

CONFLICTING JURISDICTIONS OVER DISPUTES ARISING FROM THE APPLICATION OF TRADE- RELATED ENVIRONMENTAL MEASURES

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I. INTRODUCTION

From the legendary Tuna/Dolphin case¹ that triggered the launching of the campaign against the General Agreement on Tariffs and Trade (GATT) by environmentalists in early 1990s, to the Shrimp/

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¹ Report of the Panel, *United States—Restrictions on Imports of Tuna*, 39S/155 (Sept. 3, 1991), GATT B.I.S.D. (39th Supp.) (unadopted), available at <http://www.worldtradelaw.net/reports/gattpanels/tunadolphinI.pdf>; Report of the Panel, *United States - Restrictions on Imports of Tuna*, DS29/R (June 16, 1994) (unadopted) [hereinafter *Dolphin/Tuna Report*].

Turtle case² after the establishment of the World Trade Organization (WTO), trade-related environmental measures (TREMs)³ continue to generate an intense debate of trade versus environment in the GATT/WTO legal context. The controversies concerning the legality of TREMs under the GATT/WTO, such as the application and interpretation of GATT Article XX⁴ and of other WTO agreements,⁵ and additionally the relationship between the GATT/WTO and multilateral environmental agreements (MEAs) containing trade measures, have yet to be settled in the GATT/WTO legal order. The Committee on Trade and Environment (CTE), established under the WTO in 1995, is tasked to undertake discussion on trade and environment issues in the WTO and two of the ten items on its Working Programme relate to the issues of TREMs.⁶ In the current Doha Round negotiation, trade and

² See Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998); Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter jointly referred to as *Shrimp/Turtle Panel and Appellate Body Reports*].

³ TREMs refer to trade restrictive measures adopted for the purpose of environmental protection. Some scholars, such as Esty, use “environmental trade measures” when referring to such measures. See, e.g., DANIEL C. ESTY, *GREENING THE GATT* (Institute for International Economics 1994). Most of the literature, however, uses the term “trade-related environmental measures”, which resembles similar terms and concepts under the WTO. See, e.g., Agreement on Trade-related Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Trade Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIPS]; Agreement on Trade-related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Trade Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TRIMs]; Paul Demaret, *TREMs, Multilateralism, Unilateralism and the GATT*, in *TRADE & THE ENVIRONMENT: THE SEARCH FOR BALANCE* 52, 52 (James Cameron et al., eds., 1994).

⁴ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, art. XX [hereinafter GATT].

⁵ See, e.g., Agreement on Technical Barriers to Trade, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Trade Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter TBT Agreement]; Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Trade Instruments – Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter SPS Agreement].

⁶ Item 1 and Item 5, as recognized in the original 1994 CTE ten-point working programme via the 1994 Marrakesh Ministerial Decision on Trade and Environment, are the relationship between the rules of the multilateral trading system and the trade measures contained in MEAs, and between their dispute settlement mechanisms. World Trade Organization, Ministerial Decision on Trade and Environment of 14 Apr. 1994, MTN.TNC/45(MIN), Annex II (1994), available at <http://>

environment are also on the negotiation agenda and the CTE in Special Session (CTESS) is established to undertake this negotiation. One of the negotiation mandates is to clarify the relationship between WTO rules and specific trade obligations set out in MEAs.⁷ There has been, however, little progress on this specific issue in the CTESS as of 2008.

Two types of legal controversies arise in the context of disputes between GATT/WTO and TREMs, especially TREMs adopted under the MEAs. First, there is potential conflict between two sets of substantive legal rules: the relationship between international trade rules under the GATT/WTO and trade-related provisions under the MEAs. Second, there is potential conflict between jurisdictions: both the dispute settlement mechanisms under the WTO and those under the MEAs can obtain jurisdiction concerning disputes arising from the application of TREMs.⁸ In the case of potential conflicts of legal rules, there has been a large volume of relevant literature after the Tuna/Dolphin case.⁹ The main focus in this area of debate includes, but is not inclusive of: the application and interpretation of GATT Article XX, in particular its preamble and sub-paragraphs (b) and (g),¹⁰ the application and interpretation of relevant WTO covered agreements in disputes involving TREMs, etc.¹¹ Despite the lack of dispute concern-

www.wto.org/english/docs_e/legal_e/56-dtenv_e.htm; see generally, WORLD TRADE ORGANIZATION, *Trade and Environment*, http://www.wto.org/english/tratop_e/envir_e/envir_e.htm (providing an updated and detailed description of the CTE Work Programme).

⁷ However, it is also stated that: "The negotiation shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiation shall not prejudice the WTO rights of any Member that is not a party to the MEA in question." World Trade Organization, Ministerial Declaration of 14 Nov. 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746, ¶31.i (2002) [hereinafter Doha Declaration].

⁸ Gabrielle Marceau, *Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreements and MEAs and Other Treaties*, 35 J. WORLD TRADE 1081, 1082 (2001).

⁹ For example, using "GATT Article XX AND disputes" as a key search term in the Westlaw legal periodical database usually produces more than 400 journal articles. Using the same key search term and narrowing down the search years to the last five years in the Lexis-Nexis database also produce more than 190 journal articles.

¹⁰ See, e.g., Sanford Gaines, *The WTO's Reading of the GATT Article XX Chapeau: A Disguised Restriction on Environmental Measures*, 22 U. PA. J. INT'L ECON. L. 739 (2001); John H. Knox, *The Judicial Resolution of Conflicts between Trade and the Environment*, 28 HARV. ENV'T L. REV. 1 (2004).

¹¹ See, e.g., Daniel Kalderimis, *Problems of WTO Harmonization and the Virtues of Shields over Swords*, 13 MINN. J. GLOBAL TRADE 305 (2004); Kevin C. Kennedy, *Resolving International Sanitary and Phytosanitary Disputes in the WTO: Lessons and Future Directions*, 55 FOOD & DRUG L. J. 81 (2000).

ing TREMs adopted under the authorization of an MEA, literature abounds concerning the potential conflicts between legal rules of the GATT/WTO and trade provisions contained in the MEAs, including general discussion as well as more specific discussion on individual MEAs,¹² and how to solve such conflict through treaty interpretation or principles on conflicts of norms.¹³ In comparison, there has been less attention on discussing the issues of conflict of jurisdictions in the application of TREMs. There is some literature on more general discussion on the relationship between dispute settlement mechanisms under the WTO and the MEAs.¹⁴ In addition, as there has been a proliferation of international tribunals after the end of the Cold War, the issue of conflicting jurisdictions, including debates on their positive and negative implications, has also attracted the attention of international legal scholars in public international law.¹⁵

In the area of conflicting substantive legal rules, there have been some disputes involving the applications of TREMs under the GATT/WTO and, hence, the large volume of relevant literature. Nevertheless, none of the TREMs in dispute were authorized or sanctioned by any MEA. However, in the area of conflicting jurisdictions, there has been one incident involving the European Community (EC) and

¹² See generally DUNCAN BRACK, *INTERNATIONAL TRADE AND THE MONTREAL PROTOCOL* (Earthscan Publications Ltd. 1996); JONATHAN KRUEGER, *INTERNATIONAL TRADE AND THE BASEL CONVENTION* (Earthscan Publications Ltd. 1999); Cameron Hutchison, *International Environmental Law Attempts to be 'Mutually Supportive' with International Trade Law: A Compatibility Analysis of the Cartagena Protocol to the Convention on Biological Diversity with the World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures*, 4 J. INT'L WILDLIFE & POL'Y 1 (2001); Wen-chen Shih, *The Relationship Between the Climate Change Regime and the GATT/WTO: Focusing on the Kyoto Mechanism*, 34 NTU L. REV. 179 (2005) [hereinafter Shih, *Climate Change*]; Wen-chen Shih, *Multilateralism and the Case of Taiwan in the Trade Environment Nexus—The Potential Conflict Between CITES and GATT/WTO*, 30 J. WORLD TRADE 109 (1996) [hereinafter Shih, *Potential Conflict*].

¹³ See, e.g., Gabrielle Marceau, *A Call for Coherence in International Law: Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement*, 33 J. WORLD TRADE 87 (1999); Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT'L L. 535 (2001).

¹⁴ See, e.g., Alexandra Gonzalez-Calatayud & Gabrielle Marceau, *The Relationship Between the Dispute-Settlement Mechanisms of MEAs and Those of the WTO*, 11 REV. EUR. COMMUNITY & INT'L ENV'T L. 275 (2002).

¹⁵ See generally YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (Oxford Univ. Press 2003); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The pieces of the puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999).

Chile concerning a TREM adopted by Chile on the conservation of swordfish. According to its domestic fishery law, Chile prohibited the use of its ports to unload swordfish by Spanish fishing fleets that export swordfish to the United States. The EC requested consultation with Chile concerning this Chilean measure under the WTO in April 2000, alleging the violation of GATT/WTO rules of, *inter alia*, freedom of transit.¹⁶ In December 2000, Chile brought its own complaint to the International Tribunal for the Law of the Sea (ITLOS) against the EC alleging the failure of the EC to comply with its obligations under the United Nations Convention of the Law of the Sea (UNCLOS) to conserve swordfish.¹⁷ This dispute was suspended under both the WTO and the ITLOS after the EC and Chile reached an agreement and signed a Memorandum of Understanding in January 2001. There has been surprisingly little literature analyzing the implications of this dispute on the ongoing debate of conflicting jurisdictions involving the application of TREMs.¹⁸

This article, thus, will focus on the following issues concerning conflicting jurisdictions over such a dispute: can disputes arising from the application of TREMs be settled under both the dispute settlement mechanisms of the WTO and of the MEAs; Is it likely that such a dis-

¹⁶ Request for Consultations by the European Communities, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/1 (Apr. 26, 2000) [hereinafter EC Swordfish Request for Consultations], available at [http://www.worldtradelaw.net/cr/ds193-1\(cr\).pdf](http://www.worldtradelaw.net/cr/ds193-1(cr).pdf).

¹⁷ Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stock in the South-Eastern Pacific Ocean (Chile v. Eur. Cmty.), Case No. 7 (Int'l Trib. L. of the Sea Dec. 20, 2000) [hereinafter the "Swordfish Case"], available at http://www.itlos.org/case_documents/2001/document_en_100.pdf.

¹⁸ UNCLOS is probably the only MEA which provides mandatory dispute settlement procedures. See *infra* Part II. There are, thus, a few articles on whether disputes involving TREMs concerning marine conservation should be brought to the WTO or to the ITLOS. See, e.g., Lakshman D. Guruswamy, *Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes*, 7 MINN. J. GLOBAL TRADE 287 (1998); Richard J. McLaughlin, *Settling Trade-Related Disputes Over the Protection of Marine Living Resources: UNCLOS or the WTO?*, 10 GEO. INT'L ENV'T'L L. REV. 29 (1997). After the EC-Chilean dispute, there are only four journal articles that focus on this dispute known to this author. There is one article offering a general overview to introduce the background of the EC-Chilean dispute: Vaughan Lowe, *The International Tribunal for the Law of the Sea: Survey for 2000*, 16 INT'L J. MARINE & COASTAL L. 549 (2001). There are, thus, only three articles that conduct detailed analyses concerning this dispute: T. L. McDorman, *The Chile v EC Swordfish Case*, 11 Y.B. INT'L ENV'T'L L. 585 (2000); M. A. Orellana, *The Swordfish Dispute Between the EU and Chile at the ITLOS and the WTO*, 71 NORDIC J. INT'L L. 55 (2002); John Shamsey, *ITLOS vs. Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute*, 12 TRANSNAT'L L. & CONTEMP. PROBLEMS 513 (2002).

pute be subject to multiple dispute settlement mechanisms; If the answer is yes, does one of them have primary jurisdiction; If none of them have primary jurisdiction, what are the implications of parallel jurisdictions of disputes concerning the application of TREMs. The Chile-Swordfish dispute continued to be suspended as of December 2008, but the Dispute Settlement Body (DSB) of the WTO adopted both the Panel Report and the Appellate Body Report of the Mexico - Tax Measures on Soft Drink and Other Beverages,¹⁹ an important case concerning jurisdictional issues of the WTO panels, in March 2006. Though this dispute does not involve the application of TREMs, can the approach adopted by the WTO panel and Appellate Body in the Mexico-Soft Drink case concerning the issue of conflicting jurisdictions shed some light on the abovementioned questions? To answer these research questions, this article will be structured as follows. Section I will briefly introduce the concept of TREMs and offer some background introduction to the EC-Chile Swordfish dispute indicating the significance of this case in 'substantialising' the 'potential' conflict of jurisdictions in the application of TREMs. Section II will focus on the issues of conflicting jurisdictions: a brief introduction on the proliferation of international tribunals and its associated problems will be noted at the beginning, followed by a very brief introduction on the dispute settlement mechanism of the WTO and the Mexico-Soft Drink case, and a more detailed description on the dispute settlement mechanisms under the MEAs, and a detailed discussion will be conducted to analyze which judicial forum has primary or/and sole jurisdiction in disputes concerning the applications of TREMs. Through the design of various possible scenarios in the EC-Chile swordfish dispute, Section III will analyze the possibilities and implications of parallel and conflicting jurisdictions in a dispute concerning the application of TREMs on the international legal order and how this might affect the use of TREMs by an individual country.

II. TRADE-RELATED ENVIRONMENTAL MEASURES AND THE CHILE-SWORDFISH DISPUTE

A. *Trade-related Environmental Measures*

Trade-related environmental measures (TREMs) are trade restrictive measures adopted for the purpose of environmental protection. Most literature classifies TREMs into two categories: multilateral TREMs and unilateral TREMs.²⁰ The former refers to

¹⁹ Panel Report, *Mexico—Tax Measures on Soft Drink and Other Beverages*, WT/DS308/R (Oct. 7, 2005) [hereinafter *Soft Drink Panel Report*]; Appellate Body Report, *Mexico—Tax Measures on Soft Drink and Other Beverages*, WT/DS308/AB/R, (Mar. 6, 2006) [hereinafter *Soft Drink Appellate Body Report*].

²⁰ See, e.g., Demaret, *supra* note 3, at 52.

trade restrictive measures set out or adopted under the authority of MEAs whilst the latter refers to trade restrictive measures adopted according to domestic laws of individual countries.²¹

All of the disputes concerning the applications of TREMs in the GATT era and the WTO are unilateral TREMs, i.e. TREMs adopted in accordance with domestic law.²² Examples of these include the U.S. Marine Mammal Protection Act in the Tuna/Dolphin disputes,²³ the U.S. Clean Air Act in the U.S. reformulated gasoline dispute,²⁴ and the U.S. Endangered Species Act in the Shrimp/Turtle dispute.²⁵ If such unilateral TREMs are based solely on domestic laws, a dispute arising from the application of such TREMs rarely, in theory, results in a situation where multiple or conflicting jurisdictions arise, as dispute settlement mechanisms under MEAs are not available under this circumstance. If, however, the domestic law in question resembles or is relevant to certain MEAs, it might bring more complications. For example, when the domestic law in question is a means of implementing substantive obligations under an MEA or decisions of the Conference of the Parties (COP) to the MEA or prescribes substantive legal obligations relating to but stricter than an MEA, can TREMs adopted according to such domestic laws be categorized as unilateral TREMs? Demaret proposes adopting the following criteria: a TREM adopted according to domestic laws can be considered as a multilateral TREM if the objectives of such laws correspond to the objectives of an MEA that are recognized by all the contracting parties.²⁶ Take the 1973 Convention on International Trade in Endangered Species (CITES) as an example: if the domestic law authorizes trade restrictive measures adopted to protect species listed in Annex I, II or III²⁷ to the Conven-

²¹ *Id.*

²² Daniel C. Esty, *Bridging the Trade-Environment Divide*, in INTERNATIONAL TRADE & SUSTAINABLE DEVELOPMENT 187 (Kevin P. Gallagher & Jacob Werksman eds., Earthscan Publications 2002).

²³ See, e.g., Dolphin/Tuna Report, *supra* note 1.

²⁴ See, e.g., Panel Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/R (Jan. 29, 1996), available at [www.law.georgetown.edu/jiel/cases/US-Gasoline\(panel\).doc](http://www.law.georgetown.edu/jiel/cases/US-Gasoline(panel).doc) [hereinafter *Gasoline Panel Report*]; Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996), available at [www.world-tradelaw.net/reports/wtoab/us-gasoline\(ab\).pdf](http://www.world-tradelaw.net/reports/wtoab/us-gasoline(ab).pdf).

²⁵ See, e.g., Shrimp/Turtle Panel and Appellate Body Reports, *supra* note 2.

²⁶ Demaret, *supra* note 3, at 59.

²⁷ Under the CITES, species that are identified in accordance with a set of criteria developed by the COP to the CITES as endangered are listed in Annex I, II, or III according to their respective level of endangerments. Species threatened with extinction, which are or may be affected by trade, are identified and listed in Annex I by the COP. Species that are not yet threatened with extinction, but may become so if trade in specimens of such species is not regulated, are listed in Annex II.

tion, such TREMs are to be considered "multilateral"; if, however, such trade restrictive measures are introduced to protect species listed under its domestic legal framework, such TREMs are then to be considered "unilateral".²⁸ Such criteria, to a certain extent, seem to have broadened the scope of multilateral TREMs for reasons to be explained later.

Most literature refers to trade provisions set out in the 1973 CITES, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol), and the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (the Basel Convention) as typical "multilateral TREMs."²⁹ Disputes arising from the application of such "genuine" multilateral TREMs can be subject to review by the dispute settlement procedures of both the WTO and of the MEAs in question. According to the "Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements", a document prepared by the WTO Secretariat under the instruction of WTO Members to assist the negotiation on trade and environment, there are fourteen MEAs containing trade measures.³⁰ MEAs containing TREMs mainly adopt trade measures to achieve the following environmental objectives: to conserve endangered species, to protect importing countries from being exposed to hazardous materials, or to protect common resources.³¹

There is less ambiguity in the definition of a TREM as multilateral when the MEA in question specifically requires its parties to adopt "trade restrictive" measures. The situation is less clear when the MEA in question authorizes its parties to adopt "domestic" or "any" measures to achieve the objectives of the MEA, or when the COP to such MEA adopts decisions or resolutions that require or recommend its parties to adopt certain trade restrictive measures. Can such TREMs still be categorized as "multilateral"? This touches upon the definitional question mentioned earlier when unilateral TREMs were being discussed. The issue of what are trade specific trade obligations "set out" in MEAs, is currently subject to negotiation and ongoing de-

Annex III lists all species that have been identified by individual contracting parties as subject to regulations of trade in their domestic jurisdictions. Trade in species that are listed in Annex I, II, or III under the CITES are subject to different levels of control. WILLEM WIJNSTEKERS, *THE EVOLUTION OF CITES 17* (CITES Secretariat, 7th ed. 2003).

²⁸ See Demaret, *supra* note 3, at 59.

²⁹ See, e.g., *id.* at 53.

³⁰ Committee on Trade and Environment, *Note by the Secretariat: Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements*, WT/CTE/W/160/Rev.4 (Mar. 14, 2007).

³¹ See PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 942-46 (Cambridge Univ. Press 2d ed. 2003).

bate on trade and environment under the Doha negotiation.³² From the literal meanings of “set out” in “multilateral” environmental agreements, it seems that such trade obligations must be adopted based on decisions reached by the consensus of all or most of the contracting parties to the MEA. The essential point, however, concerns the extent of such consensus: should it refer to both the aims (environmental protection) and means (trade measures), or only to the aims of the MEA? The above-mentioned criteria proposed by Demaret seem to suggest the latter: trade restrictive measures can still be considered as “multilateral TREMs” if the objective of such measures is commonly shared by most of the contracting parties, albeit the MEA in question leaves the means of implementations to the parties themselves.³³ The criteria offer a broader scope to the definition of “multilateral TREMs”. Considering that a holistic approach should be adopted to perceive the regulatory regime under the MEAs, including both the aims and means adopted by the provisions of the MEAs, such criteria seem to have stretched the meaning of “set out” in MEAs a bit too far.

Another relevant ambiguity relates to the question of whether trade measures adopted according to the decisions/resolutions of various bodies or organs under the MEAs can be considered multilateral TREMs. This question boils down to the meaning and explanation of “set out”. If it is understood as “legally prescribed under” the MEAs, then the answer to this question will depend on whether decisions and resolutions adopted by various types of bodies or organs under the MEAs are legally binding on the contracting parties to the MEA in question. If such decisions and resolutions are considered to be binding, TREMs adopted under the authority of such decisions or resolu-

³² Paragraph 31(i) of the Doha Ministerial Declaration requested the WTO Members to engage in negotiation that seeks to clarify the relationship between existing WTO rules and specific trade obligations set out in the MEAs. World Trade Organization, Ministerial Declaration of 14 Nov. 2001, WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002) [hereinafter Doha Declaration]. In several WTO Members' submissions to the CTESS concerning the negotiation on paragraph 31(i), the exact definition and scope of “set out” in the MEAs generated some debates and consensus has yet to be reached. See, e.g., Submission of Australia, *Proposal for an Outcome on Trade and Environment Concerning Paragraph 31(I) of the Doha Ministerial Declaration*, TN/TE/W/72 (May 7, 2003), available at [http://docsonline.wto.org/GEN_highLightParent.asp?qu=%22set+out%22+%26+%22Paragraph+31\(i\)+of%22the%20Doha+Ministerial%22&doc=D%3A%2FDDFD%2FTE%2FTN%2FTE%2FW72.DOC.HTM&curdoc=5&popTitle=TN%2FTE%2FW%2F72](http://docsonline.wto.org/GEN_highLightParent.asp?qu=%22set+out%22+%26+%22Paragraph+31(i)+of%22the%20Doha+Ministerial%22&doc=D%3A%2FDDFD%2FTE%2FTN%2FTE%2FW72.DOC.HTM&curdoc=5&popTitle=TN%2FTE%2FW%2F72); Submission of Malaysia, *Paragraph 31(I) of the Doha Ministerial Declaration*, TN/TE/W/29, (Apr. 30, 2003), available at [http://docsonline.wto.org/GEN_highLightParent.asp?qu=%22set+out%22+%26+%22Paragraph+31\(i\)+of%22the%20Doha+Ministerial%22&doc=D%3A%2FDDFD%2FTE%2FTN%2FTE%2FW29.DOC.HTM&curdoc=21&popTitle=TN%2FTE%2FW%2F29](http://docsonline.wto.org/GEN_highLightParent.asp?qu=%22set+out%22+%26+%22Paragraph+31(i)+of%22the%20Doha+Ministerial%22&doc=D%3A%2FDDFD%2FTE%2FTN%2FTE%2FW29.DOC.HTM&curdoc=21&popTitle=TN%2FTE%2FW%2F29).

³³ Demaret, *supra* note 3, at 59.

tions will then be considered multilateral TREMs ("trade measures set out in MEAs"). Most MEAs prescribe institutional arrangements in their treaty provisions. In general, the COP, consisting of all the contracting parties to the MEA, is the ultimate decision-making body under that MEA and is responsible for matters such as adoption of protocols and amendment, interpretation of treaty provisions, adoption of soft law measures, and monitoring of implementation and compliance of the MEA by parties.³⁴ The legal characteristics of the decisions or resolutions adopted by the COP will depend on the treaty provisions, practices developed through implementation, and the language and content of the decisions or resolutions themselves. Some of the decisions and resolutions of the COP are considered legally binding on all parties (or parties that do not oppose such adoption)³⁵ whilst some are only considered advisory.³⁶ The former can be regarded as having the same legal effect as the treaty provisions and, therefore, trade measures adopted according to such a type of COP decisions and resolutions can be categorized as "multilateral TREMs". As for the latter, trade measures based on this type of COP decisions and resolutions may not be considered "multilateral TREMs" as parties are not legally required to implement such decisions and resolutions through trade measures; thus, such measures cannot be regarded as "set out" in the MEAs. In addition to the COP, there are also various types of subsidiary bodies under different MEAs. Some of these subsidiary bodies are tasked with providing scientific and technological advice to the COP and the contracting parties,³⁷ some are responsible for providing information relating to treaty implementation,³⁸ and some are

³⁴ See generally Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 636-47 (2004).

³⁵ For example, amendments to the Annexes of the CITES have binding effects on the contracting parties. Convention on International Trade in Endangered Species of Wild Fauna and Flora, art. XV, Mar. 3, 1973, 12 I.L.M. 1085 [hereinafter CITES] (Article XV of the CITES authorizes the COP to adopt amendments to Annex I and Annex II).

³⁶ See, e.g., Convention on Biological Diversity Conference of the Parties, Access and Benefit-Sharing as Related to Genetic Resources, COP 6 Decision VI/24 (Apr. 7-19, 2002), available at <http://www.cbd.int/decisions/view.shtml?id=7198>, (these guidelines are only advisory in nature).

³⁷ See, e.g., United Nations Framework Convention on Climate Change, art. 9, May 9, 1992, 1771 U.N.T.S. 107 31 I.L.M. 849 (entered into force Mar. 21, 1994) [hereinafter FCCC] (the "Subsidiary body for scientific and technological advice" set up under Article 9 of the FCCC is one such body).

³⁸ See, e.g., *id.* at art. 10 (the "Subsidiary body for implementation" set up under Article 10 of the FCCC is one such body).

designed for monitoring non-compliance.³⁹ Most, if not all, of the decisions made by such subsidiary bodies are either advisory or need to be submitted for adoption by the COP, depending on the treaty provisions or COP decisions establishing such bodies. Therefore, trade measures adopted by an individual party based on the decisions of such subsidiary bodies cannot be considered “multilateral TREMs” either.

In summary, when a dispute arises from the application of “multilateral TREMs”, i.e. trade measures set out in MEAs, the dispute settlement mechanisms of both the WTO and the MEA in question should have jurisdiction over such a dispute. However, in the situation where the issue of whether a TREM is multilateral or unilateral is in question, can a dispute arising from the application of such TREM still be submitted to the MEA? And what will be the implications of such a dispute on the question of conflicting jurisdictions? The Chile-Swordfish dispute is a case in point.

B. The WTO Chile-Swordfish case

Swordfish is a highly migratory species whose main habitat spans across the Pacific,⁴⁰ covering the high seas and the exclusive economic zones and territorial seas of several coastal states along the Pacific Ocean. According to statistics of the UN Food and Agriculture Organization and the Chilean National Fishery Agency, swordfish stock has been steadily in decline since 1991.⁴¹ Chile promulgated Decree 293 in 1990, prescribing a series of conservation measures with the aim of protecting migratory species such as swordfish. The Chilean Congress adopted the Fishery Law in 1991. According to Article 165 of the Fishery Law, vessels that carry fish caught in contravention of the Chilean conservation law are not permitted to use the Chilean ports as transship ports, nor are they allowed to dock at the Chilean ports or to be imported into Chile, regardless of the fact that fish are

³⁹ See Montreal Protocol on Substances that Deplete the Ozone, art. 8, Sept. 16, 1987, 26 I.L.M. 1541 [hereinafter the Montreal Protocol]; Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone, *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, Annex IV, UNEP/OzL.Pro.4/15 (Nov. 25, 1992) [hereinafter the Fourth MOP] (The “Implementation Committee” set up under the non-compliance procedures adopted by the Fourth MOP to the Montreal Protocol according to Article 8 of that Protocol is one such body).

⁴⁰ Marcos Orellana, *The EU and Chile Suspend the Swordfish Case Proceedings at the WTO and the International Tribunal of the Law of the Sea*, ASIL INSIGHTS (Feb. 2001), <http://www.asil.org/insights/insigh60.htm> (visited 20 Nov 2008).

⁴¹ Orellana, *supra* note 18, at 58.

caught in international waters.⁴² As a result, EC, mainly Spanish, fishing vessels have been prevented from transshipping and/or unloading their catches of highly migratory species (such as swordfish) at the Chilean ports since 1991.⁴³ This has caused great economic losses to the EC as fishing vessels could not use the Chilean ports to transship their catches to the final consuming countries like the United States. Chile maintained that these measures are necessary to prevent the depletion of fish stocks, considering the serious problem of over-fishing of swordfish in international waters.⁴⁴ In addition, Chile signed the "Galapagos Accord" with Columbia and Ecuador in August 2000 that prohibited the docking at their ports of fishing vessels that catch and carry three highly migratory species: horse-eye jack, albacore tuna, and swordfish.

After nearly ten years of bilateral negotiations, the EC and Chile still could not reach any consensus to settle this dispute. The EC thus requested for consultation with Chile under the WTO according to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).⁴⁵ When the consultation did not result in the settlement of this dispute, the EC requested the establishment of a panel in November 2000, alleging that Article 165 of Chile's Fishery Law has violated its obligations under the GATT 1994, in particular Article V and Article XI of the GATT 1994.⁴⁶ Chile, on the other hand, informed the ITLOS and requested that the dispute regarding conservation and sustainable exploitation of swordfish in the South East Pacific be submitted to the special chamber of the ITLOS in December 2000. After the good offices effort of the President of the ITLOS, both parties agreed that this dispute should be submitted to an *ad hoc* chamber under the ITLOS on 20 December 2000.⁴⁷ Chile alleged that the EC violated its obligation under the UNCLOS, in particular, *inter alia*, Article 116 to 119 to ensure conservation of swordfish in the fishing activities undertaken by vessels flying the flag of any of its Member States in the high seas adjacent to Chile's exclusive economic zones, Article 64 to cooperate with Chile as a coastal state for conservation of swordfish in the high sea, and other obliga-

⁴² Lesley Murphy, *EU and Chile reach agreement on 10-year swordfish dispute*, Int-Fish Bulletin No. 4 (2001), <http://www.intfish.net/igifl/archive/ops/ifb/focus/2001/4.htm>.

⁴³ *Id.*

⁴⁴ Gustavo Capdevila, *Chile and EU caught in dispute over swordfish*, THIRD WORLD NETWORK (Dec. 12, 2000), <http://www.twinside.org.sg/title/sword.htm>.

⁴⁵ EC Swordfish Request for Consultations, *supra* note 16.

⁴⁶ *Request for the Establishment of a Panel by the European Communities, Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/2 (Nov. 7, 2000).

⁴⁷ *Id.*; Lowe, *supra* note 18, at 568.

tions under Article 300 and Article 297.⁴⁸ The EC alleged that Chile's unilateral conservation measures violated its obligations under the UNCLOS, in particular, *inter alia*, Articles 87 and 89 regarding the freedom of the high seas, and that the "Galapagos Accord" signed by Chile has violated Article 64 regarding the obligations to cooperate.⁴⁹

After an intense negotiation, the EC and Chile signed a provisional agreement on 25 January 2001 setting out the following three arrangements. First, both parties would re-convene the "bilateral scientific and technological committee" and exchange their views on all relevant conservation measures under this institutional framework. Second, Chile would permit the unloading of swordfish by EC vessels smaller than "1,000 metric tonnes" either to land them for warehousing or to transship them onto other vessels in three Chilean ports. Third, both parties would begin negotiation on conservation measures and management in the South East Pacific.⁵⁰ As a result, both parties agreed to suspend but maintained their respective rights to re-convene the proceedings under both the WTO and the ITLOS.⁵¹

In this dispute, the TREM adopted by Chile became the subject of two international tribunals (the WTO and the ITLOS) and seemed to have "substantialised" the "potential" conflict of jurisdictions in a dispute arising from the applications of TREMs. This dispute has momentarily been suspended by consensus through negotiations of the disputing countries. Should such consensus fall through, how would the WTO Dispute Settlement Body (DSB) and the ITLOS deal with this dispute? Are there any rules relating to conflict of jurisdictions applicable to this type of dispute?

III. CONFLICT OF JURISDICTIONS IN INTERNATIONAL TRIBUNALS

As was mentioned in the Introduction, the problems of conflicting jurisdictions⁵² in disputes arising from the applications of TREMs

⁴⁸ Lowe, *supra* note 18, at 568.

⁴⁹ EC Swordfish Request for Consultations, *supra* note 16; Orellana, *supra* note 40.

⁵⁰ Arrangement between the European Communities and Chile, *Chile—Measures Affecting the Transit and Importation of Swordfish*, WT/DS193/3 (Apr. 6, 2001).

⁵¹ Murphy, *supra* note 42; Vaughan Lowe & Robin Churchill, *The International Tribunal for the Law of the Sea: Survey for 2001*, 17 INT'L J. MARINE & COASTAL L. 463, 466–67 (2002).

⁵² Terms such as "competing procedures", "competing jurisdictions", "conflicting jurisdictions", and "overlapping jurisdictions" etc. have been used by different scholars, and definitions of such terms vary. See, e.g., SHANY, *supra* note 15, at 21–28. (As the precise jurisdictional legal issues involving such phenomenon are not the subject of this research, this article will use the term "conflicting jurisdictions" and refer to the situation where the same subject matter involving the same

partly resulted from the proliferation of international tribunals, all of which can legally claim jurisdiction over such disputes. Apart from the Chile-Swordfish dispute, all of the disputes involving the applications of TREMs have been resolved under the dispute settlement mechanism of the WTO. There exist, however, other international tribunals parallel to that of the WTO that are competent to hear such disputes. The resulting complications on conflicting jurisdictions are the central research issue in this article. This Section will briefly introduce the phenomenon of the proliferation of international tribunals, including the background to this phenomenon and the positive and negative implications of it. The dispute settlement mechanisms of the WTO and of the MEAs will then be presented. A detailed analysis on relevant legal issues concerning conflicting jurisdictions, such as whether legal principles exist to deal with such issues and, if there is no such principle, what are the most appropriate approaches to deal with such conflict, will be conducted in the end.

A. *Proliferation of International Tribunals*

It was not until the early twentieth century that states set up permanent or semi-permanent dispute settlement mechanisms to deal with disputes arising between and/or amongst states.⁵³ Compared to only six to seven permanent international tribunals, more than ten international or regional judicial bodies⁵⁴ were established after 1989.⁵⁵ Some of these international tribunals deal with disputes concerning

disputing parties is subject to different international tribunals simultaneously or subsequently).

⁵³ Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COL. J. TRANSNAT'L. L. 143, 143 (2001).

⁵⁴ See generally Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. POL. 697 (1999); Romano, *supra* note 15, at 713-14 (In various literature on international dispute settlement mechanisms, terms such as "international courts and tribunals" or "international judicial bodies" have been used. The term "dispute settlement mechanisms" has not been used as often as these two terms. There has not been a uniform definition of the term "international judicial body" or any other similar terms. Romano put forward that only by meeting certain qualifications can a body be referred to as an "international judicial body". These qualifications include that a body must be a permanent one, be established by international legal documents, rely on international laws as its source of law to resolve disputes, abide by a set of procedural rules in its proceeding, and render legally binding decisions upon disputing parties. As these definitional issues are not directly relevant to the central theme of this article, general terms such as international tribunals, dispute settlement mechanisms or dispute resolution mechanisms will be used interchangeably in this Section).

⁵⁵ Romano, *supra* note 15, at 709-10; see also Cesare P.R. Romano, *The International Judiciary in Context*, THE PROJECT ON INTERNATIONAL COURTS AND TRIBU-

international laws, such as the International Court of Justice (ICJ). Some of them deal with disputes involving specialized areas of international laws, such as the International Criminal Court, the European Court of Human Rights, the DSB of the WTO, and the ITLOS of the UNCLOS. According to "The Project on International Courts and Tribunals",⁵⁶ there are forty-three different international judicial bodies currently in existence.⁵⁷

Why is there a proliferation of international tribunals? As international law increasingly develops and expands to domains that once were either solely within states' domestic jurisdiction (e.g. criminal justice), or were not the object of multilateral discipline (e.g. international trade in services), or were simply *vacua legis* (e.g. natural resources of the high seas or common heritage of mankind), norms of international law, as well as the setting up of international tribunals, increase. States begin to establish and entrust specialized international institutions to prescribe regulations and standards, resulting in the need to interpret such regulations and standards and to ensure that these regulations are implemented.⁵⁸ In other words, the more complicated the legal order becomes, the more specialized types of tribunals are necessary to deal with the increasingly diversified and technical regulations.⁵⁹ In particular, the ICJ and other pre-existing tribunals and courts might not be able to address many types of disputes involving these complicated issues.⁶⁰ Romano provides the following reasons to explain the proliferation of international tribunals. First, the end of bi-polarism and the advent of multilateralism facilitate the development of a new international legal order that is based on cooperation. Second, the abandonment of Marxist-Leninist interpretations of international relations has rendered the ex-socialist states that prefer a more diplomatic approach to settling international disputes increasingly willing to accept these international tribunals

NALS (Nov. 2004) [hereinafter Romano, International Judiciary], www.pict-pecti.org/publications/synoptic_chart/synop_c4.pdf.

⁵⁶ "The Project on International Courts and Tribunals" (PICT), funded by several U.S. and European foundations, was jointly established by the "Centre on International Cooperation (CIC) of the New York University and the "Foundation of International Environmental Law and Development" (FIELD) in London beginning in 1997. Since 2002, the PICT became a joint undertaking by the CIC and the "Centre for International Courts and Tribunals" of the University College London. The Project on International Courts and Tribunals, <http://www.pict-pecti.org/index.html> (last visited Mar. 2, 2009).

⁵⁷ See Romano, International Judiciary, *supra* note 55.

⁵⁸ Romano, *supra* note 15, at 728–29.

⁵⁹ Georges Abi-Saab, *Fragmentation or Unification Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919, 926 (1999).

⁶⁰ SHANY, *supra* note 15, at 4.

that are more judicially oriented. Third, and most importantly, the fact that capitalism, market-based economies and free-trade doctrines have remained the only plausible way to viable economic development, coupled by the explosions of FTAs, has enabled the states to become more intertwined economically, resulting in a more urgent quest for a more appropriate legal framework of protection and, hence the need to establish dispute settlement mechanisms.⁶¹

The proliferation of international tribunals has had several positive implications.⁶² First, the mere phenomenon of proliferation of international tribunals can be seen as evidence of an increased willingness on the part of states to settle their disputes peacefully through subjecting their behavior to the rule of international law. Second, the establishment and use of international tribunals to decide questions of international law means that more international issues are being resolved pursuant to international law. Third, decisions rendered by these international tribunals help to advance the norms of international law. Fourth, as the ICJ is limited in scope and function, the expanded number of international tribunals can serve to fill the gaps in the jurisprudence of the ICJ. Fifth, the establishment of new jurisdictions and systems of control improves efficiency by helping in the implementation of obligations and by generating a more refined and precise system of interpretation of norms. Sixth, the increase of international tribunals with stronger enforcement power can be seen as a decisive step in the evolution of the international legal system as it develops a real judicial function.

However, the proliferation of international tribunals also has negative implications. First, it poses the danger of creating the illusion of completely autonomous sub-systems, each equipped with its own judicial or controlling system. These sub-systems operate as if they are independent from the general international legal order, which would no longer be needed to apply the basic principles.⁶³ Second, these various international tribunals were formed to serve the interests of the states that established them within the treaty regime for which they were created. The allegiance to that treaty regime may become greater than the allegiance to the international legal system as a whole. These specialized tribunals present the risk that their own centrifugal forces will drive them in directions away from the core of international law. As a result, these specialized tribunals could de-

⁶¹ See Romano, *supra* note 15, at 729-38.

⁶² See Charney, *supra* note 54, at 704; Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 791, 795-796 (1999); Spelliscy, *supra* note 53, at 150-52.

⁶³ Dupuy, *supra* note 62, at 796.

velop greater variations in their determinations of general international law and damage the coherence of the international legal system.⁶⁴ Third, scholars pointed out that the most worrying implication of the proliferation of international tribunals will be a situation where one dispute is subject to multiple international tribunals simultaneously or subsequently.⁶⁵ Fourth, when states can "forum shop" for an international dispute, a relevant implication is the potential increase of disagreements between or amongst international institutions competing for jurisdictions and legal norms,⁶⁶ which might become an excuse for states to delay or avoid the scrutiny of international tribunals. Fifth, some scholars pointed out that the phenomenon of the proliferation of international tribunals itself is not a problem. What raises the concern is that they have proliferated in an environment without any formal relations between them.⁶⁷ This is also the root cause, and increases the impact of, the previous three negative implications. What is even worse is that this might undermine the legitimacy of international law when each tribunal can freely over-rule decisions rendered by other tribunals.⁶⁸

The overall picture of the proliferation of international tribunals is that, on the one hand, it is necessary and even inevitable when norms of international law become more diversified, specialized, complicated and technical, that more international tribunals would be set up to deal with the increasing disputes concerning these norms. On the other hand, the fact that states are willing to establish new dispute settlement mechanisms has demonstrated the determination of the international society as a whole to implement international obligations, accept international regulations, settle international disputes by peaceful means, and adopt a more judicial approach to international disputes. All these can become very positive to the development of the international legal system. However, as many scholars also pointed out, the root cause of all the negative implications associated with the proliferation of international tribunals is that these are parallel tribunals under the international legal system and no legal principles exist to determine which tribunal has primary or sole jurisdiction when more than one tribunal can legally claim jurisdiction over the same dispute. This is also the root cause of controversies concerning con-

⁶⁴ See Charney, *supra* note 54, at 706; Gilbert Guillaume, *The Future of International Judicial Tribunals*, 44 INT'L & COMP. L. Q. 848, 861-62 (1995); Pemmaraju Sreenivasa Rao, *Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?*, 25 MICH. J. INT'L. L. 929, 938 (2004).

⁶⁵ See Dupuy, *supra* note 62, at 797-98; Kingsbury, *supra* note 15, at 683.

⁶⁶ Kingsbury, *supra* note 15, at 684.

⁶⁷ Dupuy, *supra* note 62, at 797; Spelliscy, *supra* note 53, at 152.

⁶⁸ Spelliscy, *supra* note 53, at 154-55.

flicting jurisdictions of disputes arising from the applications of TREMs. The following two sub-sections will review the respective dispute settlement mechanism of the WTO and of the MEAs, followed by the analysis of the core question of this article: who has the primary or sole jurisdiction of disputes concerning the application of TREMs.

B. The WTO Dispute Settlement Mechanism⁶⁹ and the Mexico-Soft Drink case

One of the biggest achievements in the Uruguay Round is the establishment of a more "rule-based" dispute settlement mechanism. Article 1.1 of the DSU stipulates that all disputes brought pursuant to the consultation and dispute settlement provisions of the covered agreements shall apply the rules and procedures laid down in the DSU.⁷⁰ In addition to the administrative and institutional arrangement of the DSB and some general obligations, the DSU lays down detailed procedural regulations on each process of the dispute settlement procedures, including the consultation stage,⁷¹ the establishment and operations of the panel⁷² and of the Appellate Body,⁷³ and the enforcement of the rulings and recommendations of the DSB.⁷⁴

Article 3.2 of the DSU states that "dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system" and that the "Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."⁷⁵ It further states, "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."⁷⁶ Article 11 of the DSU prescribes the function of the panel and requires that "a panel should make an objective assessment of the matter before it, including an ob-

⁶⁹ There exists a large volume of literature on the WTO dispute settlement mechanism, including its significance, operational rules, practices, etc. This sub-section will, thus, only briefly introduce the key provisions of the DSU and relevant case law, in particular the Mexico—Soft Drink dispute, on the jurisdictional aspect of the WTO dispute settlement mechanism.

⁷⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, art. 1.1, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

⁷¹ *Id.* art. 4.

⁷² *Id.* arts. 6–16.

⁷³ *Id.* art. 17.

⁷⁴ *Id.* art. 21–22.

⁷⁵ *Id.* art. 3.2.

⁷⁶ *Id.*

jective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.⁷⁷ From these relevant provisions of the DSU, the panel and the Appellate Body are required to resort to the relevant provisions of the covered agreements to settle disputes brought before the DSB, including disputes involving the applications of TREMs.

Article 23.1 of the DSU further requests that WTO Members shall only have recourse to, and abide by, the rulings and procedures of the DSU when they seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements.⁷⁸ In the US-Section 301-301 of the Trade Act of 1974, the panel pointed out that Article 23.1 has rendered the rules and proceedings under the DSU, the only dispute settlement mechanism for WTO Members that seek to redress a violation of their rights under the covered agreements.⁷⁹ It does not permit WTO Members to determine unilaterally whether a violation of the covered agreement has occurred. The Panel refers to Article 23.1 as the “exclusive dispute resolution clause”.⁸⁰ It seems, thus, that the WTO Members, under this Article, have the obligation to refer to the dispute settlement mechanism of the WTO for disputes concerning the application of the covered agreements, including those involving the applications of TREMs. This provision, however, cannot provide any solution to controversies concerning conflicting jurisdictions, as will be explained later.

On March 18, 2004, the United States requested for consultation with Mexico concerning Mexico’s tax measures on soft drinks and other beverages that use any sweetener other than cane sugar, alleg-

⁷⁷ *Id.* art. 11.

⁷⁸ *Id.* art. 23.1.

⁷⁹ Panel Report, *United States—Section 301-310 of the Trade Act of 1974*, ¶ 7.60, WT/DS152/R (Dec. 22, 1999) [hereinafter Section 301 Panel Report].

⁸⁰ The Panel states that Article 23 of the DSU “prescribes a general duty of a dual nature. First, it imposes on all Members to ‘have recourse to’ the multilateral process set out in the DSU when they seek the redress of a WTO inconsistency. In these circumstances, Members have to have recourse to the DSU dispute settlement system to the exclusion of any other system, in particular a system of unilateral enforcement of WTO rights and obligations. This, what one could call ‘exclusive dispute resolution clause’, is an important new element of Members’ rights and obligations under the DSU. Second, Article 23.1 also prescribes that Members, when they have recourse to the dispute settlement system in the DSU, have to ‘abide by’ the rules and procedures set out in the DSU.” *Id.* at ¶ 7.43; see also Panel Report, *United States—Import Measures on Certain Products from the European Communities*, ¶ 6.13, WT/DS165/R (July 17, 2000).

ing violations of Article III:2 and Article III:4 of the GATT 1994.⁸¹ Mexico requested, as a preliminary matter, that the Panel should decline to exercise its jurisdiction and recommend to the parties that they submit their respective grievances to an Arbitral Panel under Chapter 21 of the NAFTA.⁸² In considering Mexico's request, the Panel first addressed whether it has the discretion to decline to exercise its jurisdiction to hear and decide a case properly brought before it.⁸³ The request by Mexico would imply that the Panel would have the freedom to choose whether or not to exercise jurisdiction, and only if a complainant did not have a legal right to have a panel decide a case properly before it would the panel have such freedom within the DSU framework. By referring to Article 11 of the DSU, the Panel states that it would not be in a position to choose freely whether or not to exercise jurisdictions, or it would be failing its duties under Article 11 of the DSU.⁸⁴ In addition, should the Panel have the freedom to choose freely whether or not to exercise its jurisdiction, it could undermine the rights of the complaining Member considering that Article 23 grants this Member the right to have recourse to the rules and procedures of the DSU, and this would be inconsistent with Article 3.2 and Article 19.2 of the DSU.⁸⁵ The Panel did mention that it "makes no findings about whether there may be other cases where a panel's jurisdiction might be legally constrained, notwithstanding its approved terms of reference."⁸⁶ Nevertheless, the Panel concludes that under the DSU, it has no discretion to decide whether or not to exercise its jurisdiction in a case properly before it.⁸⁷ Mexico appealed the rulings of the Panel on several grounds, including this jurisdictional aspect. The Appellate Body states, first, that the WTO panels have certain powers that are inherent in their adjudicative function. Notably, panels have the right to determine whether they have jurisdiction in a given case, as well as to determine the scope of their jurisdiction. Nevertheless, the Appellate Body states that once jurisdiction has been validly established, WTO panels would not have the authority to decline to rule on the entirety of the claims that are before them in a dispute.⁸⁸ On this basis, the Appellate Body proceeds to examine Articles 3.2, 7.1, 7.2, 11, 19.2, and 23 of the DSU to determine the scope of the panel's jurisdictional power and concludes that it sees no reason to

⁸¹ Request for the Establishment of a Panel by the United States, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/4 (June 11, 2004).

⁸² Soft Drink Panel Report, *supra* note 19, ¶ 4.109.

⁸³ *Id.* at ¶ 7.4.

⁸⁴ *Id.* at ¶¶ 7.5–7.8.

⁸⁵ *Id.* at ¶ 7.9.

⁸⁶ *Id.* at ¶ 7.10.

⁸⁷ *Id.* at ¶ 7.18.

⁸⁸ Soft Drink Appellate Body Report, *supra* note 19, at ¶¶ 45–46.

disagree with the Panel's statement that a WTO panel "would seem . . . not to be in a position to choose freely whether or not to exercise its jurisdiction."⁸⁹ However, mindful of the precise scope of Mexico's appeal and claim on this specific case, the Appellate Body did express that it has no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it.⁹⁰

Can these DSU provisions and jurisprudence concerning jurisdictional aspects of the WTO dispute settlement mechanism provide any guidance on controversies arising from the conflicting jurisdictions of disputes involving the applications of TREMs? Section II.D and subsequent discussion will continue this analysis.

C. Dispute Resolution under the MEAs

Compared to the unified and binding dispute settlement mechanism for disputes concerning the covered agreements under the WTO, there is no single judicial forum that deals with disputes concerning international environmental law and the MEAs that are more than 200 in number. The ICJ has jurisdiction over disputes concerning international law in general and many of the provisions on dispute resolutions in the MEAs provide recourse to the ICJ under certain circumstances. Some of the ICJ cases have played a very important role in the early development of international environmental law by establishing customary laws or general principles of international environmental law,⁹¹ and continue to contribute to the contemporary development of international environmental law.⁹² In addition, as a response to the increasing international dispute involving the use of natural resources or other environmental-related matters, the ICJ set up an Environmental Chamber in 1993. This Chamber, however, has never been called upon to hear cases. Furthermore, disputes involving the applications and interpretations of the MEAs have rarely been subject to the ICJ jurisdiction. In addition, there have always been some controversies concerning the operations of the ICJ (e.g., very strict conditions for obtaining jurisdictions, lengthy court proceedings).

⁸⁹ *Id.* at ¶¶ 47–53.

⁹⁰ *Id.* at ¶ 54.

⁹¹ See *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9) (establishing that no state shall permit the use of its territory in such a way as to cause damage to other states); *Fisheries Jurisdiction* (U.K. v. Ice.) 1974 I.C.J. 3 (July 25) (confirming that states have the obligation to cooperate in the use and management of shared resources in the high seas).

⁹² See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8); see also *Gabcikovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

All these factors have rendered the ICJ an unsuitable judicial forum to deal with disputes concerning international environmental law and the MEAs.⁹³ An "International Environmental Court" has been proposed by some scholars.⁹⁴ Nevertheless, this proposal has also encountered difficulties and criticisms.⁹⁵ Nearly all of the MEAs have put down dispute resolution provisions in their treaties, and their main characteristics are the flexibility they offer to choose from a variety of dispute resolution mechanisms (such as negotiation, mediation, conciliation), and the often non-binding nature of these various mechanisms.⁹⁶

In addition to the more traditional means of dispute resolutions, there has been some new development under international environmental law in this front. As regulations provided under the treaty become stricter and more technical, efforts to make sure that contracting parties are in compliance with their treaty obligations and, thus, to avoid a dispute, become the focus of MEAs that were concluded after the 1980s. Therefore, general compliance mechanisms, such as the submission of national implementation reports and the setting up of review bodies, have been adopted by several MEAs with the aim of assisting effective implementation of treaty obligations by parties. A significant feature is the so-called "non-compliance procedures" to deal with parties that are in non-compliance with their treaty obligations. This non-compliance mechanism has become part of the standard dispute resolution mechanisms in some of the more recent MEAs concluded after the 1990s.

To provide a more comprehensive overview on the dispute settlement mechanisms under the MEAs, this sub-section will first introduce the standard, more traditional, dispute resolution provisions of the CITES, the 1992 UN Convention on Biological Diversity (CBD) and the UNCLOS, followed by an introduction to the Non-Compliance Procedures (NCP) to the Montreal Protocol, which is the first MEA that set up a non-compliance mechanism.

1. *Standard Dispute Resolution Clauses—Using the CITES, CBD and UNCLOS as Examples*

The dispute resolution clauses under most of the MEAs are quite standard, usually ranging from diplomatic means to more judi-

⁹³ See Jeffrey L. Dunoff, *Institutional Misfits: The GATT, the ICJ & Trade-Environment Disputes*, 15 MICH. J. INT'L L. 1043, 1085-1106 (1994).

⁹⁴ *Id.* at 1106, 1106 n.317.

⁹⁵ See, e.g., *id.* at 1107-08; see generally Sean D. Murphy, *Does the World Need a New International Environmental Court?*, 32 GEO. WASH. J. INT'L L. & ECON. 333 (2000).

⁹⁶ Gonzalez-Calatayud & Marceau, *supra* note 14, at 279.

cial-oriented means of dispute resolution methods. Most of them include negotiation and consultation, good offices, mediation, arbitration, conciliation, and recourse to the ICJ. The MEAs that were concluded earlier have provided simpler dispute resolution clauses, as the case of the CITES will illustrate. The MEAs that were concluded after the 1980s, on the other hand, provide more comprehensive dispute resolution provisions that include almost all of the dispute resolution methods, as the case of the CBD will illustrate. Only a few MEAs set down mandatory dispute settlement mechanisms, as the case of the UNCLOS will illustrate.

In the case of the 1973 CITES, there is only one Article in the treaty that deals with dispute resolution. Article 18.1 states that disputes between two or more Parties with respect to the interpretation or application of the provisions of the Convention "shall" be subject to negotiation between the Parties involved in the dispute. If the dispute cannot be settled through negotiation, Article 18.2 then provides that the disputing parties "may", by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at the Hague.⁹⁷ Once the dispute is submitted to arbitration, the disputing parties shall be bound by the arbitration decision. This is a fairly standard dispute resolution clause in those MEAs that were concluded earlier. In practice, rather than invoking Article 18, cases involving parties that are suspected of not complying with the regulations of the CITES, in particular those relating to trade regulations, are usually dealt with by the decisions adopted by the Standing Committee or decisions/resolutions adopted by the COP.⁹⁸

The 1992 United Nations Convention on Biological Diversity (CBD), compared to the CITES, provides a more "diversified" set of dispute resolution methods in Article 27.⁹⁹ Article 27.1, similar to Article 18.1 of the CITES, provides that a dispute between parties concerning the interpretation or application of the Convention "shall" seek solution through negotiation.¹⁰⁰ If the dispute cannot be settled through negotiation, Article 27.2 prescribes that the disputing parties

⁹⁷ CITES, *supra* note 35, art. 18.2.

⁹⁸ See Shih, Potential Conflict, *supra* note 12, at 121–24 (Taiwan was identified by a group of NGOs as over-consuming rhino horns and thus hampering the conservation measures for several endangered species of rhinos in 1992. The Standing Committee of the CITES adopted a decision calling its contracting parties to adopt stricter domestic measures against Taiwan, including trade prohibition, for its failure to control illegal trade of rhino horns and tiger bones. As Taiwan is not a contracting party to the CITES, the legality or legal effect of this decision of the Standing Committee remained controversial).

⁹⁹ United Nations Convention on Biological Diversity art. 27, Jun. 5, 1992, 31 I.L.M. 1004 [hereinafter CBD].

¹⁰⁰ *Id.* art. 27.1; CITES, *supra* note 35, art. 18.1.

"may" jointly seek the good offices of, or request mediation by, a third party.¹⁰¹ Article 27.3 stipulates that, when ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, the contracting parties may declare in writing to the Depositary of the treaty that for a dispute not resolved in accordance with Article 27.1 or Article 27.2, it accepts one or both of the dispute settlement means as compulsory: arbitration in accordance with the procedure laid down in Part 1 of Annex II or submission to the ICJ.¹⁰² Article 27.4 further states that if the disputing parties have not accepted the same or any procedures laid down in Article 27.3, the dispute "shall" be submitted to conciliation in accordance with Part 2 of Annex II unless the parties otherwise agree.¹⁰³ This dispute resolution provision of the CBD clearly represents the flexibility of the MEAs in terms of a more diversified nature of dispute settlement mechanisms and can be seen in many other MEAs as well.

The 1982 United Nation Convention on the Law of the Sea (UNCLOS) is the codification of customary rules on the law of the seas and, from this perspective, is quite different from, and is wider in scope than, other MEAs that lay down new regulations to protect the subject matter of their respective treaty regime.¹⁰⁴ The UNCLOS, however, does contain regulations on the protection and conservation of the marine environment and its resources.¹⁰⁵ Thus, it can be considered as one MEA. There are three Sections in Part XV (Settlement of Disputes) of the UNCLOS.¹⁰⁶ Section 1 lays down general provisions on dispute settlement, mainly requiring parties to resort to peaceful means of dispute resolution for disputes arising from the applications and interpretations of the Convention.¹⁰⁷ Section 2, entitled "Compulsory Procedures Entailing Binding Decisions" and containing ten provisions from Article 286 to Article 296, prescribes the circumstances under which the parties shall refer any dispute concerning the interpretation and application of the Convention to one of the four compulsory and binding dispute settlement means, including the ITLOS, under Article 287.¹⁰⁸ Section 2 also provides detailed procedural rules concerning the operations of its compulsory and binding dis-

¹⁰¹ CBD, *supra* note 99, art. 27.2.

¹⁰² *Id.* art. 27.3.

¹⁰³ *Id.* art. 27.4.

¹⁰⁴ United Nation Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

¹⁰⁵ *Id.* arts. 192-237.

¹⁰⁶ There is a large body of literature on the dispute settlement mechanisms of the UNCLOS. The following paragraphs will only provide a brief summary of the relevant provisions of the UNCLOS on dispute resolution.

¹⁰⁷ UNCLOS, *supra* note 104, arts. 279-85.

¹⁰⁸ *Id.* arts. 286-97.

pute settlement means, such as jurisdiction, provisional measures, preliminary proceeding, the applicable law, the exhaustion of local remedies, and the finality and binding force of the decision reached by any of the judicial forums having jurisdiction over the dispute in question.¹⁰⁹

These compulsory and binding dispute settlement provisions are rarely seen in other MEAs. Article 286 provides that: "Subject to Section 3, any dispute concerning the interpretation or application of this Convention shall, where no settlement has been reached by recourse to Section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section."¹¹⁰ Article 287.1 prescribes four means of settling disputes concerning the interpretation or application of the Convention from which the parties shall choose when signing, ratifying, or acceding to the Convention, or at any time thereafter: the ITLOS, set up in accordance with Annex VI; the ICJ; an arbitral tribunal constituted in accordance with Annex VII; and a special arbitral tribunal constituted in accordance with Annex VIII.¹¹¹ Decisions rendered by a court or tribunal having jurisdiction under Section 2 shall, according to Article 296.1, be final and complied with by the disputing parties.¹¹² Additionally, according to Article 296.2, these decisions shall be binding between the parties and in respect to that particular dispute.¹¹³ In terms of jurisdiction, Article 288.1 stipulates "a court or tribunal referred to in Article 287 shall have jurisdiction over any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part."¹¹⁴ Article 288.2 further provides: "A court or tribunal referred to in Article 287 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement."¹¹⁵

2. *Non-compliance Mechanisms*

The first non-compliance mechanism was established under the Montreal Protocol in 1992¹¹⁶ and similar mechanisms have since been adopted by several other MEAs such as the Kyoto Protocol.¹¹⁷

¹⁰⁹ See *id.*

¹¹⁰ *Id.* art. 286.

¹¹¹ *Id.* art. 287.1.

¹¹² *Id.* art. 296.1.

¹¹³ *Id.* art. 296.2.

¹¹⁴ *Id.* art. 288.1.

¹¹⁵ *Id.* art. 288.2.

¹¹⁶ Fourth MOP, *supra* note 39, annex IV.

¹¹⁷ Kyoto Protocol to the United Nations Framework Convention on Climate Change, U.N. DOC FCCC/CP1997/L.7/Add.1, 37 I.L.M. 22 (Dec. 10, 1997).

The main purpose of the non-compliance mechanism is to offer assistance to contracting parties that are unable to implement their treaty obligations by providing technical and financial assistance. In cases of serious or repeated non-compliance, punitive measures, such as trade restrictive measures, might also be recommended by the non-compliance mechanism.¹¹⁸ Compared to the traditional bilateral and confrontational dispute settlement methods aimed at settling disputes that have already arisen, the non-compliance mechanism takes on a more facilitative approach aimed at the avoidance of disputes arising from non-compliance. As a result, the concept and theory regarding compliance under international environmental law and the associated practices of non-compliance mechanisms are quite different from the more traditional dispute settlement mechanisms under international law.¹¹⁹ The concept of compliance and the non-compliance mechanisms adopted by some MEAs have been characterized differently by scholars under international environmental law. Birnie and Boyle regard the non-compliance mechanism as one form of supervisory techniques.¹²⁰ Sands, on the other hand, regards compliance as part of the wider concept of dispute resolution and group implementation, enforcement, and dispute settlement under the concept of "compliance".¹²¹

The non-compliance mechanism was not created to deal with disputes concerning damage caused by an act (e.g non-compliance with treaty obligations) of one party to another party. However, the concept of "disputes" can hardly be limited as only related to damage to a few countries considering that the objectives and purposes of the MEAs are to protect global resources, rather than to confer specific rights to individual parties. Moreover, all of the previously mentioned dispute

¹¹⁸ See, e.g., Jacob Werksman, *Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime*, 56(3) HEIDELBERG J. INT'L L. 750 (1996) (The 1995 Russia non-compliance case under the Montreal Protocol's NCP is one such example. In this case, Russia requested for a suspension of its obligations under the Protocol. The Implementation Committee under the NCP, however, was not satisfied with the response of Russia regarding its non-compliance situation, requested further information from Russia, and made the recommendations that trade with Russia on regulated substances should be restricted and financial assistance should be provided from the Protocol's financial mechanism. The following MOP 7 adopted the recommendations of the Implementation Committee through consensus, under the protest of Russia, in December 1995).

¹¹⁹ See generally Markus Ehrmann, *Procedures of Compliance Control in International Environmental Agreements*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 377 (2002) (providing further information on non-compliance).

¹²⁰ PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 205-09 (Oxford Univ. Press 2d ed. 2002).

¹²¹ See generally SANDS, *supra* note 31, at 171-230.

resolution provisions of several MEAs only refer to disputes "concerning the interpretation or applications" of the conventions without referring to the consequent damage caused as the qualifying conditions. Some scholars, thus, propose that dispute settlement mechanisms under international environmental law play a certain public function with an aim to preserve values and objectives common to the global society.¹²² From this perspective, rather than replacing the more traditional dispute settlement mechanisms, the non-compliance mechanisms provide an alternative set of procedures to settle differences between or amongst parties regarding disputes arising from the "interpretation or application" of MEAs.¹²³ This is why the non-compliance mechanism will be regarded in this article as within the wider concept of dispute settlement mechanisms of the MEAs.

Take the "non-compliance procedures" (NCP) under the Montreal Protocol as an example.¹²⁴ The investigation of non-compliance can be initiated by any party that suspects the non-compliance of another party, the Secretariat of the Protocol, and the party that regards itself as in the state of non-compliance. The request for investigation can be submitted to the Secretariat at any time and will be handed to the "Implementation Committee" to conduct the investigation. The Implementation Committee, consisting of ten Members selected by the Meeting of the Parties (MOP) to the Protocol, is a permanent institution that is responsible to conduct the investigation and to review all the documents before recommending the most appropriate solutions to deal with an incidence of non-compliance. The recommendation of the Implementation Committee will be submitted to the MOP, which is responsible to adopt a final decision on this matter. Under the NCP, the MOP is able to recommend financial and/or technical assistance to the non-complying party with the aim to assist prompt compliance with the Protocol. In cases of repeated or serious non-compliance, the MOP can also adopt more punitive decisions, such as issue cautions and suspend specific rights and privileges under the Protocol, including those concerned with trade, transfer of technology, and financial mechanism.¹²⁵

¹²² A. Neil Craik, *Recalcitrant Reality and Chosen Ideals: The Public Function of Dispute Settlement in International Environmental Law*, 10 GEO. INT'L ENVTL. L. REV. 551, 563 (1998).

¹²³ Gunther Handl, *Compliance Control Mechanisms and International Environmental Obligations*, 5 TUL. J. INT'L & COMP. L. 29, 46 (1997).

¹²⁴ See Fourth MOP, *supra* note 39, annex IV; Ehrmann, *supra* note 119, at 395-405.

¹²⁵ Fourth MOP, *supra* note 39, annex V.

D. Who Has the Primary and/or Sole Jurisdiction?

Disputes arising from the application of TREMs can be submitted to the dispute settlement mechanism under the WTO (such as the Chile-Swordfish Case) and to other international tribunals as well. For example, a dispute involving the application of TREMs that is authorized by an MEA can be submitted to the WTO, to the ICJ, and also to the dispute resolution procedures provided under the MEAs, including conciliation, arbitration, various types of courts and tribunals, and non-compliance procedures. Under this circumstance, this type of dispute might be subject to the jurisdictions of more than one international tribunal simultaneously or subsequently. Decisions by different tribunals might also be rendered regarding this type of dispute. Are there any legal principles on conflicting or multiple jurisdictions to determine which tribunal has the primary or sole jurisdiction?

Legal principles on dealing with multiple jurisdictions over the same dispute exist under private international law (conflict of laws) and domestic law. Scholars attempt to apply such legal principles, such as *electa una via*, *forum non conveniens*, *lis alibi pendens*, and *res judicata* to analyze controversies concerning conflicting jurisdictions under public international law in the era of proliferation of international tribunals.¹²⁶ However, treaties that set up these international tribunals have not incorporated such principles on jurisdiction in the treaties. Neither can these principles be regarded as customary law or general principles of law on conflicting jurisdictions amongst international tribunals.¹²⁷ It has also been suggested that general principles of law might be able to provide some guidance to fill this legal vacuum and that the principles of fairness and of reasonableness, two principles that apply to jurisdictional conflict of domestic courts and private international law, might be applicable here. In addition, three legal principles that deal with conflicting jurisdictions of domestic courts (i.e., the principle of comity, *forum non conveniens*, and rules on choice of law) might also be applicable.¹²⁸ Still other scholars provide that the principles of good faith and *abus de droit* might be applicable to deal with or prevent issues of conflicting jurisdictions over a dispute arising from the application of TREMs between the dispute settlement mechanism of the WTO and that of the MEAs.¹²⁹

¹²⁶ Chester Brown, 14 EUR. J. INT'L L. 1045 (2003) (reviewing SHANY, YUVAL, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (2003)); Laurence Boisson de Chazournes, *Recent Books on International Law*, 98 AM. J. INT'L L. 610, 622-25 (2004); Marceau, *supra* note 8, at 1112.

¹²⁷ Brown, *supra* note 126, at 1046.

¹²⁸ Guruswamy, *supra* note 18, at 300-01, 308.

¹²⁹ Gonzalez-Calatayud & Marceau, *supra* note 14, at 282-83.

International tribunals are established by their respective treaties. In other words, their jurisdictions are conferred only after obtaining the consent of states. Therefore, previously mentioned legal principles of private international law are legally unsuitable to be applied to jurisdictional conflicts between international tribunals under public international law, unless they are specifically prescribed by treaties establishing such tribunals. Additionally, there have yet to be cases by international tribunals that apply these principles to deal with conflicting jurisdictions. Furthermore, there is no mechanism existing under public international law which acts as a supreme court under the domestic legal system to render a final and binding decision. It is suggested that the ICJ might be an appropriate tribunal to play such a role. This suggestion, however, requires an amendment to the Statutes of the ICJ, which seems unrealistic in practice.¹³⁰ To summarize, for all the controversies that might arise concerning conflicting and multiple jurisdictions between international tribunals, there are currently no general legal principles to determine which tribunal has the primary or sole jurisdiction on a dispute over which multiple tribunals can establish jurisdictions.

As mentioned previously, international tribunals are established by their respective treaties. Can solutions to conflicting jurisdictions be found under the respective treaties setting up these tribunals? For disputes arising from the application of multilateral TREMs, a closer examination on both provisions of the DSU and the dispute resolution provisions of the MEAs will be conducted next.

Article 23.1 of the DSU mandates that Members have recourse to and abide by rules and procedures of the DSU when seeking to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements.¹³¹ The panel in the US-Section 301-310 of the Trade Act of 1974 refers to this Article as the "exclusive dispute resolution clause."¹³² Can Article 23.1 provide guidance in dealing with conflicting jurisdictions concerning disputes involving the application of TREMs? Not necessarily. First, Article 23 cannot prevent other international tribunals from legally obtaining jurisdiction under their treaty provisions over a dispute involving the application of multilateral TREMs.¹³³ A dispute arises when the application of TREMs by Country A affects the interests (usually trade interests) of Country B. When both countries are members of the WTO, Country B will naturally bring this dispute to the WTO if it

¹³⁰ Dupuy, *supra* note 62, at 800.

¹³¹ DSU, *supra* note 70, art. 23.1.

¹³² Section 301 Panel Report, *supra* note 79, ¶ 7.43.

¹³³ Marceau, *supra* note 8, at 1111.

thinks that the TREMs adopted by Country A have violated the covered agreements or have nullified or impaired the benefits under the covered agreements. The function of Article 23 of the DSU is to prevent Country B from dealing with such a dispute unilaterally.¹³⁴ However, situations involving conflicting jurisdictions usually result from disputes similar to the Chile-Swordfish case, where the disputing parties each bring their respective complaints to different tribunals, resulting in a situation where more than one tribunal will be hearing and deciding the legality of the same TREM according to different legal regimes. This is what Article 23 of the DSU is not set out to handle.

Take the above-mentioned dispute between Country A and Country B as an example and assume that both countries are contracting parties to an MEA that has its own compulsory dispute settlement mechanism. If the dispute has yet to be subjected to any tribunal and Country A alleges that, for a dispute involving the application of TREM adopted under the authorization of that particular MEA, Country B is prevented from having recourse to the dispute settlement mechanism of the WTO and is obliged to use the dispute settlement mechanism under the MEA, then Article 23 of the DSU will be inapplicable under this circumstance as Country A does not assert a violation of its rights under the WTO. If the dispute has already been brought to the WTO dispute settlement proceeding by Country B and Country A claims that the WTO does not have jurisdiction over this dispute, Article 23 of the DSU is also inapplicable to solve this conflicting jurisdictional issue. On the contrary, Article 23 and other provisions of the DSU serve to confirm that the WTO panel cannot choose to refrain from exercising its jurisdiction, as established by the Mexico-Soft Drink case.

From the findings of the Panel and the Appellate Body in the Mexico-Soft Drink case, it seems that once a case is brought before it and the jurisdiction has been validly established, the WTO panels would not have the discretion to choose freely whether or not to exercise its jurisdiction.¹³⁵ However, as the factual background of the Mexico-Soft Drink case is different from the Chile-Swordfish dispute, and the dispute had not yet been submitted to other dispute settlement proceedings, it would be difficult to predict with certainty whether the WTO panel in a dispute similar to the Chile-Swordfish case would adopt the position in the Mexico-Soft Drink case.¹³⁶ It is

¹³⁴ See DSU, *supra* note 70, art. 23.

¹³⁵ See generally Soft Drink Panel Report, *supra* note 19; Soft Drink Appellate Body Report, *supra* note 19.

¹³⁶ Soft Drink Panel Report, *supra* note 19, ¶ 4.201 (In the Mexico-Soft Drink case, Mexico alleged that its tax regime on soft drinks was adopted as a means to

also necessary to keep in mind that both the panel and the Appellate Body in the Mexico-Soft Drink case expressed the view that this jurisdictional issue is not yet conclusive as they express no view whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. Whether the existence of an ongoing dispute settlement proceeding in a particular MEA concerning the same dispute constitutes other circumstances in which legal impediments exist for the WTO panel to decline exercising jurisdiction is yet to be determined.

In comparison to the analysis that only focused on the DSU, examinations will need to be focused on the dispute resolution provisions of every single MEA to determine whether that particular MEA has laid down provisions to deal with the issues of conflicting jurisdictions. From the descriptions in Section II.C, it is noted that most MEAs provide a variety of means for the parties to choose from for settling a dispute concerning the interpretation and application of a treaty, without providing any relevant provision on jurisdictional issues. Relevant provisions are also not laid down in the non-compliance mechanism adopted by some MEAs.

UNCLOS prescribes a compulsory dispute settlement mechanism that is probably the only exception and contains two provisions to deal with jurisdictional issues, Article 281 and 282. Article 281.1 provides that:

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.¹³⁷

Article 282 further states:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply in lieu of the procedures provided for in this

force the U.S. to implement U.S. obligations under NAFTA to open its market for sugar imports from Mexico. Because of this, Mexico alleged that this dispute should be submitted to an Arbitral Panel under Chapter 21 of NAFTA).

¹³⁷ UNCLOS, *supra* note 104, art. 281.

Part, unless the parties to the dispute otherwise agree.¹³⁸

Article 281 basically defers to the choice of dispute settlement forum selected by consensus of the disputing parties and, thus, does not provide guidance to deal with issues of conflicting jurisdictions. Article 282, on the other hand, seems to deal specifically with situations where multiple jurisdictions exist over a dispute concerning the interpretation and application of the UNCLOS.

There have been three disputes involving multiple jurisdictions and the application of Article 282 under the ITLOS: the Southern Bluefin Tuna case in 1999-2000,¹³⁹ the Swordfish case in 2000,¹⁴⁰ and the MOX Plant case in 2001.¹⁴¹ Apart from the Swordfish case that has been suspended per the consensus of the disputing parties, the ITLOS has applied and interpreted Article 282 in the other two cases.¹⁴² In the Southern Bluefin Tuna case, the ITLOS noted that Article 282 only applies to a situation where the general, regional or bilateral agreement specifically prescribes that dispute settlement procedures and decisions rendered under those procedures are compulsory and only under this circumstance can the jurisdiction of the ITLOS be excluded.¹⁴³ In the MOX Plant case, the UK relied on Article 282 to claim that the dispute should be subject to the compulsory dispute settlement mechanism under the "Ospar Convention on the Protection of the Marine Environment of North-East Atlantic"¹⁴⁴ and/or the European Atomic Energy Treaty.¹⁴⁵ This claim, however, was rejected by the ITLOC because the dispute settlement mechanisms under these two treaties are responsible to deal with disputes concerning the interpretation and application of these two treaties, not of the UNCLOS.¹⁴⁶ In addition, even when rights and obligations under these two treaties are "similar to or identical with the rights or obligations set out in the LOS Convention, the rights and obligations under those agreements have a separate existence from those under the Con-

¹³⁸ *Id.* art. 282.

¹³⁹ Southern Bluefin Tuna Case (New Zealand v. Japan and Australia v. Japan), 119 I.L.M. 508 (Int'l Trib. L. of the Sea 2000) [hereinafter Southern Bluefin Tuna].

¹⁴⁰ Swordfish Case, *supra* note 17.

¹⁴¹ MOX Plant Case (Ireland v. UK), 126 I.L.M. 260 (Int'l Trib. L. of the Sea 2001) [hereinafter MOX].

¹⁴² See Robin Churchill and Joanne Scott, *The MOX Plant Litigation: The first half-life*, 53 INT'L & COMP. L. Q. 643, 653-57 (2004).

¹⁴³ See generally Southern Bluefin Tuna, *supra* note 139.

¹⁴⁴ Ospar Convention on the Protection of the Marine Environment of the North-East Atlantic, Sep. 22, 1992, available at http://www.ospar.org/html_documents/ospar/html/OSPAR_Convention_e_updated_text_2007.pdf.

¹⁴⁵ MOX, *supra* note 141, ¶¶ 49-50.

¹⁴⁶ *Id.*

vention."¹⁴⁷ From these two cases, it seems quite difficult in practice to exclude the jurisdiction of the ITLOS (or any other means of dispute settlement under Part XV) under Article 282 as it is nearly impossible to find one international agreement providing the same rights and obligations as those of the UNCLOS and a set of compulsory dispute settlement mechanisms as well.

From the above analysis of respective dispute resolution provisions of the WTO and of the UNCLOS, it seems that solutions are not provided under the respective treaty provisions to deal with issues of conflicting jurisdictions either. To summarize, no general legal principles exist to deal with issues of conflicting jurisdictions of international tribunals and, on the other hand, provisions to deal with such jurisdictional issues rarely exist in either the DSU or the dispute resolution provisions of the MEAs. It seems that such controversies concerning conflicting jurisdictions cannot be resolved effectively.¹⁴⁸

Several proposals have been put forward to deal with such controversies. First, it has been suggested that the ICJ can play a crucial role under such circumstances.¹⁴⁹ For example, the disputing parties or individual international tribunals involved under this circumstance can seek assistance from the ICJ by requesting an advisory opinion from the ICJ to clarify jurisdictional conflict between treaties or international institutions.¹⁵⁰ Alternately, the ICJ can be transformed into an appeal or supreme court to provide a final decision regarding jurisdictional conflict. However, as previously mentioned, these proposals all involve an amendment to the Statute of the ICJ, which would be rather difficult to pass. Second, it has been suggested that communications and exchange of views between international tribunals could be enhanced to reach an overall consensus of the international legal order, so that practices can be established where, under the discretion of their constituent treaties, each tribunal will give deference to rules and proceedings of other tribunals concerning legal issues that should be under the jurisdictions of those tribunals.¹⁵¹ This echoes the principle of comity proposed by some scholars.¹⁵² In the MOX Plant case, for instance, the arbitral tribunal established under Annex VII of the UNCLOS suspended the proceeding of the case for five months and waited

¹⁴⁷ *Id.*

¹⁴⁸ See Marceau, *supra* note 8, at 1130–31.

¹⁴⁹ See Dupuy, *supra* note 62, at 798–801.

¹⁵⁰ Lorand Bartels, Book review, 53 INT'L & COMP. L.Q. 519 (2004) (reviewing LAURENCE BOISSON DE CHAZOURNES, CESRE ROMANO AND RUTH MACKENZIE, INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS (2004)).

¹⁵¹ Dupuy, *supra* note 62, at 802.

¹⁵² See generally SHANY, *supra* note 15; Guruswamy, *supra* note 18, at 322.

for the more suitable tribunal, the European Court of Justice, to make the decision on the jurisdictional issue.¹⁵³

Some of the above-mentioned proposals are unrealistic in practice, while some might require tribunals to exercise a great sense of self restraint. Furthermore, some tribunals might even be legally prevented from refusing to exercise jurisdiction under certain circumstances, as the Mexico-Soft Drink case demonstrated. In other words, none of these proposals seem to offer a satisfactory solution to deal with controversies concerning conflicting jurisdictions resulting from a legal vacuum where no legal principles exist to solve such controversies. Under the circumstances, what are the implications of disputes arising from the application of TREMs, or in particular, multilateral TREMs?

IV. THE IMPLICATIONS OF CONFLICTING JURISDICTIONS ON DISPUTE ARISING FROM THE APPLICATION OF TREMS

It has already been noted in Section I that the potential conflict in jurisdictions concerning disputes involving the application of TREMs has been substantialized in the Chile-Swordfish case. It has, furthermore, been demonstrated in Section II that neither legal principles in general nor specific provisions under the DSU and MEAs exist that offer satisfactory solutions to deal with controversies concerning conflicting jurisdictions. Does this mean that the proliferation of international tribunals will inevitably produce the negative consequences mentioned in Section II.A where jurisdictions such as the WTO and MEAs conflict as how to apply TREMs?

This Section will first hypothesize several possible scenarios should the Chile-Swordfish case have not been suspended and both the ITLOS and WTO panel had the dispute before them. Second, three hypothetical cases of conflicting jurisdictions involving the application of multilateral TREMs will be constructed to analyze the possibility of such conflicts and the consequent implications to the applications of TREMs.

A. Hypothetical Scenarios of the Chile-Swordfish Case

Assuming that the EC and Chile did not reach any consensus on settling their dispute concerning the Chilean measure in question

¹⁵³ MOX Plant Arbitration (*Ireland v.s. UK*), Order No. 4, Further Suspension of Proceedings on Jurisdiction and Merits, Nov. 14, 2003, Arbitral Tribunal constituted under Art 287 and Annex 1, Art 1 of UNCLOS, cited in: Lorand Bartels, *The Separation of Powers in the WTO: How to avoid judicial activism*, 53 INT'L & COMP. L. Q. 861 (2004), at note 141 and accompanying text available at http://www.pca-cpa.org/showfile.asp?fil_id=73.

and the WTO panel and the ITLOS *ad hoc* chamber both began their respective dispute settlement proceedings, will the worst scenario happen wherein one dispute subject to multiple tribunals that has serious negative impact on the international legal order? The possible legal claims and defenses put forward by the EC and Chile in the WTO panel proceeding and in the ITLOS proceeding might be as follows.

In the WTO panel proceeding, the EC alleged that the Chilean measures violate Article V, Article XI of the GATT 1994¹⁵⁴ and Chile could use the general exception provided by Article XX(b) and (g) as its possible defense.¹⁵⁵ Chile could also put forward the argument that its measures are adopted to comply with the UNCLOS or other conservation-related MEAs, although whether the Chilean measures in question can be regarded as those set out in the UNCLOS is still unclear. Under the circumstances, the Panel and/or the Appellate Body (should the dispute be appealed) would, according to Articles 3.2 and 11 of the DSU (and their respective terms of reference),¹⁵⁶ examine the conformity of the Chilean measures in dispute with the GATT/WTO. On the other hand, Chile would allege that the EC has violated the obligations of cooperation and conservation under the UNCLOS, while the EC would claim that it did not violate the UNLCOS and that it was Chile that violated the obligations of cooperation and the freedom of the high seas. Under the circumstances, the ITLOS would need to review the action (or non-action) of the EC, according to Chile's claim, to determine whether the EC has violated the UNCLOS and then review the Chilean measures, including the signing of Galapagos Accord, according to the EC's claim to determine whether Chile has violated the UNCLOS. In the first part of the ITLOS review, the TREMs adopted by Chile are not subject to review by the ITLOS and are only subject to review by the WTO panel and/or the Appellate Body. In the second part of the ITLOS review, the TREMs adopted by Chile are subject to review by the ITLOS as well as by the WTO panel and/or the Appellate Body.

In the first part of the ITLOS review, the disputing TREMs, that is, the Chilean measures banning the unloading and importation of fish that are caught in contravention of Chile's conservation law, are not examined by two different tribunals, and thus no conflicting jurisdictions exist. In the second part of the ITLOS review, two different tribunals, both of which have legitimate jurisdiction to hear the dispute, would examine the legality of the disputing TREMs. In other words, the WTO panel and the ITLOS would determine, respectively, the consistency of the Chilean measures with GATT Article V and Ar-

¹⁵⁴ See *Swordfish Case*, *supra* note 17.

¹⁵⁵ *Id.*

¹⁵⁶ DSU, *supra* note 70,

ticle XI, as well as with the UNCLOS Article 87 and Article 89. From the previous analysis in Section II.D, neither the dispute settlement mechanism of the WTO nor that of the UNCLOS has the primary and/or sole jurisdiction here, and a decision rendered by one tribunal would not affect the proceedings or decisions of the other tribunal.¹⁵⁷ Will this result in the fragmentation and inconsistency of the international legal order as a whole?

Not necessarily. The WTO panel is required, under Articles 3.2 and 11 of the DSU as well as its terms of reference,¹⁵⁸ to apply the relevant provisions of the GATT/WTO to examine the Chilean measures, while the ITLOS, under Article 293.1 of the UNCLOS,¹⁵⁹ is required to apply the UNCLOS and other relevant rules of international law not incompatible with the UNCLOS. Under any circumstances, a single act might trigger several types of legal consequences as provided under different legal requirements. For example, an act of murder could be subject to both a civil liability proceeding of torts and a criminal investigation of homicide. The TREMs themselves exhibit dual characteristics of trade measures and environmental objectives. As the WTO panel and the ITLOS would apply their respective specialized rules to examine the legality of the same Chilean TREMs, and in the process offer their respective interpretations of their specialized rules, other international principles of general applicability are not likely to be affected. As a result, the fragmentation and inconsistency of the international legal order as a whole might not arise under the circumstances. As evidenced by the above discussion, scholars who worry about the negative implications of conflicting jurisdictions mainly express concern that rulings from different international tribunals might interpret and apply legal principles of general applicability differently, resulting in inconsistency and fragmentation of general international law. However, as each of these specialized tribunals are required to adjudicate and decide the case according to its own specialized rules, legal principles of general applicability might not even be applied and interpreted by these specialized tribunals. In fact, according to some scholars, multiple proceedings relating to the same facts but involving distinct legal claims under international law might not be regarded as "same issues," one of the two prominent features of competing jurisdictions, and hence might not even be characterized as "conflicting or competing jurisdictions."¹⁶⁰

¹⁵⁷ Namely, the decision rendered by the ITLOS confirming the conformity of the Chilean measures with the UNCLOS will not affect how the WTO panel examines the same Chilean measures under its proceeding to determine the consistency of the Chilean measures with the GATT/WTO.

¹⁵⁸ DSU, *supra* note 70, arts. 3.2, 11.

¹⁵⁹ UNCLOS, *supra* note 104, art. 293.1.

¹⁶⁰ SHANY, *supra* note 15, at 26.

Nevertheless, there are negative implications for the states in dispute, as the following discussion will illustrate. In the second part of the ITLOS review, where the same Chilean TREMs are subject to review by both the WTO panel and the ITLOS, four possible outcomes might take place, as demonstrated in Table 1:

TABLE 1: POSSIBLE SCENARIO UNDER THE CHILE—
SWORDFISH CASE

	WTO finds the Chilean TREMs inconsistent with the GATT/WTO	WTO finds the Chilean TREMs consistent with the GATT/WTO
ITLOS finds the Chilean TREMs inconsistent with the UNCLOS	Situation A	Situation B
ITLOS finds the Chilean TREMs consistent with the UNCLOS	Situation C	Situation D

For Chile, there are no difficulties under Situations A and D. In Situation D, the Chilean TREMs can be legally maintained and under Situation A, the Chilean government is also likely to withdraw the TREMs in dispute without encountering any difficulties. However, in Situations B and C, what should the Chilean government do?

Under Situation B, the WTO panel rules in favor of Chile and finds the Chilean TREMs consistent with the GATT/WTO while the ITLOS rules in favor of the EC and finds the Chilean TREMs inconsistent with the UNCLOS. What action can the Chilean government take? Should the Chilean government maintain or withdraw its TREMs in dispute? When the WTO panel rules that the Chilean measures are in conformity with the GATT/WTO, the Chilean government is not legally required to maintain these TREMs, and if it decides to implement the rulings of the ITLOS and withdraw or revise the TREMs in question, it will not affect its WTO obligations. In this situation, advocates of TREMs can hardly blame the Chilean government for failing to conserve swordfish, as it is the ITLOS that finds the Chilean TREMs illegal. Furthermore, considering that the enforcement mechanism under the UNCLOS is not as effective as that of the DSU, Chile could take the chance of choosing to maintain its conservation measures should it calculate that the odds of counteractions from the EC are minimal.

Under Situation C, the WTO panel rules in favor of the EC and Chile is required to withdraw its TREMs while the ITLOS rules in favor of Chile and Chile can legally maintain the TREMs. What action can the Chilean government take? Should the Chilean government

maintain or withdraw its TREMs in dispute? When the EC lost its case under the ITLOS, Chile can legally maintain its TREMs under the UNCLOS regime. This, however, does not mean that Chile has an obligation to do so, particularly when the TREMs in dispute are not specifically required by any provision of the UNCLOS. In other words, Chile will not violate its obligations under the UNCLOS if its government decides to implement the rulings and recommendations of the DSB and withdraw the TREMs in question. On the other hand, if Chile decides to maintain the TREMs, it might face possible trade retaliation from the EC under the authorization of the DSB. Under this circumstance, the Chilean government is quite likely to withdraw or revise its TREMs in question so that it can implement the rulings and recommendation of the DSB and is not in violation of its obligations under the UNCLOS.¹⁶¹ This decision might seem disturbing to advocates of TREMs and, to some extent, the Chilean government, as Chile is forced to withdraw legitimate TREMs under the UNCLOS to fulfill the requirements of Chile's obligation under the WTO.

For states that use TREMs as an environmental protection tool, this seems quite a negative implication resulting from the inability to resolve conflicting jurisdictions involving the applications of TREMs. This, however, does not entirely result from the unresolved issues concerning conflicting jurisdictions. Recalling from the Introduction that the legal debates on the TREMs can be categorized into two groups, one concerning the conflict of norms and the other concerning the conflicts of jurisdictions, the inability to come up with a satisfactory solution to the issues of conflict of substantive norms between the GATT/WTO and the MEAs also contributes to generate this negative implication. If substantive legal rules under both the GATT/WTO and the UNCLOS (or other MEAs), or even general legal principles can provide guidance to deal with potential conflicting norms, this negative implication might be prevented, even in the face of unresolved issues of conflicting jurisdictions, as the chances of Situation B and Situation C might be prevented.¹⁶²

B. Disputes arising from the Application of TREMs

The Chile-Swordfish dispute involves only two states, one that adopts the TREMs and the other affected by the TREMs. The application of a genuine multilateral TREM might not only generate contro-

¹⁶¹ However, if the TREMs in question are specifically authorized by the UNCLOS in its treaty provisions, the decision to implement the ruling and recommendation of the DSB will render Chile in violation of its obligations under the UNCLOS, which will be discussed in more detail in the following subsection.

¹⁶² For example, multilateral TREMs meeting certain requirements would be presumed legitimate under the GATT/WTO.

versies of conflicting jurisdictions but also involve more than two states. What will be the implications of this? This subsection will design three hypothetical cases to provide further analysis.

In Case 1, Country A and Country B are both WTO Members and parties to the Montreal Protocol. According to the phase-out schedule for controlled substances under the Montreal Protocol, Country A prohibits the importation of all types of cooling equipment containing CFCs from all countries, including Country B, while Country B does not impose the same import prohibition. Country B challenged this trade prohibition measure adopted by Country A to the WTO. At the same time, Country A brought Country B to the dispute resolution mechanism under the Montreal Protocol for Country B's failure to implement the phase-out schedules by prohibiting trade of such products. Under the Montreal Protocol, Country A can resort to the dispute resolution clauses under the Montreal Protocol, which resembles the traditional and typical dispute resolution clauses of most of the MEAs, as introduced in Section II.C, which include an arbitral tribunal, the ICJ, or a conciliation committee.

In addition, Country A can also initiate the non-compliance procedures of the Protocol and request the Implementation Committee to investigate whether Country B is not complying with its obligations under the Protocol. In this case, the WTO panel and/or the Appellate Body will examine the consistency of trade prohibition measures adopted by Country A, a genuine multilateral TREM, with relevant provisions of the GATT/WTO. The dispute settlement forum under the Montreal Protocol, be it an arbitral tribunal, the ICJ, the conciliation committee, or the Implementation Committee, will examine the actions, or inactions, of Country B as alleged by Country A. Under these circumstances, the subject matter under each respective tribunal is different and, thus, does not result in controversies concerning conflicting jurisdictions. However, should Country A's TREM be found inconsistent with the GATT/WTO and withdrawal is necessary to avoid trade retaliation authorized by the DSB from Country B, this might put Country A in a difficult situation where the implementation of one set of rules (rulings and recommendations of the DSB) inevitably results in the non-compliance with another set of rules (the Montreal Protocol).

Meanwhile, should the Implementation Committee under the Montreal Protocol make a recommendation, which is later adopted by the MOP, that Country B will be prevented from trading with other parties if it does not comply with its obligations (i.e. the import prohibition measures) under the Protocol, this might also put Country B in the same place as Country A. As similar trade measures adopted by Country A have already been found inconsistent with the GATT/WTO, Country B might face challenges from other WTO members that are

affected by such import prohibition measures. This also puts Country B in an awkward position where the implementation of one set of rules (decisions of the COP to the Montreal Protocol) might later result in legal challenges, even in trade retaliation from another set of rules (potential rulings and recommendations from the DSB). These two complexities, nevertheless, do not result from controversies concerning conflicting jurisdictions but from controversies concerning conflicting norms.

In Case 2, Countries C and D are both WTO members and Country C is a party to the Montreal Protocol. Country C, in accordance with Article 4 of the Montreal Protocol, prohibits the importation of cooling equipment containing CFCs from non-parties to the Montreal Protocol, including Country D. Country D challenges the trade prohibition measure adopted by Country C to the WTO. The WTO panel and/or the Appellate Body will examine the consistency of Country C's trade prohibition measure, a genuine multilateral TREM, with relevant provisions of the GATT/WTO. As only Country C is a party to the Montreal Protocol, the dispute settlement mechanisms under the Montreal Protocol will not have jurisdiction over any dispute arising between Country C and Country D. In addition to the dispute settlement mechanism of the WTO, can this dispute be settled in another international tribunal? For example, can Country C or Country D bring this dispute to the ICJ? For Country D, alleging that the TREM in question violated the GATT/WTO, it is required under Article 23 of the DSU to have recourse to and abide by the rules and procedures of the DSU, and, thus is prevented from resorting to the ICJ concerning seeking redress of a violation of obligations of the GATT/WTO. For Country C, it might be quite difficult to allege that Country D's continued use of cooling equipment containing CFCs is a violation of customary international law or causes damages to Country C. Therefore, Country C might also be prevented from having recourse to the ICJ. Most importantly, it must be determined whether the ICJ has obtained the jurisdiction through mutual consensus of both parties or other means as laid down in its statutes.

In this case, it is very likely that there will only be one tribunal, the WTO dispute settlement mechanism, for the dispute involving the multilateral TREM adopted by Country C and no controversies concerning conflicting jurisdictions will arise. Note, however, that controversies concerning conflicting norms might still arise under this case. If the WTO panel/Appellate Body finds that this multilateral TREM adopted by Country C in accordance with the Montreal Protocol is inconsistent with the GATT/WTO and requests the revision or withdrawal of the TREM, Country C might face a serious dilemma. If it implements the rulings and recommendations of the DSB and withdraws its TREM, it is in violation of its obligations under the Montreal

Protocol and might face investigations of non-compliance from the Montreal Protocol. If it decides to continue the trade prohibition measure to comply with the Montreal Protocol, it faces possible trade retaliation from Country D as authorized by the DSB. This, however, does not result from controversies concerning conflicting jurisdictions.

In Case 3, Countries E, F, and G are all WTO Members and Country E and F are parties to the Montreal Protocol. Country E, according to Article 4 of the Protocol, prohibits the import of all cooling equipment containing CFCs from non-parties, including those from Country G. At the same time, however, Country E does not prohibit the importation of refrigerators containing CFCs from non-parties, including those from Country G. Country G brought the dispute to the WTO alleging that the TREMs adopted by Country E prohibiting the import of cooling equipment containing CFCs are inconsistent with the GATT/WTO. Meanwhile, Country F can either initiate the non-compliance procedures, or resort to the traditional dispute resolution clauses under the Protocol, alleging that Country E is in non-compliance with the Protocol because it does not prohibit the import of refrigerators containing CFCs. In this case, the WTO dispute settlement mechanism will examine one part of the TREMs adopted by Country E while the Implementation Committee (or another tribunal set up by the Protocol) and the MOP to the Montreal Protocol will examine the overall design of the same TREMs.

In this possibility, the question of whether controversies concerning conflicting jurisdictions arise remains unclear. The disputing parties to the respective dispute settlement mechanisms of the WTO and of the Protocol are not identical. The TREMs under review by both tribunals appear to be the same, but if more closely examined, are actually not identical as the WTO panel will not be examining the part of the TREMs that do not prohibit the import of refrigerators containing CFCs, which will be examined under the dispute resolution procedures under the Protocol. As a result, it seems that in this case, controversies concerning conflicting jurisdictions do not arise.¹⁶³ Note, however, that an interesting scenario might arise should both the WTO panel/Appellate Body and the Implementation Committee/MOP find unfavorably against Country E. Technically speaking, Country E can fulfill the requirements from both sets of rules by withdrawing the import prohibition against all cooling equipment containing CFCs

¹⁶³ However, this will depend on how one defines "conflicting or competing jurisdictions." According to the definition of Shany, proceedings "which address similar or related disputes (i.e. similar or related sets of opposing claims) between similar or related parties" will qualify as competing procedures. Under this definition, there might be some room to argue that this scenario might constitute competing procedures employing Shany's definition. SHANY, *supra* note 15, at 21.

while imposing new import prohibition of refrigerators containing CFC. Nevertheless, this new trade regime might initiate another new round of disputes, similar to the previous round of disputes. This peculiarity does not result from controversies concerning conflicting jurisdictions but from controversies concerning conflicting norms.

Table 2 presents the summary of these hypothetical cases:

TABLE 2 THREE HYPOTHETICAL CASES INVOLVING THE APPLICATION OF MULTILATERAL TREMS

WTO Member	A, B	C, D	E, F, G
Montreal Protocol party	A, B	C	E, F
Measures adopted (genuine multilateral TREMs)	A prohibits importation of cooling equipment containing CFCs from all countries	C prohibits importation of cooling equipment containing CFCs from non-parties	E prohibits importation of cooling equipment containing CFCs from non-parties, but does not prohibit importation of refrigerators containing CFCs from non-parties
Dispute arises	B brought its complaint against A to the WTO, A brought its complaint against B to the Montreal Protocol	D brought its complaint against C to the WTO, C might not bring any complaint to any international tribunals	G brought its complaint against E to the WTO, F brought its complaint against E to the Montreal Protocol
Conflicting jurisdictions	No conflicting jurisdictions: →different subject matters	No conflicting jurisdictions	Conflicting jurisdictions? Dispute parties: different Subject matter: similar but not identical

C. Possibility of Conflicting Jurisdictions and its Implications to the Application of TREMs

From the analysis of several possible scenarios of the Chile-Swordfish dispute and some hypothetical cases in the previous two subsections, the following conclusions can be drawn. First, under most circumstances, controversies concerning conflicting jurisdiction disputes involving the application of TREMs might not arise as the subject matter under examination by the disputing parties in front of

different tribunals might not be identical.¹⁶⁴ Second, the negative consequences to the international legal order predicted by scholars regarding the proliferation of international tribunals might not arise as each tribunal mostly applies its own specialized set of legal rules. Negative consequences do occur to states that adopt the TREMs when conflicting rulings are rendered concerning the legality of the TREMs in dispute. This negative implication, however, does not entirely result from the inability to resolve controversies of conflicting jurisdictions. Unresolved controversies concerning conflict of norms between the GATT/WTO and the MEAs are also part of the problem.

What are the implications of this for states that seek to use TREMs to achieve environmental objectives? In disputes involving the application of TREMs, it is usually those countries whose interests are affected that initiate and bring such disputes to an international tribunal against the country applying the TREMs. Considering the more effective implementation and enforcement mechanisms under the DSU, the dispute settlement mechanism of the WTO inevitably “attracts” countries whose trade or economic interests are affected by the applications of TREMs.¹⁶⁵ Initial recourse to the WTO, rather than to the ITLOS, by the EC concerning its dispute with Chile is a case in point.¹⁶⁶ As for countries that apply the TREMs, such as Chile in the Chile-Swordfish case, such countries might not take the first initiative to resort to any dispute settlement mechanism. Should the applications of their TREMs result in an international dispute, such countries are unlikely to bring this dispute to the WTO as the TREMs in question will be subject to strict scrutiny under the specialized international trade rules and are likely to be held incompatible with the GATT/WTO. As a result, countries adopting the TREMs are more likely to resort to the dispute resolution procedures under the MEAs, even if such TREMs might not be regarded as genuine multilateral TREMs, such as the submission to the ITLOS by Chile in the Chile-Swordfish dispute.¹⁶⁷

In addition, note that most MEAs do not prescribe compulsory dispute settlement procedures and recall the hypothetical Situation C discussed in subsection III.A where Chile could face trade retaliation from the EC if it does not withdraw the TREMs found to be in violation

¹⁶⁴ Note the first part of the ITLOS review in the Chile-Swordfish dispute, and Cases 1 and 3 in the hypothetical cases.

¹⁶⁵ See DSU, *supra* note 70, arts. 21, 22.

¹⁶⁶ The EC firstly brought this dispute to the WTO. Its subsequent complaint to the ITLOS seems to be a counter-action to Chile's action of bringing the EC to the ITLOS. See World Trade Organization, Chile—Measures affecting the Transit and Importing of Swordfish, www.wto.org/english/tratop/dispu_e/cases_e/ds193_e.htm.

¹⁶⁷ See generally Swordfish Case, *supra* note 17.

of its obligations under the GATT/WTO. All these make it highly possible that the applications of TREMs will be subject to the examination and scrutiny of the WTO dispute settlement mechanism, a situation where countries might gradually become reluctant to use TREMs for true environmental purposes. Furthermore, it might deeply trouble countries that adopt, or are even legally required to adopt, the genuine TREMs according to the mandates from the MEAs, as their implementation of international legal obligations under the MEAs will constantly face threats and challenges from other countries affected by these TREMs and that decide to bring this dispute to the WTO dispute settlement mechanism. The source of this negative consequence for countries opting for using TREMs is not entirely a result of controversies concerning conflicting jurisdictions. The inability to resolve controversies concerning conflicting norms between the GATT/WTO and those MEAs containing trade measures is probably the main source of this predicament.

Would it relieve countries adopting multilateral TREMs from their dilemma and provide them with greater assurance if compulsory and binding dispute settlement mechanisms were developed under the MEAs? Take Case 3 in subsection III.B as an example and imagine the following consequences. When Country F initiates the NCP with regard to Country E's failure to prohibit import of refrigerators containing CFCs from non-parties and the Implementation Committee finds Country E in a state of serious non-compliance, the Committee suggests and the MOP adopts the decision that requires Country E to adopt a broader trade ban to include import prohibition of refrigerators containing CFCs from non-parties. If Country E does not implement this decision, it could be subject to broader trade restrictive measures from other contracting parties. Meanwhile, Country G successfully challenged Country E's TREMs and the DSB requests the withdrawal of such TREMs or otherwise be subjected to trade retaliation from Country G. Under this scenario, whether controversies arise from conflicting jurisdictions remains unclear, as the disputing parties are different and the scope of TREMs under review are not identical. However, this causes grave concern for Country E and puts it in a situation more difficult than Chile under Situation C prescribes in sub-Section III.A. Country E needs to withdraw part of its TREMs if it wants to avoid trade sanctions from Country G, but it needs to widen the scope of its original TREMs if it wants to avoid trade sanctions from all the other contracting parties to the Montreal Protocol. This puts Country E, a country that opts for adopting TREMs according to an MEA, in a true dilemma. In this situation, this dilemma mostly results from the inability to resolve controversies concerning conflicting norms, as conflicting jurisdictions do not even exist here.

To summarize, a dispute arising from the application of TREMs might not always result in controversies concerning conflicting jurisdictions.¹⁶⁸ When it does happen, it might bring serious difficulties to countries that adopt the TREMs. In a situation where compulsory and binding dispute settlement mechanisms do not exist in the relevant MEAs, the effective dispute settlement mechanism of the WTO seems capable of attracting such a dispute, which might render countries reluctant to apply the TREMs. Ironically, the more compulsory and binding the dispute settlement mechanisms adopted by the MEAs, the greater dilemma it is going to cause for countries to apply the TREMs. The root cause of such problems is the inability to resolve controversies concerning conflicting jurisdictions. However, as long as controversies concerning conflicting norms remain unresolved, such problems are only going to become worse. In other words, in the application of the TREMs, legal controversies arising from the conflict of norms play a very crucial role.

V. CONCLUSION

Two types of legal controversies arise in the context of disputes arising from the applications of multilateral TREMs. First, potential conflict may arise between two sets of substantive legal rules, the relationship between international trade rules under the GATT/WTO and trade-related provisions under the MEAs. Second, potential conflict may arise between jurisdictions; both the dispute settlement mechanisms under the WTO and those under the MEAs can obtain jurisdiction concerning disputes arising from the application of TREMs. In the former, there has yet to be an agreed-to set of rules under the GATT/WTO, the MEAs, or international law to solve problems concerning conflicting norms. In the latter, as discussed in Section II of this article, neither is there an agreed-to set of legal principles under international law, the GATT/WTO or the MEAs that offer satisfactory solutions to solve such controversies.

The following issues concerning conflicting jurisdictions over such disputes were put forward in the Introduction of this article. Can disputes arising from the application of TREMs be settled under both the dispute settlement mechanisms of the WTO and of the MEAs? Is it likely that such a dispute be subject to multiple dispute settlement mechanisms? If the answer is yes, then does one of them have primary jurisdiction? If none of them have primary jurisdiction, what are the implications of conflicting jurisdictions of disputes concerning the adopting of TREMs? After the analysis of several hypothetical cases in Section III, this article offers the following conclusions to the above-

¹⁶⁸ This, of course, will depend on the definition of "conflicting jurisdictions" or "competing procedures" one adopts.

mentioned research questions. The dispute involving the application of multilateral TREMs does bring out the legal controversies concerning conflicting jurisdictions; as such a dispute can simultaneously or subsequently be subject to the dispute settlement mechanisms of both the WTO and of the MEAs. However, no legal principle exists that confers primary or sole jurisdiction to any particular dispute settlement mechanism. Nevertheless, the possibility of such legal controversies taking place might not be as frequent as previously thought, as the subject matter in the respective tribunal might not be identical, or the disputing parties might not be the same. Even if such controversies take place, the negative consequences of causing a fragmentation and inconsistency of international legal order concerned with the proliferation of international tribunals might not be as serious as predicted, as each dispute settlement mechanism is required to apply its own set of specialized rules to examine the dispute. However, such controversies do bring grave concerns and a dilemma to countries that adopt TREMs, in particular the genuine multilateral TREMs. Nevertheless, such a dilemma is also a result of the inability to resolve controversies concerning conflicting norms.

In sum, to settle disputes arising from the applications of TREMs in a manner that contributes to the overall integrity of the international legal order and protects the legal rights of each disputing country requires effective solutions to legal controversies concerning both conflicting norms and conflicting jurisdictions. Solving one set of controversies without solving the other cannot effectively address this important issue.