ABSTRACT

This article addresses whether the WTO should extend permanent observer status to multilateral environmental agreements and analyzes the impact of injecting environmental issues into the multilateral trading system. The paper begins with a chronological analysis of the transition from the GATT governance of international trade to the formation of the WTO and will also examine influences upon the formation and the agenda of the Committee on Trade and the Environment. The discussion continues with a look at the Committee on Trade and the Environment's first year of progress and discussion of the critical report entitled *Special Studies 4: Trade and the Environment*. Following an evaluation of the impact of the first four WTO Ministerial Conferences is a discussion of the mechanics of the GATT's anti-discrimination provisions and environmental exceptions. Next, the discussion is supplemented by an analysis of international case law interpreting the environmental exceptions contained in GATT. The paper then proceeds to investigate the structure and function of the different types of trade provisions in several multilateral environmental agreements and their impact on the multilateral trading system. Furthermore, the article conducts a chronological analysis of the struggle endured by multilateral environmental agreements to acquire observer status in the WTO and the relevant implications of their participation in WTO proceedings. Finally, the author explores proposed solutions and attempts to achieve harmony between trade and the environment.

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WILL THE WTO TURN GREEN?
THE IMPLICATIONS OF EXTENDING OBSERVER STATUS TO MULTILATERAL ENVIRONMENTAL AGREEMENTS

Richard Skeen †

I. INTRODUCTION

The first attempt to govern international trade resulted in the General Agreement on Tariffs and Trade (GATT) in 1947.[1] Environmental issues had not yet emerged in the international context, and environmental organizations such as Greenpeace did not exist in developed countries at that time.[2] The 1972 Conference on the Human Environment introduced a new issue into multilateral trade negotiations.[3] Environmental issues started to slowly penetrate domestic and international policy during the mid-1970s.[4] In 1991, the GATT contracting parties convened the Working Group on Environmental Measures, which formally established environmental issues within the multilateral trading system.[5] The emphasis on the environment continued at Marrakesh with the formation of the World Trade Organization's (WTO) Committee on Trade and the Environment (CTE).[6] However, environmental concerns sometimes conflict with the goals of multilateral trade, and these discrepancies have created a dispute regarding the relevance and importance of incorporating environmental issues into modern trade negotiations. The two factions (environmentalist and trade purist) have become deeply entrenched in the debate over the level of involvement multilateral environmental agreements (MEA) should play in the World Trade Organization.

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[1] *See* discussion *infra* Part II.A.

[2] Gregory C. Shaffer, *The World Trade Organization Under Challenge: Democracy and the Law and Politics of the WTO's Treatment of Environmental Matter*, 17 HARV. ENVTL. L. REV. 1, (2001).

[3] *Id.*

[4] *Id.*

[5] *Id.*

The WTO Members at the Ministerial Conference at Doha, Qatar in 2001 committed to resolve issues including those regarding trade and the environment by January 1, 2005.[7] The Doha *Ministerial Declaration* stresses the significance of clarifying the relationship between WTO trade rules and the trade measures contained in MEAs.[8] The declaration also pinpoints both information exchange and the establishment of procedures for granting observer status to MEAs as areas of primary concern.[9] However, Members failed to reach a consensus at the recent Cancún Ministerial Conference in 2003, and these important issues were left unresolved.[10]

This comment addresses whether the WTO should extend permanent observer status to multilateral environmental agreements and analyzes the impact of injecting environmental issues into the multilateral trading system. Part II will chronicle the transition from the GATT governance of international trade to the formation of the WTO and will also examine the influences upon the formation of the Committee on Trade and the Environment and its agenda. The discussion in Part III will assess the Committee on Trade and the Environment's first year of progress and will discuss a critical report entitled *Special Studies 4: Trade and the Environment*. Part III will continue with an analysis of the relevant implications of the first four Ministerial Conferences. Part IV will outline the mechanics of the GATT's anti-discrimination provisions and related environmental exceptions. The discussion of the GATT will be supplemented by an analysis of international case law interpreting the environmental exceptions. Part V will investigate the structure and function of the different types of trade provisions contained in

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[6] *See* discussion *infra* Parts II.B-C.

[7] *See* WTO Ministerial Conference 4th Sess. Doha, *Ministerial Declaration*, WT/MIN(01)/DEC/1 para. 31,32,45 (Nov. 20 2001) http://www.wto.org (last visited Oct. 2, 2003) [hereinafter Doha, *Ministerial Declaration*].

[8] *Id.* para 31.

[9] *Id.* para. 31.

[10] *See* WTO Cancún 5th Ministerial Conference, *Summary of September 14, 2003*, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm, (last visited Oct. 29, 2003) [hereinafter *Summary of September 14, 2003*].

multilateral environmental agreements and their impact on the multilateral trading system. Part VI will begin with chronological analysis of the struggle to acquire observer status for multilateral environmental agreements and will then consider the relevant implications of their participation in the WTO proceedings. Finally, Part VII will explore proposed solutions and attempt to achieve harmony between trade and the environment.

II. THE HISTORY OF THE TRADE AND THE ENVIRONMENT FROM GATT TO THE WTO

A. The UN, the ITO, and Birth of GATT

During the 1940s, war caused extensive devastation to economic and domestic infrastructures across Europe and Southeast Asia. This brought about dramatic social, economic and political changes throughout the world. The task of rebuilding dominated national concerns and required massive amounts of labor, capital, and materials to traverse international borders.[11] In response to these concerns, the United States led an effort to harmonize world economic affairs.[12] The dilemma of conducting trade efficiently in the postwar economy was discussed at Bretton Woods in 1944, and sparked an effort to found an international organization charged with the development and coordination of international trade.[13]

Fifty-one states concerned with postwar political and economic instability formed the United Nations (UN) in 1945 and assigned certain focus areas to each of its three councils.[14] The Economic and Social Council supported the development of an international organization to

[11] *See generally* MITSUO MATSUSHITA ET AL., THE WORLD TRADE ORGANIZATION LAW, PRACTICE, AND POLICY (2003) 1-2.
[12] *See generally* JOHN H. JACKSON, ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION O F TRANSNATIONAL ECONOMIC RELATIONS 211-16 (4th ed. 2002) (discussing the weaknesses of the bilateral system of negotiating tariffs and the related implications of the 1934 Reciprocal Trade Agreements Act and the 1945 Act to Extend the Authority of the President Under section 350 of the Tariff Act of 1930).
[13] *See* MATSUSHITA, *supra* note 11, at 1-9 (analyzing WTO formation, law, policy, and practice).
[14] *See The UN in Brief, at* http://www.un.org/Overview/brief1.html (last visited Oct. 26, 2003) (providing a description of the history and formation of the United Nations).

conduct multilateral trade negotiations under the auspices of the UN.[15] The UN adopted a resolution in 1946 to undertake the formation of the International Trade Organization (ITO).[16] The process consisted of several stages, including a pivotal one in Geneva, where the schedules of tariff reductions and the General Agreement on Tariffs and Trade were prepared.[17] The original twenty-two states that wanted to adopt the tariff schedules of the GATT signed the "Protocol of Provisional Application" to apply the GATT.[18] The agreement became effective on January 1, 1948 but the signatories only intended it to govern trade until the ITO Charter could be adopted.[19] The drafting committee finished the ITO Charter in Havana, Cuba during 1948, but it was never adopted by the United States due to strong opposition from the Truman Administration and a Republican-controlled Congress.[20] The ITO ultimately floundered because the United States failed to lend the necessary support, which would have ensured its adoption by the rest of major trading nations.[21]

Although it was only intended to be a temporary solution, the GATT became the default instrument for international trade negotiations and regulation for over forty years.[22] The drafters of the GATT never intended it to serve as an international organization, and consequently it suffered from some inherent weaknesses, including the lack of any legal identity or organizational structure.[23] These failings led to ambiguity about the GATT's authority and ability to regulate trade. [24] Despite the aforementioned flaws, the GATT remained the dominant

[15] MATSUSHITA, *supra* note 11, at 1.
[16] *Id.*
[17] *Id.* at 2.
[18] JACKSON, *supra* note 12, at 213.
[19] *Id.*
[20] MATSUSHITA, *supra* note 11, at 2.
[21] *Id.*
[22] JACKSON, *supra* note 12, at 216.
[23] *Id.* at 214-16.
[24] *Id.*

forum for trade negotiations and fostered eight "rounds" of multilateral trade discussions, which lowered tariffs and eliminated other international trade barriers.[25]

B. The Uruguay Round and the Formation of the WTO

1. The Birth of the WTO

Globalization of the world economy facilitated the need for a stronger international body to not only advance but also govern international trade.[26] The contracting parties of the GATT met in Marrakesh, Uruguay for a trade round, which lasted from 1986 to 1994 and hatched negotiations that produced several agreements signed on April 15, 1994.[27] The summit at Marrakesh culminated in the formation of the World Trade Organization on January 1, 1995.[28] The contracting parties drafted the Agreement to form the WTO (WTO Agreement) and four annexes:

> ANNEX 1
> ANNEX 1A: Multilateral Agreements on Trade in Goods
> . . .
> ANNEX 1B: General Agreements on Trade in Services [GATS] and Annexes
> ANNEX 1C: Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS]
> ANNEX 2
> Understanding on the Rules and Procedures Governing the Settlement of Disputes
> ANNEX 3
> Trade Policy Review Mechanism [TPRM]
> ANNEX 4
> Plurilateral Trade Agreements [PTA][29]

The organizational structure of the WTO requires that every member state comply with each of the aforementioned agreements and annexes.[30] The entire text, including agreements and annexes, operates as one whole body of law, subject to the exception of Annex 4, which is optional.[31] The WTO Agreement requires Members to adhere to the entirety of the Uruguay

[25] MATSUSHITA, *supra* note 11, at 5.
[26] *See id.* at 1-3.
[27] *Id.* at 7.
[28] *Id.*
[29] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. (1994) 1125, 1153[hereinafter Final Act].
[30] MATSUSHITA, *supra* note 11, at 7-8.
[31] *Id.*; *see also* JACKSON, *supra* note 12, at 219-20.

Round text and all subsequent negotiations ending in consensus.[32] This greatly departs from the GATT system of rules allowing contracting parties to make side agreements or accept the GATT in fragments, which became especially problematic at the Tokyo Round.[33]

However, Annex 4, which originally contained four PTA agreements, is reminiscent of the GATT style of governance because Members can choose to opt out of the PTA.[34] The PTA agreements are either aimed primarily at several countries, or are mainly "hortatory," and simply urge action; however, when the ability to create additions to Annex 4 is considered the possible environmental impact becomes evident.[35] Annex 4's departure from the traditional organizational structure enables flexibility for the evolution of WTO involvement into nontraditional areas while still preserving the rigid structure of the WTO.[36] Annex 4 could serve as a staging area for environmentally related trade agreements to gain force and support while bypassing the inherent obstacles in the Committee on Trade and the Environment and Article XX.[37]

2. The Function of the WTO

The WTO objectives include: (1) facilitating, implementing and administering WTO agreements, the Multilateral Trade Agreements and the Plurality Trade Agreements; (2) providing a forum for trade negotiation; (3) administering the Dispute Settlement Understanding; (4) administering the Trade Policy Review Mechanism; and (5) cooperating with the World Bank, International Monetary Fund, and other international organizations.[38] Unlike the GATT,

[32] *See* JACKSON, *supra* note 12, at 219.
[33] *Id*.
[34] *Id*. at 220. Only the governmental procurement agreement and the trade in civil aircraft agreement remain in force; the bovine meat and dairy products agreements were deleted. *Id*.
[35] *Id*.
[36] *Id.*
[37] *See* JACKSON, *supra* note 12, at 220.
[38] Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. III, paras.1-5 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

the WTO possesses legal personality[39] and a much more powerful dispute resolution system with which to accomplish its objectives.[40]

3. The Organizational Structure

The WTO is organized in a hierarchy of conferences and councils. The Ministerial Conference, composed of all WTO Members, is the upper echelon and must meet at least once every two years.[41] The General Council is also composed of all the Members and meets between Ministerial Conference sessions to conduct any pressing administrative functions.[42] Furthermore, the General Council discharges the duties of the Trade Review Policy Body and also acts as the Dispute Settlement Body, which is composed of both the dispute settlement panel and the Appellate Body.[43] The next level in the hierarchy consists of three separate councils that must report to the General Council.[44] Each council covers one broad area of trade: (1) the Goods Council; (2) Services Council; and (3) TRIPS Council.[45] The WTO Agreement gives each council the ability to create subdivisions, called committees, which deal with more specific aspects of the respective broad area of trade, and the committees may be further divided into working groups to address specialized issues.[46] In addition, several committees (including the Committee on Trade and the Environment) do not fall under any of the three councils and answer directly to the General Council.[47]

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[39] *Id.* art. VIII, para. 1.
[40] *See generally* TRADING INTO THE FUTURE: WTO THE WORLD TRADE ORGANIZATION 38 (2nd ed. 1999) [hereinafter TRADING] (describing the dispute resolution process as equitable fast, effective, and mutually acceptable). When a trade violation is suspected members must submit to the multilateral dispute resolution system which is binding. Unlike GATT, the adoption of WTO enforcement rulings cannot be blocked by the losing party or any other member. *Id.*
[41] WTO Agreement, *supra* note 38, art. IV, para. 1.
[42] *Id.* art. IV, para. 2.
[43] *Id.* art. IV, paras. 3-4.
[44] *Id.* art. IV, para. 5.
[45] *Id.*
[46] *Id.* art. IV, para. 6.
[47] WTO Agreement, *supra* note 38, art. IV, para. 8; *see also* TRADING *supra* note 40, at 62.

C. The Multilateral Trading System Acknowledges Environmental Issues

1. Establishing the Committee on Trade and the Environment

WTO Members are deeply divided over whether to incorporate environmental issues into the multilateral trading system. Environmentalists and their opponents have struggled with this question in the international forum since the 1970s when these issues emerged.[48] The perplexing question of whether to commingle environmental issues with trade is not easily answered by either faction. Environmentalists are critical of the current multilateral trading regime. They claim that without environmental safeguards trade will generate rampant growth causing unsustainable natural resource consumption and waste production.[49] Environmentalists are also concerned that without environmental protections built into the multilateral trading scheme; trade liberalization and market access agreements might trump environmental policy.[50] The GATT contracting parties have been extremely divided over this issue.[51] They agreed to form the Working Group on Environmental Measures and International Trade in 1971; however, it was not convened for the first time, until twenty years later.[52]

2. Points of Reference

The Ministers to the Uruguay Round of Multilateral Trade Negations at Marrakesh (Ministers) formally decided on April 14, 1994 to direct the WTO to establish a Committee on Trade and the Environment at the General Council's first meeting.[53] The Ministers cited their authority to create, and the need for establishing the CTE, by looking to the preamble to the Agreement Establishing the WTO:

> [R]elations in the field of trade and economic endeavour [sic] should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of

[48] *See* Shaffer, *supra* note 2, at 17.
[49] Daniel C. Esty, THE GREENING OF THE GATT 42 (1994).
[50] *Id.*
[51] *See* Shaffer, *supra* note 2, at 17.
[52] *Id.* at 17-19.
[53] *See* Trade and Environment, Decision of April 14, 1994, MTN.TNC/MIN, 33 I.L.M. 1263, 1267 (1994) [hereinafter Decision on Trade and Environment].

> real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment* and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[54]

The CTE reports directly to the General Council and is open to all members of the WTO.[55] The Ministers endowed the CTE with autonomy by organizing the committee to report directly to the General Council.[56] This broadens the CTE's scope and enables it to undertake trade-related issues concerning goods, services, and intellectual property without overstepping its organizational constraints.[57]

3. The Scope of the CTE

The Ministers had the foresight to initially limit the scope of the CTE's jurisdiction to "trade policies and those trade-related aspects of environmental policies which may result in significant trade effects for its members."[58] The Ministers set points of reference or limitations, which were intended to preserve the integrity of the WTO system by preventing the CTE from addressing issues unrelated to trade.[59] The Ministers quoted the Trade Negations Committee's (TNC) Decision of December 15, 1993, which established the following guidelines and objectives for the CTE:

> (a) to identify the relationship between trade measures and environmental measures, in order to promote sustainable development;
> (b) to make appropriate recommendations on whether any modifications of the provisions of the multilateral trading system are required, compatible with the open, equitable and non-discriminatory nature of the system, as regards, in particular:
> [1] the need for rules to enhance positive interaction between trade and environmental measures, for the promotion of sustainable development, with special consideration to the needs of developing countries, in particular those of the least developed among them; and
> [2] the avoidance of protectionist trade measures, and the adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12; and
> [3] surveillance of trade measures used for environmental purposes, of trade-related aspects of

[54] *Id.* (emphasis added).
[55] WTO Agreement, *supra* note 38 art. IV, para. 5.
[56] *See generally id.*; *See also* TRADING *supra* note 40, at 61-62.
[57] *See* discussion *infra* Part II.B.3.
[58] Decision on Trade and Environment, *supra* note 53, at 1267.
[59] *See generally id.* at 1268.

> environmental measures which have significant trade effects, and of effective implementation of the multilateral disciplines governing those measures.[60]

The language of the preamble to the Agreement Establishing the WTO in conjunction with the TNC Decision provided the CTE with its initial points reference to engage and address environmental issues within the WTO.[61]

4. The CTE's Agenda

Initially, the formation of the CTE came from a push by developed nations such as the United States and the European Union to both placate environmentalists and subject the recent proliferation of environmental regulation[62] threatening free trade to greater control under the GATT.[63] The bifurcation of motivation to establish the CTE led to the balancing of North/South[64] interests in the agenda items of the committee.[65] The Ministers delineated ten areas of initial inquiry for the CTE's agenda:

> [1] the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements;
> [2] the relationship between environmental policies relevant to trade and environmental measures with significant trade effects and the provisions of the multilateral trading system;
> [3] the relationship between the provisions of the multilateral trading system and:
> (a) charges and taxes for environmental purposes
> (b) requirements for environmental purposes relating to products, including standards and technical regulations, packaging, labelling [sic] and recycling;
> [4] the provisions of the multilateral trading system with respect to the transparency of trade measures used for environmental purposes and environmental measures and requirements which have significant trade effects;
> [5] the relationship between the dispute settlement mechanisms in the multilateral trading system

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[60] *Id*. The Ministers at Marrakesh chose to refer to the Rio Declaration on Environment and Development because the language in Principle 12 tracks that of the GATT Article XX and denounces unilateral action in international forum. "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 international consensus." *Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, 47th Sess., U.N. Doc. A/CONF.151/5/Rev. 1 (1992), *reprinted in* 31 I.L.M. 874 (1992) (emphasis added).

[61] *See* Decision on Trade and Environment, *supra* note 53, at 1267-68.

[62] *See* discussion *infra* Part IV.B.

[63] *See* Shaffer, *supra* note 2, at 24.

[64] Developed and developing countries are commonly referred to as the North and the South respectively. The terms are used interchangeably through this article.

[65] Shaffer, *supra* note 2, at 25.

> and those found in multilateral environmental agreements;
> [6] the effect of environmental measures on market access, especially in relation to developing countries, in particular to the least developed among them, and environmental benefits of removing trade restrictions and distortions;
> [7] the issue of exports of domestically prohibited goods,
> [8] that the Committee on Trade and Environment will consider the work programme envisaged in the Decision on Trade in Services and the Environment and the relevant provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights as an integral part of its work, within the above terms of reference,
> [9] that, pending the first meeting of the General Council of the WTO, the work of the Committee on Trade and Environment should be carried out by a Sub-Committee of the Preparatory Committee of the World Trade Organization (PCWTO), open to all members of the PCWTO,
> [10] to invite the Sub-Committee of the Preparatory Committee, and the Committee on Trade and Environment when it is established, to provide input to the relevant bodies in respect of appropriate arrangements for relations with inter-governmental and non-governmental organizations referred to in Article V of the WTO.[66]

The Agenda Items are composed of two major categories, including market access and linkages between the environment and trade, and a third cluster of state specific concerns.[67] The market access agenda (items two, three, four, and six) generated a balanced discussion between the North and South in committee meetings.[68] The discussions on market access, particularly those issues related to Agenda Item six, including agriculture and fishing, have led to the creation of North and South partnerships.[69] Agriculture exporters consisting of the United States, Australia, New Zealand, India and several South American states joined forces and attacked, on environmental grounds, the policies designed to protect domestic producers of the European Union (EU) Japan, and Korea.[70] Developing countries have become increasingly more involved in environmental issues relating to trade by forming alliances with developed nations.[71]

III. TRADE AND THE ENVIRONMENT IN THE WTO: AN INITIAL PROGRESS REPORT AND GUIDANCE FROM THE DOHA MINISTERIAL CONFERENCE

A. The 1996 Report of the Committee on Trade and the Environment

[66] Decision on Trade and Environment, *supra* note 53, at 1268-69.
[67] Shaffer, *supra* note 2, at 25.
[68] *See id.* at 25-29. Shaffer analyzed working papers submitted by CTE Members through the 1998 sessions, and assembled a list categorized by country and agenda item addressed. *Id.*
[69] *Id.* at 30.
[70] *Id.*
[71] *Id.*

The Ministers required that the CTE report its findings to the General Council at its first meeting, and in November of 1996, the CTE published its first report.[72] Members offered many proposals in the CTE meetings throughout the first year. Unfortunately, due to irreconcilable viewpoints, Members could not reach a consensus and no actual substantive or procedural changes were implemented in the WTO as a result of the report.[73] Nevertheless, Members intensely debated the drafting of the 1996 Report because it did indicate the CTE's position on a number of controversial topics, which would eventually influence other areas, including dispute settlement.[74]

1. The Dispute Resolution Process

The report recommended that when disputes between Members occur, arising out of their responsibilities as parties to a MEA, they should "consider trying to resolve it through the dispute settlement mechanisms available under the MEA."[75] The committee feared that the exclusive jurisdiction and binding nature of the WTO dispute settlement system may attract environmentally related suits that were not the province of the WTO dispute settlement panel.[76] The committee's rationale for deferring to the MEA dispute resolution process also stems from the concern to maintain the integrity of the WTO dispute resolution system, which evidences the WTO's reluctance to police environmental issues.[77] At this developmental stage supremacy of law questions between the WTO and MEAs were uncharted territory, and the CTE wisely advised Members not to tread there.

2. Extending Observer Status and Increasing Transparency

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[72] WTO Committee on Trade and the Environment, *Report (1996) of the Committee on Trade and the Environment*, WT/CTE/1 para. 1 (Nov. 12 1996) http://www.wto.org (last visited Oct. 1, 2003) [hereinafter CTE, *1996 Report*].
[73] Shaffer, *supra* note 2, at 37.
[74] *Id.* at 38.
[75] CTE, *1996 Report*, *supra* note 72, para. 178.
[76] WTO Committee on Trade and The Environment, *Enhancing Synergies and Mutual Supportiveness of MEAs and the WTO*, WT/CTE/213 para. 39 (June 12, 2002) http://www.wto.org (last visited Oct. 21, 2003) [hereinafter CTE, *Enhancing Synergies*].
[77] *See* discussion *infra* Part V.B; *but see* discussion *infra* Part IV.B.

Agenda Item one requires the CTE to consider the impact of MEAs, item four relates to increasing transparency, and item ten calls for input regarding "arrangements for relations with inter-governmental and non-governmental organizations referred to in Article V of the WTO."[78] These Agenda Items, in conjunction with Annex 4 to the WTO Agreement set the stage for a continuing and expanding involvement of intergovernmental organizations, non-governmental organizations (NGOs), and MEAs in the WTO. [79] The 1996 report, in consideration of Agenda Item one, made several recommendations, including that "[r]equests from the appropriate bodies of MEAs for observer status should be considered . . . . [and t]he CTE should also consider extending invitations to appropriate MEA institutions" to participate in debates.[80] The CTE addressed Agenda Item four and concluded "that no modifications to WTO rules are required to ensure adequate transparency for existing trade-related environmental measures"[81] but invited "other inter-governmental organizations . . . to collect and disseminate additional information on the use of trade-related environmental measures."[82] The issue of transparency overlaps with Agenda Item ten in which the CTE indicated its intent to "improve public access to WTO documentation and to develop communication with NGOs"[83] and de-restrict working and non-working papers.[84] The CTE will continue to interact with NGOs to enhance the "accuracy and richness of public debate."[85] The CTE also announced that it agreed to extend permanent observer status to inter-governmental organizations which previously participated on an *ad hoc*

[78] Decision on Trade and Environment, *supra* note 53, at 1269; *see also* WTO Agreement, *supra* note 38, art. V, para. 1. "The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO." *Id.* "The General Council may make appropriate arrangements for consultation and cooperation with non-governmental organization concerned with matters related to those of the WTO." *Id.* art. V, para. 2.
[79] *See* JACKSON, *supra* note 12, at 220.
[80] CTE, *1996 Report*, *supra* note 72, para. 175.
[81] *Id.* para. 189.
[82] *Id.* para. 193.
[83] *Id.* para. 214.
[84] *Id.* para. 215.
[85] *Id.* para. 216.

basis and also indicated that it would consider the possibility of extending observer status to MEAs upon their request and subsequent approval by the General Council.[86] The CTE recognized that MEAs "can play a positive role in creating clearer appreciation of the mutually supportive role of trade and environmental policies."[87]

B. WTO/UNEP Joint Report Assesses Trade and the Environment

The WTO Secretariat released *Special Studies 4: Trade and the Environment* just weeks before the Seattle Ministerial Conference.[88] The study assesses the causes of environmental degradation which "can often be traced back to various market failures or, equally bad, to policy failures."[89] Market failures occur when economic forces of supply and demand do not result in optimal outcomes for society because producers and consumers do not consider environmental externalities.[90] Five case studies in Section II of the study depict market and policy failures, showing linkages between trade and the environment in the areas of "(A) chemical-intensive agriculture, (B) deforestation, (C) global warming, (D) acid rain, and (E) overfishing."[91] The study lays blame on lack of incentives to curb pollution, the failure to realize the global market for preservation of resources, lack of resource management schemes, and government subsidies that promote over consumption.[92] The study encourages a front-end attack on pollution by taxing emissions instead of production.[93]

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[86] CTE, *1996 Report*, *supra* note 72, para. 217.
[87] *Id.*
[88] *See generally* Hakan Nordstrom & Scott Vaughan, World Trade Organization, Special Studies 4: Trade and the Environment (1999) http://www.wto.org/english/news_e/pres99_e/environment.pdf (last visited Oct. 1, 2003) [hereinafter WTO, Special Studies]. When the report was drafted co-author Nordstrom worked for the Economic Research and Analysis Division of the WTO and co-author Vaughan was at the Trade Finance Division of the United Nations Environmental Program (UNEP). The report analyzes the causes of environmental degradation, linkages between trade and the environment, and relationship between the economic integration, growth and the environment. *Id.*
[89] *Id.* at 13.
[90] *Id.*
[91] *Id.* at 14.
[92] *Id.* at 26.
[93] WTO, Special Studies, *supra* note 88, at 26.

Furthermore, the study discusses the linkages between trade and the environment in Section III.[94] Through the use of empirical evidence, the authors determine that capital, labor, and availability of natural resources have dominated global trade patterns and that environmental standards have had no significant effect on these trends.[95] Although, the converse is not true: "trade liberalization can harm the local environment in countries with a comparative advantage in polluting industries and improve the environment elsewhere."[96] However, the authors argue that by combining trade and environmental reforms countries can increase income without jeopardizing the environment because excess gains can be diverted to economic policy to abate environmental degradation.[97]

Section IV of the study delves into the inquiry of whether economic integration induces states to lower environmental policy.[98] Theories such as "eco-dumping," "competition in laxity," and "race to the bottom" are often exaggerated, and the authors have determined that the empirical evidence does not support the contention that direct investment is fleeing developed counties for countries with lower environmental standards.[99] The authors do qualify the contention with individual instances of industrial relocation and compromise of environmental standards for competitive purposes.[100]

Section V of the study indicates that free trade may indirectly promote higher environmental standards.[101] Relying on the environmental Kuznets curve,[102] the authors

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[94] *See generally id.* at 29-34.
[95] *Id.* at 31.
[96] *Id.* at 34.
[97] *Id.*
[98] *See generally id.* at 35-46.
[99] WTO, Special Studies, *supra* note 88, at 46.
[100] *Id.*
[101] *See generally id.* at 47-58.
[102] *Id.* at 47 n.97. The Environmental Kuznets Curve describes "the relationship between the level and inequality of incomes, which tend to follow an inverted U-shaped relationship. That is, income inequality tens to be come worse as a country grows to of poverty, stabilizing at a middle-income level, and then gradually becoming more equal." *Id.*

stipulate that studies show "pollution levels tend to be significantly higher in countries with a skewed income distribution, a high level of illiteracy, and few political and civil liberties."[103]

Finally, the study's conclusion acknowledges the global nature of environmental problems but downplays the WTO's ability of handling the environmental concerns and discourages Members' from using trade sanctions for purposes of enforcing environmental policy.[104] The authors recommend that the WTO take steps to address and remove "trade barriers on environmentally-friendly production technologies and environmental services" in order to lower costs of direct investment in those technologies.[105] They also call for a reduction in energy, agricultural and fishing subsidies, which promote the overcapitalization of resources.[106]

C. The WTO Ministerial Conferences

After the CTE presented its initial report to the Ministerial Conference in Singapore in 1996[107] the WTO, in accordance with its bylaws, held another Ministerial Conference in Geneva in 1998 that initiated a round of trade negotiations.[108] However, in 1999 due to extensive rioting, the Seattle Ministerial Conference was canceled and failed to give rise to another trade round of eagerly anticipated discussions on agriculture, investment, and the environment.[109]

After the failed attempt at Seattle, the next major advance to the CTE's agenda came at the Doha Ministerial Conference in November of 2001.[110] Director-General Moore, of the WTO, termed the *Ministerial Declaration* the "Doha Development Agenda" to emphasize the

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[103] *Id.* at 57.
[104] WTO, Special Studies, *supra* note 88, at 59.
[105] *Id.*
[106] *Id.*
[107] *See* CTE, *1996 Report*, *supra* note 72, para. 1.
[108] *See* discussion *infra* Part II.B.3.
[109] *See* Shaffer, *supra* note 2, at 1-3.
[110] *See generally* Doha, *Ministerial Declaration*, *supra* note 7 (addressing the WTO's agenda and issues including market access, industrial tariffs, anti-dumping rules, subsidies, regional trade agreements, implementation issues, agriculture, intellectual property, and the environment).

focus on developing countries.[111] The *Ministerial Declaration's*section on trade and environment agrees to negotiate:

> (i) the relationship between existing WTO Rules and specific trade obligations set out in multilateral environmental agreement (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question;
> (ii) procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for granting of observer status;
> (iii) the reduction or, as appropriate, elimination of tariff and non-tariff barriers to environmental goods and services.[112]

The *Ministerial Declaration* further instructed the CTE to pay particular attention to several focus areas while maintaining its current terms of reference.[113] First, the CTE must study "the effect of environmental measures on market access" while focusing on developing countries and least developed countries, and identify situations where reducing or eliminating trade barriers, "would benefit trade, the environment and development."[114] The Doha *Ministerial Declaration* mandates that the CTE also address the TRIPS agreement and labeling requirements for environmental purposes.[115]

IV. ENVIRONMENTAL MEASURES IN GATT AND THE DISPUTE RESOLUTION BODY'S IMPACT ON TRADE AND THE ENVIRONMENT

A. Article XX Exceptions

In addition to the reference to environmental concerns in the Preamble to the Agreement Establishing the WTO, the GATT also has several environmental safeguards woven into various exceptions clauses.[116]

1. The Nondiscrimination Provisions

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[111] JACKSON, *supra* note 12, at 1222.
[112] Doha, *Ministerial Declaration*, *supra* note 7, para. 31.
[113] *Id.* para. 32.
[114] *Id.* para. 32 pt., i.
[115] *Id.* para. 32 pts. ii, iii.
[116] *See generally* General Agreement on Tariffs and Trade, Article XX (Oct. 30, 1947), 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 *available at* http://www.wto.org/english/docs_e/legal/gatt47_e.pdf (last visited Sept. 27, 2003) [hereinafter GATT].

Annex 1 A to the WTO Agreement contains GATT 1994 which is a series of amendments and understandings on the interpretation of certain provisions of the original version of GATT 1947.[117] The multilateral trading system strives for nondiscrimination based upon two fundamental concepts: the most favored nation (MFN) principal and the national treatment principal.[118] The MFN, found in Article I of GATT, prohibits applying different tariff schedules for the same product to different Members, by requiring that "any advantage, favour [sic], privilege or immunity granted by any contracting party to any product originating in or designed for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."[119] Article III of GATT contains the national treatment clause, which "acts to reinforce the tariff bindings made pursuant to Article II by limiting the circumstances in which it is permissible for a nation to provide treatment for domestic goods in its national legislation and programs which is more favorable than that for imported goods . . . ."[120] The relevant portion of Article III states that "products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."[121] Article XI restricts discrimination in the form of non-tariff barriers (NTB):

> No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export license or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.[122]

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[117] Final Act, *supra* note 29, at 1154-55, 1167.
[118] P. W. BIRINE & A. E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 699 (2nd ed., 2002) [hereinafter BIRNIE & BOYLE].
[119] GATT, *supra* note 116, art. I para. (1). GATT 1994 states that "[t]he references to 'contracting party' in the provisions of GATT 1994 shall now be deemed to read 'Member.'" General Agreement on Tariffs and Trade 1994, Annex 1 A, para. 2 (a), (Apr. 15, 1994), 33 I.L.M. 1154 (1994).
[120] JACKSON, *supra* note 12, at 480.
[121] GATT, *supra* note 116, art. III para. (2).
[122] *Id.* art. XI para. (1).

2. The "Environmental" Exception of GATT

Article I, III, and XI interact with each other, preventing almost every conceivable discriminatory tactic.[123] However, some discriminatory trade regulations will qualify for exceptions. Article XX implicitly allows limited environmental exemptions for violations occurring under Articles I, III, and XI.[124]

Article XX is composed of two main parts, the introductory clause (chapeau) and the list of exceptions detailing the article's scope.[125] The chapeau to Article XX allows for the adoption and enforcement of domestic laws that are discriminatory if they are within the article's scope, "[s]ubject to the requirement that measures are not applied . . . [arbitrarily or amount to] unjustifiable discrimination between countries where the same conditions prevail, or . . . disguised [as a] restriction on international trade . . . ."[126] The relevant scope of Article XX includes measures in paragraph (b) that are "necessary to protected human, animal or plant life or health"[127] and those in paragraph (g) "relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."[128]

B. Case Study: Environmental Exceptions to GATT

Discriminatory domestic legislation claimed to be exempt from Articles I, III, or XI must pass muster under Article XX.[129] The GATT panels and the WTO Appellate Body interpreted Article XX on several occasions, leading to a consistent and reliable reading of the terms contained within paragraphs (b) and (g).[130] The paragraph (b) analysis deals mainly with

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[123] *See* BIRNIE & BOYLE, *supra* note 118, at 700.
[124] JACKSON, *supra* note 12, at 479; *see also* BIRNIE & BOYLE, *supra* note 118, at 701.
[125] JACKSON, *supra* note 12, at 532.
[126] GATT, *supra* note 116, art. XX
[127] *Id.* art. XX para. b.
[128] *Id.* art. XX para. g.
[129] *See generally* JACKSON, *supra* note 12, at 532.
[130] *See* MATSUSHITA, *supra* note 11, at 451-52.

construing the word "necessary."[131] The paragraph (g) inquiry must first focus on whether the trade measure involves the "conservation of an exhaustible natural resource."[132] Second, if the panel determines that it is a conservation measure, the panel then must then decide weather the measure is "relating to" the conservation.[133] Third, the panel must determine whether the legislation aimed at foreigners works "in conjunction with restrictions on domestic production or consumption."[134] The three main issues concerning paragraph (g) were addressed first in the *Tuna Dolphin* cases and then refined in the *United States – Reformulated Gasoline* case and the *Shrimp Turtle* case.[135]

1. The *Tuna Dolphin* Cases : Reconciling Environmental Measures with the GATT

a. *Tuna Dolphin I*

The United States imposed a unilateral ban in accordance with the Marine Mammal Protection Act (MMPA) upon the importation of yellowfin tuna products that killed an unacceptable quantity of dolphins during harvesting.[136] Mexican fishermen were adversely affected by the import restrictions, and in 1991, Mexico filed a grievance with the GATT alleging violations of Articles III, XI, and XIII.[137] The United States countered the Article III attack by maintaining that the restrictive actions were justified under the national treatment clause because United States fishermen were subject to the same regulations as the Mexican fishermen.[138] The GATT panel concluded that the MMPA regulations did not apply to tuna

[131] *See id.* at 452.
[132] *Id.* at 451.
[133] *Id.* at 452.
[134] *Id.*
[135] *Id.* at 451.
[136] *See generally* Marine Mammal Protection Act, 16 U.S.C. §§ 1411- 1418 (2003) (describing findings of congress, authorization of Secretary of State to regulate the tuna fishing industry, and prohibitions relating to the incidental taking of dolphins during tuna fishing); *see also United States – Restrictions on Imports of Tuna*, para. 2.7, DS21/R-39S/155, Sept. 3, 1991, reprinted in 30 I.L.M. 1594 (1991) (unadopted) [hereinafter *Tuna Dolphin I*].
[137] *Tuna Dolphin I*, *supra* note 136, para. 3.1.
[138] *Id.* paras. 3.6, 3.7.

products within the meaning of Article III (which applies only to the imported product itself and not the production process) and were therefore mere regulations on tuna harvesting that had no effect on tuna as a product.[139] Furthermore, the panel noted that the MMPA regulations amounted to discriminatory trade measures because domestic and foreign vessels were subject to different regulatory schemes.[140] Domestic vessels were given arbitrary preset limit on dolphin kills, but the allowable dolphin kills for foreign vessels were based on a percentage of dolphin kills by domestic vessels for the present year.[141] Consequently, foreigners did not know their allowable kill limit until after harvest.[142]

(1). The "necessary" Clause of Article XX (b)

The United States argued that the regulations of the MMPA were justified under the Article XX paragraph (b) or alternatively XX paragraph (g) exceptions.[143] The panel's analysis undertook the inquiry of whether the word "necessary" in the GATT Article XX section (b) applied to measures taken to protect resources outside the borders of a nation if no reasonable alternative exists.[144] Furthermore, the panel concluded that while Article XX does not expressly limit the exception to domestic action, the United States' regulation did not merit a Article XX exception because there were other multilateral options that remained as possible solutions that would be less abrasive to GATT.[145]

(2). The "relating to" Clause of Article XX (g)

The Panel then moved to an analysis of the GATT Article XX paragraph (g).[146] Focusing on the language "relating to," the panel cited previous decisions that construed the term to mean,

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[139] *Id.* para. 5.10.
[140] *Id.* paras. 5.16, 5.33.
[141] *Id.*
[142] *Id.*
[143] *Tuna Dolphin I*, *supra* note 136, para. 5.22.
[144] *Id.* para. 5.24.
[145] *Id.* paras. 5.25, 5.28, 5.29, 5.33.
[146] *Id.* para. 5.30.

"primarily aimed at" the conservation of an exhaustible resource.[147] The panel ultimately decided that the contested measures were not allowed under Article XX paragraph (g) either.[148]

(3). Conclusion

The panel's decision, while it did not uphold a unilateral embargo, ultimately benefited the dolphin population by promoting a multilateral approach to conservation and regulation.[149] Subsequent to the adjudication of the first *Tuna Dolphin* case the United States and Mexico entered into the Agreement for the Reductions of Dolphin Mortality in the Eastern Pacific Ocean in 1992, which establishes declining a per-vessel limit on dolphin kills and requires observers on large purse-seine tuna vessels.[150] The Agreement also created a research foundation, which engages in programs to develop new fishing techniques to lessen and eventually eliminate dolphin mortality.[151]

b. *Tuna Dolphin II*

The panel subsequently revisited the dispute in 1994 when the European Economic Community (EEC) and the Netherlands challenged the validity of secondary embargoes, on processors of tuna caught by vessels not complying with the MMPA rules, and alleged them to be contrary to Articles III and XI.[152] The United States justified the regulations, termed "intermediary nation embargoes," under Article XX (b) and (g) exceptions.[153] Again, the panel reiterated that Article III was not applicable since the regulations were directed at harvesting and not the product itself.[154] The panel then concluded that the ban on imports constituted a

[147] *Id.* paras. 5.30-5.33.
[148] *Id.* para. 5.34.
[149] *See* Kevin C. Kennedy, *The Illegality of Unilateral Trade Measures to Resolve Trade-Environment Disputes*, 22 WM. & MAR Y ENVTL. L. & POL'Y REV. 375, 431-33 (1998).
[150] *Id.* at 432-33.
[151] *Id.* at 433.
[152] *See United States – Restrictions on Imports of Tuna*, DS29/R, para. 3.1, June 16, 1994, reprinted in 33 I.L.M. 839 (1994) (unadopted) [hereinafter *Tuna Dolphin II*].
[153] *Id.* para. 3.2.
[154] *Id.* para. 5.9.

prohibition or restriction, which was inconsistent with Article XI.[155] The panel then applied Article XX (g) and outlined an important three step analysis:

> First, it had to be determined whether the *policy* in respect of which these provisions were invoked fell within the range of policy to conserve exhaustible resources.
> Second, it had to be determined whether the *measure* for which the exception was being invoked . . . was "related to" the conservation of exhaustible natural resources, and whether it was made effective "in conjunction" with restrictions on domestic production or consumption.
> Third, it had to be determined whether the measure was applied in conformity with the requirement set out in the preamble to article XX . . . .[156]

Concerning the first question, the panel noted that anything capable of potential exhaustion constituted a resource.[157] This is an important ruling in respect to Article XX (g). The panel's broad interpretation of Article XX includes, as exceptions, policies protecting almost anything natural (coal, trees, water, dolphins etc.) provided that the policy is not dependant on whether present stocks of the resource are depleted,[158] regardless of whether the resource is located beyond a nation's borders.[159] The panel affirmed that previous interpretations of the term "relating to" meant "primarily aimed at" the conservation of natural resources, and that the term "in conjunction with" implied "primarily aimed at" promulgating regulations on domestic production and consumption.[160] The panel then applied Article XX (b) using the same three step analysis above and substituted the relevant portions for "protect human, animal or plant life or heath."[161] The panel found that the restrictions were not justified under Article XX (g) or (b).[162]

2. *Reformulated Gasoline*

a. Introduction

The Clean Air Act of 1990 established two regulation programs regarding the importation of foreign gasoline and domestic sales of gasoline in various areas based

[155] *Id.* para. 5.10.
[156] *Id.* para. 5.12.
[157] *Id.* para. 5.13.
[158] *Tuna Dolphin II*, *supra* note 152, para. 5.13
[159] *Id.* para. 5.16
[160] *Id.* para. 5.22.
[161] *Id.* para. 5.29.

upon the areas' pollution levels.[163] The first program applies to ozone "nonattainment areas" and only allows sale of reformulated gasoline in those districts. Locations with extremely high levels of ozone pollution (generally large cities) or those areas that have opted in by request of their state governor are designated as "nonattainment areas."[164] The second program is applicable to areas that have not experienced high levels of air pollution, which includes the rest of the United States.[165] The second program permits the sale of conventional gasoline in any location not designated a "nonattainment" area.[166] The act establishes a separate toxic emission allowance for each refiner and blender based on the classification of either reformulated or conventional gasoline using 1990 as the base year for emission levels.[167]

Brazil and Venezuela filed a compliant with the WTO Dispute Resolution Body alleging that the regulations promulgated by the Untitled States Environmental Protection Agency (EPA) pursuant to the Clean Air Act violated Article I and III of the GATT.[168] The complaint was based upon the disparity of treatment between foreign and domestic refiners regarding the availability of methods for computing an individual baseline, which determines allowable levels of pollutants contained in the gasoline.[169] Domestic refiners were allowed three different methods of computation before they were required to use the statutory baseline whereas foreign refiners were allowed to use only the first method and

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[162] *Id.* para. 5.27, 5.39.
[163] *See generally* Clean Air Act of 1990, 42 U.S.C. § 7545 (2003).
[164] WTO, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R at 5 (April 29, 1996) *available at* http://www.lexis.com (last visited Oct. 10, 2003) [hereinafter *Reformulated Gasoline*]; *see also* Clean Air Act of 1990, *supra* note 163, para. (k).
[165] *Id.*
[166] *Id*.
[167] Clean Air Act of 1990, *supra* note 163, para. (k) parts (2), (3), (8).
[168] *See generally Reformulated Gasoline*, *supra* note 164.
[169] *Id.* at 4-5.

then forced to accept the statutory baseline developed by the EPA.[170] Ultimately the panel held in favor of Brazil and Venezuela, concluding that the EPA regulations were not consistent with Article III (4) and could not be justified under either paragraphs (b) (d) or (g) of Article XX.[171] However, the panel did conclude that clean air was an exhaustible resource, which is a limited victory for environmentalists.[172] The United States appealed the ruling to the Appellate Body, which affirmed the panel discussion but on different grounds, establishing a new framework analysis for Article XX exceptions.[173]

b. The "relating to" Clause of Article XX (g)

The Appellate Body first proceeded to determine whether the "measure" was "related to" conservation under Article XX paragraph (g).[174] The term "measures" as used in Article XX refers the specific provision of a rule which conflicts with Article III due to the lack of an even application between domestic and foreign production and consumption, not necessarily because of an unequal treatment.[175] The Appellate Body interpreted the chapeau to Article XX to mean that the conflicting measure (not the legal determination of unfavorable) must be analyzed, and it ruled that that panel had erred here in its analysis.[176] The Appellate Body agreed with the panel's interpretation of "relating to" as meaning "primarily aimed at" the "conservation of exhaustible natural resources" but cautioned that it is not to be used as the ultimate "litmus test" for

[170] *Id.* at 8-10.
[171] *Id.* at 11.
[172] *Id.* at 13; *see also* Kennedy, *supra* note 149, at 442. "In a critical concession to the United States, the panel agreed that even though air was a renewable resource if adequate pollution abatement controls were put in place (unlike for example fossil fuels), that did not preclude it from being an exhaustible natural resource for purposes of Article XX (g)." *Id.*
[173] *See Reformulated Gasoline*, *supra* note 164, at 49, 63-66
[174] *Id.* at 15.
[175] *Id.* at 24.
[176] *Id.* at 31.

compliance with Article XX.[177] However, the Appellate body disagreed with the panel's application of Article XX (g) and concluded that the United States' measurers were "primarily aimed" at the conservation of natural resources due to the Clean Air Act's dependence upon on the Gasoline Rule to achieve its objectives.[178]

c. The "in conjunction with" Clause of Article XX (g)

Once the "measure" is deemed as being "relating to" conservation, the panel must then assess whether it operates "in conjunction with" domestic restrictions.[179] The panel indicated that "in conjunction with" may be read as "together with" or "jointly with" domestic regulations on production or consumption of natural resources.[180] The Appellate Body concluded that since the restrictions on domestic gasoline are established concurrently with imported gasoline, the regulatory scheme satisfies the requirements of "in conjunction with" and the fact that they are unequal is irrelevant.[181] Moreover, if the regulations were required to be identical there would be no dispute under Article III and therefore no need for an exception under Article XX.[182]

d. The Chapeau Analysis

After the regulation is determined to fall within the domain of Article XX (g) the next level of analysis concerns the chapeau's prohibition of exceptions that evidence "(a) 'arbitrary discrimination' (between countries where the same conditions prevail); (b) 'unjustifiable discrimination' (with the same qualifier); or (c) 'disguised restriction' on international trade."[183] The Appellate body attempted resolve the debate as to whether the phrase "between countries where the same conditions prevail" concerns "conditions

[177] *Id.* at 37.
[178] *Id.* at 38-39.
[179] *Reformulated Gasoline*, *supra* note 164, at 39-45.
[180] *Id.* at 41-42
[181] *Id.* at 43-44.
[182] *Id.*
[183] *Id.* at 49.

in importing and exporting countries, or only to conditions in exporting countries."[184] The phrase was determined to imply application to all GATT Articles, contradicting previous GATT panel decisions interpreting it as only referring to the MFN principle of Article I.[185] The Appellate body found that several alternate measures existed, which were equally available and less discriminatory and held that the Gasoline Rule was both a "disguised restriction" and an "unjustifiable discrimination" on trade.[186]

The Appellate Body developed a novel approach to analyzing and resolving Article XX disputes in *Reformulated Gasoline*.[187] The Appellate Body shifted away from the narrow construction of the enumerated paragraphs of Article XX and expanded the scope of the constraints.[188] Thus, thrusting the crux of the analysis back to the chapeau, which allows Article XX exceptions as long as they are not a "unjustifiable discrimination" or a "disguised restriction" on trade.[189] The new approach appears to allow more exceptions into GATT including environmental measures that fall under Article XX paragraphs (b) and (g) as long as there are no less discriminatory means to accomplish the same ends.[190]

3. The *Shrimp Turtle* Case

The *Shrimp Turtle* case raises some of the same issues as *Tuna Dolphin I* and *II* and comes to relatively similar conclusions. However, the real importance of this case is the submission of unsolicited amicus briefs by various NGOs in defense of the United States' ban on the importation of shrimp by fisherman who failed to use turtle excluder

[184] *Id* at 50.
[185] *Reformulated Gasoline*, *supra* note 164, at 50-51; *see also* Kennedy, *supra* note 149, at 446 n.404.
[186] *Reformulated Gasoline*, *supra* note 164, at 63.
[187] Kennedy, *supra* note 149, at 447.
[188] *Id.*
[189] *Id.*
[190] *See id.*

devices to protect endangered species of turtle.[191] The case is also noted for the Appellate Body's articulation and sequencing of the Article XX analysis.[192]

The original panel held that only information, which the panel seeks may be considered.[193] It also held in favor of Malaysia, Pakistan and Thailand that section 609 United States of Public Law 101-162, requiring the use of turtle excluder devices, was in violation of the article XI: 1 of GATT and did not warrant an exception under Article XX.[194]

a. Non-Member Submissions

Several NGOs including the Center for Marine Conservation, the Center for International Environmental Law, and the World Wide Fund for Nature submitted briefs to the panel and to both of the parties.[195] The panel initially declined to consider the briefs because they were not requested by the panel.[196] The panel reasoned that allowing the submission would aggravate the dispute resolution process according to Article 13 of the Dispute Resolution Understanding (DSU), but invited either party to include any information in their own briefs.[197] Upon appeal, the Appellate Body concluded that the panel is only legally required to accept information from the parties to a dispute and interested third party Members.[198] It also noted that panel has no obligation to consider unrequested outside information.[199] However, the Appellate Body found the panel's conclusion (that the panel may consider only information that is sought) was an overly

[191] *Id.* at 461-62.
[192] Report of the Appellate Body, *United States – Import Prohibition of Certain Shrimp and Shrimp Products,* WT/DS58/AB/R, (Oct. 12, 1998) *at* http://www.wto.org (last visited Oct. 10, 2003) para. 34 [hereinafter *Shrimp – Turtle*].
[193] *Id.* para. 99.
[194] *Id.* paras. 10, 99.
[195] *Id.* paras. 9, 99.
[196] *Id.* para. 100.
[197] *Id.*
[198] *Shrimp – Turtle*, *supra* note 192, paras. 101-04

narrow interpretation of Article 13 paragraph 2 of the DSU, which states that "[*p*]*anels may seek information from any relevant source.*"[200] The Appellate Body reasoned that when Article 13 of the DSU is read in conjunction with Articles 11 and 12 of the DSU, it allows the panel discretion to accept and consider unrequested information submitted by non-members.[201]

b. The Article XX Exceptions

Furthermore, the Appellate Body cited the panel's error to correctly sequence the Article XX analysis of the disputed regulation.[202] The Appellate Body criticized the panel for moving directly to the chapeau of Article XX, thereby forgoing a classification of the exception under one of the Article XX paragraphs.[203] The Appellate Body reiterated the standard two-tiered analysis as defined in *Reformulated Gasoline*: (1) determine whether the violation falls under one the enumerated categories outlined in the paragraphs following Article XX and (2) evaluate the measure under the constraints of the chapeau.[204] Sequencing the analysis in this order allows the panel flexibility in its determination of what "measures" constitute a "unjustifiable discrimination" or "disguised restrictions on trade" depending upon what paragraph the exception may fall under.[205] The panel explains that what may constitute an unacceptable level of discrimination for a measure relating to protection of public morals may be completely different than that for a measurer pertaining to products of prison labor.[206]

4. Conclusion

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[199] *Id.* para. 104.
[200] *Id.* para. 102.
[201] *Id.* paras. 105-10.
[202] *Id.* para. 116
[203] *Id.*
[204] *Shrimp – Turtle, supra* note 192, para. 118.
[205] *Id.* para. 120.
[206] *Id.*

Each of the aforementioned cases played a distinct role in establishing a sound foundation for the analysis of Article XX exceptions.[207] The Dispute Resolution Body has increased the possibility of sustaining environmental exceptions by establishing a regiment for the application of Article XX, which requires the categorization of exceptions and then the application of the chapeau.[208] Furthermore, the Appellate Body articulated a balanced approach to the issue of submissions when extended latitude to NGOs and MEAs by providing that they may request to submit amicus briefs to the Dispute Resolution Body on behalf of environmental issues, but then granted the panel discretion to accept or reject the submissions.[209]

MEAs that have been granted observer status in the CTE may be better positioned than other NGOs, to influence a dispute resolution panel's decision to allow unsolicited submissions, because of their increased access to the WTO process. [210] Moreover, the impact of extending observer status to MEAs is compounded because of the potential impact on international law. The dispute settlement panels, claimants, and respondents have all cited reports from the CTE.[211] Regular participation by MEAs in CTE meetings would garner influence for environmental constituencies in international law by directly impacting reports and policies that are cited in binding WTO dispute resolution panel decisions.

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[207] *See* Matsushita, *supra* note 11, at 451.
[208] *See Shrimp – Turtle, supra* note 192, para. 185. "We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly it is. . . . And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment." *Id.*
[209] *See generally id.* paras. 99-110.
[210] It remains undetermined whether MEAs granted observer status would be considered interested third parties, however, under the line of reasoning enunciated in *Shrimp Turtle* this proposition seems doubtful. Nevertheless, those institutions granted permanent observer status would have an even possess great influence. *See generally id.*; *see also* discussion *infra* Part VI.A.
[211] Shaffer, *supra* note 2, at 38-39.

V. TRADE RELATED RESTRICTIONS IN MEAS AND THEIR IMPACT UPON THE MULTILATERAL TRADING SYSTEM

A. Trade Measure or Trade Related?

According to statistics released by the WTO and UNEP only 38 MEAs, a small fraction of the 238 currently in force, have trade related provisions.[212] There are also other MEAs not included in the above tally, which impose notable effects upon trade because of the overarching effect of the regulations within the treaty, not the manner in which they are enforced.[213]

MEAs without specific trade measures can still affect the multilateral trading system indirectly.[214] These treaties contain no restrictive trade measures but still create waves in the pool of international trade by raising compliance costs. For example, the United Nations Framework Convention on Climate Change (UNFCCC) Kyoto Protocol impacts trade in consumer goods, industrial products, and fossil fuels by regulating greenhouse gas emissions.[215]

B. The Structure and Impact of MEA Trade Measures

Trade Measures in MEAs can appear in several formats: (1) reporting requirements; (2) labeling requirements; (3) notification and consent procedures; (4) import and/or export bans; and (5) taxes or government procurement.[216] In the debate over conflicting WTO and MEA trade measures, it is generally not acknowledged that MEAs bundle trade regulations with positive measures to mitigate the potential effect on

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[212] Ulrich Hoffman, *Specific Trade Obligations in Multilateral Environmental Agreements and their Relationship with the Rules of the Multilateral Trading System – A Developing Country Perspective*, at 5, UNCTAD (Aug. 1, 2003) http://r0.unctad.org/trade_env/test1/meetings/bangkok4/MEA-WTO%relationship.pdf. (last visited Oct. 10, 2003). Examples of MEAs with significant trade measures are: the Montreal Protocol, Basel Convention, CITES, Persistent Organic Pollutants, Prior Informed Consent Conventions, and the CBD. *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.* at 6.

trade and actually stimulate development.[217] These trade measures are commonly linked with other non-trade devices, such as technical or financial assistance, to create an optimal outcome through a balanced approach.[218] The CTE encourages environmentally friendly technology transfer but fails to address the problem of underfunding that plagues MEAs, which thwarts the availability of positive measures and requires the continuation of trade measures.[219] In fact, the CTE notes that effective MEAs support the multilateral trading system by both addressing "environmental problems of concern to the international community" and preventing "disputes from arising" within the WTO.[220]

MEA trade measures could potentially conflict with the GATT rules.[221] The CTE encourages the use of positive measures to either reduce or replace trade measures.[222] While positive measures are becoming increasingly more common in MEAs, due to underfunding and lack of multilateral support from developing countries in the area of technology transfer, it seems that MEA trade measures are not going to dissipate any time soon.[223] When a dispute arises between WTO Members, stemming from their obligations under a MEA, the CTE prefers that the parties use the environmental treaty's dispute resolution process, rather than filing a complaint with the WTO dispute resolution panel.[224] However, this does not address the problem of a dispute arising between WTO Members when one Member is a party to the MEA from which the dispute arises and the

[217] *See* Hoffman, *supra* note 212, at 6.
[218] *Id*.
[219] *Id*. at 6-7
[220] CTE, *Enhancing Synergies*, *supra* note 76, at para. 66.
[221] George William Mugwanya, *Global Free Trade Vis—a—Vis Environmental Regulation and Sustainable Development: Reinvigorating Efforts Towards a More Integrated Approach*, 14 J. ENVTL. L. & LITIG., 401, 453-54 (1999).
[222] Hoffman, *supra* note 212, at 7.
[223] *Id*.
[224] CTE, *1996 Report*, *supra* note 72, para. 178.

other Member is not a party to the MEA.[225] This scenario has not yet materialized, although, it has sparked heated debate and raised many concerns and questions regarding the supremacy of GATT versus MEAs in the context of international law.[226] Fortunately, the debate over supremacy appears to becoming a moot point due to the proliferation of membership in MEAs, which on average outnumbers that of WTO membership.[227] The party/non-party debate continues to be an issue with the United States, which has recently backed out of the Kyoto Protocol and is a non-party to several other MEAs.[228]

VI. EXTENDING OBSERVER STATUS TO MULTILATERAL ENVIRONMENT AGREEMENTS: THE PAST, PRESENT AND FUTURE

A. *What is Observer Status?*

Since 1997, the CTE has generally held three meetings per year with additional special sessions and symposia.[229] The WTO has granted invitee status to UNEP and six MEAs to participate in several of the CTE's special sessions.[230] Requests for observer status to a particular WTO body, such as the CTE, are granted on a case-by-case or *ad hoc* basis.[231] Organizations can also be granted observer status by invitation on a case-by-case basis.[232] Observers enjoy only limited privileges in WTO sessions. They may speak if invited to do so, but that invitation does not include the right to circulate papers, which can only be granted by an additional specific invitation.[233] Furthermore, observers

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[225] Hoffman, *supra* note 212, at 11.
[226] *See* discussion *infra* Part VII.A.
[227] Hoffman, *supra* note 212, at 11.
[228] *Id.*
[229] WTO Committee on Trade and The Environment, *Report (1997) of the Committee on Trade and the Environment*, WT/CTE/2, para. 3. (Nov. 26, 1997) http://www.wto.org (last visited Oct. 21, 2003) [hereinafter CTE, *1997 Report*].
[230] *5th Ministerial Conference, Cancún, WWF Briefing Series, Observer Status*, WWF doc., http://www.panda.org/downloads/policy/observerstatus.pdf. (last visited Oct. 10, 2003) [hereinafter *WWF Briefing Series*].
[231] WTO, *Rules of Procedures for Sessions of the Ministerial Conference and Meetings of the General Council*, WT/L/161 ANNEX 3 para. 4 (July 25, 1996) http://www.wto.org (last visited Oct. 10, 2003).
[232] *Id.* ANNEX 3, para. 5.
[233] *Id.* ANNEX 3, para. 8.

are allowed to receive papers which are circulated, but they are expressly prohibited from participating in the decision making process.[234]

B. A Chronological Analysis of the Role MEAs in the WTO

1. 1996: The Beginning

The CTE embarked upon a course of action that would lead to the enhanced information exchange and communication between the WTO and outside constituencies by extending observer status to fourteen IGOs in 1996.[235] The CTE also granted observer status, in 1996, to several IGOs on an *ad hoc* basis, subject to final approval by the General Council.[236] However, this*ad hoc* approach is an ineffective solution because it does not allow the CTE to take full advantage of the MEA's expertise in international environmental law.[237]

2. 1997-1998: The WTO Grants Limited Observer Status to MEAs and Discusses Linkages

After the initial report was issued in 1996, the CTE developed a "cluster approach" for subsequent years to better deal with the themes of market access (Agenda Items 2, 3, and 4) and linkages between trade and the environment (Agenda Items 1, 5, 7, and 8). [238] Discussion topics for the year are determined at the last regular meeting of the

[234] *Id.* ANNEX 3, paras. 8-9.
[235] CTE, *1996 Report, supra* note 72, para. 160. The CTE granted observer status to the various UN in general and conferences including UNEP, "the World Bank, the International Monetary Fund (IMF). . . , Commission for Sustainable Development (CSD), the Food and Agriculture Organization (FAO), the International Trade Centre (ITC), the Organization for Economic Cooperation and Development (OCED), and the European Free Trade Association (EFTA) . . . , the World Customs Organization (WCO) and the International Organization for Standardization (ISO)." *Id.* at 31 n.76.
[236] *Id*.
[237] *See* Hoffman, *supra* note 212, at 5-6; s*ee also WWF Briefing Series*, *supra* note 230.
[238] WTO Committee on Trade and The Environment, *Report (1998) of the Committee on Trade and the Environment*, WT/CTE/3, para. 1 (Oct. 30, 1998) http://www.wto.org (last visited Oct. 21, 2003) [hereinafter CTE, *1998 Report*].Under the cluster approach, the CTE addresses all issues stemming from the market access Agenda Items at the first meeting. The committee then focuses on issues relating to the linkages Agenda Items at the next meeting. *Id.*

previous year and are usually based upon several of the Agenda Items set out in the *Decision on Trade and the Environment* and sometimes focus on a specific theme.[239]

The CTE extended observer status to three non-governmental organizations in 1997.[240] Furthermore, the WTO made a landmark move by granting *ad hoc* observer status two environmental conventions: the UN Framework Convention on Biological Diversity (CBD) and the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).[241]

The July 1998 meeting of the CTE focused on linkages between trade and the environment and sponsored an Information Session with the Secretariats of several MEAs.[242] The meeting improved the information exchange between groups by disseminating information to Members regarding developments in multilateral environmental agreements, which were relevant to the CTE.[243] The CTE also extended *ad hoc* observer status to the World Intellectual Property Organization and the International Plant Genetic Resource Institute that year.[244] Several major developments occurred during the following year, including more grants of observer status and a symposium involving the relationship between MEAs and the WTO.[245]

3. 1999: The WTO's High Level Symposium

The CTE continued to expand on the information exchange between the WTO and MEAs in 1999.[246] It held another Information Session with the Secretariats of five MEAs in which

[239] *Id.* para. 8.
[240] CTE, *1997 Report*, *supra* note 229, para. 6.
[241] *Id.* The CTE also extend observer status to the Latin American Economic System in 1997. *Id.*
[242] CTE, *1998 Report*, *supra* note 238, para. 3.
[243] *Id.*
[244] *Id.* para. 7.
[245] *See* discussion *infra* part VI.B.3.
[246] S*ee* WTO Committee on Trade and The Environment, *Report (1999) of the Committee on Trade and the Environment*, WT/CTE/4, paras. 1-6 (Oct. 14, 1999) http://www.wto.org (last visited Oct. 21, 2003) [hereinafter CTE, *1999 Report*].

their representatives were invited to submit papers and give presentations.[247] The session focused on sustainable development, and one theme involved learning how trade measures in MEAs work.[248] Armed with this information, the CTE hoped to foster a better understanding of the MEA's role within the multilateral trading system.[249] In addition, the CTE extended *ad hoc* observer status to several more NGOs and the UNFCCC in 1999.[250]

The WTO held a symposium on trade and the environment in Geneva during March of 1999.[251] The symposium covered a variety of trade related issues and formed three panels which held specialized discussions on: (1) linkages between trade and environment polices; (2) synergies between trade liberalization, environmental protection, and sustainable development; and (3) interaction between trade and environment.[252] Klaus Töpfer, Executive Director of UNEP emphasized a holistic approach to dealing with international environmental issues.[253] He declared that the impacts of debt, poverty, technology transfer, and sustainable development could not be isolated from environmental issues.[254] Töpfer also stressed that the WTO could not assume the entire responsibility alone and pledged to increase UNEP's role in the multilateral trading system.[255]

4. A New Millenium: Increased UNEP Involvement and Clarification of MEA Dispute Resolution, Technical Assistance, and Capacity Building

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[247] *Id.* para. 3. The CTE received presentations and papers from: CITES; "the Montreal Protocol on Substances that Deplete the Ozone Layer [Montreal Protocol]; the United Nations Framework Convention on Climate Change [UNFCCC]; the Intergovernmental Forum on Forest [IFF]; and the International Tropical Timber Organization [ITTO]." *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.* para. 4. The CTE extended observer status to: "the International Commission for the Conservation of Atlantic Tunas [ICCAT]; the Islamic Development Bank; the South Pacific Forum; the South Asian Fisheries Development Centre." CTE, *1999 Report*, *supra* note 246, para. 4.
[251] *See* International Institute for Sustainable Development, *Report on the WTO's High-Level Symposium on Trade and the Environment*, (Mar. 15-16, 1999) http://www.wto.org (last visited Oct. 21, 2003).
[252] *Id.*
[253] *Id.*
[254] *Id.*
[255] *Id.*

The CTE held two information sessions with the secretariats of MEAs in 2000.[256] The first MEA Information Session took place in July and covered trade related developments.[257] The session consisted of presentations and papers, which discussed the linkages between upcoming WTO trade program agendas and MEAs.[258] The Director-General of the WTO and the Executive Director of UNEP both participated in the second information session held in October.[259] The presence of both directors signaled a firm resolution by both the WTO and UNEP to continue to interact with MEAs and nurture the relationships between all three factions.[260] The second session, which also spawned papers and presentations from MEAs,[261] helped to increase the understanding of the relationships within the CTE by identifying "synergies" and enhancing "mutual supportiveness."[262] Furthermore, the sessions provided an opportunity to develop and enhance institutional bonds between the Secretariats of the MEAs, UNEP and the WTO. [263]

The CTE's June 2001 meeting began with another Information Session with MEA Secretariats, this time to heighten the understanding of the dispute settlement measures and compliance provisions within MEAs and the WTO.[264] The WTO, UNEP, and MEAs collaborated to produce a background document which outlined the compliance and dispute

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[256] WTO Committee on Trade and The Environment, *Report (2000) of the Committee on Trade and the Environment*, WT/CTE/5, paras. 3-4 (Oct. 30, 2000) http://www.wto.org (last visited Oct. 21, 2003) [hereinafter CTE, *2000 Report*].
[257] *Id.* para 3.
[258] *Id.* The CTE entertained submissions from: the CBD; Montreal Protocol; UNFCCC; and ICCAT. *Id.*
[259] *Id.* para. 4.
[260] *See id.*
[261] CTE, *2000 Report, supra* note 256, para. 4. The October meeting produced submissions by: CITES; the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal (Basel Convention); the IFF; and UNEP Chemicals giving submissions on the Rotterdam Prior Informed Consent Convention (Rotterdam Convention) and the Persistent Organic Pollutants Convention. The ITTO also submitted a paper. *Id.*
[262] *Id.* para. 4.
[263] *Id.* para. 5.
[264] WTO Committee on Trade and The Environment, *Report (2001) of the Committee on Trade and the Environment*, WT/CTE/6, para. 4 (Oct. 5, 2001) http://www.wto.org (last visited Oct. 21, 2003).

resolution provisions in each of the following MEAs: the UNFCCC; the Montreal Protocol; the Basel Convention; the Rotterdam Convention; the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention); the CBD; the UNFSA; and the CITES.[265] This session provided a forum in which the WTO, UNEP, and MEA Secretariats could network, develop linkages, and promote synergy between all of the different entities.[266]

The next CTE Information Session with the MEA Secretariats was held in June 2002 and focused on technical assistance, capacity building, and information exchange.[267] The MEA representatives contributed to the meeting by presenting their current technical assistance and capacity building activities.[268] UNEP distributed a paper at the June 2002 meeting, on how to "enhance synergies and mutual supportiveness" between "trade and environmental policies, rules and institutions."[269] The report circulated by UNEP emphasized the need to increase institutional cooperation and called for both more formal and informal interaction between the WTO and MEAs.[270] UNEP underscored the value of granting observer status to MEAs, in various WTO bodies including the CTE, which it opined would thereby increase information exchange and foster more efficient cooperation.[271] UNEP bolstered the argument to extend observer status to MEAs by recalling that several of their Secretariats participated regularly in annual information sessions and offered papers and statements to the CTE.[272] The report further postulated that increased information exchange, with regard to each group's dispute settlement process, would

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[265] *Id.*
[266] *Id.* para. 5.
[267] WTO Committee on Trade and The Environment, *Report (2002) of the Committee on Trade and the Environment*, WT/CTE/7 , para. 7 (Oct. 16, 2002) http://www.wto.org (last visited Oct. 21, 2003).
[268] *Id.* MEAs that participated in the meeting include: CITES; UNEP Chemicals for Rotterdam Convention and the Stockholm Convention; UNFCC; CBD; the Basel Convention; ITTO; UN Forum on Forest; and UN Division for Ocean Affairs and the Law of the Sea, for the Convention on the Law of the Sea and the Fish Stocks Agreement. *Id.*
[269] *Id.;* see *also* CTE, *Enhancing Synergies, supra* note 76.
[270] CTE, *Enhancing Synergies, supra* note 76, para. 36.
[271] *Id.*
[272] *Id.* para. 47.

assist in creating a deeper understanding of objectives and compliance mechanisms within MEAs.[273] UNEP lobbied on behalf of the Convention on Biological Diversity to urge the WTO to approve its request for observer status in the Committee on Agriculture and the TRIPS Council by claiming that the move would help identify linkages and promote cooperation.[274] Moreover, UNEP noted that each of the ten CTE Agenda Items contained biodiversity related issues.[275] Therefore, granting observer status to the CBD Secretariat would enhance the WTO by providing a level of expertise in the area of biodiversity.

5. 2003: Cancún and Beyond

The CTE confirmed the appointment of its new chairman, Ambassador Peter Brňo, in February of 2003.[276] Several other developments occurred that year, including a symposium, the circulation of various documents, and the release of CTE's report to the WTO Ministerial Conference in Cancún.[277] In 2003, the committeefocused mainly on market access, the TRIPS agreement, and environmental labeling requirements.[278] It did not admit any more MEAs or even address the observer status of institutions, which were still pending the General Council's approval.[279]

The WTO held a Symposium on the *Challenges ahead on the Road to Cancún* in mid-June of 2003, which devoted several sessions to primarily environmental concerns.[280] The first session began when the mediator, Mr. Richard Tarasofsky, facilitated a discussion on Paragraph

[273] *Id.* para. 36.
[274] *Id.* para. 49.
[275] *Id.* para. 48.
[276] WTO Committee on Trade and The Environment, *Report (2003) of the Committee on Trade and the Environment*, WT/CTE/9, para. 1 (July 11, 2003) http://www.wto.org (last visited Oct. 21, 2003).
[277] *Id.* paras. 2-4. The documents focused on market access, eco-labeling, fisheries, and technical assistance. *Id.*
[278] *See id.* paras. 2-6.
[279] *Id.*
[280] *See* WTO Symposium: Challenges Ahead on the Road to Cancún, (June 16 2003), at http://www.wto.org/english/tratop_e/symp_devagenda_prog_3_e.htm (last visited Oct. 17, 2003).

31 (i) of the Doha Development Agenda.[281] He indicated that the relationship between the WTO and MEAs was particularly problematic.[282] Tarasofsky also accused WTO members of avoiding the issue of MEA party/non-party conflicts within the WTO and admonished Members for not addressing non-specific trade measures contained within MEAs.[283] Tarasofsky charged both the WTO and MEAs with the responsibility of address the chilling effect of WTO policy on MEA development.[284]

The Fifth Ministerial Conference began in Cancún, Mexico on September 10, 2003, and negotiations lasted through September 15, 2003.[285] The Doha Development Agenda continued to dominate the negotiations with an emphasis on least developed countries.[286] The Conference separated in to different focus groups including one on "other issues" which housed the negotiations on trade and the environment.[287] On day two of the Conference, the talks focused on granting observer status to MEAs, eco-labeling, and the relation between TRIPS, the CBD, and protection of traditional knowledge.[288] The following day, the negotiations continued to expand and near consensus upon issues dealing with relationships between TRIPS paragraph 27.3 and the Doha Declaration paragraph 19 (relating to the patenting of plants and animals, the CBD, and traditional knowledge).[289] However, on day four, the Chairperson Ernesto Derbez sensed the potentially irreconcilable differences on the Singapore and Agricultural Issues and

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[281] *Id.*
[282] *Id.*
[283] *Id.*
[284] *Id.*
[285] WTO Cancún 5th Ministerial Conference, *Summary of September 10, 2003*, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_10sept_e.htm, (last visited Oct. 29, 2003).
[286] *See id.*
[287] WTO Cancún 5th Ministerial Conference, *Summary of September 11, 2003*, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_11sept_e.htm, (last visited Oct. 29, 2003).
[288] *Id.*
[289] WTO Cancún 5th Ministerial Conference, *Summary of September 12, 2003*, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_12sept_e.htm, (last visited Oct. 29, 2003) [hereinafter *Summary of September 12, 2003*].

warned the conference of the looming deadline for consensus.[290] Unfortunately, the Cancún Fifth Ministerial Conference ended on September 14, 2003 without the Members reaching a consensus.[291]

The inability of Members' to reach a consensus at Cancún does not spell failure for the issues presented in the Doha Development Agenda. Fortunately, as Mr. Derbez noted Cancún was not a launching nor a concluding round, and the Members still have until January 1, 2005 to reconcile differences on the difficult issues.[292] While the deadline approaches, Members still must reach a consensus on (1) "clarifying the existing relationships between existing WTO rules and specific trade obligations set out in multilateral environmental agreements;" (2) information exchange between the WTO and MEAs; (3) "the criteria for granting observer status;" and (4) "the liberalization of trade in environmental goods and services."[293]

VII. CONCLUSION

A. Where Do We Go After Cancún?

Several theorists have suggested the creation of a World Environmental Organization (WEO) to coordinate MEAs and provide a consolidated forum to regulate environmental degradation. Scholars such as Daniel Esty, professor of law at Yale University, and Frank Biermann, of the Potsdam Institute of Climate Impact Research have proposed, advocated, and analyzed the creation and potential roles of an international organization dedicated solely to the environment.[294] The proposed WEO would house environmental treaties, regulate infractions,

[290] WTO Cancún 5th Ministerial Conference, *Summary of September 13, 2003*, http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_13sept_e.htm, (last visited Oct. 29, 2003).
[291] *See Summary of September 14, 2003*, *supra* note 10.
[292] *Summary of September 12, 2003*, *supra* note 289.
[293] WTO Cancún 5th Ministerial Conference, *Briefing Notes – Trade and the Environment*, http://www.wto.org/english/thewto_e/minist_e/min03_e/brief_e/brief14_e.htm#status, (last visited Oct. 29, 2003).
[294] Steve Charnovitz, *A World Environmental Organization*, 27 COLUM. J. ENVTL. L. 323, 326-27 (2002).

create policy, disseminate information, conduct research, and coordinate multilateral efforts to preserve the environment.[295]

Other scholars recommend that the WTO amend the GATT Article XX to allow Members to act in compliance with MEA trade measures. George William Mugwanya proposes an addition to Article XX that would list unilateral measures restricting trade taken pursuant to MEAs as a viable exception to violations occurring under the GATT Article XI.[296] Mugwanya recognizes that "MEAs and the GATT have equal status as treaties" and conflicts would therefore be subject to rules of the Vienna Convention in which the later signed treaty is supreme.[297] This conflict could potentially cause the collapse of the GATT by subordinating it to any later signed treaty that contains contradicting trade measures.[298]

Kenneth F. McCallion and H. Rajan Sharma, of the law firm Goodkind, Labaton, Rudoff & Sucharow LLP in New York, propose the creation of an international environmental court.[299] They cite the failure of the International Court of Justice (ICJ) to address environmental issues and the non-binding dispute resolution systems currently in place in many MEAs as reasons to establish an international environmental court.[300] McCallion and Sharma also specify the lack of standing for individuals, corporations, and NGOs in the ICJ as perpetuating acquiescence to environmental issues in the international forum.[301]

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[295] *Id.* at 359-61.
[296] Mugwanya, *supra* note 221, at 454.
[297] *Id.* at 453.
[298] *See Id.* at 451-454.
[299] *See* Kenneth F. McCallion & H. Rajan Sharma, *Conference on International Environmental Dispute Resolutions: Environmental Justice Without Boarders: The Need for an International Court of the Environment to Protect Fundamental Environmental Rights*, 32 GEO. WASH. J. INT'L L. & ECON. 351, 359-65 (2000).
[300] *Id.*
[301] *Id.*

The Friends of the Earth Europe (FoEE) recommend that the UN handle any WTO/ MEA related disputes.[302] The rationale behind this position stems from the fact that the UN is competent in trade, the environment and sustainability.[303] The FoEE contends that the "WTO is not an environmentally policy-making body" and fears "that negotiations under WTO auspices risk undermining the status of MEA's."[304] FoEE calls for the immediate granting of observer status for all MEAs in all WTO bodies and the strengthening of compliance and dispute settlement mechanisms in MEAs to strike a better balance between the organizations.[305] FoEE further demands that the MEAs be recognized as consistent with the WTO. [306]

B. Proposals from the Author

There are many proposed solutions by both environmentalists and those from the trade camp. The proposals range from the creation of new intergovernmental organizations to an international court of environmental law.[307] Moreover, others have considered amendments to GATT to create specific exceptions for multilateral environmental agreements, and still others have called for the expansion of the WTO or the UN to police the environment.[308] These solutions should not be considered mutually exclusive. They can be integrated to create an effective, fair and efficient system of environmental protection that will accommodate both environmentalists and trade purists.

The integration of these proposals should first establish an organization, which could be formed under the UN, WTO, or independently, which would house the secretariats of the

[302] *See After Doha and Johannesburg: Dispute over Multilateral Environmental Agreements (MEAs) and Trade Rules: What Next?*, Friends of the Earth Europe (Nov. 2002) http://www.foeeurope.org/publications/MEA_paper_Nov_2002.doc [hereinafter *After Doha and Johannesburg*].
[303] *Id.*
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *See* discussion *infra* Part VI.5.
[308] *See* discussion *infra* Part VI.5.

multilateral environmental agreements and coordinate their collective policymaking.[309] Next, the legal structure of current MEAs must be assessed and reconciled with WTO through a series of compromises consisting of both WTO amendments to GATT and similarly structured amendments to provisions contained within MEAs.[310] Third, the judiciary must possess jurisdiction over environmental matters, have the power to render binding decisions, and avail standing to states, NGOs, Corporations, and individuals.[311] Improvements to the adjudication process would require modification of the ICJ, or the creation of a new judiciary composed of representation from the WTO, the UN and MEAs.[312] Regardless of the legal structure, any new entity must work in close coordination with the UN, WTO and MEAs.

Finally, the WTO must recognize the value that MEAs have to offer in the multilateral trading system. It is necessary for the WTO to extend permanent observer status to MEAs in order to ensure adequate information exchange, the development of synergies, and the exploitation of the specialties that MEAs have to offer in the area of environmental law.[313] Extending observer status to MEAs in the WTO will promote a more informed and educated decision making process by WTO Members with regard to the environmental consequences of their trade decisions.[314]

Preserving both the environment and the world's natural resources is a task that everyone must undertake. The environment is an increasingly important issue that must be addressed in this period of rapid economic growth and proportionally rapid increase in pollution, natural resource depletion, and environmental degradation.[315] Environmental issues need to be dealt

[309] *See generally* Charnovitz, *supra* note 294.
[310] *See generally* Mugwanya, *supra* note 221.
[311] *Id.*
[312] *See generally* McCallion & Sharma, *supra* note 299.
[313] *See generally After Doha and Johannesburg*, *supra* note 302.
[314] *Id.*
[315] *See generally* WTO Special Studies, *supra* note 88.

with on a global basis to avoid the promulgation of "race to the bottom" legislation, "competition in laxity" and "eco dumping."[316] After all every one has to share this planet, including current and further generations of both developed and developing nations. Whether you support the Wold Trade Organization, a non-governmental organization, a multilateral environmental agreement, or even a corporation there is only one way to achieve harmony between trade and the environment. We all must cooperate on a global level and comply with the principals of intergenerational equity in order to preserve the natural environment and all its resources for the future generations.[317]

[316] *See supra* text accompanying note 90; *see also* WTO, Special Studies, *supra* note 88.
[317] *See generally* EDITH BROWN WEISS ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 66-77 (Richard A. Epstein et al. eds., 1998). "Specifically, the principle of intergenerational equity requires conserving the diversity and the quality of biological resources, of renewable resources . . . as well as of our knowledge of natural and cultural systems. The principal requires that we avoid actions with harmful and irreversible consequences for our natural and cultural heritage . . . without unduly shifting the costs to coming generations." *Id.* at 76.