

TRADE, LABOUR AND SUSTAINABLE DEVELOPMENT: AN INTEGRATED PERSPECTIVE

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Abstract

Some contemporary challenges for global trade regulation and labour governance arise from the barriers between questions of law and social justice, and development policy and distributional issues. This thesis attempts to address some of these regulatory or governance challenges by exploring the interactions between sustainable development (SD), trade regulation, and social or distributive justice. Borrowing from multiple disciplines, i.e. law, international relations, and development economy, and focusing on the problems of low-income countries, this thesis examines the potential and importance of a broad ideational objective in introducing transformative changes in different regulatory or governance mechanisms. This thesis does not discuss ways to link trade regulation or labour governance with SD; rather here the possibilities of operationalizing SD, within the global trade regulatory site or transnational governance mechanisms, are explored from a capability perspective. It is argued that a capability-based understanding can resituate some questions on trade-SD interaction and introduce important behavioural changes in the functioning of the World Trade Organization (WTO). Yet, ongoing operationalization of capability-based SD requires effective market complementary interventions from governance mechanisms operating at different spaces and with diverse actors. Certain emerging transnational governance mechanisms, which connect broader social or distributional issues such as labour governance with trade opening or economic cooperation, attempt to provide crucial market complementary interventions. Taking examples from the recent transnational safety initiatives for Bangladeshi garment workers and relying on a broad conceptualization of the social or distributional issues, it is argued that attention to capability enhancement produces a much more compelling form of labour governance mechanism at these hybrid sites. With a focus

on capability-based SD, a model of transformative linkage is proposed for effective labour governance. The model demands that fundamental and redistributive rights of labour are interconnected and appropriate labour governance requires a stronger form of corporate responsibility. Analyzing the interaction of diverse rules, governance processes and mechanisms, with the demands of marginalized forces the global hegemony of capital is juxtaposed with available options and possible alternatives.

Résumé

Certains défis contemporains aux règles du commerce international et de la gouvernance du travail découlent des barrières entre les questions de droit et de justice sociale et les politiques de développement et les problèmes de distribution. La thèse tente de répondre à certains de ces défis en matière de réglementation ou de gouvernance en explorant les interactions entre les règles du développement durable (DD), du commerce ou de l'économie et la justice sociale ou distributive. Empruntant à de multiples disciplines, i.e. les relations internationales, économie de développement et le droit, et se concentrant sur le problème des pays à faible revenu, la thèse étudie le potentiel et l'importance d'un objectif conceptuel global (DD) pour apporter des changements significatifs à divers mécanismes de régulation ou de gouvernance. La thèse ne parle pas des moyens d'établir des liens entre les règles du commerce ou la gouvernance du travail et le DD; elle explore plutôt les possibilités d'opérationnaliser le DD, au sein de la zone réglementaire du commerce mondial ou des mécanismes de gouvernance multinationale, dans une perspective de capacité. On fait valoir que la compréhension basée sur les capacités peut resituer certaines questions sur l'interaction commerce-DD et apporter d'importants changements de comportement dans le fonctionnement de l'Organisation mondiale du commerce (OMC). Pourtant, l'opérationnalisation continue du DD basé sur les capacités exige des interventions commerciales complémentaires efficaces des mécanismes de gouvernance qui opèrent en divers lieux et avec divers acteurs. Certains mécanismes de gouvernance multinationaux émergents, qui mettent en lien des questions sociales ou distributionnelles plus vastes telles la gouvernance du travail et la coopération commerciale ou économique, tentent de mener à des interventions commerciales complémentaires cruciales. Tirant des exemples des

récentes initiatives internationales en matière de sécurité pour les travailleurs du textile au Bangladesh et s'appuyant sur une conceptualisation plus vaste des questions sociales et distributives, on fait valoir que l'attention portée à l'amélioration des compétences crée une meilleure forme de mécanisme de gouvernance du travail dans ces zones hybrides. Avec une attention particulière portée sur le DD basé sur les capacités, un modèle de rapports conduisant à une transformation est proposé pour obtenir une gouvernance du travail efficace. Ce modèle exige que les droits du travail fondamentaux et redistributifs soient étroitement liés et une gouvernance du travail appropriée exige une forme plus solide de responsabilité corporative. Analysant l'interaction des diverses règles, des processus de gouvernance et des divers mécanismes avec les exigences des forces marginalisées l'hégémonie globale du capital est juxtaposée aux options disponibles et aux possibles alternatives.

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Introduction

On 24th April, 2013, Rana Plaza, an eight-story commercial building located in Savar, Bangladesh, collapsed, killing approximately 1,136 workers employed in ready-made garment (RMG) factories.¹ Considered the deadliest garment factory accident in human history, the collapse was primarily due to faulty construction and the illegal conversion of the building to a factory site. With a politically influential building owner and economically powerful factory owners, Rana Plaza continued as a factory site. Prior to its collapse, workers were forced to enter and continue working, even though large cracks were visible in its columns and warnings were in place to avoid any use of the building.² The garment factories operating in Rana Plaza were either suppliers or sub-contractors to retailers or brands situated mostly in the industrialized countries of the North.³ Offering the lowest production cost, Bangladesh is an attractive sourcing choice for foreign retailers and brands, and ranks as the world's second-largest RMG supplier.⁴ Despite the fact that Bangladesh's RMG sector creates employment opportunities for millions

¹ Factory Collapse in Bangladesh, Institute for Global Labour and Human Rights, online

² *Ibid.* Before the collapse of Rana Plaza, fire at Tazreen fashions caused death of approximately 112 factory workers who were trapped into a locked premise when the fire started. See Julfikar Ali Manik & Jim Yardley, "Bangladesh Finds Gross Negligence in Factory Fire" *The New York Times*, online: <http://www.nytimes.com/2012/12/18/world/asia/bangladesh-factory-fire-caused-by-gross-negligence.html?_r=0%3E>.

³ *Supra* notes 1 and 2. Labour rights activists found documents and garments of 29 brands and retailers from the collapsed building site of Rana Plaza, Savar in Bangladesh. See Steven Greenhouse, "\$40 Million in Aid set for Bangladesh Garment Workers" *The New York Times* (23 December 2013), online: <www.nytimes.com/2013/12/24/business/international/40-million-in-aid-set-for-bangladesh-garment-workers.html?hpw&rref=business&_r=1&pagewanted=all&=>>.

⁴ See ILO, News Release, "Partners Aims to Improve Conditions in Bangladesh Garments Factory" (23 September 2013), online: ILO < www.ilo.org/global/about-the-ilo/activities/all/WCMS_222019/lang--en/index.htm>. The ready-made garments sector has exported goods worth US \$19.3 billion for 11 months that ended in May, 2013.

and earns a huge export income, the tragic nature of the Rana Plaza collapse depicts the bitter reality of cheap fashion and the exploitation of low-wage labour. While retailers and brands from all around the world enjoy the mobility of sourcing from the lowest-cost producers, and producing firms or suppliers enjoy government patronage (through favourable tax and investment policies), millions of impoverished garment workers—mostly women—work at rock-bottom wages with poor or negative work entitlements and put their lives and wellbeing at risk. Despite directly participating in the production process, these workers do not necessarily gain from the economic growth. Rather, competitive pressures from globalized systems of production and distribution render them vulnerable in terms of bargaining and negotiating for work entitlements and working conditions, put them in competition with other low-wage and low-entitlement workers and create increased risk of “underbidding.”⁵

Considering this background, this research discusses some important effects of separating social and distributional issues from market-based economic development policy and how the concept of sustainable development (SD) can introduce significant transformative changes both in the workings of the World Trade Organization (WTO) and in the transnational labour governance mechanisms. The idea is to emphasize the mutually reinforcing nature of SD, social justice and trade and economic governance and prescribe ways to operationalize SD.

As a concept of international law, SD connects three important pillars -- environmental sustainability, economic development, and social justice -- which are necessary for human survival. Though originally rooted in the national and international law on protection of forestry

⁵ Andreas Bieler, Ingemar Lindberg & Devan Pillay “The future of the global working class: an introduction” in Andreas Bieler, Ingemar Lindberg and Devan Pillay (eds) *Labour and the Challenges of Globalization: What prospects for Transnational Solidarity?* (London: Pluto Press, 2008) 1-22; Andreas Bieler, Ingemar Lindberg & Devan Pillay, “What future strategy for the global working class? The need for a new historical subject” in Andreas Bieler, Ingemar Lindberg and Devan Pillay, (eds) *Labour and the Challenges of Globalization: What prospects for Transnational Solidarity?* (London: Pluto Press, 2008) 264-85.

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” (notably known as the *Brundtland Report*) provides a short definition of the term SD as a “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”⁶ 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.⁷

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 international law is hugely contested,⁸ 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 distribution of resources) and the proliferation of international, regional and transnational institutions and governance mechanisms, the SD concept has been utilized to accommodate viewpoints of diverse actors (both state and non-state) and to manage conflicting or overlapping rights and obligations, and values and ideas. Yet, the

⁶ World Commission on Environment and Development, *Our Common Future*, Oxford, Oxford University Press, 1987 at 43.

⁷ *Ibid.*

⁸ Jaye Ellis, "Sustainable Development as a Legal Principle: A Rhetorical Analysis" (22 December 2008) online: SSRN < <http://ssrn.com/abstract=1319360> or <http://dx.doi.org/10.2139/ssrn.1319360>>. See pages 13-15; Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003); Phillip Sands, "Environmental Protection in the Twenty-First Century: Sustainable Development and International Law" in R Revesz, P Sands & R Stewart, eds, *Environmental Law, the Economy and Sustainable Development* (Cambridge: Cambridge University Press, 2000) 369.

perception of the concept is different amongst the countries in the North and in the South, and each uses this concept in order to prioritize their own concern for environmental protection, for labour governance or for economic development.⁹

Despite such divergences in the theoretical understanding and practical implementation, one important unifying point is the increasing attention to operationalize SD in trade and/or economic arrangements. It is well recognized that operationalizing SD would significantly contribute not only to our economic wellbeing, but would also improve the distributional processes as well as environmental sustainability. This motivation to operationalize SD in trade and/or economic arrangements guides this research. While I search the international trade institution or transnational labour governance mechanisms and their complex relationship with SD, the idea is to expose the possibilities of operationalizing SD. For this, I deliberately choose the capability-based understanding of SD.¹⁰ Capability enhancement insists on a broader framework of social and distributive justice and argues for effective attention to social or distributional issues while designing and implementing market-based development rules and policies. Thus, unlike some researches that focus on the possible ways to link SD with trade regulation or with trade and/or economic arrangements, I discuss how capability-based understanding of SD redirects the behavioural functions of the WTO (Chapters 1, 2 and 3) and the questions on effective labour governance (Chapters 4 and 5).

The presence of the preambular objective of SD in the Agreement establishing the World Trade Organization (the WTO Agreement) makes it easier to find an entry point into trade-SD interaction. In the first and second paragraphs of the preamble to the WTO Agreement, the

⁹ See Lavanya Rajamani, "From Stockholm to Johannesburg: The Anatomy of Dissonance in the International Environmental Dialogue" (2003) 12 *Receil* 1 23-32. See p. 24-25 for a discussion on the prelude to the UN Conference on Environment and Development in 1992.

¹⁰ Amartya Sen, *Development As Freedom* (New York: Anchor Books, 2000); Amartya Sen, "The Ends and Means of Sustainability" (2013) 14:1 *J Hum Dev & Capabilities* 6-20.

signatory parties recognized the objectives underlying the establishment of a multilateral trading system as follows,

[R]ecognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

[R]ecognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development....¹¹

While, as an international trade regulatory site, the WTO does not directly deal with environmental protection or social governance, the linkage between trade and labour, trade and environment, and trade and SD has been explored in many prominent publications.¹² I do not reiterate the need for linkage. Rather, I examine how the organizational behaviour of the WTO can be redirected to accommodate some contemporary concerns on social inequality, labour deregulation and unsustainable process of development (Chapter 1). I discuss how the treaty interpretation process (Chapter 2) and trade policy review process in the WTO (Chapter 3) can be refocused to address some of these challenges.

¹¹ See *Marrakesh Agreement Establishing the World Trade Organization*, 1994, 1867 UNTS 154 [Referred to as "WTO Agreement"] at the first and second para of the preamble, online: WTO <https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm> [referred to as "the WTO Agreement"].

¹² The literature on the linkage issue is enormous. I have referred to some of the publications in Chapter 1 (1.1.4.4). A recent book persuasively explains the reasons and methods for linkage between trade and SD. See Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Portland, Oregon: Hart Publishing, 2015).

There has been a considerable variation in the WTO's number of members and their levels of development.¹³ World trade has increased dramatically, and low-income countries' share of trade is about one-third in proportion to their respective GDPs.¹⁴ This means that they are deeply integrated in world trade. Yet, their exports face declining terms of trade, and attention to social or distributional issues remains "secondary" to market liberalization issues.¹⁵ Consistently, research shows that following a fixed template of trade and economic governance policies, most low-income countries (i.e., small developing countries and least developed countries)¹⁶ are facing significant social or distributional problems.¹⁷ There is wide divergence in the living and working conditions of their people. A deep dissatisfaction is growing amongst the "ecological" (people living in places where landscape has changed due to climate change effects) and "economic" (low-paid or under-aged labour) "proletariat."¹⁸ The expansion of social divisions and "production of under-classes" in low-income developing countries have produced massive dissatisfaction with present international economic and financial policy and trade regulation. SD has become an illusion for most low-income countries.

Focusing on the situation in low-income countries and their social or distributional problems, I discuss the changing realities in achieving the objective of SD. While neo-liberal

¹³ Starting with 23 contracting parties in the GATT, the WTO has 161 members as of 26 April 2015. Two-thirds of these are developing countries. See online: WTO <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>.

¹⁴ In 2006, it was US \$15 trillion compared with US \$ 1 trillion in 1970s. See Bernard Hoekman, "Proposals for WTO Reform: A Synthesis and Assessment" (2011) 20:2 Minn J Intl L 324.

¹⁵ Diamond Ashiagbor, "Embedding Trade Liberalization in Social Policy: Lessons from the European Union?" (2011) 32:2 Comp Lab L & Pol'y J 373.

¹⁶ Countries included within the category of developing countries are at diverse levels of development. While the World Bank classifies economies on the basis of gross national income (GNI) per capita per year, some high-income developing countries are certainly not equivalent to other middle and low-income developing economies. Countries with GNI per capita of US \$1045 or less are referred to as low-income economies. Low-income countries have weak human development and socio-economic indicators when compared with high-income developing countries. For more information on these see Development Policy and Analysis Division (DESA), UN, online: DESA <www.un.org/en/development/desa/policy/cdp/ldc/ldc_criteria.shtml>.

¹⁷ The World Commission on the Social Dimension of Globalization, *A Fair Globalization, Making it Happen* (Geneva, Switzerland: ILO, 2004). See at 3-9.

¹⁸ Slavoj Zizek, *Living in the End Times* (New York: Verso, 2010).

economic policies have allowed liberal trade and ensured the mobility of capital and goods, movement of persons remains under strict national control.¹⁹ With an abundant supply of low-skill labour²⁰ and dependence on commodity export or low-skill based manufacturing ability, what should be their path to SD?

At this point, it is necessary to explain that while focusing on trade-SD interaction at the WTO, I do not analyze ways to reconcile trade with SD issues. Rather, I inquire what distinctive role SD can play in the WTO as its “ideational” objective. Borrowing from constructivists,²¹ I particularly stress the importance and capacity of a broad ideational objective in introducing transformative changes in different regulatory or governance mechanisms. What is an ideational objective, and why it is important to analyze trading rules and arrangements from an ideational perspective and not from a materialistic perspective?

The realists and neo-liberals assume that only rational, material and strategic thinking motivate state behaviour in international relations and in the institutions they form. If this idea is the starting point, then it confines the actors’ behaviour to a pre-determined route. In

¹⁹ Adelle Blackett, "Trade liberalization, Labour Law and Development: A contextualization" (2007) Discussion Paper Series No. 179 ILS.

²⁰ In a seminal work, noted economist Sir Arthur Lewis connected the pattern of trade with labour and migration. During the period of industrialization between 1870-1913, the manufacturing bases in industrialized countries like US, UK, Germany and France were trading with the commodity exporting countries situated in “temperate regions of recent settlement” such as Australia, New Zealand, Canada and Argentina and with “tropical regions”, consisting of countries which are now the LDCs, with unlimited supply of labour. The suppliers in temperate countries enjoyed favourable terms of trade. The differences in wage level between European migrant labour in temperate regions and Indian and Chinese labour in the tropical regions was in the order of 10 to 1. Eventually, the unfavourable terms of trade for suppliers and “subsistence” wages for labour of tropical regions affected the process of industrialization and import substitution in the tropical regions. See Arthur Lewis, *Growth and Fluctuations, 1870-1913* (London: George Allen & Unwin Ltd., 1979). See at 170-197.

²¹ Paul R Viotti & Mark V Kauppi, *International Relations Theory* (New York: Pearson, 2010); Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999). While most constructivists argue that constructivism is not a theory, but an “analytical framework,” Wendt sought to outline a comprehensive theory of international relations. See Reus-Smith for a summary of the debates on constructivism. Christian Reus Smith, "Constructivism" in Scott Burchill *et al.*, eds., *Theories of International Relations* (New York: Palgrave, Macmillan, 2005) 188-212 [hereinafter referred to as “Reus Smith, Constructivism”]. For my analysis, the importance of constructivism lies in its capacity to introduce or explain changes in international relations due to influence of ideational objective(s).

international relations, norms, rules and principles are framed and applied, at a given time, by powerful and self-interested political forces (such as states) without regard for the social context or contemporary demands. Constructivism challenges this restrictive perception of norm-making and norm-implementation. Contesting the materialistic approach, the constructivists introduce the notion of ideational objective. A broad ideational objective consists of “shared ideas, norms or values” prevalent at a particular time and space, and evolves with global consensus. For example, while the ideational objective of an institution might remain the same, its understanding evolves and shapes the behaviour of the actors in international relations. Illustrating how an ideational objective modifies institutional or state behavior or even world politics, constructivism introduces an alternative way to re-think the “possibilities of meaningful change.”²²

If a broad ideational objective of SD guides trade regulation, what behavioral changes can it introduce in the WTO? How should the complexities in trade-SD interaction be addressed? While answering these questions in Chapters 1, 2 and 3, I specifically focus on the interaction between economic development and social or distributive justice components of SD. Chapter 2 refers to the environmental protection component of SD, as most of the decisions from the Panels and the AB of the WTO deal with the trade-environment nexus. Chapter 3 analyzes certain suggestions of the WTO’s Trade Policy Review Mechanism (TPRM) on Bangladesh’s trade policy. By emphasizing that “a large pool of inexpensive labour” constitutes one of the “strengths” for Bangladesh’s robust economic growth and by predicting that Bangladesh’s “longer-term growth prospects” depend on fostering a “competitive business environment

²² Reus Smith, *Constructivism*, *ibid*, at 206. How a broad ideational objective(s) consisting of shared norms, principles, and rules shapes behaviour of actors in international relations (state or institutions) and even forms their identity are described in details in Chapter 1.

focused on labour-intensive activities,”²³ the TPRM report on Bangladesh’s trade policy offers a useful context to examine the interactions between SD, trade and social issues.

Despite the primary focus on social justice, none of the components of SD is treated as an isolated factor. Rather, I rely on the creativity and broadness of SD. I particularly note that the development component of SD abandons the narrow approach to economic growth, adopts a “long-term” perspective by taking the concerns of the “poor” of each generation, takes care of the “limits” in environmental capacity and attempts to promote social equity.²⁴ The mutually reinforcing nature of the components of SD conforms to its capability-based understanding. For example, from a capability enhancing perspective environmental sustainability is an essential consideration both in the process of development and in harnessing and promoting enjoyment of the benefits of development. In a similar way, without attending to the social or distributive justice issues, such as the concerns of labour—which participates both in the production processes and in social relations—development as a process would contribute to social inequality and as an end would be unsustainable.

The capability-enhancing framework’s insistence on the mutually reinforcing nature of trade and economic governance, development policy and social or distributive justice inevitably points to the complementary role of the labour governance mechanisms in addressing the challenges of operationalizing SD. Chapter 4 focuses on the transnational labour governance sites. I find that with their capacity to create multi-dimensional forms of regulation, engage both state and/or non-state actors, and accommodate region or country-specific labour concerns, these transnational sites offer a fruitful searching ground for considering labour governance from a capability-enhancing approach (Chapter 4). Legal scholars have widely explored how these

²³ *Trade Policy Review on Bangladesh, Summary Report* (Geneva, Switzerland: WTO, 2012), online: WTO <www.wto.org> at paras 26 & 27.

²⁴ *Supra* note 6.

transnational mechanisms can address labour governance problems in countries with poor regulatory capacity. Yet, differing from some of these scholarly proposals, I try to focus on the central organizing principle or objective of linkage and understand the aggregate effects of isolation or separation of social or distributional rules from market-based development law and policy,²⁵ weakened economic and political capacity of labour and poor governance of labour issues (Chapter 5).

In order to connect the theoretical analysis (in Chapter 4) with some real-life examples, I choose the transnational safety initiatives taken for RMG workers in Bangladesh (in Chapter 5). Being one of the world's poorest and most densely populated countries, Bangladesh has an abundant supply of low-skilled labour. In the past decade, its economy consistently grew at the rate of about 6% per year and "poverty dropped by nearly a third with increased life expectancy, literacy and per capita food intake."²⁶ In 2015, in terms of Gross National Income (GNI) per capita, it has entered the United Nations category of lower-middle-income countries.²⁷ Yet, in terms of purchasing power parity, it offers the lowest level of wages for labour employed in its RMG sector.²⁸ To make matters worse, consistent patterns of poor working conditions and workplace safety raise significant doubts as to the sustainability of the growth. Bangladesh's export-based economic development policy, the labour conditions in the garment factories, and recent safety initiatives taken by transnational actors provide an ideal setting to discuss the

²⁵ For an excellent critique on the isolation or separation of social or distributional issues from market based development law and policy, see Kerry Rittich, *Recharacterizing restructuring: law, distribution and gender in market reform* (The Hague: London: Kluwer Law International, 2002). See at 1-25, 153-169 & 283-291.

²⁶ "Bangladesh Overview," World Bank, online: World Bank <www.worldbank.org/en/country/bangladesh/overview>

²⁷ The UN classifies least developed economies for their low GNI (gross national income), weak human assets and high degree of economic vulnerability. However, in terms of GNI per capita, Bangladesh graduated to lower-middle income economy in 2015. See World Bank, Press Release, "WB Update Says 10 Countries Move Up in Income Bracket" (1 July 2015), online: World Bank <www.worldbank.org/en/news/press-release/2015/07/01/new-world-bank-update-shows-bangladesh-kenya-myanmar-and-tajikistan-as-middle-income-while-south-sudan-falls-back-to-low-income>.

²⁸ Anu Muhammad, "Wealth and Deprivation: Ready-Made Garment Industries in Bangladesh" (August 20, 2011) XLVI: 4 Econ & Pol Weekly 23-27.

importance of operationalizing SD from a capability perspective. Taking examples from these transnational safety initiatives and critically analyzing these, I explore the importance of designing linkage (between labour and trade or economic governance) mechanisms with a central organizing principle (Chapter 5). I ask: Does a capability-based approach bridge the gap between fundamental and redistributive rights of labour or place heightened focus both on economic and political empowerment of labour? What type of corporate responsibility does the capability framework require for effective labour governance?

While addressing multiple queries, I explore and expose the potential influence of SD as a broad ideational objective within two different sites of trade or economic governance framework: one at a global institutional level (Chapters 1, 2 and 3) and the other at some recent transnational labour governance mechanisms (Chapters 4 and 5). Chapter 1 focuses on the influence of SD in reconstructing the organizational behaviour of the WTO. Chapter 2 focuses on the reports of the Panels and the Appellate Body of the WTO and discusses the potentials and problems of operationalizing capability-based SD through judicial resolution. Referring to the TPRM report on Bangladesh's trade policy, in Chapter 3, I examine whether and how SD can influence the existing trade policy review process. In both Chapters 2 and 3, the objective is to inquire the capacity of two specific mechanisms of the WTO to accommodate the crucial features of capability-based SD. Chapter 4 provides a critical review of some scholarly proposals that attempt to link labour governance with trade and/or economic arrangements. In Chapter 5, I ask what changes capability-based SD would introduce, for transnational labour regulation, corporate responsibility and social or distributive justice issues, if it were the organizing principle or objective of linkage.

The flow weaving through the different chapters relies on Blackett's "social regionalism" concept,²⁹ international relations theory of constructivism,³⁰ Sen's capability theory³¹ and the United Nations Guiding Principles on Business and Human rights,³² and depicts contesting methods and sites of norm creation, revision, or implementation. Throughout the entire thesis, the constant remains the capability-based understanding of SD and its relationship with trade and/or economic institutions or governance mechanisms.

Throughout the entire thesis I ask: "Would preference towards a broader ideational objective such as capability-based SD produce a different outcome for global trade regulation (Chapters 1, 2 and 3) or transnational labour governance (Chapters 4 and 5)?" Can we distill a normative preference towards SD in global trade regulation (Chapter 1)? If not, what are the promises and obstacles (Chapters 2 and 3)? How can capability-based SD be operationalized on a practical level (Chapters 2 and 3)? Would preference towards a capability-based SD objective address the structural problems of marginalized actors in the adjudicatory system of the WTO (Chapter 2), or manage the multiple issues arising from trade-SD interaction (Chapter 2), or redirect the process of trade policy reviews by the trade policy review mechanism (TPRM) of the

²⁹ Adelle Blackett, "Towards Social Regionalism in the Americas " (2002) 23:4 Comp Lab L & Pol'y J 901-966; Adelle Blackett & Christian Levesque, "Social Regionalism in the Global Economy" in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York: Routledge, 2011) 1. Blackett's social regionalism concept seeks to understand the interaction of the "social with the economic" at multiple levels. At a global level, it is attentive to existing institutional arrangements and their structural problems and helps to widen attention to social or distributional issues and embed them into "the economic" in a fundamental way. Similar to Ruggie's embedded liberalism notion, it positions their institutional framework along with the ideas and norms that were shared by the original participants. In labour law scholarship, the concept of social regionalism attempts to build on the mutually enhancing relationship between the social and the economic policies.

³⁰ *Supra* note 21.

³¹ *Supra* note 10.

³² This is the first corporate human rights responsibility initiative that has been endorsed by the UN. The guiding principles were proposed by the UN Special Rapporteur Professor John Ruggie and later, UN Human Rights Council endorsed the principles in resolution no. 17/4 of 16 June, 2011. See *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, remedy" Framework* (New York and Geneva: United Nations Human Rights Council, Office of the High Commissioner, UN, 2011) online: UNHCR <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>; John Ruggie, "Protect, Respect and Remedy: A Framework for Business and Human Rights" (2008) 3.2 *Innovations* 189-212.

WTO (Chapter 3)? Even if such an objective infuses some changes in the organizational behavior of the WTO, is it possible for the WTO to accommodate the broader demands of capability-based SD (Chapter 2 and 3)? If social justice issues are integrally tied to SD questions, what should the approach to labour governance be, especially when international financial institutions (IFIs) continue to advise fiscal austerity and labour market deregulation as methods for overcoming financial crisis?³³ Would such an ideational objective help to re-situate questions relating to regulatory complexities for addressing labour governance issues (Chapters 4 and 5)? Would it reconstruct transnational corporate responsibility in a different framework (Chapters 4 and 5)? In the emerging forms of labour governance, would marginalized actors i.e. the workers, be allowed more space and capacity to confront the negative impacts of transnational production and distribution systems (Chapter 5)? Is it possible to address not only labour's dignity in work and economic empowerment, but also their political empowerment within labour regulatory mechanisms (Chapter 5)? All the chapters in the thesis discuss some possible answers and ongoing challenges.

I explore the capacity of SD to confront some challenges of neo-liberal laws and institutions and use the interactions between norms, rules, and principles, institutional behaviour, and state and non-state actors in a different way. Although I rely on conceptual and descriptive analysis of global trade rules, international relations theory of constructivism and transnational safety initiatives taken for RMG workers in Bangladesh, the discussion is not confined to an analysis of enforceable legal rules. Rather, in several places the thesis emphasizes the influence of changing global consensus in norm-making and norm-implementation, the role of non-state actors in shaping global governance, and the role of informal, dialogue-based mechanisms in

³³ See *Trade and Development Report, Report by the Secretariat (New York: UNCTAD 2012)* online: *UNCTAD* <www.unctad.org>; see the overview at pages I-XV. The report pointed that the IFIs suggestion for labour deregulation led to lower productivity, slower growth and higher rate of unemployment.

connecting institutional rules with the ideational objective(s) of the regime.³⁴ Instead of taking a compare and contrast type analysis, the discussion portrays the complementary roles of the international trade regime and transnational labour governance mechanisms in addressing some crucial challenges of SD and in maximizing the operationalization of SD. The idea is to link all available options (rules, governance processes, mechanisms and actors) in a way that challenges the global hegemony of capital.

While this thesis in no way endorses a unique and one-size-fits-all type of response that can address the governance and institutional challenges, relying on the capability-based understanding of SD and its integral relationship with trade and/or labour governance arrangements, it endorses a pluralistic approach that connects law with the demands of social justice, links enforceable legal rules with broader ideational objective(s), and searches for effective distributive mechanisms that address the asymmetries in labour-capital relationship. It does not discard the necessity of state-based actions and regulations. However, realizing the globalized nature of production and its influence on workers and work conditions, this thesis calls for re-thinking the ways norms, principles, and rules are framed and applied in international and transnational settings.

To summarize, this thesis focuses on the role of norms, principles, and rules in defining and transforming the organizational behavior of a global institution (Chapters 1, 2 and 3) and in identifying crucial features of a labour governance mechanism (Chapters 4 and 5). This thesis links the institutional or structural issues of trade regulation and transnational labour regulatory mechanisms by extracting the influence of a broad-based ideational objective. It posits that both

³⁴ Trebilcock and Kirton address the complementary role of hard legal rules and “soft law” (voluntary initiatives and informal institutions) in promoting “economically, ecologically and socially” sustainable global governance. See John J. Kirton & Michael J. Trebilcock, “Introduction: Hard Choices and Soft Law in Sustainable Global Governance” in John J. Kirton & Michael J. Trebilcock., eds., *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Burlington, USA: Ashgate, 2004) 3.

regulatory sites can improve their functionability with regard to re-embedding of the “social into the economic.”³⁵

I argue that from a capability-based perspective, the trade-SD relationship is not to be viewed solely as a relationship that requires continuing compromise or reconciliation between opposing or conflicting norms, principles, and rules. That is certainly a part of the debate. However, as a broader ideational objective of the global trade regime and of a labour regulatory mechanism, capability-based SD transforms the notion of how to regulate or apply the social or distributive justice issues. Instead of putting market liberalization and social justice in opposition to each other, this analysis treats them both as necessary components for achieving SD. Norms, principles, and rules relating to SD are applied, challenged and redefined by myriad of forces (state and non-state actors) and institutions within and beyond national boundaries, instead of being dependent on formalized rules and regulations and state-based enforcement. Rather than putting workers in competition with each other, the analysis puts the concepts of labour empowerment and labour entitlements back on the development agenda. For global trade regulation, it helps to re-situate questions relating to the social purposes of trade liberalization in its original framework, where trade liberalization is not an end in itself, but a means to achieve the broader purposes of creating greater possibilities for convergence of income and ultimately increasing the living standards of the working population. For labour governance, this analysis requires the effective involvement of the working class in the labour regulatory mechanism. Positioning the working class crucially, both in the process of monitoring labour governance and in the process of the transition from fundamental rights to both fundamental and redistributive rights of labour, this thesis insists on effective corporate sourcing and investment policy for the realization of those rights.

³⁵ I borrow the term “social into the economic” from Adelle Blackett, *supra* note 29 at 905.

Chapter 1: Sustainable Development Principle in Reconstructing International Trade Regime: A Perspective from Constructivism

Background: Risks of a “Disembedded” Market

A review of the history of liberal trade at the global level takes us back to the practices of the early 19th century capitalist states. Using liberalist ideas, the imperial British rulers used slave labour and raw materials from colonial countries, and introduced gold standard to regulate currencies through a central banking system. Market ideology and market operation was then a matter of the nation-states, and local merchants and industrialists primarily determined the nature and policy of trade. The state-led protectionist policies of market closure through tariff hikes and currency devaluations at the end of the 1920s plagued the world economy and have been blamed for partly causing the Great Depression and the Second World War (WWII).¹ After WWII, the US emerged as the world’s major economic and political power and was involved in designing a global economic structure. Liberal trade, without any discrimination against nations, became one of the founding pillars of this new structure. J.G. Ruggie, through his famous “embedded liberalism” notion, depicts how economic integration after WWII gave rise to a new form of the

¹ Following the passing of Smoot-Hawley Tariff Act of 1930 in the US, tariff rates were more than doubled and trade volume decreased by 41 percent between 1929-1932. See Jakob B Madsen, "Trade Barriers and the Collapse of the World Trading System during the Great Depression" (2001) 67:4 S Econ J 848; Joseph M Jones, *Tariff Retaliation: Repercussions of the Hawley-Smoot Bill* (Philadelphia: University of Pennsylvania Press 1934).

state-market relationship.² The new economic arrangement ensured a “double movement” under which trade liberalization process was accompanied by “social citizenship rights and social welfare entitlements, at least for the paradigmatic worker in the North.”³ In other words, for states participating in the liberal market system, it reserved the power to determine their social policies and address social dislocations.

Ruggie’s embedded liberalism notion is influenced by Polanyi’s sociological theory of market “embeddedness.”⁴ Trying to craft a balance between two extreme sociological approaches to the market, i.e., economic anthropology (which explains that culture and history shape economic behavior and form of market) and a pure liberal economic approach (which explains that free market and utility maximization determine economic behaviour), Polanyi famously propagated his theory of embeddedness. According to Polanyi, the human economy is “embedded and enmeshed in institutions, economic and non-economic.”⁵ In other words, the economy is embedded within its surrounding politics, culture and social reality. As a result, a disembedded market, which severs ties with its particular social, political and cultural relations and institutions, and relies on its own laws for regulation, is an “impossibility.”⁶ Following Polanyi, Coparaso identifies three essential features of an embedded market: first, the market is created, continued and sustained in its particular political and social sphere; second, market failures can be remedied through complementary social protections; and third, for benefitting

² John Gerard Ruggie, "International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order" (1982) 36:2 Intl Orgn 379-415. [Hereinafter referred to as “Ruggie, Embedded Liberalism”].

³ Adelle Blackett, "Towards Social Regionalism in the Americas" (2002) 23:4 Comp Lab L & Pol'y J 901-966. [Hereinafter referred to as “Blackett, Social Regionalism”].

⁴ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (Beacon Hill, Boston: Beacon Press, 1944).

⁵ *Ibid.*

⁶ Fred Block, "Karl Polanyi and the Writing of 'The Great Transformation'" (2003) 32:3 Theory & Society 275-306.

both market and non-market participants, it is necessary for the market to operate with a broader social purpose and in an efficient and equitable manner.⁷

However, as I elaborate below, there have been great changes since Polanyi introduced his concept of embeddedness of market. First, the state-market relationship has changed substantially; second, a narrow conceptualization of “the social” has encouraged compartmentalized analysis of laws and rules relating to trade liberalization, economic development and distributional issues.

A. Transformed State-Market Relationship

Transnational capital mobility, dominance of transnational or international economic governance, integration of regional and global markets, and globalization of production facilities have changed the state-market relationship in a fundamental way. Addressing the social purposes of market integration, or providing social protections against market externalities, no longer remains within the autonomy of states.⁸ Even states with necessary financial capacity do not possess the exclusive ability to control trade, currency fluctuations, and capital mobility. For example, industrialized states no longer control the movement of production facilities to places where labour or environmental laws are relaxed. As a result of this transformation, both

⁷ James A Caporaso & Sidney Tarrow, "Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets" (2009) 63:4 Intl Org 593-620.

⁸ Political scientists use world systems theory to explain the relationship of states and market in an integrated world economy. States integrate their market and compete with each other for “capturing mobile capital.” Core states compete for “power to organize world economy.” See Sean O. Riain, "States and Markets in an Era of Globalization" (2000) 26:1 Ann Rev Socio 187-213.

industrialized and developing countries, became either unable or incapable to address or control the social or distributional consequences of liberalized trade.⁹

The transformed state-market relationship challenges both the assumptions of embedded liberalism and its application at a global level. Embedded liberalism approach assumed that nation-states possess the ability to provide necessary social cushions. Except a few, the original GATT participants had the capacity to address their social concerns. However, with the emergence of newly independent developing countries and their increased participation in the liberalized trade regime, their needs and capacity to cushion the social dislocations and disadvantages from market openings, and to offer necessary social protections became crucial to ensure ongoing global cooperation.¹⁰ To provide Polanyian protections against the externalities of market integration at a global level, it became obvious that it is necessary to undertake a holistic analysis of trade and related issues and market integration process should uphold a broader social purpose. Blackett argues tellingly that the “single nation optic through which the ‘embedded liberalism’ concept differentiates between the domestic concerns requiring social protection and international concerns, are now outdated and tends to narrow the broader version of the distributive justice concerns.”¹¹

⁹ Jeffrey L Dunoff, "The Death of Trade Regime" (1999) 10:4 EJIL 733. [Hereinafter referred to as 'Dunoff, Death of Trade Regime']; S. Dillon, "A Farewell to Linkages: International Trade Law and Global Sustainability Indicators" (2002) 87:55(1) Rutgers L Rev 152.

¹⁰ Andrew T F Lang, "Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime" (2006) 9:1 J Intl Econ L 81-116. [Hereinafter referred to as "Lang, Reconstructing Embedded Liberalism"].

¹¹ Blackett, Social Regionalism, *supra* note 3.

B. Narrow Conceptualization of the Social or Distributional Issues

The second important change occurred from the isolation or separation of social or distributional issues from the economic integration process. After WWII, international development and financial institutions, such as the World Bank (WB) and the International Monetary Fund (IMF), became involved in designing national development policies for the newly independent developing countries. As their development efforts intensified, during the 1990s, these institutions supported neo-liberal prescriptions and attempted to promote and justify a single and uniform template of rules and institutions with which to build market-based societies and achieve economic development.¹² Within this particular template of rules and institutions, there developed a narrow conceptualization of the social or distributional issues. Strict separation was maintained between the process of constructing appropriate legal rules and institutions to promote a particular objective i.e., economic development and the process of evaluating social or distributional concerns or consequences.¹³

By erecting permanent barriers between questions of law and social policies, development policy and distributional policy, and market efficiency and social equity, neo-liberals preached for market-based societies.¹⁴ They promoted the neo-classical economic idea

¹² For a review of the role of “law” for achieving “economic development”, see David M. Trubek & Alvaro Santos, “Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice” in David M. Trubek & Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 1-18; David M. Trubek, “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future” in David M. Trubek & Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 74-94; Kerry Rittich, “The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social” in David M. Trubek & Alvaro Santos, eds., *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 203-252.

¹³ Ibid.

¹⁴ For an excellent discussion on the isolation of social or distributional issues and critique on the impacts of neo-liberal policy, see Kerry Rittich, *Recharacterizing restructuring: law, distribution and gender in market reform* (The Hague: London: Kluwer Law International, 2002) [hereinafter referred to as “Rittich, Recharacterizing restructuring”]. See at 1-25, 153-169 & 283-291.

that suggests optimum allocation of resources to ensure efficiency in production. In the process of allocation of resources, they argued that it is not necessary to monitor the possible adverse impacts on different social groups.¹⁵ In development law and policy-making, the neo-liberal influence allocated a central role to “law” (consisting of market-oriented rules and institutions) in order to ensure proper economic governance. The market-based law would sharply demarcate the state-market boundary, facilitate foreign investment and contribute to economic growth. The “appropriate” legal rules, regulations and institutions were exported from the developed world to developing countries. The transplantation occurred at such a level that boundaries and traditional concepts of state sovereignty were rendered less significant for matters of production and distribution.¹⁶ Yet, the same did not happen for social or distributional concerns. No regard was paid to different social, political and economic constructs of the developing countries and their disadvantaged social groups. By offering an either/or type prescription, i.e., choosing between state-led or market-led economic development policy, no space was left for addressing the tensions, failures, risks or externalities arising from market-based development.¹⁷ The market-based legal reforms were analyzed strictly from the lens of economic necessity and not through the lens of social or distributive justice. In this process of reform and *restructuring*, market-based development law and policy became concerned with the task of enforcing the rules of efficiency without regard to their social or distributional concerns.¹⁸ The influences of actors or institutions, which do not promote market-based societies, were eliminated.

This subordination of social or distributive concerns continued through neo-liberalists’ assurances of superiority and exclusivity of their suggestion. They explained that adverse social

¹⁵ *Ibid.*

¹⁶ *Ibid.* See *supra* note 12 at 203-252.

¹⁷ See *Ibid.*

¹⁸ *Ibid.*

or distributional consequences, if any, would be experienced for a short period of time, and in the long term, the rising tide of economic growth would lift “all boats.”¹⁹ When the neo-liberal prescriptions failed, the international development and financial institutions adopted a revised development policy, which became popularly known as the “post-Washington consensus.”²⁰ Even though social or distributive justice was a goal to be attained within the reformed development policy, market-oriented rules and institutions continued to determine the process of attaining these social or distributional goals and shaped the “conceptual” meaning of social or distributive justice by determining who gets what and in what priority.²¹ According to Rittich, this view created a particular framework for social or distributional concerns. Social or distributional concerns were viewed as “matters of politics” and would eventually be dealt with as a result of “spillover” benefits from economic growth.²² By suggesting that market-oriented rules and institutions were enough for achieving economic development, this narrow view not only required that attention to social issues was secondary but also prioritized the interests of capital owners over a large majority of the working population.

The consequences of these two significant changes, i.e. transformed state-market relationship and the isolation or separation of the social issues from trade and economic arrangements, raised serious discontent(s) around the globe. For several decades, protests, movements and network activities have emerged against the working of international economic and financial institutions including the WTO. The protesters have diverse identities (NGOs,

¹⁹ *Ibid.* See *supra* note 12 at 203-252; Steven Bernstein & Louis W. Pauly, eds., *Global Liberalism and Political Order: Towards a New Grand Compromise?* (Albany: State University of New York Press 2007). At 3-22, 23-44.

²⁰ For a discussion on the “post-Washington consensus” see Yuhiro Hayami, “From the Washington Consensus to the Post-Washington Consensus: Retrospect and Prospect” (2003) 20:2 *Asian Dev Rev* 40-65.

²¹ Rittich, Recharacterizing restructuring, *supra* note 14; Judy Fudge, “The Cartography of Transnational Labour Law: Protection, Scale and Symbolism” in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York Routledge, 2011) 299 [Hereinafter referred to as “Fudge, Transnational Labour Law”].

²² Rittich, Recharacterizing restructuring, *Ibid.*

political parties, individuals, unions, indigenous groups) and agendas (environment, labor, human rights). Their diverse demands include discarding unlimited economic growth, increasing labour wages and improving work conditions, managing environmental threats and pursuing economic development to improve the living conditions of peoples in low-income developing countries. Whether it is concerning forest protection (in tropical countries), food safety (in Europe), environmental sustainability, labour rights and safety, or fair trade campaigns (around the world), the protesters unify in one important point. Despite their dissents, all these protests, movements, and network activities unite against the workings of the global economic and trade institutions and manifest the *changing global consensus* that the liberalized market should neither work to advance economic interests of the powerful actors nor operate without having any regard to its social or distributional (and environmental) consequences.²³ They demand not only a new inclusive right to development (as opposed to the statist's right to development viewing state as the exclusive engine of economic growth), but also a new process of development which maintains sharp attention to social or distributional consequences and allows diverse local cultures, businesses and communities to survive.²⁴

²³ For an excellent review of global economic policies and the discontents see Joseph Stiglitz, *Globalization and its discontents* (London: Penguin Books, 2002). For an analysis that particularly highlights the trade negotiation capacity problems of "poor, small and vulnerable" countries see Carolyn Deere Birkbeck & Emily Jones, *Beyond the Eighth Ministerial Conference of the WTO: A Forward Looking Agenda for Development* (2012) Global Economic Governance Working Paper No 2012/69 online: SSRN <<http://ssrn.com/abstract=2195876> or <http://dx.doi.org/10.2139/ssrn.2195876>>. For a recent vigorous critique on how "fragmented" governance of trade, labour standards, and environmental protection has given rise to inequality within and between countries, see Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Portland, Oregon: Hart Publishing, 2015). See the introductory chapter at 1-6.

²⁴ Balakrishnan Rajagopal, "International Law and Social Movements: Challenges of Theorizing Resistance" (2003) 41:2 Colum J Transnat'l L 397; Balakrishnan Rajagopal, "Postdevelopment as a Vision for a Third World Approach to International Law" (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) The American Society of International Law at 306; Richard Falk, Balakrishnan Rajagopal & Jacqueline Stevens, "Reshaping Justice: International Law and the Third World: An Introduction" (2006) 27:5 Third World Quarterly 711-712.

Aligning with these protesters, legal scholars raise not only the epistemological questions of accommodating the “third world” in the realm of international law or viewing international law from their viewpoint,²⁵ but also ask important questions on the design and preferences of international economic and financial institutions. For global trade regulation, they search for an alternative to the neo-liberal governance framework by demanding that both the institutional and organizational structure of the WTO should acknowledge the interdependence of economic, social and environmental factors in trade and economic governance. More specifically, they emphasize that trade liberalization as a process should address both social or distributional and environmental problems arising out of market operation or caused by market forces, and argue that the market should promote sustainable development (SD) of low-income countries equitably and efficiently.

This chapter seeks to identify an alternative scenario for global trade regulation. I use concepts and ideas from law, international relations, and development economy to understand the interaction between the norms, ideas and principles, institutional behaviours and diverse non-state actors. I ask: what sort of trading arrangement(s) should we pursue? More specifically, what normative commitment(s) should guide the global trade regime and its future policy-making? Should the questions be how much liberalization should be pursued and how to achieve that at an optimum level, or should we be concerned about the pursuit of broader ideas or objectives that shaped the existing trading order?²⁶ If we choose the latter, how should we reconstruct the ideas

²⁵ *Ibid.*

²⁶ See Lang, *Reconstructing Embedded Liberalism*, *supra* note 10. Recently Professor Schutter proposes that states can link trade with SD by taking unilateral trade restrictive measures to pursue their multilateral ends such as climate change mitigation or improvement of labour standards, provided some conditions are fulfilled. First, the unilateral measures in the form of trade restriction, border adjustment tax or eco-labelling should pursue a shared value (such as universally recognized standard); second, an independent and transparent evaluation system should monitor compliance with prescribed standards; finally, a burden sharing arrangement should be devised that allows poor trading partners technical and financial assistance for capacity building and for compliance. The objective is to link a unilateral trade-restrictive tool(s) with multilateral end(s). According to

or objectives of the global trade regime in a way that addresses the contemporary problems of growing and persisting inequalities, uneven development and environmental crises?

In the first section of this chapter, I discuss some theories of international relations (IR), which explain why states resort to international cooperation in liberalizing trade and how a global trade institution works.²⁷ Thereafter, using insights from the IR theory of constructivism, I argue that it is possible to introduce some behavioural changes in global trading institution by referring to its broader “ideational” objective(s). I elaborate two unique concepts of the constructivist approach, i.e. “shared understanding” and “constitutive rules.” Contrasting liberal and other IR theorists’ dependence on regulatory rules, constructivists’ approach not only explains the transformation of a norm, rule or principle or even an institutional preference, but also allows significant behavioural evolution in international institutions through accommodating the changed norm, rule, principle or preference. To verify that identity and behavioural transformation of institutions is not simply a hypothetical idea, I mention some practical examples.

With particular reference to the SD objective mentioned in the preamble to the WTO Agreement,²⁸ I discuss how at a global level, the normative influence of a broad ideational

Professor Schutter, such a measure would survive a WTO-inconsistency challenge because the restriction-imposing state can demonstrate its “purer” motivation by establishing non-discrimination and transparency in the application of the measure and “strong support to the development objectives of the poor countries.” See Schutter, *supra* note 23. See pages 165-173.

²⁷ For this, I borrow heavily from a similar analysis by Shell. See Richard G Shell, “Trade Legalism and the International Relations Theory: An Analysis of the World Trade Organisation” (1995) Duke LJ 829-927. [Hereinafter referred to as “Shell, Trade Legalism”].

²⁸ *Marrakesh Agreement Establishing the World Trade Organization*, 1994 1867 UNTS 154 online: WTO <https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm> [referred to as “WTO Agreement”]. In the first paragraph of the preamble to the WTO Agreement the signatory parties recognized that “their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.”

objective can be utilized to challenge and confront the fundamental assumptions of a free and self-regulating market economy. Several factors motivate the integrated analysis of trade-SD interaction within a global trade organization's framework. I argue that while materialistic analysis assumes that the ideological framework of trade regulation is narrow, an integrated analysis actually connects trade regulation with its broader ideational objective(s). Additionally, while the changing "concept" and "circumstances" of distributive justice require greater responsibility of international trade and economic institutions in tackling trade-related social (and environmental) issues, only an integrated analysis allows for the expansion or redirection of an institution's existing functions.

I find that the preambular objective of SD mentioned in the WTO Agreement²⁹ is a useful starting point, as it integrates three inter-related components, i.e.: economic development, environmental protection and social justice. However, both the status and importance of SD as a normative concept of IL is intensely criticized. Thus, the second section of the chapter clarifies what sort of trade-SD relationship should be promoted at the WTO. I find that SD as a concept is criticized either for the complexities in its meaning or application, or for its inherent bias towards neo-liberal economic ideology. Revolving around the human needs-based understanding of SD, the existing understanding on trade-SD relationship attends only a limited number of issues, such as how to reconcile the conflicting components of SD within liberal trade. This uncritical approach to the needs-based understanding of SD leads to the assertions that either broader social or distributional (and environmental) issues are automatically taken care of by increased economic growth or liberal trade and SD cannot co-exist. Borrowing from Sen's recent proposal to analyze sustainability not from a needs-based framework, but from a human capability-

²⁹ *Ibid.*

enhancing framework, I propose a wider understanding of the trade-SD relationship.³⁰ My idea is to distill from the constantly evolving relationship between trade and SD, a specific transformative agenda that not only influences the existing understanding of the trade-SD relationship but also responds to some of the recent challenges that trade-SD debate tends to produce.

My approach is different from existing research focusing on linking trade and SD, trade and environment, and trade and social issues; I focus not on the possible ways to link trade with SD. Rather, by emphasizing the role of a broader ideational objective in modifying the workings of a global trade institution, this analysis redirects the trade-SD research in two ways. First, borrowing from the constructivists', I discuss how it is possible to infuse some behavioural transformation within the WTO without undergoing a rigorous treaty amendment process. As a result, this view reconstructs the purpose, effect and future horizon of the trade regime, not as an institution in which to pursue only material interests, but as an institution, which reflects *broader aspirational goals* for the common good and upholds the superior ideational objective(s) over specific provisions of a treaty. Second, borrowing from Sen's capability theory, I propose a wider understanding of trade-SD relationship. While this chapter elaborates the distinctive features of this wider understanding, Chapters 2 and 3 mention some practical ways to accommodate the apparently contradictory demands that there should be a limit to the ever-expanding mode of trade and that there should be some mitigation in the widening socio-economic divisions amongst countries in the North and the South.

Taking a capability-enhancing approach, the wider understanding on the trade-SD relationship addresses a crucial issue. It challenges the neo-liberal idea of conforming blindly

³⁰ Amartya Sen, "The Ends and Means of Sustainability" (2013) 14:1 J Hum Dev & Capabilities 6-20. [Hereinafter referred to as "Sen, Sustainability"].

with market-led development prescriptions, and rejects a compartmentalized analysis of SD, trade liberalization and development law and policy. As a result, the wider understanding negates an outcome where the global market is viewed as natural, self-regulatory and ultimately disembedded from its particular “political, economic and social constructs.”³¹ Rather, it supports that social or distributional questions are intricately linked with the design, operation and outcome of trading rules and policies.

Section I: Relevance of Constructivism for Reconstructing International Trade

With a strict procedure for amending its provisions,³² the WTO has a large number of members at different levels of development.³³ A strict legalistic approach requires frequent treaty amendments and does not work for an institution with such a large number of members. On the

³¹ Adelle Blackett, "Trade liberalization, Labour Law and Development: A Contextualization" (2007) Discussion Paper Series No. 179 ILS. [Hereinafter referred to as "Blackett, Trade, Labour and Development"].

³² Article IX of the WTO Agreement, expressly adopted the GATT practice of making trade rules by consensus. Article IX (1) mentions that “[t]he WTO shall continue the practice of decision-making by consensus followed under GATT 1947(1). Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote.” Thus, trade rules are made through consensus. Consensus means “if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.” [See the footnote 1 to the WTO Agreement]. However, if no decision is arrived at by consensus, decisions are made through majority voting. Article X of the WTO Agreement mentions a rigid procedure for amending existing trade rules. According to Article X, any member or a council of the WTO may submit a proposal to the ministerial conference in order to amend the WTO Agreement or the multilateral trade agreements in Annex 1. When the amendment proposal is formally tabled, the ministerial conference shall approve the amendment proposal by consensus and submit the proposed amendment to members for acceptance. If no consensus can be reached within a period of 90 days, the ministerial conference shall decide by two-thirds majority of members, whether to submit the proposed amendment to the members for acceptance (Article X, Paragraph 1). If two-thirds of the members accept the amendment proposal, then it shall be binding on all members. However, if the amendment affects substantive rights and obligations of the members under the WTO Agreement, it shall be binding only on the members accepting the proposal (Article X, Paragraph 3, 4 and 5). Consensus of all members is required for amending Article IX (rules for decision-making), and Article X (rules for amendment) of the WTO Agreement. Amendment of most-favoured-nation-treatment rule (mentioned in Article 1 of GATT, 1994, Article II:1 of GATS and Article 4 of TRIPS) and national treatment rule (mentioned in Article 2 of GATT) also requires consensus of all members (Article X, Paragraph 2). See Article IX & X of the WTO Agreement, 1994 available online: WTO <https://www.wto.org/english/docs_e/legal_e/04-wto.pdf>.

³³ The WTO has 161 members since April 26, 2015. Amongst them 117 are developing countries or separate custom territories. See <https://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm>.

other hand, the IR theory of constructivism suggests important tools to transform the identity and behaviour of an institution. All IR theories, including constructivism, explain why and how trade cooperation is possible, why international institutions are formed, how they continue their work and accommodate the preferences of their members. Yet, amongst all of these, constructivism exceptionally explains the process of institutional evolution.

1.1 Four Dominant Models Based on IR Theories to Explain the Formation/Working of the GATT/WTO

Based on the IR theories, trade scholars have discussed some models that explain the formation and working of the General Agreement on Trade and Tariffs (GATT), the predecessor of the WTO. I briefly refer to these models and elaborate how constructivism uses distinctive concepts and tools to explain transformation of an institution's identity and behavioural functions.

1.1.1 Realist model: Realist theory is based on the idea that motivated by self-interests, powerful states form and manage international institutions. In the "anarchical" world of power, stronger states form and participate in international institutions solely to enhance their existing power and dictate the working of these institutions according to their rational interests or objectives. Viewed from the perspective of this realist model, the GATT/WTO is a contract, where participating states pursue their trading interests in order to strengthen their economic and political power. According to Shell, the realist model was prevalent in the early dispute resolution method of the

GATT, under which a defendant state could veto panel decisions when they would come to the GATT Council for approval.³⁴

The economic theory of public choice contains some similarity with this realist model in recognizing that the market is not natural and is actually dictated by powerful state and non-state actors. This theory explains that though apparently the market is formed and shaped by rules, governments tend to prioritize politically powerful producers' interests over consumers' interests and focus on protectionist trade policies even though these are economically irrational and reduce aggregate welfare. Dunoff cites the example of political battles over non-regulation of cigarettes and concludes that public choice theory explains why in international trade regime, rules favouring the political welfare of some narrow private interests dominate over rules favouring the economic welfare of consumers.³⁵

However, the realist model does not explain the formation of a strong dispute settlement model in the WTO,³⁶ or the continuing cooperation between participating states who are at different levels of development.

1.1.2 Regime model: The regime model is similar to the realist approach in explaining that states act according to their rational interests in international policy-making. However, in this model the participating states' objectives are not only increase of power, but also the accumulation of wealth and domestic stability. When forming international institutions, the participating states craft binding norms and rules and an effective dispute resolution system. These are opposite to

³⁴ Shell, Trade Legalism, *supra* note 27.

³⁵ Public choice theory also explains why increased government intervention is necessary in shaping market. See Jeffrey L Dunoff, "Trade and Recent Developments in Trade Policy and Scholarship - and their Surprising Political Implications. " (1996) 17:2-3 Nw J Intl L & Bus 759. For a recent analysis on public choice theory see 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. .

³⁶ Shell, Trade Legalism, *supra* note 27.

the “anarchic” expressions of power in the realist model. The regime model has a similarity to the “game theoretic approach” in which, “trading nations face a strategic situation akin to a Prisoner’s Dilemma.”³⁷ States engage in trading through forming institutions, as the latter allows them to “avoid suboptimal outcomes associated with the prisoners’ dilemmas;” some of the benefits of cooperation are “reduced transaction costs”, an established “framework for mutually beneficial decision-making” and “reduced chances of defection through a strong dispute settlement mechanism.”³⁸ This approach explains the presence of a strong and binding dispute resolution model in the WTO. Shell cites the *Tuna-Dolphin I* decision³⁹ as an example of maintenance of “regime-stability,” in which the GATT Panel upheld member states’ sovereign power to decide their environmental priorities and decided that environmental concerns would be addressed in separate forums.⁴⁰

1.1.3 Liberalist model: Adam Smith and David Ricardo’s economic theory of minimum state interference in individual entrepreneurs’ work reflects the fundamental tenets of liberal theory.⁴¹ Under the classical liberal model, a state is not the primary actor and its role should be minimal in economic and international relations. The ultimate beneficiaries of any international trade or economic cooperation arrangement are the citizens of states. Liberal ideas also shaped the development of international law relating to human rights and environment. The rules and regulations of these disciplines and institutions enforcing these rules and regulations, focus on

³⁷ Dunoff, Death of Trade Regime, *supra* note 9.

³⁸ *Ibid.*

³⁹ *United States-Restrictions on Imports of Tuna (Complaint by Mexico and others)* GATT panel report not adopted, circulated on September 3, 1991 online: WTO <https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm>. [Referred to as Tuna-Dolphin I].

⁴⁰ Shell, Trade Legalism, *supra* note 27.

⁴¹ For a detailed discussion on the liberal theory, see Paul R Viotti & Mark V Kauppi, *International Relations Theory* (New York: Pearson, 2010). [Hereinafter referred to as “Viotti & Kauppi”].

the protection of the individual.⁴² Liberalist ideas thus changed the focus of global governance; states' prominence is replaced by individuals, international institutions, and regulatory networks.⁴³

For global economic governance, the liberal model emphasizes trade liberalization and relies heavily on the comparative advantage theory of the neo-classical economists. The comparative advantage theory assumes that all trading partners would gain simultaneously if they limit their production only in the sector(s) in which they enjoy comparative advantage over others. This theory is criticized for ignoring the distributional consequences; for example, unemployment in sectors where a state has no competitive advantage and is not capable of providing domestic support for these disadvantaged social groups.⁴⁴ As a result, a liberal model of trade regulation protects the advantages of the industrialized countries, who possess the capacity to deal with the social costs of open market.⁴⁵ In response, social liberalism emerged "to mitigate the harmful effects of unrestrained economic competition" and allowed a limited "activist" role for states.⁴⁶

1.1.4 Constructivist model: Criticizing realist and liberal approaches, in the early 1980s constructivists developed their argument that international institutions are built upon certain norms, principles, ideas, or preferences and evolve with change in shared understanding.⁴⁷

⁴² *Ibid.*

⁴³ Sol Picciotto, "Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism" (1996) 17 Nw J Intl L & Bus 1014. [Hereinafter referred to as 'Picciotto, Networks'].

⁴⁴ Dillon, *supra* note 9.

⁴⁵ For a recent analysis, see Bernard C Beaudreau, "Vertical Comparative Advantage " (2011) 25:3 Intl Trade J 305-348.

⁴⁶ Viotti & Kauppi, *supra* note 41.

⁴⁷ Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); Alexander Wendt, "Anarchy Is What States Make of It: The Social Construction of Power Politics" (1992) 46:2 Intl Org 391-425; John Gerard Ruggie, "What Makes the World Hang Together? Neo-Utilitarianism and

Constructivists argue that a broad “ideational objective,” consisting of a norm, principle, idea, or preference, guides the behaviour of the agents or actors (institutions, states and non-states actors, corporations, individuals, groups) in international relations and sets their legitimate expectations as to how the institution(s) should work.⁴⁸ For constructivists, material interests do not play an important role in determining actors’ behaviour in international relations; rather they rely on “intersubjectively shared”⁴⁹ “ideational” objective(s), which guides actors’ behaviour in international relations and evolves with change in prevalent consensus.⁵⁰ A favourite example of constructivists is the emergence of human rights norms, which have changed the shared understanding that a sovereign state has complete and unfettered jurisdiction within its own territory.⁵¹ Another example is that the ban on slavery was accomplished only because of the changed shared understanding that the practice of slavery is “immoral and illegal” according to domestic laws and international norms.⁵² With innovative concepts, such as shared understanding and constitutive rules, constructivists explain the role of ideational objective(s) in international relations.

the Social Constructivist Challenge” (1998) 52:4 Intl Org 855-885. [Hereinafter referred to as “Ruggie, Social Constructivist Challenge”].

⁴⁸ Viotti & Kauppi, *supra* note 41.

⁴⁹ Intersubjectively shared means shared by people, not the sum total of people’s belief. See *ibid.*

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.* A deeper analysis on abolition of slave trade by Martinez reveals the combined role of power, ideas and institutions. Martinez argues that the initiatives to eradicate transatlantic slave trade started and became successful due to multiple factors, such as the influence of economically and militarily powerful Britain, the “humanitarian concern” resulting in anti-slave trade movement and use of international law and legal mechanisms. The author details how Britain persuaded other powerful countries like France and US to join the permanent legal initiatives against slave trade. Anti-slavery rules were effectively enforced beyond national borders when powerful nations joined together to “declare slave trade as a form of piracy” and thus subjected the slave traders to trial and punishment. Although broader ideas may not play a solitary role in influencing norm-making and norm-implementation, Martinez traces the influence of “broader ideas” like “humanity and humanitarianism”, “crimes against humanity” and individual human rights in motivating Britain and other powerful countries towards creation of international courts and tribunals against slave trade. See Jenny S. Martinez, *The slave trade and the origins of international human rights law* (Oxford: Oxford University Press, 2011) at chapters 7, 8 & 9.

1.1.4.1 The Concepts of Shared Understanding and Constitutive Rules

Shared understanding relies upon intersubjectively shared ideational factors rather than material factors, and represents the norms, principles or values shared amongst people.⁵³ Shared understanding determines the ideational objective of a regime and causes both institutional and normative changes; it constitutes the identity of actors and explains their behavioural change. Normatively, it explains why and how a particular norm generates and then evolves. The concept of constitutive rules allows norm generation or revision in an institution, even without a formal change in the regulatory rules.

A. Organizational Identity and Behaviour

Constructivists explain why and how a shared understanding evolves along with a change in global consensus and how it can influence the working of international institutions. They explain the identity and behavioral transformation of not only institutions and nation states, but also transnational or trans-governmental networks, including epistemic communities and diverse social movements. These networks, whether they are a forum of experts, of government professionals or of political communities, rely on some sort of shared understanding and influence the policy prescriptions of international and national institutions according to contemporary social trends, needs or demands.⁵⁴

⁵³ Viotti & Kauppi. *Supra* note 41.

⁵⁴ Economic integration after WWII left the states with loose control over regulatory issues and they find themselves increasingly unable to deal with the complexities of diverse social interests. On the other hand, the market became integrated so much so that states engaged in regulatory competition for increasing competitiveness of their products and their markets. At that point, not only the number and activities of international institutions proliferated, but also fragmented and multilayered system of regulation emerged. Regulatory networks, either transnational or trans-governmental (depending on the level and type of regulatory bodies involved), emerged

The concept of shared understanding covers not just ordinary regulatory rules of the institution. Rather, it creates a broader framework for the regulatory rules to function and directs future working of the institution. The extent of influence of shared understanding can expand so much that the question no longer remains “why organizations exist.” Rather, the focal point of inquiry becomes “what do these organizations do after creation.” Taking a sociological or constructivist approach to international institution’s working processes and expansion, Barnett and Finnemore argue that *broad aspirational goals* reflecting the widely shared social values legitimize the necessity for creating organizations and expanding their specific mandates.⁵⁵ They find that a constructivist approach is helpful in “treating international organizations as ontologically independent actors” and “for theorizing about their nature and behavioral proclivities.”⁵⁶ For them, these institutions are not just reflecting the desires of powerful states and regulating interstate relations. Rather, “[t]hey are creating new actors, tasks and goals that transform the character of global politics itself.”⁵⁷ Thus, new or reconstructed normative goals or

and became a new reality. The networks became an alternative but supplementary response to liberal internationalism which premised the primacy of states and treaties in international law. See Kal Raustiala, "The Architecture for International Cooperation: Transgovernmental Networks and the Future of International Law" (2002) 43:1 *Vir J Intl L* 1. Also see Picciotto, Networks, *supra* note 43. Picciotto distinguishes the networks from epistemic communities and argues that these communities influence national or international policy changes relying upon shared understanding, i.e. a shared set of beliefs and common mutual expectations. Policies change through shared expectations and values entering into national and international politics. In the process of evolution of policies, epistemic communities effectively participate through four steps: policy innovation, diffusion, selection and persistence. Epistemic communities influence policy makers at the national and international level through changing existing perceptions and propagating the need for collective response for global problems. They also help in identifying the interests of the state and situate these in a broader international/ regional context through standard setting/ procedural/ regulatory tasks. See E Alder, & P M Haas, "Conclusion: Epistemic Communities, World Order and the Creation of a Reflective Research Program" (1992) 46:1 *Intl Org* 367-390. For a discussion on how local and transnational social movements influenced global norm making or norm implementation in a variety of sectors such as public health, security or development issues, see Rajagopal *supra* note 24. In his article on theorizing resistance, Rajagopal persuasively mentions that along with the networks, various social movements, either local and transnational, not only contributed in influencing norm generation, but also and more significantly, challenged the theoretical foundations of international law which relied only upon states or individuals as the subjects and tend to address their viewpoints.

⁵⁵ Michael Barnett & Martha Finnemore, *Rules for the World* (Ithaca & London: Cornell University Press 2004).

⁵⁶ *Ibid.*

⁵⁷ *Ibid* at 157.

policy preferences are included to justify an institution's continued efficiency and legitimacy and to persuade existing member states and other actors to accept new preferences and value new policy goals.

Contrasting the realists' assumption that changes in international organizations working process initiate from powerful states, the constructivist approach, thus, explains "organizational change as a response to shifts in the regulatory and normative patterns in the environment."⁵⁸ For Barnett and Finnemore, internal working process of an institution informs its external behaviour and vice versa. According to Finnemore, only through accommodating the prevalent shared understanding, i.e. keeping pace with the changing broad aspirational goals, an institution can sustain and legitimize its working for a long period of time using regulatory rules that were crafted some years or even decades ago. Thus, shared understanding not only defines institution's identity and justify its continued necessity, but also by providing a broader framework, it allows for significant behavioural changes. The presence of shared understanding is visible both in the design and operation of the international trade institution. Ruggie observes,

[t]he Bretton Woods negotiations and the corresponding efforts to establish an international trade regime produced more than external standards of behavior and rules of conduct in monetary and trade relations. They also established intersubjective frameworks of understanding that included a shared narrative about the conditions that had made the regimes necessary and the objectives they were intended to accomplish and generated a grammar, as it were, on the basis of which states agreed to interpret the appropriateness of future acts that they could not possibly foresee.⁵⁹

How do the norms, principles or even preferences of an institution change? Below I discuss the process of norm generation and evolution in an international institution.

⁵⁸ *Ibid* at 43.

⁵⁹ Ruggie, Social Constructivist Challenge *supra* note 49 at 870.

B. Norm Generation and Evolution in Institutions

According to the constructivists, states, non-state actors, institutions and individuals shape and construct global norms, rules and principles according to the prevalent shared understanding. These norms, rules and principles, in effect, are *transformatory* in character and create the *ideational structure* for the states to determine and re-determine their actions and preferences in international politics. The socially constructed and culturally influenced structure eventually influences the behaviour of the states in international relations.⁶⁰ When this structure becomes institutionalized, it results in the creation of binding international rules, norms or practice. According to constructivists, the norms, rules and principles, which form the structure evolve with changes in the shared understanding of the actors, and the old structure transforms into a new or revised structure. The new or revised structure then creates new or revised rights and responsibilities for the actors. Thus, both the structure and the actors mutually constitute each other. Ruggie identifies that shared understanding in the form of “collective intentionality”

⁶⁰ Constructivists explain that “social identities” of states determine their interests, preferences and influence their decision making. They cite a familiar example: thinking rationally Canada should be more threatening to US than Cuba on security grounds because of its geographical proximity, military capacity etc. However, in reality the situation is the opposite because of the shared understanding and social identities of US and Canada that they are not threatening to each other. For details, see Christian Reus Smith, “Constructivism” in Scott Burchill et al, eds, *Theories of International Relations* (New York: Palgrave, Macmillan, 2005) at 188. [Hereinafter referred to as Reus Smith, “Constructivism”]. At the national level, similar influence of social identity can be detected from the works of noted legal scholar like Esty. Although Esty did not refer to the concept of shared understanding, he found that a society’s political, legal and social structure or identity critically affects its economic development and environmental policies. See Esty D. & Porter M., “Measuring National Economic Performance and its Determinants” in Michael E Porter & Jeffrey D Sachs, eds, *The Global Competitiveness Report* (New York: Oxford University Press, 2000). Daniel C Esty, “Bridging the Trade-Environment Divide” (2001) 15:3 J Economic Perspectives 113-130. [hereinafter referred to as “Esty, Bridging Trade-Environment Divide”]

performs a “deontic” function: in response to changed norms and principles it creates new rights and responsibilities for the actors.⁶¹

C. Constitutive Rules

The concept of constitutive rules helps to explain how institutional transformation is possible without a formal change in the regulatory rules. International institutions follow norms that are either regulatory or constitutive in character. Regulatory rules have a causal effect i.e. they inform actors what needs to be done and what the consequences are if these rules are not carried out in the prescribed way. Constitutive rules, in Ruggie’s words, “define a set of practices that make up a particular class of consciously organized social activity - that is to say, they specify what counts as that activity.”⁶²

Frank Hindriks argues against the claim that the only distinction between regulatory and constitutive rules is a linguistic one. He argues that regulatory rules specify obligations, rights and powers, whereas constitutive rules create the “very conditions” for regulation. If the conditions of the constitutive rules are accepted then a particular “status is instantiated,” these “status rules” in turn provide the opportunity for the regulatory rules to operate.⁶³ Thus, constitutive rules are different from regulatory rules in the sense that their performance is a precondition of the “institutional legal concept” and these rules “pre-structure the domains of action” within which regulatory rules operate or determine how regulatory rules are to be enforced and interpreted. For example, Lang shows that, in international trade regime, there are not only regulatory rules, such as rules relating to tariffs and quotas, but also constitutive rules,

⁶¹ Ruggie, Social Constructivist Challenge, *supra* note 47 at 870.

⁶² *Ibid.*

⁶³ Frank Hindriks, "Constitutive Rules, Language, and Ontology" (2009) 71:2 Erkenntnis 253-275.

such as non-discrimination and most favoured nation treatment, which creates the “very possibility” of trading activity at a global level.⁶⁴

The broader space provided by these concepts, such as constitutive rules and ideational objective, allows an institution to connect its organizational behaviour with the prevalent shared understanding. Contrasting the approaches of other IR theories, these distinctive concepts of constructivism offer the unique opportunity to identify what the broader ideational objective(s) of an institution is, what the constitutive rules are, and how the original ideational objective is to be reconstructed by connecting it with the prevalent shared understanding.

1.1.4.2 Utilizing Constructivists’ Insights and Addressing the Problems of Constructivism

There are two important differences between constructivists and other IR theorists. First, in economic and trade policy-making, realists understand that, powerful states are the primary determinants of economic and trading policies.⁶⁵ In contrast, under constructivism, international institutions, though formed by states, are themselves important players both in global politics and in norm making. Constructivists recognize that global institutions are increasingly asserting their dominance in the development or revision and implementation of new rules, principles and norms. Using a constructivist approach, Payne and Samhat illustrate how global politics is “experiencing dramatic changes in terms of the transnational challenges confronting the capacity

⁶⁴ Lang, *Reconstructing Embedded Liberalism*, *supra* note 10.

⁶⁵ Taking a realist perspective, Gilpin shows how a state determines the social and political purpose of economic activity. Whether it is for benefit of the state (enhancement of national power) or benefit of the society (through promoting social welfare goals) depends on each state’s political economy. R Gilpin, *Global Political Economy: Understanding the International Economic Order* (Princeton, NJ: Princeton University Press, 2001).

of states.”⁶⁶ According to Payne and Samhat, international institutions are not “mere artifacts of states” and instead are “in the process of becoming legitimate political communities,” through which member states perform some “shared duties” for their collective benefit.⁶⁷ They find support from political scientist Andrew Linklater, who argues that international institutions promote “some consensus about the substantive moral purposes which the whole society of states has a duty to uphold.”⁶⁸

Second, while other theories of IR require an institution to work within a framework of rules and preferences defined by powerful states, constructivism provides an institution with the necessary tools to function and evolve. By allowing transformation of an institution in accordance with its broader ideational objective(s), constructivism not only allows an institution to evolve and modify its working methodology, but also helps to create new or revised preferences for its actors i.e., the members states. As discussed before, the concepts of shared understanding and constitutive rules empower constructivism with *transformative logic* and allow systemic transformation of the norms, principles or preferences of an international institution.⁶⁹

Many criticisms have been posed against the constructivist approach. Constructivists have mostly referred to empirical studies that trace the influence of shared understanding in

⁶⁶ Roger Payne & Nayef Samhat, *Democratizing Global Politics: Discourse, Norms, International Regimes and Political Community* (Albany, New York: State University of New York Press, 2004). Specially at 27-49.

⁶⁷ *Ibid.*

⁶⁸ Andrew Linklater, "The Transformation of Political Community: E H Carr, Critical Theory and International Relations" (1997) 23:3 *Rev Intl Stud* 321-338.

⁶⁹ See Martha Finnemore & Keck Sikkink, "International Norm Dynamics and Political Change" (1998) 52:4 *Intl Org* 887-917. Through some examples such as women's voting rights, medical personnel's right to be treated as "neutrals" and "noncombatants", Finnemore and Sikkink showed how norms emerge in the international arena, then get accepted into the "organizational platform" of the related institution through support of "critical" states and then become "internationalized." When norms are accepted widely in the domestic and international levels, "conformance becomes almost automatic." At 904.

causing some modifications in national or international institutions.⁷⁰ There is lack of precision as to when the normative change happens and it is problematic to quantify how much change in shared understanding results in generation or revision of a norm, rule or principle. There is also no clarification as to whether a new or revised norm, principle or even preference is constructed automatically or whether institutions or other actors bear significant responsibility for inducing these changes. To these objections, the following points are interesting.

First, Jeffrey Legro identifies the stages of replacement of norms, ideas or principles; “collapse” of the old happens when a new or revised idea in the form of shared understanding is already present and produces positive results.⁷¹ At the “consolidation stage,” new norms emerge and the replacement of the old is finalized. At both stages, interest groups, transnational and trans-governmental networks and non-state actors play a crucial role in motivating states and institutions in adopting the necessary changes.⁷² It is difficult both to quantify how much shared understanding operates as a causal factor to explain a particular change in an institution, and to locate precisely when the change occurs in an objective manner. However, it is interesting to note that prevalent shared understanding “offers clues to the likely behavioural pattern of actors.”⁷³ Therefore, the new or revised norm, principle or preference is not entirely novel. In between the period when the old norm is in the process of being replaced by the new or revised

⁷⁰ Craig parsons elaborated how the particular “ideology of integration” resulted in the formation of present EU. If instead the traditional or confederal model were chosen, then it would have been a different EU. As a sole causal factor, ideas generated a particular type for an institution, which would otherwise have been entirely different. See Craig Parsons, “Showing Ideas as Causes: The Origins of the European Union” (2002) 56:1 Intl Org at 47-84.

⁷¹ Jeffrey Legro, *Rethinking the World: Great Power Strategies and International Order* (Ithaca, New York: Cornell University Press, 2005). [Hereinafter referred to as “Legro, Rethinking the World”].

⁷² See Lang, *Reconstructing Embedded Liberalism*, *supra* note 10. Lang provides an example of how constructivism helps in explaining the inclusion of the trade in services within the trade regime and the change of emphasis from border restrictions towards “behind the border restrictions” on trade. According to Lang, these changes can be traced back to “fundamental reconceptualization of the shared ideas and understanding of the normative domain and operation of the trade regime.”

⁷³ Legro, *Rethinking the World*, *supra* note 71.

one, most of the actors accept the necessity for a change and tune their behaviour in accordance with the prevalent shared understanding rather than adhering to old norm.

Second, the process of change is an ongoing pattern. In some situations, the transformation process could be slow and might not produce a single outcome. For example, after the Great Depression and WWII, though protectionism as an economic policy was discarded, different states followed different models of economic development. Import substitution and government intervention was followed in some states (Argentina, Brazil) whereas some followed the policy of lowering tariff and liberalizing trade (US).⁷⁴

Third, following the insights of constructivism, it is possible to argue that institutions bear greater responsibility in initiating necessary behavioural changes amongst its members. Though there is no straightforward formula for the change or revision of a norm, principle or preference, transformation or extension of institutional responsibility is not a new or hypothetical idea. As the discussion goes on we will see that, in reality, institutional transformation is a continuous process and happens quite often either through reorienting an institution's existing working methodology or through the judicial interpretative process.

1.1.4.3 Identity and Behavioural Transformation in Institutions: Accommodating Shared Understanding

Influence of norms, rules or principles can be traced not just in causing behavioural transformation in institutions, but also in shaping a particular legal discipline. While arguing the necessity for “greater understanding” between international law and international economic law, Professor Donald McRae describes the influence of “ideas” that shaped the evolution of

⁷⁴ *Ibid.*

international law and international economic law.⁷⁵ McRae finds that introduction of war crimes liability for individuals, international legal personality of organizations, rights of individuals or minorities, or even inclusion of newer branches of international law (international human rights law, international environmental law) can be traced back to the role of “ideas” and new “needs.”⁷⁶ Similar influence of broader “ideas” (such as non-discrimination) can be traced in international trade law and in international investment law.⁷⁷

The transformation of institutional identity and behaviour in accordance with prevalent shared understanding is evident both in the regular working process of an institution and in the dispute resolution process. For example, the Appellate Body (AB) of the WTO has utilized the preambular objective of SD while deciding WTO-consistency of trade restrictions imposed for the protection of environment or health. Referring to the meaning and importance of SD, in post-WTO decisions like *Shrimp I* and *Shrimp II*, *Asbestos* and *Retreaded Tyres*,⁷⁸ the AB has shown

⁷⁵ Donald McRae, "International Economic Law and Public International Law: The Past and The Future." (2014) 17:3 JIEL 627.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ I discuss these decisions in details in Chapter 2. *US-Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India et al)* (15 May, 1998) WT/DS58/R (Panel report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>. [Referred to as *Shrimp I*, Panel Report]; *US-Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India et al)* (12 October, 1998) WT/DS58/AB/R (Appellate Body Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>. [Referred to as *Shrimp I*, AB Report]. *US-Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)* (15 June, 2001) WT/DS58/RW (Panel report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>. [Referred to as *Shrimp II*, Panel Report]; *US-Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)* (22 October, 2001) WT/DS58/AB/RW (Appellate Body Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>. [Referred to as “*Shrimp II*, AB Report”]. *European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada)*, (September 18, 2000) WT/DS135/P/R (Panel Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm> [Referred to as “*Asbestos*, Panel report”]; *European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada)*, (March 12, 2001 adopted April 5, 2001) WT/DS135/AB/R (Appellate Body Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm> [Referred to as “*Asbestos*, AB report”]. *Brazil — Measures Affecting Imports of Retreaded Tyres (Complaint by EC)* (12 June, 2007) WT/DS332/R (Panel Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm> [Referred to as “*Retreaded Tyres*, Panel Report”]; *Brazil — Measures Affecting Imports of Retreaded Tyres (Complaint by EC)* (3 December, 2007,

greater willingness to defer to member states' regulatory policies and has allowed some flexibility for member states to choose the type of scientific evidence and the level and type of protective measures. Comparing the attitude of the Appellate Body in the post-WTO decisions with its earlier decision in *Tuna Dolphin I*,⁷⁹ the influence of the concept of “fundamental change” in “the intersubjective understandings about the objective and values of trade regime” is notably apparent.⁸⁰ Chapter 2 elaborates in detail this reconstruction through judicial decisions and shows that values of trade have evolved with time and have taken a meaning, which is broader and different than what was crafted some fifty years ago.

In its working process, the WTO constantly encounters the influence of shared understanding and the changing consensus. Howse observes that the growing demands for participatory opportunity from the non-state actors at the WTO can be traced back to the changing consensus that states are not the “only really legitimate or effective institution for mediating different collective interests and values.”⁸¹ There are other situations where the demands for transformation have been accommodated by trade regulatory institutions. For example, diplomacy-based dispute resolution system of the GATT has transformed into a rule-based adversarial system in the WTO.⁸² From accommodating views of non-state actors,⁸³ to

adopted 17 December 2007) WT/DS332/AB/R (Appellate Body Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm> [Referred to as “Retreaded Tyres, AB Report”].

⁷⁹ *Supra* note 39.

⁸⁰ Lang, *Reconstructing Embedded Liberalism*, *supra* note 10.

⁸¹ Robert Howse, “From Politics to Technocracy-and Back Again: The Fate of the Multilateral Trading Regime” (2002) 96:1 AJIL 94-117. At 115.

⁸² See Joel P Trachtman, “Institutional linkage: Transcending “Trade and ...” (Symposium: The Boundaries of the WTO)” (2002) 96:1 AJIL 77-93.

⁸³ The WTO holds an annual public forum. For a suggestion that the WTO should allow non-state actors an effective standing to channel their views, see Carolyn Deere Birkbeck, “The Future of the WTO: Governing Trade for a Fairer, More Sustainable Future” in Ricardo Meléndez-Ortiz, Christophe Bellmann & Miguel Rodriguez Mendoza, eds, *The Future and the WTO: Confronting the Challenges. A Collection of Short Essays* (Geneva, Switzerland: ICTSD Programme on Global Economic Policy and Institutions, 2012) 119-129.

undertaking inter-institutional joint research programmes,⁸⁴ the WTO is continuously striving to construct alternative ways to manage its interaction with trade-related matters. Changes in shared understanding to oversee not only the quantity of trade, but also its quality (i.e. the mode of production and effects of trade), could explain the addition of side agreements to the North American Free Trade Agreement (NAFTA) which included labour and environmental considerations into the formulation of trade policy.⁸⁵

In the identity transformation process, an international institution's social interactions with other actors play an important role.⁸⁶ With examples from the World Bank (WB), Park elaborates on the process of transformation in an institution.⁸⁷ Park illustrates how "Transnational Environmental Advocacy Networks" (TEANs) along with local communities challenged some "environmentally damaging" development projects undertaken by the WB. Though the WB is supposed to contribute to the development projects of developing countries through finance (lending, underwriting and investing) expertise and advice, some WB projects' connections to environmental degradation or dislocation of local communities and the TEAN's activities in reaction have caused institutional changes within the WB. As a result of intense pressures from the TEANs, the WB has adopted the idea of SD within its project approval policies.

Park illustrates two famous disputes. "The Polonoroeste campaign" was the first one in which the TEANs successfully persuaded the WB to suspend their loan disbursement on a project, which aimed to use the Amazon forest for farming, cattle ranching and settlement of

⁸⁴ Jansen M & E Lee, *Trade and Employment: Challenges for Policy Research* (Geneva: World Trade Organization and International Labour Office, 2007).

⁸⁵ NAFTA signatory states negotiated two side agreements: the North American Agreement on Environmental Cooperation and the North American Agreement on Labour Cooperation. More information available online: NAFTA <www.naftanow.org>.

⁸⁶ Susan Park, *World Bank Group Interactions With Environmentalists: Changing International Organisation Identities* (Manchester: Manchester University Press, 2010). See at 1-17, 19-55 & 58-120

⁸⁷ *Ibid* at 58-120.

some colonists through road building and other projects.⁸⁸ It appeared that the project would cause environmental problems and produce undue social consequences by severing the local community from their reserve land and livelihood, and using the forest for unsustainable farming practices. Another major campaign against the WB was the “Narmada Sardar Sarovar” project in India.⁸⁹ Both domestic and international social groups fought against the hydro-electricity project in India for its disastrous environmental and social consequences. The protest groups contended that the project would destroy traditional livelihood without adequate environmental or resettlement plans. Ultimately, India asked the WB to cancel the loan disbursements. The WB later generated detailed rules for evaluating and monitoring the social and environmental effects of their lending projects to ensure an effective accountability mechanism. One of the objectives of the change was to ensure that the WB projects do not adversely affect the local communities residing within the project site.⁹⁰

Two important influences of prevalent shared understanding are noteworthy. First, the demand for change, in this regard, originated not from powerful member states, but from non-materially powerful non-state actors such as TEANs and other local groups or movements. Second, not only did the WB change its project evaluation policy, but these institutional changes in the WB led to demands for scrutinizing loan disbursement policies in other organizations of the WB Group, such as: the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA). Identity transformation in these organizations occurred

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

⁹⁰ Park, *Ibid* at 58-120.

due to a change in shared understanding as to what should be considered “acceptable behaviour for multilateral development lenders and investors.”⁹¹

1.1.4.4 From the Idea of Linking Trade with Trade-Related Issues towards Reconstructing Liberal Trade from an Ideational Perspective

Numerous scholarly analyses have argued for linking trade with trade-related issues in order to address the problems relating to environmental protections, human rights and social justice (distributional problems).⁹² All of these analyses have rich arguments. For most scholars, the central question is whether the WTO should be confined to its trade liberalization mandate or there should be an institutional transformation. If the latter is preferred, what would be the guiding rule and objective of such institutional evolution? However, I analyze not the ways to link trade with social justice or environmental protection, but how to reconstruct liberal trade from a broader ideational perspective. For this I deliberately choose the SD objective.

⁹¹ *Ibid* at 237-246, Park argues that introducing green policies in development lending and investment is not enough to deal with the social and environmental problems arising from market operations of different actors, lenders and industries; however, we can hope that the transformation of the identity and thus the preferences of the WBG may lead the way to “spreading international norms of sustainable development” amongst borrowers and other development lenders. Kenneth Abbott also cites how the WB has changed its formula for measuring “national wealth” of a particular country. Having regard to the concept of SD, it now takes into account not only production based assets but also natural assets and human capital. See Kenneth W Abbott, “Economic’ Issues and Political Participation: The Evolving Boundaries of International Federalism” (1996) 18 Cardozo L Rev 971. See at 982.

⁹² I list only a few scholarly works from the enormous literature on “trade and” issues. David W. Leeborn, “Linkages (linking international trade policy to other concerns, such as human rights or the environment) ” (2002) 96:1 AJIL 5-27; Daniel Kalderimis, “Problems of WTO harmonization and the virtues of shields over swords” (2004) 13:2 Minn J Global Trade 305; David M Driesen, “Linkage and Multilevel Governance” (2009) 19:3 Duke J Comp & Int’l L 389; David M Driesen, “What is free Trade? The Real Issue Lurking Behind the Trade and Environmental Debate” (2001) 41:2 Va J Intl L 279; Steve Charnovitz, “The WTO’s Environmental progress” (2007) 10:3 J Intl Econ L 685-706; Debra P Steger, “The Culture of the WTO: Why it Needs to Change” (2007) 10:3 J Intl Econ L 483-495; Philip M Nichols, “Trade Without Values” (1996) 90:2 Nw UL Rev 658; Sarah Joseph, David Kinley & Jeff Waincymer, eds, *The World Trade Organization and Human Rights: Interdisciplinary Perspectives* (Northampton, MA: Edward Elgar, 2009). For a more recent analysis that refers to most scholarly works on “trade and” issues, see Sungjoon Cho, “From control to communication: science, philosophy, and world trade law” (2011) 44:2 Cornell Intl LJ 249. For a recent analysis on linkage between trade and SD, see Schutter, *supra* note 23.

If the global trading regime is to be reconstructed with reference to its ideational objective, it is important to clarify why an integrated analysis is preferable. The existing trading regime evolved with some materialistic economic objectives. It was designed with the purpose of achieving the fundamental assumptions of neo-classical economists. For these economists, maximizing the benefits of individual consumers and efficient utilization of the earth's resources were the primary objectives of any economic activity.⁹³ How rational, then, is the reliance on ideational objective(s) to motivate, inform and influence some transformative changes within a trade regulatory institution? Why should trade policy-makers be evaluating their choices with an ideational objective rather than resorting solely to economic or technical analyses? Is the notion of free trade inherently incapable of accommodating any ideational objective?

There are at least four reasons that indicate the necessity for undertaking an integrated analysis of trade and related matters by referring to a broad ideational objective. First, a materialistic or technical analysis promotes a fragmented analysis of trade and trade-related issues. It requires that trade-related environmental and social or distributional concerns should be addressed through separate organizations. As a result, it encourages a compartmentalized view of the ideological frameworks of trade and other regimes. While trade and economic institutions would apply their respective rules, trade-related issues such as environmental and social or distributional issues would be addressed in their respective forums. Such analysis promotes the view that compliance with narrow regulatory rules of an institution is enough and there is no need to focus on the broader ideational objective(s) of an institution.

⁹³ *Supra* note 41. For a critical analysis on how neo-classical economic theory gave rise to neo-liberal discourse see H. J. Chang, "Breaking the mould: an institutionalist political economy alternative to the neo-liberal theory of the market and the state" (2002) 26:5 *Cam J Eco* 539. Criticizing the assumptions of neo-liberal discourse, Chang proposes for institutionalist political economy, as the latter recognizes the role and responsibility of state and institutions in shaping and limiting market.

On the other hand, integrated analysis allows an institution to consider the broad ideational objective of the regime and create a shared space with other contemporary regimes [I discuss more on this in Chapter 2]. Thus, integrated analysis suggests an important way (though not the optimum way) to overcome the problems of fragmented and weakened nature of global governance in social or environmental issues.

Secondly, despite the presence of strong materialistic objectives that influenced the formation of a liberal trading system, the “embedded liberalism” concept ensured that member states would address necessary social or distributional issues. Since the formation of the WTO, the preambular objective of the WTO Agreement has explicitly referred to SD. Therefore, even at their formation, the rule-based structures of the GATT and the WTO negated the idea of free trade,⁹⁴ reserved some space for broad ideational objective(s) and allowed for an integrated analysis of trade and trade-related matters.

Thirdly, even within the liberal model, economists have long recognized that externalities arising from regulatory failures need to be overseen both at the domestic and international levels. Otherwise, the resulting growth would be unsustainable in the future. This realization has infused a component of “welfare” in liberal market economics.⁹⁵ According to Daniel Esty, the welfare concern requires that trade liberalization policy needs to balance or offset the negative costs of open market; for example increased economic growth without regard for sustainability (for example, economic growth through following pollution-intensive or resource-consuming production methods) leads to adverse socio-economic and environmental costs, which would

⁹⁴ Ruggie, Embedded Liberalism, *supra* note 2; Blackett, Trade, Labour and Development, *supra* note 31.

⁹⁵ Daniel C Esty, "Linkages and governance: NGOs at the World Trade Organization (Linkage as Phenomenon: An Interdisciplinary Approach)" (1998) 19:3 U Penn J Intl Econ L 709.

eventually offset the gains from economic development.⁹⁶ While studying economic growth and environment protection policies of the Asia Pacific Economic Cooperation Forum (APEC), Andre Dua and Daniel Esty conclude that to ensure sustainable economic growth and to ensure *welfare gain* from trade, it is necessary to address environmental costs of economic expansion in terms of loss of productivity, depletion of natural resources, and increased public health care expenditure.⁹⁷

Fourthly, and more importantly, changes in the “concept” and “circumstances” of distributive justice⁹⁸ challenge the analysis of trade and related issues from a materialistic perspective. These changes demand that as a global trade institution, the WTO share a greater responsibility in addressing the social or distributional concerns from market opening. Contrary to popular perspective, social or distributive justice is not only about financial transfer or aid for humanitarian purposes; it covers wider issues such as the allocation of resources such as income, health and education to weaker and marginalized or disadvantaged sections of society, assistance to social groups displaced due to trade opening etc.⁹⁹ Usually, state-based institutions monitor

⁹⁶ Andre Dua & Daniel Esty, *Sustaining the Asia-Pacific Miracle: Environmental Protection and Economic Integration* (Washington Institute for International Economics, 1997).

⁹⁷ *Ibid.* Dua and Esty argue that economic cooperation organization like APEC is the best institutional response to address these environmental issues and ensure economic growth which is sustainable in future.

Even from a liberal economists’ perspective it is possible for a concept of “limit” to operate within trade and economic policies. Taking a different perspective from the neo-classical economists, some economists (including Robert Solow, winner of Nobel Prize in economics in 1987) have proposed that even liberal economic framework may allow “slow or even no growth” but “functional” economies in which “stability, resilience and wellbeing” are the primary objectives taking into account “the environmental and resource constraints.” For these economists, there would be growth in some sectors such as renewable-energy development and as a result, although the GDP (Gross Domestic Product) would decrease, GPI (Genuine Progress Indicator) would increase. See P, Victor “Questioning Economic Growth” (18 November 2010) 468:7322 *Nature* 370-371. Victor argues that the developed economies could realistically afford to alter their primary policy objective of economic growth in favour of adopting green growth policy. Abandoning growth in industries, which are based on high consumption of natural resources, would be offset by growth in new sectors such as renewable energy development and clean energy.

⁹⁸ Andrew Hurrell, "Global Inequality and International Institutions" (2001) 32:1/2 *Metaphilosophy* 34-57. [Hereinafter referred to as “Hurrell”]. Hurrell uses the words “concept” and “circumstances” of justice. See Charles R Beitz, "International Liberalism and Distributive Justice: A Survey of Recent Thought " (1999) 51 *World Politics* 269-296.

⁹⁹ Hurrell, *Ibid.*

the resource allocation process and as an international trade institution, the WTO neither possesses the institutional structure nor the organizational capacity for overseeing this process.

However, in a globalized world, international institutions through their norms, principles and rules, do participate in building, and “universalizing or particularizing” “ongoing social practices”, which significantly influence and shape both national and global resource allocation processes.¹⁰⁰ The increasing influences of institutions in the resource allocation process have changed both the concept and the circumstances of distributive justice. Hurrell argues that the immense proliferation and strengthening of international and regional institutions and their “social practices” have challenged the Rawlsian idea of community-based distributive justice.

The concept and circumstances of social or distributive justice are no longer confined within the boundary of a particular community/state.¹⁰¹ As an example of the profound influences of institutions, he cites that domestic economic policy-making in developing countries is greatly influenced by the rules and regulations of the WTO and by the prescriptions from international financial and development institutions. Despite the “density” and deep influences of international institutions in proliferating economic globalization, no such density in the form of “global common interest” to tackle social or distributional problems at a global level has been formed.¹⁰² As a result, the changing concept and circumstances of distributive justice require that

¹⁰⁰ *Ibid*, at 38.

¹⁰¹ *Ibid* at 45.

¹⁰² *Ibid* at 52. Hurrell traces some factors that contributed to this segregation of distributional issues. One such factor is international financial and development institutions’ preaching that market-based growth provides the only option to reduce poverty and to achieve economic growth. As a result of following this narrow advice, attention to issues relating to equity and equality and debates on how far international rules and institutional structure contribute to under-development in poor countries “remained off the limits.” Another factor that hindered the process of developing “global common interest” in distributional issues relates to allocation of preference to politically influential powerful interest groups both within and beyond national boundaries. Hurrell also mentions that developed nations have continuously offered contrasting behaviour while undertaking financial responsibility for distribution with their attitude to dominate financial reform decisions. He cites that though there has been declining rate for allocation of aid and assistance to the poor countries, for major financial reform issues, the industrialized nations have formed special groups excluding the developing and poor countries.

trade and economic institutions and arrangements should accommodate a broader space for social justice concerns. Also, it is reasonable to expect that an institution with a strong organizational structure, a large number of members and a strong influence on member states' trade policy, should at the minimum focus on trade-related social or distributional (and environmental) problems.

The foregoing discussion elaborates the necessity for an integrated analysis of trade and trade-related issues and for organizational transformation of the WTO. Lang finds that the changing global consensus as to how the trade regime should work can be discerned at both operational and institutional levels of the WTO.¹⁰³ At the operational level, the constitutive rules of the trade regime do not incorporate development as an objective of the trading regime, though the majority of the participants are developing economies.¹⁰⁴ At the institutional level, the embedded liberalism model on which the liberal trade system was built is immensely challenged by inclusion of large number of developing countries at different levels of development. This “alerted constructivists to the possible weakening of this intersubjective, capitalist consensus” and opened “the door for states and non-state actors to begin modifying, adapting, or constructing alternatives to the status quo.”¹⁰⁵

In summary, both realists (in their path of pursuit of power) and liberalists (in their path of beneficial cooperation amongst states) follow a neo-classical model of economics. Material factors, such as *self-interest*, *utility maximization* are the ultimate aim for any economic cooperation. Constructivists, on the other hand, prioritize the role of norms, principles and rules and explain why and how broader ideational objective(s) shapes and reshapes the workings of international institutions, actors' behaviour and global politics. Constructivists have shown both

¹⁰³ Lang, *Reconstructing Embedded Liberalism*, *supra* note 10.

¹⁰⁴ *Ibid.*

¹⁰⁵ *Ibid.* Also see Viotti & Kauppi, *supra* note 41.

qualitatively and quantitatively (for example, through the end of slavery as a “property right” and apartheid as a “social practice”)¹⁰⁶ how broad ideational objective(s) has changed both institutional behavior and the patterns of international politics. Their approach not only allows behavioural changes and preference-setting at the level of international institutions, but also indirectly influences national policy making within these institutions. Contrasting the approaches of realists and liberalists, constructivism is immensely useful for connecting trade rules and policies with broader ideational objective(s) of trade liberalization, prioritizing the social purpose(s) of market operation and pursuing broad aspirational social goal(s) by market institutions.

Section II: Reconstructing SD: Proposal for a Wider Understanding on Trade-SD Relationship

Section I discusses how without undergoing a rigorous treaty amendment procedure, it is possible to connect the global trade institution with its broad ideational objective. As long as an institution tune its behavioral functions in accordance with the prevalent shared understanding and within the broader framework of its ideational objective, it is not necessary to undertake a complex treaty amendment process. In section II, I do not argue for linking trade with SD. The idea of connecting trading regime with its SD objective is not entirely new. Although there was no specific reference to SD, the history of the Havana Charter and the International Trade Organization (ITO) that was projected to be created following the Havana Charter, referred to

¹⁰⁶ Reus Smith, Constructivism, *supra* note 60; Viotti & Kauppi, *supra* note 41.

the possibility of linking trade with labour issues.¹⁰⁷ Although the ITO never materialized (partly due to the objections from the United States), in 1947 the GATT referred to the social purposes of liberal trade, i.e.: full employment, standards of living, and a large and steady volume of real income. It also included exception provisions, which allowed trade restrictions for the purposes mentioned in Article XX, GATT.¹⁰⁸ In 1994, SD was included in the preamble of the Agreement establishing the WTO.¹⁰⁹

In this section, I prescribe a different way to connect the global trade regime with its broader ideational objective. More importantly, I argue that it is necessary to clarify or reconstruct the conceptual underpinnings of SD. I briefly refer to the emergence of SD in trading regime and summarize two groups of critique on SD. The first group argues that an inherent incompatibility lies amongst the triple components of SD. Also, the meaning and application of SD is confusing and is susceptible to manipulation by policy-makers. The second group argues that SD contains an inherent bias towards neo-liberal economic growth. I find that in both discussions on trade-SD interaction, little attention has been paid to the conceptual deficiency of SD. Borrowing Sen's capability-based understanding of SD, I propose for a wider understanding

¹⁰⁷ The UN Conference on Trade and Employment held in Havana, Cuba in 1947 adopted the Havana Charter for establishment of the ITO. Article 7 para 1 declares that "[t]he Members recognize that measures relating to employment must take fully into account the rights of workers under inter-governmental declarations, conventions and agreements. They recognize that all countries have a common interest in the achievement and maintenance of fair labour standards related to productivity, and thus in the improvement of wages and working conditions as productivity may permit. The Members recognize that unfair labour conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory." Available online: WTO <https://www.wto.org/english/docs_e/legal_e/prevto_legal_e.htm>.

¹⁰⁸ *General Agreement on Tariffs and Trade* 30 October 1947 58 UNTS 187 (entered into force 1 January, 1948). [Referred to as "GATT, 1947"]. GATT, 1994 adopted the provisions of GATT, 1947 and was included as Annex 1A of the WTO Agreement. GATT 1994 is available online: WTO <https://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm>. See Steve Charnovitz, "The World Trade Organization and the Environment" in G Sampson & J Walley, eds, *The WTO, Trade and Environment* (Massachusetts: Edward Elgar Publishing, 2007) 413.

¹⁰⁹ See WTO Agreement, *supra* note 28.

of trade-SD interaction and argue that the latter relates trade regulation with a broader framework of social or distributive justice.

1.2 Emergence of SD Paradigm

The economic theory of comparative advantage, on which the liberal trading system is based, assumes unlimited resources, free movement of labour, and consequently, unlimited economic growth. In the early years of the GATT, this assumption helped many industrialized nations “to build up embedded liberalism policies” through “the extraction of raw commodities (from the colonies and metropolitan territories) – and through the commodification of the labour power of colonial people.”¹¹⁰ At that time, the European nations benefitted from open migration to the US. While the US absorbed their excess labour, the industrial nations of Europe continued to build their economies through growing exports to their colonies. After the end of colonialism, developing countries tried to follow similar resource-based and labour-incentive export-led development, which in turn created higher social or distributional (and environmental) costs. These costs remain hidden and not calculated within production costs. Additionally, although goods and capital achieved mobility through liberalized trading system, this was not the case for the movement of labour. The newly independent developing countries had to absorb their abundant factor of production,¹¹¹ into their export economy, which is dependent either on commodity production or on a low-skill manufacturing. These harsh realities of the economic development process provoked immense debates on the design and functions of trade and other

¹¹⁰ Blackett, Trade, Labour and Development, *supra* note 31.

¹¹¹ Arthur Lewis, *Growth and Fluctuations, 1870-1913* (London: George Allen & Unwin Ltd., 1979).

regulatory mechanisms and challenged the neo-liberal prescription that liberal trade secures both social and economic progress for all participants.

At around the same time, the unlimited economic growth policy was challenged at two levels. Proponents of the “limits to growth” idea were entirely opposed to trade liberalization. They argued that not only trade liberalization leads to an unsustainable pattern of consumption and causes more pollution, but also an inherent contradiction lies amongst growing trade, environmental sustainability and social justice.¹¹² On the other hand, some mainstream environmentalists favoured the introduction of the concept of SD outlined in the Brundtland Report in 1987.¹¹³ Principle 4 of the UN Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil in 1992 (the Rio Declaration) proclaimed the famous “integration” principle of SD and declared that “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”¹¹⁴ The Rio Declaration attempted to integrate the environmental concerns of developed countries and the developmental right of the developing countries through 27 key principles.

After the Rio Declaration, the SD concept soon became popular. From its original idea of preserving and protecting resources, it gradually refocused to include socio-economic substance within its conceptual basis. For example, SD defined the rights of states to pursue their economic

¹¹² See Donnell H Meadows et al, eds, *The Limits to Growth*, 1st ed (London: Pann Books, 1972); Herman Daly, "The Perils of Free Trade" (1993): November Scientific American 50; Herman Daly, "Against Free Trade: Neoclassical and Steady-States Perspectives" (1994) 5:3 J of Evolutionary Econ 313-326.

¹¹³ See Paul Ekins, "Limits to growth and sustainable development: Grappling with ecological realities" (1993) 8 Ecological Econ 269. See pages 269-288 for an overview of the literature on both sides.

¹¹⁴ The Rio Declaration on Environment and Development was adopted at the 1992 United Nations Conference for Environment and Development in Rio De Janeiro. *Rio Declaration on Environment and Development*, UNEP 31 ILM 874 (1992), online: <www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>. [Hereinafter referred to as “Rio Declaration”].

development without harming the environment.¹¹⁵ Blending irreconcilable disciplines of international law (international environmental law and international economic law), it penetrated a large number of influential international and national legal instruments as a paradigm objective. As a result, not only did a common consensus develop for linking environmental and social challenges while pursuing economic development, but most instruments also allowed some form of participation for non-state actors.

Although there are some major criticisms against the status and usefulness of SD, it is agreed that by introducing the concept, the Brundtland report established several significant changes. First, the report succeeded in creating a post-cold war “new vision” of global governance, which relies on cooperation amongst state and non-state actors and prefers an integrated approach to deal with global challenges.¹¹⁶ The SD concept provided the ideological basis to approach global economic, environmental and social problems in an integrated manner and laid down the basic normative ground for guiding global governance of these issues. The Rio Declaration also introduced the notion of “shared responsibility”¹¹⁷ to pursue the objective of SD at a supra-national level, which actually departs from the previous state-centric approach to solving these problems.

Second, the report introduced significant changes in the existing understandings on development and the means to achieve it. It adopted a long-term perspective for development

¹¹⁵ 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: Europa Law Publishing, 2008) 223-248. See B Magraw & D Hawk "Sustainable Development," in D Bodansky, J Brunnee & E Hey, eds, *The Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press, 2007) 613-637.

¹¹⁶ Bernstein & Pauly, eds, *Supra* note 19. At 161 & 162.

¹¹⁷ Principle 27 of Rio Declaration states, “[s]tates and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.” See Rio Declaration, *supra* note 114.

which does not “compromise the ability of future generations” to meet their own needs.¹¹⁸ According to Haque, “[r]egardless of where the ‘essence of intended meaning may lie in the Brundtland Report, it undoubtedly transformed the concerns for the environment and sustainability into a global development agenda.”¹¹⁹ It “succeeded in bringing in the environment onto the international agenda in a new, creative and productive way that provided a solid basis for a global compromise between environment and economy.”¹²⁰

Third, the report introduced the concept of “limits” in the development process by introducing concerns for both inter-generational and intra-generational equity. In this manner, SD shifted the focus “away from resources to human beings.”¹²¹ These changes promoted a newer understanding for economic development in which concern for the “poor of each generation” occupied a central position. Particular attention to this aspect of social or distributive justice through inter-generational and intra-generational equity, gave the “entire discourse an ethical force.”¹²²

¹¹⁸ *The World Commission on Environment and Development: Our Common Future* (Oxford: Oxford University Press, 1987) at 43. WCED was established in 1983 pursuant to a resolution of the UN General Assembly and its members were selected carefully to reflect representations from both North and South. See Chapter 2 of the WCED Report available online: UN <www.un-documents.net/ocf-02.htm - I >; Steven Bernstein, "Legitimacy in Global Environmental Governance" (2004-5) 1 J Intl L & Intl Rel 139. [Hereinafter referred to as “Bernstein, Global Environmental Governance”]; Shamsul Haque, "The Fate of Sustainable Development Under Neo-liberal Regimes in Developing Countries" (1999) 20:2 Intl Pol Sci Rev 197. [Hereinafter referred to as “Haque, Sustainable Development under Neo-liberal Regimes”]. See Andrew Dobson, "Environmental Sustainability: An Analysis and a Typology" (Autumn 1996) S:3 Env'tl Politics 401. According to Dobson, the debate on SD became complicated as different questions could be posed against the form and substance of SD, such as what is to be protected (human capital, natural capital or both), for how long, what should the objective of protection (human welfare in material terms or for aesthetic purposes or both), level and degree of “substitutability of human-made capital for natural capital.” Dobson argues that despite debates about these questions and various conceptions on SD, as a theory it provides direction as to a “particular form of development” in which environmental sustainability can be guaranteed. In his arguments he took an ‘anthropocentric’ approach which accommodates the integral relationship between three components of SD concept. See the discussions at 422 ff.

¹¹⁹ Haque, Sustainable Development under Neo-Liberal Regimes, *Ibid.*

¹²⁰ Bernstein, Global Environmental Governance, *supra* note 118 at 183.

¹²¹ Sen, Sustainability, *supra* note 30.

¹²² *Ibid.*, at 8.

Fourth, the report attempted to bridge the gap between the northern perspective of environmental protection and the southern perspective of economic growth through supporting trade liberalization with particular attention to trade-related impacts. It also accommodated the political economy of the trade regime by encouraging support for the trade liberalization policy, provided necessary attention was paid to trade-related social and environmental issues.¹²³

1.2.1 Criticism Based on the Meaning and Application of SD

Despite its promises and utilities, the concept of SD is criticized widely. The scholarly arguments can be broken down into two major groups. The first type of critique alleges that SD started as a “political concept” trying to match divergent interests and expectations of countries in the North and in the South. As a result, the concept incorporates “too many uncertainties to be really operational in real life.”¹²⁴ SD is criticized for its ambiguity and for being too broad for practical application. Scholars argue that SD cannot be considered a regime consisting of norms and rules “reflecting consistent patterns of behavior.”¹²⁵ Therefore, it is referred to as an “empty concept” which, though politically convenient, is not a legal principle, rule or norm.¹²⁶ Its status in international law is contested amongst lawyers.¹²⁷ Ellis finds that only a minority view holds

¹²³ Esty, Bridging Trade-Environment Divide, *supra* note 60. At 116-118 Esty elaborates how some congressmen, while voting in favour of North American Free Trade Agreement (NAFTA), found support from some environmental groups who preferred the trade-environment nexus in NAFTA.

¹²⁴ Winfried Lang, "How to Manage Sustainable Development " in Konrad Ginther, Erik Denters & Paul JIM de Waart, eds, *Sustainable Development and Good Governance* (Dordrecht: Martinus Nijhoff Publishers 1995) 90-104.

¹²⁵ *Ibid.*

¹²⁶ *Ibid* at 94. See Jaye Ellis, "Sustainable Development as a Legal Principle: A Rhetorical Analysis", (22 December, 2008) online SSRN: <<https://ssrn.com/abstract=1319360>> [Hereinafter referred to as “Ellis, Sustainable Development”] The author argues that while some analyses on SD tried to identify its status in international law, others focused on its core features and elements.

¹²⁷ Ellis, Sustainable Development, *Ibid.* Also see Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 2003); Phillip Sands, "Environmental Protection in the Twenty-First Century: Sustainable Development and International Law" in R Revesz, P Sands & Stewart R, eds, *Environmental*

SD as a principle of international law,¹²⁸ while others doubt that it has achieved such status.¹²⁹

Despite these debates, Ellis argues that the relevance of SD lies not in its status but in its capacity to perform *networking functions* among several fragmented legal frameworks.¹³⁰ She summarizes that the concept is immensely useful in the “development and interpretation of international law,” sifting weak from strong arguments and determining what are “acceptable conclusions and robust decision-making procedures.”¹³¹

Many scholars now agree that as an “umbrella concept”, SD covers both “legal and policy” principles.¹³² These include: inter-generational and intra-generational equity, precaution, common but differentiated responsibilities, and the polluter pays principle. Scholars also agree that this broad concept incorporates three pillars: environment, development and social equity. Philip Sands mentions in his book that the concept of SD is now “established as an international

Law, the Economy and Sustainable Development (Cambridge: Cambridge University Press, 2000) at 369; Sands argues that the meaning of the concept is unclear. However, he identifies the following four objectives of the SD concept: commitment to preserve natural resources for present and future generations, appropriate standards for exploitation of natural resources based upon “harvest” or “use”, equitable use of natural resources taking needs of others into account and integration of environmental considerations into economic and other development plans and programmes.

¹²⁸ *Ibid.* See Phillip Sands, *Principles of International Environmental Law* (Cambridge: Cambridge University Press 2003). See p. 252-266. [Hereinafter referred to as “Sands, International Environmental Law”].

¹²⁹ V Lowe, “Sustainable Development and Unsustainable Arguments” in Alan Boyle & David Freestone, eds, *International Law and Sustainable Development* (Oxford: Oxford University Press, 1999) 19. Lowe argues that state practice and *opinio juris* in favour of the SD principle has not developed so far as to describe it as a customary norm of international law. But he opines that the concept, when applied in treaty negotiation or dispute resolution, acts as a “meta-principle”, one that acts “upon other legal rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other.” For more elaborate discussion as to status of the concept in international law, see M Segger, “Sustainable Development in International Law” in Hans Christian Bugge & Christina Voigt, eds, *Sustainable Development in International and National Law* (Groningen: Europa Law Publishing, 2008) 87.

¹³⁰ Ellis, Sustainable Development, *supra* note 127.

¹³¹ *Ibid.*

¹³² *Ibid.* Ellis provides an excellent summary on the components ideas and principles of SD. At 13-15, Ellis argues that identifying the “core elements” of SD performs an important task. It clarifies why SD is a novel and different concept and how unique would be its contribution in international law. See “*Johannesburg Declaration on Sustainable Development*” (World Summit on Sustainable Development, Johannesburg, South Africa: 4 September 2002) at para 5; JB Ruhl, “Sustainable Development: A Five-Dimensional Algorithm for Environmental Law”(1999) 18:31 *Stan. Env'tl LJ* at 35.

legal concept.”¹³³ Its integrative capacity includes development, which is broader than the term economic growth, and emphasizes intangibles such as health standards, access to environmental amenities.¹³⁴ It also includes the principle of intra-generational and inter-generational equity: equity amongst generations and nations. Environmental protection is premised for both present and future generations, whereas the economic development process is ensured for the countries in the South realizing their minimal contribution to the present environmental crisis and their need for continuing growth.¹³⁵ Pointing to its over-encompassing capacity, critics argue that the application of SD has raised controversies as to which pillar would have priority over the others or how to “weigh” conflicting policy objectives when “tension” arises.¹³⁶ While interpreting and according priority amongst the different components of SD, developed countries rely more on environmental protection and developing countries rely on the development component.¹³⁷

¹³³ Sands, *International Environmental Law*, *supra* note 128 at 252; Magraw & Hawk, *supra* note 115 at 619.

¹³⁴ The failure of the claim for a NIEO (New International Economic Order) gave birth to claim of “Right to Development” by the third world (the newly independent colonized countries). As early as 1979, UN study on development presented to the Commission on Human Rights proclaimed the differences between development and growth; the former is not confined to growth and includes human welfare and respect for human rights as ultimate goals of development. In 1986, the UN adopted the Declaration on Right to Development (UNDRD). The preamble of the UNDRD defines development as a “comprehensive, economic, social, cultural and political process, which aims at the constant improvement of the well being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.” See *Declaration on the Right to Development*, UNGA, 1987, UN Doc A/RES/41/128; Isabella Bunn, “The Right to Development: Implications for International Economic Law” (2000) 15:6 Am U Int’l L R at 1425-1467.

¹³⁵ For an analysis applying the principles of environmental economics in third world countries see David Pearce, Edward Barbier & Anil Markandya, eds, *Sustainable Development: Economics and Environment in the Third World*, 1st ed (Washington, : Earthscan, 1990).

¹³⁶ For a summary of some relevant critiques, see Ellis, *Sustainable Development*, *supra* note 127.

¹³⁷ Lavanya Rajamani, “From Stockholm to Johannesburg: The Anatomy of Dissonance in the International Environmental Dialogue” (2003) 12:1 RECIEL at 23-32. At 27, she argued that the notion of the SD, “lost significantly not just in its subjective content and coherence but also in its ability to present a genuine compromise position between the needs and desires of developing and industrial countries. It is no surprise then that, in post-Rio environmental battles, both developing and industrial countries employ common language of sustainable development, which suggests a consensus in values, yet differs significantly in their approach, focus, method and aims.”

1.2.2 Criticism Based on Inherent Bias toward Economic Growth

The second type of critique alleges that SD prioritizes economic development over its other pillars, namely environmental protection and social equity. According to these critics, the Brundtland Commission supported the idea of prolonged economic growth as the basis to pursue the other components of SD and thus diverted the original sustainability discourse.¹³⁸ For them, SD has contributed to the destruction of the environment, created unequal societies and prioritized neo-liberal economic governance through market liberalization.¹³⁹ According to these scholars, a positive trade-SD relationship is essentially incompatible. Possessing an inherent bias towards liberal economic thought, SD allowed neo-liberals to depend on the efficiency of the market and to construct a trading regime that serves their purposes.¹⁴⁰ SD and the recent tools used to achieve it, such as eco-modernization or green economy, promote a form of “neo-colonialism,” and further the Northern economic and environmental agenda while ignoring the other pillars of SD concept i.e. development and social justice.¹⁴¹

¹³⁸ See Haque, “Sustainable Development under Neo-liberal Regimes”, *supra* note 118 for an excellent overview of the critics.

¹³⁹ *Ibid.*

¹⁴⁰ Timothy Doyle, "Sustainable development and Agenda 21: The Secular Bible of Global Free Markets and Pluralist Democracy" (1998) 19:4 Third World Quarterly 771-786; Michael Redclift, "Sustainable Development: Needs, Values, Rights" (1993) 2:1 *Envtl Values* 3-20 online: <www.environmentandsociety.org/node/5485>; Wolfgang Sachs, "On the Archaeology of the Development Idea" in Michael Redclift, ed, *Sustainability: Critical Concepts in the Social Sciences* (New York: Routledge, 2005) 149; Wolfgang Sachs, "Sustainable Development and the Crisis of Nature: on the Political Anatomy of an Oxymoron" in Frank Fischer & Maarten Hajer, eds, *Living With Nature: Environmental Politics as Cultural Discourse* (Oxford: Oxford University Press, 1999) 23; R Barkemeyer *et al*, "What Happened to the Development in 'Sustainable Development'?" (2014) 22:1 *Sustainable Dev* at 15-32.

¹⁴¹ Starke finds that SD concept is a new instrument for the North to dictate the economic and industrial policies of the third world. Linda Starke, *Signs of Hope: Working towards our Common Future* (Oxford: Oxford University Press 1990) 9. See P Christoff, "Ecological Modernisation: Ecological Modernities" (1996) 5 *Envtl Pol* 476–500.

1.3 Reconstructing Trade-SD interaction: From Mere Linkage Towards Wider Understanding of Trade-SD Relationship

In all these arguments against SD more emphasis is put on the inherent complexities between SD's three main components or its inherent bias for unlimited growth; little attention has been paid to the lack of conceptual clarity in SD. From a conceptual viewpoint, SD starts with a human needs-based analysis. The definition of SD provided by the Brundtland Commission in 1987 emphasizes the notion of environmental limitation to "meet present and future needs." Yet, when viewed from human needs-fulfillment approach, the SD concept is unable to put any significant internal or external limit on the profit-driven market economy. Although some sort of limit (such as resource cap) could be imposed externally, without changing the form and objective of market-based economic activity (internal limit) and without establishing strong distributive (and environmental) mechanisms (external limit), the needs-based SD concept takes an uncritical approach to unlimited economic growth and the ever-increasing consumption and isolation of social or distributional issues from national and international trade and economic governance. As a result, from a needs-based perspective, trade-SD relationship searches for changes only by introducing certain technological (such as, green technology) and/or financial solutions (such as, carbon trading, emission tax, sustainable investment, sustainability impact assessment, voluntary corporate codes), rather than arguing in favour of fundamentally restructuring both the form and objective of economic activity and mandatory inclusion of social or distributive and environmental arrangements within economic governance.

Some scholars argue that the limitation of SD can be seen in recent proposals for ecological modernization or for valuation of natural services. They find that in these proposals, environmental and social justice components are not given an integral role, but relegated to a “supporting role.”¹⁴² This thesis opposes neither technological improvements nor financial or voluntary types of solutions that tend to correct or minimize social or environmental externalities of trade liberalization. Rather, it takes the position that without acknowledging the inherent connection between social or distributional (and environmental) issues with economic and trading issues, existing understanding on trade-SD would continuously endeavour to superficially balance economic, environmental and development policies and address socio-environmental critiques through some creative instruments, such as ecological modernization or voluntary codes of conduct adopted by multinational corporations. These quick-fixes or voluntary types of instruments exclude broader social or distributional issues from their design and operation. Existing understanding, thus, promotes SD as a “political strategy” or at best, as a “declaratory shared norm”, which not only legitimizes the existing market integration process but also upholds the compartmentalized analysis of trade-related social and environmental matters.¹⁴³

Thus, it is important to clarify the conceptual underpinning of SD, i.e. what sort of social and economic structure would guide its functions, what sort of trading arrangement would it

¹⁴² Susan Baker, "Sustainable Development as Symbolic Commitment: Declaratory Politics and the Seductive Appeal of Ecological Modernisation in the European Union" (2007) 16:2 *Envtl Pol* 297-317. [Hereinafter referred to as ‘Baker, Sustainable Development’]; Nicolas Kosoy & Esteve Corbera, "Payments for Eco-System Services as Commodity Fetishism" (2010) 69 *Ecol Econ* at 1228-1236.

¹⁴³ Baker, Sustainable Development, *Ibid.* According to Baker, “ecological modernization” offered Europe a unique political identity based on “normative power” (as opposed to military power) which is reflected through its commitment to issues like climate change, bio-diversity etc. However, this “symbolic adoption” of SD as an ideology though justifies and legitimizes the European integration project, in reality ecological modernization is adopted to reflect the “organized power and interest group politics.” This is a reflection of capitalist industrial society’s tendency to bypass the social and environmental critiques against its “expansionist character.” See Susan Baker, "Environmental Values and Climate Change Policy: Contrasting the European Union and the United States" in S Lucarelli & I Manners, eds, *Values in EU Policy* (London Routledge, 2006) at 77–96.

support, what sort of economic development policy would it promote. Within the WTO, there is no guidance on how its preambular objective of SD should guide the implementation of other rules of the WTO. If we construct SD objective of the global trade institution through the existing needs-based approach, then it is necessary to explain how to deal with problems of over-consumption (leading to environmental consequences) and the problems of accumulation of profit by some powerful segments of society (leading to social or distributional problems). Without addressing this broader conceptual problem, the debate on trade-SD interaction would remain preoccupied with searching for solutions within the existing framework. Such a debate would not challenge the existing economic and social framework, which until now has prioritized short-term economic growth over long-term developmental aspirations in developing countries. Without clarity (even if not precision) regarding this fundamental conceptual issue, we will continue to witness concern for greater coherence between trade and SD objective through some regulatory compliance at a superficial level, rather than a substantial change both in the institutional objective and organizational workings of the WTO.¹⁴⁴

To summarize, the conceptual deficiency of needs-based SD contributes to the polarized positions in trade-SD debate. For some proponents of SD, liberalized trade is the primary cause for unsustainable production and consumption.¹⁴⁵ On the other hand, some scholars argue that liberalized trade promotes sustainability either automatically i.e. by allocating production to the

¹⁴⁴ Oran R. Young, "The Architecture of Global Environmental Governance: Bringing Science to Bear on Policy" (2008) 8:1 Global Env'tl Pol 14-32. Young articulated the difference between organizational and institutional change. Young argues that while organizational changes are easy to introduce, institutional changes require substantial improvements both in the structural form and objective of the institution.

¹⁴⁵ For an analysis that argues for "reconciliation" of environmental protection and for social justice to resist "Northern political and economic dominance," see Carmen C. Gonzalez, "Beyond Eco-imperialism: An Environmental Justice Critique of Free Trade" (2001) 78 Denv U L Rev 979 online <digitalcommons.law.seattleu.edu/faculty/298>. Taking the perspective of environmental justice, Gonzalez argues that trade, human rights and environment are "intertwined" and trade liberalization and environmental protection policies must consider this complex relationship. Carmen C. Gonzalez, "Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage" (2006) 7:65 Berkley LA Raza LJ online <digitalcommons.law.seattleu.edu/faculty/283>.

most efficient producer, or indirectly i.e. by generating necessary funds to attend to social (and environmental) issues.¹⁴⁶ Taking a middle ground, I propose that capability-based understanding of SD promotes a new and wider dimension of trade-SD relationship. As mentioned earlier, Sen argues for understanding SD not by taking its existing needs-fulfillment approach but through a capability-enhancing approach.¹⁴⁷ 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.”¹⁴⁸ The focus on freedom and capability enhancing perspective changes both the values and institutions to pursue SD by relying on human beings not as “consumers” or as “people with needs” but as “agents of change.”¹⁴⁹ In his much-acclaimed book, *“Development as Freedom,”* Sen elaborates the connection between capability enhancement and development. Sen does not provide a specific “formula” for capability enhancement. Rather, he connects the “organizing principle,” which is enhancement of human freedom or capability, with the process and end of development and argues that the process of development is influenced by several interlinked components of human freedom or capability, such as “economic facilities, political freedoms, social opportunities, transparency guarantees and protective security.”¹⁵⁰

Thus, capability enhancement provides the necessary means for development and modifies the end of development. For example, although increased productive capacity contributes to development (and builds human capital), capability approach focuses beyond human capital increase and “on the ability – the substantive freedom – of people to lead the lives

¹⁴⁶ Shamsul Haque provides an excellent summary of the neo-liberal position on SD. See Haque, “Sustainable Development under Neo-liberal Regimes”, *supra* note 118.

¹⁴⁷ Sen, Sustainability, *supra* note 30.

¹⁴⁸ *Ibid.*

¹⁴⁹ Amartya Sen, *Development As Freedom* (New York: Anchor Books, 2000). [Hereinafter referred to as “Sen, Development as Freedom”].

¹⁵⁰ *Ibid.*, at 53, 297.

they have reason to value and to enhance the real choices they have.”¹⁵¹ Sen finds that only through an integrated analysis of all the essential components of freedom and developing and enriching diverse institutions and arrangements (economic, social and political), the “process of development” can contribute to capability enhancement.¹⁵² In order to facilitate and sustain the process of development, capability approach requires additional attention to a diverse set of factors, such as effective collaboration between social, economic and political forces and building appropriate economic, social and political institutional structures.¹⁵³

What happens when SD is viewed from a capability enhancement approach? I mention two distinctive features of capability-based SD.

First, capability enhancement perspective offers a unique way to assess and examine apparently conflicting components of SD, which are economic development, social justice and environmental sustainability. Under the needs-based analysis there is a tendency to prioritize one component over the other. Capability approach redirects attention to the “mutually reinforcing” role of each of the components of SD and evaluates all the components in an integrated manner. For example, both “market” and “social opportunities” are interrelated parts of this ‘comprehensive approach’ to development.¹⁵⁴ Instead of providing a specific ‘criterion’ for achieving SD, capability approach insists on the aspects where attention is crucial or urgent. The mutually reinforcing nature of relationship between capability enhancement, economic development and social or distributional issues can be clarified through a simple example. While

¹⁵¹ *Ibid.*, at 293

¹⁵² *Ibid.*, at 149.

¹⁵³ See John M. Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Burlington: Ashgate Publishing, 2008). See chapter 3 at 53-77.

¹⁵⁴ Sen, Development as Freedom, *supra* note 149 at 127.

increased economic growth generates funds for social interventions, public spending in education and health care contributes to raise labour productivity and skills.¹⁵⁵

Second, as an “underlying evaluative concern,” capability enhancement goes beyond the economic and material needs of human beings and approaches problems of sustainability with a distinctive lens through which political and social liberties and social or distributional issues play a crucial role.¹⁵⁶ Sen eloquently clarifies that his capability enhancement centered understanding does not question the necessity of market mechanism or the efficiency of market-based growth, but requires that “opportunities offered by them could be reasonably shared.”¹⁵⁷ “Reasonable sharing” and “distributional equity” bridges the gap between creation of social opportunities and increase of productive capacity. For example, a market-based growth would not enhance human capability, if a segment of a society is excluded from the benefits of market and are without necessary social support. On the efficiency contribution of market, Sen mentions, “[b]ut these efficiency results do not, on their own, guarantee distributional equity. The problem can be particularly large in the context of inequality of substantive freedoms, when there is a coupling of disadvantages.... The far reaching powers of the market mechanism have to be supplemented by the creation of basic social opportunities for social equity and justice.”¹⁵⁸

As this research focuses particularly on low-income developing countries, it is crucial to analyze the intricate relationship between economic growth and social opportunities, that allow vulnerable segments of society to participate and benefit from the process of development, and the capacity of economic “expansion” to contribute towards “enhancement of quality of life.” This complementary relationship between social and economic issues is more important for low-

¹⁵⁵ *Ibid.*, at 40-51.

¹⁵⁶ *Ibid.*, at 111-145.

¹⁵⁷ *Ibid.*, at 142.

¹⁵⁸ *Ibid.*, at 143.

income countries than the developed countries, who have built necessary social institutions and arrangements before opening or expanding their markets.¹⁵⁹

Below I argue that with a capability enhancement perspective, the trade-SD relationship would be wider and distinctive than the existing needs-based approach. I discuss some crucial and distinguishing features of the wider understanding on trade-SD interaction.

First, with a capability framework, the wider understanding negates the hegemony of market. Under the existing needs-based analysis on trade-SD, the focus is on accelerated economic growth through market liberalization. For tackling social problems, it supports continued dependence on market tools and institutions. Confronting neo-liberal ideas and the existing discourse on development, Sen's capability theory relies on the fundamental concept of human freedom and rejects a unidirectional view on trade liberalization.¹⁶⁰ According to the capability theory, the tasks of removing *unfreedoms* and *constraints* that prevent human being from utilizing their capability, and opening up the opportunity to utilize their potential, rely on several essential and interrelated components. For development in a "comprehensive" sense, Sen demands social inclusiveness in economic and productive systems, distribution of wealth and resources, responsibility at public, private, national, and international levels, and, finally, removal of existing economic and political structural features that allow exclusion of "social power."¹⁶¹ Instead of insisting on continued economic growth, capability enhancement requires effective social, economic and development policy for human development. With a broad focus on human development, social inclusiveness, and distributional equity, capability approach necessitates effective collaboration between social, economic and political forces and institutions to produce beneficial impacts for people.

¹⁵⁹ *Ibid.*, at 142-145.

¹⁶⁰ *Ibid.*

¹⁶¹ Ananya Mukherjee Reed, *Human Development and Social Power* (London & New York: Routledge, 2008).

Second, instead of focusing on increasing income, Sen's capability theory centralizes on distributive aspects of development. Borrowing from Sen, the wider understanding recognizes that an open market mechanism and the related freedoms only play a complementary role for capability enhancement. Market achieves success only when "political and social arrangements" allow sharing of these opportunities.¹⁶² Therefore, central importance is accorded to the inherent relationship between "the social and the economic."¹⁶³ This implies that trade liberalization benefits society, provided appropriate distributive mechanisms (i.e. resource allocation and institutional processes) consider both intra-generational and inter-generational distributional (and environmental) effects.

Third, the wider view endorses coexistence of greater domestic policy autonomy and institutional cooperation. Opposing the narrow prescription that government interference is unnecessary to advance social objectives and that an efficient market automatically takes care of social or distributional problems, the wider understanding specifically requires both greater domestic autonomy and transnational and international assistance to build necessary social and political arrangements and institutions that will address market failures, deal with the externalities of market operation and social and environmental challenges of market opening.

Fourth, the wider understanding opposes simple solutions such as technology-based quick-fixes, commodification of necessary public goods, or voluntary social compliance by multinational corporations. For example, for "property rights-based approach to environmental conservation," it advocates greater attention not to the importance of valuation of ecologically important sites but for the broad social and institutional benefits of these sites and for the adverse

¹⁶² *Ibid.*

¹⁶³ Blackett's "social regionalism" concept depicts the "integral" relationship of the "social and the economic."
Supra note 3.

implications on social inequality if valuation is imposed.¹⁶⁴ It critically evaluates the compliance on social issues through voluntary corporate codes and emphasizes stronger forms of corporate responsibility, effective corporate sourcing policies, and building necessary labour governance capacity in low-income developing countries [discussed in details in Chapters 4 and 5]. It realizes that simple and quick-fix type technological solutions and voluntary forms of corporate social responsibility turn a blind eye to the social (and environmental) critiques against untamed economic growth policy. It supports that without giving appropriate attention to broader social or distributional (and environmental) issues such as the relocation of polluting industries to low-income countries or the exploitation of low-wage labour in these countries, proposals for technological fixes, the commodification of public goods, or voluntary forms of social compliance only accord “distinctive advantage” to countries with superior industrial capacity¹⁶⁵ or to corporations with superior bargaining capacity.

Fifth, the wider view evaluates the export-based development model in a rather critical manner. Its inquiry is not just limited to questions like whether the present developmental model promotes a *race towards bottom* in respect of labour wages and conditions (or in respect of environmental degradation). With a broader horizon, it challenges and evaluates both the processes and institutions that contribute to human *unfreedom* or incapability. It analyzes both the process of trade liberalization and outcome of neo-liberal prescriptions in a comprehensive manner. For example, it connects the asymmetrical position of low-income developing countries

¹⁶⁴ Sen, Sustainability, *supra* note 30.

¹⁶⁵ Baker, Sustainable Development, *supra* note 142. David Pepper, "Sustainable Development and Ecological Modernization: A Radical Homocentric Perspective" (1998) 6 Sustainable Dev. At 1-7, Pepper argues that ecological modernization causes wealth to accumulate in technologically advanced countries, and displacement of local businesses and indigenous communities. The worldwide production and distribution processes add to increased transport pollution. As a result of the introduction of new policies in the EU regarding environment protection, environmentally harmful production processes or toxic waste transfer activities relocated to newly industrialized countries or LDCs at an increased level. See John Suttles, "Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry" (2002) 16:1 Tul Env'tl L J 1.

in trade negotiation (process of trade negotiation) with the aggregate outcome of following neo-liberal prescriptions from international financial institutions (IFIs). It is necessary to mention that the advice of IFIs, regarding privatization of social and environmental responsibility, deregulation of financial and capital market, is different from the trade liberalization process undertaken as a result of accession to the GATT/WTO. Yet, the combined effect of promotion of efficient market and lesser governmental control over socio-environmental disruptions produced devastating outcomes for low-income developing countries. Despite increased trading, these countries have experienced increasing levels of environmental disruptions, social inequities and poor human development.¹⁶⁶

Connecting the process of trade negotiation with the aggregate outcome of neo-liberal economic governance, the wider understanding abandons the narrow vision towards export-based economic growth and recognizes the “lock-in effect” for the “late-comers” in economic development process.¹⁶⁷ As a result, it demands not only greater and effective international assistance in building trading capacity of low-income, but also effective attention to related social or distributional issues in trade and economic arrangements and institutions.

1.4 Benefits of Reconstructing SD From a Capability-based Perspective

The objective of searching an alternative agenda, i.e. how the WTO could play a transformative role by keeping pace with contemporary demands, is not just to connect the global trade institution with its broader ideational objective. This research aims to reap several benefits from an integrated analysis. A particular advantage flowing from the primacy accorded

¹⁶⁶ Haque, “Sustainable Development under Neo-liberal Regimes”, *supra* note 118.

¹⁶⁷ See Chris Armstrong, *Global Distributive Justice: An Introduction* (Cambridge: Cambridge University Press, 2012). D Moellendorf, *Global Inequality Matters* (Basingstoke: Palgrave Macmillan, 2009).

to the ideational factors is that an integrated analysis allows marginalized actors an active role in generating or revising a norm, principle or preference. In the process of change in shared understanding, constructivists agree that strong and powerful actors may dominate because they possess the strength and resources to coordinate and popularize their shared understanding. Yet, by prioritizing prevalent normative influences, constructivism also allows marginalized actors a role in generating, popularizing or consolidating a new demand.¹⁶⁸ By taking an integrated analysis of trade and SD, it is intended that marginalized participants of the trade regime¹⁶⁹ could play a greater role in shaping trade rules and policy-making.

As an objective of trade liberalization, capability-based SD offers a better and wider framework for interaction and beneficial co-existence of trade-SD issues. From such a perspective, a trading system's usefulness is determined by its objective, working process and the benefits for the members. A trading system that contributes to increase the vulnerabilities of low-income countries or certain social groups (for example labour), or restricts the former's path to sustainable economic growth, or turns a blind eye to enormous social or distributional problems, cannot promote SD. On the other hand, co-existence of mutually beneficial, rules-based and fair trading system and complementary social policies, ensures not only that low-income members benefit from their participation in an international institution, but also the continuing relevance and legitimacy of trading rules and arrangements.

¹⁶⁸ See Rajagopal, *Theorizing Resistance*, *supra* note 24.

¹⁶⁹ See Chris Armstrong, *supra* note 167. Capability theory's focus on distributional equity has some similarity with the questions posed by global egalitarians. Egalitarian concept of distributive justice requires special attention to the marginalized actors of a regime. The "relational" account of distributive justice concept requires certain criteria both in process and outcome of any economic or trade cooperative arrangement. The "process" of trade/economic negotiation is tainted, if powerful actors through coercive behaviour or undue influence set terms of negotiation or there is exploitative relationship between the negotiating parties. Little bargaining capacity due to technical inability to understand terms of negotiation or political influence may prove the presence of exploitative relationship. Egalitarian distributive justice also requires fairness in the outcome of economic or trade arrangement. Also under the minimalists account, unfairness by powerful countries can trigger standards of distributive justice.

Arguing that as a global trade regime the WTO should promote capability-based SD, this analysis emphasizes greater institutional responsibility. When a state is unable to provide the necessary cushion arising from environmental and social consequences of economic activities, international institutions should offer effective assistance. With regard to global trade regulation, it is unanimously advocated that the small developing countries and the least-developed countries need support for cushioning the adverse social (and environmental) impacts of liberal market policy. More than a decade ago, the Sutherland report acknowledged that poor member states need to benefit from their membership and advocated for cooperation between the WTO and other international organizations in providing resources and building trading capacities of these states.¹⁷⁰ Endorsing the special needs of these states, this analysis argues the need for greater institutional role and responsibility in global governance.

This analysis also supports an alternative view on social or distributional issues and their relationship with trade. Challenging the isolation or separation of social or distributional issues from trade policy-making and trade regulation, this analysis searches for effective ways to operationalize broader social or distributional concerns within trade regimes. The latter includes issues, such as concerns of marginalized actors while resolving trade-SD disputes (Chapter 2), challenges in operationalizing SD through judicial resolution (Chapter 2), minimum normative standards that should apply to trade policy reviewing process (Chapter 3), and possible ways to

¹⁷⁰ In the EU, market integration policy has attempted to approach the social aspects of trade liberalization through two means: generally, through EU social law and through specific mechanisms such as EU structural funds and European Globalization Adjustment Fund. See Diamond Ashiagbor, "Embedding Trade Liberalization in Social Policy: Lessons from the European Union?" (2011) 32:2 Comp Lab L & Pol'y J 373. There is no such adjustment mechanism in the global trade regime. Though differences in development levels of the member countries hinder adoption of any uniform solution, it is acknowledged that developing countries lack the necessary adjustment mechanism. It has been suggested that international development institutions, like World Bank should pioneer such programs. See Peter Sutherland et al, *The Future of the WTO: Addressing Institutional Challenges in the New Millennium* (Switzerland: WTO, 2004) [hereinafter referred to as Sutherland report]. See Chapter IV.

accommodate the voices of marginalized states or social groups in managing trade-SD interactions (Chapters 2 and 3).

Finally, while emphasizing mutual interactions between actors, institutions, and norms and the importance of broad ideational objective in reconstructing institutional priorities, constructivism challenges the strict separation between legal rules and social policy. It allows for the reconstruction or transformation of existing legal rules, principles, norms or institutional preferences by referring to prevalent social and political values. For example, different from *grund norms*, the unique concepts of shared understanding, ideational objective and constitutive rules pave the way for transformation by paying attention to the social and political context in which a particular institution operates. Proposing that as a broad ideational objective, SD should redirect the WTO's organizational behaviour, this analysis attempts to connect the global trade institution with the developmental and social realities of low-income countries.

Conclusion

Jeffrey Sachs¹⁷¹ reminds us that even Adam Smith had reservations about the functioning of market while propagating liberal economic system and global trade. Smith was cautious to point out that market opening, on its own, does not guarantee greater societal benefit:

The discovery of America, and that of a passage to the East Indies by the Cape of Good Hope, are the two greatest and most important events recorded in the history of mankind. Their consequences have already been great; but, in the short period of between two and three centuries which has elapsed since these discoveries were made, it is impossible that the whole extent of

¹⁷¹ Jeffrey D Sachs, *The End of Poverty: Economic Possibilities of Our Time* (New York: The Penguin Press, 2005) at 351.

their consequences can have been seen. What benefits or what misfortunes to mankind may hereafter result from those great events, no human wisdom can foresee. By uniting in some measure the most distant parts of the world, by enabling them to relieve one another's wants, to increase one another's enjoyments, and to encourage one another's industry, their general tendency would seem to be beneficial. To the natives, however, both of the East and West Indies, all the commercial benefits which can have resulted from those events have been sunk and lost in the dreadful misfortunes which they have occasioned. These misfortunes, however, seem to have arisen rather from accident than from any thing in the nature of those events themselves. At the particular time when these discoveries were made, the superiority of force happened to be so great on the side of the Europeans, that they were enabled to commit with impunity every sort of injustice in those remote countries. Hereafter, perhaps, the natives of those countries may grow stronger, or those of Europe may grow weaker; and the inhabitants of all the different quarters of the world may arrive at that equality of courage and force which, by inspiring mutual fear, can alone overawe the injustice of independent nations into some sort of respect for the rights of one another. But nothing seems more likely to establish this equality of force, than that mutual communication of knowledge, and of all sorts of improvements, which an extensive commerce from all countries to all countries naturally, or rather necessarily, carries along with it.¹⁷²

Thus, market opening becomes advantageous if its functioning produces beneficial results for all of its members. It is simply a component of the 'integrated whole' that should aim to enhance human capability. After decades of trade liberalization, most of the low-income developing countries and the LDCs are "locked in a vicious circle of political impotence, unfair trading rules and weakening trade performance."¹⁷³ It is true that the WTO should not solely bear

¹⁷² Adam Smith, *An Inquiry into the nature and causes of the wealth of nations* (Hazleton, PA: The Electronic Classics Series, 2005) at 508.

¹⁷³ Fatoumata Jawara & Aileen Kwa, *Behind the Scenes at the WTO: The real World of International Trade Negotiator* (New York, USA: Zed Books Ltd, 2004) at 182. See James Thuo Gathii, "Process and Substance in WTO Reform" (2004) 56:885 Rutgers L Rev. online: SSRN <ssrn.com/abstract=1635476>; Gathii analyses the procedural (lack of fair representation of all members, public involvement in decision making process) as well as substantive problems (inherent bias in favour of developed countries) in the WTO that cause its legitimacy crisis. Gathii argues that without attending the substantive problems of the WTO, some organizational and procedural changes will only partially solve WTO's legitimacy crisis. The literature on

the burden of addressing developmental, environmental and distributional challenges arising from market liberalization. However, as an international institution it has the responsibility that global trade regulation promotes the SD objective, rather than thwarting it.¹⁷⁴

In order to accommodate the conflicting demands for economic growth, social justice and environmental protection, in this chapter, I explored the possibility of reconstructing the neo-liberal governance of global trade. Borrowing from the constructivist approach, I showed how without undergoing a rigorous treaty amending procedure, it is possible to connect the global trade regime with its SD objective. The idea of connecting trade regime with its superior ideational objective is nothing new. The ban on trading in goods produced through prison labor or on the trading of endangered species emanated from the global consensus that these are objectionable processes to uphold and/or products to be traded.¹⁷⁵ In a similar way, the idea of connecting trade with SD emanates from the change in consensus that trade and trade-related

structural inequity of the WTO is enormous. Developing countries face tremendous challenges in liberal trade regime; their products consisting mostly of agricultural and raw materials face higher tariff. Although market access for services has been liberalized for sectors in which countries in the North are “more competitive”, no such liberalization is allowed for “unskilled and semi-skilled services.” See Ashiagbor, *supra* note 121; Joel P Trachtman, "Legal Aspects of a Poverty Agenda at the WTO: Trade Law and 'Global Apartheid'" (2003) 6:1 Journal of Intl Econ L 3; Dani Rodrik, "Feasible Globalizations" (2002) NBER Working Paper No. 9129 online: NBER < <http://www.nber.org/papers/w9129> >. For a more specific analysis on how trade liberalization in the food sector adversely affected the local production capacity in developing countries see, James Thuo Gathii, "Food Sovereignty for Poor Countries in the Global Trading System" (February, 2012) 57 Loy L Rev 509 online: SSRN <<http://ssrn.com/abstract=2002244>>.

¹⁷⁴ The Uruguay round promised “quantitative global gain,” i.e. gain in income from increasing trade through liberal trade. This has not been realized for many developing countries. Criticizing existing development projects and trade liberalization policy, Adams mentions tellingly that “[d]ecades of development projects and plans have brought a mix of success and failure, but poor countries have been running up a down escalator. At the end of the twentieth century, after five decades of formal development efforts, low-income countries had less than 10% of the world’s gross national product (GNP) of US\$ 28,862.2 trillion. This figure fell to less than 2% if India and China were excluded.” W M Adams & S J Jeanrenaud, *Transition to Sustainability: Towards a Humane and Diverse World* (Switzerland: International Union for Conservation and Nature (IUCN), 2008) at 22. Although the Doha round started with the promise of addressing development questions, after 10 plus years of negotiation, it has failed to achieve any notable implication until now. See Kleinman, David & Joe Guinan. *The Doha Round: An Obituary* (June 1, 2011) European University Institute, Robert Schuman Centre for Advanced Studies, Global Governance Programme Policy Brief No. 1/2011 online: SSRN <ssrn.com/abstract=1881069 or [dx.doi.org/10.2139/ssrn.1881069](https://doi.org/10.2139/ssrn.1881069)>.

¹⁷⁵ *Supra* note 81.

issues such as social justice are inherently interconnected and it is necessary to accommodate the interests of the marginalized participants of the WTO.

To address the criticisms against SD, notably the lack of precision in its meaning and complexities in its application or for its bias towards unlimited economic growth, I analyze trade-SD relationship from a capability enhancement perspective. I argue that reconstruction of existing trade-SD relationship would prove beneficial as the WTO has broad-based membership and the members' capacity to perform their obligations and expectations from the treaty vary widely. The objective of a broad and integrated analysis is not just to search for effective ways to accommodate the social or distributional consequences of market opening. As discussed in later chapters, a wider reconstruction of the trade-SD relationship challenges the isolation or separation of the social and endeavours to embrace broader social or distributional questions within trade regulation. Most importantly, this wider understanding challenges the neo-liberal idea that the market is natural and self-regulatory and encourages an alternative view on how the international trade institution can keep pace with changing social and political values.

Many questions arise from reconstructing the trade-SD interaction from a wider perspective. If an ideational objective(s) influence institutions' workings, can we detect such an influence in the WTO? Does the preambular objective of SD influence the WTO's existing working process? Why and how to transform the existing focus on mere linkage between trade and SD towards operationalizing a wider understanding of SD in trade regulation? Does the WTO possess the institutional capacity to accommodate this wider perspective? Focusing on two distinct areas, i.e. the reports of the Panels and of the Appellate Body, and trade policy review mechanism, Chapters 2 and 3 analyze the existing trade-SD relationship and the benefits and challenges of analyzing trade and related issues from the wider perspective. The idea is to

consider the existing influence of SD as a preambular objective and to elaborate why and how SD, from a capability enhancement perspective, would produce beneficial outcomes within these two mechanisms of the WTO. These two chapters also discuss the limitations of the respective WTO bodies while implementing SD from a capability enhancement perspective.

This chapter concludes by answering an important methodological question. If the transformative capacity of shared understanding, ideational objective and constitutive rules allows institutions to cope with global changes, then why it is necessary to undertake research that connects an institution with its broader ideational objective? This question assumes that the transformation of an institution's ideational objective or its normative preferences happens automatically, and as a result, a uniform set of changes is introduced in its working within a particular period of time. However, constructivists neither argue that the transformation process is automatic nor that it causes a uniform set of changes in institutional behaviour. For constructivists, the specific method or time frame for norm, principle, or preference creation/revision or institutional transformation is not important. Rather, the focus is on how an ideational objective, rather than material factors, causes transformation(s) in an institution and how this transformation not only justifies the continued necessity of an institution but also increases its legitimacy. Although a change in shared understanding and the resulting changes in norms, principles or preferences could be identified with some precision (such as, the idea that global trade institutions should reflect broader ideational objective(s) of liberal trade), institutions could adopt different methodologies to keep pace with prevalent consensus. This research aims to outline one particular methodology of coping with divergent challenges arising from the market integration process. Although the analysis does not claim to prescribe the optimum method to address these contradictory demands, by relying on an ideational objective to

transform a global trade institution's working methodology, it promotes an alternative understanding of existing trade rules.

Chapter 2: Trade-Sustainable Development Relationship: An Analysis of the Reports of the WTO Appellate Body and the Panels

Introduction

This chapter serves an important purpose. The first section 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 sustainable development (SD) as the preambular objective of trade regulation.¹ It describes how the WTO's Panels and the AB (hereinafter referred to as the "adjudicatory body") resorted to a purposive method of interpretation and imported rules, principles or norms from other regimes in order to construct a distinctive trade-SD relationship. The second section analyzes the deeper challenges of judicial resolution of trade-SD disputes and argues for focusing on non-judicial regulatory bodies in order to operationalize SD within trade regulation.

In the first section, my objective is not just to highlight the importance of the preambular objective of SD, but also to find whether inclusion of SD in 1994 has caused any transformation

¹ Only a few analyses focus specifically on trade-SD interaction at the Panels and the AB of the WTO. All these analyses do not question the needs-based understanding of SD. See Ala'I Padideh, "An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization" (1999) 14:4 A 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; M Segger & C Weeramantry, eds, *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Leiden/Boston: Martinus Nijhoff Publishers, 2005); C Voigt, *Sustainable Development as a Principle of International Law: Resolving Conflicts Between Climate Measures and WTO Law* (Leiden & Boston: Martinus Nijhoff Publishers, 2009).

in the reasoning process of the Panels and the AB. I argue that in the complicated task of balancing trade with trade-related rights, the adjudicatory body's purposive analysis has produced four distinctive effects. First, an important change is discernible in the interpretation of the exception provisions mentioned in Article XX of the GATT, 1994. Article XX allows member states to impose trade restriction(s) to pursue trade-related objectives mentioned in clauses (a) to (j). While determining the WTO-compatibility of a domestic trade restriction, the Panels and the AB now endorse that judicial interpretation should take into account the transformative character of norms, ideas and principles rather than be frozen at the time the treaty was adopted. Second, for implementing extra-territorial environmental measures that impose trade restrictions, the Panels and the AB endorse multilateral over unilateral measures. Third, member states enjoy wider regulatory space for imposing trade restrictions to implement trade-related objectives. Finally, while determining justification of a trade-restrictive regulation to achieve a social or environmental objective, the Panels and the AB accommodate arguments based on the differential capacity of developing countries. In other words, the reports tend to balance the overwhelming power of richer countries by introducing the consideration of differential position of low-income countries.

During the transformation in the interpretative pattern of the Panels and the AB, SD played a crucial role as the preambular objective of the WTO Agreement. In some decisions, the Panels or the AB did not hesitate to borrow norms, principles, or rules from other regimes and connect these with SD objective of liberal trading system. However, in some high-profile disputes, SD objective was not invoked as a defense to justify domestic trade restrictions. The interpretative shift had been minimal, especially in situations where norms, principles or rules from different

regimes “conflict” or require “redefinition of conventional obligations.”² This selective or restrictive importation of non-WTO norms, principles or rules starkly reveals the limited influence of SD as a broad ideational objective.

In the second section of this chapter, I inquire whether the interpretative shift operates as a tool to operationalize SD within trade regulation. Borrowing insights from Sen’s capability enhancement theory, I proposed a wider trade-SD relationship in Chapter 1 and argued that the capability-based understanding of SD not only accommodates the prevalent demands to utilize the benefits of liberal trade for marginalized actors but also requires greater operationalization of SD in trade, labour and development policy making.³

The second section of this chapter illustrates the limitations and challenges of judicial inquiry from this wider perspective. I argue that when viewed from a capability enhancement perspective, trade-SD interaction produces some complex challenges, for which judicial resolution might not be the best route. I ask whether importation of norms, principles or rules from related or even “colliding”⁴ regimes would enrich trade-SD discourse or effectively address the contemporary demands to limit the adverse effects of a liberalized market system; how to utilize the broader normative potential of SD to address issues that reflect divergent demands and expectations. I show that challenges from unique social, cultural, economic and political constructs of contesting markets continue to produce diverse social (or environmental) impacts. These challenges create divergent demands and expectations not only from the participants of the

² See Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm" (2012) 23:2 EJIL377-400, [hereinafter referred to as “Barral, SD”]. Virginie 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.

³ See Chapter 1 for details.

⁴ I borrow the term “colliding regimes” from Fishcher-Lescano and G. Teubner. See Fischer-Lescano, Andreas & Gunther Teubner. "Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law" (2004) 25:4 Mich J Intl L 99-1046 at 1017. The authors argue that it is a “chimera” to expect organizational or doctrinal unity of law at a period when there are immense societal and legal fragmentations. Only some “selective process of networking” can limitedly “cope” with the inter-regime conflicts.

international trade regime, but also from different constituents of each member state, and affect the judicial process of reaching an optimum solution. I ask whether it is possible for the Panel or the AB to address the concerns of the marginalized participants of economic integration;⁵ 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; how to deal with situations where fishing communities engaged in shrimp fishing using turtle-killing nets are displaced from their traditional livelihood. Should the adjudicatory body of the WTO be the only/primary forum to accommodate prevalent concerns relating to market-based growth? Having regard to fragmented and weakened governance of social and environmental matters at a global level, is it pragmatic to confine our attention to judicial resolution of trade-SD disputes?

Describing these multiple challenges of judicial resolution, I conclude that although existing scholarship mostly emphasizes “judicialization”⁶ of 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 are better positioned to balance and clarify diverse issues relating to SD, manage trade-SD conflicts, and devise innovative case-based solutions.

⁵ I have mentioned in Chapter 1 that like global egalitarians, the capability theory pays special attention to the concerns of marginalized actors. For global egalitarians, *fairness* in competition should be a necessary issue in designing trading or economic arrangements. Fairness requires not only “positive duty” of assistance (such as increased aid and adjustment cost, technical assistance, greater market access for low-income countries) but also a “negative duty” of not harming the “weaker” participants involved in economic integration. See Chris Armstrong, *Global Distributive Justice: An Introduction* (Cambridge, UK: Cambridge University Press, 2012). Armstrong referred to Thomas Pogge’s distinction between “positive duty” and “negative duty.” According to Pogge, while the “positive duty” ensures appropriate distribution of resources, the “negative duty” evaluates the actual “outcomes” of any treaty or arrangement. For example, if a trading arrangement prevents a member state to comply with “basic human rights,” then it would be considered to violate the “negative duty” of not harming “weaker” parties.

⁶ See Martha Finnemore & Stephen J Toope, “Alternatives to ‘Legalization’: Richer Views of Law and Politics” (2001) 55:3 *Intl Org* 743-758. The authors caution against the process of “judicialization.” Judicialization creates a “compliance atmosphere,” where compliance with legal rules remains the main focus of participants, rather than adherence to the “spirit” of law.

Section I: Reconstruction of Exception Provisions and the Influence of the Concept of SD

Section I elaborates the development of trade-SD relationship in the reports of the Panels and the AB. More importantly, it connects the influence of the preambular objective of SD with judicial borrowing of rules, principles or norms of other regimes or providing a broader context for treaty interpretation. It also finds the limited influence of SD as a defense and the selective importation of rules, principles or norms of international law (IL) in some important decisions.

2.1 Influence of SD: Decisions under Article XX

Various aspects of the SD concept operate within international trade rules. The GATT permits imposition of trade restrictions for the purpose of protecting human, animal or plant life or health in Article XX(b) and for conservation of exhaustible natural resources in Article XX(g).⁷ Agreement on the Application of Sanitary and Phytosanitary 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 (the phytosanitary measures); Agreement on Technical Barriers to Trade (TBT Agreement), on the other hand, allows states to impose trade restrictions based on product standards for the purpose of protecting the objectives of human health or safety, animal or plant life or health, or

⁷ Article XX lists the general exceptions. See Article XX, *General Agreement on Tariffs and Trade*, 30 October 1947 55 UNTS 194 (entered into force 1 January, 1948). [Referred to as “GATT, 1947”].

environmental protection measures.⁸ These two agreements, annexed to the WTO Agreement, opened the possibility of invoking the precautionary principle to defend trade restrictions imposed for human, animal, or plant health or safety or on environmental grounds.

Within the WTO's dispute resolution process, the question of balancing the colliding features of trade and SD occupies a substantial space. According to Lowe, "[i]t is the most likely place in which to find evidence of States actively pursuing the goal of sustainable development by the imposition of trade restrictions, and also the most likely location of careful and authoritative analysis of the compatibility of such restrictions ...with a state's international trading obligations."⁹ It is reported that within the WTO "the most high-profile and contentious disputes have concerned social regulatory issues."¹⁰ Disputes regarding protection of trade-related rights involve not only important methodological and legitimacy-related questions (such as expertise of the members of the Panels and the AB; whether a trade adjudicatory body should decide these disputes and if so, how far should it go; how to address problems emanating from different priorities and concerns of diverse member states; etc.), but also deeper structural questions, such as what should be the limit(s) of liberal trade and where and how to draw the line between trade and trade-related rights. These decisions are complex in the sense that these encroach domestic decision-making and require complicated balancing amongst divergent rights

⁸ See *Agreement on the Application of Sanitary and Phyto-sanitary*, 1994 1867 UNTS 493 (Annex 1A to Agreement Establishing the World Trade Organization, 1994) online: WTO <https://www.wto.org/english/docs_e/legal_e/legal_e.htm#sanitary> [referred to as "SPS Agreement"]. *Agreement on Technical Barriers to Trade*, 1994 1868 UNTS 120 (Annex 1A to Agreement Establishing the World Trade Organization, 1994) online: WTO <https://www.wto.org/english/docs_e/legal_e/legal_e.htm#sanitary> [referred to as "TBT Agreement"].

⁹ Vaugan Lowe, "Preface to Does the WTO Dispute Settlement Understanding Promote Sustainable Development" in M Gehring & M Segger, eds, *Sustainable Development in World Trade Law* (The Hague, Netherlands: Kluwer Law International, 2005) 257 at 257.

¹⁰ Sylvia Ostry, "The future of the World Trading System: Beyond Doha" in John Kirton & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Aldershot: Ashgate, 2004) 270 at 270.

and obligations of not only member states but also their various constituents (traders, producers, consumers).

Below, I analyze the adjudicatory body's purposive route of interpretation, i.e. the influence of SD as a preambular objective of WTO Agreement.¹¹ Taking a purposive route, adjudicators interpret treaty rules by detecting the broader purpose(s) of the treaty. For example, while determining WTO-consistency of a trade restrictive domestic measure, in its several decisions, the Panel or the AB referred to SD as the "context" for interpretation. The Panel in *Raw Materials*¹² expressly pointed that it will consider not only the exception clauses mentioned in Article XX, but also the preambular words to determine the "context" of trade restriction. It noted:

[p]ursuant to Article 31(2) of the Vienna Convention, which makes clear that the context of a treaty includes its "text, including its preamble and annexes", the Preamble to the WTO Agreement forms part of the context of Article XX(g). The Preamble's role as relevant context for interpreting Article XX(g) was confirmed by the Appellate Body in *US – Shrimp*, where it stated that the Preamble gives "colour, texture, and shading to [the] interpretation of the agreements annexed to the WTO Agreement, in this case, the GATT 1994."¹³

Since SD was introduced as the preambular objective of the WTO Agreement, several distinctive changes can be detected in the interpretative pattern of the Panels and the AB.

¹¹ In disputes involving purely trade issues, the AB usually prefers a textual approach in order to uphold "rule-based" international economic order. Under the textual approach, a decision maker interprets the relevant rules through detecting their "ordinary meaning." See Dongsheng Zang, "Textualism in GATT/WTO Jurisprudence: Lessons from the Constitutionalization Debate" (2005-2006) 33 *Syracuse J Intl L & Com* 393.

¹² *China-Measures Related to the Exportation of Various Raw Materials (Complaint by EU, Mexico & US)*, (5 July, 2011) WT/DS 394, 395, 398/R at para 7.373 (Panel Report) Online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds394_e.htm> <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds395_e.htm>, <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds398_e.htm>. [Hereinafter referred to as *Raw Materials*, Panel Report]; *China-Measures Related to the Exportation of Various Raw Materials (Complaint by EU, Mexico & US)*, (30 January, 2012, adopted 22 February, 2012) WT/DS 394, 395, 398/AB/R (Appellate Body Report). [Hereinafter referred to as *Raw Materials*, AB Report].

¹³ *Ibid*, *Raw Materials*, Panel Report, at para 7.373.

2.1.1 Transformative Character of Norms

In some influential decisions, the AB endorsed the transformative character of international norms, principles, and rules. Article 31(3)(c) of the Vienna Convention on 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.¹⁴ Following this prescription, the International Court of Justice (ICJ) in its advisory opinion on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, stated that “an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.”¹⁵ The evolutionary method of interpretation allows adjudicators substantial discretion not only to consider contemporary developments in related 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 “understanding and expectations” of the global community evolves and Article 31 of the VCLT prescribes an evolutionary approach to interpretation which “assures that WTO law evolves in a manner that

¹⁴ *Vienna Convention on the Law of Treaties*, 23 May 1969 UNTS 1155, I-18232 (entered into force on 27 January 1980). The meaning of the terms “rules” is used in Article 31 (3)(c) of the VCLT are debated. See the discussion in Andrew D Mitchell, *Legal Principles in WTO Disputes* (Cambridge Cambridge University Press, 2008) at 84. Mitchell finds that to the extent the general principles or customary international law are incorporated into relevant rules, then those are relevant under the VCLT provision in interpreting a treaty. McLachlan points out that rules do not include broader principles or considerations, which are not established as “rules” of international law. But for Marceau, principles and rules are different and including both general principles and customary principles within the umbrella of rules would be too much. See Cambell MacLachlan, “The Principles of Systemic Integration and Article 31 (3)(c) of the Vienna Convention” (April, 2005) 54:2 ICLQ 279-320; Gabrielle Z Marceau, “Conflicts of Norms and Conflict of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties” (2001) 35:6 J World Trade 1081-1131.

¹⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16, 31.

reduces, rather than enhances, conflict and inconsistency with evolving law in other international legal regimes.”¹⁶

In *Shrimp I*,¹⁷ the AB used the evolutionary method for defining the term “exhaustible natural resources” mentioned in GATT Article XX(g). US regulation imposed an import ban on shrimp that have been harvested with commercial fishing technology, which might adversely affect sea turtles. No such ban was imposed if US-prescribed TED (turtle excluder devices) technology were used during shrimp harvesting process. US regulation was challenged by India, Malaysia, Pakistan and Thailand as violating the GATT provisions. The AB started its inquiry from the GATT exception clauses i.e. whether the measure at issue complies with any of the exceptions noted in Article XX (a) to (j). If the measure complies with one of the exception clauses, the determination of arbitrary, unjustifiable, or disguised discrimination under the chapeau to Article XX comes next.¹⁸ With this formula, the AB reversed the Panel’s decision and held that the US measure relates to conservation of exhaustible natural resources as defined in Article XX(g) of the GATT.

For ascertaining what is included within the term exhaustible natural resources, the AB rejected the complainants’ argument that the term is to be interpreted according to the

¹⁶ 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 Law* (Oxford, UK: Oxford University Press, 2000) 35 at 58.

¹⁷ *US-Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India et al)* (15 May, 1998) WT/DS58/R (Panel report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>. [Referred to as *Shrimp I*, Panel Report]; *US-Import Prohibition of Certain Shrimp and Shrimp Products (Complaint by India et al)* (12 October, 1998) WT/DS58/AB/R (Appellate Body Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>. [Referred to as *Shrimp I*, AB Report]. *United States - Standards for Reformulated and Conventional Gasoline (Complaint by Venezuela, Republic of Bolivarian)* (1995) WT/DS2/P/R (Panel Report) Online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm>. [Referred to as *Gasoline*, Panel Report]; *United States - Standards for Reformulated and Conventional Gasoline (Complaint by Venezuela, Republic of Bolivarian)* (1995, adopted 20 May, 1996) WT/DS2/AB/R (Appellate Body Report) Online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm>. [Referred to as *Gasoline*, AB Report].

¹⁸ *Shrimp I*, AB Report; *supra* note 12 at paras 118, 121.

understandings of the GATT, 1947.¹⁹ The AB endorsed that the words exhaustible natural resources in Article XX(g), were actually crafted more than fifty years ago. The term 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.”²⁰ Although the drafting history of Article XX (g) referred to discussions about mineral resources and Article XX was not modified in the Uruguay Round, 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’.”²¹

In its effort to interpret the term according to the contemporary understanding, the AB referred to some international agreements and declarations such as the UN Convention on Law of the Sea, the Convention on Biological Diversity, Agenda 21 and the Resolution on Assistance to Developing Countries adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals, to find out whether living resources can come within the definition of exhaustible natural resources. It referred to concerted efforts on the part of global community to protect both living and non-living natural resources. To determine exhaustibility of sea turtles, the AB found that sea turtles are included in the Appendix 1 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) as a species facing the threat of extinction. It is interesting to note that, while referring to international conventions

¹⁹ *Shrimp I*, AB Report; *supra* note 12, at paras 130-131 and the footnote to para 130.

²⁰ *Ibid.*

²¹ *Ibid* at para 129.

and agreements, the AB referred to some other regional agreements and even a convention that was not yet in force.²²

In order to determine whether the US regulatory measure complies with the requirements in the chapeau to Article XX, i.e. that the measure is not arbitrary, unjustifiable or disguised discrimination, the AB applied the balancing test: balancing legal duties of the party claiming the exception with legal rights of the complainant. 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....²³ The AB acknowledged that the preambular words “must add colour, texture and shading” to its interpretations and noted that “Article XX(g) of the GATT 1994 is appropriately read with the perspective embodied” in the preamble.”²⁴ The AB pointed that the SD concept is generally accepted for integrating economic and social development and environmental protection. The AB also referred to the provisions of the Rio declaration and Agenda 21, which prescribe balancing multiple components of SD with special regard to the needs of developing countries.²⁵ The AB also referred to the establishment of a permanent Committee on Trade and Environment (CTE) in 1995, after the Marrakesh Ministerial

²² *Ibid* at paras 130-131.

²³ *Ibid* at para 152.

²⁴ *Ibid* at para 153. Also see paras 131..

²⁵ *Ibid*. See the footnote to paras 129 and 130, 154. In its footnote 147 and 148 to para 154, the AB referred to Principle 3 and Principle 4 of the Rio Declaration on Environment and Development. Principle 3 states that “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” Principle 4 states that “[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.” Then the AB quoted from Agenda 21 to show that economic development and the preservation and protection of the environment should be mutually supportive. It specifically quoted from paragraph 2.3(b) of Agenda 21 which states that “[t]he international economy should provide a supportive international climate for achieving environment and development goals by ... making trade and environment mutually supportive” Additionally it quoted paragraph 2.9(d) of Agenda 21, which states that the national governments should work “to promote and support policies, domestic and international, that make economic growth and environmental protection mutually supportive.”

decision and CTE's terms of reference to promote SD through a supportive and positive relationship between trade and environment, avoidance of protectionist trade measures, and recognition of multilateral disciplines.²⁶

By referring to diverse sources of information from multiple regimes 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 endorsed a meaning that fits both the broader purpose of the treaty and the contemporary demands. Endorsing transformative character for a specific term of the treaty, it also bridged the gap between apparently colliding regimes. Indirectly, it endorsed that it is not unusual for a trade regulatory regime to learn from the developments in the environmental regime and vice versa.

2.1.2 Multilateral rather than Unilateral Approach in Environmental Decision-making

While reviewing trade restrictive measures taken to manage extra-territorial environmental problems, the AB consistently preferred multilateral over unilateral measures. The AB expressly referred to the *consensual* character of international environmental law (IEL) and stressed on the duty to cooperate and consult before imposing extraterritorial environmental measures in both *Shrimp I* and *Shrimp II*²⁷ decisions. According to Sands, the principle of cooperation in

²⁶ *Ibid* at paras 154 & 155.

²⁷ *US-Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)* (15 June, 2001) WT/DS58/RW (Panel report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>. [Referred to as *Shrimp II*, Panel Report]; *US-Import Prohibition of Certain Shrimp and Shrimp Products (Recourse to Article 21.5 by Malaysia)* (22 October, 2001) WT/DS58/AB/RW (Appellate Body Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>. [Referred to as "*Shrimp II*, AB Report"].

international environmental law emerged from the principle of “good-neighborliness” mentioned in Article 74 of the UN Charter in relation to social, economic, and commercial matters.²⁸

In *Shrimp I*, the AB noted that the failure by the US to engage in multilateral negotiations with certain shrimp exporting countries before imposing an import ban contributed to its measure being unjustifiably discriminatory. Although the US regulation allowed for the possibility of multilateral negotiation, and the US authorities exchanged some documents before imposing import ban on May 1 1996, the AB stressed the fact that the US did not engage in “serious” or “substantial” negotiation “with the objective of concluding bilateral or multilateral agreements.”²⁹ The AB pointed to the Panel members’ discussion on the conclusion of “Inter-American Convention on the Protection and Preservation of Sea Turtles” in September, 1996, long after the imposition of trade ban against shrimp exporting countries in Asia.³⁰ Endorsing a “concerted and cooperative” method to deal with transboundary environmental policy objectives, the AB quoted principle 12 of the Rio Declaration on Environment and Development, which states, in part, “[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*.” [emphasis added]³¹

²⁸ Sands elaborates that the requirement to cooperate in trans-boundary environmental measures is present in some well-known treaties such as Principle 24 of the Stockholm Declaration and Principle 27 of the Rio Declaration. He cites examples from other international and regional instruments and declarations, where the general obligation to cooperate has been given more specific application. The principle of cooperation played an important role in international judicial decision making, especially in the ICJ and in the International Tribunal on Law of Sea (ITLOS). See Philippe Sands, *Principles of International Environmental Law* (Cambridge:UK: Cambridge University Press, 2003). See at 249-251. [Hereinafter referred to as ‘Sands, International Environmental Law’].

²⁹ *Shrimp I*, AB report; *supra* note 17, at paras 166-170.

³⁰ *Ibid* at paras 166, 167; *Shrimp I*, Panel report; *supra* note 17, at para 7.56.

³¹ *Ibid* at paras 168-169.

The AB also referred to the presence of 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, and endorsed the cooperative and consensual approach for resolving environmental problems.³² It proclaimed that unilateral domestic measures would be allowed only when these are based on some international or regional agreements and pursue some “shared goals.”³³

The *Shrimp II* report also reveals the AB’s repeated emphasis on multilateral cooperation in good faith before imposing any trade ban or restrictions.³⁴ In order to comply with *Shrimp I* ruling, US adopted new guidelines and allowed for a more transparent and predictable process of certification for shrimp export in 1999. Malaysia, one of the complainants of the *Shrimp I* case, complained that the revised US guidelines violated the requirements of the chapeau. Rejecting the 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.³⁵ The AB clarified that although an Article XX inquiry may positively 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.³⁶ The AB found that if the importing state conditions market

³² *Ibid* at para 168. Also see *supra* note 27.

³³ *Ibid* at para 168. The AB proclaimed at para 135 “[i]t is well to bear in mind that the policy of protecting and conserving the endangered sea turtles here involved is shared by all participants in this appeal, indeed, by the vast majority of the Nations of the world.” See G 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) 181.

³⁴ Some have also argued that the AB went too far in prescribing how to conduct treaty negotiation. See Lakshman Guruswamy, “The Annihilation of Sea Turtles: World Trade Organization, Intransigence and US Equivocation” (2000) 30:4 *Envl. L. Rep* at 10261-10276.

³⁵ *Shrimp II*, AB Report; *supra* note 27, at paras 140-4, 146-152.

³⁶ *Ibid* at para 124. Art. 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes 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. See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Annex 2 of the WTO

access by prescribing an “inflexible” environmental measure, which does not take into account the specific conditions of the exporting states, then it causes unjustifiable discrimination. There is no arbitrary or unjustifiable discrimination, if an importing state puts a programme which is “comparable in effectiveness” for all exporting countries and allows “sufficient flexibility in the application of the measures.”³⁷ Thus, it is not necessary that an identical agreement should be reached with all the exporting states.³⁸

In order to find 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.”³⁹ The AB relied on the Panel’s finding of ample evidences of good faith efforts on the part of US. The US officials organized meetings, negotiations, conferences and symposiums which ultimately led to conclusion of a regional convention on sea turtles, adoption of the “Memorandum of Understanding on the Conservation and Management of Marine Turtles, and their Habitats of the Indian Ocean and South-East Asia (the ‘South-East Asian MOU’),” and a conservation and management plan for the sea turtles before the MOU is finalized.⁴⁰

It is apparent from these two decisions that though it is theoretically possible to introduce a WTO-consistent unilateral trade restrictive measure, the AB discouraged absence of cooperation and introduced the principle of consultation from another regime (international environmental law) as the precondition(s) for approval of a trade restriction/ban. This attitude is different from the GATT Panel’s earlier decision in *Tuna-Dolphin I*, where it proclaimed that if market access

Agreement, 1994, online: WTO
 <https://www.wto.org/english/res_e/booksp_e/analytic_index_e/dsu_08_e.htm#article21>.

³⁷ *Ibid* at paras 144, 149.

³⁸ *Ibid* at paras 124-130. Malaysia pointed to the Panel’s improper use of the Inter-American Convention on Protection of Sea Turtles as a “benchmark” in order to compare US negotiations with regard to protection of sea turtles. While the AB denounced the use of the word “benchmark,” it endorsed that “comparison” and “factual reference” to an existing international cooperative effort is “useful” and “relevant” as long as it is not used as an “absolute standard” i.e. as a “legal standard.”

³⁹ *Ibid* at para 131; *Shrimp II*, Panel report, *supra* note 27 at para 5.71.

⁴⁰ *Shrimp II*, AB Report, *supra* note 27 at para 131.

can be hindered by conflicting policies of member states then this would cause a “demise of the liberal trading system.”⁴¹ Since the introduction of SD as the preambular objective, the adjudicatory body of the WTO started to change its tone and endeavoured to bring apparently colliding regimes (trade and environment) under a common framework. Judicial borrowing of rules, norms or principles provided the necessary tools for building this common framework.

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 measure(s). A member state enjoys relatively better flexibility in choosing a trade-restrictive measure, as long as it negotiates in good faith with the affected country and prescribes some flexibilities 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. An immediate relationship between the restrictive measure and the trade-related objective is not necessary; a measure could be justified if it is *currently* making a material contribution or “*is apt to make a material contribution in the future*” in realizing the objective. I elaborate the relevant reports below.

In *Shrimp II*, the US certification procedure for export of shrimp was under scrutiny.⁴² The main contention rested on whether the revised guidelines by US were flexible enough to take

⁴¹ *United States-Restrictions on Imports of Tuna (Complaint by Mexico and others)* GATT panel report not adopted, circulated on September 3, 1991 online: WTO <
https://www.wto.org/english/tratop_e/envir_e/edis04_e.htm>. [Referred to as Tuna-Dolphin I].

⁴² *Shrimp II*, AB Report, *supra* note 27.

into account the specific conditions in Malaysia. Malaysia argued that incidental turtle catch occurs due to fish trawling and not due to shrimp trawling. Malaysia also argued that its shrimp season and turtle-nesting season occur in different periods of time. Moreover, turtles like loggerheads and kemps, which suffer from high mortality and for whose protection the US law has been promulgated, rarely nest in Malaysian waters. Other turtles which nest in Malaysian waters live close to the coast and trawling is already prohibited in these areas.⁴³ The AB found that the revised US guidelines provide enough flexibility by requiring US authorities to take notice of the certification applicant's national programme(s) relating to protection of turtles and its participation in any international agreement relating to the protection and conservation of turtles. The revised certification process was designed in a way that would reveal to US authorities the specific concerns of an applicant. If in case the certification is denied, non-qualifying exporting state would be informed of the reason and their possible options.⁴⁴ Considering these flexibilities and since Malaysia had not applied for certification at the time of dispute, the AB decided not to speculate how US authorities would deal with different conditions and concerns of Malaysia.⁴⁵

The decision in *Asbestos* represents that trade liberalization need not be pursued in a manner that curtails the regulatory space of a member state to pursue its public health (or environmental) objectives.⁴⁶ Rather, trade-related objectives can co-exist with liberal trading system. In *Asbestos*, a French legislative ban on importation of asbestos and asbestos-containing

⁴³ *Ibid* at para 145 and the footnote to it.

⁴⁴ *Ibid* at para 147.

⁴⁵ *Ibid* at para 148.

⁴⁶ *European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada)*, (September 18, 2000) WT/DS135/P/R (Panel Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm> [Referred to as “Asbestos, Panel report”]; *European Communities — Measures Affecting Asbestos and Products Containing Asbestos (Complaint by Canada)*, (March 12, 2001 adopted April 5, 2001) WT/DS135/AB/R (Appellate Body Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm> [Referred to as “Asbestos, AB report”].

substances was challenged by Canada. Pursuant to the French Labour Code, the legislative ban sought to protect workers by prohibiting manufacturing, processing, sale, import or placement of asbestos fibres in French market. Relaxing the burden of the regulating state, the AB held that a member state might follow divergent scientific opinion and decide its level of protection.⁴⁷ Both the Panel and the AB accepted the French evidence that health risks posed by asbestos and asbestos-containing products are of “a very serious nature”.⁴⁸ All the experts consulted by the Panel were unanimous as to the presence of toxicity in asbestos and its irreversible threat for human life and health. Presence of a direct link between asbestos and health risk rendered it easy to invoke the justification under Article XX.

Later in *Retreaded Tyres*,⁴⁹ the AB considered that environmental and public health objectives need not be immediately observable from the restrictive measure. It was deemed enough that a trade restrictive measure would contribute to public health/environmental objective(s) in a “material” way.⁵⁰ *Retreaded Tyres* is the first case in which a developing country sought to justify its trade ban by invoking environmental grounds. EC, as one of the main exporters of used and retreaded tyres, challenged Brazil's import ban on these. Brazil sought to justify its import ban as being necessary to protect human, animal, or plant life or health within the meaning of Article XX(b) and argued that disposal of these tyres create 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

⁴⁷ *Asbestos*, AB Report; *Ibid*.

⁴⁸ *Ibid* at paras 167, 172-3.

⁴⁹ *Brazil – Measures Affecting Imports of Retreaded Tyres (Complaint by EC)* (12 June, 2007) WT/DS332/R (Panel Report) online: WTO < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm > [Referred to as “*Retreaded Tyres*, Panel Report”]; *Brazil – Measures Affecting Imports of Retreaded Tyres (Complaint by EC)* (3 December, 2007, adopted 17 December 2007) WT/DS332/AB/R (Appellate Body Report) online: WTO < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds332_e.htm > [Referred to as “*Retreaded Tyres*, AB Report”].

⁵⁰ *Ibid*.

import ban was necessary within the meaning of Article XX(b). However, considering Brazilian state law, which allowed exemption for MERCOSUR countries for the import ban, the AB held the import ban was applied in a manner that constituted arbitrary or unjustifiable discrimination and found disguised restriction on international trade within the meaning of the chapeau to Article XX.⁵¹

The AB reiterated its earlier position that a member state enjoys wide autonomy as long as its regulatory measure fulfills non-discrimination requirement and is enacted in good faith.⁵² While examining whether the import ban on retreaded tyres is necessary under Article XX (b) of GATT, both the Panel and the AB endorsed that the measure at issue could be part of regulating state's comprehensive policy to deal with environmental and health problems. Though, in previous decisions (*Shrimp I*, *Shrimp II* and *Asbestos*), the Panels or the AB examined only the measure at issue, 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. Taking a broader approach in the necessity analysis, the AB eased the evidentiary burden of the regulating state, if the latter can prove that the restrictive measure is an essential component of its comprehensive environmental or health objectives.⁵³

The ease of the burden to defend a domestic measure can also be identified from the way in which the Panel analyzed and the AB endorsed a flexible *means-ends* type of analysis to find the relationship between the objective pursued (means) and the restrictive measure at issue (ends).

⁵¹ MERCOSUR is a regional trade agreement entered into in 1991 between Argentina, Uruguay, Paraguay and Brazil. Brazil explained 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. See *Ibid*.

⁵² *Retreaded Tyres*, AB Report, *supra* note 49 at paras 140 -153.

⁵³ Isabelle Van Damme, "Appellate Body Report, Brazil: Measures Affecting Imports of Retreaded Tyres, Adopted on 17 December 2007" (2008) 57:3 ICLQ 710-723.

The factors to be considered in the means-ends test include the type of risk, the regulatory objective(s), the type of protection sought, and the nature of evidence. The AB eased proof of all these factors.

Both direct objective (waste reduction) and indirect but related objective (minimization of risks to human or plant life and health resulting from accumulation of waste from retreaded tyres) of the measure could be considered. The nature of the evidence could “consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.”⁵⁴ The Panel’s qualitative analysis as to whether the import ban would contribute to lesser waste and consequently reduce the risks arising from accumulation of tyres was upheld by the AB. On appeal, EC insisted on the differences between actual versus potential contribution of the measure in realizing the environmental and health objectives and suggested that the necessity analysis should inquire only the actual and not the potential contribution. 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

⁵⁴ *Retreaded Tyres*, AB Report, *supra* note 49 at para 153. The AB referred to its ruling in *Asbestos*, where it held that “[a] risk may be evaluated either in quantitative or qualitative terms.” See *Asbestos*, AB Report, *supra* note 46 at para 167. In *Retreaded Tyres*, the AB held that “[t]his does not mean that an import ban, or another trade-restrictive measure, the contribution of which is not immediately observable, cannot be justified under Article XX(b). We recognize that certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions—for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time—can only be evaluated with the benefit of time. In order to justify an import ban under Article XX(b), a panel must be satisfied that it brings about a material contribution to the achievement of its objective. Such a demonstration can of course be made by resorting to evidence or data, pertaining to the past or the present, that establish that the import ban at issue makes a material contribution to the protection of public health or environmental objectives pursued. This is not, however, the only type of demonstration that could establish such a contribution. Thus, a panel might conclude that an import ban is necessary on the basis of a demonstration that the import ban at issue is apt to produce a material contribution to the achievement of its objective. This demonstration could consist of quantitative projections in the future, or qualitative reasoning based on a set of hypotheses that are tested and supported by sufficient evidence.”

produce a material contribution to the achievement of its objective” then it is enough to justify the import ban.⁵⁵

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.”⁵⁶ The AB clarified that although actual and immediate contribution would make it easier to pass the necessity test, long-term contribution can be analyzed hypothetically, as long as there is quantitative or qualitative evidence, which shows the connection between the restrictive measure and its potential contribution in achieving health and environmental objectives.⁵⁷

An important connecting theme in all these decisions is greater autonomy for the regulating state. Domestic regulatory autonomy remains intact, even if a trade-restrictive measure imposes additional costs for foreign producers. In a recent decision on *Clove Cigarettes*, the AB found that it is entirely possible for an importing state to impose some additional costs through a technical regulation, if these costs are not related to foreign origin of the products; increase of costs to foreign producers without increasing cost to domestic producers does not necessarily indicate an automatic finding of “less favourable treatment” under the provisions of the TBT Agreement.⁵⁸

⁵⁵ *Retreaded Tyres*, AB Report, *supra* note 49 at para 151.

⁵⁶ *Retreaded Tyres*, Panel Report, *supra* note 49 at paras 7.146-7.148.

⁵⁷ *Retreaded Tyres*, AB Report, *supra* note 49, para 151, *Retreaded Tyres*, Panel Report, *supra* note 49 para 7.146-148.

⁵⁸ *United States - Measures Affecting the Production and Sale of Clove Cigarettes (Complaint by Indonesia)* (2 September, 2011) WT/DS406/P/R (Panel Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm>. [Referred to as “*Clove Cigarettes*, Panel Report”]; *United States - Measures Affecting the Production and Sale of Clove Cigarettes (Complaint by Indonesia)* (4 April, 2012) adopted April 24, 2012 WT/DS406/AB/R (Appellate Body Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds406_e.htm> [Referred to as “*Clove Cigarettes*, AB Report”]. See *Clove Cigarettes*, AB Report at para 217-221. But see *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef [Complaint by US]* (31 July 2000) WT/DS161/P/R (Panel Report) online WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds161_e.htm> [Referred to as “*Korea-Beef*, Panel Report”]. *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef [Complaint by US]* (11 December, 2000) WT/DS161/AB/R (Appellate Body Report) online WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds161_e.htm> [Referred to as “*Korea-Beef*, AB

2.1.4 Differential Position of Developing Countries

The fourth distinctive influence in the AB's interpretative task is the recognition of the differential capacity of developing countries in imposing trade restrictions and implementing social or environmental objectives. This attention to the differential capacity can be connected to the IL principle of equity, though the AB did not expressly refer to the latter.⁵⁹ 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.⁶⁰ In *Retreaded Tyres*, in order to counter the EC's argument on the availability of a lesser trade-restrictive alternative, the AB approved Brazil's argument about its different financial and administrative capacity. 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..."⁶¹ Applying these criteria the AB held,

Report"]. In *Korea-Beef*, Korea could not justify the necessity of its dual retail system for imported and domestic beef by invoking 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, on the grounds that it is better than shifting costs to "imported goods and retailers of imported goods." See *Korea-Beef*, AB Report at paras 29-30. 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. This earlier attitude has changed significantly.

⁵⁹ The principle of equity has a long history in IL. Equity between and amongst generations led to formulation of some principles of IL such as intra-generational and inter-generational equity and the principle of common but differentiated responsibility. Equitable allocation of natural resources has instructed decision-making at an international and regional level. In the *Gabcikovo-Nagymaros* decision, the ICJ had to decide on equitable sharing of resources of the Danube river between Czechoslovakia and Hungary. See *Case Concerning the Gabcikovo Nagymaros Dam (Hungary v. Slovakia)*, Judgment of 25 September 1997 [1997] ICJ Reports at 7, online: ICJ <www.icj-cij.org/docket/index.php?p1=3&p2=3&case=92&code=hs>.

⁶⁰ *Shrimp I*, AB report, *supra* note 17 at paras 161-163.

⁶¹ *Retreaded Tyres*, AB report, *supra* note 49 at para 171.

[w]hereas the Import Ban is a preventive non-generation measure, most of the proposed alternatives are waste management and disposal measures that are remedial in character. We consider that measures to encourage domestic retreading or to improve the retreadability of tyres, a better enforcement of the import ban on used tyres, and a better implementation of existing collection and disposal schemes, are complementary to the Import Ban; indeed, they constitute mutually supportive elements of a comprehensive policy to deal with waste tyres. Therefore, these measures cannot be considered real alternatives to the Import Ban.⁶²

Therefore, efficacy and acceptability of a regulatory measure are judged not only on the basis of its probability to achieve a health or environmental objective but also from the point of the respondent state's financial and administrative capacity to implement other alternative measures.

In the *EC-GSP* decision,⁶³ India challenged the EU's imposition of conditionalities for receiving benefits under Generalized System of Preferences (GSP). Under the EU's GSP programme, special tariff preferences were to be accorded to developing countries if special arrangements were taken (i) to combat drug production and trafficking and (ii) to protect labour rights and environment. India resorted to the first issue and reserved its right to challenge on the second issue later. The Panel found that the EC's drug arrangement was arbitrary and was accorded contrary to the non-discrimination requirement of the "enabling clause" of the GATT.⁶⁴

The enabling clause allows granting of special tariff preferences to developing countries.

⁶² *Ibid* at para 211.

⁶³ *EC-Conditions for the Granting Tariff Preferences to Developing Countries (Complaint by India)* (1 December, 2003) WT/DS246/P/R (Panel Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm> [Referred to as *Tariff Preferences*, Panel Report]; *EC-Conditions Granting Tariff Preferences to Developing Countries (Complaint by India)* (7 April, 2004, adopted on 20 April, 2004) WT/DS246/AB/R (Appellate Body Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm> [Referred to as "*Tariff Preferences*, AB Report"].

⁶⁴ 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. It is argued that the enabling clause contributes towards economic development of developing countries by permitting preferential market access for their products.

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."⁶⁵

In determining WTO-consistency of a tariff preference, the AB emphasized that fair and transparent process in granting the benefits and treatment of "similarly situated countries similarly" should ensure equitable treatment of recipients. The AB stressed that the preambular objective of the WTO can be pursued by provisions characterized as exceptions. It held:

The Preamble to the *WTO Agreement* identifies certain objectives that may be pursued by Members through measures that would have to be justified under the 'General Exceptions' of Article XX. For instance, one such objective is reflected in the recognition by Members that the expansion of trade must be accompanied by.... the optimal use of the world's resources in accordance with the objective of sustainable development, [with Members] seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.⁶⁶

In all these decisions, accommodating prevalent norms, principles, rules or even ideas from contemporary regimes and connecting these with the issues on trade-SD interaction, the Panels or the AB reports not just enriched their decisions, but also provided practical guidelines on how member states can pursue their SD objectives through WTO-consistent trade restrictive measures. In some decisions as a "context" for interpretation, SD allowed the Panels or the AB a broader space to endorse the transformative character of norms or increased regulatory autonomy of states. In other decisions, norms, principles or rules from contemporary regimes (i.e. the

⁶⁵ *Tariff Preferences*, AB Report, *supra* note 63 at para 173.

⁶⁶ *Tariff Preferences*, AB Report, *supra* note 63 at paras 94 & 95.

principle of cooperation from international environmental law and the principle of equity from international law) played a specific role in fine-tuning the interpretative process of the Panels and the AB. Thus, an important connecting theme in these decisions is the influence of the preambular objective of SD. However, the following sub-section discusses that the influence of SD was minimal in some high-profile food safety disputes.

2.2 Limited Influence of SD as a Broader Ideational Objective of Trade Regime

At the level of judicial determination, SD is utilized when member states' divergent policy goals clash with the trade liberalization objective. The broadness and over-encompassing capacity of SD 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 SD concept and its diverse components allow necessary flexibility in the decision-making process and for consideration of a wider range of trade-related rights.

Second, in some decisions under Article XX, the Panels or the AB considered not only the environmental norms or principles but also distributive effects of its decision.⁶⁷ This interpretative methodology reinforces *interrelatedness* between social, environmental, and economic policies. The emphasis on the “integrative” feature of SD 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

⁶⁷ Deborah Z Cass, *The Constitutionalization of the World Trade Organization: Legitimacy, Democracy, and Community in the International Trading System* (Oxford: Oxford University Press, 2005).

competition policy, primarily because of their asserted effects on international competitiveness.”⁶⁸ 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.”⁶⁹

Third, utilization of broad normative ideas like SD in judicial decisions also instills indirect procedural impacts in trade policy-making. For example, trade policy-makers or negotiators develop increased understanding on social, environmental and other trade-related issues. For example, 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.⁷⁰

Most importantly, prioritizing the purpose of a treaty, adjudicators usually endeavour to attain broad ideational objective of the regime and detect the “social goal of law.”⁷¹ In other words, broad ideational objective allows adjudicators to consider divergent rules, principles or norms and to accommodate existing social critiques. For example, 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,

⁶⁸ Kenneth W Abbott, "'Economic' Issues and Political Participation: The Evolving Boundaries of International Federalism" (1996) 18 Cardozo L Rev 971.

⁶⁹ *Ibid* at 978.

⁷⁰ *Shrimp II*, AB Report, *supra* note 27.

⁷¹ Aharon Barak, *Purposive Interpretation in Law* (Princeton and Oxford: Princeton University Press, 2005). See the introductory chapter and chapter 7. Although 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 purpose is identifiable from the text of law and its surrounding circumstances. However, the objective component is identifiable not from “actual intent” but from “hypothetical intent of the author.” This hypothetical intent is derived from prevalent social values, social goals and other relevant norms and values of the legal system concerned such as human rights. Barak argues that purposive interpretation allows judges to bridge the gap between these objective and subjective components. A judge performs a crucial balancing task by considering relative social importance of the conflicting purposes.

principles or rules of IL. This sometimes opens up the necessary avenue to address values, which are rather political, and contextualize these in the broader framework of IL in general. For example, in *Shrimp I*, although domestic shrimp industries in US were interested in extension of the TED regulations for foreign shrimp exporters, domestic environmental organizations played a larger role in enforcing the extra-territorial application of turtle conservation law.⁷² However, while analyzing the WTO-consistency of the US measure, the AB considered not just international trade rules, but also international environmental law on turtle conservation and IL principles on imposition of extra-territorial measures.

Despite its contributions, the influence of SD, even as a preambular objective did not remain coherent or systematic at adjudicatory body's interpretative process. I mention two significant limitations below.

2.2.1 Relevance of SD as a Defense

In two recent decisions, the AB resorted to a purposive analysis in order to detect whether “less favourable treatment” was accorded to foreign products in violation of Article 2.1 of the TBT Agreement.⁷³ In both decisions, the AB scrutinized whether any arbitrary or unjustifiable

⁷² Peter Chessick, "Explaining U.S. Policy on Shrimp-Turtle: An International Business Diplomacy Analysis" in Edith Weiss, John Jackson & Nathalie Bernasconi-Osterwalder, eds, *Reconciling Environment and Trade* (Leiden, Netherlands: Martinus Nijhoff Publishers, 2008) 501-522. Chessick analyses the interests of the domestic shrimp industries for expansion of domestic TED regulations to the foreign producers. His analysis points to the absence of protectionist intent on the part of US authorities who initially imposed and enforced the TED regulations on the domestic shrimp producers. When the US law requiring use of TED technology was amended in 1989, it required the State department to negotiate with shrimp exporting countries for installing necessary technology to conserve turtles. The US authorities imposed similar requirements for use of TEDs by foreign producers only pursuant to an order from the Court of International Trade (CIT). His analysis provides important insights of how environmental NGOs in terms of resources and interests dominated in forcing the enforcement of US law beyond its border. In fact, only one shrimp organization joined the NGOs in challenge before the CIT.

⁷³ Article 2.1 of the TBT Agreement stipulates, “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

discrimination has been caused against “like” foreign products and then analyzed the justifiability of the regulatory purpose for which the domestic measure has been enacted.

In *Clove Cigarettes*,⁷⁴ the Panel and the AB ruled that the US *Family Smoking Prevention and Tobacco Control Act* imposing ban on clove cigarettes unfairly discriminates against Indonesian products. Though both menthol and clove cigarettes contain a characterizing flavor that has unique appeal to young smokers, no ban was imposed for domestically produced menthol cigarettes. Finding “uneven-handed treatment” between domestic and foreign cigarettes and availability of lesser alternative measures that US could have utilized to attain its objective to reduce youth smoking, the AB found that the US regulation caused unjustifiable discrimination.⁷⁵

In *Tuna II*,⁷⁶ the AB found that dolphin-safe labeling regulation by US caused disparate impact on Mexican Tuna products. Though purported to be enacted for conservation of dolphins, the US regulation differentiated between tuna harvested by setting on dolphins within the ETP (Eastern Tropical Pacific) and outside the ETP in an “un-even handed” manner.⁷⁷ In *Tuna II*, the AB chose an analysis that connects the US regulatory measure with its non-protectionist conservation purpose and rejected the Panel’s “impossibility test” that determines whether it was impossible for Mexican exporters to comply with the “dolphin-safe” labeling requirement.

accorded to like products of national origin and to like products originating in any other country.” TBT Agreement, *supra* note 8.

⁷⁴ *Clove Cigarettes*, AB Report, *supra* note 58.

⁷⁵ *Ibid* at paras 235 & 236.

⁷⁶ *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Complaint by Mexico)* (15 September, 2011) WT/DS381/P/R (Panel Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm> [Referred to as “*Tuna II*, Panel Report”]; *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Complaint by Mexico)* (16 May, 2012, adopted 13 June 2012) WT/DS381/AB/R (Appellate Body Report) online: WTO <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm> [Referred to as “*Tuna II*, AB Report”]; Appellate Body Report, WT/DS381/AB/R. [Referred to as “*Tuna II*, AB Report”].

⁷⁷ In *Tuna II*, the AB finds that while the US regulatory measure is concerned with the objective of dolphin conservation in the ETP region, it does not address “equivalent harm” to dolphins arising from fishing methods other than setting on dolphins outside the ETP. See *Tuna II*, AB Report at paras 251, 288, 297 & 299.

Rather, the AB proclaimed that despite being “origin-neutral” on its face, the domestic technical regulation could still be *defacto* discriminatory. If the “impossibility” test is allowed, then any origin-neutral yet *defacto* discriminatory measure would not accord less favourable treatment to foreign products, as long as it is not “formally impossible” to comply with the regulatory requirements.⁷⁸

In both decisions, the ultimate objective of the AB’s purposive analysis was to balance trade liberalization with regulatory autonomy of states and to leave regulatory space for states to pursue their “non-protectionist” policy objectives.⁷⁹ However, the question is which regulatory objective(s) would be considered as appropriate defense(s)? Until now, all domestic trade restrictive measures have been defended on one of the grounds mentioned in clauses (a) to (j) of Article XX, 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 caused against foreign products. In both decisions mentioned above, reasonable availability of non-discriminatory measures (in *Clove Cigarettes*, a similar ban on domestically produced flavoured cigarettes and in *Tuna II*, an alternative certification process for monitoring tuna fishing in a dolphin-friendly manner) affected the process of assessing policy justifications.

Can SD as a broad ideational objective, or even as a preambular objective, justify a trade restrictive measure without invoking the policy exceptions mentioned in Article XX, GATT? Does it have any independent role in the balancing process that determines the line between trade liberalization and domestic regulatory autonomy? Though in none of the disputes under the

⁷⁸ *Tuna II*, AB Report, *ibid* at para 225.

⁷⁹ 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 Intl Econ L 1075.

GATT, 1994 or under the TBT Agreement, the defense was framed solely on SD argument, it is not hard to predict the fate of such a defense after the *Raw Materials* decision.⁸⁰

In *Raw Materials*, China placed different forms of export restrictions on some essential raw materials, which are used to produce everyday items and technology products.⁸¹ China sought to justify some of its export restrictions on the ground of resource conservation under Article XX (g) and other export restrictions on the ground of 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."⁸² China also argued that export restrictions are part of its comprehensive policy to conserve energy and transform towards recycle economy which in long-term would contribute to lesser pollution and ensure protection of its citizens' health.⁸³ The Panel observed that a member state has large autonomy in integrating its different policy priorities; however trade restrictions should be justified in accordance with the exception clauses of Article XX.⁸⁴ 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.⁸⁵ In other words, a member state could not rely on Article XX justification to pursue trade restriction on the ground that conservation of resources and economic growth would eventually help its transformation

⁸⁰ *Supra* note 12.

⁸¹ *Ibid.*

⁸² *Raw Materials*, Panel Report, *supra* note 12 at paras 7.356, 7.363.

⁸³ *Ibid* at para 7.498. Since the findings of the Panel on Article XX have not been appealed, I discuss only the panel opinion.

⁸⁴ *Ibid* at para 7.360.

⁸⁵ *Ibid* at paras 7.470, 7.471 & 7.501-7.511.

towards a less-polluting and high-tech economy. For the Panel, accepting such a broad defense would eventually allow trade restriction on any raw material.⁸⁶ Rather, the Panel found that without showing a “close and genuine” relationship between the measure and the objective, an exception provision under Article XX could not be extended in a vague manner. Rather, it is necessary to show that the trade restrictive measure would contribute specifically to the environmental or health policy objectives in a material way. 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 criterion, the Panel found that China failed to justify how the exports restrictions would achieve its sustainable development goals.⁸⁷

In all three decisions, discussed above, the Panel or the AB consistently applied the chapeau to Article XX test to determine WTO-consistency of a trade restriction. In *Clove Cigarettes*, the AB specifically pronounced that both the preamble and the provisions of the TBT Agreement require that the balancing task under the TBT Agreement should be conducted in a manner similar to GATT, 1994.⁸⁸ Thus, apart from its influence as a context for treaty interpretation, as a defense SD has a very minimal role.

⁸⁶ *Ibid* at paras 7.514, 7.751-7.754.

⁸⁷ For defenses based on conservation and protection of health, in *Raw Materials* the Panel found that Chinese policy documents contain reference neither to the “goal of conservation” nor for protection of health. Overall, the evidence clearly pointed towards the protectionist nature of Chinese measure. China could not demonstrate that other WTO-consistent available alternative measures could not achieve its objective of less pollution and protection of health of its citizens. See *Raw Materials*, Panel Report, *supra* note 12 at paras 7.432-7.435, 7.588. On appeal, the AB upheld the Panel’s rulings that Article XX does not apply to China’s obligations under its Accession Protocol. In a more recent dispute on *Rare Earths*, the AB reached a similar decision. The “textualist” interpretation of the AB in finding that Article XX does not apply to Paragraph 11.3 of China’s Accession Protocol is criticized widely. Bin Gu, “Applicability of GATT Article XX in China-Raw Materials: A Clash Within the WTO Agreement” (2012) 15:4 J Intl Econ L 1007; Julian Ya Qin, “Judicial Authority in WTO Law: A Commentary on the Appellate Body’s Decision in China-Rare Earths” (2014) 13:4 Chinese J Intl L 639.

⁸⁸ The AB found that prohibition of unnecessary obstacles to trade through technical regulation is qualified by a member state’s concern as to “quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices,” provided it is not applied in a manner constituting arbitrary or unjustifiable discrimination or a disguised restriction on trade. *Clove Cigarettes*, AB Report, *supra* note 58 at paras 90-92 & 96. The 6th recitals of the TBT Agreement allows

2.2.2 Selective Importation of Principles of International Law

Unlike Article XX decisions, in some food safety disputes, the Panel and the AB hesitated on the relevance of norms, principles or rules of international law as their interpretative source. *Beef Hormones*⁸⁹ is the first dispute under the SPS Agreement to reach the appellate level. EC banned importation of beef from US and Canada on the ground that artificial growth hormones used in these countries might pose health risk.⁹⁰ Both the Panel and the AB ruled against EC for its failure to undertake the risk assessment required by Article 5.1 of the SPS Agreement.⁹¹ 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 international law. The AB held that whether the PP has been widely accepted as a principle of general or customary IL appears unclear. The AB pointed out that there has been no authoritative decision by any international court or tribunal recognizing the status of PP nor has there been any uniform view amongst the legal commentators. However, the AB recognized that the PP is reflected in Article 5.7, Article 3.3, and the sixth paragraph of the preamble to the SPS Agreement. All these provisions in the SPS Agreement allow a member state to take provisional measures and to raise its standard of protection higher than those accorded by international standards, recommendations, and guidelines. The AB held that while determining whether

domestic technical regulation for non-protectionist purposes such as protection of human life or health, *supra* note 8.

⁸⁹ *EC-Measures Concerning Meat and Meat Products (Complaints by US, Canada)* (18 August, 1997) WT/DS/26/P/R, WT/DS/48/P/R (Panel Report) [Referred to as "*Beef Hormones*, Panel Report"]; *EC-Measures Concerning Meat and Meat Products (Complaints by US, Canada)* (16 January, 1998, adopted 13 February, 1998) WT/DS/26/AB/R, WT/DS/48/AB/R (Appellate Body Report) [Referred to as "*Beef Hormones*, AB Report"].

⁹⁰ *Ibid.*

⁹¹ For a detailed discussion on science-based risk assessment, see A Eliason, "Science Versus Law In WTO Jurisprudence: The (Mis)interpretation of the Scientific Process and the (In)sufficiency of Scientific Evidence in EC –Biotech" (2008-2009) 41 NYUJ Intl L & Pol 341.

sufficient scientific evidence warrants a regulatory measure under the SPS Agreement, a Panel “may... and should, bear in mind, that responsible, representative governments commonly act from perspectives of prudence and precaution where risks of irreversible, e.g. life-terminating, damage to human health are concerned.”⁹²

The AB also noted that its observation regarding the PP is not exhaustive and thus opened up the possibility of different interpretative approaches for future disputes.⁹³ This attitude by the AB restricting the application of precautionary measures solely within the SPS Agreement stands sharply in contrast with the wider approach taken in some contemporary regimes. For example, the Rio Declaration allows precautionary measures in case of scientific uncertainty, provided there are “threats of serious or irreversible damage.”⁹⁴

In *Biotech*,⁹⁵ the Panel was similarly hesitant to apply the principles mentioned in the Cartagena Protocol on Bio-Safety (CPBS).⁹⁶ The Panel did not clarify or provide any conclusive guidance with regard to the role of principles or rules of a multilateral agreement. Rather, the Panel interpreted Article 31(3)(c) of the VCLT narrowly and held that only IL rules binding on

⁹² *Hormones*, AB Report, *supra* note 89 at para 123-124.

⁹³ Alan O Sykes, "Domestic Regulation, Sovereignty, and Scientific Evidence Requirements: a Pessimistic View" (2002) 3:2 Chicago J Intl L 353; Jaye Ellis & Alison FitzGerald, "The Precautionary Principle in International Law: Lessons from Fuller's Internal Morality" (2004) 49:3 McGill LJ 779.

⁹⁴ 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.” See Principle 15, *Rio Declaration on Environment and Development* (1992) 31 ILM 874. Online: UNEP <<http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>> [Hereinafter referred to as “*Rio Declaration*”].

⁹⁵ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (Complaint by US, Canada & Argentina)* (29 September, 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R (Panel Report) [Referred to as “*Biotech*, Panel Report”].

⁹⁶ *Cartagena Protocol on Bio Safety*, Supplementary Agreement 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>> [Referred to as CPBS]. The Convention on Biological Diversity (CBD) was drafted with the objective to conserve biological diversity and promote 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. The CPBS was enacted with the objective to ensure safe handling, transportation and use of living modified organisms (LMOs). More information available online: CBD <<https://www.cbd.int>>

all parties to the treaty can inform its interpretative task. The Panel found that since the complainants in the dispute are not parties to the CPBS, its provisions would not apply in the Panel's interpretative task.⁹⁷ This restrictive approach renders most of the international treaties "inoperative" in the interpretative task of the Panel or the AB, as the WTO has huge membership.⁹⁸ Henckels contrasts this approach with *Shrimp I*, in which the AB referred to some international and regional agreements though all disputing parties were not signatories to these.⁹⁹ 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,¹⁰⁰ or the specific treaty provision that needs to be interpreted is "reasonably connected" to the "external sources of international law."¹⁰¹ Henckels even suggests that under Article 31(3)(c) of the VCLT, it is not necessary that the precautionary principle (PP) be a customary principle of international law so that the Panel or the AB may refer to it while interpreting the SPS agreement; the Panel could have referred to the general understanding on PP as defined in recent multilateral environmental agreements (MEAs) in order to determine the appropriateness of an existing "state practice."¹⁰²

In the field of GMOs (genetically modified organisms) or LMOs (living modified organisms) and their possible/probable effect on human health and environment, the CPBS emerged as an alternative regime emphasizing greater role for the PP and minimizing unknown

⁹⁷ *Ibid.*

⁹⁸ Caroline Henckels, "GMOS in the WTO: a Critique of the Panel's Legal Reasoning in EC - Biotech" (2006) 7 Melb J Intl L 278.

⁹⁹ *Ibid* at 297-305

¹⁰⁰ Joost Pauwelyn, "The Role of Public International Law in the WTO: How far can we go?" (2001) AJIL 535-578 at 575-576.

¹⁰¹ *Supra* note 98 at 297-305

¹⁰² *Ibid* at 305.

or potential risks.¹⁰³ These developments in international biosafety regime were parallel to the *Biotech* dispute, where the EU imposed a *de facto* moratorium on importation of some GM crops.

It is necessary to note that the focus and methodology of risk assessment differ substantially under the SPS Agreement and the CPBS. The CPBS allows greater regulatory space for states, not only in defining the level of risk but also at the risk assessment level. 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 GMO/LMOs on “the conservation and sustainable use of biological diversity” taking into account “risks to human health.”¹⁰⁴ For risk assessment, the SPS Agreement demands science-based risk analysis. On the other hand, though the CPBS prescribed risk analysis depends on scientifically sound and transparent process, CPBS disconnects the exclusive relationship between science and risk assessment. Rather, the CPBS declares that “lack of scientific knowledge or scientific consensus should not necessarily be interpreted as indicating a particular level of risk, an absence of risk, or an acceptable level of risk.”¹⁰⁵ The CPBS allows wider use of PP in case “there is lack of scientific information due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of LMOs.”¹⁰⁶ In situations where there is a lack of scientific knowledge or scientific consensus, the CPBS allows other factors to enter into the risk analysis. For example, the CPBS prescribed risk analysis allows importers of LMOs/LMO products to consider the possible adverse impact on their socio-economic conditions under

¹⁰³ Critics allege that the Panel “legislated beyond” its capacity while deciding the appropriateness of trade restrictions in biotech product by the EU. See *supra* note 93.; Robert Falkner, eds, *The International Politics of Genetically Modified Food: Diplomacy, Trade and Law* (Basingstoke: Palgrave Macmillan, 2007)

¹⁰⁴ CPBS, *supra* note 96, Annex III [1].

¹⁰⁵ CPBS, *ibid*, Annex III paras 3 and 4.

¹⁰⁶ CPBS, *ibid*, Article 10 (6) and 11 (8).

Article 26.¹⁰⁷ 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 recent *Clove Cigarettes* decision, the AB pointed out that the overall objective of the GATT informs its interpretation under the TBT agreement.¹⁰⁸ If this were so and if a purposive interpretation route were taken in the disputes under the SPS Agreement, then nothing bars interpretation of latter's provisions in accordance with the preambular objective (SD) of the WTO Agreement. In a majority of the scholarly discussions, the PP is considered as one of the component principles of SD.¹⁰⁹ If rules and principles from international environmental law or general 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 were approved while deciding disputes under Article XX of the GATT, why a similar route was not preferred for the precautionary measures in *Hormones* and *Biotech*. Important transformations could be identified in the application of PP.¹¹⁰ According to Harald,

¹⁰⁷ Article 26 of the CPBS was inserted in order to allow the importers to consider social and economic effects of LMOs/LMO products. The negotiating history of Article 26 of the CPBS depicts the concerns of developing countries (especially of African countries), who are mostly importers of GM food or feed. These importing countries expressed concerns that introduction/importation of transgenic crops/products might affect their biodiversity, their indigenous and local communities and traditional farming methods. Since transgenic crops are cultivated in large fields, rich farmers would dominate farming and reduce traditional smallholder farms. If transgenic crops were cultivated, production costs would increase in the importing countries. Farmers have to pay for seeds every year and also bear the additional costs for packaging. Multinational corporations sell seeds, necessary insecticides, fertilizers and pesticides in a single package. Some countries point to the fact that ecological impacts from some of the crops are not scientifically known. For details see Vincente Paulo B Yu, "Compatibility of GMO Import Regulations with WTO Rules" in Edith Brown Weiss, John Jackson & Nathalie Bernasconi-Osterwalder, eds, *Reconciling Environment and Trade* (Leiden, Netherlands: Martinus Nijhoff Publishers 2008) 579-628.

¹⁰⁸ *Clove Cigarettes*, AB Report *supra* note 58 at para 96.

¹⁰⁹ 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: Europa Law Publishing, 2008) 223-248 at 236. Jaye Ellis, "Sustainable Development as a Legal Principle: A Rhetorical Analysis", (22 December, 2008) online SSRN: <<https://ssrn.com/abstract=1319360>>

¹¹⁰ Harald Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law* (London: Martinus Nijhoff, 1994).

when international environmental law preferred an *ecological* instead of *economic* approach, assessment of environmental damages and environmental management programs adopted or allowed for consideration of *long term interests*. From the middle of 1980s, some international environmental agreements recognized this transformation in international environmental law and required no immediate and conclusive proof of substantial harm or risk for adopting precautionary measure. Instead, reasonable belief as to potential/probable danger of harm is enough. Also, it is not necessary to rely solely on fully conclusive scientific evidence; the PP can apply in situations where “present state of knowledge” may not prove a “definitive causality relationship” between the precautionary measure and the potential risk.¹¹¹ In case of *prima facie* proof of probable or possible damages or risk, the burden of proof reverses onto the person claiming the safety of the product.¹¹² Overlooking all these transformations in international environmental law, the Panel has rendered its decision under considerable scrutiny.

Although SPS-based risk assessment procedure differs from other regimes (such as the CPBS), certain common procedural factors are present. Under both regimes, it is required that national regulatory decisions regarding precaution should comply with certain procedural criteria such as non-discrimination in its application, reasonable proportionality between the measure and the possible risk, review of the decision on an ongoing basis etc.¹¹³ Therefore, even if the Panel resorted to the broader PP as an interpretative aid, 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 EU member states’ specific moratoria were adopted without any sort of risk

¹¹¹ *Ibid*, at 4, 302-3.

¹¹² *Ibid*, see the introductory chapter, concluding chapter and pages 340-345. Pointing to the divergences in opinion as to the application of PP, Harald argues that these divergences should not preclude PP to operate as a principle of IL. According to Harald, if vague and ambiguous principles such as the principle of self-determination are recognized in IL, there is no reason why PP cannot be argued as a principle of IL. See Sands, *supra* note 28 at 266-279.

¹¹³ *Supra* note 98.

assessment and against the European Commission's and European Food Safety Authority's (EFSA) decisions.¹¹⁴ However, if the general understanding of PP in international environmental law were considered, it would have allowed for a wider perspective on risk assessment, justified adoption of precaution on wider grounds, and would have endorsed the Panel's decision with necessary social acceptability.¹¹⁵

This rigid attitude towards importation of non-WTO norms, principles or rules generated significant criticism against the reasoning processes of the Panels and the AB. Many scholars have explained the reasons for this rigid or selective attitude. Especially for food safety, scholars have explained that these disputes involve not just trade but complex scientific matters. 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.¹¹⁶ However, except these food safety issues,

¹¹⁴ In *Biotech*, several of the GM Corps were regarded safe by the EU's scientific body EFSA, but some member states of the EC imposed more stringent precautionary measures against those GM corps by barring their entry. See 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 [hereinafter referred to as "Shaffer, Structural Theory"].

¹¹⁵ Some organizations consider that CPBS, *supra* note 95, reflects social, cultural and environmental viewpoints from the local and grass root levels. <www.soilassociation.org/>, <www.globalgap.org/>, <www.centerforfoodsafety.org/>, <www.greenpeace.org/international/en/>; "Corporate Lies: Busting the Myths of Industrial Agriculture" available online at <www.centreforfoodsafety.org/>. Both in US and EU, the federal/regional level inaction has caused intensive state/national level efforts to address the contemporary demands for food safety and long term assessment of health hazards, environmental damages. For example, at a local and state level there are detectable changes in GM food regulation in US. For more details see "A New View of US Agriculture: State by State Factsheets on Top Agricultural Commodities, Organic Sales and Genetically Engineered Foods," available online <www.centreforfoodsafety.org/>.

¹¹⁶ Sungjoon Cho, "From Control to Communication: Science, Philosophy, and World Trade Law" (2011) 44:2 Cornell Intl LJ 249. Many scholars now argue that dispute resolution through an international adjudicatory body is not appropriate for food safety matters, as it encourages more "backfire" from consumers and non-state actors and judicial intervention is perceived as "surrender" to the political and commercial pressures. Andrew T Guzman, "Food Fears: Health and Safety at the WTO" (2004-5) 45 Va J Intl L 1, online: SSRN <ssrn.com/abstract=618361>. Guzman argues that judicial resolution in food safety matters empowers the winning party with a "comparative advantage" to negotiate and bargain for "admittance of products" that the losing party considers not safe. Guzman argues that adjudicatory body "is poorly placed" to review regulatory autonomy of states to define its tolerance level for risks and to evaluate and judge science-based arguments. His suggestion is to evaluate these complex disputes by inquiring into procedural obligations of the SPS Agreement, which is non-discrimination against foreign products. The latter requires proof that there is no unjustified or arbitrary or disguised discrimination against foreign products and is not more trade

most scholars praised the widened vision from the Panels and the AB for accommodating trade-related rights within trade regulation.¹¹⁷

Despite these scholarly explanations, one important critique posits that importation of norms, principles or rules from related or colliding regimes remains selective, especially when broader public or consumer interest conflicts with substantial economic interests of multinational corporations.¹¹⁸ 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 economic stakes. When substantial commercial

restrictive than necessary. Les Levidow, "The Transatlantic Agbiotech Conflict as a Problem and Opportunity for EU Regulatory Practices" in Robert Falkner, ed, *The International Politics of Genetically Modified Food: Diplomacy, Trade and Law* (Basingstoke: Palgrave Macmillan, 2007) 118-137.

¹¹⁷ See Steve Charnovitz, "The Environment vs Trade Rules: Defogging the Debate" (1993) 23:2 *Env'tl L* 475; Steve Charnovitz, "The WTO's Environmental Progress" (2007) 10:3 *J Intl Econ L* 685; Daniel C Esty, "Linkages and Governance: NGOs at the World Trade Organization (Linkage as Phenomenon: An Interdisciplinary Approach)" (1998) 19:3 *U Pa J Intl Econ L* 709; Daniel Esty, "Bridging the Trade-Environment Divide" (2001) 15:3 *J Econ Perspectives* 113-130. Robert Howse & Ruti Teitel, "Cross Judging: Tribunalization in a Fragmented but Interconnected Global Order" (2009) 41:4 *NYU J Intl L & Pol* 959. For a recent analysis that lauds the "majoritarian activism" by the Panels or the AB, see Alec Stone Sweet & Thomas L Brunell, "Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO", (2013) online: <digitalcommons.law.yale.edu/fss_papers/4625>. The authors argue that by using majoritarian activism, the judges contribute to developing the law of the regime and enhance the effectiveness of the regime. But others suggested cautious judicial activism. See David M Driesen, "What is Free Trade? The Real Issue Lurking Behind the Trade and Environmental Debate" (2001) 41:2 *Va J Intl L* 279; Jeffrey Dunoff, "'Trade and': Recent Developments in Trade Policy and Scholarship - and Their Surprising Political Implications." (1996) 17:2-3 *Nw J Intl L & Bus* 759. For scholarly debates on the appropriateness and the extent of judicial interpretation, whether the Panel or the AB should engage in "law-generating" tasks in hugely contested and complex policy matters, whether the adjudicators possess the expertise to decide complex issues and if so, how far should it go, see Richard H Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints" (2004) 98:2 *AJIL* 247; Shaffer, Structural Theory, *supra* note 114; Armin von Bogdandy, "Law and Politics in the WTO -- Strategies to Cope with a Deficient Relationship" in JA Frowein & R Wolfrum, eds, *Max Planck Yearbook of United Nations Law* (Netherlands: Kluwer Law International, 2001) 609-674.

¹¹⁸ Debra Strauss describes the corporate dominance for framing the intellectual property (IP) rules especially for biotech products and the inequities in IP rights in TRIPS that operate against the developing countries. She referred to the concentration of patents: 71% patents in agro-biotech are owned by top five companies. See Debra M Strauss, "Defying Nature: The Ethical Implications of Genetically Modified Plants," (2007) 3 *J Food L & Pol'y* 1. Critics voice concerns about priority being placed for corporate and industry interests through the global trading system with devastating effects for local communities and environment. See Hilary French, "Challenging the WTO" (1999) *World Watch* 22-28. 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.

interests are involved, as in the case of GMOs, the effects on the environment may be examined in a cursory manner.”¹¹⁹

As this section summarizes the development of trade-SD relationship through the reports of the Panels and the AB, section II moves on to discuss the deeper and bigger challenges of resolving trade-SD disputes especially if SD is viewed from a capability enhancement perspective.

Section II: SD from a Capability Enhancement Perspective: Moving beyond “Judicialization”

As mentioned at the beginning of this chapter, only a few analyses actually focus on the usefulness of SD in resolving complex disputes.¹²⁰ Accepting the needs-based perspective on SD, most of these analyses focus on how trade-SD disputes are resolved. In a thought-provoking article Ruse-Kahn argues that although use of this broader normative concept does not ensure a fixed outcome, as a treaty objective it allows sufficient domestic regulatory space for implementing the treaty rules.¹²¹ He finds that its application in international economic law promotes “international coherence” because of its flexibility and capacity for possible open-ended interpretation.¹²² It also allows for treaty interpretation in a way that comprehensively reconciles the economic, social and environmental aspects of application of the treaty or its norms. Most of these analyses on trade-SD disputes evaluate what rules, principles or norms relating to SD are imported from related or colliding regimes, how strong the influence of SD is

¹¹⁹ Veena Jha, *Ibid* at 475.

¹²⁰ *Supra* note 1.

¹²¹ Ruse-Khan, *supra* note 1.

¹²² *Ibid*.

while interpreting a particular text of the treaty, how much space it allows for domestic regulation, what role it plays as the broader context of the treaty, how effectively or correctly disputes involving trade-related rights are resolved, what potential role SD could play in future trade-SD disputes and its effect on the legitimacy of the WTO.¹²³ In other words, there is a tendency to judicialize the trade-SD relationship.

Criticizing the needs-based understanding of SD, I proposed a wider understanding of the trade-SD relationship in Chapter 1. With a distinctive focus on capability enhancement, the wider understanding reconstructs the trade-SD relationship and recognizes the essential interconnection between trade and trade-related issues.¹²⁴ What should be the nature of judicial inquiry under such a wider perspective? This section describes some possible options and limitations below.

Since most trade-SD disputes involve consideration of norms, principles, or rules of different regimes, or divergent demands from state or non-state actors, it is much more important and beneficial to utilize the broader normative influence of SD in a way that bridges the gap between trade and trade-related regimes and these multiple actors. Adjudicators play a crucial role in bridging the gap between different regulatory regimes by borrowing from diverse sources. I explain why the process of borrowing is important.

Wide consideration of rules, principles or norms from related or colliding regimes help adjudicators to detect common features of multiple regimes and/or devise some creative interpretations. Professor Donald McRae argues that this process of borrowing allows both

¹²³ *Supra* note 1.

¹²⁴ Under the wider understanding, capability-based SD realizes that market mechanisms and other institutions (public and private arrangements) play a supporting role for enhancing human capability. Under this wider perception, all the components of the SD (i.e. environmental protection, economic development and social justice) inform and modify the neo-liberal concept that the market is autonomous and operates independently. See Amartya Sen, *Development As Freedom* (New York: Anchor Books, 2000).

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.”¹²⁵ The process of borrowing not only shapes the nature and extent of relationship between different regimes but also allows multiple regimes to co-exist. For example, in *Raw Materials*, the Panel specifically referred to the IL principle of a state’s sovereign rights over its resources and the Convention on Biological Diversity while discussing the conflicts between different policy priorities in resource conservation.¹²⁶ In some Article XX decisions, utilizing the preambular objective of SD, the AB allowed apparently colliding regimes (trade and environment) to move closer towards each other by considering trade regulatory rules and principles, conventions or declarations from multilateral environmental agreements under a holistic framework.

The process of borrowing also allows adjudicators to accommodate the contestation between state and non-state actors such as national governments, traders, multinational corporations, and environmental groups. Teitel and Howse illustrate the greater benefits of the process of borrowing and “normative communication” between diverse regimes and actors. They find that even 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.¹²⁷ With increasing “tribunalization in international regimes,” judicial bodies are deeply “entangled” with the new “politics of an international order” and craft policies not just for states but also for diverse actors.¹²⁸

¹²⁵ Donald McRae, "International Economic Law and Public International Law: The Past and The Future." (2014) 17:3 JIEL 627 at 638.

¹²⁶ *Raw Materials*, Panel Report, *supra* note 12 at para 7.381.

¹²⁷ Howse & Teitel. *supra* note 117. But see von Bogdandy. *Supra* note 117 at 632. Bogdandy argues for “governance” of diverse trade-related issues in the councils and committees of the WTO. For Von Bogdandy, efficiency and effectiveness of the AB and the Panels results in “law-generating task” in changing socio-economic conditions and for hugely contested complex policy matters.

¹²⁸ *Ibid.* Comparing the flexibility and openness in AB with the political impasse in Doha round, Howse and Teitel, *ibid*, argue that as an international judicial body, the AB has an enhanced role in preserving the legitimacy of

The borrowing process obviously involves consideration of contesting or oppositional ideas from diverse regimes and actors. In certain circumstances, this may produce an outcome that is not politically palatable. Yet, by considering these oppositional ideas, it is possible for the adjudicators of a trade regime to reserve some space for other trade-related rights and connect trade regulation with contemporary demands.

Finally, for operationalizing SD in trade regulation, the process of borrowing from contemporary regimes and actors offers two specific benefits.

First, by borrowing from divergent norms, principles, and ideas and accommodating diverse actors, it is possible for the adjudicators to take contemporary understandings on sustainability into account and devise realistic method(s) to reserve some space for trade-related rights. For example, in *Shrimp I*, the AB creatively included the principle of cooperation from international environmental law while determining whether the US regulation was unjustifiably discriminatory under the Chapeau to Article XX. Later in *Shrimp II*, the principle was taken into account by US regulatory authorities while revising the shrimp export certification process. 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.

Second, instead of promoting conflict, judicial decisions borrowing from different regimes and actors not only enrich the trade-SD discourse, but also influence multiple domestic

the system by taking into account the “shifting conceptions of legitimate international order.” According to them, the AB’s “human-centered vision” and greater activism by referring to diverse international legal and policy instruments, caused greater use of the WTO’s dispute settlement compared to similar dispute resolution systems under regional/bilateral treaties. In a similar tone, Charnovitz lauds the AB’s interpretative role in examining compliance of domestic environmental laws with the WTO rules and predicts that in the next decade of the WTO, international governance would be dominated by environmental concerns and the AB’s “advances” in environmental matters “will not be reversed.” See Charnovitz, WTO’s Environmental Progress, *supra* note 117; Steve Charnovitz, “The World Trade Organization and the Environment” in G Sampson & J Walley, eds, *The WTO, Trade and Environment* (Massachusetts: Edward Elgar Publishing, 2007) 413. Esty also argues that the legitimacy of the WTO would suffer if it confines within its narrow trade mandate. Esty suggests that the global nature of environmental problems and the absence of a global environmental organization points more towards resolution of environmental issues within the WTO. See Esty, *supra* note 117.

regulatory regimes (such as trade, environment, and public health). 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. For operationalizing capability-based SD, it is much more important to influence the domestic regulatory regimes which affect residents or citizens directly, than some abstract or generalized decisions which determine WTO-consistency of a trade restrictive measure.

Recognizing all these benefits of the borrowing process, the wider understanding focuses, not on SD's influence in delineating the exact boundary between trade and trade-related issues, but on whether judicial resolution leads to the development of a shared or common ground between different regimes and actors. Despite its emphasis on bridging the gap between trade and other trade-related regimes, the wider understanding recognizes that it is not just the task of crafting or developing a particular legal meaning to a particular issue or interpreting a particular text of the treaty or even importation of norms, principles or rules that matters in trade-SD debate. It is undeniable that the influence of a broad-based ideational objective like SD is an important measure of judicial contribution in connecting the trade regime with contemporary demands for equitable and sustainable economic governance. Yet, it is necessary to situate the debate on trade-SD beyond the judicialization approach. From the perspective of wider understanding, the bigger issue in trade-SD debate is effective operationalization of SD into the regulatory system of the WTO and other trade regulatory or economic cooperation bodies. The later discussion finds that the challenges of resolving trade-SD disputes emanate not just from the inherent complexities of the SD concept or from selective importation of non-WTO rules, norms, or principles. Multiple challenges arise from divergent demands and expectations of state and non-state actors, the institutional limitations of the Panels and the AB, and the weakened governance

of global social and environmental matters. Below I describe why it is unrealistic to expect that the adjudicatory body of a global trade regime can address the complexities arising from trade-SD interaction (2.3) and why other non-judicial regulatory bodies are more appropriate sites for operationalizing SD and for developing a resourceful and richer trade-SD discourse (2.4).

2.3 Challenges of Operationalizing SD through Judicial Analysis

The wider understanding realizes that an extended analysis from a trade adjudicatory body neither guarantees appropriate attention to all the contesting issues nor would be desirable from the point of its legitimacy. Rather, when assessed from a capability enhancement perspective, SD require some unique demands that require attention beyond judicial sites. I am not suggesting that judicial resolution does not produce fruitful results. I suggest that in the process of operationalizing capability-based SD within trade regulation, the adjudicatory body of the WTO faces significant internal and external challenges, some of which are mentioned below.

2.3.1 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. Different priorities and flexibilities of SD as a concept affect the process of coherency in judicial decisions.¹²⁹ 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 states and even non-states actors would react to the

¹²⁹ Critics argue intensely against the legal status and clarity of SD. I discussed these critiques in Chapter 1.

decisions),¹³⁰ but also open-ended questions from multiple disciplines (development policy, environmental law and policy, labour law and standards, risk analysis). Thus, it is not just pure legal solutions that can address these hybrid issues; effective resolution of these disputes requires productive and continuous attention to the unique socio-political and economic realities of different states and of non-state actors.

This matter became particularly evident in food safety disputes. In most disputes under the SPS Agreement, the main concern is balancing the safety of the product versus proportionate restriction on trade. Pursuant to the provisions of the SPS Agreement, the Panel or the AB emphasizes science-based risk assessment¹³¹ and acknowledges that these should not be confined to results of laboratory testings, but might include results of the actual or potential effect in human society. However, for some ecological 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 question is how to leave appropriate regulatory space for states.

To accommodate these complicated risk scenarios, there grew a sharp regulatory divergence on the adoption, continuation and justification of PP. Opposing science-based risk

¹³⁰ Shaffer, Structural Theory, *supra* note 114 at 68-9. Shaffer finds that, in most food safety disputes, it was harder for the Panels or the AB to decide on a proper interpretative route. The WTO's adjudicatory body had to consider not only "conflict of norms" amongst multiple regimes, but also the political impact of its decision. Shaffer finds that this awareness is reflected both in *Hormones* and *Biotech*, where the AB insisted on procedural aspects rather than making a definitive decision on substantive grounds. Also the possibilities of non-compliance by powerful states, response of non-state actors such as NGOs situated in the EU and the US, and public opinion all play a "catalyzing role" in inducing the decision-making process of the AB. Shaffer argues that the AB's cautious procedural turn in deciding these issues is "politically correct" and procedural inquiry in complicated decisions is not novel. A similar attitude is discernible from the courts in the European Union. See Miguel Poiares Maduro, *We The Court: The European Court of Justice and The European Economic Constitution* (Oxford, UK: Hart Publishing 1998). Maduro has identified that through proportionality tests, European courts, while balancing the trade restriction with member states regulatory policy, analyze procedural questions rather than the substantive merits of the decisions.

¹³¹ Drawing on the limitations of science-based risk assessment, Peel describes how the Panel or the AB can sort out the nature of risk situation and adjust the stringency of its standard of review accordingly. See Jacqueline Peel, "Of Apples And Oranges (And Hormones In Beef): Science And The Standard Of Review In Wto Disputes Under The SPS Agreement" (2012) 61 ICLQ 427.

assessment, local, national, and transnational movements from consumers, small farmers and NGOs emphasized the broader concept of risk research and risk assessment. Under the latter, risk analysis becomes “multidimensional,” realizes “incommensurability of different classes and aspects of risk,” prioritizes knowledge beyond science, and endorses “scientific ignorance” in some situations.¹³² Depending on this broader risk analysis, PP itself is continuously constituted, framed and influenced by divergent actors (consumers, corporations, scientists) operating in a particular social setting.¹³³ The methodology of risk assessment, i.e. what to consider, how to interpret or evaluate a particular finding or data or what to conclude, is influenced not only by science but also by socio-political factors. For example, when a broader objective is included in risk assessment, it changes the questions asked, and the interpretations from the finding. For example, questions posed to assess the safety of GM products would differ substantially depending on whether the objective pursued is broad (such as potential harm to human survival,

¹³² Levidow, *supra* note 116 at 847-848.

¹³³ With regard to approval of GM crops in EU, Levidow, *ibid*, shows how risk assessment, its methodology, and approaches to precaution changed with public protests and scientific disagreements. In 1990, the European directive governing approval processes for GMOs was initially justified with scientific and socio-economic justifications. For scientific basis, it relied upon the potential risks to the “agriculture and other human created systems” and “irreversible environmental effects.” Referring to the potential ecological harm, the EC noted that “[t]here are concerns that this new technology might entail potential risks not only related to human health, but also for the total environment. There could be a risk that the widespread use and release of novel GMOs could upset the delicate balance existing in nature or even have evolutionary impacts.” [Quoted in Levidow at p. 849]. However, huge political pressure mounted due to the corporate influence in which the scientific basis for precaution was questioned. Corporate lobby groups were active and threatened national governments of European countries to move biotechnology related investments to North America. These political influences drastically changed the risk evaluation methodology. The new methodology assumed that all risks are capable of identification and evaluation, “downplayed” “uncertainties which could not readily be reduced by the available science.” This led to approval of some GM crops in the European commission although some countries like Denmark, Sweden and Austria demanded a more stringent risk assessment. Then again from mid-1990 onwards, popular protests, demands from NGOs and disagreements amongst scientific communities led to introduction of moratorium on commercial use of GM crops. There were three important changes in uncertainty assessment: “more stringent agro-environmental norms; greater scrutiny of safety evidence or assumptions; and more complex causal pathways of potential harm,” were introduced. The risk assessment became entirely different than the early regulatory mechanism for approval of GM crops; it questioned the intensive agricultural method, “emphasized unpredictable effects” and endorsed possibility of contaminating other non-GM foods. Levidow shows through case studies how political influence in the form of public protests, demands from NGOs along with the restructuring of the EU scientific committee initiated changes in precautionary approach of the EU. See at 850-868. See Levidow, “Precautionary Uncertainty: Regulating GM Crops in Europe” (2001) 31:6 *Social Studies of Science* 842-874.

biodiversity, and nature conservation) or narrow and focused (such as potential harm to human health).

Considering these extensive regulatory divergences, (for example, risk assessment differs not only between states but also within a state),¹³⁴ and unique socio-political demands of member states and their constituents, what pragmatic role can we expect from a global trade adjudicatory body? Aren't the political or administrative committees better placed to address these complex issues on an ongoing basis and devise some case-based solutions?

2.3.2 Upholding Integrative Feature of SD: Concern for Marginalized States or Non-state Actors

The integration principle requiring integrated analysis of all the components of SD, 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 ICJ.¹³⁵ While approving a trade ban on the ground of environmental protection or food safety, the integrative feature of SD demands that long-term effect of the decision should be a vital concern for the adjudicators. Yet, practical use of this feature might be limited for various reasons. For example, long-term effect of a decision might not become apparent either at the

¹³⁴ In the US, the federal regulatory system dealing with food safety issues is facing considerable opposition from the states. In the US, the safety assessment of GM food is primarily approached by concept of "substantial equivalence." According to this concept, if a GM crop looks and grows in a way similar to non-GM crops, then these are assumed to be similar and there is no need to assess their safety. The "substantial equivalence" concept has led to not labeling the GM products in US regulatory system. However, due to growing resistance from consumers, some farm organizations questions the approval process of the safety of GM crops. 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. For an elaborate discussion on the debate on allowing production and marketing of transgenic salmon, see Allison M Straka, "Why Alfalfa is Not the Only Little Rascal for Bio-Agriculture Law" (2010) 21:2 Vill Envtl L J 383.

¹³⁵ Sands, *supra* note 29 at 263-266. Sands mentions that SD's "integrative" feature appeared in resource conservation documents prior to Stockholm conference in 1972. Sands finds that the integrative feature of SD is increasingly shaping international economic law and policy. It has also initiated changes in operation of international and regional economic institutions such as the EU, the World Bank and other multilateral development banks.

time of judicial analysis, or might not properly be considered as a *justiciable* issue. For example, In *Retreaded Tyres*, indirect and long-term risks from waste tyres were considered enough to justify Brazil's import ban on retreaded and used tyres.¹³⁶ Similarly for health risks, in *Asbestos*, the AB rejected Canada's argument that a low level of exposure does not cause carcinogenicity.¹³⁷ In contrast, both the Panel and the AB relied on science-based risk assessment under the SPS Agreement in the *Biotech* and *Beef Hormones* decisions.¹³⁸ I have already discussed that for the latter decisions, regulatory divergences between SPS and other contesting regimes might have caused exclusion of long-term risk analysis from judicial consideration.¹³⁹ However, even in situations where there is no 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 other words, judicial determination might adversely affect the marginalized participant(s) of the trading regime or some disadvantaged social groups.

¹³⁶ The AB's report in *Retreaded Tyres*, *supra* note 49 is intensely criticized. It is argued that while relying on qualitative analysis of how import ban on retreaded tyres could result in lesser waste and ultimately contribute to its broader environmental and health objectives, the Panel and the AB did not consider the negative possibilities emanating from the import ban i.e. increase of demand for imported and domestically produced new tyres. See Van Damme, *Supra* note 53 at p. 715. The AB did not prefer EC's argument that better waste management would have been a better alternative to deal with environmental and health risks emanating from waste tyres. A total ban would certainly cause reduction of risks from waste tyres. Yet, the issue of risks from new tyres would still be there, though these would generate waste in a longer time span when compared with retreaded tyres. Would some sort of additional remedial measures in the form of better waste management been a better alternative? If EC had offered some technological support to improve Brazil's waste management, certainly EC's arguments regarding availability of alternative measure would have been stronger. The AB's decision is criticized for not assessing the "magnitude" of possible risks of both the measure and its alternatives. Without evaluating the estimated magnitude of the risks involved, it is questionable how the AB determined that lesser restrictive alternatives could not achieve an "equivalent" level of contribution. See Chad P Bown & Joel P Trachtman, "Brazil - Measures Affecting Imports of Retreaded Tyres: A Balancing Act", (2008) online: SSRN <ssrn.com/abstract=1222981 or <http://dx.doi.org/10.2139/ssrn.1222981>>.

¹³⁷ *Supra* note 46.

¹³⁸ *Supra* notes 89 & 95.

¹³⁹ It has been argued that, the SPS-based risk assessment only allows for consideration of short-term risks to human health and excludes long-term risks to humans/the environment from low exposure of hormones or from new technologies. See Evelyne Hong, "Globalisation and the Impact on health: A Third World View," (August, 2000), Third World Network; Levidow, *supra* note 116; Veena Jha, *supra* note 119.

As a prelude to *Shrimp I* dispute, turtle excluder devices (TEDs) were introduced in US in 1993 to reduce incidental capture of endangered sea turtles by shrimp fishing trawlers.¹⁴⁰ When a US regulatory measure banned import of shrimps caught without TEDs, Indian fisheries agencies conducted experiments with several imported TEDs and endeavored to popularize use of these amongst fishermen. Yet, fishermen in India were less interested in using TEDs, as a considerable amounts of shrimp and other fishes escape from the outlets of these devices.¹⁴¹ As a result, some fishermen in India switched to produce “cultured” shrimp as opposed to “catch” shrimp in order to avoid the use of TEDs and the traders diverted their shrimp export to other countries such as Japan, which did not require use of TEDs.¹⁴² Therefore, even though an exporting government is willing to comply with the requirements of an importing country, since the primary producers bear the increased cost of compliance, to evade legal requirements, they might divert their export to other less-regulated destinations. As a result, a regulatory measure, which intends to achieve SD objective, might produce negligible or even negative effect.

In the *Shrimp* example, in order to protect the turtles, Indian agencies imposed either a total ban on fishing activities in some beaches, or some restrictions such as prohibiting fishing during closed season.¹⁴³ As a result, a substantial number of fishermen have lost their traditional livelihood.¹⁴⁴ Though alternative measures to ensure sustainable livelihood for the displaced fishermen should be part and parcel of turtle conservation measures taken by Indian authorities, it was neither possible nor should have been appropriate for the AB to consider the coordination

¹⁴⁰ *Asbestos*, AB Report, *supra* note 46.

¹⁴¹ G Sudhakara Rao, "Turtle Excluder Device (TED) in Trawl Nets: Applicability in Indian Trawl Fishery" (2011) 58:4 Indian J Fisheries 115-124, online: < epubs.icar.org.in/ejournal/index.php/IJF/article/view/13789>

¹⁴² Jayati Srivastava & Rajeev Ahuja, "Shrimp-Turtle Decision in WTO: Economic and Systemic Implication for Developing Countries" (2002) 37:33 Economic & Political Weekly 3445-3455.

¹⁴³ Sudhakara Rao, *supra* note 142.

¹⁴⁴ *Ibid.*, Aarthi Sridhar, *Sea Turtle Conservation and Fisheries in Orissa, India* (Chennai, India: International Collective in Support of Fishworkers, 2005).

problems amongst different state-based regulatory agencies that have isolated the fishing community and their livelihood from the turtle conservation efforts.¹⁴⁵

The second example, of how a judicial determination could adversely affect low-income countries or some disadvantaged social groups, is taken from the well-known *Asbestos* decision. As a developed nation, respondent France had the advanced technology and economic and administrative capacity to set and administer its public health goals. Is it possible for a low-income country with limited financial and technical capacity to undertake necessary risk assessment for hazardous exports? What level of proof would be required to justify its trade restrictive health or environmental policies? The *Asbestos* decision suggests that determination of availability of reasonable and less restrictive alternative would include “economic and administrative realities of the member states.”¹⁴⁶ Should economic and administrative difficulties justify imposition of trade bans without undertaking elaborate risk assessment procedure? What happens, if the evidence regarding possible or probable risks is not conclusive and overwhelming?¹⁴⁷ After the AB’s decision in *Asbestos*, strict national regulations banned asbestos production and export in most developed countries.¹⁴⁸ As a result, asbestos production and export relocated to some developing and third world countries, where lack of occupational or environmental safety standards affects the health and wellbeing of workers directly.¹⁴⁹

¹⁴⁵ Sudhakara Rao, *supra* note 142; Sridhar, *ibid.* Gregory Shaffer, "Comparative Institutional Analysis and a New Legal Realism" (2013) 2 Wis L Rev 607. At 625-628, while arguing for a “legal realist” approach grounded in empirical work and critical self-reflection, Shaffer describes the glaring differences that exist between developed and developing countries on trade-environment nexus.

¹⁴⁶ *Asbestos*, Panel report, *supra* note 46 at para 8.207.

¹⁴⁷ Marie-Claire Cordonier Segger & Markus W Gehring, "The WTO and precaution: Sustainable Development Implications of the WTO Asbestos Dispute" (2003) 15:3 J Env L 289.

¹⁴⁸ For a detailed report on Asbestos ban in developed countries and its prevalence in poorer Asian countries see Laurent Vogel, “Asbestos in the World”, News Report, (June, 2005), 27 HESA Newsletter, online: European Trade Union Institute < www.etui-rehs.org/hesa >

¹⁴⁹ See John Suttles, "Transmigration of Hazardous Industry: The Global Race to the Bottom, Environmental Justice, and the Asbestos Industry" (2002) 16:1 Tul Envtl L J 1. 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 attest to the necessity to focus beyond judicial resolution. See chapter 5 of this thesis for details.

Above examples show that judicial determination of trade-SD issues at an inter-state level promises limited benefits while addressing the changing demands from diverse actors or assessing potential long-term risks or adverse situations. On the other hand, capability-based SD pays more attention to the broader concerns of the society as a whole.¹⁵⁰ It suggests ongoing attention to distributional (and environmental) issues. Ongoing attention allows continuous evaluation and rebalancing of newer challenges or risks.

2.3.3 Democratic Process of Decision-making

Under the capability enhancement formula, public discussion allows determination of a correct mix of trade and trade-related social (and environmental) priorities. Context-sensitive analysis determines where urgent attention is required for sustainability. In case of conflict between different components of sustainability, ongoing attention and public debate allow shifting of existing priorities.¹⁵¹ This democratic process of decision-making insists on designing the social, economic and political arrangements of a society in a manner that provides the individual with the necessary social and economic resources and public goods for his or her capability enhancement. Also, capability framework requires not just discussion or negotiation at an inter-state level, but meaningful practical deliberation and constructive engagement of marginalized trading partners and their socially and economically disadvantaged groups. It

¹⁵⁰ Sen, Development as Freedom, *supra* note 124.

¹⁵¹ John M. Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Burlington: Ashgate Publishing, 2008). See Chapter 3 at 53-77.

requires that politically non-influential actors can discuss and deliberate on their socio-economic priorities.¹⁵²

On the other hand, decision-making by the WTO's adjudicatory body on SD issues is widely criticized for its alleged intrusion into the domain that was once reserved for the 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 what to eat, how to control our health risks, or how to make our social, health and environmental policy decisions, etc.¹⁵³ The accountability debate on the WTO argues that the adjudicatory body is not accountable for its decisions and prefers economic interests against the wishes of democratically elected governments.¹⁵⁴ It also questions the expertise of members of the Panel and the AB and their capacity to decide issues without the presence and arguments of all interested or affected parties in question.¹⁵⁵ Although *amicus curie* briefs were allowed, the AB's analysis did not rely on those briefs.¹⁵⁶ The absence of public discussion and opinions from interested non-state actors places the decisions of the Panels and the AB remote from the demands of capability enhancement.

¹⁵² *Ibid.* For a recent analysis that emphasizes on strengthening the negotiation and deliberation capacity of the marginalized trading partners, see Chantal Thomas, "The Death of Doha? Forensics of Democratic Governance, Distributive Justice, and Development in the WTO" (May 2, 2012), Cornell Legal Studies Research Paper 12-18, online: SSRN <ssrn.com/abstract=2050072> or <[dx.doi.org/10.2139/ssrn.2050072](https://doi.org/10.2139/ssrn.2050072)>.

¹⁵³ For details see Noreena Hertz, *Global Capitalism and the Death of Democracy: the Silent Takeover* 1st ed (New York: HarperCollins Publishers 2003).

¹⁵⁴ *Ibid.* See Manfred Elsig, "The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?" 41:1 J World Trade 75; Gregory Shaffer, "The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Trade and Environment Matters" (February 22, 2010) 25 Harv Envtl L Rev 1.

¹⁵⁵ *Ibid.*

¹⁵⁶ Shaffer mentions the "symbolic role" of amicus briefs in *Shrimp I*. See Gregory Shaffer, "The WTO Shrimp-Turtle Case (United States- Import Prohibition of Certain Shrimp And Shrimp Products)" (April, 1999) 93 AJIL 507.

2.3.4 Fragmented Governance of SD Issues

Compared with the strong rule-based institutional structure of the WTO, global environmental and social governance remains fragmented and incoherent, and depends largely on voluntary enforcement measures.¹⁵⁷ The weakened system of environmental governance does not even question the economic consequences of environmental challenges.¹⁵⁸ For social justice or distributional issues, neo-liberal economic governance promoted the idea that government interference is unnecessary to attend these challenges. Efficient functioning of the market would eventually take care of these issues.¹⁵⁹ In such a scenario, when two significant components of the SD concept (social justice and environmental protection) suffer from fragmented and weakened governance, robust interpretative role of a trade adjudicatory body can only promise limited benefits for capability enhancement.

The above discussion illustrates not the incapacity or unwillingness of adjudicators to address trade-SD disputes, but rather a bigger account of the complexities of the trade-SD relationship. These challenges include, but are not limited to: incoherent and continuing interactions between diverse actors, norms and regimes; difficulties in accommodating the concerns of marginalized actors; absence of public input in judicial decision-making; and weakened global governance of social and environmental issues. These multiple challenges demand broader and ongoing attention to trade-SD interaction. If we confine our attention only towards effective judicial resolution, it only endorses international (not global or transnational)

¹⁵⁷ Steven Bernstein, "Legitimacy in Global Environmental Governance" (2004-5) 1 J Intl L & Intl Rel 139. See 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. [Referred to as "Thomas, WTO and Labor Rights"].

¹⁵⁸ See the Stern Report. Nicholas Stern, *The Economics of Climate Change: Stern Review* (Cambridge & New York: Cambridge University Press, 2007).

¹⁵⁹ For a forceful critique on the neo-liberal economic policies, see Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (London: Kluwer Law International, 2002).

solution 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.¹⁶⁰ The financial and legal capacities of low-income countries to initiate disputes and to implement the Panel's or the AB's decision are seriously constrained.¹⁶¹ Moreover, while the mobility of capital is entirely global, it is only possible to understand and give attention to necessary social (and environmental) issues by going beyond inter-state relations and weaving amongst state and non-state actors and through multiple regulatory sites where trade-SD interactions happen more regularly and intensely.

Below I argue that non-judicial trade and trade-related regulatory bodies are better positioned to accommodate a wider number of SD issues and diverse actors. Moving beyond the narrow compound of judicial analysis, it would be much more practical and holistic to examine the interactions of trade and SD at these multiple points of interaction.

2.4 Preference for Non-Judicial Governance

The wider understanding recognizes that the trade-SD relationship is continuously constituted and challenged by demands from various constituents operating in different socio-

¹⁶⁰ Although states litigate in the WTO's dispute settlement system, corporations play a vital role as the background to most commercial trade disputes and "public-private network" operate from preparation to handling of the disputes, see Gregory Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Washington DC: The Brookings Institution, 2003).

¹⁶¹ It is argued that only the emerging economies have benefitted from the WTO adjudicatory body's activist role. For example poor developing countries and least developed countries need necessary assistance and "incentives" for challenging the "prejudicial subsidies." For details see Luke Olsen, "Incentivizing Access to the WTO's Dispute Resolution System for the Least Developed Countries: Legal Flaws in Brazil's Upland Cotton Decision" (2014) 23:1 Minn J Intl L 101. But see MW Mitchell Kristina, "Developing Country Success in WTO Disputes" (2013) 47:1 J World Trade L 77. The author explains that the recent mechanisms allowing assistance from ACWL (Advisory Centre on WTO Law) and hiring of external legal counsel largely address the problems of "systematic bias" when a developing country "faces an industrialized opponent." It is not legal capacity that matters at the panel stage of disputes. Rather, decisions are decided on "strategic grounds."

political and economic realities. Whether this happens in case of demands for prioritizing trade-related social issues (for example, labour standards, right to traditional livelihood) or for attention to trade-related environmental issues (for example a broader risk assessment), the upshot is the continuity and variety in these complex interactions and the contribution of multiple regulatory bodies and actors in building a richer trade-SD discourse. The relevant discussion on trade-SD, therefore, should not be confined to the desirability or appropriateness of judicial resolution. The important question is what positive effects can result from linking trade with SD. With this wider perspective, I mention four reasons for preferring non-judicial governance of trade-SD relationship.

First, 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 considerations of marginalized countries (subsidy on agricultural products, limited opening of market for their products)¹⁶² and their version of environmental problems (desertification, land degradation, environmental pollution or resource exploitation by foreign investors)¹⁶³ within the trade-SD debate, the North prefers to emphasize on marginalized social groups (and argue for minimum labour standards) and their version of environmental problems (climate challenges, over population, and environmental degradation by the poor).¹⁶⁴ With such deep division in North-

¹⁶² See 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. See Joseph Stiglitz & Andrew Charleton, *Fair Trade For All: How Trade Can Promote Development* (Oxford: Oxford University Press, 2005); Mario Cimoli, Giovanni Dosi & Joseph E Stiglitz, eds, *Industrial Policy of Development: The Political Economy of Capabilities Accumulation* (Oxford: Oxford University Press, 2009). See pages at 1-13, 19-35, 79-103 & 541-559. Developing countries point to two types of barriers in trade: they face tariff or non-tariff barriers in agriculture and in labour-intensive manufacturing. In addition, the present "structure" of tariff, under the WTO rules as opposed to the "average" tariff rate, imposes higher tariffs for more-processed goods than those on raw or less processed goods. For labour-intensive manufacturing products such as processed food or textiles, an "escalating" tariff structure actually operates as a disincentive for moving up the value chain in production and inhibits potential transformation of its economy.

¹⁶³ Adil Najam & Nick Robins, *Ibid.*

¹⁶⁴ *Ibid.*

South positioning, an emerging consensus is to channel development aid and finance and technical assistance to increase both trading and social governance capacities of low-income developing countries and LDCs. Recently donors, development banks and financing institutions are forming *hybrid partnerships*¹⁶⁵ to coordinate their aid and technical assistance delivery processes. Aid is disbursed for increasing trading capacity of recipient countries and for ensuring that trading benefits help them to address institutional and social or distributional policy challenges arising from trade opening, to reduce poverty and to attain millennium development goals (MDG).¹⁶⁶ Through trade capacity-building aid and diverse social governance related assistance, the idea is to attain SD in low-income developing countries. In these projects of aid and assistance, trade-SD interaction occurs more frequently and administrative bodies or non-judicial committees of the WTO and of other international financial and development institutions play a more important role in vetting, shaping and resolving these crucial issues than the adjudicatory body.

Second, crucial questions relating to trade-SD linkages occur more frequently at the trade policy-making process. Assessing how trade policy-making at a national or sectoral level would cause adverse social (or environmental) impacts requires prior assessment of the policy itself.

¹⁶⁵ To increase trade opportunities and capacities for LDCs, Integrated Framework, modified later to become Enhanced Integrated Framework (EIF) emerged as a technical assistance partnership initiative. EIF possesses certain characteristics that distinguishes it from other technical assistance (TA) programmes: first, it is a country-driven process and the needs are identified by the recipients; second it integrates trade into national development policy or poverty reduction strategy papers (PRSPs); third in order to be effective, it relies on coordinated delivery of TA. Acting as a partnership between 17 bilateral and multilateral donors, recipients, and international agencies (including the WTO), EIF sought to mingle the trade and donor community at least from the perspective of building trade capacity. It has received widespread support from the international community and was endorsed at the Johannesburg Conference on SD in 2002. For more information see online: WTO <https://www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm>; *An IF Manual: Integrating LDCs into the International Trading System*, UNCTAD (New York & Geneva: UN, 2005).

¹⁶⁶ See Masato Hayashikawa, "Trading Out of Poverty: How Aid for Trade Can Help" (2010) 10:2 OECD J Development 7 online: OECD <dx.doi.org/10.1787/journal_dev-v10-art16-en>; J Michael Finger & Phillip Schuler, "Implementation of Uruguay Round Commitments: The Development Challenge" in Bernard Hoekman & Will Martin, eds, *Developing Countries and the WTO: A Pro-Active Agenda* (UK: Blackwell Publishers 2001) 115-130.

For example, the WTO's trade policy review mechanism (TPRM) plays an important role in reviewing trade policies of member states.¹⁶⁷

Third, only a few SD issues are brought before the Panels or the AB. As mentioned at the beginning of this chapter that trade-SD disputes initiate only through provisions that allow imposition of trade restrictions, under Article XX of the GATT, or the SPS Agreement or the TBT Agreement. There is no provision in the WTO, other than the exception provisions, that allows for "positive linkage."¹⁶⁸ Thus, operationalization of SD depends largely on reorienting the tasks of non-judicial political organs and administrative committees. These 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 bringing disputes. A much-cited example of efficient dispute prevention through the WTO's administrative committee-level work is taken from an SPS measure. EU banned 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 EU lifted the ban as 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. This example shows how complex food safety issues might adversely affect the trade pattern between poor developing countries and developed ones and how specific advice from a reputed international organization and

¹⁶⁷ The TPRM monitors compliance of domestic trading rules and policies with the WTO. Chapter 3 discusses the TPRM's potential role if it takes a purposive approach in its review process.

¹⁶⁸ Thomas, WTO and Labor Rights, *supra* note 158. .

discussion through the SPS committee helped to solve the matter both amicably and in a cost-effective manner.¹⁶⁹

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 policy subsidizing production of renewable energy production is escalating, the WTO should not be the only forum to decide the conflicts between climate change, environmental protection and trade rules. In two recent decisions, the AB ruled that government support programmes that benefit renewable energy producers if they use domestic contents, violate WTO rules on non-discrimination.¹⁷⁰ Even facing an adverse ruling from the AB, it can safely be argued that the new-comers in renewable energy sector would neither cease to provide these supports for green industrial capacity-building by charting different solutions (e.g. through formally modifying the “quasi-protectionist” elements) nor would abandon “political support”

¹⁶⁹ "Climate Change and Trade: The Link to Sanitary and Phytosanitary Standards" (September, 2011) Joint paper of the World Bank, Development Research Group, Trade and International Integration (DECTI) and the Standards and Trade Development Facility (STDF) online: <www.standardsfacility.org/climate-change>. For a scholarly analysis that elaborates the growing importance of non-judicial governance in the WTO, see Andrew Lang and Joanne Scott, "The Hidden World of WTO Governance" (2009) 20:3 EJIL 575. Citing examples from the WTO's committee level work, the authors depict these committees' crucial role in information dissemination, regulatory learning, technical cooperation and dispute prevention. They argue that by explaining the “open ended” norms, these committees also work as “interpretative communities.” For a critique on the role of the committee, see Richard H Steinberg, "The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott" (2009) 20:4 EJIL 1063.

¹⁷⁰ *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Complaint by Japan) / Canada – Measures Relating to the Feed-in Tariff Program (Complaint by the EU)*, (2012), WTO Doc WT/DS412,426/R, (Panel Report), online: WTO <docsonline.wto.org>; *Canada – Certain Measures Affecting the Renewable Energy Generation Sector (Complaint by Japan) / Canada – Measures Relating to the Feed-in Tariff Program (Complaint by the EU)*, (2013) WTO Doc WT/DS412,426/AB/R (Appellate Body Report) online: WTO <docsonline.wto.org>; *India– Certain Measures Relating to Solar Cells and Solar Modules (Complaint by US)*, (2016), WTO Doc WT/DS456/R, (Panel Report), online: WTO <docsonline.wto.org>; *India– Certain Measures Relating to Solar Cells and Solar Modules (Complaint by US)*, (2016), WTO Doc WT/DS456/AB/R, (Appellate Body Report), online: WTO <docsonline.wto.org>;.

regarding these the climate change or renewable energy related policy preferences.¹⁷¹ In order to develop national capacity for renewable energy through different forms of subsidies, policy-makers would vigorously argue in favour of domestic content requirements and search alternative regimes to validate government support programmes. Therefore, the questions are not just how these disputes are decided or what grounds prevailed, but also whether some bilateral or multilateral approach is more useful to deal with these complex interactions,¹⁷² what the role of the WTO would be while advising member states on their natural resources management and trading policies, how collaborative co-existence with climate change regime can be ensured specially having regard to the fact that the latter requires mitigation of climate change through measures such as promotion of national capacities for renewable energy and green trading capacity.

Apart from climate change and environmental protection, social issues and questions for example competitiveness based on low-wage labour, would continue to challenge the boundaries and aspirations of liberal trade.¹⁷³ These challenges became more intense with the growth and proliferation of the bilateral and regional trade and economic arrangements which encompass

¹⁷¹ Mark Wu & James E. Salzman, "The next generation of trade and environment conflicts: The rise of green industrial policy" (2014) 108:2 Northwestern U L Rev 401 at 474. For an analysis on how some government support programmes in renewable energy production could be designed as "general infrastructure projects of a state" and thus avoid the application the Agreement on Subsidies and Countervailing Measures, see J. Lee, "SCM Agreement Revisited: Climate Change, Renewable Energy, and the SCM Agreement" (2016) 15:4 World Trade Rev 613–644 at 628-640.

¹⁷² Some scholars suggested that the form, boundaries and restrictions of sustainable energy trade should be decided at other forums. For an analysis that sustainable energy trade should be decided at a multilateral level see Mahesh Sugathan & Ricardo Melendez-Ortiz, "Fostering Low Carbon Growth: The Case for a Sustainable Energy Trade Agreement" (2011) ICTSD, Geneva, Switzerland online: ICTSD <<http://ictsd.org/i/publications/117557/?view=details>>. For an analysis that suggests that bilateral and regional approaches would be more appropriate see Joanna I Lewis, "The Rise of Renewable Energy Protectionism: Emerging Trade Conflicts and Implications for Low Carbon Development" (Nov, 2014) 14:4 Global Environmental Pol 10-35, at 28-29.

¹⁷³ Recently, this institutional conflict became intense in food security issues. See Oliver De Schutter, "Recommendation of the Special Rapporteur of the UN for 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). As part of the solution to the food crisis, the Special Rapporteur recommended "orderly market management" and "limiting excessive reliance on international trade in pursuit of food security." See section D at 26-28.

multi-dimensional issues such as trade, human rights, social and environmental issues, development cooperation, climate change, security.

Whatever routes are chosen to address these complex challenges, managing these on an ongoing basis would certainly require strong and productive inter-institutional linkages and a context-sensitive analysis of the problems. For example, in section I of this chapter, I find that in some recent trade-SD disputes, some developing countries justified their trade restrictive policies on sustainability grounds. In *Retreaded Tyres*, Brazil used health ground to justify trade restriction on used and retreaded tyres and in *Raw Materials*, China used environmental and health grounds to justify trade restriction on raw materials.¹⁷⁴ In both disputes, the adjudicatory decisions revolved around some common questions such as how trade and environmental or health rules interact, what options are open for the defendants, what factors are considered when the defendant is at a different level of development etc. These are crucial issues while deciding a trade-SD dispute. However, for an ongoing management of these trade-SD debates, from a capability-based perspective it is necessary to step beyond these questions and ask how these decisions are enforced by the losing state, what significant changes are introduced into their national laws for implementing sustainability issues, how enforcement of these decisions would affect non-trading (social/environmental) groups etc. Only through an ongoing analysis of these broader complexities in a context-sensitive manner, it is possible to identify trade regulatory policies that would lead to capability enhancement.

In summary, trade-SD issues interact on a regular basis at different non-judicial regulatory sites. These are the sites where the normative potential of capability-based SD would produce a much more beneficial outcome. The preference for non-judicial sites arises not because of their superior ability to balance conflicting norms, ideas or principles that can be covered under the

¹⁷⁴ See *supra* notes 12 & 49.

wider umbrella of the SD concept, but for their greater flexibility to adapt with particular circumstances. These sites possess the unique capacity to accommodate viewpoints of not only member states but also various socio-political and economic actors. Frequent interactions amongst multiple actors offer much better opportunity 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 ideational objectives like capability-based SD can help multiple forces or actors operating at local, national or transnational levels to develop better options to redress the negative aspects of trade liberalization. The whole point is to develop an effective agenda for operationalizing capability-based SD.

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 influenced not only the thinking process of a reputed and influential international adjudicatory body, but also trade regulatory policies of the WTO member states and even their future regulatory choices. Critically analyzing the absence of a coherent approach in some of the decisions of the Panels and the AB, I find that a future cooperative relationship, between trade and SD at the WTO and between trade and other trade-related regimes, depends more on moving closer towards a broad ideational objective such as SD, than selective importation of norms, rules or principles from related or even colliding regime(s).

When a conflict arises between norms, principles or rules of different regimes or when conventional obligations under a treaty require substantial redefinition, capacity of the broader ideational objective of a regime to withstand the conflict and guide or influence judicial decision-making depicts its strength or influence. At these crucial points, adjudicators deciding complex issues refer to the broader ideational objective of the regime to justify their chosen interpretative route over other routes. Creative utilization of a broader ideational goal of the regime in this manner not only helps adjudicators to develop a shared or common ground between overlapping regimes, but also allows multiple regimes to interact and co-exist and ultimately holds together apparently colliding regimes and actors and enriches the law and policy making process.

Taking a capability-based understanding, this chapter questions the potential role of the Panels and the AB in operationalizing SD in trade regulation. From a capability-enhancement perspective, the question of operationalizing SD within trade regulation is not limited to how the judicial interpretative task is modified by the presence of a preambular objective or by importation of norms, principles and rules from different regimes. In other words, trade-SD debate should not just focus on reorienting the adjudicatory task towards attending SD issues or borrowing from other regimes or measuring the level of adjudicators' expertise or quality of their decisions. These are important issues; yet, it would be much more useful to move beyond judicialization of the trade-SD relationship and address diverse challenges of the trade-SD relationship at multiple points of interaction at vertical (within different governance bodies of the WTO) and horizontal (between trade and trade-related regimes) levels.

These multiple governance bodies, where trade-SD issues interact on a regular basis, are more effective forums for managing the complexities arising from the intersection of economic, social and environmental policy making. Strong intra-institutional (within the WTO) and inter-

institutional connections (amongst contemporary regimes) through active involvement, cooperation, confrontation, or encounters, create important space for looking at sustainability issues from a holistic perspective. An important feature of the proposed wider understanding on trade-SD is its emphasis on the aggregate effect of multiple interactions amongst different regulatory sites. Increasing interactions amongst trade and non-trade regulatory sites search for ways to align the present economic development model with sustainability issues that are sidelined in the politics of the powerful actors. Although multiple interactions could produce variable answers, the importance of these interactions lies in their innovative and context-based solutions and in the emphasis on the power and potential of an ideational objective in shaping trade or economic regulation.

The TPRM provides an important example of a dialogue-based point of interaction or platform within the WTO. While reviewing trade policies of member states, does the TPRM advise on some overlapping concerns relating to trade-SD interaction? In my next chapter, I inquire whether as a non-judicial site, the WTO's TPRM remains attentive to address contemporary demands on sustainable economic governance. I do not argue that non-judicial regulatory frameworks produce optimum results for attending diverse SD issues. With specific reference to Bangladesh's trade policy review, my objective is to find and evaluate the strategies (if any) the TPRM uses to deal with the complex problem of accommodating SD within trade regulation.

Chapter 3: Sustainable Development Objective in Global Trade Regime: An Analysis of Bangladesh's Trade Policy Review

Introduction

While the daunting task of applying the “rule of consensus” impedes decision making within the political bodies of the WTO,¹ the Trade Policy Review Mechanism (TPRM) is increasingly viewed as a more plausible space to promote consensual understanding on trade policies. Existing researches on the TPRM identify qualitative problems in its reports and recommend extending its mandate and resources. Yet, limited attention has been paid to analyzing trade and related information by taking a purposive approach.

Although SD is a preambular objective of the WTO Agreement, my analysis specifically addresses SD from a capability enhancement perspective. Proposing a wider understanding on the trade-SD relationship in Chapter 1, I argue that though the market mechanism is a complementary instrument, distribution of social opportunities and creation of political and social arrangements for human and institutional development are necessary to achieve SD.² Borrowing insights from Sen's capability enhancement perspective, in this chapter I focus specifically on the inevitable connection between social issues (labour development) and trade policy.

¹ The WTO has 161 members as of 26 April, 2015 and accounts for 90% of world trade. See online: WTO <https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>. Chapter 1 of this thesis mentions the rigid procedures of amending the rules of the WTO Agreement.

² Amartya Sen, *Development As Freedom* (New York: Anchor Books, 2000).

In this chapter, I inquire whether the preambular objective of SD influences the TPRM's trade policy monitoring task. For this purpose, I extract and analyze some suggestions from the TPRM report with regard to Bangladesh's trade policy. With one in three people living in poverty,³ Bangladesh's development challenges are huge. During the last decade, its GDP grew consistently at the rate of about 6% per year.⁴ It also achieved remarkable social development in some sectors: for example, maternal mortality declined by 40% and female literacy has doubled since 1990. Millions of job opportunities have been created since Bangladesh started exporting ready-made garments (RMG) in the 1980s.⁵ Yet, the wage level for workers employed in this important export sector is amongst the lowest in the world in terms of purchasing power parity.⁶ Repeated industrial accidents also exposed the vulnerable work and workplace conditions of garment workers. Thus, Bangladesh and especially its RMG sector, offer an ideal setting to discuss the correlation of trade policy review and trade-related social (labour) issues.

Critically analyzing some policy suggestions in the TPRM report on Bangladesh's trade policy, I argue that a purposive inquiry would provide a broader analytical frame and generate reviews that relate multilateral rules of the WTO with specific social conditions and developmental priorities of a member state. I argue that despite a narrow mandate and negative enforceability of the trade policy reviews (TPRs), a purposive approach would entail important changes in the TPRM's surveillance function. First, social or distributional impacts of trade and regulatory policies would constitute an important addition to the TPRM's task; second, TPRs

³ <https://www.usaid.gov/sites/default/files/documents/1861/Bangladesh_CountryProfile_Nov2014.pdf>

⁴ <<http://data.worldbank.org/country/bangladesh>>; < <http://www.adb.org/countries/bangladesh/economy> >

⁵ *Bangladesh: Seeking Better Employment Conditions for Better Socio-economic Outcomes, Studies on Growth and Equity* (Geneva, Switzerland: International Labour Organization (ILO) and International Institute of Labour Studies (IILS), 2013).

⁶ Anu Muhammad, "Wealth and Deprivation: Ready-Made Garment Industries in Bangladesh" (August 20, 2011) XLVI: 4 Econ & Pol Weekly 23-27.

would include some advice on the systemic problems that low-income developing countries face while facilitating trade liberalization.

Several connecting threads run through the analyses. First, it is suggested that with a purposive approach, trade-related information would be analyzed in a context-sensitive manner, i.e. taking into account the specific developmental needs and constraints of the member state for whom the TPRM report is prepared (hereinafter referred to as “the country under review”). Second, it is repeatedly stressed that the TPRM’s surveillance mechanism should address social or distributional effects of trade opening. Third, it is expected that adoption of a purposive approach by the TPRM might indirectly infuse a process of learning amongst the reporting member states. For example, while preparing their policy statements, the country under review rely solely on inputs from governmental institutions and from employees with a background in economics or trade matters. A purposive approach at the TPRM might encourage greater contribution from non-state actors such as labour unions.

The concluding section refers to some significant challenges or limitations of purposive inquiry.

3.1 A Brief Overview of the Trade Policy Review Mechanism (TPRM)

Historically, there has been no mechanism to undertake systematic and periodic reviews of trading policies and practices of the GATT member states. However, some occasional reviews and reporting on specific issues were conducted. The “Leutwiler Report” prepared in 1983, at the request of then Director General of the GATT Arthur Dunkel, endorsed the need to monitor domestic trading policies on a regular basis and identified the GATT Secretariat as the

appropriate institution to undertake the review process.⁷ The report stated that, “[i]n each country, the making of trade policy should be brought into the open. The costs and benefits of trade policy actions, existing and prospective, should be analysed.”⁸ Although monitoring compliance with rules and commitments under the GATT was the main purpose of review, two important purposes could be derived from the Leutwiler report: first, dissemination of information during the review would enable trading partners to evaluate their existing trade and related policies and determine future trading policies; second, the costs and benefits of existing and prospective trade policy would be analyzed in the context of specific developmental and economic needs of the member concerned.

When the Uruguay Round started in 1986, the *Punta Del Este* Ministerial Declaration committed to establishing a mechanism to undertake a review of members’ trading policies and practices. Consequently, the TPRM became one of the first WTO mechanisms to be provisionally established since *Montreal* Mid-Term Review in 1989.⁹ In 1994, the Marrakesh Agreement establishing the WTO (referred to as “the WTO Agreement”) permanently established the TPRM for periodic evaluation of members’ trading policies. Annex 3 (A) of the WTO Agreement defines the objectives of the TPRM.

- (i) The purpose of the Trade Policy Review Mechanism (“TPRM”) is to contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade

⁷ *Trade Policies for a Better Future: The "Leutwiler" Report. The GATT and the Uruguay Round* (Dordrecht: Kluwer Academic Publishers, 1987).

⁸ *Ibid*; Fiona Marshal, "The WTO's Trade Policy Review Mechanism: An Effective Surveillance Mechanism for Aid for Trade?" (2012) 9 *Manchester J Intl Econ L* 259.

⁹ For more information the WTO Analytical Index, Trade Policy Review Mechanism available online at < https://www.wto.org/english/res_e/booksp_e/analytic_index_e/tprm_01_e.htm#P1B1> [hereinafter referred to as “Analytical Index, TPRM”]. See paras a, b and c of the Analytical Index, TPRM. See Arunabha Ghosh, "Developing Countries in the WTO Trade Policy Review Mechanism" (2010) 9:3 *World Trade Rev* at 419-455. [Hereinafter referred to as “Ghosh, Developing Countries in the TPRM”]

Agreements, and hence to the *smoother functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members*. Accordingly, the review mechanism enables the regular collective appreciation and evaluation of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system. *It is not, however, intended to serve as a basis for the enforcement of specific obligations under the Agreements or for dispute settlement procedures, or to impose new policy commitments on Members*.

- (ii) *The assessment carried out under the review mechanism takes place, to the extent relevant, against the background of the wider economic and developmental needs, policies and objectives of the Member concerned, as well as of its external environment*. However, the function of the review mechanism is to examine the impact of a Member's trade policies and practices on the multilateral trading system. [italics mine]¹⁰

The frequency of the TPRM reports depends on the member state's share in world trade; the first four states with the largest share in world trade are reviewed every 2 years, the next sixteen every four years and the remaining members are reviewed every 6 years.¹¹ Since its establishment till the end of 2010, the TPRM has conducted 324 trade policy reviews covering 140 out of 153 member states. The review process within this period covered 28 out of 32 LDCs that are members of the WTO.¹²

Preparation of the report involves collaborative participation of multiple actors. The country under review prepares a short policy statement on its trading policies and a report is prepared by economists working in the WTO's Secretariat's trade policy review division; on the basis of these two reports, the Trade Policy Review Body (TPRB), which is actually the WTO's General Council comprising all member states, produces an independent and comprehensive

¹⁰ Annex 3 (A), *Marrakesh Agreement Establishing the World Trade Organization*, 1994 1867 UNTS 154 online: <https://www.wto.org/english/docs_e/legal_e/04-wto_e.htm> [Referred to as "WTO Agreement"].

¹¹ *Ibid.* Annex 3 (C) (ii).

¹² *WTO Annual Report* (Geneva, Switzerland: WTO, 2011). [Hereinafter referred to as "WTO Annual Report, 2011"]. At p. 57.

report on each member state's trade policy [referred to as a "TPRM report"]. During the review meeting, the country under review submits written answers to the questions sent by other members. The minutes of the review meeting, the TPRM report and the country report are published promptly after review. The WTO Secretariat adds summary observations to the report and its perspective on member states' trading policies (hereinafter referred to as "summary report").¹³ Annex 3 (F) of the WTO Agreement requires that the TPRB shall undertake an appraisal of the operation of the TPRM not more than five years after the WTO Agreement and subsequent appraisals would be undertaken at intervals determined by the TPRB or the ministerial conference.¹⁴ The appraisals were undertaken in 1999, 2005, 2008, 2011 and in 2013.

The TPRM is instrumentally different from WTO's dispute settlement mechanism and does not possess any rule-making capacity. The Leutwiler report made it clear that while collecting, publishing and disseminating information, the Secretariat would work as "watchdog" and not as a "judge."¹⁵ After the WTO was established, member states explicitly agreed to use TPRs as reference material in WTO committees. The information in TPRs cannot be used to impose new commitments on members or to enforce specific obligations under the GATT or the WTO Agreement.¹⁶ Despite its non-mandatory nature, the surveillance function of the TPRM produces several important benefits.

First, transparency in domestic trade policy making is an integral part of the TPRM's periodic evaluation task.¹⁷ Preparation and dissemination of domestic trading policies involve

¹³ See WTO Analytical Index, TPRM *supra* note 9 at para C.

¹⁴ WTO Agreement, *supra* note 10 at annex 3 (F).

¹⁵ See Ghosh, Developing Countries in the TPRM, *supra* note 9 at 431 quoting from Leutwiler report.

¹⁶ *Ibid* at 437. WTO Agreement. *Supra* note 10 at annex 3 (A) & (B).

¹⁷ Joseph Francois, "Maximizing the Benefits of the Trade Policy Review Mechanism for Developing Countries" in Bernard Hoekman & Will Martin, eds, *Developing Countries and the World Trade Organization* (London: John Wiley & Sons 2001) 147-166.

multiple ministries (trade, finance) of the country under review. Such internal coordination aims to enhance transparency in domestic trade policy making.

Second, there is a sharp contrast between the adjudicatory body of the WTO and the TPRM, as the latter follows “diplomatic and peer-pressure approach,”¹⁸ and is considered as a useful complement to “legalization” of international trade policies. According to Hainsworth, the TPRM promotes a unique understanding amongst member states as to what are “common, acceptable approaches in trade policy arena.”¹⁹ In effect, by identifying WTO-inconsistent trade and trade-related policies and rules, the review process encourages compatibility between domestic and international trade regulatory policies.

Third, instead of following rigorous analyses on the level of compliance, TPR sessions usually accommodate discussions and consultations between member states. Regular yet informal interactions amongst member states offer important opportunities to prevent potential trade conflicts. For low-income member states, the TPRM has the potential to act as an alternative forum where instead of pursuing matters through the dispute settlement mechanism, they can generate collective demands against “harmful” trade and regulatory policies of richer states.²⁰

Fourth, although the TPR is not supposed to have an impact like the decisions of the adjudicatory body of the WTO, it provides an overall evaluation of the member state’s policies regarding economic environment, trade and investment framework, market access for goods, export and import procedures, government procurement policies, and governmental intervention in the economy and sectoral policies. While encouraging trade liberalization in goods and

¹⁸ Victoria Curzon Price, "GATT's New Trade Policy Review Mechanism" (1991) 14:2 *The World Economy* 227-238.

¹⁹ Susan Hainsworth, "Sovereignty, Economic Integration, and the World Trade Organization" (1995) 33:3 *Osgoode Hall LJ* 583 at 609.

²⁰ See Ghosh, *Developing Countries in the TPRM*, *supra* note 9.

services, and open fiscal and monetary policies, the TPR contains an overall picture of economic management of the member state. It identifies areas and levels of non-compliance with the WTO rules, and areas, which--although not contradictory to WTO rules--might have an adverse effect for the country imposing the measure.²¹ According to Valdes, the objectives for establishing the TPRM “emphasize the role of the TPRM both as a device to describe trade-related measures, and as an analytical tool to evaluate the effects of those measures.”²²

Fifth, for the country under review, the report receives considerable public attention and provides guidance as to how a member state is performing under a multilateral trading system and how it can modify its trade policies and practices in future. For some LDCs, periodic evaluation of trading policies provides important technical assistance, where they lack the institutional capacity to effectively prepare an exhaustive economic report based on trading policies.

Finally, the ongoing nature of the evaluation enables a member state to review its trading policies along with the changes in global economic conditions, the nature of international competition, and areas of comparative advantage.

3.2 Existing Suggestions to Reform the TPRM

Political negotiations under the WTO have become deeply challenging with growing members at a diverse level of development. To sustain cooperation and continue trade negotiations at a global level, academics and policy makers are increasingly suggesting for

²¹ Michael Daly, "Evolution of Asia's Outward-Looking Economic Policies: Some Lessons From Trade Policy Reviews" (2011) ERSD Staff Working Paper, online: WTO <www.wto.org>.

²² R Valdes "Lessons from the First Two Decades of Trade Policy Reviews of the Americas" (2010) Economic Research and Statistics Division, WTO, Geneva, Switzerland, Staff Working paper ERSD-2010-15 online: WTO <www.wto.org>. See at 3-5.

increase of the TPRM's institutional mandate and resources. Although historically the GATT intended to establish binding rules for regulation of global trade through hard negotiations amongst member states, scholars argue that it is necessary to improve the performance of dialogue-based mechanisms.²³ According to the scholars, the TPRM's greatest strength lies in its cooperative and non-binding institutional mechanism. It creates a fertile ground for better understanding member states' trade regulatory policies by providing independent and objective review.

While assessing performance of the TPRM, Donald Keesing identifies two sets of questions: the first set asks whether TPRs are covering trade-related questions with "sufficient depth, intellectual rigor and without bias" and the second set deals with the mandate, resources and capacity of the TPRM to produce effective reviews.²⁴ On substantive issues, he finds that there is an absence of long-term perspective in TPRs and the TPRM ignores the critical question of how the trade policies of a particular country have evolved and why; rather TPRM's analysis is confined to trade policies during the review period and does not question the "credibility or sustainability" of trade policies.²⁵

Recent analyses from Chaisse and Matsushita focus on extending TPRM's current functions to include contemporary concerns such as harmonization of preferential trade agreements and coordination with major environmental issues such as greenhouse gas

²³ Bernard Hoekman, "Proposals for WTO Reform: A Synthesis and Assessment" (2011) The World Bank, Poverty Reduction and Economic Management Network, International Trade Department, Policy Research Working Paper [hereinafter referred to as "Hoekman, Proposals for WTO Reform"]; Julien Chaisse & Mitsuo Matsushita, "Maintaining the WTO's Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism" (2013) 16:1 J Intl Econ L 9-36 [Hereinafter referred to as "Chaisse & Matsushita, TPRM"]. Ghosh, *Developing Countries in the TPRM*, *supra* note 9.

²⁴ Donald Keesing, *Improving Trade Policy Review in the World Trade Organisation* (Washington: Peterson Institute for Economics, 1998). [Hereinafter referred to as "Keesing, Improving TPR"].

²⁵ *Ibid*, at 25-36.

emission.²⁶ The authors argue that by involving stakeholders from relevant fields and developing a set of recommended guidelines, the revised TPRM would act as a forum for informal interaction amongst member states, facilitate technical assistance amongst poor members, and ultimately lead to convergence of trade and trade-related rules and policies. For example, by sponsoring frequent meetings for trade and environmental officials of the member states and engaging them into discussion, the TPRM would play an important role in “converging” divergent rules and regimes.²⁷ The capacity to generate common consensus through the TPRM’s improved structure and/or functionality would also benefit the global trade regime’s legitimacy and competency and maintain supremacy of the WTO in “international trade order.”²⁸

Ghosh in her article provides detailed empirical evidence on the contents of TPRs and participation of developing countries in the TPRM.²⁹ In her critical analysis, she finds that the TPRM is not “generating information specific to the needs of developing countries,” and as a result, developing countries choose to become “passive participants” in the review process.³⁰ Ghosh shows that “most contentious” trade policies are not analyzed in the TPRs, “peer pressure flows against developing countries,” and participation in the TPR process is “dominated by a handful of WTO members;” developing countries, considering the “toothless” nature of the reports and expecting little benefit from these, pay little attention to the reports prepared for them or for other member states.³¹ Inactive participation by country delegates and their perception of

²⁶ Chaisse & Matsushita, TPRM, *supra* note 23.

²⁷ *Ibid.*, at 33-36.

²⁸ *Ibid.* See Hoekman, Proposals for WTO Reform, *supra* note 23. Hoekman refers to utilities of informal mechanisms within an institutional framework. Not only do such mechanisms offer a place for sourcing information and learning, but also by offering effective discussion forums these mechanisms help members to share information on substance of rules.

²⁹ Ghosh, Developing Countries in the TPRM, *supra* note 9.

³⁰ *Ibid.*

³¹ Arunabha Ghosh, "Strengthening WTO Surveillance: Making Transparency Work for Developing Countries" in Carolyn Deere-Birkbeck, ed, *Making Global Trade Governance Work for Development: Perspective and*

the TPRM as a forum preparing ‘negotiated reviews’ prevent its utilization as a good source of information and as an alternative complement to the WTO’s political process of negotiation. Outlining both content and capacity related challenges faced by the TPRM, Ghosh suggests improving both the quality of the TPRs (by focusing on the needs of developing countries, identifying a minimum standard for surveillance, utilizing sector and country-specific expertise, and analyzing systemic impacts of policies of major trading countries) and the “capacity of domestic trade surveillance” (by collecting information from non-official sources).³²

In his thought-provoking paper, Hoekman finds that the aim of surveillance through the TPRM is to ensure compliance with the WTO rules, rather than to scrutinize domestic regulation(s).³³ The surveillance task focuses on identifying discriminatory policies and not on the substance of domestic regulation. At a practical level, this “benign neglect” significantly impacts the TPRM’s report preparation; although domestic regulations might pass the “market access” test, there “are no assurances that liberalization will in fact be beneficial (increase national welfare).”³⁴ To remedy this narrow focus, Hoekman endorses his and Mavroidis’s earlier proposal for establishing a WTO-independent transparency body. Hoekman and Mavroidis argue that for analyzing the impacts of domestic or international trade policies on various “constituencies and stakeholders, both within and across economies,” a WTO-independent transparency body would be a better alternative. Although the authors argue that the composition, governance, and funding of such a neutral body needs further research, they agree that this would be a “public-private partnership” and that it would search for alternative ways to

Priorities from Developing Countries (Cambridge Cambridge University Press, 2011). [Hereinafter referred to as “Ghosh, Making Trade Governance Work for Development”]. At 394-441.

³² Ibid; Ghosh, Developing Countries in the TPRM, *supra* note 9.

³³ Hoekman, Proposals for WTO Reform, *supra* note 23.

³⁴ *Ibid.*

achieve societal or other objectives more efficiently.³⁵ Hoekman also urges the need for a revamped TPRM. For Hoekman, with an increased mandate and greater resources, the revised TPRM would accommodate discussions on the possible or actual trade-related impacts of a particular trade policy, generate “common understanding” as to possible “gains” and ways to limit or address the negative impacts of trade liberalization.³⁶

The scholars mentioned above correctly identify that the problem lies with the TPRM’s existing analytical methodology. However, although the literature suggests revising the TPRM, it does not describe how to revise the TPRM with regard to present political divisions. Some of the scholarly analyses mentioned above focus on the TPRM’s extended role in analysing the sustainability of member states’ trading policies,³⁷ or in addressing the trade-environment relationship,³⁸ or in assessing trade-related impacts.³⁹ Yet limited attention has been paid to whether SD as a preambular objective of trade liberalization guides the review task, whether a purposive inquiry is possible without revising the existing mandate of the TPRM, whether such inquiry can produce beneficial impacts for the low-income member states or what the challenges are of such inquiry. This chapter attempts to address these questions.

³⁵ Bernard Hoekman & Peter Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance" (2000) 23:4 *The World Economy* 527-542. Finger J Michael & Phillip Schuler, "Implementation of Uruguay Round Commitments: The Development Challenge" in Bernard Hoekman & Will Martin, eds, *Developing Countries and the WTO: A Pro-Active Agenda* (UK: Blackwell Publishers 2001) 115-130.

³⁶ Hoekman, Proposals for WTO Reform, *supra* note 23.

³⁷ Keesing, Improving TPR, *supra* note 24.

³⁸ Chaisse & Matsushita, TPRM, *supra* note 23.

³⁹ Hoekman, Proposals for WTO Reform, *supra* note 23.

3.3 Purposive Inquiry at the TPRM: A Perspective from the Wider Understanding of the Trade-SD Relationship

In chapter 1, I proposed a wider understanding of the trade-SD relationship. The wider understanding argues that an increase of productive capacity and economic growth creates a positive impact for human capability, provided social opportunities are created through necessary political, economic and social arrangements and social inequalities are addressed. In other words, the market achieves success when social or distributive issues are addressed through necessary institutions and arrangements.

How would this wider understanding improve the TPRM's review process? From a capability-enhancing perspective, analysis of trade and regulatory policies requires careful attention on the distribution of social opportunities and resources and institutional forms and types of social arrangements that would deal with social impacts.⁴⁰ However, historically, the TPRM was intended as a surveillance mechanism to oversee member states' compliance with multilateral trading rules and to advise how they can address their trade-related structural problems. Chapter 1 discusses how this historical premise has changed with the growth in numbers of members and diversity in members' level of development. The WTO is now increasingly viewed as an international organization that should step out of its traditional regulatory tasks and provide assistance especially to its low-income member states with regard to their trade-related challenges and allow them to benefit from their participation in the liberal trade regime. More emphasis is placed on the necessity to balance the functioning of market with trade-related distributional arrangements, and on the need to discard the idea that trade policy-making and trade policy reviews should continue to focus exclusively on the pace and level of

⁴⁰ For an outline on this issue see Chapter 1 of this thesis.

liberalization and exclude social and related concerns from its analysis. Thus, the wider understanding connects the process of trade policy reviews with contemporary demands to acknowledge the interrelatedness of “the social and the economic.”⁴¹ As a result, the wider understanding reconstructs trade policy reviews in a significantly different manner. I elaborate some changes below.

First, according to the capability theory, the responsibility for the enhancement of human capability extends beyond states and engages local, transnational and international institutions or arrangements. As a global trade policy monitoring body, the meaningful role and responsibility of the TPRM is presupposed under the purposive approach.

Second, instead of focusing on increasing income, Sen’s freedom-based capability theory prioritizes the distributive justice aspect of development. Sen proclaims eloquently, “[t]he far reaching powers of market mechanism have to be supplemented by the creation of basic social opportunities for social equity and justice. In the context of developing countries in general, the need for public policy initiatives in creating social opportunities is crucially important.”⁴² According to the wider understanding, adverse distributive (social) impacts of trade liberalization would constitute one of the essential considerations of the review process.

Third, under the wider understanding, inclusion of social actors in economic and political decision-making is required.⁴³ This requires meaningful participation and consultations with non-state actors and careful consideration of the inputs from these actors while designing and reviewing trade regulatory policy. For trade policy-making and reviews at a domestic level, the

⁴¹ Adelle Blackett & Christian Levesque, "Social Regionalism in the Global Economy " in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York: Routledge, 2011) 1. [Hereinafter referred to as “Blackett & Levesque, Social Regionalism”].

⁴² Sen, *supra* note 2 at 143.

⁴³ Ananya Mukherjee Reed, *Human Development and Social Power* (London and New York: Routledge, 2008), at 30.

wider understanding insists on involving diverse stakeholders and prioritizing demands and problems of not only trading communities, but also of different social groups to be affected/benefitted by a particular trading rule or policy. Opening the possibility of inputs from diverse stakeholders, this process would not only allow them an important role in the process of trade policy review,⁴⁴ but would also enrich the transparency objective of monitoring. It is true that adoption of a purposive approach at the TPRM would not necessarily oblige the member states to involve non-state actors while preparing their trade policy reviews. However, the TPRM heavily relies on the country report prepared by a member state. Therefore, the adoption of a purposive inquiry at the TPRM might indirectly induce member states to get a holistic picture of trade-related impacts by considering inputs from diverse social groups.

Fourth, under the wider understanding, a country-specific approach would be used to evaluate or review trade policy. Focusing on the specific socio-political and economic conditions and arrangements of the country under review, the TPR can identify some urgent sector-based social impacts. Such an approach would not replace member states' ownership in adopting their own development strategies, but would insist on identifying country-specific good practices that link trade with capability enhancement.

In order to find whether as a preambular objective SD plays any role in the trade policy review process, I analyze some relevant portions of the TPRM report on Bangladesh in the next section. I find that the TPRM largely ignores social or distributional issues. I place particular importance on the TPRM's suggestion of low-wage labour as a primary criterion for trade-based economic growth.

⁴⁴ In most WTO processes only national governments have direct standing (in dispute resolution) and voting power (in decision making).

3.4 The TPRM Report on Bangladesh: Absence of Purposive Inquiry

The fourth TPRM report on Bangladesh in 2012 covers an extremely crucial period between 2006 and 2012. During this time, Bangladesh achieved consistent economic growth despite global economic and financial crisis.⁴⁵ According to the report, the trade-GDP ratio increased from 44.3 percent in 2005-6, to 55 percent in 2011-12, except during the period from 2009-10. Export rate also increased during the review period.⁴⁶ An important structural transformation of the economy has taken place since Bangladesh's independence in 1971. Replacing agriculture as the dominant contributor to GDP, RMG industries and other labour-intensive manufacturing have doubled their contribution (17%) to GDP, and the contribution of services to GDP has increased to 50%.⁴⁷ Despite a decreasing contribution to GDP, agriculture remains the sector to absorb the large mass of the unemployed population. The increase of global market share in RMG export has been cited both as a success and as a tool to tackle the adverse impacts from slow growth in developed economies.⁴⁸ The TPR on Bangladesh provides useful guidance with regard to the problems faced by a least developed country (LDC) while implementing trade liberalization policies. I discuss some of its common features.

First, the TPR emphasizes technical, human and financial constraints faced by Bangladesh while implementing its trade liberalization policies.⁴⁹ It identifies the problems of

⁴⁵ *Trade Policy Review on Bangladesh, Summary Report* (Geneva, Switzerland: WTO, 2012), online: WTO <www.wto.org>. (Hereinafter referred to as "Summary report").

⁴⁶ *Trade Policy Review on Bangladesh, Policy Statement by Bangladesh* (Geneva, Switzerland: WTO, 2012), online: WTO <www.wto.org>. [Hereinafter referred to as "Bangladesh report"], at paras 10-11.

⁴⁷ *Trade Policy Review on Bangladesh, Report by the Secretariat* (Geneva, Switzerland: WTO, 10 September, 2012), online: WTO <www.wto.org>. [Hereinafter referred to as "TPRM report"]; TPRM report, WT/TPR/S 270-05 at para 1.

⁴⁸ Summary report, *supra* note 45 at para 1.

⁴⁹ Challenges faced by low-income developing countries are similar. See Valdes, *supra* note 22. In his paper, Valdes observes that the largest member states of the American region as opposed to the smaller states in Caribbean and Central America benefited from trade liberalization policies. The largest members in the Americas used

appropriate standards and quality infrastructure.⁵⁰ Apart from technical constraints, it stresses Bangladeshi economies' considerable dependence on foreign remittances from low-skilled workers in Gulf countries. Although remittances primarily offset macroeconomic instability arising from trade, income, and services deficits,⁵¹ the TPR briefly mentions that it is necessary to improve skill and productivity of expatriate workers.⁵²

Second, Bangladesh's export reveals a pattern shared by all least developed economies; low manufacturing capacity, non-diversification in production and export based on labour-intensive manufacturing products (for some LDCs, it is based on export of natural resources). RMG and loss-oriented state owned enterprises (SOEs) are the primary manufacturing sectors, and RMG is the major exporting sector.⁵³ The TPR mentions that due to its dependence on a limited number of products and limited foreign markets, Bangladesh's export remains extremely vulnerable to external shocks.⁵⁴

Third, the TPR pays little attention to trade-related social impacts. Although some social impacts directly related to trade facilitation are mentioned briefly, the report contains no detailed analysis. Gender bias causing low participation of women workers and lower productivity and

technical and sanitary and phyto-sanitary measures more frequently and rigorously which had the effect of "holding back imports" although they had not manifested these in their regulations. On the other hand, the smaller states could not use these measures, as they do not have the technology/ expertise to set up and implement the "operational systems" for these regulations/ measures. Therefore, though the larger member states might have used some of these regulations/ measures as a device for import restrictions or for protecting local producers/ exporters, smaller states were unable to benefit from these measures for genuine consumer protection purposes.

⁵⁰ For example, the report cites that the export of frozen shrimps to the EU market has faced critical challenges. Summary report, *supra* note 45 at para 19.

⁵¹ TPRM report, *supra* note 47, WT/TPR/S 270-01, at para 3, 17-21, 27, 29. The TPRM report mentions that although the average annual real GDP growth continued at 6% for a continuous period of 6 years, there is a huge deficit in the foreign trade account. The deficit is caused by higher dependence on imports of essential goods; the prices of imported food and fuel have increased at a steep rate, whereas export products are limited (only 18% of total GDP since 2006).

⁵² TPRM report, *supra* note 47, WT/TPR/S 270-01 at paras 10 & 19.

⁵³ Summary report, *supra* note 45 at para 22.

⁵⁴ Export consists 18% of total GDP. Summary report, *supra* note 45; TPRM report, *supra* note 47, WT/TPR/S 270-01 at para 1-3.

skill of labour are considered as areas where government intervention is needed in order to increase sector-wide export competitiveness.⁵⁵ Along with economic growth, level of social progress is analyzed summarily both in the Bangladesh report and in the TPRM report. The emphasis is primarily on the rate of poverty reduction.⁵⁶ The summary report briefly stresses the necessity to reform legal and regulatory frameworks for necessary social development.⁵⁷

Fourth, a major theme running throughout the TPR is its emphasis on the need to attract both domestic and foreign investments in order to ensure rapid and inclusive trade-based growth. The TPR endorses Bangladesh's national development strategy where trade-based growth through the diversification of the export market, increased market access for Bangladeshi products, increased absorption of workers in the foreign market, and accelerated growth in the industrial and services sectors are prioritized.⁵⁸ For improving the investment climate and doing business indicators, the TPR suggests reduction of trade distortions and anti-export bias, removal of administrative delays and further integration into a multilateral trading system.⁵⁹

From the TPR on Bangladesh, it is clear that even as a preambular objective, SD does not guide the review process. By following a fixed template for evaluating the trade and economic development policies of a member state, the TPRM pays negligible attention to the disastrous socio-economic consequences of trade opening or from the growth of selected economic

⁵⁵ TPRM report, *supra* note 47, WT/TPR/S 270-05, at para 12.

⁵⁶ TPRM report, *supra* note 47, WT/TPR/S 270-01 Summary report, *supra* note 45 at paras 4,5 & 8. According to the Bangladesh Report, *supra* note 46, poverty rate declined sharply from 57% in the 1990s to 31.5% in 2010. The Bangladesh Report contains a detailed table on the status of MDG in Bangladesh and predicts that continued reduction at this rate would enable Bangladesh to meet the UN Millennium Development Goals (MDG) of halving extreme poverty by 2015. See TPRM Report, *supra* note 47, WT/TPR/S 270-02 at paras 4-5; Bangladesh Report, *supra* note 46 at para 3.

⁵⁷ Summary report, *supra* note 45 at para 8.

⁵⁸ Perspective Plan of Bangladesh 2010-21: Making Vision 2021 a Reality, The plan is to be implemented in two five year plans; from 2011-15 and 2016-21. See TPRM report, *supra* note 47, WT/TPR/S 270-02 at paras 18-22.

⁵⁹ TPRM report, *supra* note 47, WT/TPR/S 270-01 at paras 8-11. TPRM report, *supra* note 47, WT/TPR/S 270-05, at para 12. It also endorses the need to address inadequate enforcement of property rules, inadequate and ineffective dispute resolution, and slow pace of privatization, etc.

sector(s). Instead, the TPRM mainly emphasizes an investment-friendly environment and export-based growth.

Both the TPR on Bangladesh and the country report (hereinafter referred to as “the Bangladesh report”) established a direct link between trade-related growth and poverty reduction. While theoretically and empirically scholars have shown a straightforward relationship between trade and GDP growth, most agree that there is no automatic relationship between trade and poverty reduction.⁶⁰ To establish such a relationship, most scholars argue that effective, complementary, domestic policies such as redistribution and good governance are necessary to ensure that growth realized through increasing export capacity actually contributes to the poverty reduction objective. According to these researchers, with well-designed national (re)distributive policies, it is possible to increase the welfare impact of trade liberalization and to reduce poverty by channeling export income to the poor, connecting them with market (infrastructure

⁶⁰ Adrian Gauci & Stephen N Karingi, "Trade and Poverty: the Little We Know of the Effect in Africa and Possibly Why" in John Cockburn & Paolo Giordano, eds, *Trade and Poverty in the Developing World, Poverty and Economic Policy Network* (Poverty and Economic Policy (PEP) Research Network, 2008) 87-108. The authors find that high level of trade integration in sub-Saharan African countries (51% of GDP compared to 43% in OECD countries) has not resulted in reduction of poverty level. Hard commodity exporting countries are benefitting from the rising prices of oil and minerals, whereas soft commodity (i.e. agricultural products) exporting countries are suffering from low prices. Most of these low-income countries, which rely on resources trade or on a small manufacturing base created on the basis of preferences granted by developed countries, either have “enclave” type of economy or the majority of the population who are poor do not participate in the productive and tradable sector. See JK Sundaram, & Rudiger von Arnim, “Economic Liberalization and Constraints to Development in Sub-Saharan Africa” (2008) DESA Working Paper No 67, ST/ESA/2008/DWP/67. However, Oxfam has suggested direct connection between export growth and poverty reduction. Oxfam’s analysis projects that in Africa, 1 percent increase in export will generate 5 times more income than the present level of aid and debt relief within the region. The same rate of increase in export in all developing countries will have the chance of reducing poverty by 12 percent, lifting 128 million people out of poverty. In its analysis, Oxfam finds that in countries like Bangladesh, Uganda and Vietnam, export growth has contributed to income gains for the rural poor and for women. Suggesting an end to “double standards” in global trade rules, Oxfam argues for increasing the market access capacity of the poor countries by reforming global rules relating to trade, technology, intellectual property and commodity transaction. For more details, see Kevin Watkins & Penny Fowler, *Rigged Rules and Double Standards: Trade, Globalization and the Fight Against Poverty* (Oxford, UK: Oxfam, 2002).

development) and by offering them necessary training and other assistance (adjustment and implementation costs).⁶¹

A different type of analysis promotes a broader view.⁶² The latter group of scholars argues that though domestic (re)distributive policies are important to channel the benefits of export growth towards larger sections of society, increased trade-based growth might not necessarily address long-term developmental needs of low-income developing countries. Pointing to the structural problems in the global trading system such as asymmetric rules inhibiting transformation of the economy, and huge productivity and technological gaps between rich and poor countries, these scholars argue that the market plays a complementary rather than an essential role in achieving SD. According to these scholars, maximizing per capita income is no longer a determinant of growth. Rather, issues like (re)distribution and equality both within and between countries, environmental sustainability, employment creation and resilience to external shocks, diversity in export market and products are main determinants for long-term SD.⁶³ Though both analyses concentrate on distributional and related policies, they differ in their

⁶¹ A Winters, N McCulloch & A McKay, "Trade Liberalization and Poverty: The Evidence So Far" (2004) 42:1 J Econ Lit 72-115; Kate Bird, "A Framework to Analyze Linkages Between Trade Policy, Poverty Reduction and Sustainable Development" (2004) Paper for the DFID Africa Trade & Poverty Programme, ODI, London, online: ODI <odi.org/publications/1576-linkages-trade-policy-poverty-reduction-sustainable-development>; Kate Higgins & Susan Prowse, "Trade, Growth and Poverty: Making Aid for Trade Work for Inclusive Growth and Poverty Reduction" (2010) ODI Working Paper No 313; Susan Prowse, "Aid for Trade: Supporting Trade Preference Reform" (2010) Center for Global Development (CGD) Washington, DC Working Paper 224 online: CGD <www.cgdev.org/content/publications/detail/1424468>.

⁶² Joseph Stiglitz & Andrew Charleton, *Fair Trade For All: How Trade Can Promote Development* (Oxford: Oxford University Press, 2005); Mario Cimoli, Giovanni Dosi & Joseph E Stiglitz, eds, *Industrial Policy of Development: The Political Economy of Capabilities Accumulation* (Oxford: Oxford University Press, 2009) at chapters 1-4 & 20.

⁶³ See UNCTAD, *The Least Developed Countries Report: Towards a New International Development Architecture for LDCs* (New York & Geneva: UN 2010). UNCTAD's LDC report, 2010 suggested "New International Development Architecture (NIDA)" for LDCs. According to the report, high rates of economic growth have not translated into structural improvements in the form of human and institutional development. Productive capacity has not improved and thus low-income economies remain extremely vulnerable to external shocks. In order to realize an inclusive and sustainable development, the proposed NIDA would require reform in the rules and processes of global economic regime and would design a new generation of international support mechanism (ISM), which would address LDCs' specific vulnerabilities and constraints with an aim to ensuring practical developmental effects. The ISM would work to ensure that LDCs can build up the

spatial dimension. While one focuses on the national policies the other focuses on both national and international rules and policies.

Sen's capability theory encompasses the ideas of both analyses and requires wider attention to trade-related social issues and arrangements, both within and beyond national boundaries. Under the capability enhancement formula, any process of industrialization or poverty reduction, without careful attention to build domestic social opportunities and remove social disparities both within and beyond borders, would not result in the expansion of human freedom. As a result, market-based growth would not be sustainable (i.e. result in long-term capability enhancement for a larger mass of working people).

It is interesting to note that all these analyses including Sen's capability theory do not insist on a standard recipe; yet most agree on the point that all economically successful countries have achieved technological advancement, environmental objectives and lesser income inequality among divergent social groups through a mixture of socio-economic (and environmental) policies before embarking upon export-led growth.⁶⁴ After trade opening, these countries have continued to guard against adverse impacts and externalities.⁶⁵ For ensuring SD,

productive base of their economies. This new mechanism would be part of an overall agenda to ensure that international development architecture is actually working for the benefit of all LDCs through stable, inclusive and equitable development. All related global economic regimes need to work to attain the same objective. At page 84, the report notes: "[t]o the extent that the general development architecture works in a way, that does not support the special needs and interests of the LDCs, the overall results would be neutral or even negative. In effect, the right hand (the general framework) would take away what was given by the left hand (the special ISMs). A necessary condition to make the special international support mechanisms for LDCs effective is therefore not simply to improve them, but also to ensure that the global economic regimes affecting developing countries in general, including LDCs, and sub-categories within them which overlap with the LDCs, are also reformed so that they work to support development and poverty reduction in the LDCs."

⁶⁴ Sen, *supra* note 2. See chapter 5 at 111-145; Erik S Reinert, "Emulation Versus Comparative Advantage: Competing and Complementary Policies in the History of Economic Policy" in Mario Cimoli, Giovanni Dosi & Joseph E Stiglitz, ed., *Economic Development and Environmental Sustainability: New Policy Options* (Oxford/New York: Oxford University Press, 2006) 79-103. [Hereinafter referred to as "Reinert, Emulation"]; Ramon Lopez & Michael A Toman, eds, *Economic Development and Environmental Sustainability: New Policy Options* (Oxford/ New York: Oxford University Press, 2006); Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (New York: Anthem Press, 2003).

⁶⁵ *Ibid.*

effective (re)distribution policies and effective assistance programmes (to improve productive structure, to address the challenges of market opening, to lessen the productivity gap, to build competitive advantage in some selected sectors) are considered as pre-conditions, not as automatic after-effects.⁶⁶

Contrary to all these suggestions, which endorse careful and regulated use of the market to attain SD, the TPR on Bangladesh seems to promote a unidirectional view on trade, economic growth and poverty reduction. It emphasizes exclusively the pace and level of trade openness. According to the TPR, long-term growth prospects for export industries in Bangladesh depend on the removal of infrastructural bottlenecks and providing a “competitive business environment” for labour-intensive sectors.⁶⁷

The TPR on Bangladesh also ignores the social or distributional impacts of export-based growth. The TPRM report specifically mentions that the Bangladeshi economy remains vulnerable to “external shocks” by relying on a limited number of export products and destinations.⁶⁸ It also describes how vulnerabilities from external shocks (such as weakness in the EU market) have badly affected RMG export and GDP growth in 2012; yet its suggestion focuses on accelerating the export potential of the RMG sector.⁶⁹ The report mentions that the RMG sector in particular grew at an accelerated pace due to a combined effect of various factors, such as: duty-free and quota-free access to the markets of Japan, EU and Australia; increased demand for low-priced apparel followed by a global economic and financial crisis; inventory rebuilding among international buyers, the high prices of cotton, yarn and accessories; and the

⁶⁶ Reinert, Emulation. *Supra* note 64.

⁶⁷ Summary report, *supra* note 45 at paras 26-7; TPRM report, *supra* note 47, WT/TPR/S 270-01 at para 34.

⁶⁸ TPRM report, *supra* note 47, WT/TPR/S 260-01 at para 3.

⁶⁹ Summary report, *supra* note 45 at paras 1 and 2; TPRM report, *supra* note 47, WT/TPR/S 270-04 at para 7.

increase of sales to the markets of newly emerging economies.⁷⁰ Yet, surpassing all these factors, price competitiveness in the global market due to low-wage labour is regarded as one of the main reasons for the continued success of the RMG sector.⁷¹ Comparing the lowest minimum wage in Bangladesh with the problems of labour shortages, rising wages and capacity constraints in China, the TPRM report predicts a medium-term growth prospect for the RMG sector and continued importance of Bangladesh as a sourcing place.⁷² The report specifically predicts that due to low-wage labour, eventually foreign investment would increase in the RMG and other labour-intensive exporting sectors such as shipbuilding, ceramics, pharmaceuticals, and processed and frozen food. The report does not clarify how--with low productivity and limited export destinations--competitiveness can be retained for the RMG sector by merely depending on a low-wage labour pool.

Nothing in the report mentions the vulnerabilities of using low-wage labour as the sole factor of competitiveness. From an economic point of view, producing firms cannot retain competitiveness solely by relying on reduced production costs, as the emergence of other low-cost producers would eventually shift sourcing preferences.⁷³ Development economists have argued that in order to face competition from other low-wage countries, the exporters of labour-intensive industries would have no other alternative than to reduce wages on a continuous basis and /or informalize the production system. The increasing labour force would then be absorbed into existing agricultural or informal or semi-formal sectors where low-skill and low-productivity traps people into “continuing poverty” by diminishing their bargaining capacity and

⁷⁰ *ibid.*

⁷¹ TPRM report, *supra* note 47, WT/TPR/S 270-04 at para 33.

⁷² Since 2011, the EU grants duty-free access to goods produced in LDCs if import contents do not exceed 70%. See TPRM report, *supra* note 36, WT/TPR/S 270-04 at paras 32-37; TPRM report, *supra* note 36, WT/TPR/S 260-01 at paras 22-26.

⁷³ *Supra* note 62. See Dani Rodrik, "The Past, Present, and Future of Economic Growth" (2014) 57:3 Challenge 5. At 34, Rodrik mentions, “[t]he ease with which global companies sitting at the apex of the production chains can switch suppliers gives these industries a fleeting character: here today, gone tomorrow.”

chances to improve their productivity.⁷⁴ In some recent reports, it is alleged that even with low-wages, the long-term sustainability and sourcing importance of Bangladesh's RMG sector is fading after recurring industrial accidents and labour disputes.⁷⁵

The TPR on Bangladesh mentions that raw materials for RMG production are imported, and thus net export earning is considerably lower.⁷⁶ Additionally, the government provides extensive support measures for the RMG sector, such as reduced duty and tax exemptions for the import of capital machinery, cash subsidies for using local fabrics as inputs, and an export credit guarantee scheme. The government also supports the market promotion efforts of RMG exporters and subsidizes utility charges.⁷⁷ These support measures mostly benefit elite RMG producers or exporters. There is no detailed attention to long-term labour development. Rather, the TPR repeatedly points to Bangladesh's large pool of inexpensive labour as one of its strengths for robust growth in labour-intensive manufacturing industries.⁷⁸ Although, in several paragraphs of the report, the need to improve labour productivity and skill is considered briefly,⁷⁹ there is no discussion on low labour productivity in the Bangladeshi RMG industry.

The emphasis on low-cost labour continued despite the challenges mentioned in a report on systemic violation of fundamental labour standards in Bangladesh from a reputed labour organization. In 2012, the International Trade Union Confederation (ITUC) prepared a report for the WTO General Council, in which it warns specifically about the disparities between

⁷⁴ *Supra* note 64; Cornia, G A, ed, *Inequality, Growth and Poverty in an era of Liberalization and Globalization* (Oxford, New York: Oxford University Press, 2004).

⁷⁵ Zeenath Reza Khan & Gwendolyn Rodrigues, "Human before the Garment: Bangladesh Tragedy Revisited. Ethical Manufacturing or Lack Thereof in Garment Manufacturing Industry" (2015) 5:1 World J Soc Sci.

⁷⁶ TPRM report, *supra* note 47, WT/TPR/S 260-04 at para 32.

⁷⁷ TPRM report, *supra* note 47, WT/TPR/S 260-04 at para 35.

⁷⁸ The TPRM report elaborates the benefits of using inexpensive labour, per unit of which costs 50% below nearest competitor and one third of those in China. TPRM report, *supra* note 47, WT/TPR/S 260-01 at para 33. TPRM report, *supra* note 47, WT/TPR/S 260-04 at para 33.

⁷⁹ The report briefly pointed the need to upgrade labour skills for achieving product and industrial diversification and for attracting FDI. TPRM report, *supra* note 47, WT/TPR/S 260-02 at para 25 and WT/TPR/S 260-01 at para 10.

Bangladesh's international commitments and labour practices.⁸⁰ It specifically mentions that Bangladesh has ratified 35 ILO conventions, including seven fundamental conventions, and adopted the "ILO Declaration on Fundamental Rights and Principles at Work."⁸¹ The report vividly describes the violation of fundamental labour standards not only in practice, but also through existing legal rules. It mentions that the existing labour law either prohibits or does not allow adequate space for exercise and enforcement of these rights, or creates exclusionary zones where labour law does not apply. For example, the export processing zones (EPZs) fall under special labour law. The ITUC report also points out that although the RMG sector earned 79% of the total export income, at the time of their report, only 63,000 workers are unionized out of 3.5 million, only 140 unions (amongst 5000 garment factories) have registered, and 20-30 unions are active. According to the ITUC report, lack of unionization causes "extremely bad" labour conditions to persist.⁸² It also advises the WTO to raise its concerns regarding absence of fundamental labour standards, and recommends preparing future trade policy reviews with particular attention to reports from the ILO.

Despite specific warnings about labour standards, low wages, and workplace safety from a reputed labour organization, the TPRM report on Bangladesh tends to overlook these urgent social concerns or impacts of growth. Rather, it focuses exclusively on increasing investment opportunity and export-led growth. It mentions that although there is huge potential to utilize

⁸⁰ *Internationally Recognized Core Labour Standards in Bangladesh: Report for the WTO General Council Review of the Trade Policies of Bangladesh* (Geneva: International Trade Union Conference (ITUC), September 2012). See the executive summary. [Hereinafter referred to as "ITUC Report"].

⁸¹ ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, commit member states to respect and promote four fundamental principles and rights at work. These are freedom of association and effective recognition of the right to collective bargaining, elimination of forced or compulsory labour and abolition of child labour, elimination of discrimination in respect of employment and occupation. *ILO Declaration on Fundamental Principles and Rights at Work*, (ILO, 1998) online: ILO < <http://www.ilo.org/declaration/lang--en/index.htm> >.

⁸² ITUC specifically reports on workplace injury and death from poor working conditions. It mentions that to meet extremely competitive pricing and rigorous timelines for supply, long hours of work in unsafe and unhealthy premises are common features of these industrial jobs. ITUC Report, *supra* note 80 at 7-8.

EPZs to create jobs and increase export,⁸³ these zones have limited contribution in increase of export volume and in diversifying export products. While encouraging establishment of more EPZs as envisaged under the *Bangladesh Economic Zones Act, 2010*, it avoids any advice/discussion on labour issues. It also overlooks the ITUC report, which says that to promote investment-friendly business environment, both the government and employers discourage exercise of fundamental labour rights, such as unionization, collective bargaining, and strikes in these zones. The TPR, therefore, seems to be disconnected from domestic social contexts and socio-economic arrangements. The link between “the economic and the social,” or at least continuing meaningful attention to urgent social impacts, remains conspicuously absent in the TPR on Bangladesh.

It is necessary at this point to clarify that I do not contest the ability of increasing trade to promote economic growth. Nor do I contest that low-wages can usefully be used as a legitimate source of comparative advantage in a country with an abundant supply of low-skilled or unskilled labour. However, as pointed out by scholars, there should be a “principled stopping point” to this economic theory of comparative advantage.⁸⁴ Scholars have repeatedly argued that the “Fundamental Principles and Rights at Work,” proclaimed at the ILO declaration, could provide such a principled stopping point.⁸⁵ They argue that in countries that face trade liberalization impacts with dreadful results, it is necessary to analyze economic policies with sharp attention to social standards and arrangements. While suggesting an investment-attractive

⁸³ These zones would create job opportunities for 1.5 million and account for 85% of countries’ total exports. See Summary report, *supra* note 45 at para 18.

⁸⁴ See Adelle Blackett, “Trade Liberalization, Labour Law and Development: A contextualization” (2007) Discussion Paper Series No. 179 ILS; Adelle Blackett, “Towards Social Regionalism in the Americas ” (2002) 23:4 Comp Lab L& Pol’y J 901-966; Adelle Blackett, “Beyond Standard Setting: A Study of ILO Technical Cooperation on Regional Labor Law Reform in West and Central Africa” (2010) 32:2 Comp Lab L & Pol’y J 443; Bob Hepple, *Labour Laws and Global Trade* (Oxford & Portland: Oregon: Hart Publishing, 2005).

⁸⁵ *Ibid.*

trade and economic policy, it is absolutely necessary to consider the conditions of labour and industrial relations. At the minimum, it is necessary to avoid a suggestion that endorses low-wage and low-entitlement labour as the primary asset of a growing economy. Some familiarity with fundamental labour rights is essential. It is also necessary not to analyze developmental challenges and visions of a low-income country at a superficial level, but rather to offer meaningful attention to trade-related social issues and arrangements. With regard to Bangladesh, the TPRM reports' appreciation of low-cost RMG labours excludes any consideration of labour development. At one point, the report even explains the rapid growth of inflation in food and non-food prices.⁸⁶ Although theoretically an increase in the inflation level justifies an increase of wage level,⁸⁷ no attempt has been made to connect high levels of inflation with low-wage labour. By promoting the disadvantaged position of labour as the primary means of competitiveness, it seems to reproduce ideologies prevalent in "dominant" societies and reflect their "self-interested prescriptions."⁸⁸

Although it is apparent that the TPRM primarily reports on compliance issues, why should broader distributive questions be integral parts of its analysis? The next section goes on to analyze the benefits of purposive inquiry.

⁸⁶ TPRM report, *supra* note 47, WT/TPR/S 260-01 at para 12.

⁸⁷ Andreas Bieler, Ingemar Lindberg & Devan Pillay "The future of the global working class: an introduction" in Andreas Bieler, Ingemar Lindberg and Devan Pillay (eds) *Labour and the Challenges of Globalization: What prospects for Transnational Solidarity?* (London: Pluto Press, 2008) 1-22; Andreas Bieler, Ingemar Lindberg & Devan Pillay, "What future strategy for the global working class? The need for a new historical subject" in Andreas Bieler, Ingemar Lindberg and Devan Pillay, (eds) *Labour and the Challenges of Globalization: What prospects for Transnational Solidarity?* (London: Pluto Press, 2008) 264-85 [hereinafter referred to as Bieler, Lindberg & Pillay, *Transnational Solidarity*].

⁸⁸ See M Sonarajah, "Economic Neo-Liberalism and the International Law on Foreign Investment" in Antony Anghie et al, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden/Boston: Martinus Nijhoff Publishers 2003) 173-190; B Rajagopal, "International Law and Third World Resistance: A Theoretical Inquiry" in Antony Anghie et al, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden/Boston: Martinus Nijhoff Publishers 2003) 145-172.

3.5 Benefits of Purposive Inquiry

There are some significant benefits of purposive analysis.

First, no treaty revision is necessary if the TPRM takes a purposive approach in the review process.

Second, with a purposive approach, it is possible for the TPRM to initiate a discussion on trade-related impacts at the review process and to craft its advice with sharp attention to social impacts. At the minimum, the present trend to overlook growth of informal economy, violation of fundamental labour standards, low wages and life-threatening work conditions would not produce negligible effect on TPRs. Instead, the TPRM can encourage increase of labour productivity and skill, and sharp attention to fundamental labour rights.⁸⁹

Third, an extended monitoring task would bridge the existing gap between rules and policies on market access, and beneficially implementing these among low-income member states. Recent emphasis on financial aid and technical assistance to low-income developing countries in order to integrate them with the global trade regime is a perfect example of linking trade negotiation with the SD objective. Yet, most aid for trade (Aft) and assistance is allocated in order to help low-income countries adapt to the multilateral system of trade regulation.⁹⁰ Aid disbursement focuses on helping recipient countries by building their institutional and regulatory

⁸⁹ For attending environmental concerns, it is suggested that the TPRM can advise bio-diversity rich developing countries on sustainable trading opportunities such as better management of natural resources and reinvestment of the profits from the trade in these resources in building economies. See W Corrales-Leal, "Basic Concepts and Proposals on the use of Policy Spaces in Trade-supported Strategies for Sustainable Development" (2007) Geneva, Switzerland: ICTSD Working Paper. W Corrales-Leal, M Sugathan & D Primack, "Spaces for Development Policy, Revisiting Special and Differential Treatment" (2003) Geneva, Switzerland: ICTSD Working Paper. Both online: ICTSD < www.ictsd.org >.

⁹⁰ Aldo Caliari, "Civil Society Perspectives in the Aid for Trade Debate" in Dominique Njinkeu & Hugo Cameron, eds, *Aid for Trade and Development* (New York: Cambridge University Press, 2008) 341.

capacity to trade.⁹¹ The primary objectives of AfT are to educate recipient governments' officials on compliance with existing rules and standards, and improve existing the legal and institutional capacity of low-income countries to comply with trade rules and standards. With a capability-enhancement perspective, TPRM's AfT analysis would be different. It would emphasize low-income countries' capacity to critically review expansive bilateral or regional trade agreements containing WTO-plus commitments with narrow developmental space,⁹² capacity to identify long-term developmental needs,⁹³ and effectively channel aid and assistance to priority sectors.⁹⁴

Perhaps, TPRM could recommend aid disbursement for improvement of labour skill and productivity, or technical assistance in sectors to reduce the productivity gap with the developed or middle-income developing countries. In the TPR on Bangladesh, although there is much emphasis on the growth of the RMG sector in Bangladesh, there is insufficient attention to

⁹¹ It is alleged that most aid funding policies advance donor countries' corporate interests either by involving the latter in the infrastructural development projects or by allowing them to extract and export resources. See Mark Langan & James Scott, "The False Promise of Aid for Trade" (December, 2011) Brooks World Poverty Institute Working Paper 160 ,online SSRN: <<http://ssrn.com/abstract=1983209>>; Shaffer Gregory, "Can WTO Technical Assistance and Capacity-Building Serve Developing Countries" (2005) 23 Wis J Intl L 643.

⁹² James Gathii, "Neoliberal Turn in Regional Trade Agreements" (2011) 86 Wash L Rev 421. Gathii argues that through bilateral and regional trade agreements neoliberal economic ideals are entering into the "periphery" of the global trading system. Contrary to many scholarly accounts, he argues that the neoliberal turn is voluntarily accepted by developing countries for several reasons. These countries are persuaded that this turn is an important precondition for economic and public sector efficiency and it projects that it is safe to invest in their territory. See Stephen R Hart, "The EU-SADC Economic Partnership Agreement Negotiations: 'Locking In' the Neoliberal Development Model in Southern Africa?" (2012) 33:3 Third World Quarterly 495-510.

⁹³ Even though in multilateral AfT initiatives like Enhanced Integrated Framework (EIF), stakeholder participation principle enhances recipient countries' scope to participate in identifying trade-related priority areas, in practice aid recipient countries give priority to their immediate economic needs and capacity to comply with existing rules of trade, over their long-term needs of economic diversification, long-term adjustment and capital formation. See Ann Weston, "The Role of International Research Institutions and Networks in Supporting Low-Income Countries in Trade Policymaking and Negotiations" in Dominique Njinkeu & Hugo Cameron, eds, *Aid for Trade and Development* (New York: Cambridge University Press 2008) 326-340.

⁹⁴ For low-income developing countries, coordinating with the EIF, TPRM reports can identify priority areas where funding and technological support is necessary not only to enhance productive/trading capacity but also to address adverse social impacts from trade opening. See "The Integrated Framework for Least Developed Countries (LDCs): How does it fit into Aid for Trade" A Note by the WTO Secretariat (September, 2007) online: WTO <www.wto.org/english/tratop_e/devel_e/teccop_e/if_e.htm>.

improve its major infrastructural problems through AfT.⁹⁵ With a long-term perspective, the TPRM report would encourage aid disbursement in projects that aim to improve the existing infrastructures and/or build safe working places.

Fourth, alternative utilization of the monitoring process would indirectly encourage a “process of learning” for many developing country representatives at Geneva. These representatives usually come from a specific background (trade/economics/law), and do not necessarily comprehend or prioritize the related impacts of trade liberalization. Similarly, at a national level, technical analysis from trade or economic policy makers gives a partial view of trade policies and their impacts. A purposive approach to the TPRs would create strong background information for the national trade policy makers and persuade them to evaluate their existing trade policies and regulatory options in a holistic manner. It is reported that there is an increasing demand from low-income developing countries to include information on “flexibilities” in the WTO rules and obligations.⁹⁶ These countries are more interested in identifying policies that suit their development level.⁹⁷ With its limited mandate, the TPRM’s emphasis on urgent social (distributional) impacts of trade opening would certainly introduce a new thinking process amongst its members on how to proceed in future trade or economic cooperation arrangements, which trade-related impacts should be monitored and which options or flexibilities to use to implement trade facilitation policies.

Despite having pointed out potential benefits, the next section discusses the significant challenges or limitations that affect TPRM’s capacity to undertake a purposive approach in its

⁹⁵ A recent study on the Bangladeshi garments sector finds that in disbursement of development funding little attention is given to improving the infrastructure. Low technology and defective buildings increases workers’ safety risks. See Sarah Labowitz & Dorothee Baumann-Pauly, *Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza* (New York: Centre for Business and Human Rights, New York University Stern School of Business, April, 2014) at 42-44.

⁹⁶ Ghosh, Developing Countries in TPRM, *supra* note 9.

⁹⁷ *Ibid* at 410.

review process. These challenges do not question the necessity of purposive inquiry. Rather, these challenges indicate why and how the TPRM's functionality is limited in addressing the complex relationship between trade and SD.

3.6 Limitations/Challenges of Purposive Inquiry

3.6.1 Institutional Limitations

From its inception, narrow political interest and divergent understanding between countries in the North and the South have restricted the scope of surveillance from the TPRM. With no enforcing power, the function of the TPRM is confined to “examining the impact of member states’ trading policies and practices on the multilateral trading system.”⁹⁸ For developing countries, TPRs were understood to be important sources of information in trade “negotiations and post-negotiations phases” and of “moral suasion” against policies or rules that adversely affect the multilateral trading system.⁹⁹ Yet, at the same time, fearing “unwarranted asymmetry” in surveillance obligation, developing countries preferred a restrictive role for the TPRM. According to Ghosh, “relaxed” institutional monitoring was preferred by developing countries in order to gather a “multilateral stamp of approval” for their existing trade policies. This was particularly important for many newly independent developing countries, who wanted to attract foreign investment and justify their openness to the international financial institutions.¹⁰⁰ Developed countries, on the other hand, preferred institutional surveillance in order to ensure compliance with rules, to “counter-weight the pressures from domestic specific

⁹⁸ WTO Agreement, *supra* note 10 at annex 3 (A) (i).

⁹⁹ Ghosh, Developing Countries in TPRM, *supra* note 9 at 437.

¹⁰⁰ *Ibid* at 433.

interests lobbies” and to develop an “early warning system.”¹⁰¹ The divergences between countries in the North and in the South resulted in an understanding that surveillance tasks would not include a prescription of appropriate economic policies and would only discuss (but not conclusively determine) the operationalization of market opening. There would be no “legal judgments,” but TPRs can contain “economic analyses.”¹⁰² This limited and rigorous perspective allocated a smaller space for the TPRM. No clarification was given as to the benefits of evaluation or whether any broader purpose would guide its functions. In reality, Ghosh’s research shows that even the narrow political understanding that “peer pressure” from TPRs would benefit low-income member states, by creating moral grounds for necessary modifications in trading rules and policies of richer states, did not materialize.¹⁰³

With limited resources and a huge responsibility to analyze the trading policies of member states by measures and by sectors, tariff and non-tariff barriers, sanitary and phytosanitary (SPS), technical barriers to trade (TBT), intellectual property rights, domestic trading institutions, and overall macroeconomic policies, the TPRM is already overburdened. In this situation, does the TPRM possess the institutional mandate and capacity (in terms of expertise, resources, and time) to prepare a report that goes beyond its basic surveillance functions? Is it institutionally possible to analyze member states’ economic and trading policies from the perspective of a broader ideational objective? To these objections several points can be argued.

¹⁰¹ *Ibid.*

¹⁰² *Ibid* at 432.

¹⁰³ See Ghosh, Developing Countries in the TPRM, *supra* note 9. Also see Ghosh, Making Trade Governance Work for Development, *supra* note 31. Keesing mentions that “cheerleading” role of the TPRM avoids discussion on “looming crises” and encourages the country under review to move in their desired direction. Although tough TPRs are prepared, some reviews lack discussion on protective or trade-distorting policies of influential and major trading powers. Keesing is quite clear that doubts as to a particular trade policy could be expressed “softly” as politically these might not be palatable for the country under review and even “non-credible” policies might appear to be a better course during a particular economic and political situation. See Keesing, Improving TPR, *supra* note 24.

First, there is no positive mandate for the TPRM to undertake its review with a broader purpose. Yet, nothing obliges the TPRM to follow a singular format for reporting. Instead, the latest Appraisal report, undertaken pursuant to Annex 3(F) of the WTO Agreement, requests that the Secretariat should pay more attention “to reporting more comprehensively on trade and trade-related measures, covering both trade in goods and trade in services, that are applied behind the border by individual Members.”¹⁰⁴ It also mentions that nothing prevents improving the functions of the TPRM, for example “by identifying which aspects are of the greatest systemic importance.”¹⁰⁵ Thus, it can be argued that the TPRM can undertake a purposive approach in its review process, since SD is also a preambular objective of the WTO Agreement. I have argued in Chapter 1 that the addition of the preambular objective of SD in the WTO indicates a fundamental shift in the purpose of trade liberalization. Unlike the GATT, increasing market access capacity was not the sole objective of establishing the WTO; rather the preamble of the WTO Agreement explicitly emphasizes delivering benefits of liberalization to low-income countries by increasing the “living standards” of their people and helping them to achieve SD. Having regard to this purposive shift, it is possible to argue that SD objective can be achieved not by increasing member states’ trading capacity, but by increasing their capacity to achieve broader developmental and social goals through participating in a rule-based multilateral system.¹⁰⁶

Second, since its formation, the TPRM has evolved despite its limited mandate. Keesing suggests that TPRs are no longer “merely descriptive” and are increasingly incorporating an

¹⁰⁴ Fifth Appraisal of the Trade Policy Review Mechanism, 28 October, 2013, WT/MIN (13)/5, Presented to the Ministerial Conference, Ninth Session, Bali, 3-6 December, 2013, WTO, available online: WTO <https://mc9.wto.org/system/files/documents/5_2.pdf> at para 4.4.

¹⁰⁵ *Ibid.*, at para 4.3.

¹⁰⁶ Dani Rodrik, “The Global Governance of Trade -- As if Development Really Mattered”, (October, 2001) UNDP 27-33.

“analytical element.”¹⁰⁷ With the specific example of Bangladesh, my discussion shows that the TPRM no longer confines itself to identifying the level of compliance with multilateral rules. TPRM’s analytical role has increased and it even advises on future trading policies. Therefore, even within its limited mandate, it is possible to improve the quality and approach of its analysis by undertaking a purposive inquiry.

Third, even though briefly, the TPRM considers some trade-related social and/or environmental issues, and thus indirectly acknowledges interrelatedness amongst the social and the economic.

Fourth, while producing its reports, the TPRM takes note of specific developmental and economic needs of the country under review.¹⁰⁸ Examination of member states’ developmental and economic needs inevitably involves consideration of social impacts from trade opening. While the report preparation task already emphasizes the first, it is possible that some space is allocated to consider the latter.

Though the above arguments address the issue of institutional mandate, the WTO Secretariat’s limited staffing and resources affect TPRM’s surveillance capacity and quality. According to Hoekman,

Large lacunae in information exist on a variety of relevant policies affecting international integration. Even in the area where information is the best — barriers to goods trade — the focus of data collection (and thus analysis) is mostly on statutory MFN tariffs. Data on the types of nontariff policies that are increasingly used by countries—such as subsidies or excessively burdensome product standards—are not collected on a comprehensive and regular basis. Matters are much worse when it comes to

¹⁰⁷ Keesing, Improving TPR, *supra* note 24.

¹⁰⁸ Chaisse & Matsushita, TPRM, *supra* note 23; Elizabeth Trujillo, "A Dialogical Approach to Trade and Environment" (2013) 16:3 J Intl Econ L 535-585. [Hereinafter referred to as “Trujillo, Dialogical Approach”].

information on policies affecting services trade. Steps to remedy these gaps – through strengthening and more effective enforcement of notification requirements, cross-notification, as well as direct collection of data (including from secondary sources) – are a precondition for better policy analysis and monitoring of policies. For the secretariat to do more to compile data on a comprehensive basis, WTO members must give it the mandate and resources to do so, and permit the results to be made publicly available in a format that lends itself to analysis by third parties.¹⁰⁹

Below, however, I argue that even with limited resources and mandate, it is possible to improve TPRM's analytical quality.

First, while preparing the report, the WTO Secretariat uses published materials from national and international sources such as the International Monetary Fund (IMF) and the World Bank (WB). The WTO Secretariat also considers national official data, academic publications and the WTO's own document database.¹¹⁰ The TPRM can obtain information both internally (information from the WTO's trade and environment committee and the WTO Secretariat reviews' on Aft) and externally (ITUC's report on labour issues). If requested by a developing country or an LDC, Trade Policies Review Division (TPRD) of the WTO Secretariat's office provides necessary technical assistance in preparing a country report and grants an extension of time to submit the report.¹¹¹ Utilizing information and assistance from these diverse sources, the TPRM can add useful analysis on crucial, related issues such as trade-related impacts and possible utilization of Aft and technical assistance, even without an extension of its existing mandate and resources. At the minimum, it is possible to avoid suggestions that encourage low-wage-based competitiveness without giving attention to labour development issues.

¹⁰⁹ Hoekman, *Proposals for WTO Reform*, *supra* note 23 at 18-19.

¹¹⁰ Chaisse & Matsushita, *TPRM*, *supra* note 23.

¹¹¹ WTO Analytical Index, *TPRM*, *supra* note 9.

Second, on institutional readiness, it is important to note two recent initiatives taken by the WTO Secretariat. In order to strengthen institutional surveillance capacity and quality the WTO's General Council established a transparency mechanism for regional trade agreements in December 2006. Also, in response to the global financial crisis in 2008, an internal task force was established by the then director general Pascal Lamy to monitor trade-restrictive policies. The WTO Secretariat now annually reports on the threats to, and actual use of, trade-restrictive measures.¹¹² The WTO's annual report in 2011 specifically describes the sectors (transport equipment, base metals and products, machinery and mechanical appliances) and ratio of world imports (1.2%) that are affected by trade restrictions. At one point, the annual report clarified that trade protectionist measures or threats increased as a result of high levels of unemployment since the financial crisis in 2008. The annual report cautiously opposed such protectionist measures and argued that these would increase retaliation and ultimately threaten economic growth and jobs.¹¹³ This chapter does not contest that suggestion. Rather, it takes the position that if it is possible for the Secretariat to connect trade regulatory issues (more trade-restrictive policies) with its social causes (unemployment) and advise accordingly, it is quite possible for the TPRM to avoid suggestions that totally disregard the disastrous social impacts of trade liberalization. These two recent developments¹¹⁴ indicate that it is possible for TPRM to emphasize some trade-related urgent issues and improve its monitoring quality, although the narrow mandate is not extended formally.

¹¹² For more see < www.wto.org/english/tratop_e/tp_r_e/trade_monitoring_e.htm>, Ghosh, Making Trade Governance Work for Development, *supra* note 31 at 394.

¹¹³ WTO Annual Report, 2011, *supra* note 12 at 57-80; see at 79-80, available online at <www.wto.org>.

¹¹⁴ See Ghosh, Developing Countries in the TPRM, *supra* note 9; Chaisse & Matsushita, TPRM, *supra* note 23. It is highly debated that these recent mechanisms have met the demands and needs of developing countries; yet these indicate the institutional readiness of the WTO for greater surveillance and monitoring.

The next discussion portrays limitations or challenges external to the WTO that affect the TPRM's capacity to undertake an extensive purposive analysis.

3.6.2 Limitations of State-Based Policy Monitoring

A profound shift is occurring in the regulatory frameworks governing the trade-SD interaction. Not only have governance mechanisms shifted from government to public-private hybrid mechanisms but governance tools also have become hybrid (soft-law, voluntary commitments, and guidelines).¹¹⁵ As a starting point, this shift endorses the shared capacity of private and public regulatory bodies and initiatives¹¹⁶ to determine the content and process of sustainability. As an example of such emerging hybrid governance mechanisms, Trujillo cites the process of eco-labelling. Although introduced through voluntary and private initiative, the process of eco-labelling now follows international standards for product or food safety and significantly changes both testing and marketing practices of certain products.¹¹⁷ Another example comes from labour regulation, where scholars have identified pluralistic forms and methods of hybrid governance mechanisms. These governance mechanisms challenge the mobility of capital (although in a limited sense) and include diverse actors (NGOs, unions, corporations), resources and strategies (negotiation, dialogue, struggle).¹¹⁸ With the emergence of these “multi-centred points” to regulate interactions between different aspects of trade-SD

¹¹⁵ Trujillo, *Dialogical Approach*, *supra* note 108 at 581; Adelle Blackett, "Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries" in John J Kirton & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Aldershot, UK: Ashgate, 2004) 121-133.

¹¹⁶ Kenneth W Abbott, "Engaging the Public and the Private in Global Sustainability Governance" (May, 2012) 88:3 *Intl Affairs* 543-564. In this article, Abbott, forcefully argues for better cooperation and engagement between private and inter-governmental institutions in order to promote an effective governance framework for SD.

¹¹⁷ Trujillo, *Dialogical Approach*, *supra* note 108.

¹¹⁸ *Supra* note 41.

interaction, a pivotal question is: What role is there for the TPRM? How can the TPRM, relying on a top-down process of review, effectively influence states' role in establishing regulatory preferences for SD issues?

3.6.3 Alternative Mechanisms under Regional or Bilateral Trade and Economic Arrangements

It is increasingly recognized that long-term cooperation amongst diverse members of an institution requires non-formal yet effective mechanisms to promote regular and fruitful interactions, and strong administrative committees to reduce pre-negotiation disputes and disagreements among members.¹¹⁹ Some bilateral or regional economic arrangements are already offering such alternative mechanisms through working groups, councils and committees that promote greater cooperation and “convergence in regulatory regimes,” facilitate continued dialogue, and suggest alternatives to reduce disputes.¹²⁰ Going beyond nation states, these mechanisms and actors creatively endeavour to retain greater space for social issues within bilateral, regional or transnational trade or economic cooperative arrangements. In such a scenario, reorienting TPRM's report preparation objective remains a challenging issue. At least politically, it remains important to identify why and how member states would prefer to engage with the TPRM rather than these regional or bilateral mechanisms.

¹¹⁹ Hoekman, Proposals for WTO Reform 2011, *supra* note 23.

¹²⁰ See *ibid* at 22. In July, 2014, the newly emerging economies BRICs announced formation of its New Development Bank which will finance developmental and infrastructural projects in developing countries. Aiming more internal coherence, BRICs countries, particularly China, are becoming more assertive in regional economic governance. See Yang Jiang, "Rethinking the Beijing Consensus: How China Responds to Crisis" (2011) 24:3 Pacific Rev 337-356; Nicholas Bayne & Stephen Wolcock, *The New Economic Diplomacy, Decision-making and Negotiation in International Economic Relations*, 3rd ed (Burlington, USA: Ashgate Publishing, 2011). At 359-376, the authors discuss that in order to meet the challenges of economic globalization, informal negotiation and “multi-level economic diplomacy” increased at both bilateral and regional levels. This has eventually caused lesser interest in multilateral rule making.

3.6.4 Limited Attention of the TPRM Versus Wider Coverage of Capability Enhancement

Finally, the biggest challenge comes from the breadth of issues that can be derived from a capability enhancement perspective. With a wider understanding, trade-SD debate goes beyond simple attention to the fundamental rights of labour. Even with limited attention to trade-related labour issues, such as enforcement of fundamental labour standards, only a small percentage of the formal labour force would receive attention in the TPRs. Informalization of the economy became a reality for most developing countries; the proportion of workers employed in the informal or semi-formal economy is outrageously higher than that of the formal economy.¹²¹ The complexity and breadth of social concerns and arrangements necessary for capability enhancement are such that it is harder for the TPRM to capture and address all these issues even with an extended mandate and resources. For example, if domestic coverage and enforcement of labour law, criminal law (prohibiting sexual harassment of female labours), and building codes (prescribing safety conditions for industrial buildings) remain subject to orthodox, bureaucratic and complex procedures, and fail to extend protection to a large mass of the working population or even intervene to protect a formal class of workers, what beneficial changes can possibly be expected from extending TPRM's analytical capacity?

With regard to social issues, this wider understanding acknowledges the limited perspective of labour unions.¹²² Unions reflect a partial view of labour rights and workplace conditions in the unionized sectors. On the contrary, the wider understanding takes the debate on

¹²¹ The growth of the global economy has changed the "gender dimension" of labour. "Feminization" of labour, though offered limited financial benefits and superficial form of "liberation" for women, has caused women labours to work with lesser benefits and wages. Gender-based discrimination and violence is present in most production structures. Women are preferred as workers as they are less likely to organize through unions and demand better pay/working conditions. See Rosalind Bond, "Labour Class and Capitalism", in Henry Veltmeyer, ed, *The Critical Development Studies Handbook: Tools for Change* (Halifax & Winnipeg: Fernwood Publishing 2011).

¹²² Bieler, Lindberg & Pillay, *Transnational Solidarity*, *supra* note 87.

sustainability beyond fundamental labour rights and domestic attention to social issues. Also, the shift to regionalization and globalization in trade and economic matters reinforces the need to view social concerns within a wider framework – allowing linkages across communities and workers within and beyond national boundaries and allowing “collaborative networks” to pursue labour activism at a transnational level.¹²³ With a broader horizon, a wider understanding requires abandonment of ideas to adjust the labour force to the demands of economic globalization. It requires careful attention to trade-related social impacts and prescribes building necessary social arrangements (both at state and inter-state levels) that minimize the division between the formal and informal productive structures and pave the way for necessary socio-economic transformation to realize SD. Being a monitoring mechanism of an international trade institution, it is neither possible (in terms of resources and technical capacity) nor appropriate (in terms of institutional mandate) for the TPRM to deal with these issues.

Conclusion

Analyzing the TPRM report on Bangladesh, I find that, as a preambular objective, SD does not guide the report preparation task. If a purposive approach were taken while reviewing member states’ trade policies, the TPRM could have considered some urgent trade-related social implications. My suggestion is not that the TPRM should aim for or even prescribe member states’ trade or trade-related policy changes. It does not have this mandate, nor would it be acceptable within the current concept of state sovereignty in economic governance. These can only be accomplished through political understanding or at the level of dispute settlement. Nor it

¹²³ Pulignano, Valeria, “European Works Councils and Trade Union Networking: A New Space for Regulation and Workers’ Solidarity in Europe” at Blackett & Levesque, eds *supra* note 41 at 111.

is suggested that purposive inquiry would produce a complete picture on trade-related social concerns. My suggestion is that through focusing on the SD objective of the WTO Agreement, the TPRM can address two different issues: First, it can address the links between trade opening and related policies. At the minimum, it can refer to some trade-related social impacts (labour issues) that require immediate attention, or at least avoid suggestions that disregard violation of fundamental labour rights. Second, in its reviews on low-income developing countries it can prioritize their systemic problems (for example, how to absorb aid and technical assistance) and offer effective suggestions. From such a limited perspective, purposive approach would not be contrary to the institutional mandate of the TPRM. I mention how the TPRM is increasingly incorporating some trade and trade-related policy advice in its periodic reviews. I also argue that considering the reports and policy documents from reputed international labour organizations, it would not be burdensome for the TPRM to advise on some crucial trade-related social impacts.

Adopting a purposive approach, TPRM could go beyond its traditional task of overseeing compliance with the WTO rules and contribute to generating a consensual understanding of how a trade-SD relationship can work at a practical level. For example, basic respect for fundamental labour rights should remain an integral part of trade policy reviews. Despite having no legal implication, TPRM's analysis on trade-related social issues can connect productive, financial and monetary policies of an economy with its dreadful social realities. In this sense, TPRM has a much bigger role in connecting international trade rules with its SD objective by identifying crucial trade-related implications, and the connection between trade facilitation, aid, technical assistance and SD.

However, this chapter mentions some significant limitations or challenges that affect either the TPRM's analytical capacity to portray a holistic picture on trade-capability

enhancement relationship or question the effectiveness of a purposive inquiry. It is also possible that a purposive inquiry might affect the open discussion process at the TPRM. Some inevitable questions include: Would such purposive analysis compromise the objective nature of the TPRs? And, what if such inquiry is not appreciated at the review meeting?

Even if the TPRM could consider reports and analyses from reputed local and international organizations and identify country-specific urgent social concerns or impacts, trade and economic policies are not framed solely considering economic welfare. Neither labour regulatory issues are confined within the boundary of a state. Rather, policy making in trade and labour results from a combination of other social, economic and political considerations. Policy making in these areas is hugely influenced not only by state and non-state actors, such as influential domestic lobbies, NGOs, foreign businesses, development agencies and international financial institutions, but also by different processes in national and international settings.¹²⁴

To add to these complexities, trade-SD issues interact at different governance frameworks. With the recent proliferation of bilateral and regional trade and economic arrangements, which encompass multi-dimensional issues (trade, human rights, social issues, environment, development cooperation, climate change, security), a crucial question is how to address trade-SD interactions at these multiple governance frameworks.

A capability perspective requires attention not only toward enforcement of fundamental labour rights, but also for multi-dimensional problems of labour engaged in formal, semi-formal and informal sectors. Considering the broader demands of capability-based SD, this chapter takes

¹²⁴ See Andrew T Lang, "Rethinking Trade and Human Rights " (2006):Paper No. 1685 Bepress Legal Series.Also see, 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.

a cautious approach to the TPRM's purposive analysis and its potential for addressing trade-related social issues.

The limitations of the TPRM and the challenges it faces are mentioned not to negate the usefulness of a purposive inquiry, but to argue that the TPRM's role is limited and is complementary to the multiple governance frameworks. At some of these governance sites mediation of "the social into the economic" is constructed, either by retaining some space for social issues (such as labour governance) and/or by creating capacity for non-state actors to monitor the practical implementation of the arrangements.¹²⁵ The remaining chapters (Chapters 4 and 5) analyze some of these recent *hybrid* arrangements and examine whether they accommodate SD within trade or economic governance.

¹²⁵ Hepple, *supra* note 84.

Chapter 4: Transnational Labour Regulation: A Critical Review of Some Proposals for Linkage

Introduction

Chapter 3 discussed that some emerging bilateral or regional arrangements innovatively reserve a space for social or distributional issues by linking labour governance with trade-opening or economic cooperation. Since effective labour governance is intimately connected with the demands of capability enhancement, these mechanisms are an important searching ground for operationalizing SD. In this chapter, I deliberately focus on the transnational labour governance mechanisms, for their unique region or country-specific setting, their capacity to involve diverse frameworks (public-private, private) and actors (state and non-state actors), and their capacity to improve or strengthen domestic labour regulation. More importantly, from a capability perspective, these transnational mechanisms provide crucial “market complementary” interventions that attempt to redress the pressures of open market.¹

In order to offer effective market-complementary intervention, how should these transnational labour governance mechanisms be designed? Scholars focus on various interrelated areas of law, (i.e. social or distributive justice, corporate social responsibility, labour law, trade regulation, fair trade) and endeavour to develop an effective and strategic response to confront the superior mobility of capital and the pressures of the globalized nature of production. In this

¹ John M. Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Burlington: Ashgate Publishing, 2008) [hereinafter referred to as "Alexander, Capabilities and Social Justice"]. See Chapter 3 at 53-77.

chapter, I argue that despite rich theoretical analyses on the structure or design of hybrid governance mechanisms, less attention has been paid to the narrow conceptualization of the social and its aggregate consequences. The narrow conceptualization of the social leads to a weakened form of governance that entrust enforcement of labour rights into the domain of private and voluntary regulation and maintains a sharp difference between fundamental or core and redistributive rights. Briefly referring to some important effects of labour deregulation and analyzing some scholarly proposals for linkage, I find that most proposals do not challenge the narrow conceptualization of the social. Rather, some concentrate only on the regulatory problems of formal labour force employed in the exporting sector only. This narrow conceptualization of the social is far from the demands of the capability-based SD as the latter focuses on a broader concept of labour rights for workers engaged in formal, semi-formal and informal sectors and demands effective attention to the regulatory and distributional problems of labour.

The theoretical review in Chapter 4 sets the tone for the following chapter. Taking real-life transnational safety initiatives for Bangladeshi garment workers as examples, Chapter 5 argues that a capability-based perspective offers a better space for a broader conceptualization of the social and for accommodating both regulatory and distributional problems of labour with strong institutional commitments.

4.1 Capability-based SD and Labour Governance

In this section, I briefly clarify that effective labour governance constitutes an important part of capability-based SD.

The development process under the capability-based approach is essentially human-centric and demands effective social, economic, environmental and development policies and institutions. As a result, although economic growth and liberalized trade are useful mechanisms to increase human freedom and capability, these are not the only mechanisms for achieving the objective of SD. Rather, an integrated perspective is taken to evaluate and assess related social, political and economic institutions and arrangements.² With a holistic perspective, the mutually reinforcing connection between capability enhancement, market mechanisms and labour becomes obvious.

Even from the limited perspective of efficiency, the market is valued for the “results it ultimately generates” for the society.³ Thus, it is important to consider the conditions of workers, who as an essential factor of production manifest diverse distributional problems. However, the capability approach demands more than just efficiency or utility of the market. It challenges the processes and institutions that contribute to human unfreedom or incapability. For example, comparing the “utilities” and freedom of slave labour, Sen reminds us of the importance of freedom and capability and on aspects that might cause “loss of freedom” or incapability.⁴ It is the denial of freedom or capability, which explains the prevalence of child labour, labour bondage or poor conditions of work and entitlements. Thus, for capability enhancement, it is not just the freedom to participate in market mechanisms or freedom to choose employment that are important. Capability insists on the co-existence of “market-based liberties” with “political and social liberties” for example, the right to participate in labour governance mechanisms,

² Amartya Sen, *Development As Freedom* (New York: Anchor Books, 2000) [hereinafter referred to as “Sen, Development as Freedom”] at 142. Though not relying on the capability approach, Rodrik emphasizes that success of future growth strategies lies in making “growth strategy and social policy” as complements to each other. He finds that for a “healthy world economy,” it is more important to focus on the correct “mix” of all the necessary policies and institutions, rather than to “shoehorn countries to ill-fitting rules.” See Dani Rodrik, “The Past, Present, and Future of Economic Growth” (2014) 57:3 Challenge 5.

³ Sen, *Development as Freedom*, *ibid* at 112.

⁴ *Ibid* at 113.

expressing voice against conditions of work, the right to participate in political decision-making which eventually determines labour regulatory institutions and arrangements.⁵

Since a broader understanding of the rights of workers and their conditions of work are essential features of capability-based SD, I move to analyze some proposals that attempt to connect labour governance with trade or economic arrangements. A transnational setting of governance is chosen deliberately for two reasons.

First, the capability formula requires effective “market-complementary” interventions both within and beyond national boundaries.⁶ It recognizes that these interventions redress ethical and functional limitations or inabilities of the market and of governments. These interventions also design necessary social, political and economic structures or arrangements and include non-state actors as important participants in the formulation and implementation of the development policy.⁷ At a transnational level, mechanisms linking labour governance with trading or economic arrangements provide important market complementary interventions. Tying preferential market access with conditions to strengthen or improve domestic labour regulatory institutions, and/or offering assistance to national governments to monitor compliance with national or international labour standards, these innovative mechanisms seek to lessen the pressures of a globalized market and address multiple problems of labour deregulation.

Second, the capability approach realizes that robust integration of labour issues as essential complements of economic growth might produce variable answers for different trading states (and even for diverse sectors). Thus, it demands management of these institutional and policy-

⁵ Amartya Sen, "Work and rights" (2000) 139:2 Int'l Lab Rev 119.

⁶ Alexander, Capabilities and Social Justice, *supra* note 1 at 93-103.

⁷ For example, Hepple cites research that voluntary corporate codes of conduct perform important labour rights or environmental protection functions, when non-state actors participate in the drafting or enforcement of the codes. See Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005) [hereinafter referred to as "Hepple, Labour Laws and Global Trade"].

related challenges through a context-sensitive analysis. With a diverse set of actors and a region- or country-specific setting, transnational governance sites provide a much broader space and flexibility for such contextual analysis.

With this background, I review some proposals for linkage of labour governance with trade or economic arrangements.

4.2 Proposals for Linkage

Since open markets are taken as a starting reality for most nation states, scholarly suggestions focus on how to harness the benefits of the market to address redistributive or social justice concerns. Referring to exploitative working conditions and poor entitlements in the factories of the South, and loose contractual relationships between brands and retailers and low-skill labour, some scholars specifically discuss the method of linking effective labour governance through trade and economic cooperative policies and institutions.⁸ However, most proposals linking “the social” with “the economic” are based on a narrow conceptualization of the social. I elaborate some essential features of the narrow conceptualization of the social, such as promotion of the division between formal and informal workers, between fundamental and redistributive rights, and emphasis on a narrow and voluntary governance of labour issues. In this critical review, I find that the narrow conceptualization of the social remains unchallenged in some efforts to link labour governance with trading or economic arrangements.⁹

⁸ See David Trubek, Jim Mosher & Jeffrey S Rothstein, "Transnationalism in the Regulation of Labour Relations: International Regimes and Transnational Advocacy Networks" (2000) 25:4 L & Soc Inquiry 1187-1211.

⁹ The chapter does not cover the discussions on linkage of labour issues through judicial decisions from the World Trade Organization's dispute resolution body.

4.2.1 Narrow Conceptualization of the Social

From a capability-based perspective, it is useful to analyze the multi-dimensional effects of globalization in a holistic manner. For example, while at a national level, neo-liberal economic policy prescriptions limited national governments' abilities to develop effective public regulatory institutions or finance public goods, at the international level, unquestionable mobility of capital allowed capital owners unconditional freedom to source from business-friendly locations where labour (and environmental) laws or their enforcement are relaxed. Connecting these multiple effects of globalization, it is easier to understand that labour deregulation is not simply a matter of poor regulatory institutions and low enforcement. Labour deregulation is an aggregate effect of the narrow conceptualization of the social.

I have already discussed in Chapter 1 how separation or isolation of social or distributional issues from market-oriented rules and institutions led to a narrow conceptualization of the social. Although it is necessary to stress that internal political and poor institutional and policy choices in developing countries have also contributed to the separation of the social and exacerbated the problems of social inequality, five far-reaching effects on labour regulation can be identified.

First, as result of the narrow conceptualization of the social, a sharp division developed between fundamental and redistributive rights of workers. Globalized systems of production and mobility of capital gave rise to "market-centered model(s) of social inclusion and equality."¹⁰ According to this model, the maintenance of competitiveness is possible only by deregulation of labour. Entitlements in the form of respect for fundamental or core rights are argued to provide

¹⁰ Judy Fudge, "The Cartography of Transnational Labour Law: Protection, Scale and Symbolism" in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York Routledge, 2011) 299 [hereinafter referred to as "Fudge, Transnational Labour Law"].

the “entry point” for accessing and adapting with the market.¹¹ These generalized fundamental or core labour rights emphasize only the “[e]nabling rights that allow workers to associate together and to bargain collectively. There has been a shift away from the state imposition of substantive standards towards the provision of procedures enabling the parties to establish their own norms. This is part of a broader shift from government to governance or from hard to soft law, particularly in the realm of the social.”¹² By acquiring the status of “human rights,” these “core labour rights co-exist comfortably with the idea that rights of workers need not be enforceable entitlements, nor need labour be consulted in the design of market institutions.”¹³

These changes also reshaped the function of labour law. No longer was labour law performing its traditional role of directly intervening in the market to limit the latter’s capability to affect social rights. Rather, labour law limited its inquiry only to ensure that basic procedural protections, such as fairness of bargaining process, are allowed. These fundamental labour rights are no longer contradictory with market demands; rather these are complementary and mutually enhancing.

While emphasizing a particular form of labour rights, discussions on redistributive functions of labour law and in particular redistributive rights are marginalized or ignored.¹⁴ No importance is placed on the mutually constitutive relationship between fundamental or core and redistributive rights in enhancing the dignity, wellbeing and capability of labour. According to the narrow conceptualization of the social, shallow attention to selective fundamental rights is

¹¹ Brian Langille, "Putting International Labour Law in the Right Map" in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York: Routledge, 2011) 290-298; Steve Charnovitz, "The Labor Dimension of the Emerging Free Trade Area of the Americas" in P Alston, ed, *Labor Rights as Human Rights* (Oxford: Oxford University Press, 2005) 143-176.

¹² Fudge, *Transnational Labour Law*, *supra* note 10 at 304.

¹³ Kerry Rittich, "Core Labour Rights and Labour Market Flexibility: Two Paths Entwined" in International Bureau of the Permanent Court of Arbitration, ed, *Labour Law Beyond Borders: ADR and Internationalization of Labor Dispute Settlement* (The Hague: Kluwer Law International, 2003) 157-203 at 191.

¹⁴ Judy Fudge, "The New Discourse of Labour Rights: From Social to Fundamental Rights?" (2007) 29:1 *Comp Lab L & Pol'y J* 29.

deemed sufficient, if these can effectively enhance market participation or can heal corporations' reputational wounds sustained from systematic violation of fundamental rights in their supplier factories.

Second, unconditional mobility of capital caused significant changes in the bargaining capacity of labour. Constant fear stemming from capital's power to relocate to more hospitable places created an increased "risk of underbidding" by workers.¹⁵ For many low-income developing countries, where competitiveness is equated with low-cost and low-entitlement labour, the primary question became not the right of their workers to earn a living wage or to work in a safe workplace, but how to retain their low-wage based competitiveness and avoid allegations of "social dumping" of goods and products in countries with higher social standards.¹⁶

Third, a top-down formula of distribution developed. Although most economic and trade literature promoted the idea that multilateral trade cooperation contributes to overall net gains, international financial and development institutions preached that distribution of resources, income and wealth needs to be addressed at a national level. Even at a national level, distributional issues should be addressed after the growth has been achieved. Poverty is explained by nation states' inability to adapt to the demands of market. Accordingly policies were prescribed in order to improve their market participation capacity.¹⁷

¹⁵ Andreas Bieler, Ingemar Lindberg & Devan Pillay "The future of the global working class: an introduction" in Andreas Bieler, Ingemar Lindberg and Devan Pillay (eds) *Labour and the Challenges of Globalization: What prospects for Transnational Solidarity?* (London: Pluto Press, 2008) 1-22; Andreas Bieler, Ingemar Lindberg & Devan Pillay, "What future strategy for the global working class? The need for a new historical subject" in Andreas Bieler, Ingemar Lindberg and Devan Pillay, (eds) *Labour and the Challenges of Globalization: What prospects for Transnational Solidarity?* (London: Pluto Press, 2008) 264-85 [hereinafter referred to as Bieler, Lindberg & Pillay, *Transnational Solidarity*].

¹⁶ For a critique on social dumping see Adelle Blackett, "Wither Social Clause: Human rights, Trade Theory and Treaty Interpretation" (1999) 31 *Colum HRLR* 1.

¹⁷ Steven Bernstein & Louis W Pauly, eds, *Global Liberalism and Political Order: Towards a New Grand Compromise?* (Albany: State University of New York Press 2007).

Fourth, major structural changes have occurred in the type of labour that would be covered by labour law. Total or partial exclusion from protection of labour law became the defining feature of these new “work relationships.”¹⁸ The portion of informal workers (in developing economies) and the portion of workers who fell outside labour law (in developed economies) grew at an exponential rate. Thus, a division was created between formal and semi-formal or informal labour and only the former became entitled to receive the protection of labour laws/regulations.

Fifth, in the process of deregulation of social issues, a restrictive approach to the enforcement of labour laws ensured that even the protected formal class of workers remains satisfied with limited correction from the part of management.¹⁹ According to Lord Wedderburn, “individualization” of social rights explains why collective bargaining and industrial pressure at a transnational level were proven to be most difficult activities.²⁰ The capacity of workers to take collective industrial action is mostly limited within the boundaries of nation states and only unionized formal workers are allowed to take advantage of the protections offered from national

¹⁸ Stone describes in detail that the deregulation of the labour market continued in the structure of “work relationships.” Instead of “fordist” style long-term attachment between employees and the firm, the new structure devised new “psychological contract” or “new deal” at work which demand from employees not only performance and commitment, but also innovative activity which will help the firm in winning the competition. This structural changes in work relationship introduced flexibility in the contract of employment, differential pay to reflect different contributions to the firm and tied payment of wages to market rates rather than with internal factors. See Katherine Stone, “Rethinking Labour Law: Employment Protection for Boundaryless Workers” in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Portland: International Institute for Labour Studies, 2006) 155-180. For an excellent analysis connecting temporary and flexible work with conditions of exploitation and absence of freedom, see Judy Fudge & Kendra Strauss, eds, *Temporary Work, Agencies and Unfree Labour: Insecurity in the World of Work* (New York: Routledge 2013).

¹⁹ For an extensive critique on the promotional and undefined nature of fundamental or core labour standards see Philip Alston, “Core Labour Standards and the Transformation of the International Labour Rights Regime” (2004) 15 EJIL 457-521. For an opposing view see, Brian A Langille “Core Labour Rights – The True Story (Reply to Alston)” (June, 2005) 16:3 EJIL 409-437.

²⁰ Lord Wedderburn, “Common law, labour law and global law” in Bob Hepple, ed, *Social and Labour Rights in a Global Context* (Cambridge: Cambridge University Press, 2002) 19-54.

labour laws. As a result, no effective transnational social or labour class has emerged to confront the power and capacity of the globalized production system.²¹

Without challenging the narrow conceptualization of the social, various proposals have tried to link labour issues within a trade or economic governance framework. As discussed below, most proposals focus on the structural form of linkage or on regulatory problems of labour employed in exporting sectors only.

4.2.2 A Critical Review of the Proposals for Linkage

4.2.2.1 Linkage through Cross-border Extension of Corporate Social Responsibility (CSR)

To minimize the power of capital to affect labour relations, some scholars propose a cross-border extension of CSR to maintain minimum social (and environmental) rights in overseas production facilities of multinational corporations (MNCs).²² Approaches, like Sullivan principles, social partnership, and socially minimum standards, rely on non-binding and voluntary commitments by MNCs for effective labour governance. Sullivan principles were introduced during the apartheid period to oblige US corporations doing business in South Africa to conform to US laws against discrimination.²³ Under Sullivan principles, home states of MNCs would oblige them to invest in countries that follow minimum standards in respect to social and

²¹ See Bieler, Lindberg & Pillay, Transnational Solidarity, *supra* note 15.

²² For a summary of these linkage proposals see George DeMartino, *Global Economy, Global Justice: Theoretical objections and Policy Alternatives to Neoliberalism* (London: Routledge, 2000) [hereinafter referred to as "DeMartino"]. See at 190-215.

²³ *Ibid.* During market integration under the North American Free Trade Agreement (NAFTA), renowned economist Bhagwati proposed for replicating Sullivan principle in order to pacify the fears of critics of market liberalization. See Jagdish Bhagwati, "The Case for Free Trade" (November, 1993) 269:5 Scientific Am 42-47. However, Bhagwati later argued for multilateral governance of labour standards by the ILO. See Jagdish Bhagwati, "Trade Liberalization and 'Fair Trade' Demands: Addressing the Environmental and Labour Standard Issues" (1995) 18:6 World Econ 745-759.

environmental rights.²⁴ The social partnership approach requires MNCs to follow some voluntary codes of conduct to improve the situations of the working class directly employed by them. One proposal is to extend existing CSR to ensure socially minimum standards²⁵ (both for work entitlements and work conditions) not only in MNCs' direct production sites, but also in their supply chains around the world. Theorists suggest that by broadening the existing coverage, the latter approach can redistribute the benefits of globalized production and liberalized trade amongst a wider range of workers.

However, this emphasis on the voluntary and flexible nature of CSR is directly connected to the narrow conceptualization of the social. Most CSR codes are not only unilaterally adopted, but also choose selective labour rights, avoid legal enforceability of redistributive rights and are "limited in coverage," meaning that these apply only to direct or formal employees of a direct supply chain.²⁶ In other words, they do not apply to labourers working under sub-contractors. Corporate sponsored or consensual monitoring of the factories with little or no participation from non-state actors and compliance with national labour laws are deemed sufficient.

Such cross-border CSR is regarded by some as a necessary complement to face the realities of the globalized economy. Only a few scholars compare this pattern of CSR with "heavily eroded national labour laws" and unveil the transition from "regulation" to "governance" in

²⁴ According to the supporters, while the Sullivan approach does not require harmonization of social or environmental standards irrespective of investment-receiving countries' level of development, it effectively eliminates the possibility of social dumping as feared by the countries in North. However, any unilateral application of standards by higher-standard countries is susceptible to exploitation for political purposes. Without developing adequate and transparent mechanisms to monitor compliance with high-standards in the investment receiving country, the application of Sullivan approach would be left at the mercy of MNCs. Critics also allege that since the high-standards prescribed by home states are applicable to the foreign-investment based firms, these protect only a selected portion of labour employed in those firms. Due to transformation in production systems, MNCs are now sourcing their products not only through their vertically integrated production sites, but also by outsourcing to distant and cheaper suppliers. Thus, the Sullivan approach is easily avoidable and acts as a barrier to foreign direct investment flow while not offering any "proactive incentive (such as financial assistance) for indigenous advancement of standards." For a detail discussion on all these issues, see DeMartino, *supra* note 22.

²⁵ Bieler, Lindberg & Pillay, Transnational Solidarity, *supra* note 15.

²⁶ Hepple, Labour Laws and Global Trade, *supra* note 7.

ensuring labour welfare; they find that hegemonic power of capital and explicit or implicit threats to relocate production or sourcing facilities create “downward pressure” on the already low labour standards in poor countries.²⁷ Compliance with national labour laws, which already have narrow coverage or prescribe low standards for fundamental or core and /or redistributive labour rights, is deemed sufficient. Even when there is some coverage under the national labour law, enforcement remains secondary to the protection of employers’ interests. Low coverage with lax enforcement standards only eases MNCs’ conduct of business in competitive countries. Critics argue that CSR codes are drafted with a “top-down” approach without necessary input from workers,²⁸ and these cannot replace the need for public regulation and might undermine the development of effective public labour regulatory systems.²⁹

It has been found that CSR codes, when combined with other approaches, such as inclusion of multi-stakeholders in factory monitoring, (consumer activist organizations and /or trade unions), regularity in the monitoring process, technological and organizational assistance to suppliers (for example, adjustment to sourcing strategies, revising complex procurement processes that potentially cause excessive overtime among suppliers), improves factory-level working conditions³⁰ and “work(s) symbiotically with public regulation to help develop the

²⁷ *Ibid*; Cesar A Rodriguez-Garavito, "Nike's Law: The Anti-sweatshop Movement, Transnational Corporations, and the Struggle Over International Labor Rights in the Americas" in B De Souza Santos & CA Rodriguez Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 64 [hereinafter referred to as “Rodriguez-Garavito, Anti-Sweatshop Movement”].

²⁸ Harry Arthurs, "Labor Law Without the State?" (1996) 46:1 UTLJ 1-45; Harry Arthurs, "Private Ordering and Workers' Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation" in Joanne Conaghan, Richard Michael Fischl & Karl Klare, eds, *Labour Law in an Era of Globalization* (Oxford: Oxford University Press, 2002) 471.

²⁹ Adelle Blackett, "Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries" in John J Kirton & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Aldershot, UK: Ashgate, 2004) 121-133.

³⁰ For a detailed discussion, on the limitations of corporate monitoring and how it can be improved, see Richard M Locke, Fei Qin & Alberto Brause, "Does Monitoring Improve Labor Standards: Lessons from Nike" (2007) 61:1 Indiana Labour Relations Review 3-31 [hereinafter referred to as “Locke, Qin & Brause, 2007”]. Kate Raworth & Anna Coryndon, *Trading Away Our Rights: Women Working in Global Supply Chains* (Oxford:

capacity of (developing countries') dysfunctional regulatory regimes."³¹ If designed and operated in a transparent manner and with robust mechanisms, corporate monitoring can offer a useful complement to public regulation.³² Hepple cites research, which shows that involvement of labour representatives or unions in the drafting and adoption of corporate codes causes the inclusion of redistributive rights; more specifically, NGOs emphasize a living wage and independent monitoring at the time of drafting corporate codes.³³

Despite their potential, CSR codes face the risk of being "used as a vehicle for a neo-liberal deregulatory agenda" and might promote a "technocratic" and "managerialist" type of self-regulation by powerfully positioned actors.³⁴ Shamir argues tellingly that corporations use CSR by shaping it in a way that "diffuses its potentially radical application to MNCs" and "that fits the hegemonic neoliberal framework."³⁵ Questions are raised as to the independence of auditors from the parent or sponsoring corporations or transparency in monitoring effective labour

Oxfam Publishing 2004). At 58-63, the authors elaborate how employees are coached and paperwork is prepared prior to factory inspection.

³¹ Kevin Kolben, "Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes" (2007) 48:Winter Harv Intl J 203 [Hereinafter referred to as "Kolben, Integrative Linkage"]. At 231-4, Kolben illustrates the potential merits of private regulation and how these improve state regulatory system.

³² Dara O'Rourke, "Multi-stakeholder Regulation: Privatizing or Socializing Global Labor Standards?" (2006) 34:5 World Dev 899. The author argues for four criteria to evaluate private monitoring system: "(1) legitimacy—are key stakeholders involved in all stages of standard setting, monitoring, and enforcement? (2) rigor—do codes of conduct meet or exceed ILO conventions and local laws; are standards measurable; and is monitoring technically competent? (3) accountability—is monitoring independent, transparent, and accountable to local stakeholders? (4) complementarity—do non-governmental regulatory systems support state regulation and help to improve standards and monitoring methods?"

³³ See Hepple, *Labour Laws and Global Trade*, *supra* note 7.

³⁴ Grainne de Burca, "New Governance and Experimentalism: An Introduction" (2010) Wisc L Rev 227. See pages 227-235. Although Burca was analyzing the new and experimentalist type of governance mechanisms in general, the critiques apply to cross-border corporate governance of labour matters as well.

³⁵ See Ronen Shamir, "Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony" in B De Souza Santos & CA Rodriguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press 2005). See at 92-117. According to Shamir, market-oriented NGOs and consumer groups support the MNCs ongoing emphasis on codes as "public relations ploy." "[C]orporate-sponsored and corporate-oriented NGOs" assist in the process of structuring the concept and application of CSR in a way that hinder the 'transformational role' that law can play by subjecting corporations to enforceable obligations. By corporatizing major institutional powers to resist neo-liberalism and 'de-radicalization,' law is used to weaken the formation of coalitions between 'the subaltern of West and the rest'." [Shamir, at 110, quoting Santos].

standards. Also, self-regulation and the voluntary nature of corporate compliance casts doubt on the possibility of introducing enforceable, identifiable, and effective CSR covering a broader range of workers. Initiatives to impose “mandatory social and environmental reporting” by corporations were rejected by the EU on the ground that the diversity of EU member states’ corporate “culture” precludes the adoption of compulsory regulation.³⁶ Attempts to impose direct legal responsibility, upon MNCs for the failures or omission of self-regulation in their supply chains, remain questionable as to their possible coverage and effectiveness.³⁷ In a recent publication, Isabelle Martin argues that although CSR frameworks have evolved, created higher standards (by aligning with standards prescribed in the core ILO conventions) and reserved more space for overseeing work conditions in supply chains of the MNCs, workers’ collective action rights are significantly downplayed in these frameworks.³⁸

How far can legal responsibility be extended not only for direct suppliers, but also for those connected directly or indirectly with the supply chain?³⁹ Would the revised notion of CSR encompass a broader class of workers working for the sub-contractors of suppliers, for suppliers

³⁶ Pall A Davidsson, "Legal Enforcement of Corporate Social Responsibility within the EU" (2002) 8 Columbia J Eur L 529.

³⁷ Locke, Qin & Brause, 2007, *supra* note 30.

³⁸ With their ultimate objective to increase “shareholder value,” corporate governance mechanism prioritizes compliance with corporate codes over the demands of local unions. Martin finds that it is necessary for emerging transnational labour law, which offers a viable space for collective demands of workers, to maintain its distance from the CSR frameworks. See Isabelle Martin, "Corporate governance structures and practices: From ordeal to opportunities and challenges for transnational labour law" in Adelle Blackett & Anne Trebilcock, eds., *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar Publishing, 2015) 51-64.

³⁹ Recently, Costco Wholesale Corp is sued in California for false claim of absence of any “illegal conduct” in their supply chain. The lawsuit alleges that Costco misleads consumers about its sourcing of farmed shrimp products from Thailand. It is alleged that due to low margin of profit in farmed shrimps, Thai shrimp farms use slave labour. Although Costco and its distributors do not “directly” engage in these human rights violations, by procuring from these farms, the complaint alleges that Costco falsely represents that its sourcing practices are free from slavery and other gross violations of human rights. See Erik Larson, "Costco Sued Over Claims Shrimp Harvested With Slave Labor" *BloombergBusiness* (2015) online: <www.bloomberg.com/news/articles/2015-08-19/costco-sued-over-claims-shrimp-is-harvested-with-slave-labor>.

on a “test” basis⁴⁰ and temporary workers supplying independently to the sub-contractors?⁴¹ What would be the MNCs’ responsibility for failure to enforce their codes? Anne Trebilcock elaborates an important transition in the CSR framework: corporate dictated ‘soft’ social responsibility has “thickened” though emphasis on concepts like due diligence mentioned in UN Guiding Principles on Business and Human Rights. However, she finds that though due diligence could be an important “tool” for understanding individual and collective rights of labour, practical difficulties in implementing and monitoring corporate compliance with due diligence, makes such concept distant from collective labour relations or from rights of workers in supply chains.⁴² What happens if a particular supply chain fails to comply with these codes? How

⁴⁰ Although labour rights activists found documents and garments of 29 brands and retailers from the collapsed building site of Rana Plaza, Savar, initially only half of the companies, with recent or current orders to five garment factories in Rana Plaza, committed to contribute to the Rana Plaza compensation fund. Mango, a Spanish apparel brand responded that there was no formal contractual relationship with the supplier and it only had a “test order.” Denying that their garments came from one of the factories situated in Rana Plaza, Wal-Mart and some other retailers responded that an unauthorized contractor was producing garments without their knowledge. Children’s Place, a US based children’s clothes brand, argued that although one factory at Rana Plaza was producing for them, no supply was due at the time of collapse. See Steven Greenhouse, “\$40 Million in Aid set for Bangladesh Garment Workers” *The New York Times* (23 December 2013) online: <www.nytimes.com/2013/12/24/business/international/40-million-in-aid-set-for-bangladesh-garment-workers.html?hpw&rref=business&_r=1&pagewanted=all&=>>. Later Mango, Children’s Place and Wal-Mart committed to fund.

⁴¹ Labour law scholars have explored the possibility of utilizing innovative legal techniques such as extending the definition of employer, employee, responsibility of “user” of labour to deal with the shortcomings or inabilities of existing labor law to reach a vast number of people not covered by supply-chain production arrangements. Some labour law scholars have addressed both the conceptual basis for extending protection of labour laws beyond contractual industrial relationships (explaining why it is necessary to dissolve the distinction between different classes of employees) and the functional means of doing it, (identifying what are the best means to protect these “other” people, such as unpaid workers, sub-contractors, independent contractors, home-based workers supplying to formal workers). They argue that even within existing labour law, various legal techniques (such as fair practices, looking through the veil of employment relationship) were developed by courts with the idea of blurring the distinction between employee and the other, when it is deemed necessary to protect the vulnerable worker and upheld the fundamental purpose of labour law, i.e. to equalize the power of labour while bargaining with capital. For details, see Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Portland: International Institute for Labour Studies, 2006). However, legal techniques such as extending definition of employer, employee, or the concept of industrial relationship, depend entirely on judicial interpretations. The anticipatory redrawing of the “boundary” of labour law though conceptually promises extension of protection to those who need it most, in reality access to courts are limited only for privileged formal workers and entail prohibitive costs and lengthy procedures.

⁴² See Anne Trebilcock, “Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights” in Adelle Blackett & Anne Trebilcock, eds., *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar Publishing, 2015) 93-110. Citing the limits of

should independent and effective monitoring throughout the supply chain be established? If corporate monitoring covers compliance with fundamental rights, what about the redistributive rights? Does CSR mechanism reserve any space for enforcement of collective rights of workers? All these questions challenge the effectiveness of CSR in addressing the deeper consequences of labour deregulation.

4.2.2.2 Linkage through Institutional Frameworks

Some scholars suggest that the problems of poor labour governance in developing countries can be addressed through designing an appropriate global institutional framework. According to them, reforming existing international trade and/or labour regulatory institutions would delineate proper relationships between trade-opening and labour governance, and provide adequate threats or incentives to undertake necessary labour reforms in developing countries.

A. Reforming the WTO

Andrew Guzman proposes reforming the WTO by establishing two separate departments.⁴³ While a trade department would deal with purely trade issues, a labour department would oversee labour issues agreed on by participating states. Guzman argues that the establishment of

corporate self regulation, David Graham and Ngaire Woods argue at 870 “[t]he recent profusion of corporate and industry association codes of conduct is misleading. The existence of new codes does not necessarily mean that corporate behaviour or impact has changed. Indeed, in practice the codes are often not implemented. Many apparent instances of self regulation are ineffective.” See David Graham & Ngaire Woods, "Making Corporate Self-Regulation Effective in Developing Countries" (2006) 34:5 World Dev 868. The authors argue that government and international institutions and instruments play a vital role in enhancing effectiveness of corporate self-regulation in developing countries.

⁴³ Andrew T Guzman, "Trade, Labor and Legitimacy" (May, 2003) 91:3 California L Rev 885 [hereinafter referred to as “Guzman, Trade, Labor & Legitimacy”].

a labour department would balance the “trade bias” of the WTO by bringing labour expertise into trade regulation and legitimizing trade sanctions for violations of labour rights.⁴⁴ While both departments would continue their functions on trade and labour issues respectively, neither would “negotiate agreements that bear directly on the other’s area of expertise.”⁴⁵ Only during periodic mega rounds would these departments initiate “cross-issue talks,” discuss appropriate relationships between labour and trade and attempt to reach a collaborative yet political solution to the problem. During mega rounds, states in favour of linking labour-based exceptions to trade obligations would offer further concessions, such as WTO-plus access to market in exchange for linkage. For Guzman, the long and complex process through mega rounds, though imperfect, is the “best” chance to reach a “negotiated, consensual agreement on trade and labour issue[s]” within the WTO.⁴⁶

According to Guzman, the WTO’s political body is a better forum to address the linkage of trade and labour than the ILO, since the latter lacks an effective enforcement mechanism to address violations of labour rights.⁴⁷ He discusses how the WTO can accommodate trade-based sanctions, though he acknowledges that the effectiveness of sanctions in improving labour conditions in the sanctioned state remains an open question.⁴⁸ For Guzman, in the absence of a political consensus amongst member states, any imposition of trade sanctions under some non-WTO agreement for violation of some labour rights would inevitably involve determination by the appellate body (AB) as to its WTO-compatibility. Guzman finds that any such policy-making

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at 901.

⁴⁷ *Ibid.*

⁴⁸ *Ibid* at 893.

role by a “quasi-judicial,” “unaccountable,” “unrepresentative” AB consisting of trade experts would only aggravate the “legitimacy challenges” both for the AB and for the WTO.⁴⁹

Preferring a political solution, Guzman’s analysis assumes that his proposed labour department can effectively resolve the deep political controversy and delineate proper relationships and boundaries between trade and labour. His analysis does not elaborate why developing countries would support the creation of a separate labour department.⁵⁰ While some of his arguments were based on the WTO’s limited funding to address complex issues like labour, it is not clear how his proposed departments would receive adequate funding to appoint labour experts.

Guzman agrees that complexities in determining the meaning of some fundamental or core labour rights prescribed by the ILO pose significant obstacles for interpreting and enforcing these through the WTO.⁵¹ As an example, he cites difficulties in comprehending the meaning of the elimination of discrimination in employment and occupation. He admits that the issue becomes more complex when this determination takes place at an international level.⁵² In the event that his proposed department fails to reach a political solution or a political understanding as to the meaning of a particular labour right in a particular context, what would be the role of the AB? Guzman does not mention which forum would decide the appropriateness of a particular interpretation of a specific labour right; if the AB interprets at that point, would it still be “adding to” the ongoing “political controversy?”⁵³

⁴⁹ *Ibid.*

⁵⁰ Professor Kolben mentions this point in his article. See Kevin Kolben, “The WTO Distraction” (2010) 21 *Stan L & Pol’y Rev* 461 [hereinafter referred to as “Kolben, WTO Distraction”].

⁵¹ Guzman, Trade, Labour and Legitimacy, *supra* note 43.

⁵² Guzman, Trade, Labour and Legitimacy, *supra* note 43 at 899.

⁵³ *Ibid.*, at 902.

Guzman's "process-based" solution focuses on issues of "human welfare," only when it does not threaten the legitimacy of the WTO.⁵⁴ Even if all problems relating to determination of the contents of labour standards or of the appropriate relationship between trade and labour can be addressed by establishing a separate labour department within the WTO, labour governance problems in developing countries are connected more to the enforcement of labour standards than to their commitment to fundamental labour standards. Either by ratifying ILO core conventions or by entering into a bilateral or regional economic or trade relationship, most of the developing countries have already assumed broad social obligations. Therefore, it is much more important to focus on how to develop effective "cost-sharing" arrangements that can realistically address enforcement problems in developing countries.⁵⁵ Without attending to these crucial issues, Guzman relies on trade sanctions for improving labour conditions and on the institutional role of the WTO, although he briefly refers to other possible approaches to improve labour conditions.⁵⁶ He identifies only regulatory problems of workers, while their distributional problems remain largely unexplored. His institutional approach does not address the problems of labour engaged in non-exporting firms or with sub-contractors of exporting firms.

B. Reforming the WTO and the ILO

Going beyond usual trade sanction-based linkage, Christian Barry and Sanjay Reddy propose a novel, incentive-based system of linkage.⁵⁷ According to Barry and Reddy, developing

⁵⁴ *Ibid.*

⁵⁵ 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.

⁵⁶ Guzman, Trade, Labour and Legitimacy, *supra* note 43 at 893-4.

⁵⁷ Christian Barry & Sanjay G Reddy, *International Trade & Labor Standards: A Proposal for Linkage* (New York: Columbia University Press, 2008).

countries would commit to improve labour governance in return for developed countries' positive inducements, such as WTO-plus market access benefits and burden-sharing arrangements to fund necessary improvements. Their proposed system of linkage attempts to channel the gains from increased trade to improve the situations of the less advantaged workers and to neutralize the adverse competitive pressures of the liberalized market. For them, an appropriate institutional design is crucial for effective labour governance. Administration of the linkage system by a "rule-based and impartial" mechanism, which follows "transparent, participatory and consensual" procedures, will effectively address the problem of "opportunistic use" of social clauses in bilateral trade agreements.⁵⁸ They argue that their proposed neutral system with the ability to impose sanctions, as a measure of last resort and only for "egregious and systematic" violations of labour rights, will be more acceptable to the developing countries who oppose linkage for fear of protectionism.

Barry and Reddy address the argument that improved labour standards would obviously raise production costs and affect the existing competitive advantage of developing countries; the authors find that despite improvement of labour standards and a consequent increase in production costs, the developing countries in the South would still remain competitive in producing labour-intensive commodities due to substantial North-South cost differences.⁵⁹ With regard to competition from other developing countries, they argue that the impact of cost differences will not be substantial, if linkage is adopted by a large number of developing countries. In the absence of such coordination amongst developing countries, they argue that the best alternative would be to allow wage subsidies to producers in developing countries that improve labour standards. Such wage subsidies would be financed internally or by multinational

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

corporations and/or by importing developed trade partners. The “second-best” policy choice is the reduction of tariffs or the implementation of import subsidies by the importing developed partner in order to neutralize the effect on the cost of production through improved labour standards. Therefore, whatever the form of the burden sharing arrangement is, the idea is to create powerful incentives for both developed and developing countries to adopt the linkage system.⁶⁰

After considering the viewpoints of all participants, the institutional design of Barry and Reddy’s proposed linkage system would be applied in a context-sensitive manner and would give regard to each participant’s level of development to determine the content of labour standards. According to them, one such possible system is to reform both the ILO and the WTO to form an “Agency for Trade and Labour Standards” (ATLAS).⁶¹ Rather than being a single undertaking, the reform would come in the form of separate undertakings and thus make participation in the linkage system voluntary but rule-based.

Barry and Reddy’s cooperative and promotional approach to improving labour standards significantly advances the existing research on labour governance. Their analysis focuses on the institutional form of linkage rather than the contents of labour rights.⁶² However, determining the form of linkage crucially depends on the type of labour rights and standards that are intended to

⁶⁰ *Ibid.*

⁶¹ According to Barry and Reddy, the activities of ATLAS would be of two types: developmental and adjudicative. In its developmental function, ATLAS would contribute to the progressive development of labour standards in participating countries. The secretariat and peer-and-partner review committees of the ATLAS will undertake the developmental task by monitoring and assessing periodic labour standard progress reports from participating countries, management of and disbursement from burden-sharing fund, site visit, public consultation etc. At the adjudicatory level, the advocate’s office would on its own initiative or based on a complaint filed by a person, firm, participating country or peer-and-partner review committee, investigate potentially egregious violations of labour rights. The adjudicative tribunal will decide allegations of serious violations of labour standards lodged by a person, organization or country. It can recommend technical or financial assistance from the burden-sharing fund to the offending country or require it to formulate an action plan and report back the updates. Sanction or withdrawal of trade preferences will be allowed only if there is “persistent and egregious violation” and as a matter of “last resort.” *Ibid.*

⁶² *Ibid* at 153.

be protected. For example, a focus on both fundamental and redistributive rights would certainly entail a greater administrative and financial burden than a focus on fundamental rights only.

Barry and Reddy argue that increased market access and financial assistance from burden-sharing funds are crucial incentives to secure the participation of developing countries in the linkage system. However, my discussion in Chapter 5 shows that linkage through trade or economic instruments alone cannot address diverse labour problems in developing countries. Barry and Reddy's market-based linkage proposals not only exclude informal or semi-formal workers from this institutional form of linkage, but might also be unable to secure the benefits that formal workers receive when low-skill based exporting sector(s) of a developing economy suddenly loses its competitive advantage. Their proposal focuses only on improved governance and enforcement of labour rights at a national level through global financial assistance and monitoring. It does not clarify broader issues like assistance to developing countries for the retention of existing competitive advantages through improved labour skills or greater access to the "ideas" and "technologies" of from MNCs or industrialized countries.⁶³

According to Barry and Reddy, only with trade incentives it is possible to expect "action," i.e. financial commitment on the part of countries in the North that are the "sites of ownership, registration and management" of firms.⁶⁴ For them, without any powerful incentive such as the "ability to impose limitations on right to trade," "it would be unfair to require Northern countries that do not actively participate in conduct that undermines labour standards to make net transfers to those that do for the purpose of providing the latter with incentives to desist from such conduct."⁶⁵ Barry and Reddy do not explore whether the North would still be interested to join and fund an international linkage system, if through expansive bilateral or regional trade or

⁶³ Roberto Unger, in his comments, raised the latter argument. *Ibid* at 135-140.

⁶⁴ *Ibid* at 45.

⁶⁵ *Ibid*.

economic cooperation arrangements they could require signatory developing states to follow minimum labour standards. As discussed later in this chapter, bilateral and regional trade agreements provide more space for the inclusion of region or country-specific social clauses.

Finally, Barry and Reddy's argument that the North did not contribute to the weakening of labour standards in developing countries remains a highly contested issue. Proposals for imposing minimum labour standards in developing countries have met counter-arguments for adopting these not only with fair trade policies such as opening markets for developing countries' goods and products, significant fund transfers to address effective labour governance and other distributional effects, but also with policies to ensure fairness in competition.⁶⁶ It is argued that "sweatshop-labour" is itself a "product, at least in part, of decisions made over the decades by wealthier countries and consumers."⁶⁷

4.2.2.3 Linkage through Social Clause in Economic and Trade Arrangements

The social clause mechanism, in trade or economic cooperation arrangements, aims to establish a minimum floor of rights as a condition to access signatory members' liberalized markets. Within the WTO, developing countries' fear of protectionism and strong opposition caused the demise of the proposal for inclusion of social clause. Rather, in the Singapore declaration, they declared that the ILO is the appropriate international body to address labour issues.⁶⁸ In 1995, the ILO's Governing Council decided to suspend analyses on social clause and

⁶⁶ See Chris Armstrong, *Global Distributive Justice: An Introduction* (Cambridge: Cambridge University Press, 2012). See Chapter 6 on "Global Justice and International Trade" at 163-187; E Kapstein, "Distributive Justice and International Trade" (1999) 13:1 *Ethics and Intl Affairs* 175-204; D Moellendorf, *Global Inequality Matters* (Basingstoke: Palgrave Macmillan, 2009). See the discussions in chapters 5 & 7 at 90 & 132.

⁶⁷ Armstrong, *Ibid*, at 163-187.

⁶⁸ *Singapore Ministerial Declaration*, (18 December, 1996), WTO Doc. WT/MIN(96)/DEC. .

the link between international trade and social standards. The ILO also declared that its “Working Committee on Social Dimensions of Globalization” (WCSDG) would not discuss trade sanctions.⁶⁹ However, at a regional level, efforts to include social clause in the case of the North American Free Trade Agreement (NAFTA) led to the inclusion of two side agreements (the North American Agreement on Labour Co-operation and the North American Agreement on Environmental Protection), which require the member states to enforce their domestic labour and environmental laws.⁷⁰

Proponents of the social clause mechanism argue that regions possess both distinctive understanding of social dislocations and capacity to tailor a region-specific approach.⁷¹ As parties negotiate the terms of the economic or trade cooperation agreement, the social standards prescribed are context-sensitive and give regard to the developmental level of the signatories. Proponents argue that monitoring also entails minimal costs, as most social clauses require compliance with fundamental labour standards.⁷² Also, compliance by exporting firms would eventually cause spillover benefits for the local non-exporting firms and improve the public labour regulatory system.⁷³

Critics argue that social clause mechanism in trade agreements effectively prevents a race towards the top by discouraging unilateral improvements in social/environmental standards for fear of losing existing competitive advantage.⁷⁴ Since a social clause usually contains the threat

⁶⁹ Michael J. Trebilcock & Robert Howse, "Trade Policy & (and) Labor Standards" (2004-2005) 14 Minn J Global Trade 261.

⁷⁰ Steve Charnovitz, "The NAFTA Environmental Side Agreement: Implications For Environmental Cooperation, Trade Policy, and American Treaty making" (1994) 8 Temple Intl & Compe L J 257; Mary Jane Bolle, *NAFTA Labor Side Agreement: Lessons for the Worker Rights and Fast-Track Debate* (Cornell University ILR School, October, 2001).

⁷¹ See DeMartino, *supra* note 22 for a summary of the arguments for and against social clause mechanism. Kolben, Integrative Linkage, *supra* note 31 at 246.

⁷² DeMartino, *supra* note 22.

⁷³ Kolben, Integrative Linkage, *supra* note 31.

⁷⁴ DeMartino, *supra* note 22 summarizes the critiques.

of financial or trade sanctions for non-compliance, it increases the possibility of using sanctions for political or protectionist purposes against trading partners with weaker social institutions and lower standards. Until now, a sanction-based social clause has neither “effectively barred” products/ services from low-standard countries,⁷⁵ nor has it produced any positive result for their labour. Rather, sanctions perpetuate the marginalization faced by workers in low-standard sectors or countries.

Kevin Kolben argues for a model of “integrative linkage” (IL) and suggests focusing outside the WTO to address labour governance problems. Kolben is against the standard “state action-state sanction” model of linkage, as it is “ill-suited to developing countries with dysfunctional regulatory regimes.”⁷⁶ Instead, he argues that, incentive-based social clauses in trade or economic agreements provide room for a context-sensitive analysis of labour governance problems and make it easier to address specific problems of trading partners through “creative solutions.”⁷⁷

Kolben’s comprehensive and rich analysis takes the linkage debate onto a different path. By prescribing a hybrid public-private labour regulatory regime, Kolben’s bilateral or regional trade-incentive based IL mechanism accommodates a wider range of stakeholders than private labour regulatory regimes.⁷⁸ Comprised of representatives from unions, businesses, non-state actors, government and employers, his proposed trade and labour governance council (TLGC) would design and direct the IL regime through master and regional/local councils. The TLGC would decide the particular form of monitoring (for example, whether the focus would be on freedom of association or on wage or on child labour) and choose an independent monitoring

⁷⁵ Hepple, *Labour Laws and Global Trade*, *supra* note 7.

⁷⁶ Kolben, “Integrative Linkage,” *supra* note 31 at 205.

⁷⁷ Kolben, “The WTO Distraction” *supra* note 50; Kolben, “Integrative Linkage,” *supra* note 31.

⁷⁸ Kolben, “Integrative Linkage,” *supra* note 31.

body. The monitoring body would require compliance with a mandatory set of standards. Kolben insists that the local councils under the TGLC might develop “novel forms of mediation that bring together all stakeholders, including multinational corporations that do business in that industry.”⁷⁹ Through the IL model, Kolben insists on creating and expanding necessary institutions to achieve capability enhancement of labour. He admits that effective monitoring implicitly improves domestic labour regulation;⁸⁰ yet, it does not replace the necessity for an effective public regulatory system.⁸¹

In another paper, as an example of his IL model, Kolben cites the ILO’s Better Factories Cambodia programme.⁸² Under the US-Cambodia Textile Agreement, the US offered Cambodian garment exporters increased quota bonus over and above regularly agreed-upon yearly quota bonus. In exchange, Cambodia agreed to improve work conditions in its garment factories and allowed the ILO to inspect and monitor factory-level compliance with Cambodian labour law and international labour standards that have been approved by the government, unions and employers. The innovative features of the Better Factories Cambodia (such as insistence on independent inspection through the ILO, public reporting on compliance by factories and tying Cambodia’s participation in the program with preferential market access in the US) caused a unique and robust integration of public-private labour regulatory regimes.⁸³ Kolben finds that it

⁷⁹ Kolben, “Integrative Linkage,” *supra* note 31 at 253.

⁸⁰ The improvement would generate through adoption of different capacity-building projects. These capacity-building projects would be tailored according to country-specific needs and might include multi-stakeholders consultation, training to government labour regulatory and adjudicatory officials, public reporting on existing regulatory capacity, establishment of research bodies in universities and/or a separate advisory commission to criticize existing regulatory practices and recommend regulatory improvements. See Kolben, “Integrative Linkage,” *supra* note 31 at 246-255.

⁸¹ Kolben, “Integrative Linkage,” *supra* note 31; Kolben, “WTO Distraction,” *supra* note 50.

⁸² Kolben, “WTO Distraction,” *supra* note 50.

⁸³ *Ibid.*

created a “high-standard destination” for foreign buyers, offered a competitive advantage for factory owners and increased the levels of economic and employment growth for Cambodia.⁸⁴

I agree with Kolben that, until now, sanction-based social clause has only enriched the academic level debate on linkage, without producing any significant consensus at a political level.⁸⁵ I also unite with Kolben on his analysis on labour governance from the perspective of capability enhancement of labour.⁸⁶ However, some distributional problems of the labour remain unexplored in his analysis.

First, Kolben agrees that the monitoring under his IL model would cover only workers employed in major export industries that experience the “greatest rise in exports due to tariff liberalization.”⁸⁷ Kolben argues that the stakeholders in his IL model would eventually address the question of protecting labour in informal or non-export sectors.⁸⁸ My discussion, in Chapter 5, elaborates on the routine practice of indirect sourcing by RMG suppliers in a country, which happens to be the second largest RMG supplier in the world.⁸⁹ Though a large pool of informal or semi-formal workers appointed by sub-contractors produce for exporting firms, informalization causes them to be outside the protection of national labour laws and corporate/regional/international monitoring systems. While these workers are in dire need of monitoring and assistance, they neither face any inspection, nor qualify to receive any technical, administrative or financial advice or assistance.

Second, relying on Sen’s capability theory, Kolben creatively links the expansion of labour freedom with effective institutional development. According to Kolben, “[a] thicker conception

⁸⁴ *Ibid.*

⁸⁵ Kolben, “WTO Distraction,” *supra* note 50.

⁸⁶ *Ibid.*

⁸⁷ Kolben, “Integrative Linkage,” *supra* note 31 at 247.

⁸⁸ *Ibid* at 256.

⁸⁹ See the discussion in Chapter 5 of the thesis. For a discussion on routine sub-contracting by Bangladeshi RMG factories see Sarah Labowitz & Baumann-Pauly Dorothee, *Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza* (New York University Stern School of Business, April, 2014).

of development ... should be grounded in the traditional goals and values of labor regulation and industrial relations, which are (1) protective of workers in an unequal power relationship, but at the same time (2) embedded and supportive of democratic functioning both in society and the workplace.”⁹⁰ Yet, his IL model primarily emphasizes the ILO prescribed fundamental labour standards. Although his proposed TLGC might include other labour rights or standards such as the right to a living wage, even in the absence of any domestic law prescribing minimum wage,⁹¹ there is no emphasis on the integral connection between fundamental and redistributive rights of labour.

Third, in terms of poor labour governance in developing countries, Kolben cites political and structural problems such as corruption, corporatist ties between the state, capital and trade unions and lesser allocation of government funds for labour ministries.⁹² For the problem of underfunded labour ministries, he cites internal causes such as the government’s priority to create attractive investment environment.⁹³ His analysis on labour regulatory problems in developing countries does not focus on the isolation of social or distributive rules from development law and policy or on the disruptive influence of neo-liberal prescriptions in developing countries.

Fourth, Kolben finds that the purpose of independent monitoring is to generate information on compliance and transmit these in a transparent and accessible manner. With such information, not only can consumers and businesses determine their buying and sourcing policies, but also NGOs, unions and activists can pressure local employers to improve working conditions and

⁹⁰ Kolben, “WTO Distraction,” *supra* note 50 at 466.

⁹¹ Kolben, “Integrative Linkage,” *supra* note 31 at 250-3.

⁹² Kolben, “The WTO distraction,” *supra* note 50 at 483-484.

⁹³ *Ibid.*

local regulators to improve their regulatory capacity.⁹⁴ Kolben finds that while factory-level performance comparison would pressure a race to the top, a comparative evaluation of public regulatory systems of trading partners would “potentially lead to greater regional integration in labor standards.”⁹⁵ In Kolben’s IL model, the emphasis is not on businesses’ responsibility to adopt an ethical sourcing strategy, but on their capacity to choose compliant producers or suppliers. The inevitable connection between corporate sourcing strategies, poor working conditions in the factories of the South and the rampant presence of indirect sourcing from informal or semi-formal factories remains largely unexplored in his analysis.⁹⁶

Finally, any discussion on the linkage of the social into the economic should not just focus on the presence of a monitoring programme that inspects compliance with domestically or internationally recognized core labour rights. Kolben briefly hints that monitoring might not solve all labour problems and expresses that “it is unclear” how much “Cambodia’s labour regulatory capacity has grown despite better monitoring.”⁹⁷ An effective linkage mechanism should cover broader questions relating to the capacity of the developing partner(s) to design and fund an appropriate labour regulatory framework and connect the latter with overall trade,

⁹⁴ Kolben, “Integrative Linkage”, *supra* note 31 at 247.

⁹⁵ Kolben, “Integrative Linkage”, *supra* note 31 at 250.

⁹⁶ For a discussion on how “upstream” sourcing practices of retailers and brands (downward pressure on prices, volatility and instability in orders) causes “downstream” (indirect sourcing, low wages, over time and exploitation of migrants, contingent workers) problems, see Mark Anner, “Workers’ Power in Global Value Chains: Fighting Sweatshop Practices at Russell, Nike and Knights Apparel” in Peter Fairbrother, Marc-Antonin Hennebert & Christian Leveque, eds, *Transnational Trade Unionism: Building Union Power* (London: Routledge, 2013) 23-41; Mark Anner, Jennifer Bair & Jeremy Blasi, “Toward Joint Liability In Global Supply Chains: Addressing The Root Causes of Labor Violations in International Subcontracting Networks” (2013) 35:1 *Comp Lab L & Pol’y J* 1. Also see Locke, Qin & Brause, 2007, *supra* note 30. For an empirical analysis that connects poor working conditions for garment workers in China and Turkey with corporate sourcing policies, see Tugce Bulut & Christel Lane, “The Private Regulation of Labour Standards and Rights in the Global clothing Industry: An Evaluation of its Effectiveness in Two Developing Countries” (February, 2011) 16:1 *New Pol Econ* 41-71. For a discussion on the relation between these “hyper-competitive supply chains” and “downward pressure” on workers, see Mark Anner & Jakir Hossain, “Multinational Corporations and Economic Inequality in the Global South: Causes, Consequences, and Countermeasures” (paper delivered at the 9th Global Labour University Conference, Berlin, 15-17 May 2014).

⁹⁷ Kolben, “Integrative Linkage”, *supra* note 31 at 242.

economic and redistributive policies. In a more recent publication, Kolben also argues for a “deeper market analysis” by the developed trading partner(s) to understand country-specific “structural organization” of the labour market and impacts of trade liberalization, rather than taking a “formalistic, legal compliance oriented approach” to enforce labour protections under trading agreements.⁹⁸

However, with emphasis on multifaceted issues such as competition, government procurement, investment, and intellectual property rights, most of the bilateral or regional trade or economic arrangements contain WTO-plus commitments and promote labour issues as a “secondary” concern. It has been found that trade agreements between the EU and developing countries are pursued with a market-enhancing objective in which labour standards “do not seem to stand out as a clear priority.”⁹⁹ The developing partners also appreciate limited attention to social issues. Deeper and broader questions, such as what social issues will be addressed, who will be covered, and how, remain on the periphery. According to Ashiagbor, the emphasis on the social in these trade or economic cooperation arrangements neither takes into account developing economies’ limited capacity to deal with social dislocations nor leaves policy space for them to develop appropriate labour development institutions.¹⁰⁰ Rather, the exclusive, “activist” and “robust” focus on market access, without building the necessary adjustment mechanisms at a bilateral or regional level “weakens nascent social integration in developing states.”¹⁰¹

⁹⁸ Kevin Kolben, "Trade, Development, and Migrant Garments Workers in Jordan" (2013) 5 Middle East L & Governance 195-226.

⁹⁹ Jan Orbie, Myriam Gistelinck & Bart Kerremans, "The Social Dimension of EU Trade Policies" in Jan Orbie & Lisa Tortell, eds, *The European Union and the Social Dimension of Globalization: How the EU influences the world* (London: Routledge, 2009) 148-165 at 158 [hereinafter referred to as “Orbie, Gistelinck & Kerremans, Social Dimension of EU Trade Policies”]

¹⁰⁰ Diamond Ashiagbor, "Embedding Trade Liberalization in Social Policy: Lessons from the European Union?" (2011) 32:2 Comp LabL & Pol'y J 373.

¹⁰¹ *Ibid.* Ashiagbor’s analysis of EU trade integration projects at a bilateral and regional level identifies that these projects focus more on increasing “competitiveness” and market access for corporate actors of industrialized trading partners and on accelerating the pace of liberalization. In consequence, social clauses are tailored

The asymmetries between trade and social agenda through trade and economic cooperation arrangements are also reflected partially through the means used to enforce them. While trade opening is ensured through hard means, labour issues are addressed with soft means.¹⁰² EU's bilateral trade treaties are satisfied with dialogue and cooperative mechanisms to discuss and assist in improvements of social standards at an intergovernmental and civil society level. Even sustainability impact assessments are criticized for being used to legitimize trade policies and are cited only as an "academic exercise."¹⁰³

Conclusion

It is possible to extract some common features from the above-mentioned linkage proposals. Focusing on developing countries, most scholars find that addressing the problems of poor labour regulatory institutions and low level of enforcement is the route to ensure effective labour governance. Lesser attention has been paid to the aggregate effects of labour deregulation or to the distributional problems of labour. As a result, most linkage mechanisms are market-based, for example, improved labour governance is tied to preferential market access and benefits only the formal workers employed in exporting firms. Discussions on semi-formal or informal labour force, the inherent connection between fundamental and redistributive rights of

narrowly, focus on compliance with specific core labour rights and avoid complex distributional questions such as institutional capacity of developing partners and assistance from developed partners.

¹⁰² Jan Orbie & Lisa Tortell, "From Social Clause to the Social Dimension of Globalization" in Jan Orbie & Lisa Tortell, eds, *The European Union and the Social Dimension of Globalization: How the EU Influences the World* (London: Routledge, 2009) 1-26.

¹⁰³ Werner Raza, "European Union Trade Politics: Pursuit of Neo-Mercantilism in Different Fora" in Wolfgang Blass & Joachim Becker, eds, *Strategic Arena Switching in International Trade Negotiations* (Aldershot, UK: Ashgate, 2007) 67-96; Orbie, Gistelinck & Kerremans, Social Dimension of EU Trade Policies, *supra* note 99 at 160 cite the e.g. of EU's GSP social clause. With its sanction and incentive combinations, though the GSP social clause achieved some "real and measurable" progress in requiring incentive-recipient countries to ratify ILO core conventions, ILO reports have complained the level of "implementation" "vigorously."

labour, and the connection between corporate sourcing policies and poor working conditions do not receive any priority. Even the improvement of productivity of labour engaged in exporting firm(s) or the importance of retaining existing competitive advantages for major exporting sectors of a developing country, are not discussed in these linkage proposals. Nor do these proposals consider that existing disparities between developing and industrialized economies, both in institutional development and in offering social protections, immensely challenge the linkage of social or distributional questions within the market-based growth framework.

Without giving appropriate attention to the root causes of these disparities and without prioritizing these broader social issues, the existing narrow focus on the form of linkage (CSR codes or social clause mechanism or on institutional monitoring) will not necessarily improve poor labour governance in developing countries, let alone develop the social institutions necessary to withstand the challenges of market integration. Effective labour governance mechanisms needs to be viewed in the overall context of the net economic benefits that a developing partner would receive (i.e. whether a developing partner would be able to generate the appropriate funds for improving their labour regulatory framework and for undertaking broad redistributive programmes), labour regulatory framework (covering workers in sectors that would experience export growth) and redistributive policies (covering workers dislocated due to trade opening).¹⁰⁴ The linkage of the social into the economic requires a careful and detailed analysis of who, what and how (i.e. which social development model is to be pursued—development of a formal labour class or development of a redistributive mechanism covering

¹⁰⁴ In a recent paper on US-Jordan Free Trade Agreement, Professor Trebilcock referred to the potential downside of preferential trading agreements. Despite conditioning trade incentives with labour rights protection, some provisions might significantly disadvantage established economic sectors of smaller developing partners. See Michael Trebilcock, "Response to Kevin Kolben on Bilateralism, Trade Preferences, and Market Abuse" (2013) 5 Middle East L & Governance 227.

formal, semi-formal and informal workers), what type of rights are to be prioritized (fundamental rights, redistributive rights or both), and how to realize these labour rights (how to fund and mobilize the development of necessary social institutions and formulate the necessary redistributive policies). Without a coherent and context-specific analysis of these interrelated issues, labour groups, disadvantaged by market integration projects or disconnected from formal export sectors, can expect very little from any linkage mechanism.

The next chapter discusses how the capability enhancement approach challenges this narrow conceptualization of the social and demands a stronger form of corporate responsibility to address both regulatory and distributional problems of labour.

Chapter 5: Transnational Labour Regulation: A Proposal for Transformative Linkage

Introduction

In order to design and sustain an effective linkage mechanism that connects labour governance with trade or economic arrangements, Chapter 4 stresses the necessity to consider the multiple consequences of labour deregulation and mobility of capital in a holistic framework. In this chapter, I specifically refer to some recent transnational safety initiatives (TSIs), i.e. the ILO's Partnership Programme for "Improving Working Conditions in the Ready-Made Garments (RMG) Sector," the North American "Alliance for Bangladesh Worker Safety," and the "Accord on Building and Fire Safety," the joint initiative of EU and Bangladesh government titled "Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh,"¹ that attempt to improve the safety of RMG factory workers in Bangladesh. Critically analyzing the TSIs and their restrictive approach to labour governance, I argue that sustainable development (SD), in particular, freedom and capability enhancement of labour, as an essential organizing principle or objective of linkage,

¹ *Improving Working Conditions in the Ready-Made Garment Sector in Bangladesh*, (22 October 2013 to 31 December 2016) ILO online: ILO <www.ilo.org/dhaka/Whatwedo/Projects/safer-garment-industry-in-bangladesh/lang--en/index.htm>; *Member Agreement, Alliance for Bangladesh Worker Safety* (2013), online: <www.bangladeshworkersafety.org>; *Accord on Fire and Building Safety in Bangladesh* (13 May 2013) online: Accord on Fire and Building Safety in Bangladesh <www.bangladeshaccord.org>; *Bangladesh: Protect Garment Worker's Rights*, (6 February 2014) European Commission online: EC <trade.ec.europa.eu/doclib/press/index.cfm?id=935>.

focuses on diverse regulatory and distributional problems of labour and produces a much more compelling linkage mechanism.

This chapter starts with a short summary of the growth of Bangladesh's RMG sector. Thereafter, I analyze the TSIs taken after the collapse of Rana Plaza at Savar, Bangladesh. Analyzing both the omissions and inclusions within the TSIs, I construct a robust version of linkage model. While the proposed model does not prescribe or approve of a particular initiative, using capability enhancement of labour,² some essential features of an effective transnational labour governance mechanism are listed.

I argue that it is more important to identify the organizing principle or objective of linkage, which not only focuses on addressing a wide variety of labour problems in a context-sensitive manner but also emphasizes sustaining the process of labour development. I argue that as an organizing principle of linkage, capability enhancement of labour emphasizes two distinct issues. First, it demands a broad conceptualization of the social.³ More specifically, it stresses the essential inter-connection between fundamental and redistributive rights of labour and on the necessity to protect labour engaged in both formal and semi-formal or informal sectors. Second, it demands an effective institutional framework, for example stronger form of transnational corporate responsibility,⁴ to improve labour governance and to focus on a wider range of labour issues, such as improving labour productivity and labour empowerment.

² Amartya Sen, *Development As Freedom* (New York: Anchor Books, 2000); Amartya Sen, "The Ends and Means of Sustainability" (2013) 14:1 J Hum Dev & Capabilities at 6-20.

³ For this I rely on Professor Adelle Blackett's "social regionalism" concept. See Adelle Blackett, "Towards Social Regionalism in the Americas " (2002) 23:4 Comp Lab L & Pol'y J 906-966; Adelle Blackett & Christian Levesque, "Social Regionalism in the Global Economy" in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York: Routledge, 2011) 1.

⁴ *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, remedy" Framework* (2011), UNHR, Office of the High Commissioner, New York and Geneva online: UNHCR <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>. This is the first corporate human rights responsibility initiative that has been endorsed by the UN. The guiding principles were proposed by the UN Special Rapporteur Professor John Ruggie and later, UN Human Rights Council

5.1 Growth of Ready Made Garments Sector (RMG) in Bangladesh

Since 1974, the GATT Multi-Fibre Arrangement (MFA) has governed world trade in textiles and garments.⁵ The MFA allowed protection of local textile and garment industries through the imposition of quotas and licensing requirements for foreign textiles and garments. Under the MFA, some developed countries imposed quota limits on garment-producing developing countries such as South Korea, India and China.⁶ For garments exported from the newly independent Bangladesh, the EU imposed no quota and there was an ever-rising quota for entering into the market of the US.⁷ When South Korean companies reached their quota under the MFA, they became interested in developing garment production bases in Bangladesh.⁸ Through collaboration with a local company, Desh Limited (Desh), the South Korean Daewoo Corporation started their first garment industry in Bangladesh. Later when Desh and Daewoo separated, trained employees from Desh started their own garment manufacturing and trading businesses in Bangladesh.⁹ The military government in 1980s also offered favorable policies, such as special bonded warehouse system and back-to-back letters of credit, to increase the

endorsed the principles in resolution 17/4 of 16 June, 2011. See John Ruggie, "Protect, Respect and Remedy: A Framework for Business and Human Rights" (2008) 3.2 Innovations 189-212.

⁵ The quota restrictions under the MFA were bilaterally negotiated between individual developed and developing countries and renegotiated in the GATT committee on textiles. Although starting as a short-term arrangement, MFA lasted for 30 years. The protection allowed domestic textile industries of the developed countries, the necessary "time to adjust to foreign competition." For a detailed discussion on the MFA and its impacts, see Carl B. Hamilton, ed., *Textiles trade and the developing countries: eliminating the multi-fibre arrangement in the 1990s* (Washington D.C.: The World Bank 1990).

⁶ *Ibid.*

⁷ For details see Faisal Ahmed, Anne Greenleaf & Audrey Sacks, "The Paradox of Export Growth in Areas of Weak Governance: The Case of the Ready Made Garment Sector in Bangladesh" (2014) 56 World Dev 258 [hereinafter referred to as "Ahmed, Greenleaf & Sacks, Paradox of Export Growth"]; For a detailed overview of the history of Bangladeshi garment factories, see Sarah Labowitz & Baumann-Pauly Dorothee, *Business as Usual is Not an Option: Supply Chains and Sourcing After Rana Plaza* (New York University Stern School of Business, April, 2014) [hereinafter referred to as "Labowitz, Business as Usual Not an Option"].

⁸ *Ibid.*

⁹ *Ibid.*

export potential of this sector.¹⁰ When a quota under the MFA was introduced for Bangladesh in 1986, it was “generous” compared with other potential competitors, such as India and Sri Lanka.¹¹

During the Uruguay round of trade negotiations under the GATT, the Agreement on Textiles and Clothing (ATC) was reached between the signatory states.¹² The aim of the ATC was that within a period of ten years (between 1995-2005), the quota restrictions under the MFA would be gradually abolished and a duty-free and quota-free trading environment for textiles and garments would be established.¹³ On January 1, 2005, when the MFA finally ended, the RMG sector in Bangladesh faced intense competition from neighboring countries. Yet, with low-cost labour, preferential access in the affluent markets of the EU,¹⁴ and highly qualified entrepreneurs,

¹⁰ *Ibid.*

¹¹ For an excellent critique on how developed countries, especially the US reacted to the rapid success of garment industry in Bangladesh by imposing quota under the MFA, see Dean Spinanger, "Will the Multi-fibre Arrangement Keep Bangladesh Humble?" (1987) 10:1 World Econ 75. Spinanger finds that in US market, the rates of growth of imports from Bangladeshi garment industry, in terms of volume, was “sharp and substantial.” However, when compared with total RMG imports from developing countries, the growth rate was really low. In 1984, when the US quota was imposed, Bangladesh’s share in developed countries’ clothing imports was only 0.2% compared with 60% share in imports from East Asian “super-exporters.”

¹² *Agreement on Textiles and Clothing*, 2005 1868 UNTS 14 online: WTO <https://www.wto.org/english/docs_e/legal_e/16-tex_e.htm>.

¹³ For a discussion on the ATC and its possible impacts see Maarten Smeets, "Main Features of the Uruguay Round Agreement on textiles and clothing, and implications for the trading system" (1995) 29:5 J World Trade 97.

¹⁴ About 90% of total exports from Bangladesh consist of ready-made garments. As a least-developed country Bangladesh enjoys duty and quota free access to the EU market under the Everything But Arms (EBA) initiative. For RMG, EU is Bangladesh’s largest trading partner and 55% of total RMG exports are covered under the EBA initiative. In 2012, total export from Bangladesh to the EU was 9.2 billion euro. See *Global Forum on Responsible Business Conduct, Summary Report* (OECD Conference Centre, Paris, France: OECD, 26-27 June, 2013) [hereinafter “Summary Report of Global Forum on Responsible Business Conduct”].

The GSP (Generalized System of Preferences) privileges accorded to Bangladesh by the US has been suspended by Obama administration on June 27, 2013 citing Bangladesh government’s continuous failure to ensure workers internationally recognized labour rights and safety. GSP suspension policy mentions that reinstatement of the benefits would be reconsidered, if the conditions mentioned in US government’s action plan is implemented. The US Department of Labour’s Action Plan 2013 mentions that for restoring Bangladesh’s GSP privilege for ready made garments and knitwear sector, the conditions include introduction of necessary labour law reform addressing freedom of association and collective bargaining of workers, granting similar freedom of association and collective bargaining rights to workers in export processing zones (EPZs), expediting the registration process of the labour unions, public reporting on the status and outcome of union registration process, expeditiously resolving charges against labour activists, allowing registration of NGOs working for labour rights, employing industrial police officers to oversee workers’ freedom of association and assembly and to prevent harassment, intimidation or violence against labour activists and unions. However, the GSP privilege by the US did not cover RMG products, but allowed

Bangladesh's RMG sector continued to remain competitive in the world market. It grew as an important export earning and job-creating economic sector accounting for 80% of the country's total exports.¹⁵

Starting with a 3.2% GDP growth in the 1980s, Bangladesh's GDP has grown steadily at a rate of 5.8% annually over the last decade.¹⁶ With a 4.8% share in global clothing export and as the world's second largest garment exporter, the RMG sector in Bangladesh employs 4 million people, out of which 3 million are women.¹⁷ Even during the financial crisis of 2008, this growth has remained resilient (falling at a 2% rate) as western consumers inclined towards low-priced garments, which are mainly produced in Bangladesh.¹⁸ Huge societal development followed the

tariff breaks for exports up to \$35 million dollars annually. Approximately apparel worth \$4.5 billion are exported to US annually and therefore, the suspension of GSP privilege is mostly a symbolic pressure. Statement by the U.S. Government on Labor Rights and Factory Safety in Bangladesh, 19 July 2013, online: US Dept of Labour < www.dol.gov/opa/media/press/ilab/ILAB20131494.htm>; Steven Greenhouse, "Obama to Suspend Trade Privileges with Bangladesh" *The New York Times* (27 June 2013) online: <www.nytimes.com/2013/06/28/business/us-to-suspend-trade-privileges-with-bangladesh-officials-say.html?pagewanted=all&_r=0>; Katerina Sokou & Howard Schneider, "US suspends Bangladesh's trade privileges due to labor concerns" *The Washington Post* (4 December 2013) online: <www.washingtonpost.com/business/economy/us-to-suspend-trade-privileges-with-bangladesh/2013/06/27/16171f08-df3d-11e2-963a-72d740e88c12_story.html>.

¹⁵ The garments sector has exported goods worth US \$19.3 billion during July-May, 2013. See ILO, News, "ILO, partners aim to improve conditions in Bangladeshi garment industry" (23 September, 2013) online: ILO <www.ilo.org/global/about-the-ilo/activities/all/WCMS_222019/lang--en/index.htm>.

¹⁶ See *Bangladesh: Seeking Better Employment Conditions for Better Socio-economic Outcomes, Studies on Growth and Equity* (Geneva, Switzerland: International Labour Organization (ILO) and International Institute of Labour Studies (IILS), 2013) [hereinafter referred to as "ILO and IILS Study on Bangladesh, 2013"].

¹⁷ ILO and IILS Study on Bangladesh, 2013, *ibid.* *Rana Plaza, Two Years on: Progress Made and Challenges Ahead for Bangladesh RMG Sector* (ILO, April 21, 2015). Online: ILO <www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_229135/lang--en/index.htm> [Hereinafter referred to as "Two Years Progress Report on Rana Plaza by ILO, 2015"]; Summary Report of Global Forum on Responsible Business Conduct, *supra* note 14; Muhammad Yunus & Tatsufumi Yamagata, "The Garment Industry in Bangladesh" in Fukunishi ed, *Dynamics of the Garment Industry in Low-Income Countries: Experience of Asia and Africa (Interim Report)* (Institute of Developing Economies (IDE) & Japan External Trade Organization (JETRO), 2012)).

¹⁸ Demand for cheap clothing increased in the west and in June 2013, caused 26% surge in garment export year-on-year. See Lianna Brinded, "Bangladesh Approves 77% Pay Rise for Garment Factory Workers" *International Business Times*, (21 November 2013) online: <<http://www.ibtimes.co.uk/bangladesh-garment-industry-rana-plaza-wage-hike-524125>>.

rapid growth of Bangladesh's RMG sector. According to the World Bank, poverty dropped by nearly a third and life expectancy, literacy and per capita food intake in the country increased.¹⁹

Despite this growth, wages in Bangladesh remained stagnant until the 1980s and later grew at a very slow rate, mostly due to intense protests from workers.²⁰ Although the wage rate increased in 2006 and again in 2010, the average monthly wage continues to remain the lowest in the world in terms of purchasing power parity.²¹ Before November, 2010, an ordinary labour employed in the RMG sector in Bangladesh used to earn US \$39 per month, compared to Chinese workers in coastal provinces who are paid US \$117-147 per month.²² The wage rate is half of the lowest applicable rate in other major garments exporting countries such as India (US \$71), Pakistan (US \$79), and Vietnam (US \$78).²³ In November 2010, the minimum monthly wage was increased to US \$43 and in 2013, the government-appointed wage board recommended an increase to US \$68. Even with the increase, the minimum wage of workers is far below the level of a living wage and is not commensurate with the rate of inflation.²⁴

¹⁹ "Bangladesh Overview," World Bank, online: World Bank <www.worldbank.org/en/country/bangladesh/overview>. But for an analysis that criticizes the World Bank's measurement of the poverty line on the basis of single yardstick of per-capita and per-day income, see Anu Muhammad, "Bangladesh: A Model of Neo-liberalism, The Case of Microfinance and NGOs," (2015) 66:10, Monthly Review, 35 online < monthlyreview.org/2015/03/01/bangladesh-a-model-of-neoliberalism/> [Hereinafter referred to as "Muhammad, Bangladesh: A Model of Neo-liberalism"]. Muhammad argues that if poverty level were calculated by increasing the yardstick or on the basis of "current prices of basic needs," then the number of people living under poverty line would far surpass the official data. According to Muhammad, "GDP and per capita income have increased without a significant improvement for the people in poverty and deprivation in Bangladesh." At 43-45.

²⁰ Muhammad, "Bangladesh: A Model of Neo-liberalism," *ibid*.

²¹ Anu Muhammad, "Wealth and Deprivation: Ready-Made Garment Industries in Bangladesh" (August 20, 2011) XLVI 4 Econ & Pol Weekly 23-27 [hereinafter referred to as "Muhammad, Ready-made Garment Industries in Bangladesh"].

²² According to General Secretary Sharan Burrow of the International Trade Union Confederation (ITUC), "the new minimum wage of 21 cents per hour is not enough to live on, with workers putting in extremely long hours in difficult working conditions but still unable to make ends meet. It is an absolute disgrace that this industry, worth \$12 billion dollar a year, treats its workforce with such contempt." Quoted in Ahmed, Greenleaf & Sacks, Paradox of Export Growth, *supra* note 7.

²³ ILO and ILS study on Bangladesh, 2013, *supra* note 16.

²⁴ According to a report of the Fair Labor Association (FLA), an association of socially responsible companies, universities, colleges and civil society organizations, a garment worker living alone in Dhaka requires US

Work conditions in Bangladesh “have been amongst the worst in the global garments industry.”²⁵ In addition to wages, other labour issues, such as work and workplace conditions, and the health and safety of workers, continue to remain marginalized political issues. RMG factory owners in Bangladesh constitute a powerful political lobby either through their position as parliamentarians or through their financial contribution to major political parties. They have tremendous influence not only in law-making but also at the level of enforcement. According to one estimate, 10% of the country’s legislators directly own garments industries or have financial interests in the RMG industry.²⁶ Other legislators maintain close financial ties with RMG manufacturers/traders or influence the distribution of rents from the RMG sector. A report by Transparency International in Bangladesh, in 2013 mentions that the “outsized” influence of garment owners in the Parliament not only ensures enactment of favourable tax and necessary legislation, but also causes a delay in regulatory reforms on labour law; the “owner-legislator ties” efficiently impede proposals for “oversight” of this important export sector.²⁷

Since independence in 1971, Bangladesh followed the import-substitution policy and maintained a protected trading regime. Towards the end of 1980s, Bangladesh faced serious macroeconomic imbalances, “stagnating” export performances and adopted the structural

\$75-82 per month and US \$164 for maintaining a family. See *Wages Along the Supply Chain: Trends, Progress and Looking Ahead* (Fair Labor Association, 2011).

²⁵ ILO and ILS study on Bangladesh, 2013, *supra* note 16.

²⁶ Jim Yardley, "Garment Trade Wields Power in Bangladesh" *New York Times* (24 July 2013) online: <http://www.nytimes.com/2013/07/25/world/asia/garment-trade-wields-power-in-bangladesh.html?_r=0>; "Rags in the Ruins, A Tragedy Shows the Need for a Radical Improvement of Building Standards" *The Economist* (4 May 2013) online: <www.economist.com/news/asia/21577124-tragedy-shows-need-radical-improvement-building-standards-rags-ruins>. The Economist reporter writes, “Bangladesh’s garment business has growing clout. The BGMEA’s 4,000 members account for four of every five dollars earned from exports. And the industry is tied to the corrupt political system: at least 25 MPs have investments in the garment business.”

²⁷ See Labowitz, Business as Usual Not an Option, *supra* note 7; Baumann-Pauly Dorotheé, Sarah Labowitz & Nayantara Banerjee, *Closing Governance Gaps in Bangladesh's Garment Industry – The Power and Limitations of Private Governance* (SSRN, March 12, 2015) [Hereinafter referred to as “Dorothee *et al*, Closing Governance Gaps”]. The authors discuss the governance gaps in Bangladeshi garments sector.

adjustment policies prescribed by international financial institutions (IFI).²⁸ Although the closure of large state-owned enterprises started during the first five years of independence, acceptance of the IFI's prescriptions caused a wider range of policy reforms in trade, monetary, fiscal and exchange rate matters. De-industrialization, increase of privatization, promotion of foreign direct investment and weakening of existing trade unions became the main features of necessary institutional reforms.²⁹ A sharp division grew between union leaders and general workers during this process of institutional reform. At national-level unions, gradual "co-option of labour leaders into the ruling elite," union leaders' rampant corruption or abuse of union leaders or labour activists weakened both the trade unions' credibility and the union leaders' connection with general workers; eventually, the union movement in Bangladesh became highly "fractionalized" and a "tool" of major political parties.³⁰ As a result, demands for improved working conditions and wages were sporadic, unorganized and received limited political attention.

These neo-liberal institutional reforms continued during the prolonged military rule in Bangladesh from 1982-1990. Since 1990, the two bitterly divided major political parties in Bangladesh continued to compete for power with no significant difference in their trade and economic policies. Both parties emphasize privatization, export-led growth and trade liberalization. Neither has any substantial pro-labour agenda and both are interested in serving the interests of employers in order to boost export income. As a consequence, the labour ministry is under-funded and labour issues are sidelined. A weak regulatory capacity for labour

²⁸ For an overview of evolution of Bangladesh's trade policy, see Selim Raihan & Bazlul Haque Khondker, "A Review of the Evolution of Trade Policies in Bangladesh" in *Bangladesh Country Report: Trade and Employment* (Dhaka, ILO: ILO Country Office for Bangladesh, ILO, 2013).

²⁹ Muhammad, "Ready-made Garment Industries in Bangladesh," *supra* note 21. At page 23-24, Muhammad argues that the neo-liberal reforms intended to "create a large pool of labour: disorganized, scattered, unable to assert its rights and forced to accept low wages." Anu Muhammad, "Globalization and Economic Transformation in a Peripheral economy, the Bangladesh experience" (April, 2006) 41:15 *Econ & Pol Weekly* 1459-1464 [hereinafter referred to as "Muhammad, Bangladesh Experience"].

³⁰ *Ibid.*

governance is connected more with the “marginalization from current political settlement” than with the problem of resources.³¹ Political isolation of workers’ issues and a built-in bias favouring the interests of the employer class are manifested through flexibility in the implementation of national labour laws and international labour standards. For example, the government’s minimal interest in effective labour regulation is reflected through the imbalanced ratio of labour inspectors to the number of factories and workers. Until the collapse of Rana Plaza, there were only 18 inspectors for 5000 garment factories. The inspectors are poorly paid and lack the utilities and technical skills necessary to monitor multifaceted production systems.³² In 2013, after the collapse of Rana Plaza, the Bangladesh government’s “National Tripartite Plan of Action for Fire Safety in the RMG Sector” announced plans to gradually increase the number of labour inspectors to 800.³³ It is necessary to mention that shortage in staffing and resources for labour regulation is not unique to Bangladesh. In many developing countries, these regulatory vacuums in labour regulation perpetuate through states’ insufficient will or power to enforce “domestic labour laws, even if those laws are on their face compliant with international standards.”³⁴

³¹ *Ibid.* Also see Ahmed, Greenleaf & Sacks, Paradox of Export Growth, *supra* note 7.

³² Ahmed, Greenleaf & Sacks, Paradox of Export Growth, *supra* note 7. For factory level inspection, a separate department of inspection for factories and establishments was created in 1970 in the then East Pakistan. The inspection department enforces not only labour law provisions, but also renders advisory services to employers and workers for determining the most effective means to comply with legal provisions. It specifically endorses Article 3 of the ILO convention no. 81 regarding “Labour Inspection” in Industry and Commerce. See online: Department of Labour, Ministry of Labour and Employment, Government of Bangladesh <www.mole.gov.bd>. After the collapse of Rana Plaza, the ILO negotiated agreement aims to appoint 200 labour and factory inspectors by the end of 2013 and another 800 within 2014; it also aims to upgrade the department of Chief Inspector of Factories and Establishment into a directorate with its annual budget and necessary infrastructure. In March, 2015 the total number of inspectors became 276 and inspection service has been upgraded to a department. See Two Years Progress Report on Rana Plaza by ILO, 2015, *supra* note 17 at 6-8.

³³ See *National Tripartite Plan of Action on Fire Safety and Structural Integrity in the Ready-Made Garment Sector in Bangladesh*, Ministry of Labour and Employment, Government of the People’s Republic of Bangladesh, 25 July 2013 online: ILO <www.ilo.org/dhaka/Informationresources/WCMS_221543/lang--en/index.htm>

³⁴ Kevin Kolben, “Theoretical Inquiries in Law, Transnational Labor Regulation and the Limits of Governance” (2011) 12:2 *Theoretical Inq L* 403-437.

Bangladesh has ratified 33 ILO conventions and amongst these seven are fundamental conventions of the ILO. The *Labour Act*, 2006 and the *Industrial Relations Ordinance* 1969 govern labour matters.³⁵ The recent labour law reform in July 2014, prescribes some impressive workplace health and safety related improvements such as the creation of safety committees in factories with 50 or more workers, safety welfare officers for factories with 500 or more workers, workplace health centers for factories with 5000 or more workers; it also provides for compensation for work-related deaths and occupational diseases, and requires additional health and safety related responsibilities for the labour inspectorate.³⁶ The recent reform also permits the formation of unions at the factory-level and discards the necessity of prior permission from factory owners in order to form unions.³⁷ Yet, there is a large gap between national/international rules and standards and their enforcement.

A joint study by the ILO and International Institute of Labour Studies (IILS) in 2013, mentions that the implementation and enforcement of the fundamental principles and rights at work remains “challenging.”³⁸ For example, recent labour law reform does not extend freedom of association and collective bargaining rights to workers in export processing zones. For registering factory-level unions, it requires the support of 30% of the company’s total workers (not 30% of workers from each factory site) and requires that union-leaders be from amongst the workers.³⁹ By the end of September 2013, only 367 factory-level unions have been registered.⁴⁰ It has been reported that factory owners and managers are blacklisting union organizers with the

³⁵ See Hasina Begum, "An Overview of the Labour market in Bangladesh", *Bangladesh Country Report: Trade and Employment* (Dhaka, ILO: ILO Country Office for Bangladesh, ILO, 2013).

³⁶ “ILO Statement on Reform of Bangladesh Labour Law,” *International Labour Organization* (22 July 2013) online: ILO <www.ilo.org/global/about-the-ilo/media-centre/statements-and-speeches/WCMS_218067/lang-en/index.htm>.

³⁷ *Ibid.*

³⁸ ILO and IILS Study on Bangladesh, 2013, *supra* note 16.

³⁹ Editorial, "Halfhearted Labor Reform in Bangladesh" *The New York Times* (17 July 2013) online: <http://www.nytimes.com/2013/07/18/opinion/halfhearted-labor-reform-in-bangladesh.html?_r=0>.

⁴⁰ Two Years Progress Report on Rana Plaza by ILO, 2015, *supra* note 17.

threat of job loss and intimidating other workers for not joining the union. This is preventing the formation and registration of effective unions at the factory level.⁴¹

5.2 Collapse of Rana Plaza and Transnational Safety Initiatives (TSIs)

The fire at Tazreen Fashions, a Dhaka-based garment factory, in November 2012 and the collapse of Rana Plaza, a Savar-based factory building, in April, 2013 bitterly exposed the extreme vulnerability of economic growth that ignores social or distributive justice. At a national level, employment conditions have not improved despite economic growth. With desperately low wages, poor working conditions and negative social protections, competitiveness for low-priced garments is retained. At a global level, profits for ready-made garments are concentrated for designing and retailing operations. Due to technological and financial changes, the upper end of RMG distribution centers (which are situated mostly in the North) excel in increase of sales and quick turnover of the latest fashions. At the lowest end, most production bases in developing countries remain desperately at the mercy of corporate brands and retailers for orders at a competitive price and rely on abundant and cheap labour force who struggle to meet the supply deadline in unsafe and sub-standard workplaces.⁴²

⁴¹ *Bangladesh: Protect Garment Workers' Rights. Factory Owners Use Beatings, Threats to Kill, to Stop Labor Organizers* (New York: Human Rights Watch, 6 February 2014)

⁴² The catastrophic collapse of the Rana plaza building in Bangladesh though raised the world-wide attention on conditions of factory workers in Bangladesh garments sector, Bangladesh is ranked as the 17th worst country on a labour rights and protection index prepared by global risk consultancy, Maplecroft. Maplecroft's index uses multiple factors like child labour, freedom to form unions and working conditions to measure risk factors. According to Sedex, a nonprofit group, which complies ethical audit data, more than half of the factories operating within global supply chains fail to meet safety standards and have long working hours and low wages. Child labour problems are persistently present in most of these supply chains. For more information see <<http://maplecroft.com/>>; See Ruth Sullivan, "Fire Risk is a Burning Supply-Chain Issue" *Financial Times (UK)* (8 September 2013) online: <www.ft.com/cms/s/0/d357ec7a-1645-11e3-a57d-00144feabdc0.html#axzz3moPfTZIZ>.

After the collapse of Rana Plaza, several safety initiatives were taken to improve the safety of workers and workplaces in the Bangladesh RMG sector. These safety initiatives, which, though they remain critical of the government's failure to regulate and inspect,⁴³ remarkably focus on transnational actors' increased regulatory roles and responsibilities in preventing further safety violations. I discuss these initiatives below.

5.2.1 The ILO's RMG Programme

Blending competition with compliance and safety of labour with sustainability of growth, the ILO launched a three-and-a-half year partnership initiative that aims to address labour governance problems in a holistic manner. Recognizing that safe working conditions are a prerequisite to sustain economic growth in the RMG sector, the ILO initiated the partnership programme for "Improving Working Conditions in the Ready Made Garments Sector" (referred to as the "ILO's RMG programme"). The ILO's RMG programme aims to monitor the implementation of the Bangladesh government's "National Tripartite Plan of Action on Fire Safety and Structural Integrity" (NTPA), implement a Better Work Programme in Bangladesh, strengthen labour inspection, support fire and building inspection, build occupational health and safety (OHS) awareness, capacities and systems and coordinate the rehabilitation and training of the victims of the Rana Plaza collapse.⁴⁴

⁴³ Apparently, government's regulatory and inspection failures have caused these easily preventable accidents. Around 90% of industrial buildings in Bangladesh do not comply with any building code. The capital city, Dhaka accommodates around 1500-2000 garment factories; yet Dhaka's building regulatory body, RAJUK, has only 40 building inspectors. Prior to collapse of Rana Plaza, there were only 18 factory inspectors for 5000 garment factories. See ILO and ILS Study on Bangladesh, 2013, *supra* note 16.

⁴⁴ See "Improving Working Conditions in the Ready-Made Garment Sector in Bangladesh" *International Labour Organization* (22 October 2013 to 31 December 2016) online: <www.ilo.org/dhaka/Whatwedo/Projects/safer-garment-industry-in-bangladesh/lang--en/index.htm>.

On 22 October 2013, the ILO launched “Better Work Bangladesh” (BWB) as a part of its RMG programme.⁴⁵ Under the BWB programme, the ILO aims to monitor and improve compliance with national labour laws and international labour standards, provide advisory and training services for building industrial relations and factory-level compliance. The ILO’s BWB programme will differentiate factories depending on the level of their social compliance, the strength of their social dialogue and industrial relations, the development of systems relating to OHS, their human rights and grievance mechanisms and their commitment to learning.⁴⁶

The ILO’s RMG programme aims to cover three broad-based issues.⁴⁷ First, by involving diverse stakeholders and representatives of multiple corporate safety initiatives (discussed in sections 5.2.2 and 5.2.3 of this chapter), the ILO aims to coordinate on some crucial issues. For example, under the ILO’s coordination, both corporate safety initiatives agreed to follow the harmonized standards for inspection of structural integrity of factory buildings and fire safety assessments. Second, while the Bangladeshi government introduced changes in labour inspection capacity, the ILO’s RMG programme particularly emphasizes increasing the “quality” of inspection. A labour inspection roadmap has been reached between the ILO and the government of Bangladesh, under which the ILO would train the inspectors and design appropriate programmes to ensure the governance and accountability of the labour inspection system.⁴⁸ Third, the ILO’s RMG programme focuses on organizing training events for labour representatives,

⁴⁵ Better Work programme, a joint partnership programme of the ILO and the International Finance Corporation (IFC), was first launched in Cambodia in 1999 to monitor compliance with national labour laws and international labour standards. Although Bangladesh remained a natural venue for operating this joint programme, both the ILO and the IFC were concerned that labour law and enforcement standards in Bangladesh do not meet the program’s minimum requirements. After Rana Plaza, as international pressure grew, the ILO initiated Better Work Bangladesh (BWB) as a partnership between the ILO and the IFC, government, workers, buyers, employers and other relevant stakeholders. More information is available online: Better Work <www.betterwork.org>.

⁴⁶ See <betterwork.org/global/wp-content/uploads/QA-for-Better-Work-Bangladesh.pdf>; *Major ILO programme aims to make Bangladesh Garment Industry Safer* (ILO, 22 October 2013).

⁴⁷ *Ibid.*

⁴⁸ See *supra* note 44; ILO and ILS study on Bangladesh, 2013, *supra* note 16.

mid-level managers and trade union organizers, and aims to improve factory-level labour-management cooperation and build local capacity in respect of freedom of association and collective bargaining.⁴⁹

5.2.2 The North American Alliance

The North American Apparel Retailers' Alliance for Bangladesh Worker Safety (hereinafter referred to as the "North American Alliance") consisting of 26 retailers and brands was formed in July, 2013.⁵⁰ With the aim to launch and develop a "Bangladesh Worker Safety Initiative" in 625 supplier factories, employing approximately 1.28 million workers, the five-year binding agreement established an initial worker safety fund of US \$42 million and continued to raise more.⁵¹ Each signatory company is to contribute to the safety fund based on a tiered fee structure that corresponds to its previous year's dollar value of apparel exports. A maximum cap (US \$1 million per year) has been put on the pledges by participating companies. The worker safety fund will be utilized for the operational costs of safety initiatives, i.e. drafting minimum safety standards, factory inspections, and enhancing awareness of workers on OHS issues. 10% of the fund is reserved for workers temporarily displaced due to safety improvement activities.⁵² The North American Alliance pledges to provide 50% of wages for up to four months, provided factory owners pay the rest to workers temporarily displaced from work due to factory

⁴⁹ *Supra* note 44.

⁵⁰ See *Member Agreement, Alliance for Bangladesh Worker Safety* (2013), online: <www.bangladeshworkersafety.org> [hereinafter referred to as "Alliance Members Agreement"].

⁵¹ Alliance Members Agreement, *ibid* at section 10.6.

⁵² *Ibid* at section 2.2.

remediation.⁵³ Signatory retailers are obliged to participate in the initiative for the first two years and would face higher rates of financial penalty if they leave the initiative prior to the completion of two years.⁵⁴ In order to prohibit unauthorized subcontracting, the signatory companies agreed to review their internal policies.⁵⁵

The North American Retailers' Alliance Members Agreement was amended to formally include the workers' right to refuse unsafe work or to work in dangerous conditions.⁵⁶ Factory workers are allowed to communicate their concerns about factory management using an "anonymous hotline" or mobile technology "without fear of retaliation."⁵⁷ More than 300 supplier factories now have access to the hotline.⁵⁸

The North American Alliance has already completed initial inspection of 587 supplier companies and it aims to finish the final inspection by 2017. At the time of writing, 19 companies have been partially or fully closed for imminent risks. For screening the prospective supplier factories' compliance with the harmonized building and fire safety standards, the North American Alliance has launched a "pre-approval policy."⁵⁹

The Board of Directors (BOD) of the North American Alliance is entrusted with the duty of providing accountability for Alliance activities, issuing semi-annual public reports, inspecting possible non-compliance incidents and taking appropriate actions. The BOD includes representatives from signatory retailers and stakeholders "with qualifications in such areas as

⁵³ In June 2014, the Board of Directors of the North American Alliance doubled the duration of compensation (from two to four months) offered to temporarily displaced workers. See Annual Report, Alliance for Bangladesh Worker Safety, online: <www.bangladeshworkersafety.org>.

⁵⁴ Alliance Members Agreement, *supra* note 50 at sections 9.1, 9.2 and 9.3.

⁵⁵ *Ibid* at sections 8.1 and 8.2. See "Action Plan Overview, Alliance For Bangladesh Worker Safety Releases Factories List & Board Approves Fire And Building Safety Standards," 33 October 2013, online: Alliance for Bangladesh Worker Safety <bangladeshworkersafety.org> [hereinafter referred to as "Action Plan Overview, Alliance"].

⁵⁶ Alliance Members Agreement, *supra* note 50 at section 3.1, amendment 1.

⁵⁷ *Ibid* at sections 3.1 and 3.2.

⁵⁸ Alliance 18 Month Update, Alliance for Bangladesh Worker Safety (9 March 2015) online: <bangladeshworkersafety.org>

⁵⁹ *Ibid*.

worker safety, human rights, anti-corruption, labor, development, international diplomacy, governance, or supplier interests within the Bangladesh garment industry.”⁶⁰ Initially, the North American Alliance did not include any labour representative in the governance of the programme. Later, three prominent Bangladeshi labour leaders were included on the Board of Advisors and a Broad Labour Committee was formed with seven prominent labour leaders from the Bangladesh RMG sector.⁶¹ The Broad Labour Committee provides necessary advice on labour issues to the BOD. The North American Alliance also maintains specific outreach activities with factory-level unions and, up to now, only 20 Alliance factories have registered trade unions.⁶²

5.2.3 The Accord on Building and Fire Safety

The Accord on Building and Fire Safety in Bangladesh (hereinafter referred to as the “Accord”), an independent agreement signed by four local trade union federations,⁶³ two global trade unions (IndustriALL and UNI) and over 190 international brands and suppliers from over

⁶⁰ Action Plan Overview, Alliance, *supra* note 55.

⁶¹ More information available online: Alliance for Bangladesh Worker Safety <bangladeshworkersafety.org>.

⁶² Second Annual report, Alliance for Bangladesh Worker Safety, September, 2015 online: Alliance for Bangladesh Worker Safety <www.bangladeshworkersafety.org>.

⁶³ “*Accord on Fire and Building Safety in Bangladesh*” (13 May 2013) online: Accord on Fire and Building Safety in Bangladesh <www.bangladeshaccord.org> [Hereinafter referred to as “Accord”]. After a series of factory fires in several RMG factories since February 2010, non-state actors including labour rights NGOS such as Clean Clothes Campaign (CCC), Maquila Solidarity Network (MSN), the Worker Rights Consortium (WRC), International Labour Rights Forum (ILRF), global unions like IndustriALL, UNI, and Ethical Trading Initiative (ETI)] were actively participating in the preparation of an effective safety mechanism for Bangladesh RMG workers. After the collapse of Rana Plaza, as a result of their continuous involvement, persuasion and consultation with various national and transnational stakeholders such as suppliers, buyers, worker representatives, and government, the Accord was drafted and signed creating strong and binding commitment on fire and building safety in Bangladesh RMG factories. Some of these organizations, such as CCC, MSN, WRC and ILRF, and unions belonging to IndustriALL Bangladesh, including the National Garments Workers Federation (NGWF), Bangladesh Independent Garment Workers Union Federation (BIGUF), Bangladesh Independent Garments Workers Federation (BIGWF) and Bangladesh Revolutionary Garment Workers Federation (BRGWF) signed the Accord as witnesses. See “The History Behind the Bangladesh Fire and Safety Accord” (8 July 2013) Clean Clothes Campaign and Maquila Solidarity Network online: Clean Clothes Campaign <www.cleanclothes.org/resources/background/history-bangladesh-safety-accord>.

20 countries in Europe, North America, Asia and Australia, aims to improve building and fire safety through independent inspections amongst 1600 export-oriented supplier factories in Bangladesh. The distinctive features of the five-year binding agreement are the provisions for financing from brands and retailers in order to undertake safety inspections [section 24-25], public reporting of safety inspectors' reports [section 19B], inclusion of trade union representatives in the implementation and oversight of safety measures [section 4], preparation of a list of supplier factories including sub-contractors [section 19A], training for workers not only covering basic safety measures and precautions but also enabling them to voice their concerns [section 15,16,18], and binding retailers' commitment to source from Bangladesh [section 21-23].

The Accord emphasizes the workers' right to refuse to enter into a facility or engage in work that he/she reasonably believes to be unsafe without suffering discrimination or loss of pay.⁶⁴ Under the Accord, the signatory retailers commit to maintain long-term sourcing relationships in Bangladesh and to negotiate contractual terms and pricing in a manner that render it financially feasible for the suppliers to maintain a safe workplace and undertake necessary upgrades or remediation. The Accord, thus, distinctively introduces the "ethical pricing" policy in the sourcing practices of brands or retailers.⁶⁵ However, the sourcing commitment is valid for the first two years with Tier 1 and 2 supplier companies, as long as business is commercially viable and the factories continue to meet the member company's requirements under the Accord.⁶⁶

⁶⁴ Accord, *ibid* at section 15.

⁶⁵ *Ibid* at section 23.

⁶⁶ *Ibid* at section 23. Accord distinguishes suppliers into tier 1, 2 and 3 depending on the percentage of signatory company's annual production in Bangladesh. While Tier 1 and 2 include major and long term suppliers that produce at least 65% of signatory companies' total production in Bangladesh, Tier 3 includes occasional suppliers who produce less than 10% of signatory companies' production in Bangladesh by volume.

The operational costs of factory inspections, i.e. funding the activities of the Steering Committee (SC), safety inspector and training coordinator, are to be shared equitably amongst the participating retailers. Although each signatory retailer is to contribute in proportion to its respective annual volumes of garments produced in Bangladesh, a maximum cap has been established at US \$500,000 for each year.⁶⁷ Despite increasing campaigns from labour organizations that the Accord distinctively includes mandatory provisions for financial support for repairs and renovations identified by safety inspectors, the executive director of the Accord has recently clarified the non-mandatory nature of brand or retailer responsibility for factory improvements.⁶⁸

5.2.4 Sustainability Compact

A joint initiative of the European Union (EU) and the government of Bangladesh titled “Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh” (hereinafter referred to as the “Sustainability Compact”) aims to implement several objectives.⁶⁹ The objectives include improved labour safety and welfare and responsible sourcing practices from retailers and brands. The Sustainability Compact emphasizes that fair, ethical and responsible supply chain management is the crucial element for ensuring better workplaces and wage-levels for workers.⁷⁰ It aims to push for necessary labour law reform to strengthen the right to collective bargaining and freedom of association and to improve OHS. It also aims to improve existing building and

⁶⁷ Accord, *supra* note 63 at section 24.

⁶⁸ Labowitz, Business as Usual Not an Option, *supra* note 7.

⁶⁹ “Bangladesh: Protect Garment Worker’s Rights, European Commission” European Commission (6 February 2014), online: <trade.ec.europa.eu/doclib/press/index.cfm?id=935>.

⁷⁰ *Ibid.*

fire safety in factories by relying on the ILO for the initial recruitment of an additional 200 factory inspectors. The idea is to stress on monitoring factories on a regular basis and to obtain transparent reports on working conditions, compliance with labour laws and the creation of OHS awareness.⁷¹

5.3 Distinctive Features of Transnational Safety Initiatives

In this section, I argue that the TSIs unveil the potential to consider linkage between labour governance and economic arrangements in a distinct manner. TSIs involve multiple actors at diverse levels of governance to address problems of labour in a distinctive manner. TSIs promote a cross-border mechanism for sustaining the growth of RMG sector in Bangladesh and prescribe an innovative, though still imperfect, means of achieving it. With emphasis on improving labour productivity and institution-building through financial, technical and advisory assistance (by ILO), on increasing monitoring capacity (Accord and North American Alliance for building and fire safety inspection; Sustainability Compact for general inspection), and on strict corporate responsibility for funding the operational costs of safety inspections (Accord, North American Alliance) and for sourcing from compliant producers (Accord), there emerged a complex yet promising partnership at the transnational level.

In the analysis on labour governance in a sector that primarily contributes to earn a major portion of export income and employ millions in an LDC, the deep nexus between economic growth and trade and labour policy remains inevitable. However, TSIs innovatively connect the safety of labour with sustainability of the RMG sector and continued economic growth.⁷² As a

⁷¹ *Ibid.*

⁷² *Supra* notes 44 & 46.

result, TSIs create an important searching ground for effective transnational labour governance. Although it is too early to analyze the successes or failures of TSIs, when compared with existing linkage mechanisms, six distinctive approaches of TSIs are noteworthy.

First, some TSIs give greater participatory space to non-state actors and allow them to organize a distinct form of strategic response for enforcement of labour safety. These non-state actors were directly involved in drafting an elaborate and effective safety mechanism (Accord), setting safety standards higher than national standards (Accord and North American Alliance) and devising an effective funding mechanism to realistically enforce safety inspections (Accord and North American Alliance). The Accord specifically involved these non-state actors both in safety monitoring and in the dispute resolution process.⁷³ Some non-state actors have actively pursued the formation and working of the Rana Plaza Coordination Committee, a joint collaborative effort involving the ILO, the labour ministry of Bangladesh, BGMEA (Bangladesh Garments Manufacturing Employers Association), trade unions, brands and retailers.⁷⁴ Starting the compensation fund with the slogan “compensation not charity,” these non-state actors continuously persuaded brands failing to participate in the programme and eventually met the target of US \$30 million. It is encouraging to note that international standards are to be followed in calculation and disbursement of the necessary financial and medical support to the victims of their families.⁷⁵

⁷³ *Supra* note 63.

⁷⁴ See “Rana Plaza Arrangement” (12 June 2015) online: *Rana Plaza Arrangement* <<http://www.ranaplaza-arrangement.org>>.

⁷⁵ One interim report, by Clean Clothes Campaign, an international workers’ rights pressure group, and International Labour Rights Forum, details the lack of commitment by majority brands and retailers to arrange fair and sufficient funds for the victims of Rana Plaza. See Liana Foxvog *et al*, *Still Waiting: Six Months After History’s Deadliest Apparel Industry Disaster, Workers Continue to Fight for Reparations* (Amsterdam: Clean Clothes Campaign, 2013). Involving four retailers (Bonmarche, Loblaws, Primark and EI Corte Ingles), these labour rights activists groups initially created an estimated US \$30 million compensation fund for the families of Rana Plaza victims. More information online <www.cleanclothes.org/ranaplaza>. At the time of

Second, the TSIs develop several structures of safety mechanisms and provide for an active role and responsibility of divergent actors, necessary finances and the independent monitoring of retailers' commitment. It is true that the TSIs restrictively focus on the safety of workers formally engaged by suppliers producing for corporate brands. Yet, through their structures, the TSIs create a model for transnational labour governance at various scales and levels. This model brings labour governance issues to the center of sustainable economic development and is replicable in future labour governance initiatives.

Third, though political campaign remains an important part of transnational strategies to pressure the implementation of transnational norms, the TSIs craft an important space for legal strategies. The corporate TSIs, reserve some space for distinctive legal strategies to implement transnational safety norms, such as multi-level financing mechanism for safety improvements (North American Alliance), long-term sourcing and ethical pricing policies (Accord), and independent inspection of factories and public reporting of inspection results (Accord and North American Alliance). The legal enforcement of the provisions and obligations of the Accord constitute another innovative solution when compared with previous efforts to establish corporate responsibility.⁷⁶ Apparently, the dispute resolution clause of the Accord is equivalent to a standard dispute resolution clause in commercial agreements. However, the importance of the clause lies not in its form or contents, but in its very inclusion within a legally binding agreement protecting labour safety. At the very minimum, its inclusion strengthens the bargaining strategies of transnational actors aiming to improve labour rights and entitlements.

writing, the arrangement notified that sufficient funds are now available for disbursement. See "Rana Plaza Arrangement", *Ibid.*

⁷⁶ Accord, *supra* note 63 at section 5. The Accord provides for dispute resolution initially through the decision of Steering Committee (SC), consisting of representatives from signatory companies and unions and headed by a chair appointed by the ILO. The decision of the SC can be appealed to an arbitration process, which will deliver a final and binding award. The award "shall be enforceable in a court of law of the domicile of the signatory against whom enforcement is sought."

Fourth, without tying attention to labour governance with increased market access, the ILO independently seeks to develop a holistic programme that links improvement in labour regulation with the sustainable development of the RMG sector. Involvement in the ILO's RMG Programme will certainly enhance the export potential of participating factories. Still, factories, not covered by the Accord or North American Alliance, i.e. not producing for major export markets, will also qualify to benefit from the ILO's RMG Programme.⁷⁷ Theoretically, workers not engaged by brand name suppliers or major retailers would be covered under the scheme. The ILO's RMG Programme thus innovatively creates the space needed to address labour problems of non-exporting and semi-informal factories and assist their entry into the formal market.

In this regard, there is an important difference between the ILO's BWB (Better Work Bangladesh) programme and the ILO's Better Work Cambodia programme. The ILO's BWB programme seeks to address multiple issues (both working conditions and industrial practices) relating to effective labour governance and uses compliance with these not as a prerequisite for preferential market access under bilateral or regional trade agreements or increased participation in supply chains of renowned brands; rather, the BWB program innovatively embeds the objective of social progress with the continued sustainability of the entire RMG sector.⁷⁸ In the Better Work programme in Cambodia, the ILO is involved in monitoring and reporting labour conditions in garment producing factories. In case of an adverse inspection report from the ILO, buyers can demand, "expedited remediation of the problems" and, finally, look for alternative suppliers in case of the failure of the factory in question to address the problems.⁷⁹ In Cambodia,

⁷⁷ See "Rana Plaza Building Collapse... 100 days on", ILO (5 August 2013) online: <www.ilo.org/global/about-the-ilo/activities/all/WCMS_218693/lang--en/index.htm>.

⁷⁸ *Supra* note 45 & 46.

⁷⁹ In Cambodia, the ILO's non-compliance report comes when an inspected factory fails to remedy the problems within several months from ILO's initial visit. See Sandra Polaski, "Harnessing Global Forces to Create Decent Work in Cambodia, ILO", (2009) online: <<http://betterwork.com/global/wp->

the ILO's monitoring and reporting function ensures that non-compliant firms eventually lose their export-oriented business. In contrast, the ILO's BWB programme does not require participation in the programme as a condition for market access. The BWB programme stresses that buyers or industry associations have an essential role in requiring/encouraging supplier factories to participate in the programme as a prerequisite for being part of their business or association. However, the programme intends to "reach out to factories" that are not direct exporters or members of industry associations.⁸⁰

Fifth, companies should not simply claim their compliance with national laws, which have low standards.⁸¹ The Accord and the North American Alliance have agreed to harmonize building and fire safety standards. These harmonized standards require uniform and stringent application of safety measures and also prescribe a timeline within which the inspection procedures will end. Safety standards prescribed by these corporate initiatives are higher than national standards and signatory retailers have committed to fund the necessary operational costs. Without waiting for changes in national building or safety standards these corporate initiatives indicate that compliance with national laws/standards provides the "regulatory floor" on which corporate codes must build and improve by setting safety standards above national levels.

Sixth, the ILO's BWB Programme seeks to focus strongly on building effective industrial relations through their advisory and training services.⁸² Improved industrial relations not only determine whether national or international labour standards are complied with, but also ensure long-term development of effective labour institutions. Effective labour regulatory institutions

content/uploads/Harnessing-Global-Forces-to-Create-Decent-Work-in-Cambodia-Sandra-Polaski.pdf>[hereinafter referred to as "Sandra Polaski, Harnessing Global Forces"].

⁸⁰ See *supra* notes 45& 46.

⁸¹ César A Rodríguez-Garavito, "Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala" (2005) 33:2 Politics & Society, 203-333 online: <pas.sagepub.com/content/33/2/203> [hereinafter referred to as "Rodríguez-Garavito, Global Governance and Labor Rights"].

⁸² *Supra* notes 45& 46.

and industrial relations address labour development issues irrespective of the firms' participation in the export market and distribute the societal opportunities arising from expansion of the market. This perspective of labour development is much wider than market-based linkages, which only promote effective labour governance at the exporting firm level.

In the next section, relying on the TSIs approach, I build a model of transformative linkage (TLM). I argue that despite possessing distinctive features, the transnational process, in effect, does not substantially contest the existing approach to labour governance and the values and objectives to be pursued. Focusing on the organizing principle or objective of linkage, which is sustainable development (SD), the proposed model endorses both a broader conceptualization of the social and strict corporate responsibility as its starting points.

5.4 Transformative Linkage Model (TLM)

The proposed TLM connects the holistic and embracing character of SD with labour governance issues. Relying on Sen's recent approach to sustainability, the model analyses the freedom and capability enhancement of labour as an essential prerequisite and an end of SD. It recognizes that as an essential organizing principle or objective of linkage, SD can substantially change the existing attention to distributional problems in developing countries and the lives and wellbeing of workers engaged in formal, semi-formal or informal sectors. Utilizing the model, I do not prescribe a particular form of labour governance. Rather, by critically analyzing the exclusions and omissions of TSIs and relying on a core organizing principle of linkage, the model seeks to emphasize several interrelated aspects of labour development.

5.4.1 Sustainable Development as an Essential Organizing Principle of Linkage

In this section, my goal is not to discuss particular forms or locations of linkage, such as increasing the institutional capacity of the WTO or the ILO or increasing inspection capacity and quality at the factory level. Rather, my goal is to connect these labour regulatory issues with the organizing principle of linkage. Taking a purposive approach, I identify the influence of SD and the interconnection between the values (contents) and the institutional framework (form) of effective labour regulation. I argue that a purposive inquiry offers a useful alternative to confront the prevalent dominance of market-based institutions. Additionally, a linkage system based on SD would substantially influence the existing understandings on effective labour governance and transnational corporate responsibility.

I have already discussed some essential features of SD from a capability enhancing perspective (Chapter 1) and the mutually reinforcing nature of trade or economic regulation and labour governance (Chapters 1, 2, 3 and 4). Although not referring to capability enhancement, Sen specifically elaborates issues relating to labour development.⁸³ Referring to the ILO's vision of decent work, Sen discusses the necessity for a comprehensive and globalized approach in dealing with labour and their conditions of work and argues why the comprehensive approach to focus on decent work for labour is superior to other narrow approaches that focus only on labour legislation. He shows that the former covers distinct classes of workers (such as formal and informal workers, workers engaged in exporting sectors and those that are not) and addresses wider range of values.⁸⁴ For example, with necessary political and social arrangements, both employment conditions and unemployment can be dealt in a way that one is not 'traded-off' to

⁸³ Amartya Sen, "Work and rights" (2000) 139:2 Int'l Lab Rev 119.

⁸⁴ *Ibid.*

address the other. A comprehensive approach to decent work “situates the conditions of work and employment within a broad economic, political and social framework.”⁸⁵ As an example, Sen cites that improving work conditions depends on the capacity of labour to influence policy-making and regulatory frameworks and to engage in “social dialogue” that enables them to communicate their concerns. He directly connects the vulnerabilities in working conditions with lack of democratic participation and influence of labour in policy-making and regulatory frameworks.

Sen’s concept of labour development is wider than international financial and development institutions’ emphasis on compliance with fundamental or core labour rights. For him, market-related benefits such as the right to seek employment freely, the creation of more job opportunities or the abolition of child or forced labour are important issues.⁸⁶ However, Sen finds that it is important to combine market-based rights with necessary human and institutional development to ensure creation and distribution of basic social opportunities and social equity and justice. His widened vision of development guarantees distributional equity and expands not only labour’s productive abilities, but also contributes to the expansion of human capabilities and the quality of life.⁸⁷

Sen vividly describes his broad concepts of freedom and capability in his several publications. His exclusive focus on human wellbeing and quality of life (rather than income or commodities) and on an elaborate understanding of development that removes unfreedom and extends substantive freedoms in a context-sensitive manner entail a broadened understanding on the rights of labour and on the societal and institutional responsibilities and obligations to ensure

⁸⁵ *Ibid* at 125.

⁸⁶ Sen, Development as Freedom, *supra* note 2 at 112-145.

⁸⁷ *Ibid*.

the fulfillment of those rights.⁸⁸ According to Sen, a commitment to addressing the possible expansion of human freedom belongs to states and to other organizations within and beyond states. He writes,

[i]t is, for example, a shared responsibility of the society that the system of labour bondage, where prevalent, should end and that bonded labour should be free to accept employment elsewhere. It is also a social responsibility that economic policies should be geared to providing widespread employment opportunities on which economic and social viability of people may crucially depend.⁸⁹

It has been argued that Sen's capability approach only accommodates "substantive freedoms" and thus cannot deal with the "process aspect of freedom."⁹⁰ According to Fudge, the capability framework has an individualistic approach that "tells us little or nothing about the fairness or equity of the processes involved or about the freedom of citizens to invoke and utilize procedures that are equitable." She continues, "Sen's account does not tell us much about either the distribution of power in a society, or the type of deliberative mechanisms needed to determine the set of human functionings that a society values."⁹¹

In my view, it is not possible to confine capability enhancement within individual aspirations and opportunities. It is necessary to connect these aspirations and opportunities, with surrounding economic and social conditions and institutions, and consequent power relationships. For example, when applied to labour rights, freedom from forced or child labour (at an individual level) cannot be realized without challenging the socio-political and economic

⁸⁸ Amartya Sen, *The Idea of Justice* (Cambridge: The Belknap Press of Harvard University Press, 2009) [Hereinafter referred to as "Sen, *Idea of Justice*"].

⁸⁹ Sen, *Development as Freedom*, *supra* note 2 at 288.

⁹⁰ Judy Fudge, "The Cartography of Transnational Labour Law: Protection, Scale and Symbolism" in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York Routledge, 2011) 299 at 309.

⁹¹ *Ibid.*

institutions and/ or processes that allow the continuation of these unfreedoms. Additionally, the capability to influence decision-making for labour rights through, participating in unions, national political processes or building transnational strategies, is inevitably tied with particular socio-political relations and economic realities.

Sen refutes the idea that capabilities are concentrated on individuals by claiming that “deep and pervasive” “social influence” frames not only the contents of a person’s values, but also the “operation” of the value.⁹² The power of capability enhancement lies in underscoring the importance of substantive freedoms that allow an individual (a labour, for example) to pursue multiple objectives, such as “freedom (of association/from forced labour, discrimination and child labour), well-being (at the work place and through social protection), social change (the political and technical role of trade unions, employers’ associations, social dialogue institutions).”⁹³ The essential interconnections between individuals, institutions and society becomes so apparent in realizing and continuing capability enhancement and challenging the existing notions of development that these negate the possibility of an individualistic approach.

Sen also strongly resists using his capability approach in all-or-none form and is very clear in acknowledging that the “possibility of using an explicitly freedom-based approach may be relatively limited. Yet, even there it is possible to make use of the insights and informational interests involved in a freedom-based approach – without insisting on ignoring other procedures when they can be, within particular context, sensibly utilized.”⁹⁴ Incorporating a wider range of “informational bases” such as “utilitarianism’s interest in human well-being, libertarianism’s involvement with the processes of choice and the freedom to act and Rawlsian theory’s focus on

⁹² Sen, *Idea of Justice*, *supra* note 88 at 244-247.

⁹³ Anne Trebilcock, “Using Development Approaches to address the Challenge of the Informal Economy for Labour Law” in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Portland: International Institute for Labour Studies, 2006) 63-86.

⁹⁴ Sen, *Development As Freedom*, *supra* note 2 at 86.

individual liberty and on the resources needed for substantive freedoms,” the focus of the capability approach is not on “achieved functionings,” but on the “freedom and opportunity” to choose a particular kind of life.⁹⁵ As a result, Sen’s capability approach accommodates a wide informational base (consisting of both choice and opportunity) with which to evaluate a particular social or economic policy or system, rather than providing a “specific formula” for using the information or for making policy decisions. The central idea is to use a “broad informational base” in a context-sensitive manner to analyze and assess the importance or necessity of specific social and economic policies and institutions and to challenge or shape the responsibilities and obligations of societies and institutions.⁹⁶

Offering a broader informational base, the capability approach allows one to question the existing power relationships within and between societies and nations and helps in evaluating whether a particular institutional framework or even its process allows for the facilitation and enhancement of human capabilities and freedom. The proposed model TLM’s reliance on the capability enhancement approach entails significant changes in prevalent labour governance. I explain some significant changes below.

First, with respect to labour rights, TLM acknowledges the increasing mobility of capital, the superior capacity of capital to set the prices and standards of production (either directly or indirectly) and nation states’ incapacities or failures to provide the redistributive functions of labour laws. Relying on capability enhancement, the proposed TLM finds it more feasible to search for effective labour regulation at a transnational level and specifically seeks to avoid

⁹⁵ *Ibid* at 85-86.

⁹⁶ Sen, *Idea of Justice*, *supra* note 88 at 231-234.

binary solutions, as the latter concentrates on reforms in national and/or international labour/trade regulation.⁹⁷

Second, the capability enhancement approach challenges the subordinated role of labour as a factor of production. In a market-based system, corporate codes and voluntary standards treat labour concerns as equivalent to other production processes such as environmental impacts and tend to correct poor work conditions, only to the extent, that they are cost-effective and enhance business opportunity and reputation. This restrictive focus is significantly different from the traditional functions of national labour laws, which used to offer necessary protection, improved bargaining capacity, and most importantly dignity to workers, by blending public policy and distributional questions into law-making.⁹⁸ Focusing on capability enhancement, TLM seeks to elevate the role of labour in trade or economic governance sites and prioritizes social or distributional questions in the design and working of both labour and trade regulatory policies and institutions.⁹⁹ It also recognizes the essentiality of the collective rights of labour. For

⁹⁷ Bob Hepple, *Labour Laws and Global Trade* (Oxford: Hart Publishing, 2005) [hereinafter referred to as "Hepple, Labour Laws and Global Trade"] at 266-275; David Trubek, Jim Mosher & Jeffrey S Rothstein, "Transnationalism in the Regulation of Labour Relations: International Regimes and Transnational Advocacy Networks" (2000) 25:4 L & Soc Inquiry 1187-1211. For a recent analysis that lauds the emerging role of the ILO in providing dialogical and coordination functions to strengthen public-private labour governance mechanisms, see Janelle M. Diller, "Pluralism and privatization in transnational labour regulation: Experience of the International Labour Organization" in Adelle Blackett & Anne Trebilcock, eds., *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar Publishing, 2015) 329-342. According to Diller, some of the benefits of this dialogic relationship include strengthening domestic labour institutions and empowerment of workers, increased market access and 'greater compliance' with international labour standards. However, Diller hesitates as to its possible long-term impact in improving domestic regulatory capacity. The questions of how effective these 'norm-setting', supervisory or 'regulatory actions' will be to counteract the issue of competitiveness still remain.

⁹⁸ Adelle Blackett, "Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries" in John J Kirton & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Aldershot, UK: Ashgate, 2004) 121-133.

⁹⁹ Some scholars identify the necessity for centrality of distributive justice beyond borders within regional and global economic and trade cooperation mechanisms. Stressing on the huge inequality in wealth and income between nations and within nations, these analyses confirm that without accommodating distribution rules, net economic gains from increasing trade would not necessarily improve working conditions or entitlements of workers. See Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York: Routledge, 2011); Hepple, *Labour Laws and Global Trade*, *supra* note 97; Jansen M & E Lee, *Trade and Employment: Challenges for Policy Research* (Geneva: World Trade Organization and International

example: capability enhancement of labour depends on realizing both individual freedoms (freedom from forced labour, right to living wage) and collective freedoms (freedom of association); interconnection between individual and collective freedoms not only accommodates a wider variety of labour rights, but also paves the way for broader and more substantial social and political change by challenging the unequal power relationship between capital and labour.

Third, with a capability-enhancement approach, TLM requires not only standard-setting at an international level and/or the independent inspection of labour standards, but also requires continued attention to building mechanisms that accommodate multiple yet overlapping social or distributional issues in a context-sensitive manner.¹⁰⁰ It acknowledges the changing realities of the developmental process and the challenges faced by developing economies in adopting the necessary (re)distributive mechanisms. It opposes the analyses stating that there is no correlation between *racing towards the bottom* in respect of labour rights and increasing levels of investment. The “varieties of capitalism” approach establishes a link between fundamental labour rights and economic development by proving that the “institutional advantages” offered by the particular market economy (coordinated or liberal) play a role in shaping the preferences of investors; the investors do not just exclusively focus on social regulations of the investment-receiving state.¹⁰¹ It is often quoted that “competition did not prevent the main industrialized countries of Europe from adopting the first labor laws.”¹⁰²

Labour Office, 2007); B De Souza Santos & CA Rodriguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press 2005).

¹⁰⁰ Hepple cites the interrelatedness between income, opportunity, and capability by stating eloquently that “lack of income may make it impossible to acquire capabilities and lack of capabilities affects the capacity to earn a living.” Hepple, *Labour Laws and Global Trade*, *supra* note 97 at 19.

¹⁰¹ P Hall & D Soskice, eds, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (New York: Oxford University Press, 2001).

¹⁰² “*Standard Setting and Globalization: Report of the Director-General*” (Geneva: ILO, 1997) 85th sess, International Labour Conference.

However, the varieties of capitalism approach compares investor preferences for particular institutional advantages offered by major industrial economies and do not fully encompass the developmental challenges and realities faced by developing countries. At the time that European countries started their labour-intensive industrialization process, they benefitted hugely from cheap supplies of raw materials and labour from their colonies. Preferential access to the market of the colonies for products manufactured in metropolitan territories allowed them to “build up embedded liberalism policies.”¹⁰³ At the same time, open migration to the US actually allowed the absorption of their surplus labour. For low-income developing countries who are aspiring to develop, the situation is very different. These countries never had the privilege of building their comparative institutional advantages beyond supplying raw materials and low-cost labour during the period of colonial occupation.¹⁰⁴ Additionally, although goods and capital achieved mobility through liberalized trade, this is not the case for the movement of persons; these countries have to absorb their abundant factors of production in their export economy, which is dependent either on commodity export or on low-skill manufacturing processes.¹⁰⁵ Fluctuations in commodity pricing or the emergence of competitors for low-cost, low-skill manufacturing profoundly affect not only the economies of poor developing countries but also the lives, security and livelihood of millions.

The changing realities under which economic development needs to be pursued thus necessarily involve not only substantive distributional questions such as minimum labour

¹⁰³ Adelle Blackett, "Trade liberalization, Labour Law and Development: A Contextualization" (2007) Discussion Paper Series No. 179 ILS.

¹⁰⁴ Comparing developing countries' path to development with currently developed states, some analyses cast doubt on the former's capacity to build their institutional advantages and catch up with industrialized partners due to premature exposure to liberalized market. See Mario Cimoli, Giovanni Dosi & Joseph E Stiglitz, eds, *Industrial Policy of Development: The Political Economy of Capabilities Accumulation* (Oxford: Oxford University Press, 2009); Ha-Joon Chang, *Kicking Away the ladder: Development Strategy in Historical Perspective* (New York: Anthem Press, 2003); Joseph Stiglitz & Andrew Charlton, *Fair Trade For All: How Trade Can Promote Development* (Oxford: Oxford University Press, 2005).

¹⁰⁵ Arthur Lewis, *Growth and Fluctuations, 1870-1913* (London: George Allen & Unwin Ltd., 1979).

standards that should apply to trade or economic cooperation arrangements at a global, regional or bilateral level, but also procedural means of addressing overlapping distributional concerns, such as channeling benefits towards disadvantaged social groups, narrow regulatory space for developing countries to address labour problems, and their inadequate capacity to address labour regulatory problems and to fund necessary institutional development.

Fourth, with a capability-enhancing approach, TLM emphasizes strong activism from divergent actors and on the formation of effective transnational advocacy networks (TANs) to address labour conditions.¹⁰⁶ With specific examples from TSIs, I have argued that non-state actors not only influenced transnational norm making (setting safety standards above national standards) but also increased visibility of the safety initiatives and mobilized pragmatic methods to enforce those norms. Though the strategies of these actors incorporate both “confronters” and “collaborators,” they still maintain a greater preference for negotiation with corporate retailers and brands.¹⁰⁷ Ultimately, all their strategies resulted in specific commitments with detailed

¹⁰⁶ Margaret Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*. (Ithaca, NY: Cornell University Press, 1998).

¹⁰⁷ A recent analysis by Amengual finds that despite problems of resources, political interference and patronage, linkages with societal groups can create conditions for better enforcement of labour rights. Even in an imperfect regulatory framework, through strategies such as mobilizing resources for enforcement and sharing information, societal groups can construct a pro-enforcement coalition and play a vital role in improving labour standards. See M Amengual, "Pathways to Enforcement: Labor Inspectors Leveraging Linkages With Society in Argentina" (2014) 67:1 ILR 3-33; Cesar A Rodriguez-Garavito, "Nike's Law: The Anti-sweatshop Movement, Transnational Corporations, and the Struggle Over International Labor Rights in the Americas" in B De Souza Santos & Cesar A Rodriguez Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 64 [hereinafter referred to as “Rodriguez-Garavito, Anti-Sweatshop Movement”]. Rodriguez-Garavito argues that diverse transnational struggles and strategies might give rise to an effective *cosmopolitan legal framework* to confront hegemonic neo-liberal economic and trade regulation; yet, success of this cosmopolitan labour law depends on how effectively these *counter-hegemonic* legal and political strategies are framed and applied. For a recent discussion on how transnational activists network acted as an “intermediary” between workers and consumers to address international and national labour governance problems and utilized the threat of punishment from consumers to redefine the evolving nature of transnational private labour regulation, see Kevin Kolben, "Transnational private labour regulation, consumer-citizenship and the consumer imaginary" in Adelle Blackett & Anne Trebilcock, ed., *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar Publishing, 2015) 361-373. Kolben argues that though the “imagined relationship” between consumers, workers and primary and supplier companies became a new feature of international economic governance, it carries both “potential and risk” for “global labour justice.”

timelines in order to upgrade safety standards of garment producing factories in Bangladesh. TLM emphasizes transnational actors' strong negotiation and monitoring power, the power to engage corporate retailers and brands situated in different parts of the world and their capacity to pursue diverse strategies, devise innovative structures and enforcement mechanisms to address country or sector specific labour concerns.

In summary, the proposed linkage model acknowledges the asymmetrical power relationships within which developing economies have to pursue their development path, seeks to accommodate a broader conceptualization of the social, and proposes a new form of transnational corporate responsibility to ensure both effective labour governance and improved labour productivity. I do not intend to describe a particular model of a perfect linkage system in this analysis; rather my focus is on identifying some crucial features that can substantially contribute to effective labour governance at a transnational level. Each feature will be used to assess the approaches of existing TSIs. The idea is to broaden the informational base with which future linkage systems (focusing on labour governance) can be shaped and evaluated. I elaborate the features below.

5.4.1.1 A Broad Conceptualization of the Social

Similar to the concept of social regionalism, the mutually enhancing relationship between social and economic policy remains the fundamental basis of the proposed TLM.¹⁰⁸ Though the

¹⁰⁸ Instead of simply acknowledging the link between the social and the economic or focusing on the social dimensions of economic integration, social regionalism concept helps to strengthen capacity of variety of actors in the process of norm-making (hard or soft) and to identify their contribution to development of institutional frameworks at a local, regional or global level. The objective of this concept is to accommodate distributive justice as an inherent and essential part of economic and trade cooperative arrangements. In relation to labour, social regionalism places heightened emphasis on increasing their political and institutional power instead of confining labour entitlements to some abstract or generalized rights. It endorses

interaction of social and trade policy is the main platform for the concept of social regionalism, a distinctive emphasis is placed on the interrelatedness and essentially inherent relationship between the social and the economic. Social regionalism focuses on a wide variety of actors in order to utilize the distributive potential of the market at different economic or trade cooperation sites. Yet, the specific idea of freedom and capability enhancement of labour both as a component and objective of the SD concept remains unexplored. As an objective of linkage, the enhancement of freedom and capability of labour provokes a broader conceptualization of the social as the starting point. Instead of confining labour entitlements to some abstract and generalized fundamental labour rights, TLM endorses expanded conceptual understandings both for labour and labour rights. It insists on the essential connection between formal, semi-formal and informal labour. For labour rights, it insists on both fundamental and redistributive rights, including the right to a living wage, and recognizes that both are essentially interlinked in ensuring labour welfare.

Despite robust commitments to ensuring the safety of workers, the corporate safety initiatives for Bangladesh RMG workers cover a narrow range of workers who have a formal employment relationship with brand name supplier companies. These initiatives cover only 1894 factories out of the 5000-6000 garment factories in Bangladesh.¹⁰⁹ Subcontractors to the brand suppliers who do not have direct and formal contractual relationship with brands or retailers are excluded from both corporate safety initiatives. Such a narrow focus ignores the socio-economic reality of the production process in low-income countries where semi-formal or informal workers

not only the fundamental rights that enable workers to adapt with the market realities, but also rights that are redistributive. It also searches for rights and entitlements that empower workers, both economically and politically. See Blackett & Levesque, *supra* note 99.

¹⁰⁹ This number is estimated at a recent report prepared by New York University Stern School of Business. See Lobowitz, *Business as Usual Not an Option*, *supra* note 7 at 39. Adding the number of factories currently covered by both the Accord and the North American Alliance, the total becomes 2225. Some retailers have joined later and brought some more suppliers within the coverage of both safety initiatives.

constitute a high percentage of the total labour force and indirect sourcing through sub-contracting is a regular practice.¹¹⁰

Though retailers and brands do not directly employ these semi-formal, low-cost, and low-entitlement workers or allow unauthorized subcontracting, a connection exists between the increase in the margin of their profit and usage of these workers in their supply chains. Most retailers and brands have sufficient *defacto* knowledge of the supplier's inability (in terms of number of machines and employees) to meet their large orders and of their use of sub-contractors. Yet, retailers avoid a direct contractual relationship with sub-contractors in order to manage fewer contracts and to profit from the lesser price of bigger orders. They continue to insist on the lowest possible price without considering its direct or indirect impact on working conditions.¹¹¹ Using multiple and cheaper indirect sourcing outlets through sub-contracting and re-subcontracting, supplier factories manage a large volume of orders with low prices. On the other hand, sub-contractors compete for orders with a slim margin of profit and are least concerned with workplace or labour conditions.¹¹² The narrow coverage of the corporate TSIs reflects a market-centric approach and excludes a large number of workers who though have no formal

¹¹⁰ *Ibid.*

¹¹¹ For an analysis that connects corporate pricing policy with work conditions see Mark Anner, "Workers' Power in Global Value Chains: Fighting Sweatshop Practices at Russell, Nike and Knights Apparel" in Peter Fairbrother, Marc-Antonin Hennebert & Christian Leveque, eds, *Transnational Trade Unionism: Building Union Power* (London: Routledge, 2013) 23-41 [hereinafter referred to as "Anner, Workers' Power in Global Value Chains"]; Mark Anner & Jakir Hossain, "Multinational Corporations and Economic Inequality in the Global South: Causes, Consequences, and Countermeasures" (paper delivered at the 9th Global Labour University Conference, Berlin, 15-17 May 2014); Edward Bearnot, "Bangladesh: A Labour Paradox" (September, 2013) 30:3 World Pol'y J 88-97 [hereinafter referred to as "Bearnot, Bangladesh: A Labour Paradox"]; Dorothee *et al*, Closing Governance Gaps, *supra* note 27 at 12-14. Dorothee, Labowitz & Banerjee describe how indirect sourcing is regularly tolerated by brands despite their written policy of zero tolerance for illegal sub-contracting. The authors find significant legitimacy deficits in both corporate safety initiatives. For a safe and sustainable garments sector, they articulate the need for a coordinated multi-stakeholder approach.

¹¹² Vikas Bajaj, "Doing Business in Bangladesh" *The New York Times* (14 September 2013) online: <www.nytimes.com/2013/09/15/opinion/sunday/doing-business-in-bangladesh.html>.

contractual relationship with the retailers, but are connected to formal supplier companies by being at the edge of the garment supply chain.

Contrasting the market-centric approaches to linkage and taking the ILO's RMG Programme in Bangladesh as an example, TLM prescribes an alternative linkage mechanism where freedom or capacity enhancement of workers is neither based on their connection to export markets nor confined to addressing selective labour governance issues. TLM recognizes that problems of the labour force are diverse and need to be viewed beyond the lens of formal industrial relations.¹¹³ Though workplace safety and dangerous working conditions due to absence of fire and building safety procedures are priorities and require urgent attention, it is necessary to contextualize labour governance initiatives to encompass diverse labour problems. For example, approximately 82% of garments workers in Bangladesh are women. Yet, the TSIs are confined to issues like fire and building safety and disregard pay differences, unequal treatment and even sexual harassment issues that are causally related to their physical safety and wellbeing.¹¹⁴ A recent report by Human Rights Watch illustrates how workers especially women

¹¹³ Relying on Sen's idea, Hepple, proposes for reorienting global labour law to "facilitate equality of capabilities" which means "designing an optimal system of regulation to reduce inequality." According to him, the challenge of global labour law lies in addressing questions of social justice by providing an "essential framework" for (re)distribution of benefits of trade towards disadvantaged, weak and poor social groups. For facilitating "equality of capability," he prescribes three important routes. First, he prescribes for a broad understanding of "productive work," which is not limited to paid work. Hepple draws attention to the ILO's "Decent Work Agenda" launched in 1999 which aims to promote equality and fair treatment amongst employed and unemployed, formal and informal workers and equal distribution of income and opportunity amongst "men and women to obtain decent and productive work, in conditions of freedom, equity, security and human dignity." Second, he argues for a broadened understanding of labour rights, by prescribing that ILO core conventions should be "enlarged and updated to include, for example, health and safety and labour inspection." Third, he proposes for independent monitoring of corporate codes and effective "national and international complaints mechanisms" for developing an effective "culture" of corporate social responsibility. See, Hepple, *Labour Laws and Global Trade*, *supra* note 97 at 18-19, 63 & 271-275.

¹¹⁴ Nidhi Khosla, "The Ready-Made Garments Industry in Bangladesh: A Means to Reducing Gender-Based Social Exclusion of Women" (2009) 11:1 J Intl Women's Studies 289 online: <<http://vc.bridgew.edu/jiws/vol11/iss1/18>>. The author argues that although social exclusion of women workers has reduced due to economic independence and higher social standing, sexual harassment and work exploitation still continue. In unionized garments industries, male workers dominate the unions, and women workers' concerns such as childcare, sexual harassment, safe transportation at night etc. get the least priority. For technology intensive works, male workers get priority and receive higher pay. Sexual harassment

face sexual abuse or threats while trying to organize or join factory-level unions.¹¹⁵ It is necessary to realize that low wages, a high level of inflation without wage increase, long working hours, child labour, forced labour, sexual harassment, unequal pay for women, and the freedom to form effective unions are the pre-conditions that determine the power or ability of workers to refuse to work in a dangerous place.

The potential to identify labour safety issues and violation of labour rights increases with the government's enhanced monitoring capacity (through recruiting adequate and qualified factory-level inspectors) and/or transparent and independent inspections (through engaging the ILO). However, it is not just theoretically enhancing the level of compliance with fundamental labour standards that matters in sustaining the process of effective labour governance. Without realizing the integral connections between fundamental and redistributive rights of labour, the effectiveness of labour governance would be judged by the presence of independent monitoring of labour rights or by data on compliance or by the presence of an independent and confidential worker complaint mechanism. Achieving better work conditions in a safe place depends on identifying the root causes of poor compliance and remedying them. The following examples clarify the integral relationship between fundamental and redistributive rights of labour.

First, for Bangladesh RMG factories, it is alleged that inspections and audits by corporate retailers may not offer any productive change, as some suppliers maintain two different books relating to wages, working hours, work conditions and even for indirect sourcing policies. In

continues more for informal jobs where the victims fear job loss and retaliatory violence. Bangladesh labour law prohibits discrimination on the basis of sex, colour and creed, yet reported incidents of violence against female garment workers have increased. See DM Siddiqui, "Sexual Harassment of Industrial Workers: Strategies for Intervention in the Workplace and Beyond" (2003) Centre for Policy Dialogue, Dhaka, CPD-UNFPA Publication Series No 26.

¹¹⁵ A recent report from Human Rights Watch also elaborates that male and female workers were either given extra work so that they could not arrange time to meet other colleagues or received physical threats or threats of removal or dismissal from employment. *Supra* note 41.

such a situation, it is difficult to monitor compliance with the retailers' suggestions that prohibit unauthorized subcontracting.¹¹⁶

Second, most of the brands or retailers for whom suppliers and sub-contractors were producing at Rana Plaza and Tazreen Fashions had detailed corporate codes of conduct. Yet, none could stop forced work, even after the fire alarms had begun at Tazreen or after visible cracks appeared in the building columns of Rana Plaza.¹¹⁷ Some retailers and brands admit that factory-level inspections only cover *factory-floor* safety issues (such as the presence of first aid kits, worker training on machine safety, and the presence of a doctor or nurse) and do not cover the *structural soundness* of the factory building.¹¹⁸

Third, the usage of the North American Alliance-established hotline depicts the inherent connections between divergent labour rights. The hotline technology is established to allow workers to express their safety concerns directly to the retailers. However, it is reported that workers use it to communicate their concerns on working hour and wages, rather than concerns with physical safety.¹¹⁹

Fourth, nowhere is the issue of linkage between fundamental and redistributive rights is more apparent than in Cambodia. In the Thirteenth Synthesis Report of Better Factories Cambodia, the ILO reports that "child labour, discrimination and freedom of association violations persisted in Cambodia even after 12 years of auditing."¹²⁰

¹¹⁶ Richard Bilton, "Bangladeshi Factory Workers Locked in on 19-hour shift" *BBC News* (23 September 2013) online: <www.bbc.co.uk/news/business-24195441%3E>. See Labowitz, Business as Usual Not an Option, *supra* note 7 at 29.

¹¹⁷ Rich Appelbaum & Nelsen Lichtenstein, "An Accident In history" (2014) 23:3 New Labor Forum 58-65.

¹¹⁸ Syed Zain Al-Mahmood, Christina Passariello & Preetika Rana, "The Global Garment Trail: From Bangladesh to a Mall Near You" *The Wall Street Journal* (3 May 2013) online: <www.wsj.com/articles/SB10001424127887324766604578460833869722240>.

¹¹⁹ Alliance 18 Month Update - March 9, 2015, Alliance for Bangladesh Worker Safety, available online at <bangladeshworkersafety.org>.

¹²⁰ Labowitz, Business as Usual Not an Option, *supra* note 7 at 37. A recent nationwide strike by Cambodian garment workers demanding an increase of wages from US \$100 to US \$160 strikingly reveals the integral

Finally, the challenge of getting effective unions at the factory-level, remains acute in Bangladesh despite labour law reform. National level labour organizations are interested in involving labour in the RMG sector, but there are “few factory-level organizations in the true sense of a trade union operation.”¹²¹ Although the amendment of the *Bangladesh Labour Act* in 2013 eased the formation of factory-level unions and there is an explicit provision in the Act that outlaws “unfair labour practices” (such as threats, dismissal or removal from employment because of union activities),¹²² anti-union abusive practices by factory owners or managers are still prevalent. Workers are either threatened not to join or support the union, or management-chosen worker representatives form “yellow unions.”¹²³ This absence of real unions weakens labour’s power to demand work entitlements or workplace safety.¹²⁴ On the other hand, the absence of a living wage and redistributive rights suppresses the voice of labour by corrupting or intimidating union leaders and/or activists. An express or implicit threat of losing ones’ job or

connection between fundamental and redistributive rights and the right to a living wage. With five workers dead, thirty injured and twenty-three arrested by government law enforcing agencies, repeated labour movements for a living wage have met strong force from government. Asian Floor Wage Alliance, an NGO for formulating union-based wage strategies for Asian garment workers, estimates that living wage in Cambodia should be US \$238 and current minimum wage (US \$100) does not allow workers who are mostly women to fulfill their basic needs. Responding to the labour movements and brutal government response, only a limited number of brands sourcing from Cambodia have sent a letter to Cambodian authority stating their opposition to all forms of violence and for commencing negotiation with the concerned parties. The brands have even failed to refer to the labour rights of striking workers. According to local labour rights activists, the most efficient way to help the workers is to continue sourcing from Cambodia with a higher price. See Marta Kasztelan, "Striking a Balance in Cambodia: International Brands Can no Longer Ignore Human Rights Abuses in their Supply Chains" *The Diplomat* (11 January 2014) online: <thediplomat.com/2014/01/striking-a-balance-in-cambodia/>; <www.asiafloorwage.org>; <www.cleanclothes.org/livingwage/real-lives-of-cambodian-workers>. For an extensive analysis covering poverty-level wages and poor working conditions for garment workers in Eastern European countries and in Asia see Christa Luginbühl & Bettina Musiolek, *Stitched Up: Poverty Wages for Garment Workers in Eastern Europe and Turkey* (Clean Clothes Campaign, 2014).

¹²¹ Ahmed, Greenleaf & Sacks, Paradox of Export Growth, *supra* note 7 at 9.

¹²² According to section 195(d) of the *Bangladesh Labour Act*, “no employer shall, dismiss, discharge, remove from employment or threaten to dismiss, discharge or remove from employment a worker or injure or threaten to injure him in respect of his employment by reason that the worker is or proposes to become, or seeks to persuade any other person to become a member or officer of a trade union...” Translated from the Bengali version available online at Department of Labour, Ministry of Labour and Employment <<http://dol.gov.bd>>.

¹²³ *Supra* note 41. Also see Bearnot, Bangladesh: A Labour Paradox *supra* note 111.

¹²⁴ Lance Compa, "After Bangladesh, Labor Unions Can Save Lives " *The Washington Post* (26 May 2013) online: <www.washingtonpost.com/opinions/after-bangladesh-labor-unions-can-save-lives/2013/05/26/77a8809c-c483-11e2-914f-a7aba60512a7_story.html>.

even life demoralizes any potential organized movement in support of unionized demands. Allegations of detention, killing and torture of the trade union representatives and general workers who organize to demand better pay or improved work conditions are widespread.¹²⁵ Bearnot mentions tellingly,

[u]nions are banned from having members who are not current employees of the factory and from hiring external advisers to help administer benefits, organize collective action, or negotiate. This empowers factory owners to destroy unions by simply firing workers who are leaders or members, and stalls the ability of a union to provide advice, support, and services to its members by starving it of external support.¹²⁶

These illustrations depict not the failure of factory-level independent monitoring system, but the integral relationship between fundamental and redistributive rights of labour. A robust approach to enhance the freedom and capability of labour requires not a narrow focus on increased inspection capacity in fire or building safety matters for formal workers of major exporting firms, but attention to the very pre-conditions that deny effective inspections, involvement of worker's representatives in labour governance mechanism and organizing and bargaining rights of labour.

¹²⁵ A labour activist demanding better pay was found murdered. It is alleged that intelligent services tortured and killed him and left his body outside the city. See Julfikar Ali Manik & Vikas Bajaj, "Killing of Bangladeshi Labor Organizer Signals an Escalation in Violence" *The New York Times* online: <http://www.nytimes.com/2012/04/10/world/asia/bangladeshi-labor-organizer-is-found-killed.html?_r=0>.

¹²⁶ Bearnot, Bangladesh: A Labour Paradox *supra* note 111.

5.4.1.2 Strengthened Forms of Transnational Corporate Responsibility (TCR)

The second pillar of the TLM is its reliance on a strong form of TCR. Kerr, Janda and Pitts, describe a fundamental shift in the “voluntary” nature of corporate responsibility. The authors argue that despite containing both formal and informal rules or mechanisms, practical impacts of “soft law” and “quasi-regulatory initiatives” have transformed the nature of corporate responsibility; it has become a “legal concept” and it is possible to undertake its “legal analysis.”¹²⁷ One practical example of such transformation is the TSIs. The safety initiatives prescribe some responsibilities, which to some extent supersede the existing boundaries and forms of corporate responsibility. Beyond addressing the direct impacts of business activity, or protecting direct and supply chain employees or individuals directly harmed by their operation, the corporate safety initiatives tackle regulatory deficiencies and failures that can primarily be attributed to the national government and /or to the producing firms. This broad and strengthened notion of TCR attempts to address the complex socio-political and economic processes and institutions that, though indirectly or remotely connected with corporate sourcing or investment policies, continuously contribute to marginalize social issues and weaken necessary social development. For example, instead of shifting responsibility to the immediate supplier companies that have forced the factory workers at Rana Plaza to work in the dangerous building or to the national government whose regulatory and inspection failures have caused the illegally-constructed building to operate as an industrial site despite visible cracks, the TSIs created a

¹²⁷ See Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (LexisNexis, 2009); Anne Trebilcock, "Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights" in Adelle Blackett & Anne Trebilcock, eds., *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar Publishing, 2015) 93-110.

novel form of corporate responsibility that connects multiple businesses and other non-state actors to address the indirect institutional influences of corporate activity and operations.¹²⁸

Moving from the negative duty of not to harm, the corporate safety initiatives for the Bangladeshi RMG sector undertake some positive and constructive duties, such as drafting inspection standards, mandatory financing for inspections and establishing a thorough safety mechanism. Though in the area of private standard-setting, various corporate responsibility programmes are already developing minimum social standards with strict deadlines, most of these institutional changes or capacity-building projects are confined to address changes within “individual companies or networks.”¹²⁹ The corporate TSIs, in contrast, address broader institutional changes that go beyond an individual company or a particular network. Some examples of such institutional changes are: the corporate practice of bargaining (i.e. sourcing and pricing policies), public reporting, corporate responsibility in strengthening labour associations and improving OHS awareness. Of course, in the TSIs there is a narrow focus on safety improvement; but by committing corporate retailers and brands to a certain institutional framework, there emerges a novel form of transnational responsibility that accommodates the pressures and expectations of a wider range of political and social actors (consumers, unions and

¹²⁸ For corporate responsibility, Teubner identifies an emerging regime of *network share liability* where *pro-rata liability* is attributed to the network for damages not clearly attributable to one of the participants, but can certainly be connected to the network as a whole. See G Teubner, "Hybrid Laws: Constitutionalising Private Governance Networks" in K Winston R Kagan, ed, *Legality and Community* (Berkeley: California University Press, 2000) 311-331.

¹²⁹ See Kate McDonald, "Re-thinking "Spheres of Responsibility": Business Responsibility for Indirect Harm" (2011) 99 J Bus Ethics 560. International Framework Agreements (IFAs) reached between individual corporations and global union federations recognize national unions of supplier companies and thus effectively cover larger number of suppliers. These agreements usually refer to workers' right to freedom of association and other fundamental rights. Workplace safety, minimum order volume or pricing policies remain outside the coverage of these collective agreements. Also there is no effective dispute resolution or enforcement mechanism in these agreements. See Michael Fichter & Dmitris Stevis, "International Framework Agreements in the United States: Escaping, Projecting, or Globalizing Social Dialogues?" (2012) 33 Comp Lab L & Pol'y J 667; Catia Gregoratti & Doug Miller, "International Framework Agreements for Workers' Rights? Insights from River Rich Cambodia" (2011) 2 Global Lab J 84; Owen Hernstadt, "Are International Framework Agreements a Path to Corporate Social Responsibility?" (2007) 10 U Penn J Bus & Employment 187.

civil society actors) that provokes the reconstruction of voluntary codes of conduct into mandatory responsibilities. This emerging approach to transnational labour regulation not only signifies a transition towards legal responsibility,¹³⁰ but also offers itself as a useful tool in the struggle against the pressures of *hegemonic globalization*.

The proposed linkage model builds on this reconstructed form of TCR to address both regulatory and distributional problems of labour. For this purpose, I borrow from the “United Nations Guiding Principles on Business and Human rights.”¹³¹ The guiding principles are based on Professor Ruggie’s “protect, respect, remedy” framework which seeks to address governance gaps in addressing and remedying corporate-related human rights abuses. His framework is comprised of three principles: “the State duty to protect against human rights abuses by third parties, including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.”¹³² Ruggie elaborates the nature of the corporate responsibility to respect; first, responsibility exists independently of states’ duties; second, instead of doing no harm, companies have to undertake positive steps to prevent harm; third, companies have to exercise due diligence in preventing and addressing human rights violations resulting from their business relationships or activities; fourth, avoiding complicity for human rights violations, which companies could reasonably be expected to know under the circumstances, is essential.

Relying on this expanded concept, TLM proposes a stronger form of corporate responsibility that can accommodate a broad conceptualization of the social. Effective corporate

¹³⁰ Anner, Workers’ Power in Global Value Chains, *supra* note 111; Mark Anner, Jennifer Bair & Jeremy Blasi, “Toward Joint Liability In Global Supply Chains: Addressing The Root Causes of Labor Violations in International Subcontracting Networks” (2013) 35:1 Comp Lab L & Pol’y J 1. [Hereinafter referred to as “Anner, Blair & Blasi, Joint Liability in Global Supply Chains”].

¹³¹ *Supra* note 4.

¹³² See *supra* note 4. UN Guiding Principles no. 11-24 elaborate the corporate responsibility to respect.

commitment is required for the necessary technical, financial and other assistance for economic empowerment of labour, for improving productive capacity of labour, and for strengthening the organizational capacity of labour. I discuss these below.

A. Economic Empowerment through Improving Corporate Investment or Sourcing Policies

TLM demands effective corporate sourcing and investment policies to promote economic empowerment of labour. TLM connects the improvement of factory working conditions and workers' wage levels with sourcing and pricing practices of supply chains, and acknowledges that without changing retailers' capacity to put downward pressure on prices and their freedom to source from the supplier quoting the lowest price, bare commitment to CSR would be another form of showcasing labour rights.¹³³ TLM demands binding corporate commitment with detailed analysis. For example, it requires a detailed description on the standard of a living wage or on the minimum floor of rights that the corporate codes intend to protect. Recent initiatives by some corporate retailers, such as H&M, Puma, Nike and Adidas, to raise wages in their supplier factories provide a crucial example on the connection between sourcing practices and workers' wages and working conditions.¹³⁴ By establishing a strong sourcing relationship (a commitment to buy 100% of supplier's products for five years) and ethical pricing, H&M, one of the largest global apparel retailers, intends to use these incentives to ensure workplace safety and a fair

¹³³ See Anner, Workers' Power in Global Value Chains, *supra* note 111.

¹³⁴ Sarah Labowitz, "H&M has Given Suppliers a Major Incentive to Actually Pay Workers More" *Quartz* (4 December 2013) online: < qz.com/153659/hm-just-handed-suppliers-major-incentive-to-actually-pay-workers-more/ >. For an illuminating discussion on why and how multinational corporations should finance "global fund" mechanism to promote labour and environmental standards see the Afterword by Arnaud Zacharie, "Linking Trade to Social and Environmental Standards: An Answer to the Challenges of Globalization" in Olivier De Schutter, *Trade in the Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (Portland, Oregon: Hart Publishing 2015) 174-186.

living wage for the workers employed with their strategic suppliers.¹³⁵ Initially, H&M intends that its roadmap towards a fair living wage will operate for a small group of model factories in Cambodia and in Bangladesh and will be extended to an additional 750 factories. As the supplier factories will solely produce for a single brand/retailer as opposed to producing for multiple brands it will be easier for the brand to manage these incentives and effectively prevent the use of sub-contractors.¹³⁶ However, it is suggested that without adopting a specific standard for determining the living wage, and without ensuring factory-level bargaining capacity of labour and union representatives' necessary voice in the management of incentives, corporate sourcing and pricing commitments may not produce tangible benefit for the workers in the long-term.¹³⁷

Improving working conditions at a factory-level also requires long-term corporate business and investment policy. TLM realizes that without a stronger form of corporate investment commitment and a long-term assistance policy, suppliers might not be willing to incur the huge amount of costs necessary to improve workplace or labour conditions. For example, the ILO's Better Work programme in Cambodia requires modest cost: limited costs are incurred through hiring mostly local personnel to undertake the monitoring and reporting functions.¹³⁸ On the other hand, safety inspection and factory renovation in the Bangladeshi RMG sector require substantial amounts of investment. As described before, both corporate TSIs for the Bangladeshi RMG industries direct substantial finance to incur the operational costs of safety inspection, worker training on OHS and worker empowerment processes so that workers

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

¹³⁸ Sandra Polaski, *Harnessing Global Forces*, *supra* note 79.

can express concerns on unsafe work. However, little attention has been paid to financing long-term infrastructural needs and industrial capacity building in the Bangladeshi RMG sector.¹³⁹

It is true that large-scale infrastructural developments and industrial projects require huge amounts of funding and greater intervention from government and donor assistance is necessary. Even with regard to safety-related factory renovations, both corporate initiatives prescribe limited responsibility. None have a direct responsibility in undertaking or funding the renovation or modification necessary to provide a safe workplace. While confusion grew as to the nature of retailer and brand responsibility for safety renovation costs, Accord representatives in Bangladesh made it clear that suppliers may, at their option, assist the factory owners in finding the necessary funds either through effective sourcing policy and/or through various financing mechanisms (loans, joint investment). However, retailers and brands have no direct responsibility for funding the safety renovations required by the inspectors.¹⁴⁰ Under the bilateral supplier finance programme, some North American Alliance members would offer either low-cost loan facility or changes in payment terms to their supplier factories.¹⁴¹ For factories not covered by the bilateral programme, the North American Alliance is developing a low-interest based credit programme in partnership with international finance institutions.¹⁴² Presently, it has raised US \$168 million for low-cost loans to factory owners for the safety improvements.¹⁴³

¹³⁹ Labowitz, Business as Usual Not an Option, *supra* note 7.

¹⁴⁰ *Ibid* at 40.

¹⁴¹ Under the Alliance “Affordable Capital for Building Safety” (ACBS) funds are to be “administered solely by the members” and it is not necessary for Alliance members to be a participant in the ACBS. See Action Plan Overview, Alliance, *supra* note 55.

¹⁴² Alliance 18 Month Update, Alliance for Bangladesh Worker Safety (9 March 2015) online: Alliance for Bangladesh Worker Safety <bangladeshworkersafety.org>.

¹⁴³ Alliance raised US \$100 million from its member contributions, US \$50 million in collaboration with the IFC and US \$18 million from the USAID. See the Second Annual Report, Alliance for Bangladesh Safety, *supra* note 62; Action Plan Overview, Alliance, *supra* note 55. Both the Accord and the North American Alliance for the Bangladesh RMG factories set a detailed inspection standard, which is higher than the national standard. See Steven Greenhouse, “Major Retailers Agree to Inspection Standards in Bangladesh” *The New York Times* (20 November 2013) online: <www.nytimes.com/2013/11/21/business/international/major-

Under both corporate initiatives, bilateral negotiations between the supplier and factories would determine the terms and conditions of credit facility and there is no unified system or neutral third party representative to oversee the terms and implementation of these arrangements.¹⁴⁴

For setting the terms and conditions of the credit facility, retailers' influence remains a questionable issue. Ultimately, the sole responsibility to incur the huge costs for factory remediation belongs to the factory owners, though both initiatives are to last for only 5 years.¹⁴⁵ Improving workplace conditions or even the safety of workers requires comprehensive corporate commitment for a much longer period of time.

B. Retaining Existing Competitive Advantage

While it is important to focus on improvement of labour regulatory institutions, TLM specifically emphasizes mobilizing mandatory financial and technical assistance and business commitment from corporate retailers to improve the productive capacity of labour. It recognizes that effective corporate commitment to increase labour productivity is required to buttress an alternative form of linkage. This form of linkage is attentive to maintaining the existing competitive advantages of important economic sector(s) that enjoy preferential access in the markets of developed countries. It also stresses the need to “purposefully build” competitive advantage for other related products.¹⁴⁶ Focused, mandatory and long-term corporate

retailers-agree-to-inspection-standards-in-bangladesh.html?_r=2&adxnnl=1&adxnnlx=1389978416-B5zzQYUFs8TIY7azWDfJ/Q>.

¹⁴⁴ For a critique on the procedural fairness of these funding arrangements, see Labowitz, Business as Usual Not an Option, *supra* note 7; Dorothee *et al*, Closing Governance Gaps, *supra* note 27.

¹⁴⁵ *Ibid.*

¹⁴⁶ Analyzing 500 years of economic policy history, Reinert observes that without successful emulation it was neither possible for the developed and the emerging industrialized countries, nor would it be possible for the developing countries, to benefit from market opening. He argues that without technological advancement and reduction of the productivity gap with richer countries, developing countries would engage in asymmetrical

commitment to improve the productive capacity of labour can crucially balance the overwhelming influence of market-led development and ensure that appropriate labour considerations reinforce the process of SD and vice versa.

The importance of retaining competitiveness in the labour-intensive garment exporting sector is critical for the Bangladeshi economy. Contrary to economies which are exclusively dependent on exporting primary commodities and face declining terms of trade, low-skill manufacturing has been found to offer a better option in terms of addressing poverty and inequality and as a “first step in the ladder of economic development.”¹⁴⁷ Labour-intensive production system creates jobs for millions. In Bangladesh, the share of manufacturing in employment rose from 12% in 1985-6 to 24% in 2010 and approximately 2 million families in Bangladesh escaped poverty by working in the garments sector.¹⁴⁸ Both urban and rural poverty levels fell considerably. Yet, earning levels have not improved to lead to “sustained improvements” in poverty.¹⁴⁹ Additionally, the vulnerabilities associated with low-value added garments production systems are enormous. Since profits in garments export are generated mostly for designers and retailers, producing firms compete for orders by continuously lowering production costs. With low-cost labour as the primary determinant of competitiveness, the terms

trade exchanging commodities produced under “non-increasing returns conditions” with industrial goods “produced under increasing returns.” This pattern of trade, even if increasing in quantity, would continue to benefit the industrialized partners and ultimately cause “gigantic market failures” in developing countries. Reinert argues tellingly that without a period of successful emulation, *i.e.* technical change, productivity growth and producing goods/ services with increasing returns, free trade under the *Malthusian formula* would sustain poverty forever by rendering the economy vulnerable to external shocks and price fluctuations, increasing unskilled labour supply and the unemployment rate, lowering wages, lessening bargaining capacity of labor, and diminishing returns. On the other hand, the *Schumpeterian formula* allows sufficient space for rebuilding a productive structure, lessening the productivity gap between poor and rich countries, and increasing skill and wages for labour. Thus, the idea should be to build comparative advantage “purposefully” and not relying on a “revealed comparative advantage” that a country possesses naturally. See Erik, S Reinert “Emulation Versus Comparative Advantage: Competing and Complementary Policies in the History of Economic Policy” in Cimoli, Dosi & Stiglitz, eds, *supra* note 104 at 79.

¹⁴⁷ R Whitley, *Divergent Capitalisms* (Oxford: Oxford University Press, 1999).

¹⁴⁸ John Glenn, *Globalization: North-South Perspectives* (London: Routledge, 2007).

¹⁴⁹ 76% of the population lives on less than US \$2 a day. See ILO and ILS study on Bangladesh, 2013, *supra* note 16 at 3.

of trade for the RMG sector in Bangladesh “are failing at around 2 percent a year”¹⁵⁰ and the sector faces fierce competition from other low-cost countries. According to a joint ILO and ILS study of 2013:

Low labour productivity is often regarded as a symptom of under-development. However growth of labour productivity varies widely among low and lower-middle income countries. In Bangladesh, the rate of labour productivity growth, as measured by GDP per hour worked, increased from 1.1 per cent to 1.8 per cent between 1990 and 2010. Meanwhile, for other countries in the region, such as India and Vietnam, it more than doubled in the same period to 3.8 per cent and 2.8 per cent, respectively. This is attributable in part to the fact that productive investment has stagnated in Bangladesh in the last 10 years – it increased by only 2 percentage points in this period, while the level currently stands at 25 per cent of GDP, lower than most other countries in the region.¹⁵¹

When measured from the perspective of increasing labour productivity and retaining competitiveness in garment production, the TSIs ignore the economic empowerment of workers. A top-down approach is manifest in both corporate safety initiatives. There is no provision for long-term economic empowerment of workers through skill improvement training. Only the ILO’s RMG Programme attempts to focus on increasing the competitiveness of the participating RMG factories.¹⁵² Though no details are available yet, the BWB programme of the ILO intends to cover only 500 firms within next three years.¹⁵³ If similar collaborative attempts focusing on improved labour productivity were replicated through corporate initiatives, more firms could be covered within a shorter period of time. Reducing the productivity gap (through skill upgrading,

¹⁵⁰ ILO and ILS study on Bangladesh, 2013, *supra* note 16. For a comparative chart on falling terms of trade in general and in the context of RMG, see Muhammad, Ready-made Garment Industries in Bangladesh, *supra* note 21 at 24. Also see J Glenn, *J supra* note 148 at 181.

¹⁵¹ ILO and ILS study on Bangladesh, 2013, *supra* note 16 at 9.

¹⁵² *Supra* notes 44 & 46.

¹⁵³ Initially BWB is focusing Dhaka-based garment factories. See online: Better Work <betterwork.org/global/?page_id=5581>.

training and technical assistance) with competing garment exporting countries not only offers the option to retain the competitive advantage of the RMG sector, but also provides the long-term potential to increase the bargaining capacity of workers in respect to wages and entitlements. Higher productivity from a skilled labour force not only prevents the race towards the bottom, but also renders it possible to move towards more value-added products and sectors and to build a sustainable economy.¹⁵⁴

C. Empowerment of Labour

The proposed TLM acknowledges the existing power imbalances between capital and labour (through trade, economic and financial arrangements) that tend to sustain the political isolation of labour and positions itself with demands for labour empowerment both at a local and transnational level. Citing how dominant theories of labour governance focus on “collaborative networks” and sideline the “risks of governance failures stemming from power differentials,” Rodriguez asserts tellingly, “[a]s shown by the realities of firm-centered code monitoring schemes, when there is no countervailing power, governance systems can become deregulatory strategies that, while serving the needs of image-sensitive TNCs, are deleterious to the task of protecting workers’ rights in the global economy.”¹⁵⁵

¹⁵⁴ For a detailed discussion on how Bangladesh RMG sector can retain competitiveness by improving social compliance and increasing productivity, see Dirk Willem te Velde, *Enhancing Productivity in Bangladesh’s Garments Sector: Current Policy and Research Debates* (UK: Overseas Development Institute, September, 2014). For economic transformation and structural changes, Dirk Willem te Velde compared the example of Mauritius, which shifted its garment production from middle-range to more fashionable (higher value added) products and later diversified its economy and included services.

¹⁵⁵ Rodríguez-Garavito, *Global Governance and Labor Rights*, *supra* note 81 at 227.

The proposed model acknowledges that the real needs of labour in developing countries require not only a progressive analysis of a wider range of labour rights but also the accommodation of these rights within national and transnational redistributive policies and mechanisms. As a result, questions relating to effective labour governance transcend beyond some quick-fixes like drafting the ILO-assisted labour code, increasing the number and quality of inspections and improving workplace conditions. These are important issues, but with a capability enhancement perspective, TLM underscores the essential link between economic and political empowerment of labour and effective corporate commitment.¹⁵⁶ TLM realizes that it is necessary to strengthen the weakened capacity of workers' to resist, shape or re-create labour governance initiatives that are prescribed or designed by corporate actors, and to challenge their exclusion from these initiatives. It realizes that it is only when labour groups have strong organizational strength and voice at local, national and transnational levels, they can challenge the power asymmetries between capital and labour, the division of labour, the restricted responsibilities of employers,¹⁵⁷ and can translate codified rights or standards into practice. Recent anti-sweatshop movements uniting labour groups and other transnational activists (students, consumer organizations, NGOs) offer a prime example of the connection between labour movements and stronger forms of corporate responsibility. Anti-sweatshop movements not only connect labour crises with the crises of other social forces such as citizens', migrants',

¹⁵⁶ Strong unions and labour representation in the political structure of the state lead to sustained improvements in the protection of labour rights and labour standards. Where interests of workers are represented politically, state regulatory and enforcement capacity increases. For an empirical analysis (covering 85 developing countries) that connect low state capacity in protection of labour rights with political disempowerment of labour see Daniel Berliner *et al*, "Building Capacity, Building Rights? State Capacity and Labor Rights in Developing Countries" (2015) 72 World Dev 127-139.

¹⁵⁷ Davidov & Langille, eds, *supra* note 93.

social movements,¹⁵⁸ but also engage powerful brands and retailers in accepting various forms of joint liability.¹⁵⁹

When assessed from the perspective of labour empowerment, both corporate safety initiatives preclude any possible collective strategic response from the garment factory workers. Sustainability compact and the ILO's RMG programme emphasize developing effective labour organizations to voice concerns against the working conditions or work entitlements without providing any details.¹⁶⁰ The North American Alliance mentions that "worker empowerment is a critical element in achieving meaningful building and fire safety in Bangladesh" and prescribes for the creation of a "Worker Participation Committee" (WPC) in all of its supplier factories.¹⁶¹ The WPC will have access to factory management for raising labour safety concerns and to the North American Alliance by using mobile hotline technology.¹⁶² In case the Alliance-qualified inspector identifies an "imminent danger" and recommends "special remedial measures," the WPC will receive a necessary safety warning.¹⁶³ The Accord obliges supplier factories to establish joint worker-management occupational health and safety committees, which can effectively monitor health and safety risks on a day-to-day basis.¹⁶⁴ It also requires the

¹⁵⁸ Emergence of the *new form of transnational labour* has altered the landscape and concerns of traditional labour. This new form of transnational labour stimulates a process of networking between labour and other marginalized social actors for issues ranging from work related fundamental or enabling rights to redistributive rights, from labour rights to wider concerns of local communities. Uniting forces of social movements and operating within and beyond local and national settings, the networking process attempts to empower workers to "forge links with other democratic internationalists." See Pulignano, Valeria, "European Works Councils and Trade Union Networking: A New Space for Regulation and Workers' Solidarity in Europe" in Blackett & Levesque, eds, *supra* note 99 at 111; Hepple, Labour Laws and Global Trade, *supra* note 97; Adelle Blackett & Anne Trebilcock, eds., *Research Handbook on Transnational Labour Law* (Cheltenham, UK Edward Elgar Publishing, 2015); Andreas Bieler, I Lindberg & Devan Pillay, eds, *Labour and the Challenges of Globalization: What Prospects for Transnational Solidarity* (London: Pluto Press, 2008).

¹⁵⁹ Anner, Workers' Power in Global value Chains, *supra* note 111.

¹⁶⁰ *Supra* notes 44 & 69.

¹⁶¹ Alliance Members Agreement, *supra* note 50 at section 3.1.

¹⁶² *Ibid* at section 3.1-3.2.

¹⁶³ *Ibid* at section 7.1-7.2.

¹⁶⁴ Section 17-18, Accord, *supra* note 63.

establishment of safety and health “worker complaint processes and mechanisms” that enable workers to report probable health and safety risks to an independent safety inspector in a confidential and safe manner.¹⁶⁵ Yet, none of the corporate initiatives provide for discussion between factory-level labour representatives and retailer representatives, nor allow information sharing between different labour representatives working with different suppliers.

Even from the limited perspective of achieving workplace safety, the importance of labour empowerment becomes apparent from a recent worker baseline survey conducted by the North American Alliance. After receiving OHS training, only 2% of workers correctly identify potential safety hazards, only 17% would report their safety-related concerns to their leaders and 73% consider that fatal fire accidents are not preventable.¹⁶⁶ The survey starkly reveals the limited impact of safety training offered by the North American Alliance. The survey finds that understanding the technical materials of safety training was hard for the workers, particularly for female workers. More importantly, the survey finds that majority of the representatives from factory-level health and safety committees are not elected.¹⁶⁷ These committees are often inactive and potential safety concerns or complaints might not get appropriate attention from

¹⁶⁵ *Ibid.* Under the Accord, the signatory union representatives (from national and international unions) are allowed to participate both in the monitoring of the safety measures and in the dispute resolution process. See Sections 4-6. Under the North American Alliance, the Worker Participation Committee (WPC) have no role in the management of the safety inspection system, other than commenting on the inspection report and providing necessary inputs into safety remediation plans. Although WPC would have access to necessary information in order to effectively comment on the reports, having regard to the recent survey of 28 participating factories, it is unclear whether the WPC would have the necessary power or capacity to provide necessary inputs or contradict factory management. See “Baseline Worker Survey Report” Alliance for Bangladesh Worker Safety (19 February 2014); “Protecting the Lives and Livelihoods of Bangladesh’s Garment Workers,” (First Annual Report of the Alliance for Bangladesh Worker Safety, July 2014) online: Alliance for Bangladesh Worker Safety <www.bangladeshworkersafety.org>. For a detailed discussion on the lack of local industry (Accord) and local labour (Alliance) representation see Dorothee *et al*, Closing Governance Gaps, *supra* note 27 at 9-10.

¹⁶⁶ Baseline Worker Survey Report, *ibid.* Out of 625 participating factories, workers from 28 factories were covered by the survey. Since the survey, the North American Alliance is undertaking significant reforms in its safety training contents and process. It also emphasizes worker empowerment by strengthening effective worker participation in health and safety committees. For example, it supports election of worker representatives in the safety committee. For more information see online: Alliance for Bangladesh Worker Safety <www.bangladeshworkersafety.org>

¹⁶⁷ *Ibid.*

these representatives or from management. A combination of all these factors: low levels of literacy, low organizational capacity, selection of committee members and workers' lack of access to management, caused a large percentage of workers to believe that they do not have any role in cases of safety hazards and that fatal accidents are not preventable.

TLM understands that a wider perspective on freedom and capability enhancement of labour sustains labour development and empowerment efforts on an ongoing basis. TLM emphasizes that it is necessary build not only appropriate labour regulatory institutions, but also adequate social and political arrangements that strengthen the labour empowerment process (for example, by informing them of their rights and responsibilities, by increasing both sectoral and factory-level communication between workers and by increasing worker-outreach programmes). TLM realizes the limitations of addressing the problems of a huge majority of labourers, who are not directly engaged in the exporting sector, through corporate commitments, as the latter applies only to exporting firms. Yet, within the limited sphere of corporate responsibility, TLM demands that workers employed in export-based industrial firms be allowed to effectively participate and challenge intra-company labour governance mechanisms and to connect themselves with others working with different suppliers (including sub-contractors) in order to form effective labour relations.

Conclusion

This chapter identifies that the TSIs taken after the collapse of Rana Plaza expose a crucial area where a significant consensus exists, even in a low-income country, to consider labour development issues within economic development policy, provided appropriate

commitment and assistance mechanisms (technical, financial, advisory) are in place. Thus, the TSIs effectively negate the existing bare assertions that developing countries or LDCs are not willing to consider labour issues as an integral part of their economic policy making.

The TSI's prescribed mechanism of linkage is different from the existing attention to labour governance through cross-border corporate responsibility, or social clauses in trade or economic instruments or through global institutional reform. Bilateral and regional trade-based linkages and/or effective monitoring by independent and credible global organizations provide important avenues to address labour governance problems. Yet, TSIs innovatively create not only some cross-border efforts involving multiple actors to address the safety problems of labour in a particular economic sector, but also develop specific legal structures and legal strategies for operating, financing and monitoring safety mechanisms. Within this triangular interaction between specific structures, strong operational rules, and activism by independent and credible non-state actors, we hope that the emerging form of transnational labour regulation will be an essential complement to national and international regulation of labour issues.

Taking examples from the TSIs and critically analyzing these, in this chapter I propose a TLM and argue that it is necessary to reconstruct the values and institutions of labour governance and ultimately the objectives and structure of a linkage system. Distinctively, the TLM does not prescribe a specific structural form of transnational labour regulation, but relies on an organizing principle and objective of linkage, i.e. SD from a capability-enhancement perspective.

TLM acknowledges that the SD of low-income countries involves intricate and wider questions of infusing social or distributional issues within trade, development and labour governance policies. TLM aims to build on the multiple labour regulatory initiatives taken for

the Bangladesh RMG factories by evaluating these with an organizing principle. Requiring specific attention to the developmental level of the states (participating in the linkage mechanism) and the importance of the particular economic sector, it identifies some essential features of an effective linkage mechanism and introduces an alternative understanding of the integral relationship between SD, economic growth and labour development. It stresses greater participatory space for labour and strong activism from multiple actors (government, corporate retailers, NGOs, international/regional trade, labour and economic arrangements, national and international unions) both in economic governance mechanisms (for example, influencing trade rules through labour empowerment, mandatory corporate responsibility in funding labour development efforts and in sourcing from compliant firms) and in labour governance mechanisms (for example, participating in labour inspection, building or strengthening the national labour regulatory capacity). Specifically, it stresses that improved labour governance is neither a routine result of increased export performance nor should it be a short-term component of development policy. Rather, the realization of the freedom and capability of labour and sustaining and enhancing those freedoms and capabilities require ongoing attention to improving labour entitlements, productivity and empowerment, and vice versa.

Utilizing the SD concept to understand the deep relationship between the social and the economic involves complex questions. Similar to the TSIs, the proposed TLM endorses transnational linkage mechanisms that operate at multiple economic governance sites and connect non-state actors in a context and sector-sensitive manner. In contrast to the TSIs, the proposed TLM stresses not compliance with labour standards in selected matters, but analyzing both regulatory and distributional problems of labour in a holistic manner. For example, TLM acknowledges that though the safety of workers requires urgent attention, the challenge lies in

addressing broader issues like distributional problems of labour. More specifically, the proposed TLM argues for the inclusion of a broader version of labour rights as opposed to selective attention to certain fundamental rights. It seeks to connect multidimensional issues relating to labour welfare, i.e. minimum living wages, fundamental rights, redistributive rights and an increase in productivity, in a holistic framework. Taking a broad conceptualization of the social as a starting point, the proposed linkage model not only emphasizes the types of labour rights, but also the types of labour to be covered. It argues that capability enhancement of labour – formal, semi-formal or informal – certainly involves questions on long-term institutional development to distribute social gains from increased trade and economic growth.

Finally, TLM insists on a strengthened form of corporate responsibility. It proposes to utilize the overwhelming force, capacity and responsibility of transnational corporate actors in addressing diverse distributional concerns arising out of economic development and trade liberalization policies. As a result, TLM requires a stronger form of corporate responsibility in addressing the appalling inequality and distributional problems within and amongst nations. The Action Plan Overview of the North American Alliance mentions, “[t]he intensive process (creating the safety initiative) involved many individuals from diverse interests, sharing a common goal: *a deep sense of responsibility* to better protect all those working in Bangladeshi garment factories through swift action that significantly elevates fire and building safety in their workplaces.”¹⁶⁸ [italics mine]

The suggestion for attention to a central organizing principle or objective to link labour issues within trading or economic arrangements, does not dislodge the necessity of labour regulatory roles of nation states. On the contrary, the proposed model emphasizes the necessity of effective transnational and international assistance and coordination amongst diverse actors

¹⁶⁸ Action Plan Overview, Alliance, *supra* note 55.

and institutions to strengthen nation states' labour governance capacity and their capacity to identify and fund their (re)distributive priorities. TLM emphasizes support from global institutions like the ILO and donors in mobilizing the necessary finances and other technical support for long-term institutional capacity development to sustain improved labour governance for both exporting and non-exporting firms.

Finally, TLM understands that to develop a common platform that unifies formal, semi-formal and informal workers' divergent demands and bridge gaps between them, it is necessary to look beyond market-centric linkages. In order to effectively confront the existing hegemonic neo-liberal regulation and the narrow conceptualization of the social, it is necessary to form effective partnerships amongst these labour groups. Market-centric approaches to linkage fail to explain, from a long-term perspective, what will prevent workers in formal and semi-informal/informal sectors from competing with each other when employment opportunities become limited and competition becomes fierce.¹⁶⁹ What will prevent firms, desperate to retain existing competitive advantage, from indirect sourcing through sub-contractors who engage low-cost semi-formal/informal workers? Market-centric linkages might be able to create some mechanisms to cover unionized labour engaged in the exporting sectors, but these will certainly exclude a large majority of the labour force engaged in informal and semi-formal sectors. In contrast to these restrictive approaches, TLM seeks to address the structural problems of labour governance (i.e. the absence of distributional concerns). It recognizes that by resorting to a common organizing principle or objective, such as freedom and capability enhancement of labour, multiple systems of linkage at different economic governance sites might offer the

¹⁶⁹ See Diller, *supra* note 97 where the author doubts hybrid labour governance mechanism's capacity to transform domestic labour regulatory institutions and arrangements for a longer period of time.

potential to hold together the complex alliances between formal, semi-formal and informal workers, strengthen their power struggles and redefine their objectives and priorities.

The model neither claims that the prescribed features of linkage would remain static, nor does it require that all of these features should be present in a single linkage mechanism. Considering the site of linkage, the conditions of labour, the importance of the economic sector and other context-sensitive issues, some proposed features might require more attention than others. This chapter attests to the variable nature of labour governance, and recognizes that the continuous shaping and reshaping of law and economic and social policy at multiple trade, economic and social regulatory sites produces immense challenges for infusing social or distributional issues through cross-border policies and institutions and demands ongoing work on the possible design and features of effective labour governance.

Concluding Remarks

Emphasizing the deep connection between social or distributive justice, trade rules, and SD, this thesis builds on the influence of norms, principles or rules in promoting an alternative vision of global trade regulation and transnational labour governance. Taking two examples, one from a global trade regulatory site (Chapters 1, 2, and 3) and the other from a labour governance setting (Chapters 4 and 5), I identify how attention to a broad ideational objective can significantly reconstruct global institutional behaviour and transnational governance mechanisms.

In Chapter 1, I explain that contemporary challenges to trade regulation focus not on trade liberalization itself, but on the ideational objective(s) that should guide trade regulatory institutions. Referring to global trade regulation, I specifically discuss whether and how the WTO can promote the broad ideational objective of SD. My discussion is not confined to the relationship between global trade regulation and SD as its preambular objective. Rather, I use SD as a broad ideational objective and propose reconstructing the trade-SD relationship in a distinct manner.

Noting the political difficulty of achieving structural changes in the WTO, I use insights from the international relations theory of constructivism.¹ I explain how the latter helps to argue for some behavioural changes within the WTO. Constructivism asserts that ideational objectives form the basis of change both in established legal norms and in institutional behaviour.

¹ Paul R Viotti & Mark V Kauppi, *International Relations Theory* (New York: Pearson, 2010); Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999); Christian Reus Smith, "Constructivism" in Scott Burchill *et al.*, eds., *Theories of International Relations* (New York: Palgrave, Macmillan, 2005) 188-212.

Constructivism explains how broader ideational objective(s) consisting of norms, principles or rules shape the formation and transformation of a particular institution. With its unique proposition that intersubjectively shared ideational objectives (and not material interests) influence norm making and norm implementation and guide actors' behaviour in international relations, constructivism allows a distinctive framework to challenge the strict separation between law (for example, market-based trade liberalization and economic development rules) and social or distributive justice issues. Constructivism explains that without relying on an ideational objective, law is stripped from its balancing role, i.e., balancing particular legal rules with competing political and social values. Relying on constructivism, I discuss the problems that strict separation between law and social justice produce. I discuss that compartmentalized analyses of social or distributive justice, trade liberalization, and development law and policy tend to produce an outcome in which the market is viewed as natural, self-regulatory and ultimately disembedded from its political, economic and social constructs. Constructivism questions this artificial distinction and advances an alternative analytical framework on how a broad ideational objective(s) can construct and reconstruct the mutual relationship between law and social policy.

The basic proposition of the constructivists does not operate only at a theoretical level. It is supported by practical examples and is endorsed by scholars from law and international relations.² Scholars have identified how a broad ideational objective(s) profoundly influences both norm making and the institutional framework in which legal rules operate. I use two unique concepts of constructivism, i.e., shared understanding and constitutive rules, and elaborate the mutual interaction between prevalent shared understanding, ideational objective and actors'

² J G Ruggie "What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge" (1998) 52:4 Intl Org 855-885; A T F Lang, "Reconstructing embedded liberalism: John Gerard Ruggie and constructivist approaches to the study of the international trade regime." (2006) 9:1 J Intl Econ L 82-116.

behaviour. A broad ideational objective of an institution is determined by prevalent shared understanding. Also, the concept of constitutive rules, i.e., the “status rules,” determines where and how the regulatory rules of an institution would operate and how the latter rules would be interpreted. Along with a change in global consensus, the shared understanding evolves and the broad space provided by the ideational objective and constitutive rules allows transformation in organizational behaviour and determines actors’ rights and responsibilities. The behavioural changes in an institution happen without any formal change in the regulatory rules. Depending on the space provided by the constitutive rules and the ideational objective of an institution, the actors (both states and institutions) determine and re-determine their behaviour in international relations. Using these unique concepts, I propose connecting the global trading institution with its ideational objective of SD even without formal amendment of specific trade regulatory rules.

How would this broad ideational objective apply to trade regulation? In most trade-SD discussion, scholars either suggest total incompatibility between liberal trade and SD or focus on the narrow issue of how to reconcile the contradictory issues relating to ever-expanding trade and sustainability. Borrowing Sen’s recent proposition to analyze SD from a capability enhancement perspective and not from a needs-based perspective,³ I propose a wider understanding of the trade-SD relationship. I argue that while the existing analyses endeavour simply to link or reconcile trade with SD issues or draw the line between trade and SD, the wider view focuses on the role of social or distributive justice by transforming it into an important lens with which to view the fairness of national and international trade rules and development policy. The wider understanding proposes that only by considering the mutually reinforcing relationship, between social or distributional issues, trading rules, and economic arrangements and institutions, it is

³ Amartya Sen, "The Ends and Means of Sustainability" (2013) 14:1 J Hum Dev & Capabilities at 6-20; Amartya Sen, *Development As Freedom* (New York: Anchor Books, 2000).

possible to contribute towards human-capability enhancement. With such a broad lens, the wider understanding requires greater domestic policy autonomy in trade and development policy making, opposes quick-fixes, accords priority to the demands of marginalized actors in law and policy-making, emphasizes strong inter-institutional linkages, and finally, is interested in operationalizing capability-based SD in trade regulation.

In Chapters 2 and 3, I inquire whether and how the WTO's two regulatory bodies, the adjudicatory body of the WTO (consisting of the Panels and the AB) and the trade policy review mechanism (TPRM), can accommodate the crucial demands of the wider understanding. In these two chapters, I elaborate why and how emphasis on a broad ideational objective such as SD can initiate some important behavioural changes. Chapter 2 (with regard to the decisions of the Panels and the AB) and Chapter 3 (with regard to the TPRM) elaborate the limitations and challenges of operationalizing the crucial features of capability-based SD. The challenges are not expressed to negate the importance of SD as a broad ideational objective, or to negate the importance of the WTO in promoting SD in low-income countries, but rather to illustrate the complementary role of some emerging governance sites, which are operating at different spaces and with diverse actors.

In Chapter 2, I explore the reports of the Panels and the AB of the WTO. Since my suggestion depends more on the search for alternatives to rule-based changes in the WTO Agreement, it is necessary to clarify the contribution of the Panels and the AB in addressing trade-SD interaction. Analyzing some relevant reports, I explore whether the change in shared understanding -- that global trading rules should reflect the broad ideational objective(s) of liberal trade -- has caused any interpretative shift in the reasoning process of the Panels and the AB. I discuss that as a preambular objective, SD has caused some interpretative shifts in some

post-WTO decisions. I note that 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 other trade-related issues.⁴ Numerous scholars have identified different reasons to support or to criticize the adjudicators' restrictive attitude in some high-profile disputes. However, taking a capability-based understanding of SD, I depict the enormous challenges of resolving trade-SD disputes and the limited nature of judicial inquiry. I argue that the capability-enhancement perspective requires a holistic analysis of trade and trade-related issues. From such a perspective, adjudicators need to focus on bridging the gap between trade and trade-related regimes and communities, and develop a coherent approach in the interpretative process. Borrowing from different regimes, creating a shared or common ground between conflicting or opposing regimes, and moving closer towards the ideational objective of SD, adjudicators can determine and re-determine the boundaries of collaborative relationship or conflicts between trade and 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. The process of borrowing allows two specific benefits for operationalizing SD. First, borrowing from diverse sources the adjudicators can shape and reshape trade-SD relationship on an ongoing basis and thus keep pace with contemporary demands. Second, prescribing some inter-disciplinary conditions or considerations before a trade restrictive measure is taken, the judicial decisions indirectly inform the domestic trade policy-makers on the importance of trade-related issues and potential ways to address these while taking trade policy decisions.

⁴ Virginie Barral, "Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm" (2012) 23:2 EJIL 377-400.

Towards the end of Chapter 2, I argue that from a capability perspective, the process of “judicialization”⁵ might not address some complex challenges of trade-SD interaction. It is questionable how the normative potential of capability-based SD can be utilized to address issues that reflect divergent demands and expectations of member states and their different social groups. Also, importation of norms, principles, or rules from related or opposing regimes might not produce positive impacts for some low-income countries or their marginalized social groups. Therefore, the relevant questions are not confined to how far the Panels or the AB should go, where to draw the line between trade and trade-related issues, or what norms, principles or rules should influence their decisions or how to link trade with SD issues. Rather, in trade-SD interaction, the relevant questions are whether the judicial body is the right forum to operationalize SD, whether it is possible to address the complex demands of different members and their constituents at a judicial site, or whether the judicial body can or should resolve issues that are not necessarily confined to disputing parties. I conclude that ultimately the issue is not just how unique socio-political and cultural constructs of each market continue to determine its boundaries and produce unique distributive impacts for different member states and their social groups. Considering multiple challenges from regulatory diversities (both within and between states), the complexities in addressing the concerns of marginalized participants of the trading system, absence of public opinion in the Panel or the AB proceedings, and fragmented and weakened governance of social or distributional issues, I find it useful to focus on non-judicial regulatory bodies to operationalize capability-based SD.

I argue that trade-SD issues interact more frequently at these regulatory sites. These sites offer a better place to manage the complexities arising from the intersection of economic, social

⁵ Martha Finnemore & Stephen J Toope, "Alternatives to "Legalization": Richer Views of Law and Politics" (2001) 55:3 Intl Org 743-758.

and environmental policy making, as they can consider the viewpoints of diverse actors and attend to multiple concerns relating to capability issues on an ongoing basis. Through their active involvement, cooperation or even encounters, it is possible not only to devise some context-sensitive solutions in trade-SD disputes, but also to maximize operationalization of capability-based SD in global trade or economic regulation.

For analyzing the WTO's committee-level work, in Chapter 3, I focus on the TPRM of the WTO. Critics argue that at the committee level, the WTO's monitoring activity is limited to performance evaluation, compliance and implementation with the WTO rules rather than evaluation of the impact of these rules. According to Lang, "[t]he international trade regime, has always lacked a systematic, institutionalized system of monitoring the impact of decisions taken within it, and feeding back lessons learnt into new decision-making processes."⁶ With particular reference to Bangladesh's trade policy review,⁷ in Chapter 3 I find that the TPRM's evaluation task follows a specific format and relies on materialistic analysis: how much liberalization has been achieved, the level of barriers to trade, and the presence of favourable policies to attract foreign investment and market-based growth. Poor working conditions, absence of a living wage and systemic violation of fundamental labour standards mentioned in the ILO Declaration on "Fundamental Rights and Principles at Work"⁸ are not considered by the TPRM, while

⁶ Andrew T Lang, "Rethinking Trade and Human Rights" (2006) Paper No. 1685 Bepress Legal Series at 76; B Hoekman, "Making WTO More Supportive of Development" (2005) 42 Finance & Dev 14.

⁷ *Trade Policy Review on Bangladesh, Report by the Secretariat* (Geneva, Switzerland: WTO, 10 September, 2012) [hereinafter referred to as "TPRM Report on Bangladesh"]; *Trade Policy Review on Bangladesh, Summary Report* (Geneva, Switzerland: WTO, 2012) [hereinafter referred to as "Summary Report"]; both reports are available online: WTO <www.wto.org>.

⁸ ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, commit member states to respect and promote fundamental principles and rights in four categories. These are freedom of association and effective recognition of the right to collective bargaining, elimination of forced or compulsory labour and abolition of child labour, elimination of discrimination in respect of employment and occupation. See *ILO Declaration on Fundamental Principles and Rights at Work*, (ILO: 1998) online: ILO <<http://www.ilo.org/declaration/lang--en/index.htm>>; *Internationally Recognized Core Labour Standards in Bangladesh: Report for the WTO General Council Review of the Trade Policies of Bangladesh* (Geneva: International Trade Union Conference (ITUC), September 2012).

appreciating the availability of low-cost labour and growth of the RMG sector. Rather, the TPRM report suggests export-based GDP growth as the primary means to alleviate poverty and pays little attention to the domestic socio-economic context. For example, the report encourages growth of export processing zones without considering that fundamental labour standards do not apply in these zones.⁹ Without connecting a high level of inflation in food and non-food prices to low-wage labour, the report repeatedly emphasizes the availability of low-cost labour for the growth of labour-intensive export sectors.¹⁰

In Chapter 3, I argue that purposive analyses prioritizing the broad ideational objective of trade liberalization can redirect the review process. For example, in its review, the TPRM can evaluate the potential and real impact and outcome of trade-related rules, decisions and policies, and bring these to the attention of trade policy-makers. Some urgent social or distributional impacts of trade liberalization in the country under review would be an integral part of its analysis. Trade policy reviews can also advice on positive relationship between work entitlements and sustainable economic development, or at least refrain from encouraging economic growth based on low-wage and low-entitlement labour only. Using some examples, I suggest that despite the TPRM's institutional limitations in terms of resources, mandate and personnel, it is possible to improve the analytical quality of its reports. I argue that focusing on trade-related social issues, and considering reports of reputed labour organizations such as the international labour organization, the TPRM can contribute to developing a consensual understanding on trade-SD interaction.

⁹ See Summary Report, *supra* note 7 at para 18. But a report from International Trade Union Conference warned the WTO's General Council that the fundamental principles and rights at work mentioned in the ILO Declaration do not apply in the export processing zones. See ITUC Report, *ibid*.

¹⁰ TPRM report on Bangladesh, *supra* note 7, WT/TPR/S 260-01, at para 12.

Towards the end of Chapter 3, I find that even with a purposive inquiry, the TPRM is unable to attend some broader social or distributional issues that capability-based SD would demand. For example, even if it is possible to allocate some space in the TPRM reports on the conditions of labour engaged in exporting sectors or on enforcement of fundamental labour standards, it would not be possible to report on issues relating to semi-formal or informal workers and their life-threatening work conditions. Also, some emerging bilateral and regional trade and economic arrangements reserve a broader space to accommodate discussions or dialogue on trade-related impacts experienced by participating member states. The challenges mentioned in Chapter 3 do not discourage purposive inquiry, but portray the limitations of a top-down process of review in addressing the trade-SD questions. Taking a cautious approach to TPRM's role in operationalizing SD, Chapter 3 concludes that policy making in trade and economic matters and in labour governance is not simply confined within the boundaries of a member state. Rather, multiple variables, such as economic and political interests of a state and its dominant constituents or lobbies, relationship with other states, bilateral, regional and transnational trade and economic cooperation arrangements, and prescriptions from international financial institutions and development agencies (especially for low-income countries), continuously shape and reshape domestic policy making.

Chapter 4 starts with an argument that social issues such as labour governance are integrally tied to the capability-enhancing approach and transnational labour governance sites constitute a robust area of study to understand linkages between trade/economic and social issues. Capability-based SD requires not only the “market-based liberties,” such as freedom of employment, but also a broader version of “political and social liberties,” such as the right to participate in labour regulation and expressing voice against exploitative work conditions or low

entitlements.¹¹ Capability framework's insistence on a broader framework of rights of labour and effective governance necessitates a discussion on the hybrid forms of linkage mechanisms that connect labour issues with trade or economic arrangements. With their region or country-specific setting, context-sensitive analysis of labour concerns, and capacity to strengthen or improve domestic labour standards and regulatory capacity, these transnational governance mechanisms attempt to provide important market-complementary interventions, i.e., redress negative externalities of market or inabilities of national government.

In order to provide effective market-complementary interventions, how should these mechanisms be designed, and what should their preferences be? To answer these questions, I analyze some linkage proposals in Chapter 4. I argue that certain scholarly proposals for linkage of labour governance within trade or economic arrangements do not challenge the narrow conceptualization of the social. The narrow conceptualization of the social promotes a restrictive form of labour governance. It maintains a sharp difference between fundamental and redistributive right of labour (and enforces the former), covers only workers engaged in exporting sector(s), upholds individual rights of labour as opposed to their collective rights, excludes or weakens the participation of non-state actors in the monitoring process, and, finally, promotes a voluntary form of responsibility.¹² Without addressing the distributional problems arising from labour deregulation and unquestionable mobility of capital, some of these proposals

¹¹ Amartya Sen, "Work and rights" (2000) 139:2 Int'l Lab Rev 119.

¹² For a discussion on the form and consequences of labour deregulation see, A Bieler, I Lindberg and Devan Pillay, "What Future Strategy for the Global Working Class? The Need for a New Historical Subject", in Andreas Bieler, I Lindberg & Devan Pillay, eds, *Labour and the Challenges of Globalization: What Prospects for Transnational Solidarity* (London: Pluto Press, 2008) 264; Judy Fudge, "The Cartography of Transnational Labour Law: Protection, Scale and Symbolism" in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York Routledge, 2011) 299; Kerry Rittich, "Core Labour Rights and Labour Market Flexibility: Two Paths Entwined" in International Bureau of the Permanent Court of Arbitration, ed, *Labour Law Beyond Borders: ADR and Internationalization of Labor Dispute Settlement* (The Hague: Kluwer Law International, 2003) 157-203; Lord Wedderburn, "Common law, labour law and global law" in Bob Hepple, ed, *Social and Labour Rights in a Global Context* (Cambridge: Cambridge University Press, 2002) 19-54.

concentrate on the structural form of linkage (i.e., cross-order corporate responsibility, improvement of global institutional framework or inclusion of social clause mechanism in a bilateral/regional/multilateral trade or economic arrangements) and on the regulatory problems of labour employed in exporting sector only. The findings in Chapter 4 help me to propose a model for labour governance (Chapter 5) that accommodates both regulatory and distributional problems of labour.

In Chapter 5, relying on a broad ideational objective, i.e., capability-based SD, I propose a model of transformative linkage and describe some essential features of effective labour governance. Unlike certain existing scholarly proposals, the proposed model does not endorse a particular form of linkage between social issues and trade or economic arrangements. Rather, referring to the organizing principle or objective of linkage, it prescribes some crucial features of transnational labour governance. Specifically referring to the transnational safety initiatives (TSIs) taken to ensure the safety of Bangladeshi garment workers after the collapse of Rana Plaza, I discuss the promises and limitations of these labour regulatory mechanisms. I discuss that though productive and responsible engagement of a myriad of forces (retailers, national government, international and national unions) offer a promising way to address some adverse distributional effects of market opening, the TSIs inadequately address the weakened capacity of labour against actors who control the globalized form of production and distribution. Critically analyzing the limitations of the safety initiatives, I argue that the narrow conceptualization of the social and incompatibility between the power and mobility of capital with vulnerability and immobility of labour at a global level create a situation in which the pursuit of a redistributive agenda through voluntary responses or soft rules becomes questionable. I do not argue that in a labour governance mechanism, the form of linkage is unimportant. Neither do I claim that the

presence of all the proposed features is necessary for effective labour governance or that the list of features is exhaustive. Rather, I claim that context-based attention to the prescribed features would produce a much more compelling form of labour governance.

First, borrowing from Blackett's social regionalism concept and the emerging transnational labour law,¹³ I insist on the essential and inseparable connection between fundamental and redistributive rights of labour. Instead of simply acknowledging the link between "the social" and "the economic," or focusing on the social dimensions of economic integration, a linkage system based on SD as an ideational objective would accommodate the broader framework of social or distributive justice as an inherent and essential part of trade and/or economic arrangements.

Second, I maintain a difference from the voluntary corporate codes that accommodate a place for labour governance. I criticize the voluntary nature, limited coverage (formal workers) and restrictive focus (concerned only with fundamental rights) of corporate codes and propose a stronger form of corporate responsibility to ensure a broader version of labour rights and entitlements.¹⁴

Third, I step beyond workplace rights and entitlements (such as the right to work in a safe place and to receive a living wage) and economic empowerment of workers. I argue that though workplace entitlements and economic empowerment are the primary steps towards forming an

¹³ See Adelle Blackett & Christian Levesque, "Social Regionalism in the Global Economy " in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York: Routledge, 2011); Adelle Blackett, "Towards Social Regionalism in the Americas " (2002) 23:4 Comp Lab L & Pol'y J 901-966. For a more recent analysis of transnational labour law see Adelle Blackett & Anne Trebilcock, eds., *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar Publishing 2015).

¹⁴ See *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, remedy" Framework* (New York and Geneva: United Nations Human Rights, Office of the High Commissioner, UN, 2011) online: UNHCR <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>; Also see John Ruggie, "Protect, Respect and Remedy: A Framework for Business and Human Rights" (2008) 3.2 Innovations 189-212.

alternative to neo-liberal labour “restructuring,” these are far from establishing an egalitarian socio-economic order in the South where labour laws, had their origin in colonial struggles or in the struggles for democracy, and aimed for the institutional strengthening and political empowerment of the working class. I argue that efforts to link labour governance within trade or economic arrangements cannot remain an end point in the effort to mediate “the social into the economic,” as they do not address the structural problems that contribute to uneven development within and between nations or uneven allocation of resources between workers and firms and its impact on political empowerment of the working class. From a long-term perspective, it is crucial to focus beyond economic empowerment of a narrow range of formal workers or voluntary forms of corporate responsibility and transform our understanding as to what sort of linkage mechanism can address the problems of growing and persisting inequalities within and between nations, and between firms and workers, that contribute to uneven development.

In all the chapters, although I provide some examples of how attention to a broad ideational objective can reconstruct trade regulation and labour governance, I conclude with the caution that the multi-dimensional debates on globalization, trade liberalization and labour governance transcend the search for some easy quick-fix solutions. For example, in Chapter 3 I argue that with diversity in WTO members’ level of development and sector-wide implications of trade opening, it is much more necessary to undertake a context-sensitive review of trade policies and trade-related impacts. In Chapter 5, I argue that improvement of workplace conditions and work entitlements involve broader questions such as widening both the understandings of the concept of labour and of employer’s responsibility, and finally, connecting

the labour movements with movements of other social forces (citizens, migrants, social movements).¹⁵

Throughout the thesis, it is repeatedly stressed that a broad ideational objective does not provide an automatic solution or easy answer to all contending issues. Rather, by utilizing a broad ideational objective, this thesis aims to identify the wide gap between marginalized actors and regulation or governance of global trade regime and transnational trade or economic arrangements. I do not assert that in the mediation of the “social into the economic,” powerful forces (for example, developed states and corporate actors) always dominate or benefit, but rather I claim that to successfully engage and empower the marginalized forces, broader ideational objectives or preferences such as SD constitute a useful starting point to overcome the structural barriers of neo-liberal laws and institutions.

In Chapters 1, 2 and 3, for global trade regulation, I show that the usefulness of a broad ideational objective lies in accommodating the prevalent shared understanding and allowing marginalized actors a greater role in norm-making and governance. In Chapters 4 and 5, I argue that a broader ideational objective such as SD has the potential to hold together the complex alliances between formal and informal workers to strengthen their power struggles, redefine their objectives and priorities, and move them forward. I also argue that commitment to a central organizing principle of linkage, i.e., SD, offers the possibility to encompass both fundamental and redistributive rights for the working population, to induce a profound shift in the capacity of marginalized forces to confront the challenges from neo-liberal laws and institutions, to

¹⁵ Like social regionalism, significant features of the “new form” of labour movement are its vision for broader space for the social within the economic and its emphasis on a new form of labour activism to confront the power and capacity transnational production system. See Valeria Pulignano, “European Works Councils and Trade Union Networking: A New Space for Regulation and Workers’ Solidarity in Europe” in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York: Routledge, 2011) 111.

understand the globalizing forces they confront, to strengthen their understanding as to how to move forward, and to broaden their base to include those in informal sectors within the shifting lines of economic globalization.

One important clarification remains. This thesis builds on the potential importance of norms, principles or rules in shaping institutional behavior and governance mechanisms. Inevitably it involves the question: whose norms, principles or rules prevail in the contest between diverse law-making forces? Some scholarly analyses proceed from the view that law-making is hugely influenced by the ideologies prevalent in the dominant societies and reflect their “self-interested prescriptions.”¹⁶ Amongst existing ideologies, it is the interests, aspirations and goals of the dominant class, consisting of powerful Northern states and multinational corporations, that prevail over the ideologies of the marginalized actors. As a result, any analysis that ignores the direct and indirect relevance of power and politics is profoundly defective.

International law scholars have identified numerous situations in which power and politics actually shaped the formation of prevalent ideologies and norms.¹⁷ As important examples of such law-making, they cite that international human rights law focuses mostly on civil and political rights and demands state-centric responsibility to protect these.¹⁸ In order to ensure transnational corporate responsibility for human rights violations, international law

¹⁶ See M Sonarajah, "Economic Neo-Liberalism and the International Law on Foreign Investment" in Antony Anghie *et al*, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publishers 2003) 173-190 [hereinafter referred to as "Sonarajah, Economic Neo-Liberalism"].

¹⁷ Shedrack Agbakwa, "A Line in the Sand: International (Dis)Order and the Impunity of Non-State Corporate Actors in the Developing World" in Antony Anghie *et al*, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publishers 2003) 1-18. See at 1-5. A similar account of development of international law posits that though enforceable regulatory regimes have been created for protecting the intellectual property rights of corporations, no such mechanism exists for enforcement of human rights violations by corporations. Even the proposal to subject corporations within jurisdiction of international criminal court for violations of human rights have been rejected on the ground that legal persons would not be subject to International Criminal Court. See Andrew Clapham, "Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups" (2008) 6:5 J Intl Criminal Justice 899, online: SSRN <ssrn.com/abstract=1338066>.

¹⁸ See Sonarajah, Economic Neo-Liberalism, *supra* note 16.

prescribes minimal remedies.¹⁹ On the other hand, with regard to economic and trade governance, international law has eased transnational corporations' production and distribution processes.²⁰

Dominance of power and politics also explains why rules and provisions of trade and economic cooperation treaties and agreements are negotiated efficiently within a short period of time and are enforceable legally. Chantal Thomas refers to public choice theory to explain the dominance of politically powerful industrial lobbies in trade negotiations.²¹ The dominance of these lobbies explains the political deadlock in reaching negotiations on development issues at Doha Round or on climate change issues. More importantly, their dominance extends beyond trade negotiation. Public choice theory explains how powerful lobbies oppose strong interconnections between trade, labour, environment and human rights institutions and eventually shape the *fragmented* forms of global governance. Thomas goes on to explain that in the absence of any *real possibility* of negotiation at the political level, some superficial forms of *formal* institutional connections within and outside the WTO endeavour to address the relationship between trade and other trade-related rights.²² The weakened nature of both inter-institutional connections and global governance on social and environmental matters stands sharply in contrast with political negotiations on Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), General Agreement on Trade in Services (GATS) and

¹⁹ *Ibid.*

²⁰ Sonarajah argues that internationalizing investment contracts (prescribing that basic principles of public international law apply to foreign investment contracts and subjecting these contracts to supranational dispute resolution), establishing market freedom, privatizing property rights, international law tends to further a particular vision of development for the third world and ultimately helps to preserve an economic order that will continue to favour superior economic powers. See Sonarajah, *Economic Neo-Liberalism*, *supra* note 16.

²¹ 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. .

²² *Ibid.*

other regional trade agreements that deal with protection of corporate rights or market access issues.²³

Literature on environmental protection also provides a similar explanation of lack of political will to connect trade with environment. According to some scholars, neo-liberal governance of economic, environmental and developmental issues, and the prominence of powerful industrial lobbies, have given rise to fragmented and piecemeal efforts to address social and environmental issues.²⁴ The interplay of power and politics between the North and the South and between strong industrial lobbies and weaker non-state actors has resulted in adoption of finance-driven economic globalization process. Although strong rule-based institutional structure governs global trade and economic issues, no such unified governance system has emerged for environmental or social issues. Compared with the WTO, global environmental/labour management remains fragmented, incoherent and depends on voluntary enforcement measures.²⁵

If power and politics dominate law-making and even global governance, what role is there for norms, principles or rules that reflect the demands of marginalized forces?²⁶ Why choose norm-based evolution of law to propose institutional or regulatory transformation? Is there a space for *counter-norms* to challenge both the dominant globalizing forces and the widening gap between law and social justice? Do these counter-norms possess the capacity to promote an alternative understanding of law-making and global governance?

²³ *Ibid.*

²⁴ Steven Bernstein, "Legitimacy in Global Environmental Governance" (2004-5) 1 J Intl L & Intl Rel 139; Steven Bernstein & Louis W Pauly, eds, *Global Liberalism and Political Order: Towards a New Grand Compromise?* (Albany: State University of New York Press 2007); Andrew Hurrell, "Global Inequality and International Institutions" (2001) 32:1/2 *Metaphilosophy* 34-57.

²⁵ *Ibid.*

²⁶ Though intellectual challenges to existing international economic/trade law started with the demands for a "New International Economic Order," "the Charter of Economic Rights and Duties of States," there are serious doubts that the relevant UN General Assembly resolutions have created binding international law. See Sonarajah, *supra* note 16 at 177.

I do not answer these questions in this thesis. Rather, from a limited perspective, I elaborate why norm-based evolution of law offers a broader space for initiating or implementing meaningful changes. It is true that strong arguments and evidence depict the proliferating role of power and politics in global law-making and governance issues. However, their profound dominance does not automatically negate the growing importance of counter-norms from marginalized forces in defining relations between states, non-state actors and institutions. Considering the latter's diverse tactics, broad coverage and linkages, it would give a partial view on law-making and global governance, if the challenges from marginalized forces (consisting of both state and non-state actors) and the strength of these counter-norms were ignored. One forceful example of their presence is diverse forms of social movements, network activities and protests from the grassroot levels.²⁷ Adopting various methodologies (both "intellectual" and "on-the-ground"), these movements, initiatives or activities allow marginalized forces to articulate their challenges against neo-liberal economic governance and demand law and global governance based on social justice. As a result of these continuing confrontations, "law remains unsettled and is best studied as a process that constantly shifts in accordance with policy and other issues."²⁸

This thesis does not negate the influence of power and politics in law-making and global governance. Rather, it builds on the idea that within the perpetual struggle between power and norms, politics and ideas, and contestation between demands of dominant and marginalized

²⁷ See Sonarajah, *supra* note 16 at 189. The intellectual challenges in international law started with concepts such as "third world approaches to international law," "people-centered international law" etc. See Balakrishnan Rajagopal, "International Law and Third World Resistance: A Theoretical Inquiry" in Antony Anghie *et al*, eds, *The Third World and International Order: Law, Politics and Globalization* (Leiden: Martinus Nijhoff Publishers 2003) 145-172; Balakrishnan Rajagopal, "From Resistance to Renewal: the Third World, Social Movements, and the Expansion of International Institutions" (2000) 41:2 Harv Intl L J 529; B De Souza Santos & CA Rodriguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press 2005).

²⁸ Sonarajah, *supra* note 16 at 188.

forces, the norm-based evolution of law reserves space for a broader understanding of law and persuasively accommodates the viewpoints of both strong and weak actors. While power-based law explains that at an international level only the powerful states, corporations and lobbies determine the content of law and ensure enforcement of the law through forming institutions, norm-based evolution of law accommodates a variety of actors. The latter includes not just powerful states, well-organized institutions or corporations, but also non-state actors, networks or social movements operating at a local, regional or transnational level. While power-based law emphasizes the role of power and politics, norm-based evolution of law searches for ways to connect law-making with emerging global consensus. Accommodating the views from multiple struggles, movements and resistances, and offering “alternatives to the exclusions, inequalities and discriminations,”²⁹ the latter engages more actors, challenges the conventional understanding of law-making and paves the way for social change.

Taking two examples, one from a global trade regime and the other from a labour governance setting, this thesis endeavours to identify an alternative view of global governance of trade and labour matters, i.e. how norm-based changes can reshape institutional behaviour and/or transnational regulatory mechanism and to canvass some possible options, in which these regulatory or governance mechanisms can improvise or learn from each other. The objective is to address the glaring inequalities and distributional problems of power-based law and to promote an understanding of law that is more responsive to the demands of the marginalized and neglected forces. There remain ample opportunities where this limited attempt to align with the demands of marginalized forces can be expanded.

²⁹ Boaventura De Sousa Santos, *The Rise of the Global Left: The World Social Forum* (London & New York: Zed Books 2006).

I conclude by clarifying an important limitation of this research. In any legal research, potential or actual normative significance remains a useful consideration and this thesis fails to outline any specific route for implementing its suggestions. To some extent, this omission was deliberate considering the redistributive concerns and the regulatory challenges. These challenges and concerns transcend national boundaries and demand resolute attention on identifying not just various spaces or forces of law, but also alternative and innovative mix of hard and soft regulatory ways. A recent example of such diversities and alternatives can be found in the emerging transnational system of law. Operating within and beyond national boundaries, involving diverse actors and enforcement approaches, the complex “transnational legal order” challenges the conventional understanding, operation and enforcement of law.³⁰ Tracing and connecting these de-centralized regulatory spaces, strategies, forces and orders, should validly occupy a substantial space in researches on law and global governance.

³⁰ For an excellent discussion on the concept of transnational legal order and its influence in human rights law, regulatory law and business law, see Terence C. Halliday & Gregory Shaffer, "Introduction: Transnational legal Orders" in Terence C. Halliday & Gregory Shaffer, eds., *Transnational Legal Orders*: (Cambridge: Cambridge University Press, 2015) 1. Terence C. Halliday & Gregory Shaffer, "Conclusion: Researching Transnational Legal Orders" in Terence C. Halliday & Gregory Shaffer, eds., *Transnational Legal Orders*: (Cambridge: Cambridge University Press, 2015) 475.

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