



[Public Administration Magazine](#)

Print version ISSN 0034-7612

Rev. Adm. Pública vol.49 no.6 Rio de Janeiro Nov./Dec. 2015

[Http://dx.doi.org/10.1590/0034-7612139082](http://dx.doi.org/10.1590/0034-7612139082)

**ARTICLES**

**Sustainable development in the World Trade Organization's Dispute Settlement Body: demolishing myths and barriers**

**Sustainable Development Issues in the Dispute Settlement Body of the World Trade Organization: breaking down myths and barriers**

**Sustainable development in the World Trade Organization Dispute Settlement Body: breaking myths and barriers**

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**SUMMARY:**

The notion of sustainable development includes social justice, income distribution, full employment, safety and health in the workplace, environmental protection and socio-economic well-being. This article presents a comparative analysis of the disputes brought to the WTO, since the entry into force of the institution 1<sup>st</sup> January 1995 to 1<sup>st</sup> January 2014, related elements of sustainable development. The aim is to examine the extent and nature of the

concept of sustainable development in the WTO dispute settlement system through the WTO "jurisprudence" reviews. It is a fact that the WTO will, in the near future, face challenges linked to the notion of sustainable development. The WTO's ability to reconcile multilateral trade liberalization with sustainable development in its dispute settlement system is a central concern of the legitimacy of this institution.

**Keywords:** WTO; sustainability; sustainable development; Dispute settlement body

## **ABSTRACT:**

The notion of sustainable development includes social justice, income distribution, full employment, health and safety at work, protection of the environment and socio-economic well-being. This article presents a comparative analysis of the disputes raised in the WTO from the entry into force of the institution from 1 January 1995 to 1 January 2014 and issues related to sustainable development present in many of these disputes. The article seeks to examine the scope and nature of the concept of sustainable development in the WTO dispute settlement system by examining WTO jurisprudence. There is no denying that many challenges that the WTO system will have to face in the near future are linked to the notion of sustainable development. The possibility of reconciling WTO multilateral trade liberalization with sustainable development is a central concern for the legitimacy of this institution.

**Palabras clave:** WTO; Sustainability; Sustainable development; Dispute settlement body

## **ABSTRACT:**

The concept of sustainable development includes social justice, equal income distribution, full employment, safe and healthy working environments, environmental protection and socio-economic welfare. This paper intends to Provide a comparative analysis of sustainable development issues inside the WTO dispute system based on the analysis of the cases presented to WTO since January 1<sup>st</sup> 1995 until January 1<sup>st</sup> 2014. This paper Proposes to analyze the extent and nature of the incorporation Of sustainable development issues in WTO dispute settlement of the WTO case law. No one can deny that the WTO will face in the near future challenges related to sustainable development issues. The WTO's ability to reconcile multilateral trade liberalization with sustainable development in its system of dispute is central to the institution's legitimacy.

**Key words:** WTO; Sustainability; Sustainable development; Dispute settlement body

## **1. INTRODUCTION**

At the end of the 20th century, the World Trade Organization (WTO) was created as a result of the Uruguay Round of multilateral trade negotiations. The fundamental value of the WTO is the liberalization of trade in goods, services and aspects related to intellectual property ( [Flory, 1999](#) : 29; [Jackson, 2000](#) : 34; [Hudec, 2002](#) : 82; [Amaral Júnior, 2002](#) ; [Thorstensen, 2003](#) : 78 ). The notion of sustainable development is not present in the themes outlined in the WTO Agreements. However, it can not be denied that sustainable development is linked to trade liberalization. It is a fact that trade liberalization and sustainable development are interrelated. One can not advance on one side without concomitantly protecting the other. So much so that the WTO Agreements bring a total of 155 provisions to developing countries and their chronic development problems. For a long time, however, the connection between subjects, apparently so distinct, was not even mentioned.

Sustainable development within the framework of the WTO is included in the Preamble to its Constituent Agreement, which expressly recognizes that the Member States

The rise in living standards, full employment and a considerable and steadily rising real income and effective demand, increased production and trade in goods and services, while allowing the optimal use of the world's resources accordingly With the goal of sustainable development.

Similarly, the Doha Declaration reaffirms the commitment of the WTO member countries to sustainable development ( [Cesar and Sato, 2012](#) : 174) and adds that

(...) the aim of sustaining and safeguarding an open and non-discriminatory multilateral system, and acting to protect the environment and promote sustainable development can and should be mutually supportive.

(...)

We recognize that, under WTO rules, no country should be prevented from taking measures to protect human, animal or plant life or health or the environment at such levels as it deems appropriate, provided they are not used Such as to constitute a form of arbitrary and unjustified discrimination between countries where the same conditions should prevail or a disguised restriction on international trade and otherwise be in accordance with the provisions of the WTO Agreements.

The liberalization of international trade in goods, services and intellectual property can only work effectively on an efficient dispute resolution mechanism ( [Petersmann 2005](#) ). This is because, as well remembers Luiz Olavo Baptista, "legal certainty is a fundamental fact in the relations between human beings" ( [Baptista, 2007](#) : 19), and such security if totals through an efficient system of conflict resolution. The Dispute Settlement Body (DSB), created to play this role, has responded appropriately to expectations. The compulsory jurisdiction of all member countries granted to the OSC, together with the possibility of sanctions, was a major breakthrough in the history of international law ( [Baptista, 2007](#) : 17). The WTO has "teeth" - to use the expression that made his fortune in the specialized doctrine - but it can only "bite" in the presence of violation of their agreements, breaches those reflected in discriminatory leading to obstruct world trade ( [Faini and Grilli 1997](#) : 102, [Hudec, 2002](#) : 84; [Costa, 2005](#) : 167). Extending this golden rule to embrace the notion of sustainable development, which is only present obliquely in the WTO Agreements, could jeopardize the well-crafted mechanism of dispute resolution.

But if WTO member countries recognize that sustainable living standards should be pursued with a view to raising living standards, full employment, complying with internationally recognized labor standards, economic growth, global resources, the question that arises is whether the WTO can bring real media, *de jure* and *de facto* , protection to the notion of sustainable development. *A priori* , the answer is negative. There is no agreement in the WTO that aims to establish rights and obligations for sustainable development. The myth that the WTO can do anything because of the institution's possibility of retaliation has limits. The adage *nulla poena sine lege* must never be forgotten. The WTO Agreements deal only obliquely with the notion of sustainable development. As there "is no right without obligation, and there is neither right nor obligation without a rule of conduct" ( [Bobbio, 2004](#) : 18), force is to note that the WTO has no institutional competence to respond to judicial protection aspirations sought by the notion Sustainable development.

However, since the entry into force of the WTO on 1<sup>th</sup> January 1995 its paísesmembrós bring in their arguments legal concepts related to sustainable development before the OSC. Just remember the first decision by the OSC in the case *United States: standards for reformulated and conventional gasoline*. In view of this, we ask whether it is indeed possible for the WTO to protect this universality of values called sustainable development, despite the silence of its covered Agreements. In other words, if the CSO, in examining possible violations of the WTO Agreements, can legally "impose" respect on the concepts of sustainable development in the member countries, would we be breaking down certain WTO barriers and limits? In order to respond to these inquiries, we will first examine the arguments relating to sustainable development in the disputes brought to the OSC by the member countries. Next, we will examine the treatment given by the CSO to the arguments related to sustainable development in the respective disputes. On the basis of the results obtained, in conclusion, we suggest the precautions that must be taken in the implementation of the concept of sustainable development within the framework of the WTO.

## 2. The concept of sustainable development

In 1964, Andrew Philip said in his speech at the UN Conference on Trade and Development (UNCTAD), the importance of the right to development ( [Philip, 1964](#) : 23). Later, the classic work, *Towards the international law of development*, highlighted "the gap now existing between developing and developed countries, [which is] to grow gradually until it promotes a complete transformation of the economic policies International" ( [Virally 1965](#) : 8). In the 1970s, the Club of Rome report [in 1972](#), *The Limits of growth*, warns of the increasing industrialization, uncontrolled growth of world population, the shortage in food production and the extensive use of natural resources, and calls for the Humanity to become worried about the "limits of growth of the planet". In the same year, the Stockholm Conference on the Human Environment of the United Nations brings a global debate, for the first time, on environmental issues.

Later in the report *Our common future* of the World Commission on Environment and Development (Brundtland Report, 1987), comes a wide and very flexible definition of sustainable development. *Our common future* calls for a political transformation taking into account the problems related to environmental degradation in addition to problems related to social and economic development. Thus, the notion of sustainable development is understood as development that seeks to answer "the current and present needs of mankind, without compromising, however, the needs of future generations" ( [Brundtland Report, 1987](#) ). From this perspective, the "establishment of sustainable conditions of ecological and economic stability for the future" becomes the ideal sought by all ( [Brundtland Report, 1987](#) ).

It is a fact that this broad notion does not prevail for clarity in its definition and for this reason has been and is, until today, much criticized. Anyway, for [Oliveira and Santos \(2015](#) : 192), sustainable development is a process variable approach to long-term sustainability condition. Almost in the same direction, [Dovers and Handmer \(1992](#) ) argue that sustainable development is an endogenous change in the way that maintains or increases the sustainability attribute, to meet the needs of today's population. For Veiga (2007: 60), sustainable development is the situation where "economic growth respects the limits of nature rather than destroying its ecosystems," offering "a chance for future generations that they can progress as well." It is possible to affirm that there is no unanimity in the doctrine for a definition of sustainable development, given the complexity of the theme.

In any case, the adoption of *Our common future* by the international community is recognized as the moment that sustainable development has become a global policy objective ( [Cordonier Segger and Khalfan, 2004](#) : 19; [Schrijver and Weiss, 2004](#) : 13; [Vizeu et al, 2012](#) : 574). There are three variables that are highlighted in the elaboration of the concept of sustainable development by most of the doctrine: aspects related to human and labor rights; Socioeconomic aspects and aspects related to the environment. In short, sustainable development seeks to improve the human quality of life globally and primarily taking into account three aspects - human rights, socio-economic and environmental - for the present generation and for future generations ( [United Nations, 2001](#) ; [Van Bellen, 2010](#) ).

Recent doctrine proclaims the emergence of a new branch of international law, international law of sustainable development ( [French, 2005](#) : 20; [Cordonier Segger and Khalfan, 2004](#) : 46; [Schrijver and Weiss, 2004](#) : 13; [Lowe, 2001](#) : 36; [Costa 2009](#) : 101; [2013](#) : 239). Based on this doctrine, international law on sustainable development seeks to protect, at the international level, the integration and adaptation of legal rules to achieve social justice, economic development and environmental protection. Without wishing to bring to the discussion the emergence or not of a new branch of international law, it is possible to affirm that the concept of sustainable development is treated by an increasing number of international treaties and conventions, both in relation to aspects related to human and labor rights , Regarding socioeconomic aspects and aspects related to the environment. We do not intend to mention here all the legal instruments, but we think, particularly next to [the WTO Agreement](#) , the Universal Declaration of Human Rights, the [UN Stockholm Declaration on the Human Environment 1972](#) , the ILO Core Conventions , The International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the 1992 UN Rio Declaration on Environment and Development, the Johannesburg Declaration on Sustainable Development 2002. These treaties and conventions Are mentioned and mentioned in the WTO dispute, in the disputes brought by the member countries to the CSO. It is on the basis of these legal instruments, therefore, that the concept of sustainable development can be argued in the context of the WTO, despite the lack of a specific agreement on the subject.

### 3. METHODOLOGY

The appreciation of the concept of sustainable development in the WTO is examined in the light "case law", through the analysis of the disputes brought to litigation OSC ( [Yin, 1989](#) ; [Eisenhardt, 1989](#) : 532). In order to identify the aspects related to sustainable development in the CSO dynamics, that is, the aspects related to the tripod human and labor rights, socioeconomic aspects and aspects related to the environment, the qualitative methodology was chosen, judging the most appropriate. This is because the verification of the frequency of occurrence of recurrent phenomena, typical of the quantitative method, is not fully effective for the full understanding of these aspects in the WTO legal dispute that deals with the concept of sustainable development. It is a fact that the disputes brought by the WTO member countries are not exactly identical. However, the criteria related to sustainable development are similar, therefore allowing the use of the study of cases "jurisprudence" by the comparative method ( [Collier, 1993](#) ).

To achieve the goal proposed here, we examined 474 disputes submitted to the OSC, since the entry into force of the WTO on 1<sup>st</sup> January 1995 to 1<sup>st</sup> January 2014. The disputes were selected from the WTO website, which lists all The disputes brought by its member countries, since the institution's entry into force. Disputes that were brought to the DSB but that remain outstanding result by 1<sup>st</sup> January 2014, ie at the stage of consultations, the appointment of panelists or without the publication of a panel report, were not

considered, since there is no How to examine whether the parties have used arguments related to sustainable development at this stage. In a second moment, after examining the 474 disputes, the disputes that brought in their legal arguments elements related to the notion of sustainable development were selected. The disputes were selected and classified taking into account the three fundamental topics present in the notion of sustainable development, namely: protection of human and labor rights, socioeconomic aspects and environmental aspects. An examination was then carried out, both in form and content, to verify how the CSO decided these disputes in relation to legal arguments related to sustainable development, since such arguments are only present in the WTO agreements obliquely. In most cases brought to the CSO, the main argument for the notion of sustainable development is based on the exceptions of art. XX of the Gatt-94 Agreement, the exceptions of art. XIV of the Gats Agreement and the exceptions of art. 27 of the TRIPS Agreement. In addition, other Agreements covered may be cited, such as the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade. As already explained, the WTO does not have, among all its Agreements covered, any agreement specifically dealing with sustainable development, just as there is no agreement on protection of the environment. Thus, the aspects related to sustainable development brought by the member countries in their disputes at the CSO were made indirectly. At the end of the analysis, it was possible to ascertain the extent of the presence of elements related to sustainable development within the scope of the CSO, as well as the way in which the disputes brought by the member countries concerning the arguments brought about sustainable development were decided.

#### **4. Sustainable development in disputes brought to the OSC**

The dynamic "jurisprudential" WTO gives the OSC the task of interpreting the WTO Agreement, as determined by the Understanding [on Rules and Procedures Governing the Settlement of Disputes](#) (Understanding). It represents the basis of the WTO dispute settlement system. Among its functions, it is the responsibility of the CSO to establish the Panels and to monitor the implementation of the recommendations of the Panels and the Appellate Body by member countries and the retaliation or suspension of concessions or obligations.

Practice shows that the OSC has played the role assigned to it, effectively ( [Ramanzini Junior and Viana, 2012](#) : 48). To corroborate this statement, just remember that 474 disputes were submitted to the OSC, since the entry into force of the WTO on 1<sup>st</sup> January 1995 to 1<sup>st</sup> January 2014. In just over 18 years, the WTO has had , Proportionately, a greater number of disputes than the old Gatt, in its almost 50 years of life. This demonstrates the confidence that member countries have in the WTO dispute settlement system.

To investigate the universality of values that includes the notion of sustainable development present in the WTO litigation, we analyze the 474 disputes submitted to the [OSC](#) , since the entry into force of the WTO on 1<sup>st</sup> January 1995 to 1<sup>st</sup> January 2014. From Total of 474 disputes, were found in only 46 of the arguments involving notions of sustainable development. The first conclusion to be drawn is that "jurisprudence" involving the subject is not representative, accounting for only 13% of the total number of disputes submitted to the CSO.

DS 2: United States – standards for reformulated and conventional gasoline

DS 18: Australia – measures affecting importation of salmon

DS 26: European Communities – measures concerning meat and meat products

DS 27: European Communities – regime for the importation, sale and distribution of bananas

DS 31: Canada – certain measures concerning periodicals

DS 44: Japan – measures affecting consumer photographic film and paper

DS 46: Brazil – export financing programme for aircraft

DS 50: India – patent protection for pharmaceutical and agricultural chemical products

DS 58: United States – import prohibition of certain shrimp and shrimp products

DS 60: Guatemala – anti-dumping investigation regarding portland cement from Mexico

DS 70: Canada – measures affecting the export of civilian aircraft

DS 76: Japan – measures affecting agricultural products

DS 79: India – patent protection for pharmaceutical and agricultural chemical products

DS 89: United States – anti-dumping duties on imports of colour television receivers from Korea

DS 90: India – quantitative restrictions on imports of agricultural, textile and industrial products

DS 103: Canada – measures affecting the importation of milk and the exportation of dairy products

DS 113: Canada – measures affecting dairy exports

DS 114: Canada – patent protection of pharmaceutical products

DS 132: Mexico – anti-dumping investigation of high-fructose corn syrup (hfcs) from the United States

DS 135: European Communities – measures affecting asbestos and products containing asbestos

DS 174: European Communities – protection of trademarks and geographical indications for agricultural products and foodstuffs

DS 176: United States – Section 211 omnibus appropriations Act of 1998

DS 193: Chile – measures affecting the transit and importing of swordfish

DS 236: United States – preliminary determinations with respect to certain softwood lumber from Canada

DS 245: Japan – measures affecting the importation of apples

DS 246: European Communities – conditions for the granting of tariff preferences to developing countries

DS 247: United States – provisional anti-dumping measure on imports of certain softwood lumber from Canada

DS 257: United States – final countervailing duty determination with respect to certain softwood lumber from Canada

DS 267: United States – subsidies on upland cotton

DS 290: European Communities – protection of trademarks and geographical indications for agricultural products and foodstuffs

DS 291: European Communities – measures affecting the approval and marketing of biotech products

DS 292: European Communities – measures affecting the approval and marketing of biotech products

DS 293: European Communities – measures affecting the approval and marketing of biotech products

DS 308: Mexico – tax measures on soft drinks and other beverages

DS 315: European Communities – selected customs matters

DS 320: United States – continued suspension of obligations in the EC – hormones dispute

DS 321: Canada – continued suspension of obligations in the EC – hormones dispute

DS 332: Brazil – measures affecting imports of retreaded tyres

DS 362: China – measures affecting the protection and enforcement of intellectual property rights

DS 381: United States – measures concerning the importation, marketing and sale of tuna and tuna products

DS 386: United States of America – certain country of origin labelling requirements

DS 391: Korea, Republic of – measures affecting the importation of bovine meat and meat products from Canada

DS 398: China – measures related to the exportation of various raw materials

DS 401: European Communities – measures prohibiting the importation and marketing of seal products

DS 406: United States of America – measures affecting the production and sale of clove cigarettes

DS 430: India – measures concerning the importation of certain agricultural products from the United States

Source: [WTO \(2015\)](#)

**Table 1:** List of the 46 disputes related to sustainable development submitted to the OSC

Links: [DS 2](#) ; [DS 18](#) ; [DS 26](#) ; [DS 27](#) ; [DS 31](#) ; [DS 44](#) ; [DS 46](#) ; [DS 50](#) ; [DS 58](#) ; [DS 60](#) ; [DS 70](#) ; [DS 76](#) ; [DS 79](#) ; [DS 89](#) ; [DS 90](#) ; [DS 103](#) ; [DS 113](#) ; [DS 114](#) ; [DS 132](#) ; [DS 135](#) ; [DS 174](#) ; [DS 176](#) ; [DS 193](#) ; [DS 236](#) ; [DS 245](#) ; [DS 246](#) ; [DS 247](#) ; [DS 257](#) ; [DS 267](#) ; [DS 290](#) ; [DS 291](#) ; [DS 292](#) ; [DS 293](#) ; [DS 308](#) ; [DS 315](#) ; [DS 320](#) ; [DS 321](#) ; [DS 332](#) ; [DS 362](#) ; [DS 381](#) ; [DS 386](#) ; [DS 391](#) ; [DS 398](#) ; [DS 401](#) ; [DS 406](#) ; [DS 430](#)

Of these 46 disputes, more than 50% of them were proposed between 1995 and 1999; almost 40% of disputes were proposed between 2000 and 2004 and even 10% of [disputes were proposed between the years 2005-2014](#) .

**Table 1** Dispute for periods of time

Período	Nº de Casos
Casos OMC e Desenvolvimento Sustentável: 1995-99	23
Casos OMC e Desenvolvimento Sustentável: 2000-04	15
Casos OMC e Desenvolvimento Sustentável: 2005-14	8
<b>TOTAL</b>	<b>46</b>

Source: [WTO \(2015\)](#) . Data analysis performed by the author.

Still, as an example, we mention some examples of aspects related to the notion of sustainability found in the aforementioned 46 selected disputes. Read in the case *United States - standards for reformulated and conventional gasoline* , that "this rule aims to protect public health and welfare by reducing the emission of toxic pollutants." The protection of the environment and public health is part of the universality of values that make up the concept of sustainable development. Similarly, cites the case *Brazil - Measures Affecting imports of retreaded tires* , "the of Rio Grande do Sul authorities are concerned about the increase in imports of tires recycled in the state and the risks associated with environmental and health Public ".

The legal arguments are therefore related to two topics of the notion of sustainable development: protection of human and labor rights and environmental aspects.

It is worth noting also the case *United States - Import prohibition of Certain shrimp and shrimp products* . The Panel, stressing the "objective of sustainable development" and its relation to the environment, says that this objective is explicitly expressed in the Preamble to the WTO Agreement. The OSC says still in a *dictum* that: "Under Article XX (e), a signatory may prohibit or otherwise regulate trade in products made in prisons this case, a specific form of labor exploitation, is the target of Special treatment in the GATT ".

Still, related to the protection of human rights and the environment, we cite the case *Brazil - Export financing program for aircraft* : "(...) financing aircraft and other products that are 'friends-allies of the environment' or are made through labor standards 'fair' { fair } . " Similarly in relation to protection of human rights and the environment, we can mention other similar cases, namely: *Australia - Measures Affecting Importation of Salmon* ,



*European Communities - measures Concerning meat and meat products, United States - Import prohibition of Certain shrimp and shrimp products , Chile - provisional safeguard measure on Certain milk products, European Communities - Measures Affecting the approval and marketing of biotech products and European Communities - Measures Affecting asbestos and products containing asbestos .*

Regarding human and labor and socioeconomic rights, "leading case" which was the subject of examination by the OSC is *India - Quantitative restrictions on imports of agricultural, textile and industrial products* . In this dispute can be seen the preoccupation with "(...) the impact on wages and employment and, therefore, *ceteris paribus* , poverty too," due to the trade measure in dispute. Other disputes may be brought to the collation. In case *European Communities - conditions for the granting of tariff preferences to Developing Countries* can read the decision of the Appellate Body that: "According to the Andean Community, these are socio-economic consequences very well documented by the world's largest donor of international aid, the Development agencies and human rights organizations ".

Similarly the two previous disputes, the case *European Communities - selected customs matters* .

Also cites the case *European Communities - protection of trademarks and geographical indications for agricultural products and foodstuffs* :

Member States may, when formulating and amending their laws and regulations, adopt measures necessary for the protection of health and nutrition, and promote public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Wake up.

Taking into account only the environmental aspect, the case *China - measures related to the exportation of various raw materials* points out that:

China argued in its defense that export quotas and rates were justified for the conservation of exhaustible natural resources for some raw materials. But China has not been able to demonstrate that it imposes such restrictions on local production or consumption.

Similarly, it cites the case *Chile - Measures Affecting the transit and importing of swordfish* :

Chile and the European Communities will launch a joint initiative (...) to which all stakeholders in the fishing industry will be invited to promote multilateral cooperation for the conservation and management of these stocks throughout the period of migration.

Despite the environmental concerns raised in both disputes, as well as the series of references to the international treaties and conventions on environmental matters by the parties, the fact is that the measures at issue were purely and simply protectionist in nature and had no real purpose Protection of the environment and exhaustible natural resources and sustainable development as the ultimate goal.

Regarding the socioeconomic aspects related to sustainable development, several cases were brought to the CSO. Among them, he cites the case *European Communities - regime for the importation, sale and distribution of bananas* . In the arguments presented in this litigation, it is stated that:

It was essential for emerging economies to maintain future trade opportunities, even before "potentialities" become apparent. Otherwise, opportunities for trade promotion and development could forever be limited or excluded.

(...)

The banana industry is the largest source of foreign revenue and employs a significant portion of the Nicaraguan population.

As the concept of sustainability encompasses, on a tripod, phenomena related to third generation human rights, environmental and socioeconomic aspects, these phenomena appear concurrently in most of the 46 selected disputes. In most of the disputes examined, it was possible to see that more than one phenomenon related to the notion of sustainability was mentioned in the arguments of the parties to the dispute. Thus, in the same litigation, the parties brought arguments related to the environment, as well as to the protection of human and labor rights (public health or animal life). As an example, we remember the cases cited *United States - standards for reformulated and conventional gasoline* and *Brazil - Measures Affecting imports of retreaded tires*. Or, in the same dispute, we met reference to the tied economic development to environmental protection, as in the cases cited *Brazil - Export financing program for aircraft* and *United States - Import prohibition of Certain shrimp and shrimp products*. And so on. Few of the cases dealt with only one of the basic tripod arguments of the notion of sustainable development. With this result, it can be said that the notion of sustainable development brings together, in fact, a unique amalgam, social justice, income distribution, technological capacity, full employment, safe and healthy work environment, care for the environment and good -socioeconomic.

In short, the 474 disputes submitted to the OSC by 1<sup>to</sup> January 2014, only 46 disputes brought arguments involving sustainable development. To demonstrate the provisions concerning sustainability in these disputes, illustrated briefly the results ( [Table 2](#) ). Thus, it is possible to examine the way in which these disputes were decided by the CSO, in the face of arguments related to the notion of sustainability.

Nº	Nome do Caso	Ilustração
DS 18	<i>Australia – measures affecting importation of salmon</i>	"Membros devem assegurar que as medidas sanitárias ou fitossanitárias aplicadas apenas para proteger a vida e a saúde humana, animal ou vegetal sejam baseadas em princípios científicos e não sejam mantidas sem justificativa científica suficiente"
DS 31	<i>Canada – certain measures concerning periodicals</i>	"a capacidade de um Membro de tomar medidas para proteção da identidade cultural não é um argumento neste caso (...) é intenção do Canadá continuar a perseguir seus objetivos de política cultural"
DS 44	<i>Japan – measures affecting consumer photographic film and paper</i>	"o relatório enumera os objetivos da política de distribuição (...) como assegurar força de trabalho e educação aos empregados"
DS 50	<i>India – patent protection for pharmaceutical and agricultural chemical products</i>	"Artigo 19 da Declaração Universal dos Direitos do Homem declara que todos têm direito à liberdade de opinião e expressão 'independentemente de fronteira (...), Artigo 11 do Pacto Internacional dos Direitos Civis e Políticos estabelece que ninguém será preso baseado na incapacidade de cumprir obrigações contraídas"
DS 114	<i>Canada – patent protection of pharmaceutical products</i>	"A legitimidade das medidas para promoção do uso de medicamentos genéricos como forma de proteção da saúde pública, foi endossada pela Organização Mundial da Saúde (OMS)."
DS 176	<i>United States – Section 211 omnibus appropriations Act of 1998</i>	"De acordo com o Artigo 17 da DUDH, 'Toda pessoa tem direito à propriedade só ou em sociedade com outros. Ninguém será arbitrariamente privado de sua propriedade'. Disposição similar encontra-se, inter alia, na Declaração Americana de Direitos do Homem e no PIDESC das Nações Unidas"
DS 245	<i>Japan – measures affecting the importation of apples</i>	"O processo PRA pode ser dividido em três passos inter-relacionados: categorização da peste, avaliação de probabilidade e de disseminação, e de consequências econômicas potenciais (incluindo impacto ambiental)"
DS 267	<i>United States – subsidies on upland cotton</i>	"Não é economicamente sustentável plantar algodão em terra não adequada ao cultivo do algodão."
DS 290	<i>European Communities – protection of trademarks and geographical indications for agricultural products and foodstuffs</i>	"o Acordo TRIPS – Artigo 7 – reconhece expressamente que prototipos de cumprimento dos direitos de propriedade intelectual devem ser feitos de modo a conduzir bem-estar social e econômico"
DS 291	<i>European Communities – measures affecting the approval and marketing of biotech products</i>	"Ademais, os riscos à vida ou saúde humana, animal e vegetal são considerados singulares (mas apenas componentes) do risco global maior para a conservação e sustentabilidade da utilização da diversidade biológica"
DS 308	<i>Mexico – tax measures on soft drinks and other beverages</i>	"Além disso, a necessidade de tais esforços foi reconhecida pela própria OMC bem como por número significativo de instrumentos e declarações internacionais. Por exemplo, o Princípio 12 da Declaração do Rio diz que medidas ambientais dirigidas a problemas ambientais transfronteiriços ou globais devem, sempre que possível, estar baseadas no consenso internacional"
DS 362	<i>China – measures affecting the protection and enforcement of intellectual property rights</i>	"(...) deve ser ressaltado que o Acordo TRIPS considera como um elemento essencial, não apenas o cumprimento de aspectos de comércio do direito de propriedade intelectual, mas também a realização de outros temas; tendo em vista a necessidade de melhoria dos padrões de vida dos Membros, especialmente os de menor desenvolvimento relativo, com atenção especial às preocupações com a saúde pública e a nutrição"
DS 381	<i>United States – measures concerning the importation, marketing and sale of tuna and tuna products</i>	"México sustenta que a medida dos EUA tem por efeito proibir a etiquetagem de atum mexicano com a etiquetagem 'protege-golfinhos', mesmo quando o atum foi pescado por meios que atendem ao padrão multilateral 'protege-golfinhos' estabelecido pela Comissão Interamericana de Atum Tropical, enquanto que"

Source: [WTO \(2015\)](#) . Selection of part of the texts made by the author.

**Table 2:** Examples of references to sustainable development present in some selected disputes

Links - [DS 18](#) ; [DS 31](#) ; [DS 44](#) ; [DS 50](#) ; [DS 114](#) ; [DS 176](#) ; [DS 245](#) ; [DS 267](#) ; [DS 290](#) ; [DS 291](#) ; [DS 308](#) ; [DS 362](#) ; [DS 381](#) ; [DS 391](#)

## 5. CSOs facing the concept of sustainable development

In examining how the CSOs have assessed the sustainability arguments in the 46 selected disputes, it was clear that this body respects the golden rule: the WTO will punish member countries only in the face of discriminatory procedures that would hinder World trade, and provided that such procedures are provided for in its Agreements. Of the 46 disputes examined, only one of them had an effective relationship with the real and effective desire to protect aspects related to sustainable development. This is what was observed in the case *European Communities - Measures Affecting Asbestos and asbestos-containing products* . The argument related to sustainable development, which allowed the application of the exception provided in art. XX of the GATT-94, was a real and true argument and therefore deserved protection.

Thus, the OSC, in case *European Communities - Measures Affecting Asbestos and asbestos-containing products* , recalled that "Article XX (b) would be deprived of their *effet utile* if its provisions do not serve to enable a Member 'adopt and implement necessary measures Human protection, life or health ' . He concluded that:

Assessment of the obvious health risks arising from the physical properties of the product allows a measure inconsistent with Article III: 4 to be justified by Article XX (b) (...). In this case, the objective sought by the measure is the preservation of human life and health through the elimination or reduction (...) of asbestos. The value sought is as vital as it is important.

The exception of letter "b" of art. XX of GATT-94 was fully complied with by the CSO. Therefore, protection of arguments relating to sustainable development is possible within the framework of the WTO and in respect of the WTO Agreements. And that litigation calls into question a sanction other than moral condemnation, in accordance with the WTO Agreements. There is a path that has been trodden by the DSB in favor of such protection by the recommendation given in the case *European Communities - Measures Affecting Asbestos and asbestos-containing products* . It is in this sense that WTO litigation can protect aspects related to sustainable development in international trade.

Regarding the 45 other cases examined, none of them had, as a matter of fact, the protection of the universality of values that make up the concept of sustainable development. The "sustainability" argument was brought to the CSO, but it had no real connection with the effect of the discriminatory measure and was in fact a disguised form of obstructing international trade.

It should be noted also that when comparing the number of disputes related to sustainable development at the time of entry into force of the WTO on 1<sup>st</sup> January 1995 to the present day, it is clear that the number of disputes declined over Years. This does not mean that member countries have been less concerned about the issues related to sustainable development more recently. What actually happened is that when the WTO came into force its member countries decided to test the CSO mechanism and to see to what extent the

WTO would protect the concept of sustainable development under its Agreements. Almost all disputes that brought about sustainable development were nothing more than discriminatory measures disguised as "sustainability." The myth of the force of WTO retaliation has limits and barriers, which are dictated by its Agreements. In case of violation of its Agreements, the CSO mechanism can protect member countries. Otherwise, in the face of disguised measures to protect aspects related to sustainable development, the WTO has shown that it will not provide any protection. Thus, by testing the mechanism by member countries, the number of sustainable development disputes has declined over time.

## 6. CONCLUSION

In today's world context, the WTO has an important role to play. Such a statement requires further explanation. The notion of sustainable development covers the most diverse aspects of human life. It is present in numerous international treaties and conventions, including within the framework of the WTO, with a total of 155 specific provisions in its Agreements addressing the chronic development problems of most of its member countries.

When an international organization is created, the first step taken by its founders is to check what they can do for it. Then they check what the organization can do for them. What can the WTO do for its member countries to protect sustainable development under its dispute settlement system? The extension of the scope of the WTO Agreements to cover *de jure* and *de facto*, sustainable development requires care, despite good intentions to do so. Many hold the need for a paradigm shift in the international trade scenario, with the WTO playing a leading role in implementing the concept of sustainable development. We must not forget, however, that the "teeth" of the WTO can only "bite" in the presence of a violation of their Agreements, reflected in discriminatory procedures that would hamper world trade.

Well, out of the total number of WTO cases examined, only 46 of them refer to arguments related to sustainable development. This is a little more than 10% of the total number of WTO disputes. From the examination of those disputes, it can be concluded that the notion of sustainable development is treated only obliquely, since it does not correspond to the ultimate purpose of the discriminatory measure sought. There is, however, unreasonable to say, before the decision in the case *European Communities - Measures Affecting Asbestos and asbestos-containing products*, the concept of sustainability can be protected by the WTO; But as long as it is reflected in fact in its Agreements. In view of this, it is important that WTO member countries recognize the limitations of the institution and achieve a common agenda that supports the notion of sustainable development in the liberalization of international trade. It is true that the feasibility of aspects related to sustainable development causes discomfort among Member States, as well as numerous controversies. But sustainable development has come to stay. A realistic option to combat protectionist measures that call for the protection of aspects related to sustainable development, but which are nothing more than disguised discriminatory measures, is through a ministerial declaration, which serves as a basis and guide to conduct and For the CSO and for the WTO system as a whole.

Examination of the WTO dispute should not be abandoned. In the future, other aspects can be taken into account, based on the research already done. For example, (i) to investigate the participation of Latin American countries in the WTO litigation related to sustainable development, or (ii) to verify in a few years the participation of the BRIC countries (Brazil, Russia, India and China) Of the WTO, since today Russia's litigation is virtually non-existent

because of its recent accession to the WTO. Finally, this research work can also be useful as a way of supporting the emergence of a new branch of international law through the presence of elements of international law on sustainable development in the litigation of an international organization with the weight of the WTO, Sustainability is a relevant issue on the international agenda, although its use in the vast majority of cases has been made by WTO member countries as a "legitimate" obstacle to world trade and not as a form of Present and present needs of mankind; Without compromising, however, the needs of future generations.

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Received: August 11, 2014; Accepted: June 10, 2015