direct objective (waste reduction) and the indirect but related objective (minimization of risks to human or plant life and health resulting from the accumulation of waste from retreaded tires) could be considered.⁵⁰ On appeal, EC insisted that the necessity analysis should inquire

⁴³ *European Communities—Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada)* (2000), WTO Doc WT/DS135/P/R (Panel Report); *European Communities—Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada)* (2001), WTO Doc WT/DS135/AB/R (Appellate Body Report) [*Asbestos*, AB Report].

⁴⁴ *Asbestos*, AB Report, *supra* note 43 at paras 2–3.

⁴⁵ *Ibid* at paras 167, 172–73.

⁴⁶ *Ibid* at 178.

⁴⁷ *Brazil—Measures Affecting Imports of Retreaded Tyres (Complaint by the European Communities)* (2007), WTO Doc WT/DS332/R (Panel Report) [*Retreaded Tyres*, Panel Report]; *Brazil—Measures Affecting Imports of Retreaded Tyres (Complaint by the European Communities)* (2007) WT/DS332/AB/R (Appellate Body Report) [*Retreaded Tyres*, AB Report].

⁴⁸ *Retreaded Tyres*, AB Report, *supra* note 47 at paras 140–53.

⁴⁹ *Ibid* at para 233 (MERCOSUR, *Mercado Comun del Cono Sur*, meaning Southern Cone Common Market, is a regional trade agreement entered into in 1991 between Argentina, Uruguay, Paraguay and Brazil; Brazil defended that it was compelled to introduce the exemption from the import ban for the MERCOSUR countries in order to comply with the MERCOSUR arbitral tribunal’s ruling that the ban constituted restriction on trade contrary to the MERCOSUR rules; however, the AB observed that Brazil did not even attempt to justify its ban in the MERCOSUR Arbitral Tribunal on the grounds of human, animal, and plant health under Article 50(d) of the *Treaty of Montevideo*).

⁵⁰ *Ibid* at para 153.

into the actual and not the potential contribution of the measure in realizing its environmental and health objectives.⁵¹ However, endorsing the Panel's decision, the AB held that as long as Brazil can prove, either by quantitative or qualitative evidence, that the import ban was "apt to produce a material contribution to the achievement of its objective" then it is enough to justify the import ban.⁵² Thus, for the AB, total elimination of the risks is not required. It is enough that the measure potentially reduces the occurrence of the diseases and the tire fires.⁵³ The AB clarified that although an actual and immediate contribution would make it easier to pass the necessity test, a long-term contribution can be analyzed hypothetically, as long as there is quantitative or qualitative evidence that shows the connection between the restrictive measure and its potential to achieve health and environmental objectives.⁵⁴

Fourth, a trade-restrictive measure could be part of a broader program. In previous decisions (*Shrimp I*, *Shrimp II*, and *Asbestos*), the Panels or the AB only examined the measure at issue. However, in *Retreaded Tyres*, the AB focused on the complexity of environmental and health problems and held that a "multiplicity of interacting measures" could be part of a comprehensive policy.⁵⁵

Finally, domestic regulatory autonomy to pursue trade-related rights remains intact, even if a trade-restrictive measure imposes additional costs for foreign producers. In *Clove Cigarettes*, the AB found that an increase in the costs for foreign producers without a corresponding increase for domestic producers does not necessarily indicate an automatic finding of "less favourable treatment" under the provisions of the TBT Agreement.⁵⁶

An important connecting theme in all these decisions is a willingness to accept greater autonomy for the regulating state, although the form of cooperative approach, the level of protection, the current or potential contribution of the measure in achieving the non-trade objective, and the cost of a regulatory measure on producers might vary.

⁵¹ *Ibid* at para 149; see also paras 151–53.

⁵² *Ibid* at para 151.

⁵³ *Ibid* at paras 149–53; *Retreaded Tyres*, Panel Report, *supra* note 47 at paras 7.145–46.

⁵⁴ *Retreaded Tyres*, AB Report, *supra* note 47 at para 151. See also Panel Report, *supra* note 47 at paras 7.146–48.

⁵⁵ Isabelle Van Damme, "Appellate Body Report, Brazil: Measures Affecting Imports of Retreaded Tyres, Adopted on 17 December 2007" (2008) 57:3 ICLQ 710 at 715.

⁵⁶ *United States—Measures Affecting the Production and Sale of Clove Cigarettes (Complaint by Indonesia)* (2012), WTO Doc WT/DS406/AB/R at para 221 (Appellate Body Report) [*Clove Cigarettes*, AB Report]; see also *United States—Measures Affecting the Production and Sale of Clove Cigarettes (Complaint by Indonesia)* (2011), WTO Doc WT/DS406/P/R (Panel Report). But see *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Complaint by the United States)* (2000), WTO Doc WT/DS161/P/R (Panel Report); *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef (Complaint by the United States)* (2000), WTO Doc WT/DS161/AB/R (Appellate Body Report) at paras 29–30. In *Korea-Beef*, Korea could not justify the necessity of its dual retail system for imported and domestic beef by invoking the prevention of fraud exception. The Panel preferred the lesser trade-restrictive alternative of investigation and control for wrongdoers though this would require more resources for Korean authorities. The Panel held that the alternative measure was a better option than shifting costs to foreign producers/retailers. If a non-trade measure imposes extra costs upon foreign industries, the main concern of dispute resolution was to provide a "level playing field" for both domestic and foreign producers.

2.1.4. THE DIFFERENTIAL POSITION OF DEVELOPING COUNTRIES

While interpreting the justifiability of trade restrictions, the AB recognized the differential position of developing countries for pursuing their social or environmental objectives. This attention to differential capacity can be traced from the IL principle of equity, though the AB did not expressly refer to it.⁵⁷ In *Shrimp I*, the AB required that an importing state regulating on environmental or health grounds should take into account the financial and technological capacity of the exporting state(s) to comply with its requirements.⁵⁸ In *Retreaded Tyres*, distinguishing preventive measures from remedial measures, the AB suggested that “the capacity of a country to implement remedial measures that would be particularly costly, or would require advanced technologies, may be relevant to the assessment of whether such measures or practices are reasonably available alternatives to a preventive measure, such as the Import Ban.”⁵⁹ Therefore, the efficacy and acceptability of a regulatory measure are judged not only on the basis of the probability to achieve a health/environmental objective, but also on the respondent state’s financial and administrative capacity to implement other alternative measures.

For granting tariff preferences, the AB required equitable treatment of “similarly situated” beneficiary countries. In the *EC-GSP* decision,⁶⁰ India challenged the EU’s imposition of conditionalities for receiving benefits under the Generalized System of Preferences (GSP). Under the EU’s GSP program, special tariff preferences were to be accorded to developing countries if special arrangements were taken to combat drug production and trafficking and to protect the environment and labour rights. India resorted to the first issue and reserved its right to challenge the second issue later. The Panel found that the EC’s special tariff preference was arbitrary and was accorded contrary to the non-discrimination requirement of the enabling clause of the GATT.⁶¹ Reversing the Panel’s decision, the AB found that the non-discrimination requirement of the enabling clause requires the preference-granting country to ensure that identical tariff treatment is granted to all the similarly-situated beneficiaries that have similar ‘development, financial and trade needs.’⁶² In determining the WTO-consistency of a tariff preference, the AB stressed that the preambular objective of the WTO can be pursued by provisions characterized as exceptions, and it emphasized that a fair and transparent process in granting the benefits and in the treatment of ‘similarly situated countries’ should ensure the equitable treatment of recipients.⁶³

⁵⁷ *Shrimp I*, AB Report, *supra* note 18; *Retreaded Tyres*, AB Report, *supra* note 47.

⁵⁸ *Shrimp I*, AB Report, *supra* note 18 at paras 161–63.

⁵⁹ *Retreaded Tyres*, AB Report, *supra* note 47 at para 171.

⁶⁰ *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries (Complaint by India)* (2003), WTO Doc WT/DS246/P/R (Panel Report); *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries (Complaint by India)* (2004), WTO Doc WT/DS246/AB/R (Appellate Body Report) [*Tariff Preferences*, AB Report].

⁶¹ *Decision on differential and more favourable treatment, reciprocity, and fuller participation of developing countries*, GATT CP Decision L/4903, 35th Sess, 26th Supp BISD (1980) 203 (the Enabling Clause is an exception to Article I:1 of the GATT 1994; under the Enabling Clause, GATT members are entitled to adopt measures providing differential and more favourable treatment for the developing countries).

⁶² *Tariff Preferences*, AB Report, *supra* note 60 at para 173.

⁶³ *Ibid* at paras 94–95.

In all these decisions, when member states' divergent policy goals clash with their trade liberalization objective, adjudicators adopted one of two routes: either SD was referred to as the preambular objective or norms, principles, rules, or even ideas were imported from contemporary regimes (and in some situations connected with the SD objective). For both these routes, the Panels or the AB provided practical guidelines on how member states can pursue their social or environmental objectives through WTO-consistent trade-restrictive measures. In some decisions, as a "context" for interpretation, the SD objective allowed the Panels or the AB a broader space to endorse the transformative character of norms or the increased regulatory autonomy of states. In other decisions, the norms, principles, or rules from contemporary regimes (i.e. the principle of cooperation from IEL and the principle of equity from IL) played a specific role in fine-tuning the interpretative process of the Panels and the AB. In both situations, the objective was to allocate a space for trade-related rights within trade regulation. Through these direct and indirect influences, the broadness and all-encompassing nature of the SD concept offers some significant outlets for adjudicators.

First, relying on the preambular objective, adjudicators can utilize their superior interpretative capacity to give concrete meaning to some vague and apparently contradictory values and ideas on a case-based approach. The broadness of the SD concept and its diverse components allow for the consideration of a wide range of domestic trade-related rights, such as environmental protection, labour standards, etc.

Second, in some decisions under article XX, the Panels or the AB considered not only environmental norms or principles, but also the distributive effects of its decisions.⁶⁴ This interpretative methodology reinforces interrelatedness between social, environmental, trade, and economic policies. The emphasis on *interrelatedness* is different from the demands of countries in the North to accommodate a "level playing field" through addressing "formerly distinct areas of regulation such as labour standards, environmental protection, and competition policy, primarily because of their asserted effects on international competitiveness."⁶⁵ According to Abbott, "the best known aspect of sustainable development is this tight link between economics and environmental protection, a link based not on 'level playing field' concerns, but on deeper structural relationships."⁶⁶

Third, the utilization of broad normative objectives like SD in judicial decisions also instills indirect procedural impacts in domestic trade policy-making. For example, trade policy-makers or negotiators develop an increased understanding of social, environmental, and other trade-related issues. After the *Shrimp I* decision, US regulatory authorities consulted with affected shrimp exporting countries and designed a revised shrimp export certification process, which allowed sufficient flexibilities to consider an exporting state's specific concerns.⁶⁷

⁶⁴ Deborah Z. Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford, UK: Oxford University Press, 2005).

⁶⁵ Kenneth W. Abbott, "Economic' Issues and Political Participation: The Evolving Boundaries of International Federalism" (1996) 18 *Cardozo L Rev* 971 at 978.

⁶⁶ *Ibid.*

⁶⁷ *Shrimp II*, AB Report, *supra* note 27.

Most importantly, referring to the preambular objective of a treaty, adjudicators usually endeavor to attain the broader objective of the regime and detect the “social goal of law.”⁶⁸ In some article XX decisions, while harmonizing both trade and trade-related rights, the Panels or the AB sought to address the social critiques of existing trade law, i.e. the contemporary demands to mitigate the social, environmental, and health effects arising from trade liberalization by referring to norms, principles, or rules of IL. This can open an avenue to address values, which are rather political, and to contextualize them in the broader framework of IL. In *Shrimp I*, although local shrimp industries were interested in the extension of the TED regulations for foreign shrimp exporters, environmental organizations actually played a larger role in enforcing the trans-boundary application of turtle conservation law.⁶⁹

2.2. LIMITED INFLUENCE OF SUSTAINABLE DEVELOPMENT

Despite its contributions, and even as a preambular objective, the influence of SD has not been coherent or systematic in the interpretive processes of adjudicatory bodies. Its minimal importance as a defense for trade-restrictive measures and its doubtful relevance in importing norms, principles, and rules of IL depict some of the limitations and challenges of the trade-SD relationship.

2.2.1. RELEVANCE OF SUSTAINABLE DEVELOPMENT AS A DEFENSE

In *Clove Cigarettes* and *Tuna II*, the AB resorted to a purposive analysis in order to detect whether “treatment no less favourable” was accorded to foreign products in violation of article 2.1 of the TBT Agreement.⁷⁰ In these decisions, the AB scrutinized whether any arbitrary or unjustifiable discrimination had been applied against “like” foreign products and then proceeded to analyze the justifiability of the regulatory purpose for which the trade-restrictive measures had been enacted; the objective was to balance trade liberalization with the regulatory autonomy of states and to leave regulatory space for states to pursue their non-protectionist

⁶⁸ Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005) at xiii–xv. At the introductory chapter, Barak details the purposive method from the perspective of common law system. Similar conclusions can be drawn for interpreting an international treaty. He distinguishes the objective and subjective components of purposive interpretation. The subjective component is identifiable from the text of law and its surrounding circumstances. However, the objective component is identifiable not from “actual intent” but from the author’s “hypothetical intent” (*ibid* at xiii). This hypothetical intent is derived from prevalent social values, social goals, and other relevant norms and values of the legal system such as human rights. Barak argues that purposive interpretation allows judges to bridge the gap between these objective and subjective components.

⁶⁹ Peter Chessick, “Explaining U.S. Policy on *Shrimp-Turtle*: An International Business Diplomacy Analysis” in Edith Brown Weiss, John H Jackson & Nathalie Bernasconi-Osterwalder, eds, *Reconciling Environment and Trade*, 2nd ed (Leiden, Netherlands: Martinus Nijhoff Publishers, 2008) 501 at 518.

⁷⁰ *TBT Agreement*, *supra* note 7, art 2.1 (the article stipulates that “Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country”). See also *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Complaint by Mexico)* (2012) WTO Doc WT/DS381/AB/R (Appellate Body Report) [*Tuna II*, AB Report]; *Clove Cigarettes*, AB Report, *supra* note 56 at paras 76, 89.

policy objectives.⁷¹ However, an important question is, which regulatory objectives would be considered appropriate defenses? Until now, all domestic trade-restrictive measures have been defended on one of the grounds mentioned in article XX of the GATT. Even for technical measures challenged under the TBT Agreement, the AB employed the test under the chapeau to article XX; i.e. whether arbitrary or unjustifiable discrimination has been applied against foreign products.⁷² Can SD as a preambular objective justify a trade-restrictive measure without invoking the policy exceptions mentioned in GATT article XX? Does it have any independent role in the balancing process that determines the line between trade liberalization and domestic regulatory autonomy? Defenses in disputes under the GATT 1994 and under the TBT Agreement have never been solely framed on the SD argument. It is not hard to predict the fate of such a defense after the *Raw Materials* decision.⁷³

In *Raw Materials*, China placed different forms of export restrictions on some essential raw materials, which are used to produce everyday technology products.⁷⁴ China sought to justify the export restrictions on the ground of resource conservation under article XX(g) and protection of its citizens' health under article XX(b). As a developing country, China claimed the need "to make optimum use of their resources for their development, as they deem appropriate, including the processing of their raw materials" and the right to adopt a "comprehensive and sustainable mineral conservation policy, taking into account China's social and economic development needs."⁷⁵ The Panel observed that a member state has wide autonomy in integrating its different policy priorities; however, trade restrictions should be justified in accordance with the exception clauses of article XX.⁷⁶ Though the Panel referred to the preambular objective of SD to find the context of the treaty, for the defenses based on article XX(b) and (g), it insisted on the presence of a substantial connection between the export restrictions and conservation of the resources or protection of human health.⁷⁷ In other words, a member state could not solely rely on an article XX justification to pursue trade restrictions on the grounds that the conservation of resources and economic growth would eventually help its transformation towards a less-polluting and high-tech economy.⁷⁸ For the Panel, accepting such a broad and vague defense would eventually allow trade restrictions on any raw material.⁷⁹ Rather, it must be shown that either the measure is "currently" making a material contribution or "[is] apt to make a material contribution in the future" in realizing the objective. Using this

⁷¹ *Clove Cigarettes*, AB Report, *supra* note 56; *Tuna II*, AB Report, *supra* note 70. See also Weihuan Zhou, "US – Clove Cigarettes And US – Tuna II (Mexico): Implications for the Role of Regulatory Purpose under Article III:4 of the GATT" (2012) 15:4 J Intl Econ L 1075.

⁷² Zhou, *supra* note 71 at 1092–100.

⁷³ *Raw Materials*, Panel Report, *supra* note 15; *Raw Materials*, AB Report, *supra* note 15.

⁷⁴ *Ibid.*

⁷⁵ *Raw Materials*, Panel Report, *supra* note 15 at paras 7.356, 7.363.

⁷⁶ *Ibid* at para 7.360.

⁷⁷ *Ibid* at para 7.511.

⁷⁸ *Ibid* at paras 7.498, 7.588 (I only discuss the panel opinion since the findings of the Panel on Article XX have not been appealed).

⁷⁹ *Ibid* at paras 7.515, 7.751–54.

criterion, the Panel found that China failed to justify how the export restrictions would achieve its SD goals.⁸⁰

It is notable that in all three decisions, the Panel or the AB consistently applied the chapeau to article XX test to determine the WTO-consistency of a trade restriction. Thus, apart from its influence in providing context for treaty interpretation, the preambular objective of SD has a very minimal role as a defense to justify restrictive trade measures.

2.2.2. SELECTIVE IMPORTATION OF PRINCIPLES OF INTERNATIONAL LAW

A deeper analysis of the reports shows that the adjudicatory bodies have been selective in their borrowing processes. Unlike article XX decisions, in some food safety disputes the adjudicatory body hesitated in employing norms, principles, and rules of IL as an interpretative source. *Beef Hormones*⁸¹ is the first dispute under the SPS Agreement to reach the appellate level. EC banned the importation of beef from the United States and Canada on the grounds that artificial growth hormones used in these countries might pose a health risk.⁸² The AB ruled against EC for its failure to undertake the risk assessment required by article 5.1 of the SPS Agreement.⁸³ EC did not invoke article 5.7 (allowing for temporary provisional measures) of the SPS Agreement to justify its measures; rather it relied on the precautionary principle (PP) as a general customary rule of IL. The AB held that whether the PP has been widely accepted as a principle of general or customary IL appears unclear; there has been no authoritative decision by any international court or tribunal recognizing the status of the PP, nor has there been any uniform view amongst legal commentators. However, the AB recognized that article 5.7, article 3.3, and the sixth paragraph of the preamble to the SPS Agreement allow a member state to take provisional measures.⁸⁴ The AB's attitude in restricting the application of precautionary measures solely within the SPS Agreement stands in sharp contrast with the wider approach taken in some contemporary regimes. For example, the Rio Declaration allows precautionary measures in cases of scientific uncertainty, provided there are "threats of serious or irreversible damage."⁸⁵

⁸⁰ *Ibid* at paras 7.432–35, 7.588.

⁸¹ *European Communities—Measures Concerning Meat and Meat Products (Complaints by the United States, Canada)* (1997), WTO Doc WT/DS 26, 48/P/R (Panel Report) [*Beef Hormones*, Panel Report]; *European Communities—Measures Concerning Meat and Meat Products (Complaints by the United States, Canada)* (1998), WTO Doc WT/DS 26, 48/AB/R (Appellate Body Report) [*Beef Hormones*, AB Report].

⁸² *Beef Hormones*, Panel Report, *supra* note 81 at paras 2.1–2.5

⁸³ *Beef Hormones*, Panel Report, *supra* note 81 at para 9.1; *Beef Hormones*, AB Report, *supra* note 81 at paras 187–208.

⁸⁴ *Beef Hormones*, AB Report, *supra* note 81 at paras 123–24.

⁸⁵ *Rio Declaration on Environment and Development*, UNCED, 1992, UN Doc A/CONF 151/26 (Vol 1), reprinted in 31 ILM 874 art 15 (Principle 15 of the Rio Declaration states, “[i]n order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”).

In *Biotech*,⁸⁶ the Panel was similarly hesitant to apply the principles mentioned in the Cartagena Protocol on Bio-Safety (CPBS).⁸⁷ The Panel interpreted article 31(3)(c) of the VCLT narrowly and held that since the complainants in the dispute are not parties to the CPBS, its provisions would not apply in the Panel's interpretative task.⁸⁸ Henckels contrasts this restrictive approach with *Shrimp I*, in which the AB referred to some international and regional agreements that did not have all of the disputing parties as signatories.⁸⁹ Scholars argue that even if an international treaty does not apply to the disputants, its rules or principles can still be invoked, if they reflect some "common intentions" of the treaty members,⁹⁰ or if the specific treaty provision that needs to be interpreted is "reasonably connected" to the "external sources of international law."⁹¹

Despite the Panel's restrictive approach in *Biotech*, it is undeniable that in the field of GMOs (genetically modified organisms) or LMOs (living modified organisms) and their possible/probable effects on human health and the environment, the CPBS has emerged as an alternative regime emphasizing a greater role for the PP for minimizing unknown or potential risks.⁹² However, the focus and methodology of risk assessment differ substantially under the SPS Agreement and the CPBS. The focus of SPS-based risk assessment is the effect on "human, animal or plant life or health," whereas the focus of the CPBS risk assessment is the potential adverse effects of GMOs/LMOs on "the conservation and sustainable use of biological diversity" taking into account "risks to human health."⁹³ Disregarding all these relevant provisions from a related international regime, the Panel held that the CPBS is not applicable in its interpretative function.

In its *Clove Cigarettes* decision, the AB pointed out that the overall objective of the GATT informs its interpretation under the TBT agreement.⁹⁴ If this were so and if a purposive interpretation route were taken in the disputes under the SPS Agreement, then nothing bars interpretation of the latter's provisions in accordance with the preambular SD objective of the WTO Agreement. In the majority of scholarly discussions, the PP is considered one of

⁸⁶ *European Communities—Measures Affecting the Approval and Marketing of Biotech Products (Complaint by the United States, Canada, and Argentina)* (2006), WTO Doc WT/DS291/R (Panel Report) [*Biotech*, Panel Report].

⁸⁷ *Cartagena Protocol on Biosafety to the Convention on Biological Diversity*, 29 January 2000, 2226 UNTS 208, 39 ILM 1027 (entered into force 11 September 2003), online: CBD <<https://www.cbd.int>> [CPBS]. The Convention on Biological Diversity (CBD) was drafted with the objective to conserve biological diversity and promote the sustainable use of its components. The convention was opened for signature during the UN Conference on Environment and Development in 1992. It entered into force on 29 December, 1993.

⁸⁸ *Ibid.*

⁸⁹ Caroline Henckels, "GMOs in the WTO: A Critique of the Panel's Legal Reasoning in EC — Biotech" (2006) 7 *Melbourne J Intl L* 278 (see in particular Part II, C).

⁹⁰ Joost Pauwelyn, "The Role of Public International Law in the WTO: How Far Can We Go?" (2001) *AJIL* 535 at 575–76.

⁹¹ Henckels, *supra* note 89 at 297–305.

⁹² Robert Falkner, ed, *The International Politics of Genetically Modified Food: Diplomacy, Trade and Law* (Basingstoke, UK: Palgrave Macmillan, 2007) at 6.

⁹³ CPBS, *supra* note 87 at Annex III [1].

⁹⁴ *Clove Cigarettes*, AB Report, *supra* note 56 at para 96.

the component principles of SD.⁹⁵ If rules and principles from IEL or IL were relevant in article XX decisions, it is not clear why the PP as mentioned in contemporary multilateral environmental agreements—or at least its general understanding—was not relevant for these important food safety decisions. If the transformative character of norms, rules, and principles was approved while deciding disputes under article XX of the GATT, why was a similar route not preferred for the precautionary measures in *Hormones* and *Biotech*? Hohmann finds important transformations in the application of the PP.⁹⁶ When IEL preferred an *ecological* instead of *economic* approach, it required no immediate and conclusive proof of substantial harm or risk for adopting precautionary measures; instead, reasonable belief as to the potential/probable danger of harm is enough.⁹⁷ Disregarding all these transformations in IEL, the adjudicators took a rigid attitude towards the importation of non-WTO norms, principles, or rules. Their rulings generated significant criticisms against the reasoning processes of the Panels and the AB.

These disputes raise concerns not only about the expertise and ability of the adjudicators to evaluate and decide on important scientific, cultural, environmental, ethical, and health questions, but also whether a judicial body should resolve these issues.⁹⁸ One important critique posits that the importation of norms, principles, or rules from related or colliding legal regimes remains selective, especially when broader public or consumer interests conflict with the substantial economic interests of multinational corporations.⁹⁹ According to Veena Jha,

[a] crisis of legitimacy arises because the consensual character of environmental law is being overturned by recourse to nonconsensual trade disputes, often in an incoherent way, depending on the economic stakes. When substantial commercial interests are involved, as in the case of GMOs, the effects on the environment may be examined only in a cursory manner.¹⁰⁰

The literature captures this incoherency in the AB's attitude. Scholars have identified different reasons either to support or to criticize the adjudicators' restrictive attitude in these high-profile disputes. Taking a different perspective on this debate, the discussion in the next section examines the deeper challenges in resolving trade-SD disputes. While arguing for a more coherent and enriched approach in the judicial interpretative process, I discuss why judicial governance might not be the best option for operationalizing SD in trade regulation.

⁹⁵ Ellis, *supra* note 4 at 12; Sands, "Environmental Protection", *supra* note 4 at 375–76; Nico Schrijver, "Development: The Neglected Dimension in the Post-Rio International Law of Sustainable Development" in Hans Christian Bugge & Christina Voigt, eds, *Sustainable Development in International and National Law* (Groningen, Netherlands: Europa Law Publishing, 2008) 223 at 241–42.

⁹⁶ Harald Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law* (London: Graham & Trotman/Martinus Nijhoff, 1994).

⁹⁷ See *ibid* at 4.

⁹⁸ See Sungjoon Cho, "From Control to Communication: Science, Philosophy, and World Trade Law" (2011) 44:2 Cornell Intl LJ 249 at 259–64; Andrew T Guzman, "Food Fears: Health and Safety at the WTO" (2004) 45 Va J Intl L 1, online: SSRN <ssrn.com/abstract=618361>.

⁹⁹ See Hilary French, "Challenging the WTO" (November/December 1999) *World Watch*, online: <www.worldwatch.org/system/files/EP126B.pdf>; Veena Jha, "Environmental Regulation and the WTO" in Bernard Hoekman, Aaditya Mattoo & Philip English, eds, *Development, Trade, and the WTO: A Handbook* (Washington, DC: World Bank, 2002) 472.

¹⁰⁰ Jha, *supra* note 99 at 475.

3. OPERATIONALIZING SD: MOVING BEYOND LEGALIZATION

Most of the existing analyses on trade-SD disputes evaluate the rules, principles, or norms relating to SD which are imported from related or colliding legal regimes, how strong the influence of SD is while interpreting a particular text of a treaty, how much space SD allows for domestic regulation, what role SD plays in the broader context of the treaty, how effectively or correctly disputes involving trade-related rights are resolved, and what potential role SD could play in future trade-SD disputes and its effect on the legitimacy of the WTO.¹⁰¹

It is true that the influence of a broader objective like SD is an important measure of the effectiveness of judicial forums in connecting the trade regime with contemporary demands for equitable and sustainable economic governance. However, the theoretical understanding and practical implementation of SD in IL is strongly contested.¹⁰² In a recent publication, rejecting the existing human needs-based approach, Sen's capability-based SD approach insists on a broader framework of social and environmental justice and argues for the effective operationalization of social and environmental issues in trade and economic arrangements and institutions.¹⁰³ According to Sen, the ultimate objective of SD should be "sustaining human freedoms and capabilities," and such "substantial broadening" of the concept changes both the "ends of sustainability" and the "means for achieving this."¹⁰⁴ With a broader focus on human development, environmental protection, and distributional equity, the capability-based SD approach helps us to situate trade-SD disputes beyond the narrow confines of the legalization approach.¹⁰⁵ The capability-based SD approach pays greater attention to the operationalization of SD in trade and economic arrangements. The operationalization of SD would contribute to our economic wellbeing, improve distributional processes, and promote environmental sustainability.¹⁰⁶ As the capability-based approach does not negate the possibility of judicial resolution, it is necessary to discuss the nature of judicial inquiry from the operationalization perspective. Focusing on the operationalization of SD, I describe some possible options and limitations for the judicial governance of trade-SD issues.

¹⁰¹ For some existing discussions on trade-SD issues, see Padideh Ala'i, "Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization" (1999) 14:4 *Am U Intl L Rev* 1129; Gabrielle Marceau & Fabio C Morosini, "The Status of Sustainable Development in the Law of the World Trade Organization" (2011), online: SSRN <ssrn.com/abstract=2547282>; Henning Grosse Ruse-Khan, "A Real Partnership for Development? Sustainable Development as Treaty Objective in European Economic Partnership Agreements and Beyond" (2010) 13:1 *J Intl Econ L* 139; Marie-Claire Cordonier Segger & C G Weeramantry, eds, *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Leiden: Martinus Nijhoff Publishers, 2005); Christina Voigt, "Sustainable Development as a Principle of International Law: Resolving Conflicts Between Climate Measures and WTO Law" in David Freestone, ed, *Legal Aspects of Sustainable Development* (Leiden: Martinus Nijhoff Publishers, 2009).

¹⁰² See Ellis, *supra* note 4.

¹⁰³ See Sen, "Sustainability", *supra* note 10 at 9, 18.

¹⁰⁴ For an elaborate discussion on this issue, see the introduction, chapter 1 and concluding remarks of my DCL thesis, Zobaida Khan, *Trade, Labour and Sustainable Development: An Integrated Perspective* (DCL Thesis, McGill University Faculty of Law, 2017).

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*

One important aspect of operationalizing SD would be the increased utilization of judicial borrowing. Since most trade-SD disputes involve the consideration of norms, principles, and rules from different legal regimes, or divergent demands from state or non-state actors, adjudicators play a crucial role in bridging the gap between multiple regulatory regimes and actors by utilizing the process of borrowing. Adjudicators can determine and re-determine the boundaries of collaborative relationships or conflicts between trade and SD by borrowing from different regimes, by creating a shared or common ground between conflicting or opposing regimes, by developing a coherent approach in the interpretative process, and by moving closer towards the preambular objective of SD. This not only enriches the judicial interpretative process, but also allows multiple regimes and governance sites (such as trade, environment, and labour) to co-exist. Below, I give some examples of how the process of judicial borrowing offers some important benefits for operationalizing SD in trade regulation.

First, the wide consideration of rules, principles, or norms from related or colliding legal regimes helps adjudicators to detect common features of multiple regimes, as well as devise some creative interpretations. McRae argues that the process of borrowing allows both scholars and practitioners “to look beyond the immediate confines of their discipline for the implications and insights that can be learned from other, related and overlapping areas.”¹⁰⁷ The process of borrowing thus not only shapes the nature and extent of relationships between different regimes and allows multiple regimes to co-exist, but also generates realistic solutions to the problem at issue. For example, in *Raw Materials*, the Panel specifically referred to the IL principle of state sovereignty over resources and the Convention on Biological Diversity while discussing the conflicts between different policy priorities in resource conservation.¹⁰⁸ In some article XX decisions, utilizing the preambular objective of SD, the AB allowed apparently colliding regimes to move closer towards each other by considering trade and environmental rules under a holistic framework.¹⁰⁹ The possibility of creative interpretations and the bridging of the gap between multiple regimes can help to pave the way for the realistic operationalization of SD in trade regulation.

Second, by borrowing from diverse sources, adjudicators can accommodate contestation between state and non-state actors such as national governments, traders, multinational corporations, and environmental groups. Teitel and Howse illustrate the benefits of “normative communication” between diverse regimes and actors. They find that, especially in matters involving politics (not pure legal questions), international judiciaries can produce better results by borrowing from diverse normative sources and from different co-existing regimes.¹¹⁰ It is true that the borrowing process (particularly in disputes on SD issues) involves the consideration of contesting or opposing ideas from diverse regimes and actors, and in certain circumstances this may produce an outcome that is not politically palatable. Yet, by considering these different ideas and accommodating the viewpoints of diverse actors, it is possible for the adjudicators

¹⁰⁷ Donald McRae, “International Economic Law and Public International Law: The Past and the Future.” (2014) 17:3 J Intl Econ L 627 at 637.

¹⁰⁸ *Raw Materials*, Panel Report, *supra* note 15 at para 7.381.

¹⁰⁹ *Shrimp I*, AB Report, *supra* note 18; *Shrimp II*, AB Report, *supra* note 27; *Retreaded Tyres*, AB Report, *supra* note 47.

¹¹⁰ Robert Howse & Ruti Teitel, “Cross Judging: Tribunalization in a Fragmented but Interconnected Global Order” (2009) 41:4 NYUJ Intl L & Pol 959 at 968.

to take contemporary understandings of SD into account and to devise realistic methods to reserve space for trade-related rights. For example, in *Shrimp I*, the AB creatively included the principle of cooperation from IEL while determining whether the US regulation was unjustifiably discriminatory under the chapeau to article XX.¹¹¹ Later, in *Shrimp II*, this IEL principle was taken into account by US regulatory authorities while revising the shrimp export certification process.¹¹² The idea of creating a shared or common ground between related and colliding regimes and actors thus paves the way for operationalizing SD on an ongoing basis.

Finally, by prescribing some interdisciplinary conditions or considerations before a trade-restrictive measure is taken, judicial decisions can indirectly inform domestic trade and other policy arenas (such as environment and public health) on the importance of trade-related rights and potential ways to address these while making trade policy decisions. For example, after *Shrimp I*, US trade regulatory authorities formulated a more flexible shrimp export certification process, and after *Asbestos*, asbestos production was banned in most developed countries.¹¹³ For operationalizing SD, it is much more important to influence the domestic regulatory regimes which affect citizens directly, rather than make abstract or generalized decisions which determine the WTO-consistency of trade-restrictive measures.

Recognizing all these benefits of the borrowing process, the operationalization perspective focuses not on SD's influence in delineating the exact boundary between trade and trade-related rights, but on whether judicial resolution leads to the development of a shared/common ground between different regimes and actors. For example, although SPS-based risk assessment procedure differs from other regimes (such as the CPBS), certain common procedural elements are present: both the SPS and the CPBS require that domestic precautionary measures comply with certain procedural criteria such as non-discrimination, reasonable proportionality between the measure and possible risks, and review of the decision.¹¹⁴ Therefore, even if the Panel resorted to the broader PP, it might not have caused any significant change in the *Biotech* decision, where the EU's general moratorium was decided not to be an SPS measure, and some states adopted specific moratoria without any risk assessment, against the European Commission's and European Food Safety Authority's decisions.¹¹⁵ Thus, a promising and cooperative relationship between trade and SD depends on increasing the use of judicial borrowing and the building of some common ground, and not through outright rejection of the importance of norms, principles, or rules from other regimes.

3.1. CHALLENGES OF OPERATIONALIZING SD THROUGH JUDICIAL ANALYSIS

This section argues that operationalizing SD from the broader perspective of capability-based SD involves some unique demands that require attention beyond the judicial arena. An extended analysis from a trade adjudicatory body neither guarantees appropriate attention to all the contesting issues, nor would it be desirable on the basis of legitimacy. This section

¹¹¹ *Shrimp I*, AB Report, *supra* note 18.

¹¹² *Shrimp II*, Panel Report, *supra* note 27; *Shrimp II*, AB Report, *supra* note 27.

¹¹³ *Shrimp II*, AB Report, *supra* note 27 at paras 3–7; Suttles, *supra* note 12.

¹¹⁴ Henckels, *supra* note 89 at 297.

¹¹⁵ Gregory Shaffer, "A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Center of the GMO Case" (2008) 41:1 NYUJ Intl L & Pol 1.

describes why it is unrealistic to expect that the adjudicatory body of a global trade regime can address the complexities arising from trade-SD interactions. Section 3.2 elaborates on why other non-judicial regulatory bodies are more appropriate sites for operationalizing SD.

3.1.1. ADDRESSING UNIQUE SOCIO-POLITICAL DEMANDS OF MEMBER STATES AND THEIR DIVERSE CONSTITUENTS

The three components of SD and their collision inevitably involve matters that are not purely legal problems. To make it more complex, the capacity of judicial resolution is significantly challenged by the fact that the contested issues in trade-SD disputes involve not only matters of politics (how state and non-state actors would react to the decisions),¹¹⁶ but also open-ended questions from multiple disciplines (development policy, environmental law and policy, labour law and standards, and risk analysis). The different priorities and flexibilities of SD affect the process of achieving coherency in judicial decisions.¹¹⁷ Thus, it is not just pure legal solutions that can address these hybrid issues; the effective resolution of these disputes requires continuous attention to the unique socio-political and economic realities of different state and non-state actors.

This matter became particularly evident in food safety disputes. Under the SPS Agreement, the main concern is the proportionate balancing of product safety versus the liberalization of trade. While pursuant to the provisions of the SPS Agreement, the adjudicators emphasize science-based risk assessment, for some environmental or health risks the relationship between a particular substance/product and risk(s) may not be particularly identifiable within a short span of time. Thus, in complex situations of scientific uncertainty or inconclusiveness, the primary question is how to ensure appropriate regulatory autonomy for member states. In order to accommodate complicated risk scenarios, a sharp regulatory divergence on the adoption, continuation, and justification of the precautionary principle emerged. Groups of consumers, small farmers, and NGOs launched local, national, and transnational movements that advocated for a broader concept of risk research and risk assessment, in opposition to conventional science-based risk assessment. Under the broader concept, risk analysis became “multidimensional,” realized the “incommensurability of different classes and aspects of risk,” prioritized knowledge beyond science, and endorsed “scientific ignorance” in some situations.¹¹⁸ In this broader risk analysis approach, the precautionary principle is continuously constituted, framed, and influenced by divergent actors (consumers, corporations, scientists) operating in a particular social setting.

¹¹⁶ *Ibid* at 68–69.

¹¹⁷ Critics argue intensely against the legal status and clarity of SD. See e.g. Ellis, *supra* note 4; Wolfgang Sachs, “On the Archaeology of the Development Idea” in Michael Redclift, ed, *Sustainability: Critical Concepts in the Social Sciences* (New York: Routledge, 2005) vol 2, 149; for a critical analysis on how SD norms are mostly used symbolically in business and regulatory sectors, see Susan Baker, “Sustainable Development as Symbolic Commitment: Declaratory Politics and the Seductive Appeal of Ecological Modernisation in the European Union” (2007) 16:2 *Envtl Politics* 297.

¹¹⁸ Les Levidow, “Precautionary Uncertainty: Regulating GM Crops in Europe” (2001) 31:6 *Social Studies of Science* 842 at 849; see also *ibid* at 850–68.

Considering these extensive regulatory divergences, (for example, risk assessment differs not only between states but also within a state),¹¹⁹ and the unique socio-political demands from member-states and their constituents, what pragmatic role can we expect from a global trade adjudicatory body? Certainly political or administrative bodies are better placed to address these complex issues on an ongoing basis and to devise case-based solutions.

3.1.2. UPHOLDING INTEGRATIVE FEATURE OF SUSTAINABLE DEVELOPMENT: CONCERN FOR MARGINALIZED STATE OR NON-STATE ACTORS

SD's integrative feature (i.e. its integration of social, economic, and environmental elements) requires an integrated analysis of all its components and gives adjudicators a holistic optic to address complex trade-SD disputes. Sands identifies the *legalistic* nature of this feature in international and regional documents, forums, and even in the decisions of the International Court of Justice.¹²⁰ While approving a trade restriction on the ground of environmental protection or food safety, the integrative feature demands that the long-term effect of the decision should be a vital concern for adjudicators. Yet, the long-term effect of a decision might not be apparent at the time of judicial analysis or might not even be considered as a *justiciable* issue. In *Retreaded Tyres*, the indirect and long-term risks of waste tires were considered enough to justify Brazil's import ban on retreaded and used tires.¹²¹ Similarly for health risks, in *Asbestos*, the AB rejected Canada's argument that a low level of exposure does not cause carcinogenicity.¹²² In contrast, the adjudicators relied on science-based risk assessment under the SPS Agreement in the *Biotech* and *Beef Hormones* decisions.¹²³ It has already been discussed that for the latter decisions, regulatory divergences between SPS and other contesting legal regimes might have caused the exclusion of long-term risk analysis from judicial consideration.

However, even in situations where there is no apparent regulatory divergence between trade and other regimes, it might not be possible or appropriate for the adjudicators to consider the long-term consequences of their decisions. In some situations, judicial determination might adversely affect the marginalized participants of the trading regime or disadvantaged social groups. As a prelude to the *Shrimp I* dispute, when a US regulatory measure banned the import of shrimp caught without TEDs, Indian fisheries agencies endeavored to popularize the use of TEDs amongst fishermen. Yet, many fishermen in India were not interested in using TEDs since a considerable amount of shrimp and other fish can escape from the outlets of these devices.¹²⁴ Some fishermen in India switched to the production of "cultured" shrimp, as

¹¹⁹ In the US, the federal regulatory system dealing with food safety issues is facing considerable opposition from the states. See Gregory N Mandel, "Gaps, Inexperience, Inconsistencies and Overlaps: Crisis in the Regulation of Genetically Modified Plants and Animals" (2004) 45 *Wm & Mary L Rev* 2242.

¹²⁰ Sands, "IEL", *supra* note 28 at 263–66.

¹²¹ Van Damme, *supra* note 55 at 715. See also Chad P Bown & Joel P Trachtman, "Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act" (2008) 8:1 *World Trade Rev* 85, online: <ssrn.com/abstract=1222981>.

¹²² Marie-Claire Cordonier Segger & Markus W Gehring, "The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute" (2003) 15:3 *J Envtl L* 289.

¹²³ *Beef Hormones*, AB Report, *supra* note 81; *Biotech*, Panel Report, *supra* note 86.

¹²⁴ G Sudhakara Rao, "Turtle Excluder Device (TED) in Trawl Nets: Applicability in Indian Trawl Fishery" (2011) 58:4 *Indian J Fisheries* 115.

opposed to “catch” shrimp, in order to avoid the use of TEDs, and some traders diverted their shrimp export to other countries, such as Japan, which did not require the use of TEDs.¹²⁵ Thus, a trade-regulatory measure intending to achieve an SD objective might produce negligible or even negative effects on primary producers and traders.

In order to protect sea turtles, Indian government agencies imposed a total ban on fishing activities on some beaches and established a closed season for fishing on other beaches.¹²⁶ As a result, a substantial number of fishermen lost their traditional livelihood.¹²⁷ Though alternative measures to ensure sustainable livelihoods for the displaced fishermen should be part and parcel of turtle conservation measures taken by Indian authorities, it was neither possible nor appropriate for the AB to consider the coordination problems amongst different state-based regulatory agencies that had isolated the fishing community and their livelihood from the turtle conservation efforts.¹²⁸

The second example of the difficulty in accounting for long-term environmental or socio-economic effects is taken from the well-known *Asbestos* decision. As a developed nation, respondent France had the advanced technology and economic and administrative capacity to administer its public health goals. Is it possible for a low-income country with limited financial and technical capacity to undertake the necessary risk assessment for hazardous exports? What level of proof would be required to justify its trade-restrictive policies? Should economic and administrative difficulties justify the imposition of trade bans without undertaking elaborate risk assessments? What happens if the evidence regarding possible or probable risks is not conclusive and overwhelming? After the AB’s decision in *Asbestos*, strict national regulations banned asbestos production and export in most developed countries.¹²⁹ As a result, asbestos production and export relocated to some developing countries, where the lack of occupational or environmental safety standards affects the health and wellbeing of workers directly.¹³⁰

The above examples show that at an inter-state level, the judicial determination of trade-SD issues provides limited benefits in terms of addressing the changing demands of diverse actors or assessing the potential long-term risks and adverse social justice impacts that result from trade-SD interactions. On the other hand, operationalizing SD requires ongoing attention to distributional or social justice and environmental issues. Ongoing attention allows for the continuous evaluation and rebalancing of new challenges and risks.

¹²⁵ Jayati Srivastava & Rajeev Ahuja, “Shrimp-Turtle Decision in WTO: Economic and Systemic Implication for Developing Countries” (2002) 37:33 *Economic & Political Weekly* 3445 at 3447–49.

¹²⁶ Rao, *supra* note 124 at 115, 122.

¹²⁷ *Ibid*; Sridhar, *supra* note 13 (the author elaborates how some fishing communities suffered from the fishing ban in India).

¹²⁸ Sridhar, *supra* note 13.

¹²⁹ Suttles, *supra* note 12.

¹³⁰ *Ibid* (it is not just migration of industries from North to South, but also recent attempts to increase supply chain responsibility for gross violations of human rights, that attest to the necessity to focus beyond judicial resolution).

3.1.3. DEMOCRATIC PROCESS OF DECISION-MAKING

In the case of conflict between different components of SD, ongoing attention and public discussion will allow for the shifting of existing priorities. Context-sensitive public debate allows for the determination of a correct mix of trade and trade-related social and environmental priorities. Also, operationalizing sustainability requires not just discussion or negotiation at an inter-state level, but meaningful practical deliberation and constructive engagement with marginalized trading partners and their socially and economically disadvantaged groups. It requires that politically non-influential actors are empowered to discuss and deliberate on their socio-economic priorities.¹³¹

On the other hand, decision-making by the WTO's adjudicatory body on SD issues is widely criticized for its alleged intrusion into a domain once reserved for states. It is argued that these complex decisions, made by non-elected members of the Panel and the AB, have important implications for our daily lives ranging from the food that we eat, how to control our health risks, or how to make our social, health, and environmental policy decisions.¹³² One side of the accountability debate argues that the adjudicatory body prefers economic interests over the wishes of democratically elected governments and that the adjudicatory body is not accountable for its decisions.¹³³ It also questions the expertise of members of the Panel and the AB and their capacity to decide on issues without the presence and arguments of all interested or affected parties.¹³⁴ The absence of public discussion and opinions from interested non-state actors distances the decisions of the Panels and the AB from the possibility of operationalizing SD.

3.1.4. FRAGMENTED GOVERNANCE OF SUSTAINABLE DEVELOPMENT ISSUES

Compared with the strong rule-based institutional structure of the WTO, global environmental and social governance regimes remain fragmented and incoherent, and depend largely on voluntary enforcement measures.¹³⁵ The weakened system of environmental

¹³¹ Ananya Mukherjee Reed, *Human Development and Social Power: Perspectives from South Asia* (New York: Routledge, 2008) at 30.

¹³² Noreena Hertz, *Global Capitalism and the Death of Democracy: The Silent Takeover*, 1st ed (New York: HarperCollins Publishers, 2003) at 105.

¹³³ *Ibid.* See also Manfred Elsig, "The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?" 41:1 *J World Trade* 75 at 77; Gregory C Shaffer, "The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters" (2001) 25 *Harv Envtl L Rev* 1.

¹³⁴ Shaffer, *supra* note 133 at 120. Referring to the WTO's committee on trade and environment, Shaffer explains how "power, access and interests" of different stakeholders, i.e. states, bureaucrats and non-state actors, influence/shape the trade-environment debate. Shaffer elaborates how different stakeholders propagate/advance their interests and how trade-environment conflicts are "grounded in differing environmental and developmental values and priorities and differing financial stakes" of all these actors. It is not possible for the state-based dispute settlement system to consider and evaluate the positions of all the affected parties.

¹³⁵ See Steven Bernstein, "Legitimacy in Global Environmental Governance" (2005) 1:1-2 *J Intl L & Intl Relations* 139; Chantal Thomas, "The WTO and Labor Rights: Strategies of Linkage" in Sarah Joseph, David Kinley & Jeff Waincymer, eds, *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Northampton, MA: Edward Elgar, 2009) 257.

governance does not even question the economic consequences of environmental challenges.¹³⁶ For social justice or distributional issues, neo-liberal economic governance has promoted the idea that government interference is unnecessary to address these challenges; the efficient functioning of the market would eventually take care of these issues.¹³⁷ In such a scenario, when two significant components of the SD concept (social justice and environmental protection) suffer from fragmented and weakened governance, the robust interpretative role of a trade adjudicatory body can only promise limited benefits for operationalizing SD.

The above discussion does not portray the incapacity of the adjudicatory body to address trade-SD disputes, but rather portrays a broader account of the complexities of the trade-SD relationship. If we confine our attention only towards effective judicial resolution, it only endorses international (not global or transnational) solutions for this complex matter. Yet, when it comes to judicial resolution through the WTO, only member states determine whether and how to pursue a dispute.¹³⁸ The financial and legal capacities of low-income countries to initiate disputes and to implement the adjudicatory body's decision are seriously constrained.¹³⁹ Moreover, while the mobility of capital is entirely global, it is only possible to understand and give attention to trade-related social/environmental issues by going beyond inter-state relations and weaving amongst state and non-state actors through the multiple regulatory sites where trade-SD interactions happen more regularly and intensely. Below I argue that non-judicial regulatory bodies are better positioned to accommodate SD issues and diverse actors than judicial bodies.

3.2. PREFERENCE FOR NON-JUDICIAL GOVERNANCE

The discussion above shows that the trade-SD relationship is continuously constituted and challenged by demands from various constituents operating in different socio-political and economic realities. Whether this happens as a result of demands for prioritizing trade-related social issues (for example, minimum labour standards or the right to a traditional livelihood) or for attention to trade-related environmental issues (for example, a broader risk assessment approach), the upshot is the continuity and variety in these complex interactions and the contribution of multiple regulatory bodies and actors to a richer and more practical trade-SD discourse. The relevant discussions on the trade-SD relationship, therefore, are how to operationalize SD at a maximum level and the positive effects that can result from linking trade with SD. When measured from this broader perspective, non-judicial governance of the trade-SD relationship produces four distinct benefits, outlined below.

¹³⁶ Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge, UK: Cambridge University Press, 2007) at 24–38 (describes the economics of climate change and argues why a long-term, global economic analysis of climate change impacts is necessary).

¹³⁷ Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (London: Kluwer Law International, 2002) at 1–25, 153–69, 283–91 (for an excellent critique on the isolation or separation of social or distributional issues from market-based development law and policy).

¹³⁸ Although states litigate in the WTO's dispute settlement system, corporations play a vital role in commercial trade disputes. See Gregory C Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington DC: The Brookings Institution, 2003).

¹³⁹ Luke Olson, "Incentivizing Access to the WTO's Dispute System for the Least-Developed Countries: Legal Flaws in Brazil's Upland Cotton Decision" (2014) 23:1 *Minn J Intl L* 101. But see Kristina MW Mitchell, "Developing Country Success in WTO Disputes" (2013) 47:1 *J World Trade* 77.

First, the operationalization of SD depends largely on reorienting the tasks of non-judicial political organs and administrative committees, as only a few SD issues are brought before the Panels or the AB. There is no provision in the WTO Agreement, other than the exception provisions and the preambular objective, that expressly allows for linkage between trade and SD.¹⁴⁰ The non-judicial regulatory bodies possess better capacity to pay ongoing attention to urgent social or environmental concerns and offer cost-effective, prompt solutions considering both the urgency of the matter and the limited capacity of low-income countries in initiating trade disputes. A practical example of efficient dispute prevention through the WTO's administrative committee-level work is taken from an SPS measure.¹⁴¹ The European Union banned the importation of Nile perch fish from Kenya, Uganda, and Tanzania, as there had been a cholera outbreak in East Africa in 1997. The import ban was discussed in the SPS committee and the European Union lifted the ban since the World Health Organization (WHO) reported that although cholera is a waterborne disease, it is unlikely that cholera would be transmitted from processing fish with contaminated water.¹⁴² This example shows how specific advice from a reputed international organization and discussion through the SPS committee helped to solve the matter both amicably and in a cost-effective manner.

Second, significant issues in the trade-SD debate tend to reflect the North-South debate on economic-environmental-labour governance. While the South prefers to include the considerations of marginalized countries (e.g. the North's subsidy on agricultural products and the limited opening of markets for their products)¹⁴³ and their version of environmental problems (e.g. desertification, land degradation, environmental pollution, or resource exploitation by foreign investors),¹⁴⁴ the North prefers to emphasize minimum labour standards and their version of environmental problems (e.g. climate challenges, overpopulation, and environmental degradation by the poor).¹⁴⁵ With such deep division in North-South positioning, a useful point of consensus has been to attain SD in low-income developing countries and channel development aid and technical assistance to increase their trading and social governance capacities.¹⁴⁶ In these hybrid projects, trade-SD interaction occurs more frequently, and non-judicial bodies/committees of the WTO and other international financial

¹⁴⁰ Thomas, *supra* note 135 at 258; see also 261–67.

¹⁴¹ Michael Jensen, "Climate Change and Trade: The Link to Sanitary and Phytosanitary Standards" Joint Paper of the Standards and Trade Development Facility and the World Bank (September 2011) at 4, online: <www.standardsfacility.org/climate-change>.

¹⁴² *Ibid.*

¹⁴³ Adil Najam & Nick Robins, "Seizing the Future: The South, Sustainable Development and International Trade" in Kevin P Gallagher & Jacob Werksman, eds, *International Trade and Sustainable Development* (London: Earthscan Publications, 2002) 166; Joseph E Stiglitz & Andrew Charlton, *Fair Trade For All: How Trade Can Promote Development* (Oxford, UK: Oxford University Press, 2005); Mario Cimoli, Giovanni Dosi & Joseph E Stiglitz, eds, *Industrial Policy of Development: The Political Economy of Capabilities Accumulation* (Oxford, UK: Oxford University Press, 2009).

¹⁴⁴ Najam & Robins, *supra* note 143 at 166–69, 172–74.

¹⁴⁵ *Ibid.*

¹⁴⁶ Joseph Stiglitz & Andrew Charlton, *The Right to Trade: Rethinking the Aid for Trade Agenda*, (London: Commonwealth Secretariat, 2013) at 3–14 (the pinpointed pages elaborate the development of aid for trade; mentioning how the limited resources and donor-prescribed constraints affect the effectiveness of aid for trade, the authors argue for a right to trade and global trade facility based on development approaches).

and development institutions play a more important role in vetting and shaping these crucial issues than the trade adjudicatory body.

Third, some important questions relating to trade-SD linkages occur more frequently in the trade policy-making process. An evaluation of how trade policy-making at a national or sectoral level can cause adverse social, public health, or environmental impacts requires the prior assessment of the policy itself. The WTO's trade policy review mechanism (TPRM) reviews the trade policies of member states. By considering the broader purpose of trade opening, TPRM can generate reviews that relate the multilateral rules of the WTO with the specific social conditions and developmental priorities of the country under review, and can advise on the social and environmental effects of trade opening.¹⁴⁷

Finally, the trade-SD debate is not (and should not be) confined within the boundaries of the WTO. An emerging trade-SD conflict is centered on the issue of subsidizing renewable energy research or production. While the number of disputes to determine the WTO-consistency of national energy policies subsidizing renewable energy production is increasing, the WTO should not be the only forum to decide on the conflicts between climate change mitigation efforts and trade rules. In two recent decisions, the AB ruled that government support programs that benefit renewable energy producers if they use domestic contents violate WTO rules on non-discrimination.¹⁴⁸ In the face of adverse rulings from the AB, it is still likely that national policy-makers would vigorously search for alternative techniques or regimes to validate their support programs. National governments would neither cease to provide support for green industrial capacity-building (e.g. by formally modifying any 'quasi-protectionist' elements), nor would they abandon political support for their climate change or renewable energy related policy preferences.¹⁴⁹ Therefore, the questions are not just how these disputes are decided or what grounds prevailed, but also include: whether some bilateral or multilateral approach is more useful to deal with these complex interactions;¹⁵⁰ what the role of the WTO should be while advising member-states on their natural resource management and trade policies; and how collaborative co-existence between trade and climate change regimes

¹⁴⁷ Khan, "Utilizing Low-wage Labour for Economic Growth: A Critical Analysis of Bangladesh's Trade Policy Review" J Intl Trade & Economic Development [forthcoming in 2018] (I have discussed these issues in detail in this paper).

¹⁴⁸ *Canada—Certain Measures Affecting the Renewable Energy Generation Sector (Complaint by Japan)/Canada—Measures Relating to the Feed-in Tariff Program (Complaint by the European Union)* (2013), WTO Doc WT/DS412, 426/AB/R (Appellate Body Report); *India—Certain Measures Relating to Solar Cells and Solar Modules (Complaint by the United States)* (2016), WTO Doc WT/DS456/AB/R (Appellate Body Report).

¹⁴⁹ Mark Wu & James E Salzman, "The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy" (2014) 108:2 Nw UL Rev 401 at 474; Jaemin Lee, "SCM Agreement Revisited: Climate Change, Renewable Energy, and the SCM Agreement" (2016) 15:4 World Trade Rev 613 at 628–43.

¹⁵⁰ Some scholars suggested that the form, boundaries, and restrictions of sustainable energy trade should be decided at other forums. See e.g. Mahesh Sugathan & Ricardo Melendez-Ortiz, *Fostering Low Carbon Growth: The Case for a Sustainable Energy Trade Agreement* (Geneva: International Centre for Trade and Sustainable Development, November 2011); Joanna I Lewis, "The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development" (2014) 14:4 Global Envtl Politics 10.

can be ensured, given that the latter requires the promotion of renewable energy and green trading capacity.

Apart from climate change and environmental protection, other social justice issues and questions—for example, the impacts of low-wage labour on competitiveness—will continue to challenge the boundaries and aspirations of liberal trade.¹⁵¹ These challenges became more intense with the growth and proliferation of bilateral and regional trade and economic arrangements, which encompass multi-dimensional issues such as trade, human rights, social and environmental issues, development cooperation, climate change, and security. Therefore, whatever routes are chosen to address these complex trade-SD interactions, their ongoing management will certainly require strong and productive inter-institutional linkages and the context-sensitive analysis of problems.

For example, Section 2 of this article found that in recent trade-SD disputes, some developing countries justified their trade-restrictive policies on sustainability grounds. In *Retreaded Tyres*, Brazil used health grounds to justify a trade restriction on used and retreaded tires, and in *Raw Materials*, China used environmental and health grounds to justify a trade restriction on raw materials.¹⁵² In both disputes, the adjudicatory decisions revolved around some common questions, such as how trade and environmental/health rules interact, what alternative options were open for the defendants, and what factors should be considered when the defendant is at a different level of development than the plaintiff. These are crucial issues to consider while deciding on a trade-SD dispute. However, for the ongoing management of trade-SD debates, it is necessary to step beyond these questions and ask how decisions are enforced by the losing state, what significant changes are introduced into their national laws for addressing sustainability issues, and how the enforcement of decisions would affect non-trading (social/environmental) groups.

One point needs to be clarified here: the operationalization of SD at non-judicial sites is not without its challenges.¹⁵³ Considering the complexities in evaluating the real and potential impacts and outcomes of trade-related rules, decisions, and policies, the narrow mandate of non-judicial regulatory bodies, and the top-down process of reviewing trade and related policies, it would be beneficial to take a cautious approach while addressing trade-SD debates at these sites. Yet, despite the limitations and challenges, trade-SD issues interact on a regular basis at these sites. In addition, these sites possess the unique capacity to accommodate the viewpoints of not only member states, but also various socio-political and economic actors. Therefore, these sites are better venues to identify trade and related regulatory policies that would lead to SD through an ongoing analysis of broader complexities in a context-sensitive manner.

¹⁵¹ Khan, *supra* note 147. Olivier De Schutter, Special Rapporteur on the right to food, *Final Report: The Transformative Potential of the Right to Food*, UNGA Human Rights Council, 25th Sess, Agenda 3, UN Doc A/HRC/25/57 (24 January 2014) (recently, this institutional conflict became intense in food security issues).

¹⁵² See *Raw Materials*, Panel and AB Reports, *supra* note 15; *Retreaded Tyres*, Panel and AB Reports, *supra* note 47.

¹⁵³ An elaborate discussion on this issue is beyond the scope of this paper and is discussed in Khan, *supra* note 147.

The preference for non-judicial sites over judicial sites arises not because of any superior ability to balance conflicting SD norms, ideas, or principles, but rather because of their regular involvement in trade-SD issues and their greater flexibility to adapt to particular circumstances. Frequent interactions amongst multiple actors offer practical opportunities to shape and re-shape the normative impact of SD in trade regulation. It is within the continuing process of collaboration and encounters between trade and trade-related rights that broader objectives like operationalizing SD can come to the forefront. The operationalization of SD helps local, national, and transnational actors to develop realistic options to redress the negative aspects of trade liberalization. The whole point is to develop an effective agenda for operationalizing SD.

4. CONCLUSION

Since the introduction of SD as a preambular objective of the WTO, the interpretative shift of the Panels and the AB in disputes involving trade-related rights has influenced not only the thinking process of a reputed and influential international adjudicatory body, but also the trade regulation policies of WTO member states and even their subsequent regulatory choices. By critically analyzing the absence of a coherent approach in some of the decisions of the Panels and the AB, this article demonstrated that a future cooperative relationship—between trade and SD at the WTO and between trade and other trade-related regimes—depends more on the consistent and systematic borrowing of norms, rules, or principles from diverse sources than selective importation from related or even colliding legal regimes.

When a conflict arises between the norms, principles, or rules of different regimes, or when conventional obligations under a treaty require substantial redefinition, the capacity of the broader objective of a regime to withstand the conflict and guide or influence judicial decision-making depicts its strength or influence. At these crucial points of interaction, adjudicators refer to the broader objective of the regime to justify their chosen interpretative route over other available routes. Creative utilization of a preambular objective in this manner helps adjudicators to develop a shared or common ground between overlapping regimes and to tie together apparently colliding regimes and actors, allowing them to interact. This enriches law and policy-making processes.

Summarizing some of the distinctive influences of SD, this article questioned the potential role of the Panels and the AB in operationalizing SD in trade regulation. It found that trade-SD debate should not just focus on reorienting the adjudicatory task towards attending to SD issues, borrowing from other regimes, or measuring the level of adjudicators' expertise or the quality of their decisions. These are important issues; yet, it would be much more useful to move beyond the legalization of the trade-SD relationship, and address the diverse challenges of the trade-SD relationship at multiple points of interaction, at both vertical levels (within the different governance bodies of the WTO) and horizontal levels (between trade and trade-related regimes).

After considering Sen's capability-based SD perspective¹⁵⁴ and arguing for operationalizing SD in trade regulation, this article found that multiple non-judicial governance bodies, where trade-SD issues interact on a regular basis, are more effective forums than judicial sites for managing the complexities arising from the intersection of economic, social, and

¹⁵⁴ Sen, "Development as Freedom" and Sen, "Sustainability", *supra* note 10.

environmental policy-making. Strong intra-institutional (within the WTO) and inter-institutional connections (amongst contemporary regimes)—through active involvement, cooperation, confrontation, or encounters—create space for looking at sustainability issues from a holistic perspective. Within the increasing interactions amongst trade and non-trade regulatory sites, it would be useful to search for ways to align the present trade-based development model with the sustainability issues that are currently sidelined in the politics of powerful actors. Although multiple interactions could produce variable answers, the importance of these interactions lies in their potential for innovative and context-based solutions, and in the emphasis they place on the power and potential of a broader objective in shaping trade regulation.