Trade Measures and the Environment: Can the WTO and UNCLOS Be Reconciled?

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I
INTRODUCTION

Critics frequently lambaste the World Trade Organization's (WTO)[1] actions as detrimental to the goal of environmental conservation. While the WTO's success in fostering free trade and open markets is indisputable, these critics have lamented the Organization's seeming lack of tolerance for measures designed to protect the environment.[2] On the other hand, the United Nations Convention for the Law of the Sea (UNCLOS) has been lauded as a major success in promoting environmental preservation of the oceans.[3] UNCLOS's unique, broad-based approach to managing and preserving marine resources has been described as a "constitution for the oceans."[4]

To further efforts at international environmental protection, nations frequently resort to trade measures. These measures might be taken unilaterally to enforce domestic environmental norms or collectively within the context of multilateral environmental agreements (MEAs). Traditionally, disputes concerning

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1. The term "WTO" will be used throughout the article in lieu of the older term "GATT." The WTO Agreement came into force following the 1994 Uruguay Round and incorporates the previous GATT Agreement by reference.

2. *Turtle Wars: Greenery and Globalization Do Not Mix*, THE ECONOMIST, Oct. 1, 1998 [hereinafter Turtle Wars].

3. Howard S. Schiffman, *UNCLOS and Marine Wildlife Disputes: Big Splash or Barely a Ripple?*, 4 J INT'L WILDLIFE L. & POL'Y 257 (2001).

4. Bernard H. Oxman, *Complementary Agreements and Compulsory Jurisdiction*, 95 AM. J. INT'L L. 277, 279 (2001) (referring to remarks by Tommy T.B. Koh, President of the Third United Nations Convention for the Law of the Sea).

trade measures were handled at the WTO—often with disappointing results for environmentalists. With the advent of UNCLOS, however, an alternative forum was created for hearing such disputes—at least as they pertain to UNCLOS provisions. In this context, it is possible that a nation might use trade measures that are permissible under UNCLOS but which violate WTO rules. This raises the possibility of a jurisdictional dispute between the two regimes. Notwithstanding persuasive arguments to the contrary, it is unclear whether a UNCLOS tribunal could properly exercise jurisdiction in such a case. This potential dispute is not altogether bad from an environmental perspective; rather, given the recent evolution in WTO jurisprudence, environmental measures employed in marine preservation have a much greater chance of surviving WTO scrutiny. Moreover, to the extent trade measures are taken unilaterally, they are likely to be illegal under both the WTO and UNCLOS.

Despite this potential benefit, the spectre of having two trade measure regimes in fundamental disagreement is neither desirable nor tenable. Reconciliation between the WTO and UNCLOS is necessary to avoid a polarizing dispute that would needlessly consume limited international judicial resources. Such reconciliation is possible by following established rules in international law, as well as by recognizing the frequent convergence between the WTO and UNCLOS.

This article begins with an introduction to the origins and salient features of the WTO and UNCLOS. Such an introduction is helpful in understanding the current posture and priorities of the two regimes. Through a discussion of WTO and UNCLOS jurisprudence, this article highlights the need to discard traditional assumptions regarding the superiority of each regime in dealing with environmental issues generally, and marine environmental issues in particular. This article then discusses the issue of competing jurisdiction between the regimes, with an emphasis on the vital role of customary international law in resolving such disputes. Finally, this article suggests the need for reconciliation between the WTO and UNCLOS, with a view that the two regimes have more in common than many may have thought.

II
WTO BACKGROUND

The development of the General Agreement on Tariffs and Trade (GATT)—and its successor, the WTO—largely reflects the

United States' (U.S.) view that free and non-discriminatory trade is essential for maintaining peace, security and economic prosperity.[5] Given the number of WTO participants and the Organization's impact on world trade, the WTO is a landmark in international law and policy.[6] The WTO also breaks ground in terms of the binding nature of its provisions and extensive enforcement mechanisms—components that are often conspicuously missing in international legal agreements. The WTO Agreement is generally viewed in terms of the "four pillars" that establish the fundamental obligations of WTO Members. These pillars are (1) most-favoured nation treatment (MFN); (2) tariff bindings; (3) national treatment; and (4) transparency and the prohibition of quantitative restrictions.

A *GATT Article I: Most-Favored Nation Treatment*

GATT Article I defines most-favoured nation treatment. It requires that any "advantage, favour, privilege, or immunity" granted by a contracting party to the products of any other country, shall be extended to the "like products" of any other contracting party.[7] Simply put, the best treatment one WTO Member gives to any country must also be given to all other WTO Members. Thus, MFN is fundamentally a non-discrimination obligation, though the obligation only applies as between "like products." The definition of like products has proven troublesome and has been the subject of much WTO jurisprudence and academic commentary. This issue is discussed more thoroughly in Section III:A in relation to the national treatment obligation and WTO jurisprudence on environmental measures.

While the MFN obligation is agreeable in principle, its controversy stems from the fact that WTO Members are generally not free to discriminate between products of different countries based on disparate environmental practices. For example, suppose Country A imports shrimp from two countries, Country B and Country C. Country B harvests shrimp in an environmentally responsible fashion, while Country C does not. Under MFN, Country A is obligated to extend similar treatment to shrimp im-

5. KENNETH W. DAM, THE GATT 10-14 (1970).

6. Ryan L. Winter, Note, *Reconciling the GATT and WTO with Multilateral Environmental Agreements: Can We Have Our Cake and Eat it Too?*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 223, 227 (2000).

7. General Agreement on Tariffs and Trade, Oct. 30, 1947, pt. I, art. I, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

ports from Country C, notwithstanding concerns about Country C's harvesting methods.

B *GATT Article II: Tariff Binding*

Article II contains the second pillar of WTO Member obligations: tariff binding.[8] WTO Members generally agree to bind tariffs at a level that is agreed upon following a round of negotiations (i.e., the Tokyo Round, Uruguay Round, etc.). These negotiations are conducted with other WTO Members on the basis of reciprocity. Once a tariff is "bound," a Member may not raise the tariff above the bound rate, though it may choose to lower it. Additionally, although the bound rate may have been the result of reciprocal negotiations with only one or a few Members, the bound rate applies to all other Members. In other words, the tariff must be applied on an MFN basis.[9] The purpose of Article II is straightforward: it prevents Members from rescinding their tariff agreements. In theory, tariff bindings are to be negotiated down over time so that trade among nations eventually becomes unfettered.[10]

The tariff binding obligation is not without environmental implications. For example, if a Member is concerned about products entering its territory from countries with lax environmental standards, it cannot single out that Member for less-preferential tariff treatment. Likewise, if a Member has already bound its tariffs vis-à-vis another Member and the other Member decides to lower its environmental standards, there is no opportunity to alter tariff treatment in response.

C *GATT Article III: National Treatment*

From an environmental perspective, the national treatment obligation has proven the most controversial of the four pillars of WTO Member obligations. Article III requires that products of any Member imported into the territory of any other Member shall not be subject to taxes or other charges in excess of those applied to like domestic products.[11] Additionally, Article III requires that products of any Member imported into the territory of any other Member be accorded treatment no less favourable than like domestic products with respect to laws, regulations and

8. *Id.* pt. I, art. II.
9. *Id.* pt. I, art. II(1)(a).
10. Philip M. Nichols, *GATT Doctrine*, 36 VA. J. INT'L L. 379, 387 (1996).
11. GATT, *supra* note 7, pt. II, art. III(2).

requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.[12] The importance of the national treatment obligation stems from the reality that tariffs are not the only means nations use to discriminate against imported goods. Rather, numerous "behind the border" taxes, regulations and charges can be applied to imported goods to achieve a protectionist result that benefits domestic producers.[13]

As with the MFN obligation, national treatment hinges on the "like product" distinction.[14] The traditional definition of "like products" takes no account of process and production methods (so-called PPMs). Thus, a WTO Member may not discriminate between two products regardless of whether one product was produced in a more environmentally conscious way.[15] This logic supported the basic holding in the infamous *Tuna-Dolphin* cases—"tuna is tuna," even if it is harvested with purse-seine nets that kill dolphins.[16] The U.S. was not free to discriminate between tuna caught with destructive purse-seine nets and tuna caught with dolphin-safe nets because the method of catching tuna was not relevant to the "like product" determination. The subsequent evolution of the like product definition will be discussed further in Section III:A.

D *GATT Articles XI and X: Quantitative Restrictions and Transparency*

The prohibition of quantitative restrictions (quotas) and transparency obligations comprise the fourth pillar of WTO Member obligations.

1 Article XI: Prohibition of Quantitative Restrictions

Article XI states that no restrictions made effective through quotas shall be maintained by any Member on the importation of

12. *Id.* pt. II, art. III(4).

13. DAM, *supra* note 5, at 115-117.

14. See Edward S. Tsai, *"Like" is a Four Letter Word - GATT Article III's "Like Product " Conundrum*, 17 BERKELEY J. INT'L L. 26 (1999) (discussing the evolution of the "like product" issue with respect to the national treatment obligation).

15. The failure to account for PPM's has led to demands that the WTO allow such measures at least where they can be justified through application of the precautionary principle. *See, e.g.*, Paulette L. Stenzel, *Why and How the World Trade Organization Must Promote Environmental Protection*, 13 DUKE ENVTL. L. & POL'Y F. 1, 45 (2002).

16. Keith Ferguson, *The World Trade Organization (WTO) and its Multilateral Trade Agreements*, Peninsula Peace and Justice Center, *at* http://www.peaceandjustice.org/issues/econjustice/gl_wto.html (last visited at May 28, 2004).

the products of any other Member.[17] The ban on quantitative restrictions reflects the generally held belief that quotas have a larger trade distorting effect than tariffs. As such, if a Member wants to halt trade in environmentally destructive products, quantitative restrictions are likely the most effective means of doing so. Thus, in *Tuna-Dolphin I*, the U.S. imposed a ban on the importation of Mexican tuna caught with purse-seine nets. The direct import prohibition on Mexican tuna was a quantitative restriction in violation of Article XI.[18]

2 Article X: Transparency Obligations

Article X lays out extensive transparency obligations for Members. They include provisions such as the prompt publication of trade regulations and the necessity of officially publishing laws before they are enforced.[19] From an environmental perspective, Article X generally has a positive impact, especially as it pertains to Members with dubious environmental regulations. China, for example, was required to provide extensive documentation regarding its internal environmental controls as a prerequisite to WTO membership. This process helped cast light on China's obvious environmental deficiencies and assisted other governments and NGO's in pressuring the relevant Chinese authorities to remedy such shortcomings.[20]

E *WTO Dispute Resolution*

No summary of WTO rules and obligations would be complete without mentioning the Dispute Settlement Understanding (DSU). A major distinction must be drawn between the pre- and post-Uruguay Round DSU. Articles XXII-XXIII establish the pre-Uruguay Round DSU.[21] Of particular note is the absence of an effective enforcement mechanism. This led many to criticize the pre-Uruguay DSU as ineffective.[22] The focus had been on European-style diplomacy and conciliation in which aggrieved Members were encouraged to meet and discuss possible solu-

17. GATT, *supra* note 7, pt. III, art. XI(1).

18. Panel Report, *United States - Restrictions on Imports of Tuna*, GATT B.I.S.D. (39th Supp.) at 155 (1993) [hereinafter Tuna-Dolphin I].

19. GATT, *supra* note 7, pt. III, art. X(1).

20. Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AM. U. INT'L L. REV. 1469, 1494-1529 (2000).

21. GATT, *supra* note 7, pt. III, art. XXII-XXIII.

22. RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 199-200 (2d ed. 2001).

tions. Unfortunately, no timeline was established for discussions and, as such, many consultations tended to go on indefinitely. An even bigger problem was the fact that a "consensus" was required for the formation of a Dispute Settlement Body (DSB). Under the pre-Uruguay Round rules, unanimity was required to reach such "consensus."[23] Thus, it only took one Member (typically the Member that expected to lose) to prevent a Panel from being formed. Furthermore, even assuming a Panel was formed, the adoption of Panel Reports could be blocked through the same process. So glaring were these deficiencies that reform of the DSU became a central aim of the Uruguay Round.[24]

In the aftermath of the 1994 Uruguay Round, the rules were changed so that Panels could be formed and Panel Reports adopted unless there was a consensus *against* doing so.[25] This change ensured that the losing party could no longer unilaterally halt the dispute resolution process. Additionally, specific timeframes were established to ensure that the process moved expeditiously toward resolution. The entire process, from establishment of a Panel to adoption of a Report, must now occur within twelve months, including all appeals.[26] The dispute resolution process is broken down into four steps. First, Members are encouraged to consult with each other and find a solution.[27] Second, if the consultations fail, a Dispute Panel is formed and the case is litigated.[28] Third, after the Panel renders its decision in a Report, the losing Member may seek review at the appellate level.[29] Finally, following a review by the Appellate Body, the decision becomes final and is implemented.[30] The system of compulsory dispute settlement is viewed as a jewel in the crown of free trade, under which the world has enjoyed more than half a century of unrivalled economic growth and prosperity.[31]

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23. *Id.* at 213.

24. *Id.* at 199-200.

25. Uruguay Round Understanding on Rule and Procedures Governing the Settlement of Disputes, 1 January 1995, art. 16(4) [hereinafter DSU]. NEED MORE INFORMATION TO FIND/VERIFY SOURCE

26. *Id.* art. 20(1).

27. *Id.* art. 5.

28. *Id.* art. 6.

29. *Id.* art. 17.

30. *Id.* art. 21.

31. Lakshman D. Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?*, 7 MINN. J. GLOBAL TRADE 287, 287 (1998).

III
WTO LINKAGES TO THE ENVIRONMENT

Numerous critics have pointed to an obvious omission in all four pillars of the WTO agreement: environmental protection. Environmental measures taken by WTO Members are frequently determined to be violations of MFN and/or national treatment obligations, despite the fact that international environmental measures are an essential component of environmental preservation. As one commentator notes, "The sources of environmental concern are not constrained by political boundaries, and thus effective environmental measures designed to remedy such concerns necessarily must not be so constrained either."[32] Yet many have criticized WTO Panels for seemingly disallowing precisely such measures. Still other critics have condemned the WTO—indeed the concept of free trade in general—for having a broad detrimental effect on the natural environment. One critic notes, "One of the main purposes of WTO-supported free trade is to promote economic growth. Such growth will result in increased economic activity, and without enhanced pollution controls, this will result in more environmental degradation."[33]

While opinions on the "trade vs. environment" debate are many, it is possible to isolate certain inherent tensions that contribute to the contentious nature of the dispute. First, because the main objective of the WTO is to promote international trade by minimizing trade restrictions, enforcement of environmental measures will often conflict with the WTO's free trade priorities.[34] Free trade advocates have correctly pointed out that WTO rules impose virtually no restrictions on the ability of a nation to protect its own environment against damage caused by either domestic production or domestically produced or imported products.[35] The problem arises when nations use trade restrictions as a means of unilateral action to impose environmental regulations

32. Mark Edward Foster, *Trade and Environment: Making Room For Environmental Trade Measures Within the GATT*, 71 S. CAL. L. REV. 393, 402 (1998).

33. Andrew L. Strauss, *From GATTzilla to the Green Giant: Winning the Environmental Battle for the Soul of the World Trade Organization*, 19 U. PA. J. INT'L ECON. L. 769, 790 (1998).

34. Carol J. Miller & Jennifer L. Croston, *WTO Scrutiny v. Environmental Objectives: Assessment of the International Dolphin Conservation Program Act*, 37 AM. BUS. L. J. 73, 83 (1999).

35. Thomas J. Schoenbaum, *Trade and Environment: Free International Trade and Protection of the Environment: Irreconcilable Conflict?*, 86 AM. J. INT'L L. 700, 704 (1992).

on other countries.[36] Such measures usually run afoul of the WTO Agreement.

Second, it is impossible to ignore the tension that exists between the rich and poor nations of the world. As the environmental movement has taken hold in many wealthy countries, these governments have responded with increased domestic legislation aimed at environmental protection. However, efforts at enforcing stricter environmental regulations through trade mechanisms have prompted resistance from developing countries. Free trade advocate Jagdish Bhagwati comments:

> Having gotten the developing countries finally to come to the GATT/WTO by persuading them that multilateralism is the defence of the weak (in trade matters), [developing] countries feel that they are about to see the WTO captured to launch an assault on the weak (via the progressive intrusion of non-trade [environmental] agendas).[37]

With respect to the oceans, for example, some nations have opted for strict environmental standards within their territorial waters and Exclusive Economic Zones (EEZs). On the other hand, developing nations—who control 90 percent of the world's coastal waters—may not share the same zeal for environmental protection.[38] Developing nations complain that environmental regulations amount to a cynical effort by rich countries to thwart the comparative economic advantage of poor countries.[39] Similarly, environmental regulations—especially extraterritorial ones—are uniquely able to inflame sensitive issues of national identity and state sovereignty.[40]

For its part, the WTO is not wholly silent in regard to environmental objectives. Although the WTO has no specific agreement dealing with the environment, a number of WTO agreements include provisions dealing with environmental concerns. For example, the objectives of sustainable development and environmental protection are stated in the preamble of the agreement establishing the WTO.[41] Most importantly, Article

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36. *Id.*

37. Jose E. Alvarez & Jagdish Bhagwati, *The Boundries of the WTO: Afterward: The Question of Linkage*, 96 AM. J. INT'L L. 126, 128 (2002).

38. Miller & Croston, *supra* note 34, at 84.

39. BHALA, *supra* note 22, at 1604.

40. Miller & Croston, *supra* note 34, at 83-85.

41. Understanding the WTO: Cross-Cutting and New Issues: The Environment: A New High Profile, *available at* http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm. (last visited May 28, 2004) [hereinafter Understanding the WTO].

XX establishes exemptions from normal WTO obligations for policies designed to protect human, animal or plant life.[42] The extent to which Article XX constitutes a meaningful mode of environmental protection has been the source of bitter dispute between WTO proponents and environmentalists.

A *Article XX Interpretation*

The interpretation of Article XX involves a three-step process. First, WTO Panels must determine whether the measure in question is designed to "protect human, animal, or plant life or health."[43] Second, the Panel must assess whether the measure is "necessary" for such protection.[44] Finally, if the measure is necessary, then the Panel must assess whether the measure is nonetheless "a means of arbitrary or unjustifiable discrimination" or "a disguised restriction on trade."[45] If the measure passes this final test, then it is deemed an exception under Article XX and allowed to stand. The drafting history and subsequent interpretation of Article XX suggest a fear that Members might seek to use Article XX to erect trade barriers and engage in discriminatory treatment that undermines the entire WTO regime.[46] Nevertheless, significant progress has been made in expanding the scope of Article XX exceptions.

1 *Tuna-Dolphin I and II*

Much has been written on the *Tuna-Dolphin* cases—most of it highly critical—and this article will not present a detailed examination. Nonetheless, WTO jurisprudence interpreting Article XX has undergone a definite evolution subsequent to these initial cases. As such, the *Tuna-Dolphin* cases represent something of an ignominious starting point against which it is possible to judge subsequent WTO progress.

Tuna-Dolphin I and *II* each involved measures enacted by the U.S. government under the Marine Mammal Protection Act of 1972 (MMPA). In *Tuna-Dolphin I*, the U.S. imposed an embargo on Mexican tuna until such time as the U.S. Secretary of State

42. GATT, *supra* note 7, art. XX(b).
43. *Id.*
44. *Id.*
45. *Id.* pt. III, art. XX.
46. Julie H. Paltrowitz, Comment, *A Greening of the World Trade Organization? A Case Comment on the Asbestos Report*, 26 BROOK. J. INT'L L. 1789, 1802 (2001).

made findings as to Mexico's incidental dolphin kill rates.[47] The Panel ruled against the U.S. on the grounds that the MMPA violated the national treatment obligation. As such, the U.S. was "obliged . . . to [afford] treatment to Mexican tuna no less favourable" than U.S. tuna, regardless of whether "the incidental taking of dolphins by Mexican vessels" failed to correspond to U.S. domestic standards.[48] After finding a national treatment violation, the Panel then considered whether the violation was nonetheless permissible under Article XX exceptions. Answering in the negative, the Panel found that the U.S. failed to show it had "exhausted all options reasonably available to it," including negotiation of international cooperative agreements, before establishing the embargo.[49] Critics have pointed out that the Panel ignored the reality that international agreements can be less effective than embargoes in preserving biodiversity.[50] Likewise, such agreements can be time consuming and thus inappropriate when attempting to save a species from imminent extinction.

In *Tuna-Dolphin II*, the U.S. imposed an "intermediary nation embargo" on tuna imports from countries that imported tuna from third-party nations that harvested tuna with methods resulting in the incidental taking of dolphins.[51] The Panel reasoned that because the U.S. measure was designed to coerce intermediary nations into adopting U.S. policy, it did not have a direct conservation or protective effect on the environment.[52] As such, the U.S. embargo was not "necessary" to protect dolphins.[53] Critics have correctly pointed out that such reasoning equates "necessary" with "directly affecting," a result that was not contemplated by the language or negotiating history of Article XX.[54] In

47. Tuna-Dolphin I, *supra* note 18.

48. *Id.*

49. *Id.*

50. *See generally* Christine M. Cuccia, Note, *Protecting Animals in the Name of Biodiversity: Effects of the Uruguay Round of Measures Regulating Measures of Harvesting*, 13 B.U. INT'L J. 481 (1995) (arguing that the Uruguay Round Agreements, establishing the WTO, will increase the ability of international agreements to accommodate environmental measures).

51. GATT Dispute Panel Report, *United States-Restrictions on Imports of Tuna*, GATT Doc. DS29/R, (June 16, 1994), reprinted in 33 I.L.M 839, 876-86 (1994) [hereinafter Tuna-Dolphin II]

52. *Id.* para. 5.24.

53. *Id.* para. 5.36.

54. Paltrowitz, *supra* note 46, at 1807.

the opinion of one commentator, the *Tuna-Dolphin* cases represent "GATT doctrinalism at its worst."[55]

Perhaps the major redeeming feature of the *Tuna-Dolphin* cases is that WTO Members adopted neither decision, and thus neither decision is legally binding.[56] In response to the *Tuna-Dolphin II* decision, the U.S. entered into negotiations with numerous countries regarding dolphin conservation rules. The negotiations ultimately produced the Declaration of Panama in October 1995.[57] The Declaration is a multilateral agreement between the U.S. and twelve other nations establishing maximum limits on dolphin mortality and

2 *The Shrimp-Turtle Case*

Much occurred in the interim period between the *Tuna-Dolphin* cases and *Shrimp-Turtle*. The Uruguay Round Agreement establishing the WTO was concluded. The WTO Agreement contained numerous improvements, such as the inclusion of environmental concerns in the Agreement's preamble. Subsequently, although the *Shrimp-Turtle* Panel largely followed the analysis in *Tuna-Dolphin*, the Appellate Body overruled the Panel's reasoning and established a new approach for determining the compatibility of environmental measures with Article XX[58] The Appellate Body held that Article XX must be interpreted in light of the new preamble that outlines the objectives of environmental preservation and sustainable development.[59] Whereas previous Panels held that Article XX exceptions were fundamentally contrary to the GATT and must be limited to the greatest extent possible, the Appellate Body now recognized the "legitimate nature of the policies and interests" embodied in Article XX exceptions.[60] Thus, according to the Appellate Body, a balance must be struck between the right of Members to invoke

55. Richard J. McLaughlin, *Sovereignty, Utility, and Fairness: Using U.S. Takings Law to Guide the Evolving Utilitarian Balancing Approach to Global Environmental Disputes in the WTO*, 78 OR. L. REV. 855, 878 (1999).

56. Robert Howse, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, 27 COLUM. J. ENVTL. L. 491, 493 (2002).

57. BHALA, *supra* note 22, at 1602.

58. *Id.*

59. Appellate Body Report, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) *available at* http://www.wto.org [hereinafter Shrimp-Turtle Case].

60. *Id.* paras. 152-53.

an Article XX exception and the duty of that same Member to respect the treaty rights of other Members.[61]

In *Shrimp-Turtle*, the measure in dispute was a U.S. law prohibiting the importation of shrimp harvested with technology that could harm sea turtles.[62] For shrimp to be imported into the U.S., the U.S. Secretary of State had to find that the exporting country had a regulatory program for the protection of sea turtles that was comparable to U.S. law. Despite the new balancing approach articulated by the Appellate Body, the U.S. measure was ultimately rejected because it imposed a "single, rigid and unbending requirement" that effectively mandated that other countries adopt a sea turtle protection regime identical to the U.S. .[63] Moreover, the Appellate Body found that the U.S. had failed to make an effort to negotiate an agreement with several countries that exported shrimp to the United States.[64] Because the U.S. had negotiated seriously with some countries but not with others (including the appellees), the Appellate Body concluded that the U.S. measure was "plainly discriminatory."[65]

(a) The Aftermath of Shrimp-Turtle and a critique

The *Shrimp-Turtle* case turned into something of a nightmare for the WTO. At the 1999 WTO Ministerial Meeting in Seattle, disruptive street protests ultimately caused the meeting to be unproductive. Some of the numerous demonstrators were dressed as bloody sea turtles—an obvious reference to the recent decision in *Shrimp-Turtle*. These images received wide media coverage and seriously tainted the image of the WTO, causing it to be seen by many as the headquarters of forces hostile to the environment.[66]

Unfortunately, the demonstrators overlooked the fact that *Shrimp-Turtle* did not stand for the proposition that WTO Members may never take measures—even unilateral ones—to protect the environment. Rather, the U.S. measure was struck down because it was not applied to all WTO Members in a non-discriminatory fashion.[67] Prior to imposing its ban on shrimp imports,

61. *Id.* para. 156.
62. *Id.*
63. *Id.* paras. 2-6.
64. *Id.* para. 163.
65. *Id.* para. 166.
66. *Id.* para. 172.
67. Sydney M. Cone, The *Environment and the Law: The Environment and the World Trade Organization*, 46 N. Y. L. SCH. L. REV. 615, 616 (2002-2003).

the U.S. had entered into extensive negotiations with nations in the Western Hemisphere. As a result of these negotiations, several chosen nations equipped their shrimp-trawling vessels with nets meeting U.S. standards.[68] Meanwhile, the U.S. made no attempt to enter into negotiations with the four Asian appellees: India, Pakistan, Malaysia, and Thailand. Rather, the U.S. simply banned shrimp imports from those nations after finding they had not complied with U.S. law. Commentators have suggested that had the U.S. applied their regulations to protect sea turtles in a non-discriminatory fashion, the measure would have passed muster under the new Article XX interpretation.[69] The Appellate Body seemed to make this point themselves by specifying exactly what they *did not* hold in the case:

> 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. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other environmental fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.[70]

Some WTO supporters have argued the *Shrimp-Turtle* decision actually goes too far in eroding free trade principles. Jagdish Bhagwati commented:

> I was astounded that the Appellate Body, in effect, reversed long-standing jurisprudence. . .I have little doubt that the jurists were reflecting the political pressures brought by the rich-country environmental NGOs and essentially made law that affected the developing countries adversely.[71]

Nevertheless, most commentators greeted the *Shrimp-Turtle* decision with optimism. The "long-standing" jurisprudence Bhagwati refers to really only consists of the two un-adopted *Tuna-Dolphin* decisions.[72] As mentioned previously, most com-

68. *Embracing Greenery*, THE ECONOMIST, Oct. 19, 1999.

69. Cone, *supra* note 67, at 616.

70. *See id.* at 617-18.

71. Shrimp-Turtle Case, *supra* note 59, para. 185.

72. Jagdish Bhagwati, *After Seattle: Free Trade and the WTO*, in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENIUM (Roger P. Porter et al. eds., 2001) at 60-61.

mentators viewed those decisions as incorrect in their own right and unworthy of enduring legal value[73]

In any event, the final resolution of the *Shrimp-Turtle* controversy suggests reason for optimism among environmentalists. In July 1999, the U.S. revised its sea turtle protection regime so that it did not discriminate between nations. The changes afforded greater due process protection to shrimp exporting nations and represented genuine efforts by the U.S. to negotiate MEAs with all nations affected by the turtle protection rules.[74] Malaysia responded with a new WTO challenge against the revised U.S. rules. Despite this action, in January 2002, the Appellate Body upheld the new U.S. turtle protection laws.[75]

3 The Asbestos Case

The Panel Report in the *Asbestos Case* gives a good indication of the future direction of WTO jurisprudence in regard to Article XX exceptions.[76] In that case, the disputed measure involved a French ban on the importation of all asbestos products for the purpose of protecting workers from asbestos-related health problems.[77] Canada challenged the measure on the grounds that the ban did not differentiate between amphiboles asbestos (known to cause cancer) and the less dangerous chrysotile asbestos.[78] Canada is the world's second largest producer of chrysotile asbestos and exports 30,000 tons of it to France every year.[79]

The Panel began with a preliminary finding that the French ban violated the national treatment obligation because it discriminated between "like products."[80] According to the Panel, the relative "dangerousness" of each product was not a factor in assessing their "likeness."[81] The Panel then turned to the issue of whether the violation was nonetheless an allowable exception

73. Howse, *supra* note 56, at 516.

74. *Id.* at 493.

75. John Barlow Weiner, et al., *International Legal Developments in Review: Environmental Law*, 36 INT'L LAW. 619, 641 (2002).

76. Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc. WT/DS58/AB/RW (Oct. 22, 2001), *available at* http://www.wto.org.

77. Panel Report, *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/R (Sept. 18, 2000), *available at* http://www.wto.org [hereinafter Asbestos Panel Report].

78. *Id.* paras. 2.3-.7.

79. *Id.* paras. 3.8-.9.

80. Paltrowitz, *supra* note 46, at 1817-18.

81. Asbestos Panel Report, *supra* note 77, paras. 8.144-.150.

under Article XX. The Panel found that the French ban on all asbestos imports did constitute an exception under Article XX because it was aimed at the protection of human life and health.[82] Next, to determine whether the French measure was "necessary" for such a purpose, the Panel applied the "least trade-restrictive alternative" test. Canada argued that the controlled use of chrysotile asbestos was a less restrictive alternative to the French ban.[83] However, unlike prior cases, the Panel employed a more flexible definition of "necessary." This time, a finding that a less trade-restrictive alternative existed would not, in itself, doom the measure. Rather, the less trade-restrictive alternative must also be "sufficiently effective" and a "reasonable alternative" to the contested measure.[84] Accordingly, the Panel concluded that the controlled use of chrysotile asbestos might not meet this criteria.[85] As such, the French government "reasonably" concluded that a total ban on all asbestos was necessary for the protection of human life and health.[86]

The "sufficiently effective" and "reasonable alternative" requirements are a novel development in WTO case law concerning Article XX exceptions.[87] Had this new analysis been applied in the *Tuna-Dolphin* cases, for example, a different outcome would have been likely.[88] The *Tuna-Dolphin* Panels found that multilateral negotiations—as opposed to a unilateral import ban—constituted a less trade- restrictive alternative, thus dooming the U.S. measure. However, under the new *Asbestos Case* analysis, the U.S. could argue that a unilateral ban was necessary because several species of dolphins were on the verge of extinction and negotiations would have been too time consuming. Accordingly, multilateral negotiations were neither as "sufficiently effective as," nor a "reasonable alternative" to, a unilateral import ban.[89]

If the Panel's rulings provided a glimmer of hope for environmentalists, the Appellate Body's affirmation of the ruling is more

82. *Id.* para. 8.132.
83. *Id.* paras. 8.193-.194.
84. *Id.* para. 8.197.
85. *Id.* para. 8.208.
86. *Id.* para. 8.209.
87. *See id.*
88. *See* Paltrowitz, *supra* note 46, at 1822-23.
89. *Id.* at 1829-30.

promising yet.[90] The Appellate Body upheld the Panel's conclusion that the French ban was permissible—albeit on somewhat different grounds. In reviewing the decision, the Appellate Body revisited the threshold "like product" issue. Whereas the Panel had concluded the "dangerousness" of a product is not a factor to be considered in assessing its "likeness," the Appellate Body found that health and safety concerns are in fact legitimate criteria.[91] As such, the Appellate Body held that the Panel had erred in concluding that the two types of asbestos were "like products."[92]

At this point, the Appellate Body could have concluded there was no national treatment violation and thus no need to consider allowable exceptions under Article XX. Interestingly, the Appellate Body instead made the point of affirming the Panel's novel reasoning concerning Article XX's "necessary" requirement.[93] In effect, the Appellate Body added an additional layer of protection for measures taken in derogation of WTO obligations. If a country wishes to discriminate between products for environmental purposes, there is now an opportunity to argue that the "likeness" of two products is no longer based solely on their commercial interchangeability. The WTO now recognizes that health and safety issues (and presumably environmental issues) are legitimate factors for consideration. Additionally, even if the measure fails under the new "like product" analysis, there is a second opportunity to argue that there is neither a "sufficiently effective" nor "reasonable" alternative to the measure.

Commentators have noted that the holding in the *Asbestos Case* is a genuine concession by the WTO to the environmental community, and it further confirms the status of the Appellate Body as the "greenest" of WTO organs.[94] Given these numerous recent positive developments, even some of the WTO's harshest critics have admitted to "cautious optimism."[95]

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90. Virginia Dailey, Comment, *Sustainable Development: Re-evaluating the Trade vs. Turtles Conflict at the World Trade Organization*, 9 J TRANSNAT'L L. & POL'Y 331, 378 (2000).

91. Appellate Body Report, *European Communities - Measures Affecting Asbestos and Asbestos- Containing Products*, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001), *available at* http://www.wto.org.

92. *Id.* para. 115.

93. *Id.* para. 126.

94. Raj Bhala & David Gantz, *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457, 517 (2002).

95. *Id.*

IV
UNCLOS BACKGROUND

It is difficult to understate the global environmental importance of UNCLOS. When Secretary of State Warren Christopher submitted UNCLOS to President Clinton, Christopher described it as the "strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."[96] UNCLOS provides the first global framework for all aspects of the law of the sea and may be thought of as the "constitution of ocean governance."[97] Perhaps most environmentally significant is the fact that 59 of the 320 provisions in UNCLOS relate directly to environmental protection.[98] As a result, the fundamental aims of UNCLOS can safely be said to differ from those of the WTO. While the WTO is concerned foremost with the promotion of free trade and the removal of trade barriers, UNCLOS contains numerous provisions whose purpose is environmental protection of the oceans.

A *UNCLOS Dispute Resolution*

As mentioned previously, the WTO dispute resolution mechanism is one of the most significant in international law.[99] However, commentators have suggested that UNCLOS dispute resolution mechanisms have the potential to eclipse the WTO in importance.[100] Similar to the WTO, UNCLOS has a built-in preference for settling disputes through peaceful settlement and negotiation.[101] However, if no agreement can be reached, UNCLOS provides for a compulsory dispute settlement system that issues binding decisions. Unlike the WTO, however, there is no single dispute resolution body. Rather, parties may choose between four different forums: the International Court of Justice, the International Tribunal for the Law of the Sea, an interna-

96. Peter Stevenson, *The World Trade Organization Rules: A Legal Analysis of Their Adverse Impact on Animal Welfare*, 8 ANIMAL L. 107, 140-41 (2002).

97. *Message from the President of the United States and Commentary Accompanying the United Nations Convention for the Law of the Sea and the Agreement Relating to the Implementation of the Part XI Upon Their Transmittal to the United States Senate for its Advice and Consent*, 7 GEO. INT'L ENVTL. L. REV. 77, 81 (1994).

98. D. HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 659 (2002).

99. Guruswamy, *supra* note 31, at 291.

100. The number of law of the sea cases is far less than, for example, the number of international trade disputes submitted to WTO panels, which have rendered over 100 binding interstate decisions since 1994.

101. Guruswamy, *supra* note 31, at 294.

tional arbitral tribunal, or a special technical arbitral tribunal.[102] As such, UNCLOS dispute resolution is both comprehensive and remarkably flexible.[103]

Environmentalists have accused the WTO of "judicial suzerainty" because it has previously enjoyed a monopoly over international decision making.[104] With the advent of UNCLOS, however, it is hoped that competition in this area might prompt the WTO to give serious consideration to reforming the way it handles environmentally related disputes.[105] Nevertheless, a key problem lies in the fact that the U.S. has thus far failed to ratify UNCLOS. Until such time, the U.S. cannot avail itself of any of the dispute resolution provisions.[106] Without the U.S. on board, the possibility of UNCLOS tribunals providing real competition to the WTO will likely remain limited.

B *UNCLOS Jurisprudence*

It may still be too early to fully assess the impact of UNCLOS dispute resolution mechanisms.[107] Of the multiple UNCLOS fora, the International Tribunal for the Law of the Sea (ITLOS) is perhaps the most significant.[108] Yet, most ITLOS cases have been limited to applications for the prompt release of vessels.[109] There may be several explanations as to why there is a lack of cases settled under UNCLOS provisions. First, many sensitive areas have been exempted from compulsory dispute resolution under Articles 297 and 298.[110] Second, the UNCLOS dispute resolution provisions are simply too new for states to have had experience in dealing with them. Consequently, there has not been enough time for a consensus on UNCLOS dispute resolution to emerge on its possible use or on areas that could be potentially improved.[111] Finally, the multiple fora approach may actually discourage potential litigants. States seeking a definitive interpretation of UNCLOS obligations might be concerned that a

102. HUNTER ET AL., *supra* note 98, at 665.
103. Guruswamy, *supra* note 31, at 296.
104. HUNTER ET AL., *supra* note 98, at 665.
105. Guruswamy, *supra* note 31, at 296.
106. *See id.* at 297.
107. HUNTER ET AL., *supra* note 98, at 666.
108. *See* John E. Noyes, *Law of the Sea Dispute Settlement: Past, Present and Future*, 5 ILSA J. INT'L & COMP. L. 301, 305 (1999).
109. *See* Schiffman, *supra* note 3.
110. *Id.*
111. Noyes, *supra* note 108, at 304.

conflicting interpretation could arise from one of the other UNCLOS dispute resolution bodies.[112]

Whatever the reason for the relatively small number of disputes, UNCLOS dispute bodies have generally performed well when called to the task. The ITLOS, in particular, has established its ability to render quick and thoroughly reasoned decisions.[113] However, as discussed below, the inability of a UNCLOS tribunal to find jurisdiction in the *Southern Bluefin Tuna Case* raises doubts about the utility of UNCLOS dispute resolution provisions.

1 The Southern Bluefin Tuna Case

Of the cases settled under UNCLOS dispute resolution provisions, the *Southern Bluefin Tuna Case* (*SBT Case*) has attracted the most attention from environmentalists.[114] The case has wide implications for UNCLOS, as well as international environmental law and international dispute resolution.[115] The dispute arose under the Southern Bluefin Tuna Treaty (SBT Treaty)—a regional conservation treaty between Australia, New Zealand, and Japan. Under the treaty, a total allowable catch (TAC) for bluefin tuna was established annually and allocated among the three members.[116] In 1998, Japan announced that it would begin a unilateral "experimental fishing program" for the ostensible purpose of scientific research into bluefin tuna stocks.[117] Australia and New Zealand objected to the Japanese program and instituted arbitral proceedings against Japan under UNCLOS.

In the first phase of the dispute, Australia and New Zealand sought provisional measures against Japan at the ITLOS.[118] UNCLOS Article 290 allows a tribunal to prescribe provisional measures when it "considers [such action] appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to the marine environ-

112. *Id.*

113. *Id.* at 304-05.

114. *Id.* at 307.

115. *Southern Bluefin Tuna Case, Austl. & N.Z. v. Japan*, Award on Jurisdiction and Admissibility, Decision by the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (Aug. 4, 2000) *available at* www.worldbank.org/icsid/bluefintuna/main.htm [hereinafter SBT Case].

116. Schiffman, *supra* note 3.

117. SBT Case, *supra* note 115, at 22-23.

118. *Id.* at 25.

ment."[119] After first finding jurisdiction in the matter, the ITLOS ordered all three nations to refrain from conducting any type of "experimental fishing" unless the fish taken by such a program were counted against the TAC.[120] The provisional orders issued by the ITLOS were justified—albeit indirectly—on application of the precautionary principle in international law. The ITLOS noted that all three parties had acknowledged that southern bluefin tuna stocks were at historic lows.[121] Moreover, there was major disagreement between the parties as to scientific data and the impacts of the experimental fishing program on bluefin tuna stocks.[122] In light of these factors, the ITLOS concluded that the precautionary principle was justified—at least until the case could be decided on the merits and the underlying scientific uncertainties resolved.[123]

While the decision by the ITLOS was a hugely important success for environmentalists, its enduring value was mooted by subsequent developments. In the second phase of the dispute, an arbitral tribunal heard arguments regarding the jurisdiction of UNCLOS tribunals. Japan argued that the dispute properly concerned the SBT Treaty, and any dispute resolution proceeding must occur under that Treaty and not UNCLOS.[124] Australia and New Zealand countered with the argument that UNCLOS established a new and comprehensive regime for the oceans, and UNCLOS dispute resolution provisions were a key aspect of the regime.[125] The tribunal agreed with Japan and found that—absent consent by all parties to the dispute—Australia and New Zealand could not resort to dispute resolution outside the SBT Treaty. Noting numerous treaties similar to the SBT Treaty, the tribunal was concerned that if the position of Australia and New Zealand prevailed, parties to similar treaties who had no intention of entering into binding dispute resolution would find them-

119. *Southern Bluefin Tuna Cases* (*N.Z. v. Japan; Austl. v. Japan*), Request for Provisional Measures, Order, International Tribunal for the Law of the Sea (Aug. 27, 1999) *available at* http://www.itols.org/start2_en.html [hereinafter Provisional Measures Case].

120. International Tribunal for the Law of the Sea, *Japan files Response and Counter Request for Provisional Measures in Case Concerning Conservation of Tuna*, (Aug. 9, 1999) *available at* http://www.itols.org/news/presss_release/1999/press_release_25_en.pdf.

121. Provisional Measures Case, *supra* note 119, para. 90(1)(d).

122. *Id.* para. 71.

123. *Id.* paras. 73-74 and 79.

124. *Id.* para. 80.

125. SBT Case, *supra* note 115, at 88.

selves bound.[126] As such, the tribunal found that ITLOS lacked jurisdiction in the matter and subsequently revoked the provisional measures ordered by the ITLOS.[127]

Although commentators have expressed optimism at the willingness of the ITLOS to grant provisional measures, the ultimate inability of the arbitral tribunal to find jurisdiction is troubling. The tribunal was clearly of the opinion that UNCLOS was not irrelevant to the dispute. To the contrary, the tribunal noted the dispute involved both the SBT Treaty and UNCLOS.[128] The salient issue for the tribunal, however, appeared to be whether parties to treaties other than UNCLOS maintained the right to specify their own dispute resolution processes. Answering in the affirmative, the tribunal commented: "UNCLOS falls significantly short of establishing a truly comprehensive regime of compulsory jurisdiction entailing binding decisions."[129] On this point, the tribunal's analysis of Article 281 is telling. Article 281 provides:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

The tribunal noted the SBT Treaty does not provide "a" peaceful method of dispute settlement; rather, it provides a list of various named procedures to be used to achieve a peaceful settlement.[130] However, none of these alternatives entail compulsory dispute resolution.[131] As to the second requirement—that the treaty between the parties not exclude any further procedure—the tribunal concluded that even though the SBT Treaty does not expressly preclude other procedures, it implies as much.[132] With respect to these other procedures, the tribunal acknowledged that no settlement had been reached under the SBT

126. *Id.* at 58.
127. *Id.* at 56.
128. *Id.* at 66.
129. *Id.* at 96.
130. *Id.* at 103.
131. *Id.* at 96.
132. Leah Sturtz, Note, *Southern Bluefin Tuna Case: Australia and New Zealand v. Japan*, 28 ECOLOGY L.Q. 455, 475 (2001).

Treaty.[133] Of course, the tribunal's unwillingness to find jurisdiction might simply have boiled down to a ripeness issue—the tribunal may have felt that not all measures had been exhausted under the SBT Treaty and declined to hear the case until such time as they were.[134] Yet, any solution under the SBT Treaty might have proven inadequate given the absence of compulsory dispute resolution.[135]

Moreover, as the tribunal acknowledged, there are numerous other treaties within the purview of UNCLOS that do not provide for mandatory third-party resolution, but seemingly exclude further procedures.[136] With respect to these treaties, the tribunal's holding appears to establish the precedent that unless the treaty meets the strict criteria of Article 281, UNCLOS tribunals will decline jurisdiction. While some of these treaties might produce meaningful resolution to disputes, the apparent unavailability of UNCLOS compulsory dispute resolution excludes what might otherwise be an effective option.[137] To the extent the holding in the *SBT Case* limits the ability of states to seek redress for their grievances, the weight of these accumulated grievances might prove harmful to international dispute resolution generally.[138]

Finally, the tribunal may have discredited the ITLOS by essentially reversing its holding.[139] This action will likely dissuade parties from seeking provisional measures in future cases.[140] Often the mere threat of obtaining provisional measures can have a salutary effect on settling disputes. Given the reversal of such measures in the *SBT Case*, similar future threats are likely to carry little weight.[141]

133. SBT Case, *supra* note 115, at 98-100.

134. *Id.* at 97.

135. Oxman, *supra* note 4, at 311.

136. *See* Sturtz, *supra* note 132, at 475-76.

137. Donald L. Morgan, *Implications of the Proliferation of International Legal Fora: The Example of the Southern Bluefin Tuna Cases*, 43 HARV. INT'L L.J. 541, 550 (2002).

138. *See* Sturtz, *supra* note 132, at 479-80.

139. Oxman, *supra* note 4, at 312.

140. *See* Sturtz, *supra* note 132, at 481.

141. *Id.*

V
THE PROBLEM OF COMPETING JURISDICTION

A *How the Issue Might Arise*

Consider the following hypothetical: two nations, Greenplace and Dirtland, are both members of UNCLOS and the WTO. Additionally, Greenplace is a member of an MEA that imposes strict limits on catching octopi on the high seas. Dirtland, not a member of the same MEA, ignores the agreement and engages in excessive octopus fishing. Citing the MEA, Greenplace imposes a ban on the importation of octopus from Dirtland. Moreover, Greenplace argues the MEA is consistent with UNCLOS Article 118 (obliging nations to cooperate in establishing fisheries management regimes for conservation of marine living resources on the high seas). Dirtland objects that the import ban violates WTO rules. Dirtland files a complaint with the WTO, while Greenplace avails itself of the UNCLOS dispute resolution system. Which tribunal has jurisdiction in the matter?

B *Threshold Jurisdictional Issues*

In seeking UNCLOS jurisdiction, there is a significant threshold issue to overcome. Article 282 states that UNCLOS dispute settlement provisions are superseded to the extent parties to a dispute are members of a bilateral, regional, or international agreement that contains a previously accepted procedure that "entails a binding decision." Commentators disagree over whether the WTO's DSU meets the binding requirement under Article 282. Those preferring UNCLOS jurisdiction argue that WTO Panel Reports must still be adopted by a "consensus" of WTO Members. As this distinction implies a modicum of choice on the part of Members as to whether they will abide by the ruling, it can be said that Panel Reports fail to meet the legal definition of "binding."[142] This argument would certainly have carried more weight under the pre-Uruguay Round DSU that required the unanimous decision of Members to make a Panel Report binding. Nevertheless, the new Uruguay Round DSU states that a Panel Report will be adopted unless there is a consensus *against adoption*. Of course, it is still possible that a Panel Report might be blocked in those rare circumstances in which a global consensus emerges against adoption. The chance of this actually

142. *Id.* at 482.

occurring is exceedingly rare, given that most WTO Members have a vested interest in the surety and stability of a binding dispute resolution mechanism. In fact, since the creation of the new DSU, not a single Panel or Appellate Body Report has been blocked—every judicial opinion issued since the WTO's inception has gone on to become final and binding on the Members.

Assuming the DSU qualifies as a binding dispute mechanism, Article 282 requires any UNCLOS tribunal to first defer to the WTO. This apparent difficulty in surmounting Article 282 suggests a potentially limited role for UNCLOS in settling trade-related environmental disputes. This difficulty is compounded by the holding in the *SBT Case* that suggests UNCLOS tribunals are not particularly inventive in seeking grounds for jurisdiction.

C *The Role of International Law*

Even assuming the impediment in Article 282 can be overcome, might a UNCLOS tribunal still be compelled to decline jurisdiction in light of a competing jurisdictional claim by the WTO? Article 30 of the Vienna Convention on the Law of Treaties (Vienna Convention) states that when two treaties conflict, the most recent treaty shall govern the dispute to the extent its provisions are compatible with those of the earlier treaty (per the doctrine of *lex posterior*).[143] In comparing UNCLOS to the WTO, the applicability of *lex posterior* is uncertain. UNCLOS entered into force on 16 November 1994 and certainly postdates the 1947 GATT Agreement. However, the WTO Agreement entered into force on 1 January 1995 and (just barely) postdates UNCLOS. UNCLOS proponents argue the WTO Agreement merely reaffirmed basic GATT obligations and therefore should not be considered an entirely new treaty.[144] Nevertheless, the Uruguay Round that established the WTO was by far the most ambitious trade-liberalizing round to date.[145] Additionally, numerous structural improvements were made to the GATT including the new binding dispute resolution mechanism. To what extent the WTO Agreement is a new agreement—and therefore

143. Richard J. McLaughlin, *Settling Trade-Related Disputes Over the Protection of Marine Living Resources: UNCLOS or the WTO?*, 10 GEO. INT'L ENVTL. L. REV. 29, 39 (1997).

144. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 30, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

145. McLaughlin, *supra* note 143, at 75.

postdates UNCLOS—is an issue that will have to be addressed by whichever tribunal first infringes on the other's jurisdiction.

That said, it is probably unwise to apply *lex posterior* too dogmatically. Many treaties, including UNCLOS, are inherently evolutionary and are constantly amended and expanded over time.[146] It would be an absurd result, for example, if the U.S. finally ratified UNCLOS in 2005 and UNCLOS obligations therefore superseded pre-existing U.S. obligations under the WTO. Likewise, a WTO Member that adopted the Climate Change Convention in 1992 could be said to have nullified the treaty by adopting the WTO Agreement in 1994. In the absence of a Member's formal withdrawal from previous treaty obligations, neither example's outcome seems logical given that most treaties are continually affirmed, either directly or indirectly, through their very existence and evolution over time.[147]

Additionally, the established doctrine of *lex specialis* specifies that when two treaties conflict, the more specific treaty shall govern. In the aforementioned hypothetical, the issue at stake—preservation of marine life on the high seas—is particularly relevant to several provisions in UNCLOS, while no such provisions exist under WTO rules. Thus, it is possible to argue that UNCLOS supersedes WTO rules per *lex specialis.* [But?] Similarly, regardless of which tribunal hears the matter, either a WTO Panel or UNCLOS tribunal may apply the rules in the MEA to the extent they are specific to the conflict.

Nevertheless, the prospect of either tribunal applying a set of rules contained in an MEA against a non-party to the same MEA raises a significant problem. No one contends that it is prohibited for WTO Members to form separate agreements in which they agree, for example, not to invoke MFN obligations against one another.[148] However, if a third party, not a member to the separate agreement, is adversely affected, that party may bring a case before the WTO seeking enforcement of its rights. According to this logic, the separate agreement is, in effect, a modification to the WTO Agreement and must comport with rules regarding modification of treaties.[149] In particular, Article 41(1) of the Vienna Convention requires that treaty modification not

146. BHALA, *supra* note 22, at 193-94.

147. Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535, 545 (2001).

148. *Id.* at 546.

149. *Id.* at 548.

affect the enjoyment by other parties of their rights under the treaty or the performance of their obligations.[150] Thus, an aggrieved third party (in our example, Dirtland) could argue before the WTO that the MEA is infringing on their right to MFN treatment. The enjoyment of Dirtland's rights under WTO rules is being adversely affected by enforcement of an agreement to which they are not a party. This effect not only violates Vienna Convention Article 41 but also the Article 34 rule of *pacta tertiis nec nocent nec prosunt* (treaties are only binding on the signing parties).[151] Consequently, while MEAs might be effective as applied to those nations that agree to them, there appears to be little basis in international law for applying MEAs to nations that have not consented to their application.

D *Which Forum Is Most Appropriate?*

Putting aside the issue of treaty competition, it is also worth considering which forum is more appropriate for settling our hypothetical dispute. In a comprehensive study, McLaughlin provides a chart summarizing the salient differences between the dispute resolution systems of UNCLOS and the WTO.[152] With respect to using trade measures to protect marine life, he concludes that UNCLOS provides a more accommodating forum. UNCLOS provisions regarding non-compulsory negotiations, choice of forum, tribunal composition, applicable law, burden of proof, and implementation of decisions are all more favourable to Members than comparable WTO provisions.[153] For example, a nation that uses trade measures to protect the environment has a better chance of succeeding before a UNCLOS tribunal comprised of experts in the field of maritime and environmental law, rather than a tribunal made up of trade experts at the WTO.[154] UNCLOS provisions also benefit countries seeking to improve their marine conservation practices. This is because WTO tribunals are limited to applying law as contained in relevant trade agreements; they generally do not refer to outside sources.[155] In addition, the burden of proof in a WTO proceeding will always fall on the Member seeking to employ an environmental trade

150. *Id.*
151. Vienna Convention, *supra* note 144, art. 41(1).
152. *Id.* art. 34.
153. McLaughlin, *supra* note 143, at 47-51.
154. *Id.* at 51.
155. *Id.* at 81.

restriction. Under UNCLOS, the burden of proof shifts under different circumstances and may actually fall to the party accused of using inadequate environmental measures.[156] Finally, with respect to the implementation of a tribunal's decision, the losing party in a UNCLOS dispute often has far more flexibility, versus WTO rules, in deciding how to bring their procedures into compliance.[157]

While this author agrees with McLaughlin's analysis, it is worth asking whether trade-related disputes fall under UNCLOS to begin with. Unlike the WTO, UNCLOS contains no direct reference to trade measures.[158] UNCLOS proponents contend that this issue should be resolved from a broader perspective: do the trade measures in dispute enhance or defeat the object and purpose of UNCLOS?[159] But, is the use of trade measures—especially unilateral ones—even contemplated by UNCLOS? After all, it seems strange that UNCLOS parties would endure the tedious process of negotiating a binding dispute resolution mechanism if individual states were subsequently free to interpret UNCLOS obligations on their own and then impose trade measures to force others into adopting similar interpretations. This author suggests, rather, that the UNCLOS approach is by nature multilateral and focused on collective action with respect to environmental protection. In this vital respect, the approaches of UNCLOS and the WTO are remarkably similar.

Finally, though not bearing directly on our hypothetical dispute involving high seas fishing, Article 297 has a limiting effect on UNCLOS dispute resolution mechanisms. Article 297 provides an exemption from compulsory dispute resolution for disputes arising within a coastal state's 200-mile EEZ. Because most fisheries disputes occur within a state's EEZ, UNCLOS dispute resolution is not always available in such situations.[160] To the extent such disputes are trade-related, the WTO remains the only forum available that offers a compulsory and binding dispute resolution option. For example, in *Shrimp-Turtle*, UNCLOS dispute resolution would not have been available because the U.S. mea-

156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 54.
160. *Id.*

sures primarily affected shrimp vessels operating with the EEZs of coastal states.[161]

E *The Swordfish Stocks Case*

A situation similar to the hypothetical posited in the beginning of this section arose in the *Swordfish Stocks Case*.[162] That dispute involved a unilateral ban by Chile on the importation and transit of swordfish to the E.U.[163] Chile acted under the Galapagos Agreement—an MEA concerned with preventing the overexploitation of highly migratory fish species such as swordfish. The E.U., on the other hand, was not a signatory to the Galapagos Agreement. Chile banned E.U. ships engaged in swordfish fishing from docking at Chilean ports and processing their catches.[164] The E.U. argued that the ban violated GATT Article V (providing for freedom of transit for goods) and Article XI (prohibition on quantitative restrictions on imports or exports).[165] The E.U. filed their complaint with the WTO and successfully convened a Panel to hear the case. Meanwhile, both the E.U. and Chile brought the case before the ITLOS. Chile claimed that the E.U. violated UNCLOS Article 64 (calling for cooperation in ensuring conservation of highly migratory species), and Articles 116-119 (relating to the conservation of living resources of the high seas).[166] Consequently, the case raised the spectre of a jurisdictional turf war between the WTO and UNCLOS.

It certainly can be argued the ITLOS properly had jurisdiction on the grounds that both parties selected it for resolving the dispute. Moreover, the case was fundamentally about fisheries conservation, an issue germane to UNCLOS. On the other hand, the E.U. might have argued that Chile imposed trade measures based on the Galapagos Agreement, of which the E.U. was not a party. Thus, as between the Galapagos Agreement and the WTO, the WTO is the only proper forum for hearing the dispute; that is, the only international instrument to which both parties had subscribed. This reasoning is consistent with Article 30(4) of

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161. *Id.* at 77.

162. *Id.* at 77-78.

163. *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean* ("Swordfish Stocks Case").

164. Marcos Orellana, *The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal for the Law of the Sea*, ASIL INSIGHTS (Feb. 2001), *at* www.asil.org/insights/insigh60.htm.

165. *Id.*

166. *Id.*

the Vienna Convention which states that a treaty to which both parties are members shall govern the dispute.[167]

Unfortunately for legal scholars (if not the swordfish), this jurisdictional tug-of-war never materialized. Instead, the issue was resolved through a series of negotiations between Chile and the E.U. Consequently, the E.U. withdrew its case from the WTO, and Chile withdrew its ITLOS case.[168] Although a final judgement by either tribunal would likely have addressed the jurisdiction issue—thus contributing to greater legal certainty on the subject—commentators have still expressed optimism at the case's fate. In particular, the fact that both parties brought their claims before the ITLOS demonstrates a growing faith in the ITLOS as a dispute settlement institution.[169]

VI
RECONCILIATION BETWEEN THE WTO AND UNCLOS

As international tribunals proliferate, the potential for competition between them will only increase.[170] The WTO has historically enjoyed a near monopoly in the area of international dispute resolution. However, as UNCLOS dispute resolution mechanisms assume a primacy that rivals that of the WTO, an opportunity will arise for reconciliation between these competing regimes.

A *The WTO's Adoption of MEAs: A Roadmap for Reconciliation?*

Largely in response to the heated criticism following *Shrimp-Turtle*, the WTO Secretariat issued a report entitled "Trade and Environment" on 14 October 1999.[171] The Report was essentially an effort to refute the claim that free trade was directly responsible for global environmental degradation. The Report focused on five key environmental issues: agriculture, deforestation, global warming, acid rain and over-fishing. With respect to each issue, the Report defended free trade and pointed to market and government policy failures as the "root causes" of environmental

167. *Id.*

168. Vienna Convention, *supra* note 144, art. 30(4).

169. European Commission, *EU and Chile Reach an Amicable Settlement to End WTO/ITLOS Swordfish Dispute*, (Jan. 25, 2001) *at* http://europa.eu.int/comm/fisheries/news_corner/press/inf01_05_en.htm

170. Schiffman, *supra* note 3.

171. *Id.*

problems.[172] The report received a mild response from the environmental community, with some commentators calling it a helpful conceptual framework for environmental policymaking.[173] However, the Report was also criticized for being too timid and not addressing the real link between trade liberalization and environmental degradation.[174]

While the Report's positive endorsement of free trade was expected, the Report did contain a startling, if often overlooked, innovation. For the first time, the WTO explicitly recognized the importance of MEAs[175] Of the 200 or so existing MEAs, the Secretariat noted that about 20 of them had the potential to affect free trade.[176] Agreements such as the Montreal Protocol for the protection of the ozone layer and the Convention on International Trade in Endangered Species (CITES) allow countries to ban or restrict trade for the purpose of environmental protection. Although these and other MEAs clearly violate WTO obligations, the Secretariat explicitly endorsed their use. According to the WTO, such agreements compliment the WTO's own objective of seeking internationally accepted solutions to trade and environmental issues.

MEAs are a valuable form of environmental regulation because they are by nature multilateral and tend to foster cooperation as opposed to conflict.[177] The WTO took a significant cooperative step by promising not to intervene in trade-related disputes when it is clear that an MEA governing the issue exists between the parties. The WTO adamantly states that it is not an environmental agency, nor do its Members want it to intervene in national or international environmental policies or to set environmental standards.[178] Rather, the WTO is content to leave such issues, and the negotiation of separate environmental agreements, to individual Members. Conceivably, this relegation might include UNCLOS matters or other agreements in furtherance of UNCLOS provisions. Of course, any such agreements must be

172. HAKAN NORDSTROM & SCOTT VAUGHAN, TRADE AND ENVIRONMENT, WTO SPECIAL STUDIES 4 (1999), *at* http://www.wto.org/english/tratop_e/envir_e/environment.pdf.

173. *Id.* at 26.

174. Steve Charnovitz, *World Trade and Environment: A Review of the New WTO Report*, 12 GEO. INT'L ENVTL. L. REV. 523, 525 (2000).

175. *Id.* at 539-41.

176. NORDSTROM & VAUGHAN, *supra* note 173, at 88-91

177. Understanding the WTO, *supra* note 41.

178. *Turtle Wars*, *supra* note 2.

precisely worded to meet Article 281 and 282 requirements if the parties hope to utilize UNCLOS dispute resolution as an alternative to the WTO.

On a final note, the section of the Report dealing with over-fishing is particularly pertinent to UNCLOS. The WTO Secretariat found that subsidies given to the fishing industry are too common and encourage over-fishing and poor management of ocean resources.[179] Those involved with UNCLOS mention this finding as a primary source of agreement between the two regimes.[180] They point out that a global market characterized by subsidized overcapacity is undermining those countries maintaining sustainable fisheries.[181] Whatever critics might accuse the WTO of failing to do, it is certainly the most effective body for reducing trade-distorting subsidies. This is certainly one area in which WTO principles clearly support environmental protection.[182]

B *The Wisdom and Efficacy of Trade Measures to Protect the Environment*

Perhaps the most articulate critique of the WTO highlights the tension between basic WTO obligations and the need to protect the "global commons," including oceans. While the WTO clearly prefers multilateral solutions, such solutions may give rise to collective action problems.[183] It is clearly in the best interest of all nations to preserve the global commons; however, because the global commons belong to no single nation, individual countries may have little incentive to engage in responsible use.[184] There is also the related "free rider" problem that hampers international cooperation. For example, even if several nations agree to work together—for example, by forming a regional environmental agreement to control the harvesting of swordfish—other nations that are not members of the agreement might continue to harvest swordfish at an unsustainable level. Imposing trade restrictions can be an effective method of minimizing the benefits enjoyed by

179. *Id.*

180. NORDSTROM & VAUGHAN, *supra* note 173, at 21-24.

181. *See generally*, Thorir Ibsen, *Sustainable Fisheries: The Linkages with Trade and the Environment*, LINKAGES JOURNAL, (1999) *available at* www.iisd.ca/linkages/journal/ibsen.html.

182. *Id.*

183. HUNTER ET AL., *supra* note 98, at 679.

184. Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1054-55 (1994).

free riders, thus encouraging their participation in international conservation efforts.[185] Trade measures may also alleviate differentials in economic competitiveness that result from the implementation of environmental measures. Businesses often lobby their government to oppose environmental treaties on the grounds that they will be placed at a competitive disadvantage vis-à-vis nations that are not part of the agreement. By imposing trade measures on non-parties to the agreement, these disadvantages can be minimized.[186] As such, numerous commentators have concluded that WTO restrictions on the use of such trade measures present a serious handicap to the international community's efforts to protect the global commons.[187]

These arguments are persuasive and worth considering. However, the conclusion that the WTO imposes a general ban on trade restrictions for environmental protection is overstated—especially in light of recent WTO jurisprudence concerning Article XX exceptions. Likewise, the WTO's endorsement of bilateral, plurilateral, and multilateral agreements suggests an increasing acceptance of such measures. The "free rider" and collective action problems can also be overcome through effective enforcement mechanisms in these treaties.[188] Further, there are theoretical problems with using trade measures as a means of environmental protection. For example, when trade measures are based on the environmental practices of an exporting country, they only encourage responsible behaviour for export producers. Such measures have no impact on businesses producing products exclusively for the domestic market.[189] Moreover, the targeted country may opt to pay the price for lax environmental standards by reducing exports rather than changing its policies.[190]

It is also impossible to ignore the resentment that would result if a handful of nations attempted to impose strict environmental standards on the rest of the world. The U.S., for example, is not capable of single-handedly coercing the world into adopting extensive environmental measures.[191] The amount of resentment

185. *Id.* at 1055.
186. *Id.*
187. *Id.* at 1055-56.
188. *See, e.g., id.* at 1056-57.
189. *Why Greens Should Love Trade*, THE ECONOMIST, Oct. 7, 1999.
190. Robert Howse & Michael J. Trebilock, *The Fair Trade-Free Trade Debate: Trade, Labor and the Environment, in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW (Alan O. Sykes & Jagdeep S. Bhandari eds., 1998).
191. *Id.*

that would be inherent in such an attempt would likely derail future hopes of multinational environmental cooperation.[192] Even if other nations decided to help the U.S. by adopting similar environmental measures, the myriad conflicting national regimes would create a hopeless morass—each nation's system made further susceptible to being co-opted by domestic protectionist interests.[193] Finally, a frequently overlooked consequence of employing trade measures to further environmental protection is the possibility that a targeted nation might counter with equally damaging retaliatory measures.[194] This "tit-for-tat" scenario could quickly degenerate into a multitude of trade wars with devastating economic consequences. The resulting economic hardships would further compound the difficulties that developing nations face in instituting meaningful measures for environmental protection.

1 Unilateral Measures Under UNCLOS and the WTO

For the aforementioned reasons, the general bias against unilateral measures in both the WTO and UNCLOS is hardly lamentable. Rather, the convergence of views on this essential point represents an important aspect of reconciliation between the two. As McLaughlin persuasively points out, coercive trade measures might, in fact, violate UNCLOS provisions, particularly Article 300 requirements of "good faith" and "abuse of rights."[195] Article 300 states:

> States Parties shall fulfill in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.

If a UNCLOS party enacted a unilateral trade measure and later refused to participate in a dispute settlement proceeding brought by another aggrieved party challenging the legality of the measure, the former party may very well be in violation of the "good faith" requirement.[196] Moreover, if the purpose behind a unilateral trade measure is to pressure another party into adopting environmental measures similar to its own, then the measure may also constitute an "abuse of right" under Article

192. Strauss, *supra* note 33, at 797.
193. *Id.*
194. *Id.* at 798.
195. *Id.* at 799.
196. McLaughlin, *supra* note 143, at 63-69.

300.[197] Although commentators acknowledge that "good faith" and "abuse of right" requirements remain amorphous terms in international law, the above analysis suggests an interesting dilemma.[198] Nations such as the U.S. that favour the use of unilateral trade measures could face significant scrutiny under UNCLOS. As such, UNCLOS does not necessarily represent the panacea that some have hoped for. More realistically, membership in UNCLOS, similar to the WTO, implies an obligation to engage in negotiation, cooperation, and multilateral action.

C *A Broader View of Things*

WTO Agreements contain surprisingly little discussion about resolving conflicts with other treaties.[199] As discussed previously, guidance in this respect can be found in general principles of international law—including the Vienna Convention. Rather than viewing the WTO as the dominant legal regime, international law suggests that WTO trade-liberalizing rules are simply *lex generalis*, permitting the continuation or development of other more detailed rules.[200] This approach looks remarkably similar to the "umbrella approach" of UNCLOS, which incorporates other environmental treaties within the broad scope of its obligations.[201] WTO Panels could be compelled to give credence to more specific rules dealing with the environment. At the very least, WTO Panels might interpret WTO obligations in light of Members' competing obligations under other international instruments.

Although sceptics doubt whether the WTO is capable of such a modest application of its own rules, in the author's opinion, it is unlikely a Panel would flout international law for the purpose of asserting the supremacy of a WTO obligation. The WTO is not a hermetically sealed regime incapable of considering other treaties and aspects of international law.[202] To the contrary, WTO Panels frequently refer to outside sources and customary international law when interpreting WTO agreements.[203] Even the *Shrimp-Turtle* case is evidence of this tendency. The Appellate Body interpreted the term "exhaustible natural resources" con-

197. *Id.* at 66.
198. *Id.* at 68.
199. *Id.*
200. Pauwelyn, *supra* note 147, at 544.
201. *Id.* at 540.
202. Guruswamy, *supra* note 31, at 292.
203. John H. Jackson, *Fragmentation or Unification Among International Institutions: The World Trade Organization*, 31 N.Y.U.J. INT'L L. & POL. 823, 828 (1999).

tained in Article XX with reference to UNCLOS, the Convention on Biological Diversity, and CITES.[204] Moreover, DSU Article 11 also supports the competence of Panels to examine WTO claims, even if non-WTO rules are of crucial or higher importance in the context of the wider dispute.[205] This provision directs Panels to "make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[206]

Perhaps most importantly, the WTO should not be viewed as the sole forum for dispute resolution in all trade-related disputes.[207] The near judicial monopoly that the WTO has exercised to this point is no fault of its own given the underdeveloped nature of alternative dispute resolution fora. Nevertheless, the recent proliferation of alternatives provides a unique opportunity to broaden the options available for parties seeking resolution to trade-related environmental disputes. In today's increasingly interdependent world, WTO rules aimed fundamentally at liberalizing trade have the potential to impact numerous other segments of society and law.[208] While it is possible to characterize these disputes as "trade-related," the central issues therein might arise under other multilateral agreements. It is imperative that these agreements contain their own dispute resolution processes in order to offer parties an alternative to the WTO. At the very least, MEAs that potentially conflict with WTO obligations would greatly benefit from the addition of a conflicts clause that specifically establishes their relationship to the WTO.[209] This approach was used successfully in the recently concluded Biosafety Protocol establishing international procedures for the transboundary movement of genetically modified plants and animals.[210]

D *Using the WTO and UNCLOS Together?*

Commentators have also suggested that hitherto ignored WTO rules may actually contain untapped potential for environmental

204. *Id.* at 828-29.

205. Pauwelyn, *supra* note 147, at 572-573.

206. *Id.* at 557.

207. *DSU, supra* note 25, art. 11

208. *Why Greens Should Love Trade, supra* note 190.

209. Pauwelyn, *supra* note 147, at 539.

210. Bradley Condon, *Multilateral Environmental Agreements and the WTO: Is the Sky Really Falling?*, 9 TULSA J. COMP. & INT'L L. 533, 566 (2002).

protection.[211] By drawing on rules of international law from outside the WTO, this potential could be realized. For example, the WTO often considers so-called "non-violation" cases. These cases involve trade concessions granted by one Member to another in which the benefits that would normally accrue are nonetheless "nullified or impaired" by subsequent action. However, suppose one Member grants a trade concession to another Member—say, reduced tariffs on the importation of sardines—and the exporting Member realizes a benefit as a result. Subsequently, imagine that the granting Member begins to over-fish their waters for sardines, thus driving down the domestic price of sardines, and nullifying the benefit that the receiving country expected. The receiving country could argue that over-fishing for sardines violates UNCLOS provisions. When the trade concession was granted, the granting Member reasonably assumed that the receiving Member would continue to observe its UNCLOS obligations. The granting Member's subsequent violation of UNCLOS nullifies or impairs the effect of the WTO tariff concession. If the case is pursued at the WTO, the Panel would need to determine whether over-fishing of sardines violates UNCLOS. Assuming that it does, the Panel would then determine whether the violation—despite being a non-WTO environmental violation—nullifies the benefit of the trade concession. Assuming again that it does, two things are accomplished. First, the WTO will have explicitly recognized the applicability of a non-WTO environmental obligation between Members. Second, the WTO's DSU might be used as an enforcement mechanism for such obligations.

E *What the WTO Can Learn From UNCLOS*

Previous sections have suggested that reconciliation between the WTO and UNCLOS might be closer than some have thought, based on concepts in international law and previously ignored WTO provisions. It is also worth considering possible reforms to the WTO in light of changing attitudes towards environmental protection. Modern environmental problems often take on global characteristics that require global solutions. While the cooperative thrust of the WTO can serve as a model for a new global architecture of environmental cooperation, several im-

211. Sabrina Safrin, *Treaties in Collision?: The Biosafety Protocol and the World Trade Organization Agreements*, 96 AM. J. INT'L L. 606, 614-618 (2002).

provements are first necessary to ensure more emphasis is placed on environmental protection.[212] In this respect, UNCLOS is instructive.

WTO Panels must become more accommodating to outside sources of law. Consider UNCLOS Article 293, which gives tribunals a broad mandate to "apply this Convention and other rules of international law not incompatible with this Convention." One suggestion to improve accommodation is to alter the rules determining the composition of WTO Panels.[213] The WTO specifies that panellists should possess "a sufficiently diverse background and a wide spectrum of experience."[214] This specification should presumably allow for the selection of more panellists with expertise in international environmental law. Moreover, in assessing non-WTO rules, Panels should enlist the help of other international bodies through DSU Article 13(1).[215] The provision allows Panels to "seek information and technical advice from any individual or body which it deems appropriate."[216]

On a related point, the WTO must become more accepting of outside expert advice, especially in the form of *amicus curiae* briefs. Although the WTO has pledged to make the dispute resolution process more accessible to NGOs, such reforms have been limited. To its credit, the WTO has turned to expert advice in the form of scientific testimony. For example, the Panel in *Shrimp-Turtle* assembled a collection of marine biologists to assist in its ruling.[217] Notwithstanding, the WTO still has an uneasy relationship with NGOs. In the *Asbestos Case*, for instance, the Appellate Body made a significant effort to lay down procedures for receiving and evaluating *amicus* briefs filed by NGOs. Unfortunately, Members reacted negatively, and the Appellate Body subsequently reversed course, rejecting the NGO briefs.[218]

A final area for consideration involves the availability of provisional measures. The WTO has never granted provisional relief

212. Pauwelyn, *supra* note 147, at 559.

213. Jane I. Yoon, *The World Trade Organization: Environment Police?*, 9 CARDOZO J. INT'L & COMP. L. 201, 221 (2001).

214. Winter, *supra* note 6, at 251.

215. *Id.* (quoting WTO Agreement Annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes), art. 8, *reprinted in* 33 I.L.M. 1125, 1226-47 (1994)).

216. *DSU, supra* note 25, art. 13(1).

217. Pauwelyn, *supra* note 147, at 558.

218. *Turtle Wars, supra* note 2.

in a trade dispute, let alone a dispute involving environmental issues. As the *Tuna-Dolphin* and *Shrimp-Turtle* cases demonstrate, such relief might be particularly appropriate in situations where the contested trade measure is designed to prevent the imminent extinction of a species. In such cases, relief should be available when it can be shown that irreparable harm will occur in the interim period before international cooperative agreements can be established. Naturally, provisional relief would only be temporary, pending a full hearing on the merits of the case. Additionally, provisional measures might be based on the precautionary principle. While debate persists over whether the precautionary principle has assumed the status of customary international law, it could eventually become a basis for provisional measures at the WTO.[219] Although the final ruling in the *SBT Case* was disappointing, the ITLOS established useful precedent with respect to the precautionary principle.

VII
CONCLUSION

This article has suggested that reconciliation between the WTO and UNCLOS is both desirable and feasible. Desirable because the interests of environmental protection are not served if two of the world's most prominent international legal regimes were to collide in fundamental disagreement. Feasible because multilateralism is the fundamental trait characterizing both regimes.

With respect to the WTO, significant progress has been made in expanding Article XX exceptions for environmental protection. WTO jurisprudence has been augmented by the endorsement of MEAs as a vehicle for environmental protection. While perhaps remaining deficient in the eyes of some, these developments suggest a trend toward ever greater acceptance of environmental measures. This is no small feat given that the basic obligations of the WTO were negotiated in 1947 with only minor consideration of environmental concerns. As such, environmentalists must have patience with the WTO. According to one commentator, although battles may have been lost, the "prospects look good for winning the war."[220]

219. Bhala & Gantz, *supra* note 94, at 516.

220. Sumudu Atapattu, Book Review, 96 AM. J. INT'L L. 1016, 1017-18 (2002) (doubting that the precautionary approach has reached the status of customary international law, citing insufficient evidence of state practice).

UNCLOS, on the other hand, faces a different challenge. As a creature of the modern environmental movement, its numerous provisions establish its credentials as a vital component of international environmental law. The challenge for UNCLOS lies not in its attention to environmental issues, but in the meaningful implementation and enforcement of its provisions. While the "umbrella approach" of UNCLOS is commendable in its breadth, the lynchpin is the cooperation of Members under other treaties and international agreements in carrying out UNCLOS obligations. The precise relationship between these agreements and UNCLOS is unsettled, as demonstrated by the reluctance of tribunals to find jurisdiction in cases touching on both UNCLOS and outside agreements.

If a case arises that brings the WTO and UNCLOS into direct conflict, rules of treaty interpretation would be helpful in determining the appropriate forum and applicable laws under which to consider the dispute. However, such rules are unlikely to provide a definitive answer. In the end, a viable solution will necessarily involve cooperation between both regimes. The WTO can learn much from UNCLOS provisions that devolve authority to its members for carrying out UNCLOS obligations. UNCLOS can learn from the highly developed, rule-based procedures for settling disputes within the WTO. As vital components of international law, both regimes have a contribution to make in crafting an effective, fair, and comprehensive approach to environmental protection.

Tuna, Dolphins, and Purse Seine Fishing in the Eastern Tropical Pacific: The Controversy Continues

Denis A. O'Connell[1]

Like peace, the real work of saving the ocean is not only carried out in diplomatic chambers and government offices. It is carried out in the hearts and hands of the people.[2]

INTRODUCTION: DOLPHIN DEATHS AND THE MARINE MAMMAL PROTECTION ACT

During the early 1970's, a historic peak in the environmental movement, fueled by public outrage and activism, resulted in the passage of several new U.S. laws designed to protect the environment. Congress enacted the Marine Mammal Protection Act (MMPA)[3] in 1972 to address, among many problems concerning marine mammals, the large number of dolphins killed by the purse seine method of fishing for yellowfin tuna in the eastern tropical Pacific Ocean (ETP),[4] a 5 to 7 million square-mile area of ocean that extends roughly from Southern California to the Chilean coastline, and west to Hawaii.[5]

The MMPA established a moratorium on the taking (or killing) and importation of marine mammals, including dolphins, except those taken incidentally during commercial fishing operations.[6] Recent MMPA amendments have reiterated the

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2. ANATOLY SAGALEVITCH, *Epilogue to* SAVING THE OCEANS 157 (Joseph MacInnis ed., Key Porter Books 1992).

3. 16 U.S.C. §§ 1361 et. seq.

4. Earth Island Inst. v. Mosbacher, 929 F.2d 1449, 1453 (9th Cir. 1991).

5. *Brower v. Evans*, 257 F.2d 1058, 1061 (9th Cir. 2001).

6. 16 U.S.C. § 1371 (a)(2) (2004).