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I hereby declare that I have read and understood the regulations governing the submission of LLM dissertations/research papers, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation/research paper conforms to those regulations.

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List of Common Acronyms Used

CAA	United States Clean Air Act of 1990
CEB	Chief Executive Board
CFCs	Chlorofluorocarbons
CRS	Corporate social responsibility
CSD	Commission on Sustainable Development
CTD	Committee on Trade and Development
CTE	Committee on Trade and Environment
DSB	World Trade Organization's Dispute Settlement Body
EEC	European Economic Community
EFTA	European Free Trade Agreement members
EPA	United States Environmental Protection Agency
ETP	Eastern Tropical Pacific Ocean
EU	European Union
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICESCR	United Nations Committee on Economic, Social, and Cultural Rights
IMF	International Monetary Fund
LDCs	Least-developed Countries
MDGs	United Nations Millennium Development Goals
MMPA	United States Marine Mammal Protection Act of 1972
NAFTA	North American Free Trade Agreement
NGOs	Non-governmental Organizations
TEDs	Turtle Excluder Devices
UN	United Nations
UNCCC	United Nations Framework Convention on Climate Change
UNCED Secretariat	United Nations Conference on Environment and Development
WCED	World Commission on Environment and Development
WCS	World Conservation Strategy
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

SECTION I: INTRODUCTION

A key message at the 2007 Red Cross and Red Crescent International Conference was that "one of the greatest challenges facing humanity is environmental degradation, including deforestation, desertification, pollution, and climate change…"[1] Environmental degradation leads to more vulnerable societies with less access to resources. Less access to resources is one of the factors that fuels international conflict.[2] Furthermore, climate change will most likely lead to an increase of intensity and frequency of weather extremes. This includes floods, heat waves, droughts, and hurricanes.[3] Extreme weather can lead to an increase in diseases like malaria and can affect other factors like mass migration, poverty, and social inequality.[4] The current status of environmental protection is not sufficient enough to stop these accelerated changes from happening. Thus, more must be done by the leading international institutions to ensure that the environment is protected and that sustainable development is an effective and achievable goal.

As we move from a sovereignty-ruled system to a more globalized world, the growing influences of international financial and trade organizations such as the World Trade Organization (hereinafter "WTO"), the World Bank and the International Monetary Fund (hereinafter "IMF") are becoming more significant.[5] As these institutions increase in power, their relationships with sustainable development have become more strained. In the past half-century, trade barriers have greatly been reduced, and international trade has increased rapidly.[6] Through the WTO, a global rules-based trading system has emerged. While still a relatively new organization, the legitimacy of the WTO is illustrated by the fact that most

[1] *See generally* International Committee of the Red Cross, *Key Messages and Facts on Environmental Degradation*, Resource Centre, available at: http://www.icrc.org/eng/resources/documents/misc/30-international-conference-key-messages-environmental-degradation-201107.htm [Accessed last: 30 November 2011].
[2] *See generally* Alex Evans, *Resource Scarcity, Climate Change and the Risk of Violent Conflict*, World Development Report 2011: Back Ground Paper (2010) 1-23.
[3] *See generally* Intergovernmental Panel on Climate Change, *Climate Change 2007: Working Group II: Impacts, Adaption and Vulnerability*, available at: http://www.ipcc.ch/publications_and_data/ar4/wg2/en/contents.html [Accessed last: 1 January 2012].
[4] Supra, n.1.
[5] *See generally* The Bretton Woods Committee, *About the Bretton Woods Committee*, available at http://www.brettonwoods.org/index.php/167/About_the_Bretton_Woods_Committee [Accessed last: 1 January 2012].
[6] G. Sampson, *The WTO and Sustainable Development*, TERI Press, first published by United Nations University Press (2005).

countries in the world are members and that the recommendations and case outcomes of the Dispute Settlement Body (hereinafter "DSB")[7] are generally strictly followed. With the growing increase in world trade, there has also been an increase in awareness and desire to achieve sustainable development. Often policies on these two areas have overlapped, and as the current Director-General of the WTO, Pascal Lamy, has stated, "these days, however, the WTO cannot simply ignore the need to promote and preserve the environment."[8]

There are many definitions of "sustainable development," but the most frequently used one comes from *Our Common Future,* also known as the *Brundtland Report*.[9] It states:

> "Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it 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 organizations on the environment's ability to meet present and future needs."[10]

The *Brundtland Report* also defines sustainable development as "a process of change in which the use of resources, the directions of investments, the orientation of technological developments, and institutional change all enhance the potential to meet human needs both today and tomorrow."[11]

This vague and broad definition relies on the notion that the world's environment is a system where actions in one country can affect life on other

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[7] *See* World Trade Organization, DSU, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 354 (1999), 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).
[8] *Id.*
[9] United Nations, *Report of the World Commission on Environment and Development: Our Common Future*, UN Doc A/42/427.
[10] *Id.*
[11] *Id*.

continents. Examples of this include the 2010 Icelandic volcano eruption that affected air quality and travel in Europe, and the recent radiation detected in the United States after the earthquake and subsequent radiation leaks in Japan. The definition also implies that practically every aspect of our lives can have some effect, or can be relevant to, achieving a sustainable development goal. Most forms of production and consumption, key aspects of international trade, affect and can harm the environment. Thus, the issue is less about stopping these actions and more about making them less harmful to the environment and humankind.

There will always be tension between forms of economic activity and environmental protection. However, trade is only one of many economic activities, and the WTO cannot be solely responsible for all aspects of the promotion of sustainable development and environmental protection. At its most general definition, international trade is the "economic interaction among different nations involving the exchange of goods and services."[12] It can lead to both economic growth and development. At its core, international trade involves the basic concept of supply and demand. Human needs and desires drive what will be in demand. This demand drives the need for a supply of that resource. Thus, the real question is what aspects of the current trading system, including the WTO, can be enhanced or changed to promote sustainable development.

This paper aims to examine the relationship between the WTO and sustainable development. It further seeks to evaluate the ways in which the relationship has been successful and the ways in which it has been hindered. Finally, this paper looks to the future and suggests ways to enhance and change this relationship and more effectively protect the environment through the WTO.

This paper is divided into six major parts. Section I contains the introduction. In Section II, the history of the protection of environmental rights and the promotion of sustainable development in both the General Agreement on Tariffs and Trade (hereinafter "GATT")[13] and the WTO are examined. This is done by looking at applicable legislation, declarations, and conferences. The third section analyses

[12] Economic Glossary, *Economic Definition of International Trade*, available at: http://glossary.econguru.com/economic-term/international+trade [Accessed last 30 November 2011].
[13] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194.

relevant GATT and WTO case precedent. The fourth section deals with the current, on-going, and persistent debates that must be addressed before any serious progress can be achieved. In Section V, recommendations are discussed. In the conclusion, a summary of the findings is given.

SECTION II: THE GATT AND THE WTO ENVIRONMENTAL PROTECTIONS AND THE PROMOTION OF SUSTAINABLE DEVELOPMENT

As the WTO is the international body designated to administer trade rules and act as the major trade negotiating forum, it follows that the discussion of the relationship between trade and sustainable development should start there. By first analysing past and current WTO protections and by investigating relevant WTO case law, it can be shown that a history already exists of at least attempting to protect environmental rights and promote sustainable development in the international economic arena. However, while there is evidence of the attempts to bring these two areas together, the results are mixed, and the cases are not always successful.

When looking at the history of the relationship between trade and the environment, it is also relevant to look at applicable United Nations (hereinafter "UN") declarations and treaties. The WTO is a specialized agency of the UN, but it has very little power in governance terms. The two organizations maintain a close relationship that is governed by the "Arrangements for Effective Cooperation with other Intergovernmental Organizations-Relations between the WTO and the United Nations,"[14] which was signed in 1995. The WTO Director-General also participates on the Chief Executive Board (hereinafter "CEB"), the organ of coordination within the UN system that brings together the heads of various bodies, including the Bretton Woods institutions, with the purpose of promoting coherence within the UN.

The GATT text, the precursor to the WTO, was negotiated in 1947 and came into force on 1 January 1948.[15] In 1994, the text of the GATT was revised, and

[14] World Trade Organization, *The WTO and the United Nations,* available at: http://www.wto.org/english/thewto_e/coher_e/wto_un_e.htm [Accessed last 15 November 2011].
[15] Supra, n. 13.

during the Uruguay Round in 1995,[16] the GATT was incorporated into the newly formed WTO as a legal text binding all member states.[17] The GATT does not contain any specific provisions that solely deal with the environment. Likewise, the WTO does not have any explicit agreements that exclusively cover the issue. However, the WTO has taken several initiatives to protect environmental rights and promote sustainable development. These protections have evolved over time and have become more inclusive. Major criticisms about these protections centre on the fact that there are still no actual commitments to protect with fear of enforcement or repercussion. Rather, they only talk of how members *should* offer forms of protection.

II. A. The GATT: Pre-WTO Environmental Protection

When the GATT was first written, sustainable development was not a major issue, and the GATT itself does not explicitly mention the environment. At its inception, the main purpose of the GATT was to create a forum where a large number of member states would have the responsibility of "administering the complex web of legal rules, political relationships, and economic policy instruments that govern world trade."[18,19] The main obligation of the GATT was the tariff concession which is a commitment of a member state to impose no more of a tariff on imports than it would on other member states. This commitment is echoed in Article II of the GATT, where nations agree not to impose a "custom duty on a particular product in excess of the level listed on its tariff schedule."[20] Countries are bound to the prices on their schedule, and if a product does not appear on it, then the nation may set any price it likes. The GATT, however, provides an explicit

[16] World Trade Organization, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 2 (1999), 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994).
[17] WTO Agreement: Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 4 (1999), 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).
[18] Thomas J. Schoenbaum, *Free International Trade and Protection of the Environment: Irreconcilable Conflict?* Pg. 700 In Fairness to Future Generations: International law, Common Patrimony, and Intergenerational equality (1989) 704-705.
[19] Robert E. Hudec, *The Legal Status of the GATT in the Domestic Law of the United States*, in The European Community and GATT 187 (Meinhard Hilf, Francis G. Jacobs & Ernst Ulrich Petersmann eds., 1986).
[20] John H. Jackson, The World Trading System 40 (1989) at 229.

framework for renegotiating tariff schedules. Thus, the purpose of the GATT was to set regulations on tariffs and not protect the environment.

Many countries began passing environmental protections in the late 1960s and early 1970s. In the United States, the National Environmental Policy Act[21] was enacted in 1969. By some counts there are over nine hundred national and international legal instruments solely devoted to environmental issues,[22] but there still remains no general international agreement on environmental protection like there is on trade. By looking at first steps of GATT, one can see the evolution of the attempts to merge the international trade and environmental protection fields.

II. A .i. GATT First Steps

In 1971, the GATT Council of Representatives set up the Group on Environmental Measures and International Trade (hereinafter "EMIT") that was open to all members but would only convene at the request of GATT members.[23] This has only happened once, when it was it requested by the European Free Trade Agreement members (hereinafter "EFTA") who asked the GATT to contribute research and support to the upcoming 1992 UN Conference on Environment and Development (hereinafter "Rio Conference").[24] The effects of this report and the Rio Conference will be discussed in greater detail in Section II. A. ii. of this paper.

The link between the environment and trade was officially recognized in 1972 at the UN Conference on the Human Environment held in Stockholm.[25] A study prepared by the Secretariat of GATT, entitled "Industrial Pollution Control and International Trade,"[26] focused on the implications of environmental protection

[21] National Environmental Policy Act, Pub. L. No. 91-190, 83 Stat. 852 (1969), 42 U.S.C. SS4321-4347 (1988).
[22] Edith Brown Weiss, *Environment and Trade Partners in Sustainable Development: A commentary* The American Journal of Environmental Law Vol 86: no. 4. (Oct 1992) 728-735, 729.
[23] *See generally* World Trade Organization, EMIT-GATT Group on Environmental Measures and International Trade, available at: http://www.wto.org/english/tratop_e/envir_e/hist1_e.htm [Accessed last 31 December 2011].
[24] United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, UN Docs. 2 April 1009 E/CN.17/1997/8 (1992).
[25] United Nations Conference on Sustainable Development, *The History of Sustainable Development in the United Nations*, available at: http://www.uncsd2012.org/rio20/index.php?menu=22 [Accessed last: 31 October 2011].
[26] General Agreement on Tariffs and Trade, *Industrial Pollution Control and International Trade*, GATT Studies in International Trade 1, July 1971.

policies on trade and discussed "green protectionism." One result of this conference was the Declaration of the UN Conference on the Human Environment that laid out 26 principles concerning environmental protection.[27] The UN Conference on the Human Environment was also seen as the first time that both developed and developing nations came together to discuss and "delineate the 'rights' of the human family to a healthy and productive environment."[28] After the UN Conference concluded, more meetings were held to discuss further issues in-depth, such as "the rights of people to adequate food, to sound housing, to safer water, [and] to access to means of family planning..."[29]

The 1980s also ushered in some expansive declarations of environmental protections. The World Conservation Strategy (hereinafter "WCS") was published in 1980 by the International Union for the Conservation of Natural Resources.[30] This strategy is known to be one of the precursors to the current concept of sustainable development,[31] and it emphasized that environmental conservation cannot be achieved without development that also alleviates people in poverty.[32] It also stressed that the future of humanity was at risk unless the fertility and productivity of Earth was safeguarded.[33]

In 1982, the 48th plenary of the UN General Assembly approved the World Charter for Nature,[34] which stated, "mankind is a part of nature and life depends on the uninterrupted functioning of natural systems."[35] In 1983, the World Commission on Environment and Development (hereinafter "WCED") was created. In 1984, WCED became an independent body of the UN General Assembly, and it was charged with formulating a "global agenda for change."[36] The result of this was the aforementioned *Brundtland Report*,[37] published in 1987. This report advanced the

[27] United Nations, *Industrial Pollution Control and International Trade*, UN Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).
[28] Supra, n. 25.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] United Nations, *World Charter for Nature*, UN Doc. A/RES/37/7 (1982).
[35] *Id*.
[36] ANPED Northern Alliance for Sustainability, *Our Common Future: The Brundtland Report*, available at: http://anped.org/index.php?part=176 [Accessed last: 1 January 2012].
[37] Supra, n. 9.

awareness of the relationship between global interdependence, the economy, and the environment. It also declared that, "the environment does not exist as a sphere separate from human actions, ambitions and needs, and therefore should not be considered in isolation from human concerns. The environment is where we all live; and development is what we all do in attempting to improve out lot within this abode. The two are inseparable."[38] Thus, there was a growing awareness that environmental issues were growing in importance in the international sphere.

II. A. ii. 1992 UN Conference on Environment and Development

The 1992 Conference on Environment and Development, also known as both the Rio Conference and the Earth Summit, drew attention to the role of international trade in poverty alleviation and in combating environmental degradation. The event was hosted by the United Nations Conference on Environment and Development Secretariat (hereinafter "UNCED"). The major result of the Conference was the Rio Declaration on Environment and Development.[39] Other agreements were reached during this time, such as the Convention on Biological Diversity[40] and the UN Framework Convention on Climate Change (hereinafter "UNFCCC").[41] The Conference signified a shift in international agreement on the importance of the environment, and it was the first time the UNCED legitimized their participation in sustainable development issues.

Principle 8 of the Rio Declaration signified one of the first times that humankinds' lifestyle was tied to sustainable development publically by an international governance organization.[42] It called for an urgent and needed change in consumption habits and production patterns. This principle was widely acknowledged at the time by world leaders,[43] but not much was done to actually hold them accountable to their word. Also developed during the Rio Conference was Agenda 21: A Program of Action for Sustainable Development (hereinafter "Agenda

[38] *Id.*
[39] Supra, n. 24.
[40] United Nations Environment Program, *Convention on Biological Diversity*, 11 January 2005 UNEP/CBD/WG-ABS/3/INF/4 (2005).
[41] United Nations, *Framework Convention on Climate Change*, June 4, 1992, 31 I.L.M. 849 (1994).
[42] Supra, n. 24 at Principle 8.
[43] Supra, n. 25.

21")[44], an action plan that addressed the importance of promoting sustainable development, even through international trade.[45] It recognized each member states' right to pursue economic and social progress while also giving them the responsibility to adopt models of sustainability. Agenda 21 also reaffirmed that sustainable development was deeply rooted in and connected to the integration of three pillars of society: economic, social and environmental.[46]

The Rio Conference was seen as both a success and a failure on different issues. As for its successes, the Conference introduced an array of new non-state actors that wished to be included in the sustainable development discussion, including the WTO.[47] The Rio Conference signified the first time that Non-governmental Organizations (hereinafter "NGOs") were officially allowed to participate in the discussions because they were given access to working drafts and documents, the ability to circulate their own drafts, the ability to address meetings, and they were prominent in delegations of many developing countries.[48] This progression showed that a large number of business organizations were interested in at least discussing environmental issues, and it "demonstrat[ed] worldwide corporate interest in pursuing prosperity with new sensitivity to environmental considerations."[49]

The Rio Conference was seen as a failure in that it did not significantly bridge the growing gap between developed and developing nations, and it did not concretely solidify the concept of sustainable development. A large amount of the criticism on the Rio Conference comes from developing nations and focuses on Agenda 21. In 1993, to combat these criticisms, the UNCED created the Commission on Sustainable Development (hereinafter "CSD") as a follow-up to

[44] United Nations Conference on Environment and Development, *Agenda 21: Programme of Action for Sustainable Development,* available at: http://www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml [Accessed last: 15 December 2011].
[45] *Id.*
[46] *Id.*
[47] Daniel C. Esty, *Greening the GATT: Trade, Environment, and the Future,* Institute for International Economics (1994) at 26.
[48] Sylvia Ostry, *The WTO After Seattle: Something's happening here, what it is ain't exactly clear* Preliminary draft, University of Toronto (2001) 1-32, 9-10, available at http://www.utoronto.ca/cis/AfterSeattle.pdf [Accessed last 30 December 2011].
[49] *Id.*

assist with implementing and monitoring progress concerning the Rio Conference and Agenda 21.[50]

The successes and failures of the Rio Conference can be summed up in Principle 12 of the Declaration, which reads:

> States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral 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 an international basis.[51]

Sustainable development is recognized as a goal of all member states. However, that goal should clearly not come at the cost of interfering with the jurisdiction of other states. Thus, in 1992, the UN was ready to recognize some sustainable development goals as they related to trade, but it was not willing to discuss matters that were trans-jurisdictional. The World Summit on Sustainable Development, held in Johannesburg in 2002, renewed a global commitment to sustainable development and agreed on a Plan of Implementation to build on Rio's successes.[52]

[50] *See generally* The United Nations, *About the UN Commission on Sustainable Development*, Division of Sustainable Development, available at: http://www.un.org/esa/dsd/csd/csd_aboucsd.shtml [Accessed last 31 December 2011].
[51] Supra, n. 24 at Principle 12.
[52] United Nations *Plan of Implementation of the World Summit on Sustainable Development*, available at: http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf [Accessed last 2 January 2012].

II. B. The WTO

The WTO has two functions: legislative and judicial,[53] the latter of which is discussed in greater detail in Section III. The legislative function of the WTO is to act as a forum where member states reach trade agreements.[54] Thus, it acts less as a legislature that passes laws and more like a forum where a 'co-operative' of members meets to discuss and negotiate. For the purposes of this paper, the term "WTO" is often used synonymously with "WTO member states" and the "WTO Secretariat." Like the GATT, there is no one unequivocal agreement in the WTO framework that deals specifically with protecting the environment or promoting sustainable development. However, the WTO's commitment to both is clearly stated. On its website, the WTO declares:

> Sustainable development and protection and preservation of the environment are fundamental goals of the WTO. They are enshrined in the Marrakesh Agreement, which established the WTO, and complement the WTO's objective to reduce trade barriers and eliminate discriminatory treatment in international trade relations. While there is no specific agreement dealing with the environment, under WTO rules members can adopt trade-related measures aimed at protecting the environment provided a number of conditions to avoid the misuse of such measures for protectionist ends are fulfilled.
>
> The WTO contributes to protection and preservation of the environment through its objective of trade openness, through its rules and enforcement mechanism, through work in different WTO bodies, and through ongoing efforts under the Doha Development Agenda. The Doha Agenda includes specific negotiations on trade and environment and some tasks assigned to the regular Trade and Environment Committee.[55]

Thus, it would appear that the WTO is at least willing and able to declare its commitment to both environmental protection and the promotion of sustainable development. However, again like the GATT, these promises are merely declaratory

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[53] Keisuke Lida, *Is WTO Dispute Settlement Effective?* Global Governance 10 (2004) 207-225, 207.
[54] *Id.*
[55] World Trade Organization, *Trade and Environment*, available at: http://www.wto.org/english/tratop_e/envir_e/envir_e.htm [Accessed last: 15 December 2011].

and hold no concrete obligations or fear of ramifications. In fact, many of the criticisms of the WTO are the same ones that also plague the actual concept of international law itself. Mainly, that it is irrelevant and illusory, that powerful states ignore it when advancing their own goals, that it does not come from one central authority, and that it is generally not backed by sanctions.[56]

However, the WTO has done a good job of trying to establish itself in the international law realm of trade. The WTO has a large number of complying members that generally follow the rules, and it adopts binding judicial judgements that could trigger sanctions if not adhered to.[57] While the WTO does not specifically use the term "sanctions," its judicial powers are allowed to authorize the withdrawal of trade sanctions.[58] Proof of the WTO's growing influence is illustrated by the fact that all states have responded to WTO judgements by modifying their domestic practices, laws, and regulations.[59] In the few cases where domestic politics have blocked WTO compliant modifications, actual sanctions have resulted.[60] This illustrates that the WTO members are willing to make binding judgments that may affect member states negatively.

II. B. i. WTO Founding Charter

The Marrakesh Agreement Establishing the WTO, often called the "WTO Agreement" or the "Marrakesh Agreement," was signed in Morocco in 1994 and was entered into force on 1 January 2005. It incorporated the text of the previous GATT and maintained the goal of trade liberalization based on three core principles, some of which have been discussed above:

[56] Gregory C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation*, The Brookings Institution (2003) at 1.
[57] *Id.* at 2.
[58] *Id.*
[59] *Id.*
[60] See *EC – Regime for the Importation, Sale and Distribution of Bananas* WTO Document Series WT/DS27/R May, 22, 1997); and *EC – Measures Affecting Meat and Meat Products* WTO Document Series WT/DS26/R/USA (August 18, 1997).

(a) most-favoured nation -- Article 1 states that any privilege granted to one member must be granted to other member states;

(b) national treatment -- Article III requires that foreign goods imported into a member state be treated in the same manner as goods produced domestically in that state; and

(c) prohibition on import/export restrictions – Article XI prohibits quantitative restrictions on imports or exports, such as a ban on imports from a particular country or a measure that has had the effect of preventing or limiting such imports (e.g., quotas, import licences).[61]

These three core principles are the main source of contention in WTO litigation, especially concerning environmental rights and sustainable development. For the first time, the Marrakesh agreement also included a DSB[62] that would act as a *legally binding* judicial authority.[63] The DSB hears cases brought to it by member states against other member states concerning violations of GATT text, the Marrakesh agreement, and the supplemental documents. It is here that most of the progress on sustainable development issues and environmental protections have been debated or discussed, and case precedent has been set. The relevant cases and the holdings of the DSB are discussed in Section III of this paper.

Some additional modifications were made to the original GATT text, and the new GATT is often referred to as GATT 1994.[64] For the purposes of this paper, the major changes in the GATT 1994 are not relevant, so the "GATT" designation refers to both forms of the document. The new GATT also included supplemental documents on issues concerning trade in services,[65] trade-related aspects of

[61] Supra, n. 13, Arts. I, III, XI. *See also* Ryan L. Winter, Comment, *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat it Too?* Colum. J. Int'l Envtl. L. & Pol'y 223, 227-28 (2000).
[62] Supra, n. 7.
[63] *Id.*
[64] World Trade Organization, GATT 1994:General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).
[65] *See generally* World Trade Organization, GATS: General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 284 (1999), 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) .

intellectual property,[66] technical barriers to trade,[67] and sanitary and phytosanitary measures.[68] These Agreements were important steps in the objective of sustainable development. For example, th Agreement on Technical Barriers to Trade (hereinafter "TBT Agreement") recognizes the protection of the environment and sustainable development as legitimate objectives[69] and the Agreement on Trade-Related Aspects of Intellectual Property Rights recognizes an environmental exception in regard to patents.[70] All of the supplemental documents, the Marrakesh Agreement, and the original GATT text are indivisible, and any member state that ratifies one of the agreements is also agreeing to be party to all of them.

The WTO also took another first step by explicitly declaring in the preamble of the Marrakesh agreement that sustainable development is a major objective of the organization.[71] This has been seen by some as a declaration that the WTO understands "the need for environmentally responsible free trade."[72] The Marrakesh Agreement also created the Committee on Trade and Environment (hereinafter "CTE") to "contribute to identifying and understanding the relationship between trade and environment in order to promote sustainable development."[73] The results of the CTE have so far been minor, with its most major accomplishment being that it is now recognized as a symbol of institutionalizing environmental standards in the WTO.[74] However, these new steps are both declarations of an *understanding* and differ significantly from actual *action*. As the WTO is still a relatively new organization, it will take time to see if this objective will be met or even made a significant priority.

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[66] *See generally* World Trade Organization, TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 320 (1999), 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).
[67] World Trade Organization, The Agreement on Technical Barriers to Trade, Apr. 15, 1994, 1868 U.N.T.S. 120.
[68] World Trade Organization, The Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, 1867 U.N.T.S. 493.
[69] Supra n. 67 at Art. 2.2.
[70] Supra n. 66 at 27.2.
[71] Supra, n. 17 at preamble.
[72] William M Reichhert, *Resolving the Trade and Environment Conflict: The WTO and NGO Consultative Relations*, 5 Minn. J. Global Trade 219 (1996) pg 219.
[73] World Trade Organization, *The Committee on Trade and Environment* ('regular' CTE), available at http://www.wto.org/english/tratop_e/envir_e/wrk_committee_e.htm [Accessed last 31 December 2011].
[74] Steve Charnovitz, *Trade and the Environment in the WTO,* Journal of International Law, Vol. 10, (2007) 1-29, 8.

II. B. ii. Current Status

The WTO is currently in the Doha Round of negotiations. In 1991, The Doha Ministerial Declaration (hereinafter "Doha Declaration")[75] launched the current discussions and strongly reaffirmed the WTO commitment to sustainable development. Paragraph 51 of the Declaration called on the WTO's Committee on Trade and Development (hereinafter "CTD") and on the CTE to "identify and debate developmental and environmental aspects of the negotiations, in order to help achieve the objective of having sustainable development appropriately reflected."[76] As a result of this, the CTE has made sustainable development a standing item on its agenda and has participated in numerous environmental and developmental debates in the Doha Round.

The WTO Secretariat and its committees have also published a number of background papers that have made significant contributions in defining the relationship between trade and the environment.[77] These papers are often written by the WTO Trade and Environment Division and are eventually made public.[78] One of the most well-known of these reports was written in 1999 by the WTO Secretariat titled the "Report on Trade and the Environment."[79] This report is widely cited and continues to be a major force in the trade-related environmental field,[80] despite its weaknesses including failing to recommend any modifications "to enhance a positive interaction between trade and environmental measures..."[81]

In 2005, the WTO Secretariat organized a Symposium on Trade and Sustainable Development to help fulfil the obligations of Paragraph 51 of the Doha Declaration.[82] The focus of the Symposium was the relevance of the sustainable

[75] World Trade Organization, *DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION*, WT/MIN(01)/DEC/1 20 November 2001.
[76] *Id.*
[77] Supra n. 74 at 8.
[78] *Id.*
[79] World Trade Organization Secretariat, Special Studies 4, Trade and the Environment (1994), Available at: http://www.wto.org/english/res_e/booksp_e/special_study_4_e.pdf [Accessed last 15 January 2012].
[80] *See generally*, Steve Charnovitz, *World Trade and the Environment: A Review of the New WTO Report*, 12 Georgetown International Environmental Law Review 523 (2000).
[81] Gary P. Sampson, *Trade, Environment and the WTO: The Post-Seattle Agenda*, Overseas Development Council. Policy Essay No. 27. Washington, D.C. (2000) pg. 27.
[82] *See generally*, World Trade Organization, *WTO Symposium on Trade and Sustainable Development within the Framework of Paragraph 51 of the Doha Ministerial Declaration*,

development concept to the Doha work program, the contribution of trade towards sustainable development, and capacity programs to promote sustainable development.[83] Once again, besides declarations of commitment to the issue and discussions of what the concept meant in the trade world, little *action* was planned or promised. Thus, despite the intent of the Symposium, little progress has been made to implement Paragraph 51. This suggests that there is serious resistance to any sort of comprehensive approach to structured timelines and targets aimed at bridging the gap between trade and the environment.[84]

The reviews of the successes of the Doha Round are mixed, but it is clear that all of the goals of the Doha Declaration will not be met at its conclusion.[85] As of December 2011, the talks to end the Round were deadlocked, mostly over the discussion of a free trade pact and the failure to bridge the differences between developed countries, developing countries, and least-developed countries (hereinafter "LDCs"), opinions on lowering industrial tariffs, and cutting farm subsidies.[86] If the Doha Round fails to come to a decisive conclusion, then the legitimacy of the WTO as a whole will probably be questioned, and it is more than likely that they will lose some public support. The matter is somewhat dire, as seen in Pascal Lamy's urgent statement to members that, "the lack of convergence that exists today would not solve itself with time..."[87]

Symposium 10-11 (2005), available at: http://www.wto.org/english/tratop_e/envir_e/sym_oct05_e/sym_oct05_e.htm [Accessed last 1 January 2012].

[83] *Id.*

[84] Urs P. Thomas, *Trade, the Environment and Poverty Alleviation: Challenges for the WT0's Doha Round*, Presented at the International Studies Association 47th Annual Convention, San Diego, CA, March 22-25, 2006.

[85] Hui Min Neo, *WTO Talks end with Doha Round still Deadlocked,* Yahoo! News (17 December 2011) available at: http://news.yahoo.com/wto-talks-end-doha-round-still-deadlocked-152753792.html [Accessed last 1 January 2012].

[86] *Id.*

[87] *Id.*

SECTION III: WTO CASE PRECEDENT[88]

Under the GATT, six Panel proceedings involving an examination of environmental measures and human health-related measures were heard. Of the six reports, three were adopted. Since 1995, three proceedings have been completed and adopted by the WTO's DSB. The six GAT/WTO Panel rulings that were adopted are discussed below. The unadopted Panel decisions are not discussed in this paper, with the exception of the *Tuna Dolphin*[89] case. This case is discussed below for its relevance and continued use as precedent in international law and because it was the first time the importance of sustainable development was recognized in a GATT/WTO Panel decision. Also, it illustrates the noticeable evolution of the interpretation of Article XX of the GATT.[90]

It should also be noted that much of what countries have done to promote free trade or protect the environment have not raised legal issues. This is not to say that legal issues were not involved; rather, it says that no member state wanted to make a legal issue out of an environmental protection measure. Except for one case, all of the adopted Panel proceedings involve exceptions under Article XX of the GATT 1994 which, in relevant parts, states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in the Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal or plant life health;
>
> (c) relating to the importation of exportation of silver or gold;

[88] *See generally* supra, n. 53 for an in-depth description of how the DSB works and what changes have been made during the transition from GATT to WTO.
[89] *United States – Restrictions on Imports of Tuna (Tuna I)* DS21/R-39S/155 (Sept. 3, 1991) (unadopted).
[90] Supra, n. 64 at Art. XX.

> (d) necessary to secure compliance with the laws or regulations which are not inconsistent with the provisions of this agreement...;
>
> (e) relating to products of prison labour;
>
> (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
>
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
>
> (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement...;
>
> (i) involving restrictions on exports of domestic material necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan...;
>
> (j) essential to the acquisition or distribution of products in general or in local short supply....[91]

While the majority of environmental claims involve subparagraphs (b) or (g), most of the text of Article XX is included above for illustrative purposes and to show other subparagraphs which could possibly be used in complaints in the future. For example, member states could attempt to use subparagraph (a) to establish an exception that goes against the very morals of the country. A member state could also attempt to claim an exception under subparagraph (h) for a historic parcel of land. This author does not claim that any of these complaints would be successful; rather, the WTO DSB is a relatively new body, and all of the exceptions under Article XX have yet to be tested as they relate to the environment and the objective of sustainable development.

When a case is brought before the DSB, the burden of proof is on the party that is invoking the exceptions, generally under Article XX, to validate a GATT inconsistent measure.[92] A traditional analysis of all of the exceptions under Article XX would make this a difficult burden to meet, as the GATT Panel has itself held

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[91] *Id.*

[92] Ala'i, Padideh , *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body's Shift to a More Balanced Approach to Trade Liberalization* (1999). American University International Law Review, Vol. 14 (1999) at 1137.

that the Article should be interpreted narrowly and that none of the exceptions explicitly create an obligation in themselves.[93] This means that the Panel will not analyze an aspect of Article XX unless it is invoked by one of the parties in the dispute. There are other Articles that are sometimes claimed as an exception, but for the purposes of this paper they are not discussed in detail as they very rarely relate to environmental claims.

III. A. *United States — Prohibition of Imports of Tuna and Tuna Products from Canada*

The Panel finding was adopted pre-WTO on 22 February 1982.[94] "An import prohibition was introduced by the United States after Canada seized 19 fishing vessels and arrested US fishermen for fishing albacore tuna without authorization from the Canadian government in waters considered by Canada to be under its jurisdiction. The US did not recognize this jurisdiction and introduced an import prohibition to retaliate under the Fishery Conservation and Management Act,[95] which prohibited the entry of all tuna products from Canada.

First, the Panel found that the import prohibition was contrary to Article XI:1[96] of the GATT. Then, it looked to see if it was justified under either Article XI:2 or under Article XX (g) of the General Agreement.[97] It found that it was not. As for Article XX (g), the Panel did find that the tuna was "an exhaustible natural resource"; however, the article did not apply as the "United States had not imposed identical or similar restrictions on domestic tuna consumption or production."[98] Thus, the Panel found that the United States was in violation of the GATT as its measure constituted an impermissible quantitative restriction on trade that was not applied equally on like domestic and foreign products.

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[93] *See* GATT Analytical Index: Guide to GATT Law and Practice 563 (1995) (citing U.N. Doc. E/PC/T/C.II/32 (1946).
[94] *United States-Restrictions on Imports of Tuna*, GATT Doc. DS21/R, 30 I.L.M. 1594.
[95] Magnuson–Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884.
[96] Supra, n. 64 at Art. XI:1.
[97] *Id.* at Art. IX:2 and XX (g).
[98] David Vogel & Alan M. Rugman (1997): Environmentally Related Trade Disputes between the United States and Canada, American Review of Canadian Studies, 27:2, 271-292, 272.

III. B. *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon ("Herring and Salmon")*

The Panel finding on the *Herring and Salmon* case was adopted pre-WTO on 22 March 1988.[99] Under the 1976 Canadian Fisheries Act, Canada maintained regulations prohibiting the exportation or sale for export of certain unprocessed herring, sockeye salmon, and pink salmon. The US complained that these measures were inconsistent with GATT Article XI and that no exceptions applied.[100] Canada argued that these export restrictions were part of a system of fishery resource management aimed at preserving fish stocks and therefore were justified under Article XX (g).[101]

In examining Canada's Article XX (g) exception claim, the Panel started with an analysis of the actual language of subsection (g). The Panel held that the salmon and herring in question were "exhaustible natural resources." However, it also held that the Canadian law was not "related to" the conservation of the fish, and it was not "in conjunction with" restrictions on domestic consumption or production.[102] By doing so, the Panel declared that "relating to" means that the measure is "*primarily* aimed at the conservation of an exhaustible natural resource [emphasis added]."[103] They also held that "in conjunction with" means that the measure must be "*primarily* aimed at rendering effective the domestic production restrictions [emphasis added]."[104]

In this case, the Panel found that Canada had failed to prove that its regulations on export restrictions had been *primarily* aimed at rendering effective a domestic restriction or conserving the herring and salmon. The Panel did not examine Canada's exception claims under the chapeau of Article XX, as it had already held that the measures were not an exception of subparagraph (g). The Panel

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[99] *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, GATT Doc. BISD 35S/98.
[100] *Id.*
[101] *Id.*
[102] *Id.* at para 4.4.
[103] *Id.* at para. 4.6.
[104] *Id.*

also found that Canada had failed to place similar limits on domestic consumption of the fish, a ruling similar to the previous case between the two countries.[105]

In summary, the Panel found that the measures maintained by Canada were contrary to GATT Article XI:1 and were not justified by Article XI:2 (b) or by Article XX (g). The Panel also clarified the definition and plain meaning of some of the words in Article XX (g) and made the distinction that it is not necessary to examine the claim under the chapeau of Article XX if the section in question is already found to not apply. This case was also important because it granted states the right to argue an exception to the GATT under Article XX "in the alternative."[106] This means that a state can claim innocence, but if found to be in violation, then it is "in the alternative" allowed to violate the article in question under an exception.

III. C. *Thailand — Restrictions on the Importation of and Internal Taxes on Cigarettes ("Thailand Cigarettes")*

The Panel finding on *Thailand-Cigarettes* was adopted pre-WTO on 7 November 1990.[107] The United States brought suit against Thailand claiming that Thailand's laws prohibiting the importation of cigarettes while subsequently authorizing the domestic sale of them, was a inconsistent with Thailand's duties under Article XI:I and was not excused under Article XX.[108] Furthermore, the United States claimed that Thailand's actions were meant to protect the domestic cigarette market rather than the health of its citizens.[109] The regulation in question prohibited importation of cigarettes unless the Director-General granted a license.[110] At the time of the case, the Director-General had not granted such a license in over ten years. Furthermore, the United States claimed that Thailand had launched a large-scale domestic marketing agenda to encourage locals to take-up smoking locally made cigarettes.[111]

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[105] Supra, n. 98 at 273.
[106] Supra, n. 99.
[107] *Thailand — Restrictions on the Importation of and Internal Taxes on Cigarettes*, GATT Doc. BISD 37S/200.
[108] *Id.*
[109] *Id.*
[110] Tobacco Act of 1966 (Thailand), *quoted* in GATT Thailand-Cigarettes report, *id.* para 63.
[111] *See generally* Ross Hammond, *Big Tobacco's Global Expansion*, available at: http://www.takingontobacco.org/addicted/main.html [Accessed last 30 December 2011].

In response, Thailand claimed that its restrictions were justified under Article XX (b) to protect the health of its citizens.[112] Thailand also claimed that the cigarettes imported from the United States contained additives and chemicals that were not found in the domestically made cigarettes and that the restriction was the only way that the government could make sure that its citizens' health was protected.[113] Interestingly, the United States did not counter with a discussion about the health risks of cigarettes. Instead it argued that Thailand should seek to reduce its number of smokers in ways that are more consistent with GATT and that any exceptions under Article XX should be taken on a national treatment basis.[114] Also, the United States argued that Thailand did not have similar domestic safeguards, and the domestic sale of cigarettes remained on a high level.[115]

In examining these claims, the Panel adopted the "least-GATT-inconsistent" test, which was explained as such:

> Import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX (b) only if there were no alternative measures consistent with the General Agreement, or less inconsistent with it, which Thailand could reasonably be expected to employ to achieve its health policy objectives.[116]

Here, the Panel held that Thailand could have used other measures to protect the health of its citizens and thus had failed the "least-GATT-inconsistent" test.[117] The Panel went even further to suggest ways in which Thailand could have done this, including using a strict, non-discriminatory labelling and ingredient disclosure regulation[118] or a ban on both domestic and foreign cigarette advertising.[119]

In summary, the Panel found that the import restrictions were inconsistent with Article XI:1 and not justified under Article X1:2 (c). It further concluded that the import restrictions were not "necessary" within the meaning of Article XX (b).

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[112] Supra, n. 107.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.* at para 75.
[117] *Id* at para 77.
[118] *Id* at para 77.
[119] *Id* at para 79.

The internal taxes were found to be consistent with Article III:2. Also important to note in deciding what was "necessary," the Panel did not give any consideration to the subject matter. Thus, tobacco was probably treated in the exact same manner that other products would have been treated, i.e., as a product that is not inherently dangerous to those who use it. The Panel chose again to not discuss the case under the merits of the chapeau of Article XX. The Panel did find, though, that Thailand could maintain certain advertising restrictions on smoking, as long as the restrictions were applied the same to domestic and foreign cigarettes.[120] Thus, today, Thailand has one of the strongest anti-smoking campaigns, and imported cigarettes only account for 3% of the market.[121]

III. D. i. *United States — Prohibition of Imports of Tuna and Tuna Products from Mexico ("Tuna I" or "Tuna Dolphin")*

This Panel decision was not adopted. Mexico brought action against the United States claiming that it was violating its obligations under GATT Articles XI and XIII and was not covered by the exceptions under Article XX (b) and (g).[122] The regulation under scrutiny was the United States' Marine Mammal Protection Act of 1972 (hereinafter "MMPA"),[123] which prohibited the importation of tuna or tuna products into the United States that had been harvested by purse-seine nets in the Eastern Tropical Pacific Ocean (hereinafter "ETP"). The United States claimed that the prohibition was necessary because schools of dolphins often swam above schools of tuna, and the use of purse-seine nets to catch the tuna were also inadvertently catching and killing dolphins.[124] Some proof was also given that fisherman were actually locating schools of dolphins and fishing there, with the hopes of also catching tuna.[125]

The United States further argued that the MMPA did not violate the GATT because its regulations on domestic fisherman were similar to those that were imposed on foreign fisherman. Thus, national treatment under GATT Article III:4,

[120] *Id.*
[121] *Id.*
[122] Supra, n. 89.
[123] Marine Mammal Protection Act, Pub. L. No. 92-522, 86 Stat. 1027 (1972).
[124] Supra, n. 89 at para 2.1.
[125] *Id.* at para 2.2.

permitted its actions, and quantitative restrictions under Article XI did not apply.[126] The Panel dismissed the national treatment argument as irrelevant[127] as Article III only applied to products and that countries could not ban imports of products made by processes that were harmful to the environment or to living resources. Thus, the Panel made a distinction between *product* and *process*. From the sustainable development prospective, the product in this case was yellow-fin tuna, and it is as equally important as the process used to attain the product – the dolphins killed while fishing. The Panel decision took away countries' ability to ban products solely on the basis of environmentally unsuitable practices.

The United States also argued that the MMPA was justified under the exceptions listed in Article XX (b) because: "(1) dolphins are a threatened species, (2) there is credible evidence that yellow fin tuna and dolphins can be found in the same waters, (3) catching tuna does result in incidental killing of dolphins, and (4) prohibiting the use of purse-seine nets can minimize the incidental killing of dolphins."[128] The Panel struck down this argument by stating that the United States had failed to prove that it had fulfilled the primary step in invoking an Article XX exception, mainly that it had not "exhausted all options reasonably available to it to pursue its dolphin protection measures..."[129] In summary, the Panel held that to meet the burden of Article XX (b), the member state must "(1) adopt the least-GATT-inconsistent measure; (2) prove that it has exhausted all options before adoption of the measure; and (3) apply it in a manner that is least-GATT-inconsistent, meaning that the treatment of domestic and foreign parties must be identical."[130]

Under Article XX (g), the United States claimed that dolphins were an "exhaustible natural resource" and that the MMPA was "in conjunction with" restrictions on domestic consumption and production of yellow fin tuna.[131] The Panel again ruled that the United States had failed to meet this test in that it had not meet the "primarily aimed at" requirement because the regulations were based on United States statistics and rates and therefore could not apply to Mexican

[126] *Id.*
[127] *Id* at para 5.11-5.15.
[128] *Id.* at para. 3.33.
[129] *Id.* para. 5.33.
[130] Supra, n. 92 at 1148.
[131] Supra, n. 89 at para. 3.40.

fisherman. This means that the Panel believed that the United States actions were more based on gaining an advantage over the Mexican fisherman rather than on protecting the dolphins. Unlike its interpretation of Article XX (b), the Panel did not set a clear guideline of what a party must do to meet the burden of proof and have the exception apply. The *Tuna Dolphin* report also affirmed that countries could limit the import of products that were harmful to the domestic environment of the importing country if the products were accorded national treatment on a non-discriminatory basis.[132]

III. D. ii. *United States — Prohibition of Imports of Tuna and Tuna Products from Mexico ("Tuna II")*

Like its predecessor, this Panel decision was also not adopted. In this case, the MMPA was again at issue. This time, countries that were affected under the "intermediary nation embargo" filed the complaint, most notably the Netherlands and the European Economic Community (hereinafter "EEC"). The MMP had two distinct categories of embargo, the primary nation embargo and the intermediary nation embargo.[133] Under the primary national embargo, imports of tuna or tuna products into the United States were prohibited if they were harvested by a method that resulted in the incidental killing or serious injury of marine mammals.[134] Under the intermediary nation embargo, nations that both import tuna and tuna products and export them to the United States "must certify and provide reasonable proof that it has not imported products subject to the direct prohibition within the proceeding six months," and any nation that failed to certify as such was not allowed to export the products into the United States.[135] The purpose of this regulation was to ensure that tuna and tuna products imported into the United States from intermediary countries were not actually coming from other countries that used the purse-seine fishing method.[136]

The Netherlands and the EEC claimed that none of the exceptions in Article XX applied, while the United States claimed exception under subparagraphs (b), (d),

[132] *Id.*
[133] *Id.* at para 2.7.
[134] Supra, n. 123.
[135] Supra, n. 89 at para 2.12.
[136] Supra, n. 132.

and (g). As for subparagraph (b), the Panel found that it did not apply because it was not necessary because it forced other countries to "change their policies within their own jurisdictions, and it required such changes to be effective."[137] Under subparagraph (d), the Panel limited its scope to only cover laws and regulations that are in themselves justified, meaning that because the "primary embargo" focused on in *Tuna I* was found to not apply under Article XX, then the intermediary law based on the primary embargo could itself not apply individually under subparagraph (d).

Under subparagraph (g), the Panel again sided against the United States but did offer a more comprehensive explanation as to why it ruled this way. This was not something that was done in *Tuna I*. Here, the Panel gave a three-step analysis for subparagraph (g).[138] The first step was to ask whether or not the intermediary nation embargo provisions were part of a policy to conserve an exhaustible natural resource. Secondly, the Panel asked whether or not the intermediary embargo provisions were made "in conjunction with" domestic consumption and production and "related to" conservation efforts. Finally, the Panel asked whether or not the intermediary actions were applied in a manner that was arbitrary or unjustifiable discrimination between countries where the same conditions occur.[139]

Using the above analysis, the Panel found that the MMPA intermediary nation embargo only satisfied the first step but failed to satisfy the second. This meant that the Panel agreed that dolphins were an exhaustible natural resources but that the protection of the dolphins under the MMPA was not "in conjunction with" or "related to" the United States' conservation efforts. The Panel further concluded that the United States' measures were meant to *force* other countries to comply with its standards, and this, in and of itself, went against the basic core of the nature of the GATT. Simply put, the Panel was stating that it would not condone actions that forced member states to change their laws, even if the objective of those laws was to protect living things.

[137] Supra, n. 89 at 5.38.
[138] *Id.* at para 5.12.
[139] *Id.*

For the purposes of this paper, it should also be noted that this was the first decision that expressly stated and recognized the importance of sustainable development and protection of the environment:

> The Panel noted that the objective of sustainable development, which includes the protection and preservation of the environment, has been widely recognized by the contracting parties to the General Agreement. The Panel observed that the issue in this dispute was not the validity of the environmental objectives of the United States to protect and conserve dolphins. The issue was whether, in the pursuit of its environmental objectives, the United States could impose trade embargos to secure changes in the policies which other contracting parties pursued within their own jurisdictions.[140]

Thus, the Panel was showing a noted shift in thought that there was a dual objective of the trading system, free trade and sustainable development, which included environmental protection and conservation.[141]

III. E. *United States — Standards for Reformulated and Conventional Gasoline ("Reformulated Gasoline")*

The Panel finding on *Reformulated Gasoline* was adopted on 20 May 1996, and this was the first case adopted after the WTO was established.[142] The case brought by Venezuela and Brazil against the United States claimed that the laws and regulations implemented by the United States in its Clean Air Act of 1990 (hereinafter "CAA")[143] violated the United States' obligations under the GATT and was not excusable under any exception. A simplified description of the claims by Venezuela and Brazil included unfairness in the regulations set by the United States Environmental Protection Agency's (hereinafter "EPA") gasoline rule that set different baseline establishment methods for domestic refiners and foreign importers

[140] *Id*. para at 5.42.
[141] Supra, n. 92 at 1153.
[142] *United States — Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3.
[143] Clean Air Act, 42 U.S.C. sec. 7545(k) 1994.

and refiners. The EPA claimed that its intention for setting these regulations was to conform with the CAA.[144]

Venezuela and Brazil claimed that the EPA regulations discriminated against other countries because it did not allow them to use individual baselines, and it limited the methods by which domestic importers could calculate their own baselines.[145] In response, the United States argued that its regulations did not violate the GATT, but if it did, in the alternative it fell under exceptions listed in Article XX (b), (d) and (g).[146]

In examining Venezuela and Brazil's claim, the Panel first held that the EPA's rule was inconsistent with the GATT.[147] Next, it analyzed the rule individually under the three exceptions claimed by the United States in the alternative. Under subparagraph (b) the Panel held that the United States regulation did not pass the "least-GATT-inconsistent" test, as it treated foreign refineries less favourably than domestic ones in a way that was not "necessary" to obtain the objectives of the EPA and CAA.[148] Under subparagraph (d) the Panel held the same as it did in the *Tuna Dolphin* case, that measures cannot be invoked under this section as it is an exception for measures necessary to secure compliance with laws and regulations that are not in violation to GATT and not granted an exception under any other provision.[149]

Finally, the Panel held that the EPA's rule was not an exception under subparagraph (g) because the regulations that applied to importers of foreign gasoline was not "related to" or "primarily aimed at" the conservation of exhaustible natural resources.[150] The Panel *did* declare that clean air was an exhaustible natural resource but that there was "no direct connection between less favourable treatment of imported gasoline that was chemically identical to domestic gasoline and the objective of improving air quality in the United States..."[151] Thus, even though an

[144] Supra, n. 142.
[145] *Id.* at para 3.12-3.15.
[146] *Id.*
[147] *Id*. at para. 6.21 – 6.29.
[148] *Id.* at para. 6.21 – 6.29.
[149] *Id.*
[150] *Id. at* para. 6.40.
[151] *Id.*

exhaustible natural resource existed in this case, the connection between that resource and intention of the law did not.

In summary, the Panel affirmed that the United States had every right to adopt the highest possible standard to protect its air quality so long as it did not discriminate against foreign imports. Here, the United States lost the case because it discriminated between the domestic and foreign markets because its regulations on domestic producers were less stringent than those imposed on imported gasoline.

This case was appealed, and the Appellate Body's decision varied significantly from the original holding concerning Article XX (g). The scope of the appeal was limited to this one section, as it was the only point the United States disputed. The Appellate Body applied a two-tier analysis to subparagraph (g). First, it analyzed the EPA's rule under the requirements of (g), and then it examined the rule under the chapeau of Article XX.[152] The Appellate Body affirmed the decision of the Panel in that the EPA's rule was inconsistent with the GATT. However, the Appellate Body differed from the Panel in that it found the EPA's rule to fall under the exception of Article XX(g) because it was "primarily aimed at" the conservation of natural resources for the purposes of Article XX(g).[153] By declaring this, the Appellate Body was held that "primarily aimed at" should not be interpreted as meaning "related to" or "in conjunction with." This holding was a departure of the tradition of the Panel to interpret Article XX (g) narrowly. The Appellate Body as held that Article XX(g) requires a level of "even handedness" and not "identity in treatment" as long as domestic restrictions have some form of equivalent restrictions that meet the "in conjunction with" test.[154]

Finding that the EPA rule did meet the exception under Article XX (g), the Appellate Body then turned to examine the chapeau of Article XX. Here, the Appellate body examined the rule independently of its analysis under subparagraph (g), meaning that to be declared an exception under Article XX, the measure must not only be an exception under one of the subparagraphs, it must also meet be declared an exception *independently* under the chapeau or Article XX. It also

[152] Report of the Appellate Body on *United States- Standards for Reformulated and Conventional Gasoline*, April 29, 1996, WTO Doc. No. WT/DS2/AB/R at 19.
[153] *Id.*
[154] *Id* at 20-21.

expanded the scope of the chapeau by declaring that the Vienna Convention[155] required that each subparagraph under Article XX impose different burdens and that each should be interpreted differently based on the specific facts of each case.[156] Thus, the chapeau should in and of itself be interpreted in the light and purpose of the whole agreement and on a case-by-case basis.[157]

The Appellate Body ultimately came to the same conclusion as the Panel and found that the United States' regulation was inconsistent with the GATT and did not fall under an exception of Article XX.[158] It differed from the Panel, though, in that it found the United States did not meet the exceptions test based on the chapeau of Article XX. Here, the Appellate Body found that administrative burden of the EPA's regulation was not so great as to justify discriminatory and stricter treatment of foreign refiners. While it did come to the same final conclusion, the Appellate Body did reverse the Panel's Article XX (g) analysis. In doing so, the Appellate Body allowed for cases to be heard on a case-by-case basis by using a different standard than had been used before. In summary, the Appellate Body recognized "its duty to balance Article XX interests with the trade liberalization goals of the GATT in each case that comes before it."[159]

III. F. *European Communities — Measures affecting asbestos and asbestos-containing products*

The Panel finding was adopted on 5 April 2001.[160] Canada brought a complaint against France that challenged a French decree that banned the importation of all asbestos or asbestos containing products.[161] The decree did allow for a limited exception for some asbestos-containing products containing chrysotile asbestos because there were no alternatives for that product at the time that posed a

[155] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331; 8 I.L.M. 679 (1969).
[156] Supra, n.152 at para. 18.
[157] *Id.*
[158] *Id.* at para. 19.
[159] Supra, n. 92 at 1162.
[160] *European Communities — Measures affecting asbestos and asbestos-containing products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS135/AB/R.
[161] *Id.* (asbestos case)

lower health risk.[162] Canada alleged violations of France's national treatment obligation,[163] the prohibition on quantitative restrictions[164] and of the TBT Agreement.[165] France responded by claiming that the embargo was justified by "scientific evidence that exposure to asbestos can cause serious illness, including lung cancer [and] mesothelioma..."[166]

First, the Panel discussed whether or not asbestos, asbestos-containing products, and the available alternatives to asbestos were "like products" under Article III:4 of the GATT.[167] The Panel used a "likeness test" that turned on four factors: "the properties, nature, and qualities of the products; end uses of the products; consumers' perceptions and behaviour; and the tariff classification of the products."[168] Using this test, the Panel found that they were like products, and thus an examination under the exceptions was necessary.[169] Next, the Panel found that the French measure was justified under the chapeau of Article XX and under subparagraph (b), as it was "necessary to protect human ... life or health."[170] Thus, the Panel opened the door for member states to make successful environmental exception claims under this subparagraph.

Canada appealed the ruling, and the European Communities, on behalf of France, cross-appealed concerning the likeness designation in the Panel report. The Appellate Body reaffirmed the decision of the Panel but modified the reasoning concerning the "like products" designation under Article III:4. According to the Appellate Body, asbestos alternatives are *not* like products to asbestos or asbestos-containing products.[171] The Appellate Body affirmed that the Panel had used the correct four factor "likeness test"; however, it had not applied the test correctly as it had failed to examine all the evidence in context, including the distinct physical properties of the products.[172] Here, the toxic nature of asbestos and asbestos-

[162] David A. Wirth, *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, American Journal of International Law, Vol. 96, No. 2 (2002) 435-439, 435.
[163] Supra, n. 64 at Art. III.
[164] Supra, n. 64 at Art. IX.
[165] Supra, n. 67.
[166] Supra, n. 162.
[167] Supra, n. 64 at Art. III:4.
[168] Supra, n. 162 at 436.
[169] *Id.* at 435.
[170] Supra, n. 64 at Art. XX.
[171] Supra, n. 160 at para. 104-32.
[172] *Id.*

containing products differs from the non-toxic nature of the alternatives, which is relevant to consumer preferences.[173] Thus, Canada had failed to meet the burden of the "likeness" designation for the purposes of the complaint and an examination of exceptions was not necessary. Regardless, the Appellate Body also upheld that the measure would have been justified under Article XX (b) anyway.[174]

In summary, the Panel and the Appellate Body in this case both rejected Canada's challenge to France's import ban on asbestos and asbestos-containing products, reinforcing the view that the WTO Agreements support members' ability to protect human health and safety at the level of protection they deem appropriate. This is the only adopted Panel case concerning the environment where an exception under Article XX was one of the major determining factors in the final decision.

III. G. *United States — Import Prohibition of Certain Shrimp and Shrimp Products ("Shrimp-Turtle Case")*

The Panel finding was adopted on 21 November 2001.[175] The case was brought by India, Malaysia, Pakistan, and Thailand against the United States concerning Section 609 of the Endangered Species Act and its implementing regulations, guidelines, and judicial rulings (hereinafter "Section 609").[176] Section 609 prohibited the importation into the United States of certain types of shrimp and shrimp products that were harvested using a type of commercial fishing technology that could also adversely affect certain types of endangered sea turtles.[177]

The United States Secretary of State could exempt countries from this law by certification in two ways: first, certification was granted to countries with a "fishing environment that [did] not pose a threat to the incidental taking of sea turtles in the course of shrimp harvesting;"[178] or second, certification was granted to those harvesting nations that "provided documentary evidence of the adoption of a

[173] Supra, n. 162 at 436.
[174] Supra, 160 at para. 104-32.
[175] *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.
[176] Endangered Species Act 1973, sec. 609, 16 U.S.C. secs. 1531, 1537 (1989).
[177] Supra, 175 at para 2.7.
[178] Supra, n. 176 at sec. 609(b)(2)(a).

regulatory program...that is comparable to the United States.[179] Thus, countries could only be exempt from the law if they already posed no danger to sea turtles or if they changed their regulations to match, or be comparable to, the laws of the United States.

Further to the facts of the case, guidelines were drafted in 1991, 1993, and 1996 pursuant to Section 609 that required fisherman from nations in the Caribbean and Western Atlantic region to use special Turtle Excluder Devices (hereinafter "TEDs") that were comparable to those used by the United States to be considered for certification.[180] It was alleged that these guidelines, and Section 609 itself, violated Articles XI:I and XIII:I of the GATT and that there were no justifiable exceptions under Article XX. The United States responded by saying that the regulations on foreign fisherman were the same ones that were applied domestically, and "in the alternative, Section 609 was justified under Article XX (b) and (g)."[181]

The Panel found that Section 609 did violate Article XI:I and was not exempt under Article XX.[182] In holding such, the Panel first examined the regulation under the chapeau of Article XX and found it to be out of the scope of the Article because it appeared that the United States had created it with the intention of adopting the measure more for the purposes of threatening the multilateral trading system and less about saving the turtles.[183] This analysis was based on the fact that the regulation forced others to adopt a similar measure to the United States'.[184]

On appeal, the Panel's ultimate outcome was upheld, but the interpretation of Article XX was reversed. The Appellate Body found that Section 609 was within the scope of Article XX and that it met the qualifications under subparagraph (g) as sea turtles are "exhaustible natural resources."[185] It further held that the regulation was both "related to" and "in conjunction with" the conservation of the sea turtles.[186] However, the regulation failed to qualify for exception under the chapeau of the

[179] *Id.* Sec. 609(b)(2)(a) & (b).
[180] Supra, n. 175 at 2.21.
[181] *Id.*
[182] *Id.* at 7.62.
[183] *Id.* at para. 7.61.
[184] *Id.* at para. 122.
[185] *Id.* para. 132-134.
[186] *Id.* at para. 141.

Article. Here, the Appellate Body again made it clear that the analysis of Article XX includes two steps: first, the measure must be analyzed under the subparagraph, and second, it must be analyzed under the chapeau but only if it was first justified under the subparagraph.[187]

The holding recognized that under WTO rules governments have every right to protect human, animal, or plant life and health and to take measures to conserve exhaustible resources. The WTO does not have to "allow" them this right. Initially, the United States lost the case because it applied its import measures in a discriminatory manner; it then revised its measures to introduce flexibilities in favour of developing countries.[188] Thus, the Appellate Body subsequently concluded that the US ban was consistent with WTO rules.

This case was also significant for two other factors. First, the ruling stated that WTO Panels may accept "*amicus briefs*," also know as friends of the court submissions, from Non-governmental Organizations (hereinafter "NGOs") or other interested parties.[189] Second, in its decision, the Appellate Body relied heavily on the language of the preamble of the Marrakesh Agreement citing the objective of sustainable development.[190] This gave the language of the preamble legal significance and advanced the goal of stricter environmental protections.

SECTION IV: PERSISTANT DEBATES

Before any real change can be made within the WTO to more effectively protect the environment, the current persistent debates over the issue must be addressed. This includes the ongoing debate between the environmentalists and the free trade advocates and the intense debate between developing and developed nations over the role of the WTO in protecting the environment. These debates not only cover whether the WTO should protect the environment, but they also discuss how far protection should go and whether state sovereignty should trump

[187] *Id.* at para. 119.
[188] *Id.*
[189] *Id*.
[190] *See* John H. Jackson, *Justice Feliciano and the WTO Environmental Cases: Laying the Foundations of a "Constitutional Jurisprudence" with Implications for Developing Countries*, in Steve Charnovitz, Debra P. Steger and Peter van den Bossche (eds), Law in the Service of Human Dignity. Essays in Honour of Florentino Feliciano (Cambridge: Cambridge University Press, 2005) 29–43 at 40.

protections. Finally, the question of what role the WTO should play in more effectively protecting the environment and promoting sustainable development must be addressed. As one scholar noted, "unfortunately, trade and environment policy encompasses not a single issue, but a multiplicity of related (and unrelated) concerns that have been bundled under the 'trade and environment' rubric,"[191] meaning that there is no one issue that must be fixed or one organization that can fix everything. The issue is large and complicated. It is self-evident though, that the WTO must play some role in more effectively protecting the environment and achieving its goal of sustainable development.

IV. A. Environmentalists vs. free trade advocates

At first glance, it would appear that the goals of environmental rights and free trade are mutually exclusive, and many debates have occurred between environmentalists and free trade advocates concerning the protection of the environment and the promotion of sustainable development. Anti-globalization supporters have traditionally had a large voice in this debate. However, it would appear that the argument is slowly shifting away from those discussions and that the anti-globalization movement is being absorbed by a larger conversation on just what the WTO should protect. In simpler terms, it is clear that we live in a globalized world. Many environmentalists are catching onto this point and are now framing their questions within the globalized frame, rather than working outside of it. Now the questions and debates are beginning to focus on what the WTO can and should do concerning the protection of the environment.

One of the main points of contention between the two sides focuses on trade restrictions. *Schoenbaum* has attempted to sum up the many different types of trade restrictions that the majority of the environmentalists vs. free trade debates centre on. He claims that there are four main environmental restrictions: 1) regulations adopted by all nations to safeguard their domestic resources and environment; 2) international agreements on trade restrictions; 3) states with stringent environmental controls questioning the adequacy of protections in other nations; and 4) controls on

[191] Supra, n. 18 at 1.

hazardous wastes.[192] This list is not exhaustive, and covering both (or all) sides of the debate on each issue is beyond the scope of this paper. For the purposes of this discussion, the list above illustrates that the environmental trade-related discussion encompasses many aspects, and it is not a simple debate of good vs. evil. Below, the designation "environmentalists" may be a bit of a misnomer and stereotype, but it is meant to represent those who are hesitant to fully accept free trade and those who tirelessly advocate for environmental rights. This author also recognizes that many people and organizations may fall into both categories of "environmentalists" and "free trade advocates."

IV. A. i. The Environmentalists

Environmentalists generally tend to focus on how trade liberalization will hurt the environment. Their main arguments include that liberalization will "invite increased pollution, lost regulatory sovereignty, an anti-environmental counterforce driven by desire for jobs and profits, and policy making by obscure, unaccountable, business-oriented international bureaucrats."[193] They also argue that international trade promotes the exploitation of natural resources, with some even claiming that "free trade can destroy the environment."[194] While some environmentalists try to work within the current system, others have attempted to vilify the WTO and free trade and have made them the constant prey of their attacks. Of course, this does not mean that free trade advocates are victims in this debate; rather, it suggests that in the past, the majority of environmentalists have preferred to work against, rather than with, the current system.

One main point that environmentalists use to illustrate how the WTO is inconsistent with environmental protection is to look at the outcomes of the DSB cases. More specifically, they generally cite the *Tuna Dolphin* case as a clear example of how free trade can exploit and destroy the environment.[195] However, this conclusion would be misguided at best because in that case the United States lost not because it wanted to protect dolphins but because it attempted to impose a unilateral

[192] *Id.* at 704.
[193] Supra, n. 47 at 2.
[194] Martin Kohr, *The GATT and Environmental Protection*, GREENPEACE, Sept. – Oct. 1990, at 14, 15.
[195] Supra, n.18 at 703.

domestic standard on importing countries by using market access restrictions.[196] This is the exact sort of measure that the GATT was created to protect member states from.

Environmentalists also claim that trade expansion can lead to rapid economic growth that can outpace the institutional structures and political will necessary to effectively address resulting environmental impacts.[197] Trade expansion can distort growth, moving countries toward unsustainable production patterns. Furthermore, trade-dependent economies also split the consumers of products geographically, culturally, and economically from those who bear the environmental and social costs of production, thus undermining the ability to build political will for curtailing unsound consumption.[198] Finally, both domestic and international environmental-protection policies may be weakened if they are found to interfere with trade-expansion policies, particularly given the predominant position of trade-expansion policies in the international system.

Some argue that promoting free trade inevitably leads to Gersham's Law,[199] where "a competitiveness toward less stringent environmental regulation and protection, and that industries will migrate to areas with lower environmental standards."[200] This means that allowing for some member states to have less strict regulations could create a haven where other member states, with higher regulations, go to produce products. Even if these businesses do not move the whole of their companies to new jurisdictions, they could outsource labour to countries with these lower standards.

Many environmentalists have noted the stark difference in international environmental standards. This has lead to some to call for the "[WTO] to sponsor a new negotiation of an environmental code setting forth minimum standards for certain key economic sectors and that violations of that code then be treated as

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[196] *Id.*
[197] Supra, n. 6.
[198] *Id.*
[199] *See* Encyclopedia Britannica, *Gersham's law,* available at: http://www.britannica.com/EBchecked/topic/245850/Greshams-law [Accessed last: 1 January 2012]. Describing the theory of how "bad money drives out the good."
[200] Supra, n. 22 at 729.

subsidies subject to a countervailing duty."[201] This lofty goal would be hard to achieve. First, it has been difficult to get large numbers of countries to agree on environmental protections. This is probably the main reason that it has yet to be done. Simply stating that it *should* be done does not illustrate how it *can* be done. Furthermore, even if countries were able to reach an agreement, there is a big difference between a country *agreeing* to the protections and a country *enforcing* the protections.

Finally, there has also been a notable divide between environmentalists and developing nations and LDCs. Environmentalists again claim that these countries have unreliable and ineffective methods for dealing with environmental degradation and that many of their current procedures do more harm than good.[202] This is a misguided opinion, though, as this is an area where environmentalists could actually make a large difference in the future. For example, if they were to promote different forms of production in developing countries that are more cost effective, both the environment and trade would benefit. To put it another way, "environmentalists should not advocate withdrawing from the trade-environment debate, but instead should encourage sustainable development as an alternative to ostracizing any group of Nations."[203]

IV. A. ii. Free Trade Advocates

On the other side of the debate are free trade advocates. Some stanchly believe that trade has no impact on the degradation of the environment as evidenced by statements such as, "if trade were responsible for environmental degradation, then presumably those countries that trade the least, such as Ethiopia and Sudan, would have the best environments. We know that this is not the case..."[204] and "trade creates wealth, and wealth cleans up the environment."[205] The first of the two quotes lacks validity because the fact that Ethiopia, Sudan and South-Sudan are not at the

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[201] Supra, n. 18.
[202] Jonathan Skinner, *A Green Road to Development: Environmental Regulations and Developing Countries in the WTO*, Duke Environmental Law & Policy Forum, Vol. 20 (2009) 245-269, 246.
[203] *Id.* at 245.
[204] Tania Voon, *Sizing up the WTO: Trade-Environment Conflict and the Kyoto Protocol*, J Transnat'l L. & Policy (2000) 73-108, 73.
[205] Marino Marcich, *Trade and Environment: What Conflict?* 31 Law & Policy Int'l Bus. 917, 920 (2000).

forefront of environmental friendliness, and sustainable development is not solely related to the fact that they are not powerhouse, world-wide traders. Rather, it is probably more based on distribution of resources, political unrest, and a number of other factors. The second quote is probably a better representation of the free trade advocate mindset.

Some free trade advocates also argue that trade-fuelled economic growth is a worthwhile objective regardless of environmental issues or resulting degradation.[206] Alternatively, they sometimes argue that growth is a necessary prerequisite for developing countries to begin addressing environmental protection.[207] This means that a country that is still in the development stages lacks the ability to fruitfully protect the environment too. This is misguided, though, because even if a developing country lacks the resources to fully integrate environmental standards, this does not mean that it should not try its best to implement as many standards as it is able. Promoting sustainable development in the developing stages could also cause technological advances. Implementing sustainability measures at the very beginning stages of development has rarely been done, and it is unknown what kind of scientific breakthroughs might occur.[208] For example, building sustainably viable fisheries in developing countries would probably result in advances in efficiency and cost-effectiveness.[209] It is also claimed that green business "can, should and has to be profitable."[210]

Furthermore, there is a fear among free trade advocates that stricter environmental restrictions could limit developing countries' access to global markets and be used as a veiled form of protectionism. For example, environmental protection regulations could be used to block foreign producers from entering domestic markets, not to protect the environment but rather to promote internal

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[206] Supra, n. 204 at 73.
[207] William Ascher and Robert Healy, *Natural Resource Policy Making in Developing Countries*, Duke University Press (1990) at 4.
[208] *See generally* Edward S. Marek, *Technology for Africa*, University of Pennsylvania – African Studies Center (1996), available at: http://www.africa.upenn.edu/Articles_Gen/tech_afam.html [Accessed last 15 December 2011].
[209] *See generally* Food and Agriculture Organization of the United Nations, *Sustainable Technology Transfer*, Available at: http://www.fao.org/fishery/topic/13301/en [Accessed last 15 January 2012].
[210] Johanna Björk , *Green can, should and has to be profitable*, Goodlifer (2010), available at: http://www.goodlifer.com/2010/10/green-can-should-and-has-to-be-profitable/ [Accessed last 31 December 2011]. Discussion how initiatives in the United States are moving in this direction and increased profits are being observed.

political agendas.[211] Thus, supporting the use of trade penalties to enforce environmental agreements or to "promote unilaterally determined environmental choices"[212] could lead to the degradation of the whole trading system.

Free trade advocates also fear that any efforts to adjust and create different environmental standards and compliance costs to address competitiveness concerns could undo the differences in comparative advantage that form the foundation of the economic gains in trade.[213] However, they fail to take into account that even if there is a unilateral environmental standard, there will still be many other factors affecting world-trade. For example, the costs for an oil-rich country would be less to produce oil than for a country that has minimal oil reserves. Also, if a county has specialized in garment making, then its costs to make garments will be less than those without that same expertise. Trade will always still be at the mercy of things like distribution of natural resources, geography, weather, and access to technology.

Finally, free trade advocates argue that all countries have the sovereign right to exploit their own natural resources. It follows then, that the manner used to exploit these resources is completely up to the sovereign state, whether it be environmentally sustainable or not. However, this right to sovereignty has been increasingly challenged as evidenced by Principle 21 of the Stockholm Declaration on Human Environment of 1972 and the Rio Conference. One thing is certain, though: the environment and sustainable development are increasingly recognized as global concerns.[214] Thus, free trade advocates have little choice to support some forms of sustainable development if they want to be successful and taken seriously.

[211] Supra, n. 47 at 2.
[212] *Id.*
[213] *Id.*
[214] Supra, n. 18 at 701.

IV. B. Developed Countries vs. Developing Countries and Least-developed Nations

There is a long history of arguments between developed countries, developing countries, and LDCs over who wants environmental protections, what level of protections there should be, and who should ultimately be responsible for those protections. In this debate, developed nations are sometimes called the North, while developing nations are called the South. For the purposes of this paper, both the developed and developing nation terms are used synonymously with North and South designations. The WTO recognized the importance of integrating developing nations and LDCs into the international trade community while also preserving the environment and promoting sustainable development.[215] This was done by recognizing sustainable development as a main objective that should be achieved by reflecting the "needs and concerns [of member states] at different levels of economic development."[216]

Initially, the lines between the North and South were clearer, and it was evident that "unilateral actions by developed nations overstepped the boundaries of domestic regulations and invaded national sovereignty."[217] This was done by restricting developing nations' market access using environmental justifications.[218] However, this line between the two worlds is no longer as clear. Developing nations are quickly catching up in technological advances to their neighbours in more developed areas. Also, some Southern members are forming coalitions that rival the power held by individual countries in the North. Now unilateral environmentally friendly measures promoted by the North could even *be the cause of* environmentally harmful competitive practices like pollution havens in developing countries.[219]

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[215] Supra, n. 17 at preamble.
[216] *Id.*
[217] Supra, n. 202 at 247 and *see generally United States – Restrictions on Imports of Tuna (Tuna I)* DS21/R-39S/155 (Sept. 3, 1991) (unadopted).
[218] Supra, n. 202 at 247.
[219] Supra, n. 202 at 247 and Kevin C. Kennedy, *Implications for Global Governance: Why Multilateralism Matters in Resolving Trade-Environment Disputes,* 7 Widener L. Symp. J. 31, 49 (2001).

The traditional cooperative relationship that should exist between the environmentalists in the North and developing nations in the South is strained in the environmental protection realm.[220] Developing nations do not want to divert limited resources to environmental protections, and developed nations refuse, or are unable, to subsidize or assist the South. Instead of solely giving aid, the North has also relied on negative leverage trade measures to enforce environmental policies.[221] As mentioned above, the majority of the debates have focused on what levels of protections are needed and who is ultimately responsible for these protections. Recurring themes also include the use of power plays concerning who is in charge and whose needs and desires are ultimately fulfilled, and if environmental protection interferes with sovereignty.

Concerning the developed nations, there has been a major push for more unilateral environmental protections and the promotion of sustainable development, even if it comes at a high cost. Concerning the developing nations and LDCs, there is the belief that the processes and laws are wholly unfair to them because they create a loss of sovereignty and that the standards set are almost impossible to meet. The South has begun to retaliate by forming powerful coalitions that need to be taken seriously by those in the North.

IV. B. i. Developed Countries

With the recent push for more environmental protection and further promotion of sustainable development, it is common sense to state that achieving both of these objectives is easier for rich and more developed nations. In turn, it is these same countries, like those in Europe and the United States, that push the most for environmental regulations and bring the most claims before the WTO's DSB.[222] While the reasoning for this is mixed and ranges from actually caring and wanting to better protect the environment for future generations to a veiled form of trade

[220] Supra, n. 47 at 25.
[221] Supra, n. 47 at 15. Also known as "carrots", these negative measures have included actions like US trade penalties imposed on Taiwan for failing to control illicit trade of endangered animals.
[222] See stat about US bringing most claims in developing section

protectionism,[223] the intent of actually doing something to protect the environment is clear.

The influence of developed countries in the WTO can be seen concerning environmental rights and sustainable development by looking at the types of cases that have been heard by the DSB. Mostly, these cases have focused on: the legality of measures that have extraterritorial effects like those for endangered species and air quality; domestic health, safety and environmental protection; transboundary remediation; and trade-environment institutions.[224] Thus, the DSB has proven to be an effective way for developed nations to exercise their power.

Furthermore, it has been shown that "when powerful countries engage in integration-depending exercise, they require enhanced trade-environment solutions as part of the package they bring home for domestic ratification."[225] This means that many of the WTO regulations require not only international negotiation and bargaining but also the needed integration of domestic regulations. This necessary step of domestic integration has been easy for the North to comply with but has proven difficult for the South.[226] Reasons for this include lack of political stability and lack of monetary, technological, and information resources in developing nations and LDCs. Developed nations have expectations for the South to keep up with them, or at least catch up at some point in the foreseeable future.

Finally, another reason that so much pressure for increased environmental protection may be simply because many of the large-scale international environmental groups are based in developed nations.[227] Thus, these governments face larger scale lobbying efforts to make changes both domestically and internationally.[228] They also face wide-ranging pressure to comply with international

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[223] *See generally* RH Steinberg, *Trade-environment Negotiations in the EU, NAFTA and WTO: regional trajectories of rule development*, American Journal of International Law (1997) Vo1 91 No 2 231-250.
[224] *Id.* at 234-5.
[225] Robert Putnam, *Diplomacy and Domestic Politics: the logic of two-level games*, Cambridge University Press (1988).
[226] Supra, n. 223.
[227] Martin Webber, *Competing Political Versions: WTO Governance and Green Politics*, Global Environmental Politics 1:3 (2001) 92-113, 101.
[228] *Id.*

regulations with fear or negative media and declining public opinions.[229] For instance, if the United States failed to comply with an environmental regulation, it would be more publically chastised than Morocco would be for violating the same regulation. Granted, the actual influence and amount of trading done by these two countries differs greatly, with the US accounting for a much larger share of world trade.[230] Regardless, these two countries would face very different reactions to their violations of an environmental violation on the world stage. Simply put, developed nations are *expected* to do and be more.

IV. B. ii. Developing countries and Least-developed Countries

During this debate, developing countries and LDCs generally claim that promoting sustainable development and protecting the environment through WTO law and regulations is wholly unfair to them. They claim that following these regulations creates a loss of sovereignty, treats the nations in the South unfairly, and that the standards that are set are almost impossible to meet when playing technological catch-up with many of the nations in the North. Finally, there is a fear that "green" oriented motives in the North are actually being used as veiled trade restricting that amount to little more than eco-bullying.[231]

It is important to remember that any state joining an international organization like the WTO is surrendering some sort of sovereignty. By acceding to membership in the WTO, countries promise to follow all of the regulations and rules created by that body. Thus, even if a country feels pressured into voting a certain way, it is still bound by the decision of the majority. Environmental trade-related regulations can deeply influence the sovereignty of a state as most things that are produced and consumed interact in some way with the environment.

In 2000, the UN Committee on Economic, Social, and Cultural Rights (hereinafter "ICESCR") released a draft report titled: *The Realization of Economic, Social and Cultural Rights: Globalization and Its Impact on the Full Enjoyment of*

[229] *Id.*
[230] *See generally* World Trade Organization, *International Trade Statistics 2010* (2010), available at: http://www.wto.org/english/res_e/statis_e/its2010_e/its10_toc_e.htm [Accessed last: 15 December 2011].
[231] Supra, n. 223.

Human Rights.[232] The report claimed that, *inter alia*, the WTO excluded developing countries from the decision making process.[233] This report was swiftly rejected by the Secretariat of the WTO, but the damage had been done, and developing countries and anti-globalization advocates saw the report as a validation of their claims.[234] Some of the reasons cited for this exclusion included pressure into voting the way developed nations were voting due to funding, being left out of "green room" negotiations, and a lack of resources to get to the meetings or make an informed decision.[235]

One major way that the South is combating this perceived unfairness is to form and utilize voting coalitions that are hesitant to approve of any environmentally friendly regulations during WTO sessions.[236] Developing nations account for more than seventy-five percent of membership in the WTO,[237] and they have only recently begun to realize the power that this statistic has. For example, one of the most well-known developing country blocs is BRIC, which comprises of Brazil, Russia, India and China.[238] This bloc has shown indications that it intends to work together on WTO related issues, including being cautious to accept strict environmental regulations.[239] Another bloc is that of the G20, which brings together developing countries with traditionally different views on agriculture to negotiate on WTO issues.[240] In fact, some of the current stalemate issues in the Doha Round are mostly due to the consulting blocs of developing nations refusing to be pressured into a vote

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[232] United Nations, The Realization of Economic, Social and Cultural Rights: Globalization and its impact on the full enjoyment of human rights, UN Commission on Human Rights, 52d Sess., Provisional Agenda Item 4 Para. 15, UN Doc. E/CN.4/Sub.2/2000/13 (2000) (Preliminary report submitted by J. Oloka-Ony-ango and Deepika Udagama).
[233] Ala'i Padideh, *A Human Rights Critique of the WTO: Some preliminary observations*, 33 Geo. Wash. Intl' Rev. 537 (2000-2001) at 537.
[234] Supra, n. 48 at 16.
[235] Mayur Patel, *New Faces in the Green Room: Developing Country Coalitions and Decision-Making in the WTO*, GEG Working Paper Series 2007/WP33 (2007) 1-31, 4.
[236] Sonia E Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support* 48 Harv. Int'l L.J. 483 (2007) at 485.
[237] *Id.* at 483.
[238] *See Generally* Iulia Monica, *Recent Trends of the Trade Policies of the BRIC Countries and Their Impact on the EU-BRIC Relationships,* Institute of World Economy, Romanian Academy (2005).
[239] *Id.*
[240] Pedro da Motta Veiga, *Brazil and the G-20Group of Developing Countries*, Managing the Challenges of WTO Participation: Case Study 7, available at: http://www.wto.org/english/res_e/booksp_e/casestudies_e/case7_e.htm [Accessed last 31 December 2011].

and the failure of developed countries to sway them.[241] The North must learn to work with these increasingly powerful blocs if it wishes to maintain its influence.

The argument also exists that countries in different stages of economic development cause different levels of harm. Sometimes called the "inverted U-shaped curve,"[242] the theory states that countries that are in the beginning stages of economic development cause more harm to the environment than those that would be classified as economically developed.[243] Thus, the countries that are playing catch-up to more developed nations can cause serious damage to the environment. The current somewhat strict regulations and rules that allowed for the industrial revolution to take place, arguably one of the greatest pushes of trade-related advancements, did not exist at that time.[244] If they did, it would have been hard or potentially impossible to meet current emissions and pollution standards or even labour or human rights regulations. More simply put, if the current environmental standards had been in place a few hundred years ago, the industrial revolution may never have taken place. This is, of course, not to say that all environmental regulation should be rejected in the South so that those nations can catch up to the North. Rather, it is an important fact that should be taken into consideration when setting standards for developed countries, developing countries and LDCs.

IV. C. What role should the WTO have in protecting the environment and promoting sustainable development?

Even though a main objective of the WTO is to promote sustainable development, it does not necessarily follow that another main objective of the WTO is also to take substantive measures to protect the environment. It would seem unlikely, however, that the WTO could maintain its current integrity if it only sought to promote free trade and neglected to account for other issues including the environment, human rights, and labour. As discussed above, some free trade advocates claim that the WTO is not the appropriate forum to discuss environmental measures. However, this claim is no longer valid. This is evident in the current Doha

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[241] Supra, n. 85.
[242] Patrick Low & Raed Safadi, *Trade policy and Pollution*, World Bank Symposium on International Trade and Environment (Nov 1991).
[243] *Id.*
[244] *See generally* Phyllis Deane, *The First Industrial Revolution*, Cambridge Press, 2nd Ed. (1979).

Round where major environmental issues are being discussed, and the end of the round, if successful, will more than likely result in some significant environmental provisions.[245] Thus, it is generally accepted that environmental rights and sustainable development are relevant concerns for the WTO.

The two main alternatives to working within the current WTO system to protect the environment are to completely reform the organization or to create a new, world-wide international organization that would govern over all of the environmental protections and sustainability efforts.[246] Both of these ideas are not viable alternatives. First, completely reforming the WTO would more than likely not pass consensus. Second, a new international organization would take *years* to form, ratify, and gain respect. Even if a treaty were drafted, it is not certain that a large number of states would sign or ratify it. If the organization got enough members, then it would take more time to build a reputation as a leader in the field. Any decision by this organization, whether judicially or legislatively, would most likely be non-binding. Furthermore, as it is impossible to completely separate trade and the environment, this new organization would make environmental decisions that would have an influence on trade. Finally, in all likelihood, by the time the any type of new organization was formed, the environment may have passed a point of no return where any type of sustainable development measures would be moot.

Rather than either changing the actual nature of the WTO or by creating a new international body to govern over environmental protections, it would be better to adjust the way the WTO approaches the issue. More simply put, it is no longer about whether or not the environment or sustainable development matter: they both clearly do. The issue should now focus on how the WTO, and trade-related rules, can more effectively contribute to environmental protection. By clearly defining what role the WTO should take in promoting sustainable development, the pressure to be a major leader in the field lessens, and the WTO can be used more as a vessel to exact *some* environmental protection. To support this, some scholars have come forward stating that defining clearer WTO sustainable development goals does not

[245] Supra n. 74 at 28.
[246] *See generally*, Adil Najam, *The Case Against a New International Environmental Organization*, Global Governance, Vol. 9, No. 3 (2003).

necessarily require large-scale reforms.[247] A relatively easy first step would be to create a non-binding resolution that clarifies the specific sustainable development objective of the WTO and gives some suggestions on how to achieve it. This should differ from its former declarations of support for sustainable development; rather, it should outline actual achievable *actions* that member states can start to take like suggesting pollution output goals or small-scale, low-cost sustainable development implementation strategies. Then, more long-term goals illustrated in Section V of this paper could be implemented over time.

There are a few criticisms to this approach, mainly concerning who is in charge of the decision making at the WTO. Decision-making at the WTO is traditionally done by consensus; thus if one member state is against a measure, it will not pass.[248] However, there are many claims of unfairness in this process in the sense that developing nations feel pressured into voting for what developed nations want. This issue is discussed in greater detail in Section IV. B., above. Before any progress could be made, any issues of imbalance would need to be discussed and addressed, including biases and unfair treatment. This would assist with the current stalemate that is going on the Doha Round.[249] One way to accomplish this would be to increased transparency and encourage an actual, non-aggressive discussion between member states concerning this unfairness. Then, relationships with more trust would need to be built over time.

Thus, the debate over whether or not the WTO should play a role in protecting the environment and promoting sustainable development has ended. Now, the debate has shifted to what role the WTO should play in protecting the environment and promoting sustainable development. Radical suggestions range from supporting the establishment of a new world-wide environmental organization to completely changing the nature of the WTO. A simpler way to do this, however, is to look at how the current status of the WTO can be improved to more effectively support the WTO's objectives of sustainable development.

[247] Supra, n. 6 at 59.
[248] World Trade Organization, *Whose WTO is it Anyway?* Available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm [Accessed last" 1 January 2012].
[249] Supra, n. 85.

SECTION V: RECOMMENDATIONS

While some state sovereignty is clearly surrendered when joining an organization like the WTO, it would not be widely accepted to create stringent environmental and human rights protections in an institution that was created solely to regulate trade. Furthermore, if the WTO were to fail, there would be little to no regulation or rules governing international trade and the environment would surely suffer. Thus, the WTO must work on more effectively protecting the environment and fulfilling its objective to promote sustainable development. There are four main ways that it can begin to do this. First, it can define what the WTO can realistically accomplish and publically declare this finding. Second, it can work to make the DSB more effective. Third, it can learn from the successes and failures of multilateral and regional agreements. Finally, it can strengthen its relationships with public and private actors.

V. A. Clarify What the WTO Can Realistically Accomplish

The WTO cannot solve all of the environmental issues plaguing the world. It can, however, take demonstrative steps to fulfil its sustainable development objective and promote more trade-related environmental protections. One way the WTO can realistically accomplish this is by working to create more comprehensive and simply defined laws concerning the environment. Over the past years, the WTO system has matured and "some of the environmental omissions in WTO law have become more evident."[250] For example, the TBT Agreement does not contain any environmental exceptions to its requirement that regulations and laws must accord national treatment and most-favoured nation treatment.[251] Also, the General Agreement on Trade in Services (hereinafter "GATS") does contain an exception for measures "necessary to protect human, animal or plant life or health"[252] but does not contain any measure relating to policy exceptions for any conservation measures. It is here that the WTO could make a significant difference. For example, the member states could pass resolutions that clearly define how the objective of sustainable development fits within each of the supplemental agreements. To that end, it could

[250] Supra, n. 74 at 8.
[251] Supra n. 67 at Arts. 2.1-2.2.
[252] Supra n. 65 at Art. XIV(b).

begin negotiating for accepted environmental exceptions for each supplemental agreement that would eventually become binding by consensus.

However, while there are ways to improve the supplemental documents for future use, they can also be used in their current state to promote the objective of sustainable development. For example, the TBT Agreement requires that WTO member states must use international standards as the basis for technical regulations unless these standards would be "an ineffective or inappropriate means for the fulfilment of the legitimate objective pursued..."[253] The TBT Agreement was a major decisive factor in the *Sardines* case where the Appellate Body held broadly that the "voluntary, non-consensus standards"[254] should qualify as "international standards."[255] While this decision was not adopted, it did open the door for future debates on environmental protections and sustainable development harmonisations. This means that if a member state voluntarily complies with an environmental technical regulation that has not yet gained recognition as an "international standard," it may still meet the requirements under the TBT Agreement. This also means that if there is no agreed upon international standard, the DSB may allow a more flexible approach to accepting non-traditional standards.

The WTO can also more efficiently use the different committees it currently has to work more effectively on promoting its sustainable development objective. The CTE currently acts as a venue where national officials from trade and environment delegations meet, including representatives from the UN Environmental Program.[256] While the value of the past meetings should not be discarded as they have shown some progress and a willingness to at least hear what some of those in the environmental field have to say, it is important to note that the CTE has failed to grant observer status to many international environmental organizations.[257] By doing this, the CTE risks making the leaders of these organizations feel dejected and excluded- an action that could have consequences such as negative public relations and a lack of respect for the WTO in the

[253] Supra, n. 67 at Art. 2.4.
[254] Supra, n. 74 at 7.
[255] *See* WTO Appellate Body Report, European Communities – Trade Description of Sardines, WT/DS231/AB/R, adopted 23 October 2002, paras. 221–22.
[256] Supra n. 74 at 8.
[257] *Id* at footnote 29.

international community. By granting observer status to more organizations, the CTE would be able to expand on its effectiveness by reaching a wider audience and it could gain more comprehensive data for its discussions from information gathered by the newly included organizations. Furthermore, this gesture would illustrate the WTO's continued commitment to more effectively protect the environment.

The WTO Secretariat can also take a more significant role in promoting the objective of sustainable development. While some ways to do this are listed above, there are still other ways in which it could further encourage this. First, the WTO Secretariat can make better use of its Trade Policy Review Reports (hereinafter "TPR Reports"). While many of the TPR reports do contain notes on some ecological factors, it could more effectively utilize them to contain more sound scientific reasoning and encourage more sustainable measures.[258] As of yet, these reports have failed to do this. It is here, that the WTO could more effectively work to promote its sustainable development objective. It could use these reports as a way to explicitly state environmental steps and goals that are member state specific based on the detailed study of regional ecological factors. Second, the WTO Secretariat could also promote more friendly relationships with non-state entities, including NGOs and private actors. How to accomplish this goal is discussed thoroughly in Section V. D. below.

One major limitation on what the WTO can realistically accomplish is the matter of jurisdiction. The WTO does not have the power to regulate member states. Rather, it makes decisions on alleged violations between member states concerning trade-related environmental measures. It is up to the member states to bring the cases before the DSB rather than being the responsibility the WTO to find relevant cases. Thus, the member states themselves are accountable for what measures are challenged and what measures are not. Furthermore, the WTO has no jurisdiction over private entities and corporations. The WTO is a collective of member states, and it is up to the member state to regulate the corporations that reside within its borders. For example, if state A believes that a corporation residing in state B is operating in violation of state B's WTO obligations, then it is up to the state A to

[258] *Id.* at 9.

bring a claim against state B in the DSB. Again, it is not the responsibility of the WTO to regulate the individual measures within a member state.

Finally, while an in-depth analysis of the effectiveness of the DSB is discussed in the next section, it is also important to discuss whether or not the DSB is the most appropriate forum for all sustainable development claims. Five categories of environmental trade issues have been identified, and it would be prudent if claims brought to the DSB remained in these categories. The first four were identified by Schoenbaum[259] as trade restrictions in the name of environmental quality, and the fifth is a newly identified category to enhance the discussion. These categories are as follows:

1) Regulation of imports and exports to protect the domestic environment;
2) Trade restrictions to enforce environmental standards in international agreements;
3) Trade restrictions in response to perceived inadequate environmental protection controls in other countries;
4) Controls on the export of hazardous products, technologies and waste;[260] and
5) Trade restrictions to protect areas outside the jurisdiction of countries in the absence of formal international agreement.[261]

The final category applies to areas of the global commons, where regulation has previously been hard to negotiate. In the abstract, it could apply to future explorations of space. Currently, it would more likely apply to migratory animals that move from one jurisdiction to another and transboundary pollution. This final area of trade-related environmental claims does relate to the WTO as illustrated by the DSB Appellate Body when it declared in the *Shrimp Turtle* case[262] that member states should protect the environment "either within the WTO or in other international [fora]."[263]

[259] Supra, n. 18.
[260] *Id.*
[261] Supra, n. 22 at 731.
[262] *Supra* n. 175.
[263] WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, para. 185.

While the list above is fairly broad and most claims may fit under it, there are other reasons that claims may have more appropriate fora than the WTO itself. For example, if a participating state of the Antarctic Treaty system[264] or the Antarctic Protocol on Environmental Protection to the Antarctic Treaty (also known both as the Antarctic-Environmental Protocol or the Madrid Protocol)[265] wanted to challenge a measure concerning the Antarctic region or simply wanted to enact more protection, it would be better for that state to go to the other participating states of the treaty. This has been done numerous times concerning the Antarctic regions, including the enactments of the Agreed Measures for the Conservation of Flora and Fauna,[266] the Convention for the Conservation of Antarctic Seals,[267] and the Conservation of Antarctica Marine Living Resources.[268] These measures show that specific environmental protections may be gained in forums other than the WTO and that in some cases this may be a preferred method to enact such change.

In conclusion, it is not the sole responsibility of the WTO to protect the environment and promote sustainable development. However, there are several ways in which the WTO can improve upon its current objective. For instance, it can more effectively use the CTE and the Secretariat as leaders in promoting sustainable development as it relates to trade. It can also make better use of the supplemental documents to the GATT, and it can look to the future by beginning negotiations on binding resolutions to more clearly tie the environment to the supplemental documents. Finally, while a general consensus already exists that not all environmental claims should be brought before the WTO and the DSB, other bodies such as regional arrangements and the UN should be better utilized if they are deemed a more appropriate venue for a specific environmental debate.

[264] Antarctic Treaty, 1959: *UNTS*, 402, p. 71; *UKTS* No 97 (1961).
[265] Antarctic Treaty System is the Protocol on Environmental Protection to the Antarctic Treaty, June 22 1991, Doc. [11th Antarctic Treaty Special Consultitive Meeting] XI ATSCM/2, text of Final Act, Oct. 4, 1991.
[266] Agreed Measures for the Conservation of Flora and Fauna, June 2-13, 1964, 17 UST 991, 996, TIAS No. 6058.
[267] The Convention for the Conservation of Antarctic Seals, June 1, 1972, 29 UST 441, TIAS No. 8826.
[268] The Conservation of Antarctica Marine Living Resources, May 20, 1980, 33 UST 3476, TIAS No. 10,240.

V. B. Make the WTO's dispute resolution system and the DSB more effective

The DSB has been able to advance the WTO's sustainable development objective by ruling on environmental measures. As discussed in Section III of this paper, case precedent on environmental claims is slowly growing and possibilities exist to use other subparagraphs of Article XX to bring claims under. There is great potential to integrate more sustainable development discussions in the DSB and the WTO's dispute resolution system as a whole. However, the DSB has faced many claims of bias and unfairness, generally based on the facts that only a handful of the member states actually use the DSB and that developing nations are hesitant to use it. Thus, this section focuses on how to improve the DSB *generally*. It is the belief of this author that making the DSB more effective in any means will in time contribute to the sustainable development objective by making the DSB a more useful and valuable tool to promote and protect trade-related environmental regulations.

While any member state can bring a claim to the DSB, most have not, especially those in developing nations. In contrast, almost ten years after the WTO was established, the European Union (hereinafter "EU") and the United States were plaintiffs or defendants in 210 out of the 279 complaints brought before the WTO, consisting of more than 75% of the total claims.[269] While it is true that the United States and EU account for a large majority of the world's trade, the DSB could be seen as only catering to them and developed nations, rather than as a judicial body supposed to represent all member states. Furthermore, there is a difference in how developed and developing nations use the DSB. For example, a study conducted in 2003 showed that defendants in WTO claims were more likely to offer greater concessions in the consultation stage or during the Panel stage if it was *before* a ruling.[270] However, this trend was less evident in cases involving developing nations.[271] This information would be extremely beneficial to a developing nation that was hoping to have a greater concession offered to it in the consultation stage, as it appears that it may be more worthwhile for it to seek an actual Panel ruling.

[269] Supra, n. 56 at 6.
[270] Marc L Busch and Eric Reinhardt, *Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement*, Journal of World Trade 37(4), 719-735 (2003) at 720.
[271] *Id*.

To combat these issues, the WTO should first encourage more participation in the DSB process by states that do not generally take part in the proceedings. There may be many reasons why many member states do not participate, including lack a lack of monetary, technological and information resources, and a distrust of and lack of belief in the effectiveness of the DSB system.[272] The WTO has taken steps to combat these issues like: granting special and differential treatment to LDCs; good offices, conciliation and mediation offered to LDCs; additional legal services offered to developing nations; legal training courses in Geneva; and legal aid services from the WTO's Advisory Centre that specializes in WTO law.[273] While these efforts are extraordinary, they still mean little to LDCs that are unable to pay for travel to and from Geneva or to developing countries that lack faith in the DSB system. It is here that a public campaign by the WTO should be conducted to encourage more participation by these countries.

Second, the WTO could attempt to bridge the gap on the differences between how developed and developing nations use the DSB. As mentioned above, it appears that the developing nations that are actually using the DSB do not do as well as developed nations in the consultation stage before a Panel ruling.[274] Reasons for this range from a lack of WTO law expertise and accesses to monetary resources to not being respected by the developed nations as important to the trading system.[275] The first of these reasons is already being dealt with by the WTO in the form of offering free legal aid. This could be advanced by offering more specialized legal training in WTO law in more numerous sites around the world. There is no simple solution, however, for the second issue as it is not easy to make one side respect the other more. Probably the only practical solution would be to work on giving developing nations and LDCs more of a voice and then hoping that respect for the power that they can wield would grow from developed nations.

Despite all of the criticisms concerning the effectiveness of the DSB, it is undeniable that much of the WTO's progress concerning the protection of the

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[272] *Id.*
[273] *See generally* World Trade Organization, *Developing countries in WTO dispute settlement,* Dispute Settlement System Training Module: Chapter 11, available at http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c11s2p2_e.htm [Accessed last 31 December 2011].
[274] *Supra* n. 270.
[275] Supra, n. 273.

environment has come from its decisions. The DSB has a strong and well-known compliance record, meaning that once it has made a decision on a case, member states generally follow it.[276] In the first ten years of its existence, 83% of the DSB's judgments were complied with.[277] However, this statistic strictly refers to compliance as "how a WTO decision was implemented and whether the offending measure was withdrawn."[278] If an offending measure was only modified or replaced, more problems with compliance may have occurred, but this information was not collected in the statistical findings. In fact, other studies show that the compliance rate has started to decline in effectiveness in recent years.[279]

Thus, the high compliance rate that is touted by WTO supporters may not include the whole picture. There are several ways to remedy this. First, it would be helpful to know the actual compliance statistics if all the results were factored in. This would show where the weaknesses of compliance are. However, these statistics would be hard to calculate, and there may not be enough cases to make this study relevant yet, as the DSB has not been in existence for a long enough period. While there have been some attempts to mathematically calculate the actual statistics of compliance,[280] even the authors of these studies admit that the actual statistics are hard to clarify as there are so many outside factors.[281] Another suggestion would be to have member states publically praise or chastise those who have or have not complied with previous decisions. This would be especially beneficial if a state that brought the action to the DSB publically praised the member state that it brought the action against after that state had remedied the offending measure.

The DSB has also made significant decisions concerning the WTO's objective to promote sustainable development. For example, in the *Shrimp Turtle* case, the Appellate Body declared that the preamble of the Marrakesh agreement clearly shows that the WTO negotiators "decided to qualify the original objectives

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[276] William J Davey, *Compliance Problems in WTO Dispute Settlement,* 42 Cornell Int'l L.J. 119 (2009) at 119.
[277] William J Davey, *The WTO Dispute Settlement System: The First Ten Years,* 8 j. Int'l Econ. L. 17, 46-48 (2005).
[278] Supra, n. 276 at 119.
[279] Supra, n. 53 at 214.
[280] *See generally* Yuka Fukunaga, *Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations,* Journal of International Economic Law, Vol. 9, No. 2 (2006) 383-426.
[281] *Id.* at 385.

of the GATT 1947', and demonstrates a recognition by the WTO negotiators that optimal use of the world's resources should be made in accordance with the objectives of sustainable development."[282] Furthermore, the compliance panel affirmed this sentiment in 2001 when it stated, "sustainable development is one of the main objectives if the WTO Agreement."[283] Thus, the DSB clearly factors in this objective into its decisions. One major way that it could take further action towards this end would be to require the input of environmental experts on its trade-related environmental cases. Currently, the DSU Agreement does not have a requirement for expertise in environmental disputes.[284] If the WTO members were to amend this and require that some environmental experts be consulted during these cases, it would ensure that the Panel has a more standardized basis for its decisions, and positive public opinion and recognition concerning the decisions may be more widely recognized.

Finally, it is important to note that very few cases concerning the environment have been brought to the DSB. Of the few cases heard by the DSB, the earliest ones debated over whether the WTO wanted to protect the "sustainability" aspects, like environmental issues, or if it was going to more focus on the "development" aspect.[285] While this issue has yet to be fully resolved, the DSB is clearly evolving into a more environmentally friendly body, as its decisions have "inspired confidence in the adjudication process, and convinced many environmentalists that legitimate environmental measures would be permitted in the WTO."[286] However, in the first three environmental cases it heard, the Appellate Body had to reverse some part of the Panel's central holding because of a flaw in reasoning and the interpretation of the exceptions in Article XX of the GATT. Thus, it is clear that the Panel and the Appellate Body do not always have the same opinions concerning environmental measures and the exceptions under Article XX. There are two ways to alleviate this problem. The main way to combat this problem

[282] *Supra* n. 175 at paras. 152-153.
[283] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/RW, para. 5.54, adopted 21 November 2001, as upheld by Appellate Body Report, WT/DS58/AB/RW.
[284] Supra n. 74 at 7.
[285] *See generally* cases discussed in Section III.
[286] Supra n. 74 at 14.

is to give the DSB time to develop case precedent. Member states could help by bringing more relevant trade-related environmental claims.

In conclusion, the WTO's dispute resolution system and DSB have a moderately high compliance record. There is some debate as to whether or not this record is well-deserved or if it is in decline, as the statistics on actual compliance is hard to calculate. Furthermore, developing nations and LDCs have been hesitant to use the system and should be encouraged to participate more. This can be done by offering more support through resources and training and attempting to change the public opinion of the DSB in those countries. Furthermore, the DSB could continue to support the sustainable development objective by requiring trade-related Panel decisions to at least consult the opinion of environmental experts. Finally, the WTO members could be encouraged to bring more measures before the DSB to create a wider body of case precedent. By making the DSB more effective, it follows that environmental claims brought before the court will receive the benefits of greater efficiency. This, in turn, will promote the WTO's objective of sustainable development.

V. C. Emulate Successes and Learn from Failures of Multilateral, Regional and Preferential Trade Agreements

While widespread, comprehensive world-wide agreement on environmental rights and sustainable development has been elusive, there has been more success in multilateral and regional agreements. The agreements are numerous and are specific to a region or a particular environmental concern. They include stand alone multilateral agreement systems such as the Ozone Regime and as parts of other regional agreements such as the EU. Furthermore, the WTO sometimes finds itself in competition with preferential trade agreements (hereinafter "PTAs"), which are agreements between two or more member states that cover "trade and" issues that expand beyond the scope of the WTO.[287] These agreements have proven to be more inclusive, comprehensive and successful than any attempts made by the WTO.[288] Examples of all three of these, and what the WTO can learn from studying them, are found below.

[287] Supra n. 74 at 12.
[288] *Id.*

One multilateral environmental protection agreement that the WTO could learn from is the Ozone regime. This regime emerged in the late 1980s and consists of the Vienna Convention for the Protection of the Ozone Layer (hereinafter "Ozone Convention")[289] and the Montreal Protocol on Substances that Deplete the Ozone Layer (hereinafter "Montreal Protocol").[290] This regime has been successful in phasing out the production and consumption of harmful chemicals, including chlorofluorocarbons (hereinafter "CFCs"), that "migrate into the stratosphere and destroy ozone molecules in the upper atmosphere."[291] CFCs, popularly used in aerosol cans and sprays, were created in 1928, and at the time were hailed as technological triumphs.[292] However, as time went on, the scientific community began to recognize that these chemicals were actually harmful to the environment and were degrading the ozone layer that is vital to human survival, as it shields the Earth's atmosphere from ultraviolet radiation.[293]

Before the passage of the Ozone regime, some states like the United States,[294] Canada, and Sweden[295] unilaterally banned aerosol use, but these acts lead to the fear that other states would be pressured into passing likewise regulations in order to keep positive trade relationships with those countries.[296] Furthermore, a debate arose over the validity of the scientific research, mostly concerning whether or not the CFCs were actually to blame for the ozone depletion.[297] This debate led to the eventual passage of the Ozone Convention. However, neither side was particularly satisfied with this result, and thus the subsequent Montreal Protocol was passed. Even though there was some debate, the successes of the Ozone regime can be seen by looking at the fact that due to its existence, the demand for the chemical has significantly dropped, and as such, so has the production, usage and

[289] Vienna Convention for the Protection of the Ozone Layer, March 22, 1985, UNEP Doc. IG 53/5.
[290] Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541.
[291] Oran R Young, Marc A Levy and Gail Osherenko, *The Effectiveness of International Environmental Regimes: Causal connections and behavioral mechanisms* International Environmental Politics (11 Sept. 2008) at 68.
[292] David D. Caron, *Protection of the Stratospheric Ozone Layer and the Structure of International Environmental Law Making* From the Selected works of David D. Caron, Vol. 14 (1991) 755-780, 755, available at http://works.bepress.com/david_caron/44/ [Accessed last 1 January 2012].
[293] *Id.* at 756. For a discussion on how CFCs actually break down the ozone layer, see whole article.
[294] *See generally*, Nangel, *Stratospheric Ozone: United States Regulation of Chlorofluorocarbons,* 16 B.C. Envtl. Aff. L. Rev. 531 (1981).
[295] See generally, Ahmadzai & Hedlund, *A Profile of Measures Taken in Sweden to Protect the Stratospheric Ozone Layer*, 19 Ambio 341 (1990).
[296] Supra, n. 292 at 757.
[297] *Id.* at 759.

consumption of CFCs. It is also important to note that with the decrease in the use of CFCs, there has also been a decrease in the degradation of the ozone.[298] This author concedes that correlation does not always equal causation, but the results could signify that CFCs were damaging the environment, and now they are no longer doing so to the extent that they were previously. More important to note as a success, though, is the fact that the international community was able to shift the demand for a product due to environmental concerns. Thus, WTO members could use this same tactic to slowly change the demand for a product that they found environmentally damaging.

The EU claims to have some of the world's highest environmental standards with its main current priorities focused on protecting endangered species, protecting habitats, and finding ways to use natural resources more efficiently.[299] The history of the EU's environmental policy spans multiple agreements,[300] but it was not until the Treaties of Maastricht and Amsterdam in 1992 and 1997 that sustainable development was explicitly declared as an EU goal. Today, the EU is seen as having a strict sustainable development policy that is enacted alongside its promotion of economic growth.[301] There are claims that the EU's commitments are merely symbolic in nature and that there is no way to bring the two worlds of sustainable development and economic growth together.[302] However, it is possible that this symbolism is an actual reflection of a new precedent in the global economy to include environmental protections in the debate at the beginning of the negotiations. If this is the case, then the EU's regulations would be a sign of what is to come and what is possible, rather than what can never be.

An example of actual *action* that the EU has taken to promote its sustainable development goal was the major leadership role it played at the World Summit on

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[298] *See generally*, Science Daily *Destruction of the Ozone Layer is Slowing After World Wide ban on CFCs Release*, available at http://www.sciencedaily.com/releases/2003/07/030730080139.htm [Accessed last 29 December 2011].
[299] Europa, *Protecting and improving the planet*, available at: http://europa.eu/pol/env/index_en.htm [Accessed last 29 December 2011].
[300] Some of these agreements include the Treaty of Rome, The Single European Act, Treaties of Maastricht and Amsterdam, and the Lisbon Treaty.
[301] Susan Baker, *Sustainable Development as Symbolic Commitment: Declaratory Politics and the Seductive Appeal of Ecological Modernization in the European Union*, Environmental Politics, Vol 16, No 2, 297-317 (April 2007) at 297.
[302] *Id*.

Sustainable Development (hereinafter "WSSD") in 2002 in Johannesburg, South Africa.[303] This action came after the EU was also seen as a main protagonist for the environment and sustainable development during the negotiations for the Kyoto Protocol on Climate change in 1997.[304] Thus, while the EU is still struggling to integrate its own regulations, it has become one of the foremost global leaders on promoting sustainable development by championing the cause and advancing its agenda world-wide. This would suggest that the strict regulations that it hopes to impose are less of a symbolic declaration than it is a work in progress that requires world-wide recognition and support. It also illustrates that ambitious sustainable development action will not be done quickly and should be given time to progress. This lesson also applies to the WTO. The criticisms discussed in this paper mostly focus on how the WTO is merely declaring its commitment, rather than promoting actual *action.* However, the Marrakesh agreement was written less than twenty years ago and it is reasonably possible that not enough time has passed to see actual, lasting change.

Most PTAs contain some sort of provision concerning the environment. For example, all PTAs negotiated by the United States contain a chapter on the environment "that commits parties to enforce their own environmental laws and provides for dispute settlement should that not occur."[305] Most of the United States' PTAs also contain side agreements that that strengthen capacity building and environmental cooperation.[306] The United States clearly sets a high environmental standard that other states must meet if they want to enter into a PTA with them. Not surprisingly, this type of agreement has garnered the most criticism from the WTO. This criticism was most notable in the 2005 Report of the Consultative Board to the WTO Director-General, also known as the Sutherland Commission, which criticized infusing non-trade objectives like the environment into PTAs.[307]

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[303] Simon Lightfoot and Jon Burchell, *The European Union and the World Summit on Sustainable Development: Normative Power in Europe in Action?* JCMS (2005) Vol 43, No 1 pgs 75-95, 96.
[304] *Id.* at 97.
[305] Supra n. 74 at 12.
[306] *Id.*
[307] World Trade Organization, *The Future of the WTO, Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi, January 2005, para. 87, http://www.wto.org/english/thewto_e/10anniv_e/future_wto_e.pdf (visited 6 June 2007).

It is understandable that the WTO would criticize other multilateral and regional agreements, as well as PTAs. It is true that the reason many of these agreements work is because the small number of participating states makes them easier to manage, and lessons learned on this small scale may not work on a global scale. It is also true some of these agreements over-reach and undermine the authority of the WTO. Regardless, there are still things to be learned from their successes. The Ozone regime shows that a large collective of states can, over time, change public opinions and demand to be more environmentally friendly. The EU's strict environmental policy shows that even if a collective of states is still working on defining and standardizing its own environmental policies, it can still be a leader on other sustainable development agendas. It also shows that comprehensive agendas will take time to implement, even on a regional level. Furthermore, the EU has been able to remain effective while promoting the dual agenda of economic growth and sustainable development. Finally, PTAs, while controversial, are taking immediate steps to foster *actions* from states to actually protect their environments and promote sustainable development.

Multilateral and regional agreements foster and enhance cooperation, facilitate learning, bestow authority and define roles.[308] They also allow for the retention of some sovereignty by acting as agents for internal realignments but do not force states to give up rights if they do not want to sign certain provisions. Some agreements even allow for states to make reservations and all allow for participating members to be part of the negotiation process. Finally, these agreements go further than simply declaring that something must be done, they actually demand action. While it is true that none of this is applicable if the states do not agree in the first place, especially when each has a different interest at stake, it would be a lost opportunity if one were to simply ignore the noteworthy successes of some multilateral and regional agreements and dismiss them as irrelevant in the trade-related environmental debate.

[308] Supra, n. 291 at 84-86.

V. D. Utilize Outside Actor Assistance

The WTO could utilize outside actor assistance to make a significant contribution to sustainable development and environmental protection. It could do this by re-examining its relationship with both NGOs and private organizations. While it may be true that some NGOs are also private organizations, for the purposes of this paper the "private" designation attaches to companies with a for-profit motive. Concerning NGOs, the WTO could work to build a relationship that differs from the current strained, sometimes hostile one it has with most NGOs. This new partnership could bring about some changes such as more access to the WTO process granted to NGOs, better monitoring and expert advice communicated to the WTO, and the possible promotion of fair trade products and practices. Concerning private organizations, there are numerous ways that the WTO could prosper, including promoting further consultations and Corporate Social Responsibility (hereinafter "CSR") agendas and allowing for some co-regulation and self-regulation.

V. D. i. NGOs

There is a long-standing relationship between the WTO and NGOs, as NGOs are specifically mentioned in the Marrakesh agreement in Article V:2,[309] and their relationship was discussed in detail in the guidelines adopted by the WTO General Council in 1996 that "recognized the role NGOs can play to increase the awareness of the public in respect of WTO activities."[310] However, positive interaction between the two has remained minimal and has sometimes become aggressive and hostile. Both sides claim that the other does not play fairly, distorts information, and only pursues its own agendas.[311] For example, in 2001 at the Ministerial Conference some NGOs like Public Citizen and Global Trade Watch were instrumental in planning and supporting large-scale protests that brought the WTO to public attention.[312] This mobilization of certain NGOs painted the WTO in a negative

[309] Supra, n. 17 at Art. V:2.
[310] World Trade Organization, *Guidelines for arrangements on relations with non-governmental organizations* (23 July 1996) WT/L/162 WTO.
[311] Supra, n. 48 at 20.
[312] Supra, n. 48 at 5.

light[313] and is probably one of the main reasons that the WTO has more recently sought to improve its relationship with NGOs.

Many economists agree that some regulatory structures are needed to prevent externalities and market failures in economic systems.[314] Without regulations on things like pollution and over-fishing, trade could easily result in over-exploitation of resources and increased environmental degradation.[315] Thus, some form of structure is needed, and currently one of the only viable options for that structure is the WTO. After the 1996 guidelines, NGO interaction with the WTO has mostly been centred on attendance at Ministerial Conferences, consultative relationships with member states governments, and participation in issue specific symposia. NGOs and other outside actors have also been granted the right to submit *amicus curie* briefs to the DSB.[316] Furthermore, the WTO Secretariat sponsors annual public forums where members of civic society and the private sector meet and interact with WTO officials.[317] While environmental concerns have been a major focus of these meetings, the results have not always been positive as it was noted in 2002 that "the WTO continues to resist making arrangements, consistent with those in other major international organizations, for consultation and cooperation with NGOs."[318]

NGOs can also submit position papers which are eventually circulated to the member states.[319] This does not, however, mean that these papers are actually read or taken seriously. Even if an NGO submits a paper, there is no guarantee that it will be circulated as the WTO Secretariat can decide for any reason not to include it. Due to this, NGOs have been hesitant to submit large numbers of position papers.[320] Furthermore, it has been reported by some NGOs that their access to the WTO

[313] *Id.* at 24.
[314] *See generally* William J. Baumol & Wallace E. Oates, *The Theory of Environmental Policy* (1978). Presenting theoretical analysis between the environment and trade.
[315] *See generally* Andre Dua & Daniel C. Esty, *Sustaining the Asia Pacific Miracle: Environmental Protection and Economic Integration* (1997). Explaining how and why market failure causes environmental harm.
[316] *See generally* Petros C Marvroidis, *Amicus Curie Briefs Before the WTO: Much ado about nothing*, Jean Monnet Working Paper 2/01, Uni of Neuchatel and Centre for Economic Policy Research (2002).
[317] Supra n. 74 at 9.
[318] *Id.*
[319] Supra, n. 316.
[320] *Id.*

process has been restricted and that their opinions are not respected when they do attend the plenary meetings or participate in the issue specific symposia.[321]

Within the WTO itself, many of the officials that operate within the international trading system believe that greater NGO participation would actually harm the international trading system.[322] Some of the reasons cited for this include that the WTO is not meant to regulate the environment and that NGOs are not member states. However, a more open WTO that grants increased access to NGOs would more than likely help, rather than hinder, the process of advancing the sustainable development goal.[323] NGOs can provide a wealth of knowledge and act as monitors in situations where the WTO lacks the resources itself.[324] NGOs can also assist with giving WTO member states that have traditionally lacked the resources to be heard in negotiations, or even attend the rounds, a stronger and louder voice.

Concerning the environment, NGOs have traditionally stepped in to be both the advocate for increased regulations and to monitor the efficiency of the current ones. They have done this by lobbying the WTO, or publically chastising it, for change. It appears that the WTO can do little to avoid playing some role as a regulatory agency,[325] and it must find ways to be inclusive of NGO assistance and input. In the future, WTO members could publically support more NGO involvement including actively seeking consultations and position papers with environmental groups, promoting more interaction of NGOs at meetings and generally working on making the relationship between the two less hostile. In return, NGOs and the "green movement" could agree to work more with the WTO on what it can realistically do to promote sustainable development and to stop chastising it for aspects that it has no control over.

A final way that these two bodies could work together would be to focus more on the demand aspect of trade. This means that NGOs could further use their

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[321] Supra, n. 235.
[322] Jagdish Bhagwati & T.N. Srinivasan, *Trade and the Environment: Does Environmental Diversity Detract from the Case of Free Trade? In* Fair Trade and Harmonization: Prerequisites for Free Trade? 159, 195-96 (Jagdish Bhagwati & Robert Hudec eds., 1996).
[323] Supra, n. 315 at 716.
[324] *Id.* at 718.
[325] *Id.* at 713.

authority and influence, endorsed by the WTO Secretariat, member states and the CTE, to create public marketing campaigns to promote environmentally friendly products and procedures. By working together to create a more sustainable development minded public opinion, industries and trade would hopefully shift to be more environmentally aware. This suggestion of course will neither solve all environmental issues, nor will it create a world where sustainable development reigns supreme, especially after it has been shown that marketing schemes for "fair trade" products have only proven to be a niche market.[326] However, it is precisely the point that every step, even small ones on a global scale, could make a difference. Thus, a step of a publically declared partnership between NGOs and the WTO to promote fair trade products could go a long way in setting future precedent.

In summary, the WTO has a long-standing temperamental relationship with NGOs. This does hinders the effectiveness of the WTO's authority and quite often creates bad public opinion. On the other side, NGOs are increasingly finding themselves more dependent on the decisions made by the WTO to promulgate change. Thus, the two seemingly different interests actually rely on each other and should seek better ways to work together. A major step would be to actively work on making NGOs more respected in the decision making process by having them participate more as consultants, write more position papers and attend more meetings. WTO members should also actively work on seriously considering what NGOs are saying, as it is unlikely that they are going to go away anytime soon. Furthermore, WTO member states should be encouraged to form partnerships with NGOs to promote fair trade initiatives. By starting to implement the above steps, the relationship between the two will be strengthened. Neither side should be quick to chastise the other, as it is only with time and patience that mutual respect will develop.

[326] Marie-Christine Renard, *Fair trade: quality, market and conventions*, Journal of Rural Studies Vol. 19, Issue 1 (2003) 87-96, 90.

V. D. ii. Private Partnerships

The WTO could also work on its relationship with private companies and organizations concerning the environment and sustainable development. The reaction from private parties around the world concerning the jurisdictional powers of the WTO has been mixed.[327] Some private firms see the WTO as an interfering body that constricts and unfairly regulates them.[328] Others see this relationship as an opportunity to influence government and have more of a voice in the public arena.[329] There are several ways in which the private-public relationship could be enhanced, including promoting better communication and consultation, private firm self-regulation and CSR agendas.

Before looking at what the WTO can do to promote public-private relationships, the ongoing issues that have previously plagued this field of thought should first be analyzed. Mainly, there has been an increased blurring of the line between the private and public spheres when it comes to the WTO. This growing trend is extremely apparent in the fact that some governments, most notably in the United States and Europe, are more often seeking the opinions of private enterprises and their lawyers and are using private litigation strategies in the global sphere.[330] The history between private companies and governments pre-dates the WTO. Private firms have often collaborated with their jurisdictional governments to work to reduce foreign trade barriers, described as "any measure that directly or indirectly results in an impediment to trade."[331] Thus, many international disputes, including those concerning trade, the environment and sustainable development, are not strictly public or intergovernmental.

The easiest and most commonly agreed upon way to create a public-private partnership is to support and promote consultations and cooperation between private actors and the WTO.[332] As mentioned above, there has been a long history of governments seeking the advice and resources of private actors. While the lines

[327] Supra, n. 56 at 4.
[328] *Id.*
[329] *Id.*
[330] *Id.*
[331] *Id.* at 5.
[332] Tanja A Borzel and Thomas Risse, *Public-Private Partnerships: Effective and Legitimate Tools of International Governance?* Center for Transatlantic Foreign and Security Policy 15/10/02.

between the private and the public arenas have sometimes become blurred, the effects are not always negative. For example, if WTO members were seeking to work on reducing depleting fish stocks due to overfishing by further regulating trade standards, they could consult more with private businesses and firms that have a wealth of information on the subject. While NGOs may only converse about the evils of any fishing, businesses would have the know-how to discuss the realities of the problem. In today's market, there is no way to completely prohibit all fishing in all forms to protect certain fish stock. This was attempted by the US on several occasions, but the DSB rejected its efforts to ban some forms of fishing as veiled forms of trade favouritism.[333] However, businesses would be able to give a practical view as to what kind of reduction could be made and what kind of future goals could be realistically met.

Some private organizations have adopted international self-regulation to avoid further legislation from the WTO. For example, the WTO made a decision to create a code of ethical and scientific standards concerning the sale and marketing of pharmaceuticals, but before it could enact this the International Federation of Pharmaceutical Manufacturers Association voluntarily adopted their own Code of Pharmaceutical Marketing Practices and avoided further regulations on their marketing practices.[334] Thus, the fear of action from the WTO in the form of regulations that private firms' jurisdictional governments have to comply with, private companies will be more inspired to self-regulate. While in theory this is a good thing, the WTO should work more with private firms in developing regulations that comply with WTO standards and should assist with the monitoring of the compliance of the new rules.

A final way that the WTO could strengthen its relationship with private actors would be to actively support and implement CSR campaigns. While the concept of CSR has changed of the years and currently has a broad meaning,[335] a simple definition would be: "a company's sense of responsibility towards the

[333] *See generally* fishing cases in Section III of this paper.
[334] *Id.* at 9.
[335] *See generally* Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, Business & Society Vol. 38 (1999).

community and environment."[336] Thus, the WTO could work to make private sectors have more of a responsibility towards the environment. This could be done through CSR initiatives in the CTE and the WTO Secretariat. Furthermore, WTO member states could individually take the initiative by creating regional CSR schemes that encourage greater environmental responsibility and promote sustainable development.

In summary, there are many ways in which the private-public relationship could be enhanced between the WTO and private firms. Some ways that this can be done include: promoting better communication and consultation between the two spheres, supporting internal self-regulation in private firms and implementing CSR campaigns. There are major hurdles to overcome in creating a harmonizing, efficient relationship between these two arenas, but the positive effects of such a coordinating effort would far outweigh the negative. Concerning sustainable development and environmental rights, the WTO could also begin to make the environment a larger part of their discussion when strengthening its relationship with private firms, and it could make more of an effort to build relationships with private environmental entities.

V. D. iii. Strengthen the Relationship between the WTO and the UN

The WTO should look to strengthen its relationship with the UN and work more from within that institution. As discussed above in Section II, the UN and WTO have a long-standing relationship when it comes to environmental protection and sustainable development. However, this relationship has been criticized as mostly being symbolic, rather than actually inspiring action. By strengthening its relationship with the UN to better protect the environment, the WTO would alleviate some of the pressure to provide these protections on its own. There are signs that indicate that this is already taking place; for instance, the proposal and participation of the WTO with the Rio +20 Conference could provide a perfect opportunity for the WTO to reintroduce itself as a leader in the field of promoting sustainable development ideals. Furthermore, the WTO's role in promoting the UN's

[336] Business Dictionary, *Corporate Social Responsibility,* Available at: http://www.businessdictionary.com/definition/corporate-social-responsibility.html [Accessed last 15 January 2012].

Millennium Development Goals (hereinafter "MDGs")[337] should be reinforced and fostered.

The UN Conference on Sustainable Development is hosting a RIO +20 Conference in Brazil from 4 to 6 June in 2012. The objective of the Conference is to: "secure renewed political commitment for sustainable development, access the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development, and address new and emerging challenges."[338] The Conference has two themes: "a green economy in the context of sustainable development and poverty eradication; and the institutional framework for sustainable development."[339] The WTO has submitted a proposal for the conference and plans on attending and participating; however, much of the text is simply to reaffirm its earlier declarations on its commitment to sustainable development.[340] Regardless, taking part in this conference is a good opportunity for the WTO to reframe its relationship with the UN and sustainable development. It would be helpful though if the WTO would not only declare its commitments but would also become more of a leader in the sustainable development realm by working to strengthen its relationship with the UN. It could do this by having the CTE and the WTO Secretariat draft non-binding plans of action to promote more effective environmental protection. The WTO could also ask its member states to publically support the environmental and sustainable development goals of the UN if they are not already doing so.

Another way the WTO can strengthen its relationship with the UN is to work with it on achieving the MDGs. While all members of the WTO are members of the UN, the relationship between the two bodies could be strengthened by advocating the others' agendas concerning sustainable development. For example, there are a few of the MGDs that can apply directly to the WTO. The MDGs are a set of eight international development goals all UN member states and a large number of

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[337] United Nations, A/RES/55/2: United Nations Millennium Declaration: resolution adopted by the General Assembly. 55/2 18 September 2000.
[338] Supra, n. 25.
[339] World Trade Organization, *Full Submission*, United Nations Conference on Sustainable Development, available at: http://www.uncsd2012.org/rio20/index.php?page=view&nr=530&type=510&menu=20&template=529&str=Doha%20development%20agenda [Accessed last 1 January 2012].
[340] *Id.*

international organizations have signed. The MDGs seek to achieve an end to poverty, or at least have the outlined goals reached, by 2015. There are different achievements and goals for developed countries, developing countries and LDCs, but the main themes of reducing child mortality rates, reducing extreme poverty, fighting epidemics like HIV/AIDS, and creating a global development partnership remain the same.[341] It is here, particularly with MDG 8 to build a global partnership for development,[342] where the WTO could make an impact or at least become an adamant supporter of this new global partnership.

In conclusion, while the WTO and UN already have a strong relationship concerning environmental protection and sustainable development, there is always room for growth. By actively participating in the Rio + 20 Conference and by adamantly supporting the achievement of the MDGs, the WTO will strengthen its relationship with the UN, and it will be taking a step towards attaining its objective of sustainable development. Also, by taking these steps the WTO will probably help to build positive public opinion which may be needed after the conclusion of the Doha Round.

SECTION VI: CONCLUSION

Since the 1980s, the value of world trade has more than quadrupled, facilitated by a large amount of global, regional and bilateral trade agreements.[343] At the same time, there has been an increased global interest in environmental protections and sustainable development. Thus, the two distinct fields of trade and the environment have been developing on parallel planes. There have been many attempts to bring these two fields together; however, as of yet, none of these attempts have created an effective regime. The WTO has taken several initiatives to begin working on some sort of understanding concerning the environment and working towards a more sustainable future. However, the majority of these initiatives are only *declaratory* in nature and have failed to achieve actual *action*. The one main success of the WTO is the DSB which has been able to make binding

[341] *See generally,* Nana K Poku and Jim Whitman, *The Millennium Development Goals and Development after 2015*, Third World Quarterly, Vol. 31, No. 1 (2011), 181-198.
[342] Supra, n. 336 at 8.
[343] K Gallagher, *Mexico and the Trade Environment Debates*, Free Trade and the Environment, Stanford University Press (2004) at 3.

rulings on environmental protections. While not all of the adopted Panel decisions were pro-environment, they did open the door to bring future trade-related environmental cases which could set the precedent for actual change.

Before progress can be made the current debates concerning the relationship between trade and the environment must be discussed. This arena has been dominated by environmentalists vs. free trade advocates and developed nations vs. developing nations and LDCs. Most of these discussions deal with power struggles, lack of resources and the belief that there is no place for environmental protections or the promotion of sustainable development in the WTO. While it is likely that the first two of these debates will continue into the future, it is time to admit that the last of these arguments is now outdated. The environment clearly matters and should be incorporated into the WTO system. Now, the question becomes: how can the WTO work to more effectively protect the environment and promote sustainable development?

There are many ways that the WTO can begin to work towards this objective and this paper has discussed four of them. First, what the WTO can realistically accomplish and what it will never be able to achieve must be more clearly defined. Second, the WTO's dispute resolution system and the DSB need to be made more effective and inclusive of all member states. Third, the WTO should emulate the successes and learn from the failures of multilateral, regional and preferential trade agreements. Finally, the WTO should utilize outside assistance and strengthen its relationships with NGOs, private institutions and the UN.

What is clear is that using the WTO to more effectively protect the environment is not a short-term goal. Trade is global, and any kind of change or support for sustainable development is likely to take time. Therefore, advocates for creating a bridge between the worlds of international trade law and sustainable development should think in long-term rather than quick-fix mentalities. Just as environmentalists have to realize that the WTO is probably going to be a lasting international organization that holds great influence over the trade and environmental realms, so too must the free trade advocates and the WTO realize that environmental protections and the push for sustainable development is not going to disappear anytime soon. As Edith Brown Weiss declared, "trade is not an end in

itself, rather, it is a means to an end. The end is environmentally sustainable economic development."[344] It is here that the WTO and its member states can make a significant contribution to a sustainable future if they choose to do so.

[344] Supra, n. 22 at 728. This statement was inspired by the Director-General of the GATT in 1992, Arthur Dunkel, from a speech he made during the Rio Conference where he explicitly acknowledged the important dynamic between trade and the environment.

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