# Should UNCLOS or GATT/WTO Decide Trade and Environment Disputes?

**Lakshman D. Guruswamy**

The absence of compulsory judicial settlement is a serious weakness in the embryonic international legal system. The General Agreement on Tariffs and Trade's World Trade Organization, (referred to jointly herein as GATT/WTO), which possesses a unique system of compulsory and binding dispute settlement, endeavors to overcome this weakness by bringing all trade-related disputes under its jurisprudential canopy. This system of compulsory dispute settlement can be seen as a jewel in the crown of free trade under which the world has enjoyed nearly half a century of unrivaled economic growth, prosperity, and comity.

In contrast, international environmental law (IEL) institutions[1] are fragmented and lack the WTO's global authority, organizational structure, financial backing, and legal status. With the exception of the United Nations Convention on the Law of the Sea (UNCLOS), IEL forums lack the international jurisdiction, authority, and implementing powers of the WTO.[2] Because of their institutional and legal prominence, GATT panels and the new, stronger WTO Dispute Settlement Body (DSB) have emerged as the sole legal forum for resolving disputes where the goals of environmental protection and free trade conflict.

1. Organizations which have environmental functions include the Food and Agricultural Organization (FAO), the International Labor Organization (ILO), the World Health Organization (WHO), the World Meteorological Organization (WMO), the International Maritime Organization (IMO), the UN Education, Scientific, and Cultural Organization (UNESCO), the International Atomic Energy Agency (IAEA), the United Nations Environment Program (UNEP), and the Organisation for Economic Co-Operation and Development (OECD). This partial list illustrates the fractured nature of international organizations exercising oversight over fragmented areas of IEL.

2. None of the organizations referred to in note 1, *supra*, possess a compulsory system of dispute settlement or an overarching institutional body such as the WTO. The mission of the United Nations Environment Program, the most overtly environmental organization amongst them, is to persuade and convince states of the need for action by providing information, expertise and advice. UNEP does not, however, possess any executive or judicial powers.

Environmentalists have a number of reasons to fear this assertion of jurisdiction by GATT/WTO.[3] First, the substantive law of GATT/WTO ignores international law dealing with environmental protection and treats any law or treaty not embodied in GATT or its "Covered Agreements"[4] as irrelevant.[5] Second, the track record of GATT litigation demonstrates the extent to which international environmental protection has been diminished. As we shall see, GATT panels view IEL trade restrictions as obstructions to the painfully engineered legal regime created by the GATT/WTO which is aimed at liberalizing trade by eliminating controls and restrictions.[6] Third, the judges who interpret such substantive trade law are unfamiliar with, and possibly unfriendly toward, the laws and agreements directed at international environmental protection.[7] Furthermore, these judges are prevented from engaging in the customary judicial role of interpreting and developing the law.[8]

Part I of this Article emphasizes the importance of UNCLOS.[9] It argues that within key areas of potential conflict, the substantive international environmental obligations and dispute settlement procedures of UNCLOS countervail GATT/WTO. Part II demonstrates that, in addition to incorporating substantive principles of IEL, UNCLOS creates a binding system of adjudication and dispute resolution that confers upon its legal forums the jurisdiction and adjudicatory authority to hear trade and environment disputes. Additionally, even where states are not parties to UNCLOS, but nevertheless accept its provisions as codifications of customary IEL, the International

---

3. The arguments for this position are delineated more fully in Lakshman Guruswamy, *The Promise of UNCLOS: Justice in Trade and Environment Disputes,* 25 ECOLOGY L.Q. (forthcoming 1998). This Article is intended to supplement and extend the arguments made in the above cited article.

4. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947], *amended by* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Annex II, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125 (1994) [hereinafter GATT 1994].

5. *See infra* notes 109-12 and accompanying text (explaining the exclusion of international environmental law from GATT panels' analysis).

6. *See infra* notes 116-42 and accompanying text (discussing GATT's treatment of environmental issues).

7. *See infra* notes 143-52 and accompanying text (examining the interpretive role of GATT/WTO judges).

8. *See id.*

9. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

Court of Justice (ICJ) might be in a position to adjudicate trade and environment disputes.

The countervailing jurisdiction of UNCLOS in trade and environment disputes could raise some concerns and even give rise to the specter of judicial uncertainty resulting from competing jurisdiction between two lawfully constituted international tribunals. First, might there be a race to the most favorable courthouse? Second, what about the confusion and uncertainty resulting from two tribunals exercising jurisdiction over the same case? Third, might the absence of established rules of international law governing clashes between tribunals asserting concurrent jurisdiction lead to a form of judicial anarchy, in which UNCLOS and WTO tribunals joust with each other for judicial supremacy? Finally, how might the conflicting orders of these tribunals be implemented or enforced? Part III of this Article addresses these concerns.

The question of competing jurisdiction amongst tribunals established by treaties (intergovernmental tribunals) has not hitherto been addressed by treaty or customary law.[10] In the absence of treaty or customary norms governing how international tribunals should act, two other sources of public international law—"the general principles of law" and "the judicial decisions . . . of the various nations"[11]—must be examined. There is no doubt that "general principles of law" enjoy parity of legal status, albeit not of importance, with treaties and custom, as primary sources of international law. The Statute of the International Court of Justice underscores the primary status of "general principles" by characterizing the other source of international law, "judicial decisions and the teachings of the most highly qualified publicists," as "subsidiary" means for determining the rules of law.[12]

This Article argues that the aforementioned general principles of law can be adopted or derived from conflict of laws jurisprudence (Conflicts) dealing with jurisdiction among the

10. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 403 (1987) [hereinafter RESTATEMENT (THIRD)]. The Restatement maintains that a domestic court possessing prescriptive or adjudicatory jurisdiction may not exercise that jurisdiction if it is unreasonable to do so. It asserts that the principle of reasonableness is based on customary international law. *See infra* notes 50-63 and accompanying text. The Restatement is referring to jurisdiction exercised by domestic courts and not to the law governing intergovernmental tribunals.

11. Statute of the International Court of Justice, June 26, 1945, art. 38(c)-(d), 59 Stat. 1031, 1976 U.N.Y.B. 1052.

12. *Id.* art. 38(d).

domestic courts of various countries. Conflicts analysis divides jurisdiction into two parts: legislative or prescriptive jurisdiction, and judicial jurisdiction.[13] Furthermore, there are two primary principles that can be ascertained from Conflicts theory dealing with issues of conflicting jurisdiction: reasonableness and fairness. These foundational principles also undergird other, more specific supplemental principles such as *forum non conveniens*, comity, and choice of law. This Article adopts that analysis and seeks to apply the primary and supplemental general principles of law to the potential jurisdictional clash between GATT/WTO and UNCLOS. It concludes that the application of these general principles of law, and the judicial decisions of the various countries, justify the assertion of both legislative and judicial jurisdiction by UNCLOS tribunals.

The Conflicts experience in analogous cases also demonstrates that many of the fears articulated above are unfounded, and that conflicting jurisdiction does not give rise to judicial anarchy. Domestic courts in different countries have arrived at a functional and legal understanding and accommodation of each other's concurrent jurisdiction. They have attempted to resolve conflicts on the basis of legal principle rather than caprice.

The answers to questions relating to the legislative and judicial jurisprudence of GATT/WTO and UNCLOS assume a further foundational premise: that both forums are engaged in the common pursuit of justice rather than of judicial hegemony. This Article argues that the application of general principles of law, as well as the judicial decisions of the various nations, should obligate UNCLOS tribunals to exercise judicial jurisdiction in trade and environment disputes.

The Article concludes by arguing for justice in trade and environment disputes. The prospect of an UNCLOS challenge may break the GATT/WTO adjudicatory monopoly, and could initiate reforms that accommodate international environmental law. A reformed GATT/WTO system that deals fairly and justly with environmental questions would remove the need to seek relief from UNCLOS.

## I. THE IMPORTANCE OF UNCLOS

The global environmental importance of UNCLOS, which came into force on November 16, 1994,[14] has not fully been ap-

13. *See infra* notes 50-63 and accompanying text (discussing conflicts of law problems).

14. *See* UNCLOS, *supra* note 9.

preciated. As then-U.S. Secretary of State Warren Christopher pointed out in his letter submitting UNCLOS to President Clinton, UNCLOS "[i]s the strongest comprehensive environmental treaty now in existence or likely to emerge for quite some time."[15] It lays the foundations of a constitution for the oceans. Fifty-nine of its three hundred and twenty provisions obligate environmental protection and conservation, and the broad scope of those provisions makes it clear that UNCLOS is a far-reaching and fundamental IEL agreement.[16] UNCLOS is not only an IEL treaty, it is also a codification and articulation of the environmental rules and principles applicable to the oceans. These rules and principles have ascended to the status of customary IEL because of their wide acceptance, and are therefore binding on both signatories and non-signatories.[17]

Oceans occupy over seventy percent of the earth's surface and act in many ways as a proxy for the global environment. Most pollution enters the oceans through direct and indirect pathways from land,[18] and the control of oceanic pollution requires the use of land-based controls to limit air, land and water pollution. Furthermore, notable areas of oceanic governance, such as the conservation of wetlands, coastal areas, and biodiversity, are among the most critical issues confronting in-

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

16. In light of UNCLOS's broad environmental mandate, this Article rejects the apprehensive approach of commentators who take an inhibitory and narrow view of the environmental reach of UNCLOS. For example, Richard J. McLaughlin, *UNCLOS and the Demise of the United States' Use of Trade Sanctions to Protect Dolphins, Sea Turtles, Whales, and Other International Marine Living Resources*, 21 ECOLOGY L.Q. 1 (1994), argued that UNCLOS will restrict actions by countries such as the United States to protect the international environment. McLaughlin's views were based on a misconception about the reach of UNCLOS, and he offered a "revised analysis" in Richard J. McLaughlin, *Settling Trade-Related Disputes over the Protection of Marine Living Resources: UNCLOS or the WTO?*, 10 GEO. INT'L ENVTL. L. REV. 29, 32 (1997), that is more in accord with the thesis of this Article. As described in this section, UNCLOS incorporates an extensive and inclusive mandate, not a restrictive or confining one. *Compare* Jonathan I. Charney, *Entry Into Force of the 1982 Convention on the Law of the Sea*, 35 VA. J. INT'L L. 381, 391 n.58 (1995) (disagreeing with position taken in McLaughlin's 1994 article).

17. *See* Martin H. Belsky, *The Ecosystem Model Mandate for a Comprehensive United States Ocean Policy and Law of the Sea*, 26 SAN DIEGO L. REV. 417, 470 (1989).

18. *See* THE OECD REPORT ON THE STATE OF THE ENVIRONMENT 71 (1991).

ternational environmental protection in general. UNCLOS deals with the conservation and the management of living resources, pollution prevention, reduction and control, vessel pollution and environmental management.

One of the dominant characteristics of UNCLOS is that it is an umbrella convention that brings other international rules, regulations and implementing bodies within its canopy. Many of UNCLOS's provisions are of a constitutional, or general, character. They are intended to be augmented by specific regulations, rules and implementing procedures formulated by other international agreements and by nation States.

Article 197 illustrates how UNCLOS is interlocked with other treaties. It directs that

> States shall co-operate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.[19]

When Article 197 is read in conjunction with Article 237, UNCLOS's jurisdictional reach becomes abundantly clear. Article 237 deals with obligations under other conventions that protect and preserve the environment and it explains that the provisions of UNCLOS are "without prejudice to the specific obligations assumed by states under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this convention."[20] Having made this point, UNCLOS Article 237 goes on to clarify that "[s]pecific obligations assumed by States . . . should be carried out in a manner consistent with the general principles and objectives of this Convention."[21] It is noteworthy that Article 237 covers both past and future agreements, holding that they should be implemented in a manner consistent with UNCLOS's general principles.

Significant IEL treaties that may be antithetical to GATT are an important part of UNCLOS's design, environmental objective and architecture.[22] Not only are many of the specific obli-

19. UNCLOS, *supra* note 9, art. 197.

20. UNCLOS, *supra* note 9, art. 237.

21. *Id.*

22. These include the Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. No. 100-10 (1987) (as adjusted by S. TREATY DOC. No. 103-09 (1992)), 26 I.L.M. 1550 (1987) (as adjusted by 32

gations assumed in these IEL treaties "consistent" with UNCLOS, they are an integral and necessary part of UNCLOS's environmental umbrella. Pursuant to this legal scheme, UNCLOS Article 293 declares that an UNCLOS tribunal shall "apply this Convention and other rules of international law not incompatible with this Convention."[23]

The UNCLOS model is remarkably different from that of GATT/WTO. When they begin to function, UNCLOS tribunals will be interpreting and applying a formidable number of environmental provisions whose objective is to advance international environmental protection, not to liberalize trade. In dramatic contrast, GATT/WTO dispute settlement bodies, set up to implement a regime of liberal trade, are uncertain about IEL and tend to diminish environmental protection.[24]

## II. DISPUTE SETTLEMENT

The substantive provisions of a treaty, however strongly worded, can remain ineffectual in the absence of a system of compulsory adjudication. The international legal system does not possess a universal system of compulsory and binding dispute settlement, and many international treaties are sadly lacking in judicial enforcement. Consequently, nations and international organizations are obliged to rely upon diplomatic negotiations and other methods of dispute resolution. The absence of compulsory judicial adjudication is fast becoming recognized as a serious weakness in the embryonic legal system of international society.

It is in this context that GATT/WTO has assumed prominence as an unique system of compulsory and binding dispute settlement. The attention given to GATT/WTO appears to have overshadowed the equally compulsory and binding dispute settlement procedures under UNCLOS, as well as the more limited, but nonetheless significant, jurisdiction of the ICJ. GATT/WTO and UNCLOS are remarkable phenomena in the international

---

I.L.M. 874 (1992)) [hereinafter Montreal Protocol]; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (reprinted at 12 I.L.M. 1085 (1973)) [hereinafter CITES]; Basel Convention on the Control of Trans-boundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (1989) [hereinafter Basel Convention]; and the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Nov. 24, 1989, 29 I.L.M. 1454 (1990) [hereinafter South Pacific Convention].

23. UNCLOS, *supra* note 9, art. 293.

24. *See infra* notes 109-52 and accompanying text.

community. They both possess unique systems of compulsory, binding judicial settlement, and it is necessary to briefly consider their principal features.

While UNCLOS does not create a "World Oceanic Organization," its dispute resolution provisions arguably are stronger and more binding than those of GATT.[25] Even if the primacy of UNCLOS's dispute resolution regime is in issue, the undoubted jurisdiction of an UNCLOS tribunal, as opposed to a GATT/WTO tribunal, could be invoked to settle disputes involving environmental actions that may be contrary to GATT/WTO trade law.[26] A brief comparison of GATT/WTO, UNCLOS and the ICJ illustrates the ability of each to adjudicate trade and environment disputes.

## A. GATT/WTO

In the years following World War II, GATT, and its successor organization, the WTO, have aspired to be the sole arbiter of all disputes relating to international trade. Until 1994, however, the decisions of the prevailing panel system required affirmative approval by GATT, and were subject to single-member veto power. Judicial hegemony was greatly advanced by the 1994 Understanding on the Settlement of Disputes (DSU),[27] which established a judicial-type dispute settlement system, in contrast to the earlier, less binding, more consensus-oriented system under GATT. The DSU ensures that all dispute settlement procedures under GATT, the Subsidies Code and a variety of other trade-related agreements (Covered Agreements)[28] are brought within a single dispute resolution process overseen by the DSB.[29] If parties are unable to negotiate a consensual set-

25. Support for this position and a fuller discussion of the relative strength of the two regimes are offered by McLaughlin, *Settling Trade-Related Disputes over the Protection of Marine Living Resources: UNCLOS or the WTO?*, *supra* note 16, at 41-52.

26. *See infra* Part III.

27. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO], Annex II, art. 3, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1, (1994), 33 I.L.M. 1125 (1994) [hereinafter DSU]. The DSU consists of twenty-seven articles and four appendixes. *See id.* The purpose of the WTO dispute settlement system is to confer predictability and security of outcome upon an international legal system that is lacking such attributes. *See id.* art. 3(2).

28. *See id.* art. 1 and Appendix 1.

29. *See id.* art. 2. This ends the potential for forum shopping that existed within the old GATT. The heart of the new system is the DSB, which is authorized to establish panels, adopt panel and appellate reports, monitor the imple-

tlement of their dispute, a panel is set up to hear the case. The findings of the Panel, subject to appeal, are accepted by the DSB and are binding on the parties.[30]

## B. UNCLOS

The dispute settlement provisions of UNCLOS share GATT/WTO's objective of creating institutional procedures that lead to certainty and security of outcome. Both treaties recognize the difficulty of achieving their respective goals given that the absence of determinative and binding interpretations and rulings by a system of compulsory dispute settlement leaves room for destabilizing unilateral interpretations and acts.[31] Like GATT/WTO, UNCLOS allows parties the opportunity of settling disputes by peaceful means of their own choice at any time.[32]

UNCLOS's dispute settlement provisions are divided into three sections.[33] Section One contains seven articles[34] comprising general provisions, with an emphasis placed upon the peaceful settlement of disputes pursuant to Article 33 of the Charter of the United Nations (UN Charter).[35] State parties can make general, regional or bilateral agreements regarding the interpretation or application of UNCLOS in lieu of its ordinary proce-

---

mentation of rulings and recommendations, and authorize retaliatory measures in cases where States do not implement panel recommendations. *See* WTO, *supra* note 27, at Annex II.

30. Although more judicial than GATT, the new WTO procedures are subject to legally possible, though politically difficult, countermand at every critical stage in the procedure. There is no affirmative approval requirement, or single-member veto power, as existed under the old GATT procedures. However, each step in the process of setting up panels, along with their adoption and implementation, can be countermanded by a negative consensus decision of the DSB.

The dispute settlement procedure is activated by a request from a member state whereupon the DSB, in the absence of a consensus decision not to do so, establishes a well-qualified panel to hear the case. The panel examines the matter in light of the relevant provisions of the covered agreements cited by the parties to the dispute. After careful consideration, the panel submits its findings in a report to the DSB. This report will be adopted by the DSB unless 1) a party to the dispute formally appeals the panel decision, or 2) the DSB decides by consensus not to adopt the report. Where there is an appeal, and the Appellate Body upholds the legal findings and conclusions of the panel, its report shall be adopted by the DSB, unless the DSB decides by consensus not to adopt the decision. *See* DSU, *supra* note 27, arts. 16(4), 17(14).

31. *See* John Warren Kindt, *Dispute Settlement in International Environmental Issues: The Model Provided by the 1982 Convention on the Law of the Sea*, 22 VAND. J. TRANSNAT'L L. 1097, 1112 (1989).

32. UNCLOS, *supra* note 9, arts. 279-80.

33. *See id.* arts. 279-99.

34. *See id.* arts. 279-85.

35. *See* U.N. CHARTER art. 33.

dures with respect to any dispute, as long as a binding decision results.[36] This provision allows State parties the freedom to choose the method of interpretation and dispute procedure most compatible with the particular circumstances of their case and its needs. Similarly, parties may submit their disputes to conciliation according to the conciliation procedures of UNCLOS.[37] If no settlement can be reached by any method covered within Section One or on the request of any party to a dispute, the dispute will be submitted to a court or tribunal determined under UNCLOS Article 287.[38]

Section Two contains eleven articles and procedures[39] that, subject to the narrow exceptions in Section Three,[40] establish a compulsory dispute settlement system for binding decisions under virtually all provisions of UNCLOS. This does not, however, create a unitary system of dispute settlement, because it allows the parties to choose between one of four legal forums: the International Court of Justice, a special International Tribunal for the Law of the Sea, an international arbitral tribunal, or a special technical arbitral tribunal.[41]

Section Three exempts a limited number of disputes from the dispute settlement procedures of Section Two.[42] The exceptions vary, but are primarily aimed at recognizing territorial sovereignty and military activities. These exceptions do not significantly hamper the operation of UNCLOS's binding resolution provisions.

The primary reasons for nations to have recourse to UNCLOS are found in the environmental shortcomings of GATT/WTO. Hitherto, it appears that GATT/WTO has exercised judicial suzerainty, because it has enjoyed a monopoly over trade-environment litigation. According to conventional wisdom, unregulated monopolies stifle competition and result in huge ineffi-

36. UNCLOS, *supra* note 9, art. 282.
37. *See id.* art. 284.
38. *See id.* art. 287.
39. *See id.* arts. 286-96.
40. *See id.* arts. 297-99.
41. *See id.* art. 287.
42. The exempted disputes relate primarily to marine scientific research and fisheries in the Exclusive Economic Zones. *See* UNCLOS, *supra* note 9, arts. 297(2), 273(3). However, they remain subject to the conciliation procedures. *See id.* art. 284. A state may also file an optional declaration that will exclude binding dispute settlement in maritime boundary disputes and military activities. *See id.* art. 298. Finally, disputes related to the deep sea bed are referred to the Seabed Disputes Chamber of the International Tribunal of the Law of the Sea. *See id.* art. 187.

ciencies, inequities, and even abuse. GATT/WTO has been behaving like a judicial monopoly, conscious that its decisions cannot be challenged or overturned. The possibility of a countervailing judicial force, and competition for jurisdiction, could have a salutary effect on GATT and even lead it to pay genuine attention to reform.

### C. UNCLOS AND THE ICJ

The United States has been challenged on numerous occasions for violating GATT by taking unilateral action to protect the international environment.[43] Because the United States has not ratified UNCLOS, it is unable to take advantage of the environmental jurisdiction of UNCLOS tribunals and will be precluded from access to its dispute settlement procedures. The time may be ripe for the United States to revisit a prescient and creative suggestion, made by Louis Sohn, that might give the United States an opportunity to defend its actions in a neutral forum.[44]

Sohn's suggestion assumes the United States has not ratified UNCLOS and is, therefore, denied access to UNCLOS's dispute settlement procedures. Instead, based on the United States' acceptance of the environmental provisions of UNCLOS as a codification, or restatement, of customary international law, his suggestion opens the door for the ICJ to interpret and apply such law.

Sohn proposes that the United States might sign a supplementary declaration under Article 36 of the Statute of the International Court of Justice by which it would accept the jurisdiction of the IJC with respect to those rules of customary international law codified in UNCLOS, with an exception for deep sea bed mining if necessary.[45] Under Article 36(2), the United States may declare that it recognizes as "compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning . . . (b) any question of international law,"[46] which would include the rules of customary IEL codified in UNCLOS. This would confer jurisdiction, under the

43. *See infra* notes 120, 123, and 126 and accompanying text (discussing the *Tuna I, Tuna II,* and *Venezuela Gasoline Decision* cases respectively).

44. *See* LOUIS B. SOHN & KRISTEN GUSTAFSON, THE LAW OF THE SEA IN A NUTSHELL 238-246 (1984).

45. *See id.* at 245-46.

46. Statute of the International Court of Justice, *supra* note 11, art. 36(2).

"optional clause," on the Court over matters of the law of the sea with respect to those states that have accepted its jurisdiction, without adding crippling reservations.[47]

It should be noted that the ICJ's compulsory jursidiction as created by this course of action would be independent of the dispute settlement provisions of UNCLOS. The fact that the ICJ had been designated a judicial forum under Article 287(1)(b) of UNCLOS would not give the ICJ jurisdiction over non-parties such as the United States, who would still have no access to UNCLOS dispute settlement procedures.[48] Instead, the jurisdiction of the ICJ would arise from the fact that the states involved had agreed to its jurisdiction under Article 36(2) of the Statute of the ICJ. This would enable the ICJ to decide whether, for example, the rules of customary international law, as codified in UNCLOS, might or might not prevail over GATT/WTO.

The course Sohn advocates is admittedly of limited application. It would be confined to those countries that, first, have accepted the Article 36(2) jurisdiction of the ICJ, and second, have not effectively negated their acceptance with crippling reservations of the 'self judging' variety.[49] Nonetheless, it appears to be a felicitous way of overcoming some obstacles, bringing the United States within the customary environmental law umbrella of UNCLOS, and possibly persuading the United States to ratify the treaty. The existence of an impartial tribunal, and the possibility that IEL can be re-affirmed in a non-GATT/WTO judicial context, would restore confidence in international adjudication and help strike the balance between free trade and environmental protection.

As we have seen, the ICJ exercises consensual, not compulsory, jurisdiction, and will act as a judicial forum only in limited circumstances. It is important, therefore, to consider a more

47. *See id.* Article 36(2) is titled the "optional clause" because the decision to confer such jurisdiction is an option open to states.

48. *See* UNCLOS, *supra* note 9, art. 291.

49. Of the 60 countries that have accepted the jurisdiction of the ICJ under Article 36(2), almost three-quarters have made reservations to their declarations of acceptance. Some of these reservations are very drastic. "Self-judging" reservations allow the state, not the court, to declare that a case is removed from the ICJ's jurisdiction because it is one involving domestic jurisdiction or national security, as determined by the country concerned. For example the U.S. Declaration under Article 36(2) is subject to the proviso that "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America as determined by the United States of America." *See* ARTHUR EYFFINGER, THE INTERNATIONAL COURT OF JUSTICE 1946-1996, 130-31 (1996).

readily foreseeable situation in which an UNCLOS tribunal is invited to exercise jurisdiction in a case over which a GATT/WTO tribunal also exercises jurisdiction. Moreover, it is important to do so in a scenario not involving the United States, because a number of other countries have committed themselves to the protection of the international environment through the exercise of trade sanctions. A hypothetical scenario involving such trade sanctions will illustrate how an UNCLOS adjudication might work.

## III. COMPETING JURISDICTION

Consider a hypothetical scenario in which New Polynesia is a party to the Convention for the Prohibition of Fishing With Long Driftnets in the South Pacific (South Pacific Convention),[50] GATT/WTO, and UNCLOS, while Kuroshito is a party only to GATT/WTO and UNCLOS. Acting under Article 3(2)(c) of the South Pacific Convention, New Polynesia bans the import of fish caught by Kuroshito trawlers using driftnets, despite protests that such a ban is illegal under GATT/WTO. After unsuccessfully exploring other avenues of settlement, New Polynesia submits this matter to the International Tribunal for the Law of the Sea, established by UNCLOS. New Polynesia requests the Tribunal, under Article 288(2) of UNCLOS, to examine the legality of its actions under the South Pacific Convention. Kuroshito, on the other hand, institutes proceedings under the dispute settlement procedures of GATT/WTO pleading the illegality of such a ban, and the case is referred to a panel by the DSB.

The first question is whether the UNCLOS Tribunal possesses jurisdiction despite GATT/WTO's competing claims. A search for answers does not reveal any customary or treaty rules that can be readily applied. It is important at this juncture to clarify that we are addressing the customary law dealing with the jurisdiction of intergovernmental tribunals and not the law pertinent to domestic tribunals. As noted in the introduction to this Article, the Third Restatement of the Foreign Relations Law of the United States avers that reasonableness has emerged as a rule of customary international law, and that a state may not exercise jurisdiction when it is unreasonable to do so.[51] The Restatement, however, addresses the issue of customary law applicable to domestic courts. It is important to distin-

50. *See* South Pacific Convention, *supra* note 22, art. 3(2)(c).
51. *See* RESTATEMENT (THIRD), *supra* note 10, § 403.

guish the customary law applicable to domestic courts from that which applies to the intergovernmental or international tribunals discussed in this Article.

While this Article recognizes and embraces the existence of customary law applicable to domestic courts, intergovernmental or international tribunals that compete for jurisdiction present a different picture. Currently, no compelling evidence of practice or *opinio juris* substantiates the claim that reasonableness is a rule of customary international law applicable to a clash of jurisdiction between intergovernmental tribunals. Faced with this lacuna in customary and treaty law, we must look to other sources of international law for answers.

Hersch Lauterpacht designed a conceptual compass for dealing with lacunas in the law: "Whenever a question arises which is not governed by an existing rule of international law . . . or, in the absence of such a rule . . . the rich repository of 'general principles' may legitimately be resorted to by a tribunal, a Government, or the scholar grappling with a novel or difficult situation."[52] Furthermore, general principles "may apply to agreements . . . between one . . . [intergovernmental] organization . . . and another, between . . . [intergovernmental] organizations and States and, probably, between . . . [intergovernmental] organizations and private individuals."[53]

Having recognized a repository of general principles as part of the broader corpus of international law, we need to ascertain where this repository might be located. Then, we must identify any relevant principles that might apply to cases of conflicting jurisdiction. Clearly, national legal systems are the repositories for a substantial number of general principles, and international law continues to recruit many of its rules from national laws.[54] Lauterpacht has documented the extent to which international law is molded by domestic sources, analogies, and experience,[55] expressing rules of uniform application in all or in the main systems of jurisprudence.[56]

The jurisprudence dealing with, inter alia, the competing jurisdiction of lawfully constituted national tribunals in differ-

52. HERSCH LAUTERPACHT, *International Law—The General Part, in* 1 International Law 71 (1970).

53. *Id.* at 74.

54. *See* International Status of South West Africa, 1950 I.C.J. 128, 148 (Lord McNair concurring).

55. *See generally* HERSCH LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927).

56. *See id.* at 69.

ent nations that exercise jurisdiction over transnational transactions falls within the province of conflict of laws, or private international law. Consequently, Conflicts theory becomes a source both of general principles of law and of judicial decisions under general international law.[57]

A survey of Conflicts cases dealing with competing jurisdiction reveals two fundamental principles: fairness and reasonableness. According to the Restatement, reasonableness is a rule of customary international law applicable to domestic courts.[58] While these principles enjoy the status of custom, they also qualify as cardinal general principles of law applicable to intergovernmental tribunals. These cardinal rules are expressed through supplemental principles and rules such as comity,[59] *forum non conveniens*,[60] and choice of law,[61] all of which are based on fairness and reasonableness. As a result, reasonableness and fairness enjoy a dual legal character. They are both rules of customary international law governing jurisdictional claims among domestic tribunals, and general principles of law applicable to intergovernmental tribunals.

Conflicts theory analyzes the concept of jurisdiction as traversing two different issues: legislative (or prescriptive) jurisdiction and judicial jurisdiction. When applied to a putative clash between UNCLOS and GATT, these concepts raise two questions. First, does an UNCLOS tribunal possess the jurisdiction, power, or right to entertain the dispute? Conflicts of law commentators refer to this question as one of legislative or prescriptive jurisdiction.[62] Second, assuming that UNCLOS does possess legislative or prescriptive jurisdiction, should it exercise this jurisdiction? This question is referred to as one of judicial jurisdiction.[63]

The fact that UNCLOS is clothed with jurisdiction does not mean that its jurisdiction ought to be exercised. The question of judicial jurisdiction assumes that UNCLOS possesses the necessary power, right or jurisdiction, and examines what legal criteria should be used for deciding whether, or how, it should exercise this authority. The secondary principles of comity, *fo-*

57. *See supra* text accompanying note 11.
58. *See* RESTATEMENT (THIRD), *supra* note 10, § 403 cmt.a.
59. *See infra* notes 159-62 and accompanying text.
60. *See infra* notes 163-66 and accompanying text.
61. *See infra* notes 167-69 and accompanying text.
62. *See* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 1 (3d ed. 1996).
63. *See id.* at 1-5.

*rum non conveniens* and choice of law are applicable to this second question.

### A. LEGISLATIVE JURISDICTION

Returning to the hypothetical dispute introduced earlier, it is necessary to examine both the legislative and judicial aspects of UNCLOS's putative jurisdiction over the matter. The question of legislative jurisdiction calls for affirmative answers to two separate queries. First, is UNCLOS, by its own terms, empowered to settle disputes under the South Pacific Convention? In order to answer this question, the South Pacific Convention must qualify as an "international agreement related to the purposes of [UNCLOS]" as contemplated by Article 288(2). It is necessary to ascertain some relevant facts about driftnet fishing to answer this question. Driftnet fishing, or "driftnetting," is a particularly harmful form of commercial fishing.

> It is to be distinguished from "setnet fishing," which relies on fish swimming into nets [and] . . . can be made to isolate the particular species they are intended to catch. Driftnets, which are suspended in the water like giant curtains and strung out as a wall for many miles, drift across the open ocean and indiscriminately catch everything in their path. A single boat . . . can have up to 40 miles of such nets . . . to a depth of 48 feet . . . in a single positioning, and typically, several vessels of a driftnet fleet will work together to fish in this manner. . . . [I]n any given fishing season . . . up to 22,500 miles of deep nets . . . [drift] through the waters of the Pacific and Indian oceans each night—enough to stretch more than once around the Earth. Driftnet fishing . . . is sometimes called "wall of death fishing" because it kills most living things in its path. Whatever they catch, driftnets kill or maim. Marine creatures in search of food and lured by fish already caught in the net, swim or dive into the webbing where they become entangled. If they do not drown or manage to escape they may suffer for several months before dying from injury, starvation or both.[64]

Driftnet fishing often leads to a catch rate exceeding a species' breeding capability. The use of driftnets during the 1980s caused the near collapse of the Albacore Tuna fishery in the South Pacific and contributed to the serious decline of the North American Salmon fishery.[65] In view of these findings, the Gen-

64. LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 747 (1994).

65. *See id.* at 748. *See also Resolution on Large-Scale Pelagic Driftnet Fishing and its Impact on Living Marine Resources of the World's Oceans and Seas*, U.N. Doc. A/RES/44/225 (1989), 29 I.L.M. 1555, at 1558 [hereinafter 1989 UN Driftnet Resolution]; *Resolution on Large-Scale Pelagic Driftnet Fishing and its Impact on Living Marine Resources of the World's Oceans and Seas*, U.N. Doc. A/RES/44/215 (1991), 31 I.L.M. 241 [hereinafter 1991 UN Driftnet Resolution]. This view has been challenged by others as ignoring the scientific evidence, *see,*

eral Assembly of the United Nations recommended a moratorium on the use of large-scale pelagic driftnets in high-seas fishing.[66]

The South Pacific Convention prohibits its member states, and vessels documented under its laws, from engaging in driftnet fishing within the South Pacific.[67] It also directs parties to engage in extensive reprisals against driftnet catches of non-parties, including the prohibition of imports of fish and fish products, processed or not, caught using a driftnet.[68] Moreover, it directs parties to take further actions against non-parties, including prohibiting the landing, processing and importation of driftnet catches, prohibiting possession of driftnets and restricting port access.[69] It also empowers parties to take even stricter measures than those expressly required.[70]

The South Pacific Convention is an unmistakable offspring of UNCLOS and is impacted by many of its provisions. A cluster of UNCLOS provisions, referred to below, are particularly applicable to driftnets on the high seas and are based upon the obligations of fishing states to the wider international community.[71] They deal with the duty to take measures necessary to conserve the living resources of the high seas.[72] This duty codifies the customary law crystallized in Articles 1 and 2 of the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas,[73] and the International Court of Justice declaration that a high-seas fishing state has an obligation to take full account of fishery conservation "[f]or the benefit of all."[74]

UNCLOS obligates its signatories to cooperate with others to conserve marine resources[75] and to contribute and exchange

---

*e.g.* William T. Burke et al., *United Nations Resolutions on Driftnet Fishing: An Unsustainable Precedent for High Seas and Coastal Fisheries Management*, 25 OCEAN DEV. & INT'L L. 127, 128 (1994).

66. *See* 1991 UN Driftnet Resolution, *supra* note 65, at 242.

67. *See* South Pacific Convention, *supra* note 22, art. 2.

68. *See id.* art. 3.

69. *See id.* arts. 3(2)(d)-(e), 3(3).

70. *See id.* art. 3(3).

71. What follows is based largely on W. Burke, *The Law of the Sea Concerning Coastal State Authority over Driftnets in the High Seas*, *in* UNITED NATIONS FOOD AND AGRICULTURE ORGANIZATION (FAO) LEGISLATIVE STUDY 47 (1991).

72. *See* UNCLOS, *supra* note 9, arts. 61, 117.

73. 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, 140 T.I.A.S. No. 5969, 559 U.N.T.S. 285 (1966).

74. Fisheries Jurisdiction (U.K. v. Ice.), 1974 I.C.J. 3, 30 (July 25).

75. *See* UNCLOS, *supra* note 9, art. 118.

scientific information, catch and effort statistics and other data regarding conservation of stocks on the high seas.[76] More important, it imposes a duty to take measures "[d]esigned, on the best scientific evidence available to the states concerned, to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors"[77] and to observe treaty obligations.[78] For these reasons, the UNCLOS Tribunal could conclude that the South Pacific Convention is an agreement related to the purposes of UNCLOS.

The second query with respect to legislative jurisdiction is whether an UNCLOS Tribunal may claim jurisdiction in the face of competing claims by a GATT/WTO panel. This question addresses the fact that the UNCLOS Tribunal and the GATT/WTO panel possess concurrent legislative jurisdiction conferred upon them by their constituent corresponding treaties.

There are two aspects to this query. The first deals with the internal jurisdictional provisions of UNCLOS itself. Two such provisions merit attention: Articles 282 and 311(3). According to Article 282,

> 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 Part, unless the parties to the dispute otherwise agree.[79]

This section refers to past agreements, and one of its key facets is that an alternative procedure should entail a binding decision. This raises the issue of whether GATT/WTO judicial decisions are binding. As this Article has explained,[80] Article 296 makes all decisions of an UNCLOS court or tribunal final, without any other intervening procedures. On the other hand, the final decisions of a dispute panel or appellate body must be formally adopted by all members of GATT/WTO and can be rendered ineffective by a negative consensus of the DSB. Under the circumstances, it is arguable that GATT/WTO does not issue binding decisions of the kind contemplated by Article 282.

---

76. *See id.* art. 119(2).
77. *See id.* art. 119(1)(a).
78. *See id.* art. 116.
79. *See id.* art. 282 (emphasis added).
80. *See supra* notes 39-40 and accompanying text.

Furthermore, UNCLOS jurisdiction may be overridden only in disputes regulated by cognate environmental treaties. Article 282 would apply, for example, if the facts of the dispute were governed by an earlier conservation or environmental treaty on the conservation of fish. It would not apply, though, to a pure trade dispute, over which GATT/WTO exercises jurisdiction, or to a environmental dispute with trade ramifications, over which GATT/WTO purports to exercise jurisdiction. The thrust of this argument is borne out by Article 311(3), which explicitly disallows UNCLOS parties from entering into future agreements that are incompatible with the "effective execution of the object and purpose" of UNCLOS or that derogate from its "basic principles."

Article 282 should be interpreted in light of the environmental objectives of UNCLOS, so clearly set out by, *inter alia*, Articles 311(3) and 237. We have seen that Article 237 recognizes obligations contained in other treaties only to the extent that they further, and are carried out in a manner consistent with, the general principles and objectives of UNCLOS.[81] As a result, one may conclude that the treaties referred to in Article 282 are cognate environmental treaties that are consistent with the general principles of UNCLOS. They do not refer to unrelated treaties such as GATT/WTO, which deals with trade liberalization and not environmental protection.

Article 311 is a non-derogation clause. The eminent jurist Shabtai Rosenne argues that Article 311 is a rare example of a treaty obligation so precisely worded that it may nullify a conflicting later treaty such as GATT/WTO.[82] Further support for Rosenne's closely knit argument, which this Article endorses, is readily available.[83] As we have just seen, marine environmental protection is a basic principle and objective of UNCLOS and can be achieved only if it is so recognized by judicial tribunals. GATT/WTO does not recognize marine environmental protection as a basic principle or objective but its dispute settlement provisions must not be allowed to defeat the protection of the marine environment. In the hypothetical scenario, then, it makes no difference whether Kuroshito entered into GATT/WTO before or

81. *See supra* notes 20-21 and accompanying text

82. *See* SHABTAI ROSENNE, BREACH OF TREATY 93 (1985).

83. *See id.* at 85-86. Rosenne's argument, at its core, is that Article 311 creates a definite primary obligation that provides for the consequences of its breach. Since the obligation stipulates that any violation of its provisions would amount to a nullity, any later obligation contained in another treaty that violates the primary obligation is a nullity. *See id.*

after it joined UNCLOS, because the UNCLOS tribunal would possess jurisdiction in either event.

This raises the second aspect of this query: What might happen if GATT/WTO also assumes jurisdiction, creating a situation in which both UNCLOS and GATT/WTO are adjudicating the case at the same time? There are no exact precedents governing such a situation, so recourse must be taken to general principles of law and to the judicial decisions of various nations[84] which are applicable in analogous situations.

The world of various legally sovereign nations is an increasingly shrinking, interconnected and transnational world of global trade and technology that reaches beyond national boundaries. The actions of corporations, individuals and groups engaged in trade and communication are subject to the laws of more than one country and, therefore, to the competing jurisdiction of the forums within those countries.[85] This is not surprising because many nations exercise concurrent jurisdiction over

---

84. *See* Statute of the International Court of Justice, *supra* note 11, art. 38 (c)-(d).

85. *See generally* ANDREAS F. LOWENFELD, INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS (1996). Lowenfeld offers numerous cases supporting his thesis that there is an emerging consensus about the criteria employed in asserting both legislative and judicial jurisdiction. He argues that these cases display a confluence between national and international criteria based on fairness and reasonableness. *See id.* at 29. In *Bier v. Mines de Potasse d'Alsace SA,* 1976 E.C.R. 1735, [1977] 1 C.M.L.R. 284 (1977), a French company in Alsace discharged massive amounts of chlorides into the Rhine. The chloride allegedly damaged nursery gardens in Holland. The Dutch Supreme Court upheld the assertion of jurisdiction by a Dutch court despite the pleas that the discharge of chlorides was lawful where it took place, in Alsace, France. The European Court of Justice affirmed, basing its decision on a EEC Convention on jurisdiction and the enforcement of judgments. Subsequently, a Dutch court applied Dutch law concerning environmental damage, rejecting the defense that the conduct was lawful. See LOWENFELD, *supra*, at 30.

In another case, M, a construction company incorporated in northern Cyprus, sued a Turkish bank for $20 million, claiming the Turkish bank had wrongfully paid that amount to the Libyan government. M first sued in England, but the courts there rejected jurisdiction on the basis of *forum non conveniens* in *Muduroglou Ltd. v. TC Ziraat Bankasi,* 1986 1 Q.B. 1225 (Eng. C.A.). M then tried Germany, claiming that a German statute gave the German courts jurisdiction. The German Supreme Court found that the statute should be read in conjunction with the international competence (or jurisdiction) of the German courts, and held that the necessary link required by international law was not present. See LOWENFELD, *supra*, at 59-61.

In a third case, a Japanese widow whose husband was killed in Malaysia in an airline crash sued the Malaysian airline for non-performance of the contract of carriage. The Malaysian airline, which maintained an office and did business in Japan, moved to dismiss the suit on the basis that the contract of carriage was entered into in Malaysia and bore no relation to the business in Japan.

areas of public law that are common to all nations and peoples, such as health, safety, trade, economic regulation, communications, technology and the environment.[86] The increasing spate of international litigation reveals the extent to which the national legal systems of the world are clothed with concurrent, not exclusive, jurisdiction.[87]

An important principle that has emerged in Conflicts jurisprudence is that a duly constituted tribunal within a country, conferred with jurisdiction by its legal system (primary jurisdiction), is not free to abjure it simply because jurisdiction is concurrently enjoyed by a foreign forum.[88] The principle that a lawfully constituted tribunal on which primary jurisdiction has been conferred possesses legislative jurisdiction may be based upon the view that it is the duty of the court to assume jurisdiction because it would be immoral to subjugate national interests to those of other nations.[89] It can also be premised on the more functional argument that, in the absence of an agreed set of internationally binding rules determining when courts are rightfully clothed with legislative jurisdiction, national courts with primary jurisdiction are bound by the laws of their own country and should assume jurisdiction when empowered to do so by their national laws.

As we have seen, many domestic courts relying on principles of international law have used fairness and reasonableness as the primary criteria for asserting jurisdiction.[90] Additionally, some commentators have argued that conflict of law principles are principles of international law because the conflict of laws is part of the law of nations.[91] Such a claim has a long and distinguished lineage, originating with sixteenth- and seventeenth-century writers on international law such as Grotius, and has

---

The Japanese Supreme Court, in *Gotu v. Malaysian Airlines,* applied the principle of fairness and found that it possessed jurisdiction. *See id.* at 48-51.

86. Some examples of such overlapping jurisdiction that arose in the United States courts include economic regulations dealing with bank secrecy, *see* United States v. First Nat'l City Bank, 396 F.2d 897 (2d Cir. 1968), and the law applicable to air transportation, *see* Laker Airways Ltd. v. Sabena, 731 F.2d 909 (D.C. Cir. 1985).

87. *See generally* BORN, *supra* note 62.

88. *See* BRAINERD CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 177-85 (1963). Currie went further and argued that a court should exercise its jurisdiction to protect the interests of its own state regardless of whether another state has an interest. *See id.*

89. *See* HANS MORGENTHAU, IN DEFENSE OF THE NATIONAL INTEREST 36 (1951).

90. *See supra* note 85.

91. *See* LOWENFELD, *supra* note 85, at 3.

garnered some judicial support.[92] The cogency of their reasoning becomes evident when we consider that courts are the organs of government and that international law should determine the respective merits and jurisdiction of these competing national claims.

This Article advances the view that the absence of customary and treaty norms in international law for choosing between competing bases of treaty jurisdiction[93] opens the door to subsuming conflict of laws rules as general principles of law. Even if they are not determinative and binding as general principles of international law, conflict of laws principles are rationally compelling and legally persuasive. It is to those principles that we now turn.

Conflicts over international jurisdiction reflect interest group struggles within international society similar to those within a nation's states, in which lawmakers commit their countries to a variety of different and sometimes conflicting goals, objectives and programs that jostle for power, and resources.[94]

---

92. *See* Michael Akehurst, *Jurisdiction in International Law*, 1972-73 BRIT. Y.B. INT'L L. 145, 212-13 (discussing Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775, 802-17 (1955)).

93. *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 112 (1965); *see also* RESTATEMENT (THIRD), *supra* note 10, § 402.

94. *See, e.g.*, Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542 (1988). The theoretical underpinnings of interest group politics are traversed by ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); ROBERT A. DAHL, WHO GOVERNS?: DEMOCRACY AND POWER IN AN AMERICAN CITY (1961); DAVI BICKNELL TRUMAN, THE GOVERNMENTAL PROCESS: POLITICAL INTERESTS AND PUBLIC OPINION (1951); ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT 260-61 (1967); THEODORE J. LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES 51 (2d ed. 1979); E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA (1960); LESTER W. MILBRATH, THE WASHINGTON LOBBYISTS (1963); RAYMOND A. BAUER, ET AL., AMERICAN BUSINESS AND PUBLIC POLICY: THE POLITICS OF FOREIGN TRADE (1972); KAY LEHMAN SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986). "Public Choice" theorists attempt to take this analysis further by applying economic theory to political decisionmaking and treating the legislative process as a microeconomic system in which actual political choices are determined by the efforts of individuals and groups to further their own interests. *See* DENNIS C. MUELLER, PUBLIC CHOICE (1979); JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957); WILLIAM H. RIKER, LIBERALISM AGAINST POPULISM (1982); William M. Landes and Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875 (1975); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983). For a full review of public choice literature, see Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

In modern international society, treaties take the place of legislation. Various treaties, backed by differing interest groups, demonstrate similar characteristics and institutionalize an array of goals dealing, for example, with health, communications, welfare, transportation, human rights, trade and environmental protection. These varied goals of a pluralistic international community are potential sources of conflict.

In the case of international organizations, we need to inquire whether a treaty has conferred primary jurisdiction on the tribunal that is invited to hear and determine a case. Framed this way, it becomes quite clear that UNCLOS confers lawful authority on its judicial forums to decide the kind of case brought before it by New Polynesia in the hypothetical situation. The fact that it has jurisdiction is, however, not determinative. There are common limitations to the exercise of both legislative and judicial jurisdiction based on fairness and reasonableness, which we consider next.

### B. COMMON LIMITATIONS ON LEGISLATIVE AND JUDICIAL JURISDICTION

A plethora of conflict of law theories attempt to articulate the restraining or constraining principles that should guide a court in deciding whether to exercise its jurisdiction.[95] These theories include vested rights,[96] interest analysis,[97] comparative-impairment,[98] the better rule of law approach,[99] the most significant relationship,[100] and comity.[101] It is not necessary to choose between these theories as they can be distilled, in the final analysis, to require simply that the court find a principled and reasoned basis for its decision. In essence, a court clothed with legislative jurisdiction must exercise its judicial jurisdiction in a manner that is both politically fair[102] and reasonable.[103]

---

95. *See generally* LEA BRILMAYER, CONFLICT OF LAWS 1-125 (1995).

96. *See id.* at 47 (citing JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935)).

97. *See id.* at 1-125 (1995) (citing CURRIE, *supra* note 88).

98. *See generally* William F. Baxter, *Choice of Law and the Federal System,* 16 STAN. L. REV. 1 (1963).

99. *See generally* Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations,* 54 CAL. L. REV. 1584, 1587-88 (1966).

100. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

101. *See* Joel R. Paul, *Comity in International Law,* 32 HARV. INT'L L.J. 1, 1-5 (1991).

102. *See* BRILMAYER, *supra* note 95, at 236-37.

103. *See* RESTATEMENT (THIRD), *supra* note 10, § 403(1).

Judge Fitzmaurice encapsulated such a view in his separate opinion in the *Barcelona Traction* case, where he wrote that:

> [I]nternational law does not impose hard and fast rules on States delimiting spheres of national jurisdiction . . . . It does however . . . involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by another state.[104]

The Third Restatement of the Foreign Relations Law of the United States lists a number of factors that might guide courts in determining what is reasonable.[105] These principles and rules could be adopted by the Tribunal in deciding whether to exercise jurisdiction in the hypothetical case under discussion. When so adopted, it becomes evident that it is reasonable and fair for UNCLOS to exercise judicial jurisdiction because (i) the GATT/WTO displays constitutional defects inconsistent with the traditions of the international legal system,[106] (ii) GATT/WTO decisions offend justified expectations of an impartial legal system,[107] and (iii) the interpretive role of GATT/WTO judges nullifies the importance of international environmental regulation.[108]

---

104. Barcelona Traction, Light and Power Co., Ltd. (Belgium v. Spain), 1970 I.C.J. 3, 105 (Feb. 5) (separate opinion of Judge Fitzmaurice).

105. *See* RESTATEMENT THIRD, *supra* note 10, § 403(2). They include

> (a) the link of the activity to the territory of the regulating state . . . ;
>
> (b) the connections such as nationality, residence, or economic activity . . . ;
>
> (c) the character of the activity to be regulated [and] the importance of regulation to the regulating state . . . ;
>
> (d) the existence of justified expectations that might be protected or hurt by the regulation;
>
> (e) the importance of the regulation to the international political, legal, or economic system;
>
> (f) the extent to which the regulation is consistent with the traditions of the international system;
>
> (g) the extent to which another state may have an interest in regulating the activity; and
>
> (h) the likelihood of conflict with regulation by another state.

*Id.*

106. *See* RESTATEMENT (THIRD) *supra* note 10, § 403(2)(f). *See also infra* notes 109-12 and accompanying text.

107. *See* RESTATEMENT (THIRD), *supra* note 10, § 403(2)(d). *See also infra* notes 113-42 and accompanying text.

108. *See* RESTATEMENT (THIRD), *supra* note 10, § 403(2)(e). *See also infra* notes 143-52 and accompanying text.

*1. Constitutional Deficiencies*

First, GATT panels are less fair than UNCLOS Tribunals because they are precluded from taking notice of international environmental laws, even though these laws constitute an important segment of international law. In contrast, UNCLOS Tribunals "shall apply . . . other rules of international law not incompatible with this Convention."[109] This formulation is more receptive to international law and less restrictive of non-UNCLOS law than the comparable provisions of GATT/WTO, which assiduously and systematically exclude all non-GATT law.

The law applied by GATT/WTO is confined to that found in its own treaties and does not recognize any broader corpus of general international law, let alone IEL.[110] Since environmental protection is not, and never was, a GATT/WTO objective, the GATT and its Covered Agreements do not deal with environmental protection apart from the exceptions found in GATT 1947, Article XX. It is abundantly clear that the GATT/WTO panels and Appellate Bodies are bound to restrict themselves to the DSU and the Covered Agreements,[111] which, moreover, should be interpreted and construed strictly in a way that neither adds to, nor diminishes the rights and obligations provided by the treaties.[112]

In contrast, UNCLOS tries in various provisions to accommodate international law. The general provision dealing with its relation to other conventions tries to reconcile, not repudiate, the rights and obligations arising from other agreements. Con-

109. UNCLOS, *supra* note 9, art. 293(1).

110. *See* GATT 1994, *supra* note 4, art. 3, cl. 1.

111. *See* GATT 1994, *supra* note 4, art. 3, cl. 4. "Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter *in accordance with the rights and obligations under this Understanding and under the covered agreements.*" *Id.* (emphasis added). "All solutions . . . shall be consistent with those agreements, and *shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.*" *Id.* art. 7, cl. 5 (emphasis added). GATT 1994 Annex II, Article 7 deals with the terms of reference of panels and confines them to "the relevant provisions in any covered agreement or agreements cited by the parties to the dispute." *Id.* art. 7, cl. 2. GATT 1994 Annex II, Article 11 deals with the functions of panels and requires them to assess the "[a]pplicability of and conformity with the relevant covered agreements." *Id.* art. 11. It does not refer to any other laws or principles.

112. *See id.* art. 3, cl. 2. This provision states conclusively that "[r]ecommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements.*" *Id.* (emphasis added).

sequently, UNCLOS Tribunals can recognize GATT law, while their GATT counterparts are unable to recognize UNCLOS.

### 2. *Bias*

Despite a rhetorical reference to environmental protection in the hortatory preamble of the WTO,[113] GATT/WTO calls for the advance of free trade effectively unrestrained by environmental constraints. The GATT Secretariat justified such an advancement of free trade, impervious to environmental concerns, on the grounds that economic growth is a pre-condition to environmental protection.[114] The underlying premise of this assertion is that any environmental damage caused along the way can be remedied once economic prosperity is achieved. Such a thesis stands unproven. In fact, the prominent example—the United States' experience of *ex post facto* cleaning up of toxic and hazardous waste sites—demonstrates the contrary. The United States is the most prosperous nation in the world and has spent many more billions of dollars cleaning up hazardous waste sites resulting from the lack of environmental regulation than it would have if the environmental regulations controlled the creation and disposal of hazardous wastes earlier in its history.[115]

### 3. *GATT/WTO Decisions*

In an apparently candid admission, the GATT Secretariat conceded that it is reasonable for concerned countries to seek to change the actions and policies of others that damage the global environment.[116] Unfortunately, GATT does not permit these countries to bring about change by disallowing products of offending countries from entering their markets.

---

113. *See* GATT 1994, *supra* note 4, preamble.

114. *See* GATT Secretariat, *Trade and the Environment,* GATT Doc. 1529, *reprinted in* 4 WORLD TRADE MATERIALS 37 (1992).

115. The estimated cost of cleaning up a hazardous waste site in the United States runs between $21 million and $30 million. *See* ENCYCLOPEDIA OF THE ENVIRONMENT 679 (Ruth A. Eblen & William R. Eblen eds., 1994). The U.S. Environmental Protection Agency has identified nearly 41,000 potentially hazardous waste sites across the country. *See* COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL QUALITY: THE TWENTY-FIFTH ANNIVERSARY REPORT 365 (1996). The costs of building a new high-tech, fully-lined landfill designed to prevent leaching into groundwater, withstand severe weather, and equipped with modern monitoring equipment is far less. JOSEPH L. BAST ET AL., ECO-SANITY: A COMMON SENSE GUIDE TO ENVIRONMENTALISM 24-28 (1994).

116. *See* GATT Secretariat, *supra* note 114, at 18.

In order to overcome GATT prohibitions against trade restrictions,[117] it is necessary to provide justification under GATT 1947, Article XX, which provides that,

> [s]ubject to the requirement that such measures are not applied in a manner which could constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures . . . .

The most important exceptions, found in paragraphs (b) and (g) of that Article, allow restrictive measures

> (b) necessary to protect human, animal or plant life or health; . . . [or]
>
> (g) relat[ing] to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . . .[118]

The extensive jurisprudence dealing with the nature and ambit of these exceptions[119] can not be explored fully in the context of this Article. Instead, this Article takes a functional look at the application of these exceptions in three recent cases which offer a baseline for interpreting Article XX exceptions. The very narrow grounds on which these decisions justify environmental action do not provide a satisfactory basis for ensuring environmental protection.

---

117. *See* GATT 1947, *supra* note 4, arts. III and XI.

118. GATT 1947, *supra* note 4, art. XX (b), (g). Additionally, two conditions must be satisfied before any exception can apply. First, the measure must not "constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail." *Id.* art. XX. Second, the measure must not be a "disguised restriction on international trade." *Id.*

119. *See generally* JAGDISH BHAGWATI & ROBERT E. HUDEC, FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 57-174 (1996); Richard H. Steinberg, *Trade-Environment Negotiations in the EU, NAFTA, and WTO: Regional Trajectories of Rule Development,* 91 AM. J. INT'L L. 231, 242 (1997); Thomas J. Schoenbaum, *International Trade and Protection of the Environment: The Continuing Search for Reconciliation,* 91 AM J. INT'L L. 268, 273-80 (1997); John H. Jackson, *World Trade Rules and Environmental Policies: Congruence or Conflict?* 49 WASH. & LEE L. REV. 1227, 1239-42 (1992); Cynthia M. Maas, Note, *Should the WTO Expand GATT Article XX: An Analysis of United States—Standards for Reformulated and Conventional Gasoline,* 5 MINN. J. GLOBAL TRADE 415, 426-27 (1996); Chris Wold, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?,* 26 ENVTL. L. 841, 854-61 (1996); Charles R. Fletcher, *Greening World Trade: Reconciling GATT and Multilateral Environmental Agreements Within the Existing World Trade Regime,* 5 J. TRANSNAT'L L. & POL'Y 341, 352-56 (1996); Kazumochi Kometani, *Trade and Environment: How Should WTO Panels Review Environmental Regulations Under GATT Articles III and XX?,* 16 NW. J. INT'L L. & BUS. 441, 466-76 (1996); Paul J. Yechout, Note, *In the Wake of Tuna II: New Possibilities for GATT-Compliant Environmental Standards,* 5 MINN. J. GLOBAL TRADE 247, 255-57, 264-68 (1996).

*United States Restrictions on Imports of Tuna (Tuna I)*[120] was a case in which the United States Marine Mammal Protection Act (MMPA)[121] required a ban on the importation of yellowfin tuna caught with nets that resulted in the killing of dolphins. After years of fruitless negotiation between the United States and Mexico to establish acceptable limits for dolphin mortality, the United States placed a total embargo on the importation of yellowfin tuna caught with dolphin-killing, rather than dolphin-friendly, nets.[122] Mexico initiated GATT dispute resolution proceedings, and the GATT Panel held that the U.S. ban violated GATT and did not fall within the exceptions in Article XX(b), (d) or (g).

Three years after *Tuna I*, in *United States - Restrictions on Imports of Tuna (Tuna II)*,[123] the European Economic Community challenged the secondary embargo provisions of the MMPA, which required any intermediary nation exporting yellowfin tuna to the United States to provide the relevant authorities with proof that such tuna had not been caught with dolphin-killing nets. Once again the GATT Panel ruled against the United States. According to the Panel, such action was not "necessary" under Article XX(b) and was not "primarily aimed at" the conservation of natural resources under Article XX(g).

Finally, *United States - Standards For Reformulated and Conventional Gasoline*[124] (*Reformulated Gasoline Appeal*) involved an appeal of a WTO Panel decision in response to Venezuela and Brazil's request for review of pollution standards for gasoline imposed by the United States Environmental Protection Agency (EPA) under the Clean Air Act.[125] The dispute revolved around whether domestic refiners were given an unfair and preferential advantage over foreign refiners in the formulation and setting of the standards.[126] The Appellate Body ruled

120. Report of the Panel, *United States-Restrictions on Imports of Tuna*, Sept. 3, 1991, GATT B.I.S.D. (39th Supp.) at 155 (1993) (reprinted at 30 I.L.M. 1598 (1991)) [hereinafter *Tuna I*].

121. 16 U.S.C. §§ 1361-1421 (1994).

122. *See* Jeffrey L. Dunoff, *Reconciling International Trade with Preservation of the Global Commons: Can We Prosper and Protect?*, 49 WASH. & LEE L. REV. 1407, 1412 (1992).

123. Report of the Panel, *United States - Restrictions on Imports of Tuna*, June 1994, 33 I.L.M. 842 (1994) [hereinafter *Tuna II*].

124. Report of the Appellate Body, *United States - Standards for Reformulated and Conventional Gasoline*, May 20, 1996, 35 I.L.M. 605 (1996) [hereinafter *Reformulated Gasoline Appeal*].

125. Clean Air Act, 42 U.S.C. §§ 7401-7671q (1994).

126. Report of the Panel, *United States - Standards for Reformulated and Conventional Gasoline*, Jan. 29, 1996, 35 I.L.M. 276 (1996) [hereinafter *Refor-*

that the manner in which the United States determined the 1990 baselines, and the consequent pollution standards for gasoline under the Clean Air Act, could not be justified under GATT Article XX(b), (d) or (g).

In two of these three cases, the United States took action to protect the environment and did not argue that it was obliged to do so by treaty. In light of the apparently unilateral nature of the U.S. actions, a preliminary question is whether GATT/WTO permits environmental action that has been authorized and mandated, though not obligated, by a multilateral treaty that did not include all GATT contractual parties.[127]

This question was addressed in *Tuna II*.[128] The United States, while not claiming that its actions were obligated by CITES,[129] did offer treaty justification for its actions. It argued generally that its actions "were consistent with and directly furthered the objectives"[130] of CITES and other environmental treaties and, more specifically, that they were authorized and empowered by CITES. According to the United States,

---

*mulated Gasoline Decision*]. This report noted that the Panel's task was to ensure that the provisions and objectives of the General Agreement were maintained notwithstanding the desirability or necessity of the environmental objectives of the proposed legislation in dispute. *See id.* § 7.1. In this case, Venezuela protested U.S. restrictions on the importation of reformulated gasoline. Venezuela successfully claimed that the Clean Air Act was discriminatory because it forced foreign producers to meet U.S. refinery industry averages. *See id.* § 6.15.

127. There would be no problem, of course, if the multilateral treaty included all GATT parties and was (a) entered into subsequent to GATT, or (b) seen as a "lex specialis"—a specialist treaty. In both cases, such a multilateral treaty would trump GATT. *See Tuna II, supra* note 123, § 3.41.

128. *See Tuna II, supra* note 123. In that case the European Union (EU) and the Netherlands successfully initiated GATT proceedings against the United States similar to Mexico's suit against the United States in *Tuna I*. The EU claimed that the United States' intermediary ban on indirect imports of tuna was hurting European fishing industries. The WTO panel concluded that "measures taken so as to force other countries to change their policies, and that were effective only if such changes occurred, could not be primarily aimed . . . at rendering effective restriction on domestic production or consumption." *Id.* § 5.27.

129. *See* CITES, *supra* note 22.

130. *Tuna II, supra* note 123, § 3.14.

> All species of dolphins involved in the fishery of the eastern tropical Pacific were listed in CITES Appendix II. Moreover, while the United States was not obligated under CITES to adopt the measures at issue, CITES specifically provided for these measures in providing for "stricter domestic measures" in order to further the objectives of that agreement. The United States measures were stricter domestic measures, as explicitly contemplated under CITES, taken to protect species of dolphins that CITES protects. These measures were in addition to the restrictions on trade in specimens of the dolphins themselves that are required under CITES.[131]

Relying upon CITES and other international environmental treaties, the United States contended that according to international law, these treaties should be taken into account as general or special rules for interpreting Article XX of GATT.[132] Furthermore, the United States argued that the actions taken by the parties to these multilateral environmental treaties constituted "subsequent practice" under general international law and Article 31(3)(b) of the Vienna Convention on Treaties. The Panel gave these arguments short shrift, asserting that CITES and the other environmental treaties were not subsequent agreements signed by all the parties to the GATT. With regard to the use of IEL agreements in the interpretation or application of Article XX,[133] the Panel bluntly declared that "they did not apply to the interpretation of the General Agreement or the application of its provisions."[134]

The Panel, in so holding, was acting in conformity with GATT law and jurisprudence. The recognition that environmental treaties should affect the interpretation or application of GATT would require judicial law-making forbidden to GATT/WTO panels.[135] In any case, it would be a mistake to argue that unilateral decisions are more difficult to justify than those based on multilateral treaties,[136] because there is no distinction made in the language of Article XX between treaty and non-treaty jus-

131. *Id.*

132. The United States relied on Articles 31 and 32 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969).

133. *See Tuna II*, *supra* note 123, § 3.20.

134. *Id.* § 5.19.

135. *See infra* notes 143-52 and accompanying text.

136. Any attempt to draw support for such a proposition from the *Tuna II* decision would misconstrue it. In light of its holding that it is not open to a country to take unilateral measures that force or cajole others into changing their domestic environmental policies, it is a possible interpretation that such changes may be made by treaty. Consequently, action taken by treaty to implement agreed changes of domestic behavior may be justified under GATT/WTO. However, as this Article explains, the Panel dispelled any such implication

tifications. There are other ways in which GATT and the decisions of GATT/WTO tribunals can obstruct the implementation of environmental treaties.

First, the word "necessary" in Article XX(b) has been interpreted restrictively[137] to mean that a government must employ the measure that is the least inconsistent with GATT. Even where a measure is required to protect human, animal or plant life or health, it may well be "unnecessary" in the view of the GATT/WTO tribunal if the tribunal determines that other more GATT-consistent measures were available. Consequently, import and export restrictions under CITES could be struck down on the basis that they are not the least-trade-restrictive measures available to the country concerned.

Second, *Tuna II* interpreted "relating to" in Article XX(g) to allow extra-territorial conservation efforts which had been prohibited by *Tuna I*.[138] However, the Appellate Body in the *Reformulated Gasoline Appeal* clarified that such policies should be aimed primarily at the conservation of exhaustible natural resources,[139] as determined by GATT/WTO. This means that a GATT/WTO tribunal can impugn any action taken under any IEL convention on the basis that in its view the action is not aimed primarily at conservation even if the concerned states assert a contrary view.

Third, GATT/WTO tribunals have assumed a disturbing interventionist character. Oblivious of their appellate status, they appear eager to override the judgment of sovereign nations with

---

when it held that environmental treaties like CITES, which did not include all GATT parties, were irrelevant.

137. This happened in *Tuna II*, *supra* note 123, where the Panel stated that the U.S. measures to protect dolphin life or health were not "necessary" because they failed a proportionality test that requires the use of reasonable alternative measures not inconsistent with GATT. In the *Reformulated Gasoline Decision*, *supra* note 126, the United States argued that the non-degradation requirements of the U.S. Clean Air Act, *supra* note 125, were "necessary to protect human, animal or plant life or health." *Reformulated Gasoline Decision*, *supra* note 126, § 3.40. However, the WTO Panel, while noting that gasoline emissions are tied to human health, was more impressed by its finding that imported gasoline was accorded different treatment than United States gasoline and held that the measures taken were not "necessary." *Id.* § 6.29. The Appellate Body did not deem it necessary to address this question in light of its ruling that the United States had not satisfied the requirements of the introductory clause of Article XX by taking actions that constituted "unjustifiable discrimination" and a "disguised restriction" on international trade. *Reformulated Gasoline Appeal*, *supra* note 124, at 615.

138. *See Tuna I*, *supra* note 120, §§ 5.30-.34.

139. *See Reformulated Gasoline Appeal*, *supra* note 124, at 617; *see also Tuna II*, *supra* note 123, §§ 3.52-.53.

which they disagree and make their own decisions on the facts. They seem unaware of the need for judicial restraint, deference to the decisions of national fact-finding bodies or standards of review that restrain an appellate body from interfering with an executive action unless it is arbitrary, capricious or an abuse of discretion.[140]

Fourth, *Tuna I* reiterated the rule that Article XX could be directed only at products, not at processes or production methods.[141] It concluded that measures aimed at reducing dolphin mortality were a production method and thus were not covered by Article XX(g).

Finally, the Appellate Body in the *Reformulated Gasoline Appeal* created another formidable hurdle for states seeking to claim environmental exemptions under Article XX. It found that the burden placed on states seeking to come within Article XX was not confined to satisfying the narrow health, environment and natural resource exemptions found within paragraphs (a) through (j). States also must prove that the measures taken did not violate the chapeau (introductory or preambular provisions) of Article XX, which prohibits "arbitrary" or "unjustified" discrimination or a "disguised restriction" of free trade. In holding that the United States had violated the chapeau, the Appellate Body demonstrated no hesitation in second guessing the judgment of, and overruling decisions and rules made by, the EPA, the administrative agency that makes decisions affecting U.S. environmental policy. In doing so, it showed scant regard

140. The Appellate Body in the *Reformulated Gasoline Appeal* freely dismissed the difficulties facing the EPA in collecting evidence from foreign countries in order to give foreign refineries individual baselines. *See Reformulated Gasoline Appeal*, *supra* note 124. There is recognition within trade circles of this problem. *See generally* Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT'L L. 193 (1996). Unfortunately, these distinguished authors come to the curious conclusion that a GATT tribunal cannot be compared to a court or judicial forum reviewing administrative or executive actions in domestic law. Such a conclusion is at variance with the fundamental assumptions underlying any allocation of power in an undeveloped international legal order lacking compulsory jurisdiction. Where sovereign states allocate limited power to a functional international tribunal under GATT/WTO, such a tribunal ought to be sensitive to the demarcation of powers between sovereign states and international organizations. This should lead to greater, not less, deference to national decisionmaking.

141. *See Tuna I*, *supra* note 120, § 5.15, 5.34.

for the ordinary and well-recognized principles of according deference to the primary decisionmaker.[142]

*4. Interpretive Role of GATT/WTO Judges*

The DSU defines who may serve as a judge: persons who have served on or presented a case to a panel, served as a representative of a Member or of a contracting party to GATT 1947 or as a representative to the Council or Committee of any covered agreement or its predecessor agreement, or in the Secretariat, taught or published on international trade law or policy, or served as a senior trade policy official of a Member.[143] It is striking that this list does not include anyone with qualifications outside the field of trade law, such as expertise in international environmental law.

Article 3(2) of the DSU is an interesting provision that exhibits all the hallmarks of an unresolved disagreement. It reiterates that the dispute settlement system should, first, "preserve the rights and obligations of Members under the covered agreements," and second, "clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[144] Then, Article 3(2) immediately attenuates future interpretation by prohibiting any tribunal from adding or diminishing rights and obligations contained in the covered agreements.[145] This flies in the face of judicial lawmaking and assumes a set of precise, tailor-made, predetermined and inflexible rights and duties that can be mechanically dispensed without any judicial intervention.[146]

Such an approach is untenable for a number of reasons. First, the DSU and the covered agreements were made by

142. *See Reformulated Gasoline Appeal, supra* note 124, at 629-30 (dismissing the EPA's claim of hardship in developing baselines for foreign refiners, stating that "there was no reason to believe that, given the usual measures available in international trade for determination of origin and tracking of goods . . . there was any particular difficulty sufficient to warrant the demands of the baseline establishment methods applied by the United States").

143. GATT 1994, *supra* note 4, annex II, art. 8(1).

144. *Id.* art. 3(2).

145. *Id.*

146. Apart from judicial interpretation, Article IX(2) of the WTO Agreement allows for "interpretations" that do not "undermine the amendment provisions in Article X," provided that such an interpretation is agreed to by three-quarters of the parties. *See* Michael Lennard, *The World Trade Organization and Disputes Involving Multilateral Environmental Agreements*, 5 EUR. ENVTL. L. REV, 306, 310 (1996). However, the required three-quarters majority renders this kind of interpretation impracticable, while any interpretation is open to legal challenge possibly leading to an amendment. *See id.* at 311.

humans, not gods, and cannot anticipate the multiplicity of contingencies and circumstances that could give rise to controversies about rights and duties. Second, the DSU and covered agreements cannot anticipate the law that should be applied in every situation. Each set of rights and duties should be applied to the variegated fact situation; the scope of each right and duty cannot possibly be ordained in advance. That is why international instruments are couched in various degrees of generality.[147] Third, duties and rights are correlative concepts,[148] but they are "institutions" and tools of judicial reasoning for deriving and assigning benefits and burdens. It has been argued persuasively that institutional concepts consist of three sets of rules: 1) institutive rules specifying situations to which they might be applied, 2) rules specifying the legal consequences, and 3) terminative rules specifying outcomes.[149] Each step involves judicial analysis, reasoning, discretion and power within a continuing time frame to ascertain the nature, scope and applicability of indeterminate rights and duties.

The DSU attenuates judicial discretion, or freedom, to adapt the law to new situations. It defies reality by assuming that an initial expression of law in a treaty freezes both time and content. In fact, every expression of law is intended to be applied to future events over an indefinite period of time, during which the initial meaning is subject to change.

The customary international rules of interpretation, as restated in the Vienna Convention of the Law of Treaties (Vienna Convention),[150] assume there can be no omniscient expression of rights and obligations that can be applied automatically with dogmatic immutability. Instead, the Vienna Convention calls for any treaty to be interpreted according to its ordinary meaning in "[c]ontext and in the light of its object and purpose." In addition, the Vienna Convention states that any applicable rules of international law should be taken into account.[151]

147. *See* HERBERT HART, THE CONCEPT OF LAW 124-125 (2d ed. 1994) (discussing the need for generality in legal communications in order to assure that the law will apply to everyone in society).

148. *See generally* WESLEY HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS 35-64 (1923).

149. *See* Neil MacCormick, *Law as Institutional Fact*, 90 L. Q. REV. 102, 106-07 (1974).

150. Vienna Convention on the Law of Treaties, *supra* note 132 arts. 31-32.

151. *See id.* art. 31(3)(c). The Appellate Body in the *Reformulated Gasoline Appeal* paid *pro forma* respect to GATT 1994 Article 3(2) and to the rules of interpretation in the Vienna Convention, which it correctly identified as forming part of customary law. *See Reformulated Gasoline Appeal, supra* note 126,

The DSU has apparently rejected the Vienna Convention criteria by asserting that the rights and obligations set out in the covered agreements are sufficient for all purposes, and that earlier references to rules of interpretation in the DSU must be understood as aspirational and decorative rather than obligatory. GATT/WTO's judicial system appears even more inward-looking when compared to ICJ jurisprudence. ICJ decisions apply treaties, international custom, "the general principles of law recognized by civilized nations," judicial decisions and the teachings of publicists.[152] The law applied by GATT/WTO is confined to its own agreements.

In sum, the shortcomings of the GATT/WTO system make it clear that UNCLOS is entitled to assume legislative jurisdiction. As a result, the next question that must be addressed is whether UNCLOS should assume judicial jurisdiction over disputes in which environmental and trade goals collide.

### C. JUDICIAL JURISDICTION

Under what circumstances should a court with legislative jurisdiction exercise that jurisdiction? If a court decides to exercise its judicial jurisdiction and apply the laws of the state where it is situated, it may forbid a litigant from doing that which is permitted or even required by the laws of another state.[153] This is a drastic power that should be subject to some control and should not be left to the unrestricted discretion of any tribunal.

In his illuminating study of cases dealing with international conflicts of laws, Lowenfeld demonstrates that the domestic tribunals of nation states do not always act in a chauvinistic fashion.[154] He describes the Laker litigation, which concerned two English parties: British Airways and Freddie Laker. At one point there was an action pending in the United States to enjoin the suit pending in the United Kingdom,[155] and an anti-anti-suit injunction pending in the United States.[156] The House of

---

at 621. Having suggested that GATT/WTO is not to be read in "clinical isolation from public international law," it could not escape, however, the predicament that all its decisions should be subject to the GATT and the covered agreements. *See id.*

152. *See* Statute of the International Court of Justice, *supra* note 11, art. 38.

153. *See* Akehurst, *supra* note 92, at 167-69.

154. *See* LOWENFELD, *supra* note 85, at 3-15.

155. British Airways Board v. Laker Airways, Ltd., [1983] 3 W.L.R. 544 (C.A).

156. Laker Airways, Ltd. v. Pan American World Airways et al., 559 F. Supp. 1124 (D.D.C. 1983).

Lords, circumventing a U.K. statute relied upon by the British government, finally determined that the case should be heard in the United States.[157]

After reviewing a number of cases involving judicial jurisdiction, Lowenfeld concludes that a consensus is emerging about the relevant criteria for determining jurisdiction. He sees courts in different countries exercising judgments that are acceptable by their own states' standards and by those of the international community.[158] The three principles discussed below are among those used by domestic courts.

Proving that GATT/WTO is unfair to IEL establishes the negative, but it is necessary to demonstrate positively that UNCLOS tribunals are fair and reasonable. Fairness and reasonableness are expressed through different legal concepts, among which comity, *forum non conveniens* and choice of law are of particular importance to the thesis of this Article. These three concepts could limit or preclude the assertion of judicial jurisdiction. It is important for every UNCLOS tribunal to demonstrate that it acts reasonably and responsibly. If UNCLOS tribunals are seen to act fairly, reasonably, and according to principle, not fiat, we will have reason to expect that the international community and GATT/WTO will honor their judgments. It is important, therefore, for UNCLOS tribunals to follow acknowledged criteria for the exercise of judicial jurisdiction.

### *1. Comity*

Comity is an umbrella concept, broadly interpreted and applied in a wide variety of circumstances. It has been defined as the "basis of international law, a rule of international law, a synonym for private international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns," expediency, necessity and reciprocity.[159] It is used in this Article as a discretionary, conceptual yardstick with which courts can limit or constrain their jurisdiction to hear claims, apply law, and consider competing foreign and domestic interests. When so conceived, comity mitigates the conflicts between competing in-

157. *See* British Airways Board v. Laker Airways, Ltd. [1985] App. Cas. 58 (appeal taken from U.K.). *See generally* LOWENFELD, *supra* note 85, at 5-14 (giving a detailed account of the events of the Laker action).

158. *See* LOWENFELD, *supra* note 85, at 79-80.

159. Paul, *supra* note 101, at 3-4.

ternational forums and mediates differences between legal systems.

Comity is a balancing of the need of one sovereign to regulate its internal affairs against the needs of other sovereigns to engage in similar regulation.[160] This Article adopts the view that comity blurs the lines dividing public and private international law[161] and seeks to adapt and apply comity, as defined in the well-known case of *Hilton v. Guyot*,[162] to the relations of competing international organizations. When this definition is adapted and transcribed to the language of intergovernmental organizations, comity can be defined as neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other, but rather as the recognition that one intergovernmental tribunal allows to the jurisdiction of another, having regard to both international duty and convenience and to the rights of its own parties or of other community interests protected by its constitutive treaty. There can be little doubt that an UNCLOS tribunal, guided by the principles of comity, will need to fairly and carefully consider how it should exercise its jurisdiction.

### 2. *Forum Non Conveniens*

The doctrine of *forum non conveniens* was described succintly by Paxton Blair in his classic article as "the discretionary power of a court to decline to exercise a possessed jurisdiction whenever it appears that the cause before it may be more appropriately tried elsewhere."[163] Lord Shaw explicated the rationale for the doctrine in a decision of the House of Lords: "If in the whole circumstances of the case it be discovered that there is a real unfairness to one of the suitors in permitting the choice of a

160. *See* Gau Shan Co. Ltd. v. Bankers Trust Co., 956 F.2d 1349, 1354-55 (6th Cir. 1992) (discussing the concept of comity, building on the *Laker Airways* analysis).

161. *See* Paul, *supra* note 101, at 74-77 (stating that comity should expand the roles of public policy, public law and international politics in U.S. courts).

162. Hilton v. Guyot, 159 U.S. 113, 163-64 (1895). That definition read,

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

*Id.*

163. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1 (1929).

forum which is not the natural or proper *forum* . . . then the doctrine of *forum non conveniens* is properly applied."[164]

An UNCLOS tribunal must consider whether it is in fact an appropriate forum. *Forum non conveniens* is premised on convenience, and it may be invoked to deny judicial jurisdiction even if the tribunal might claim that its assumption of legislative jurisdiction was fair and reasonable. It is conceivable, therefore, that an UNCLOS Tribunal with legislative jurisdiction may find that the application of this doctrine requires it to decline judicial jurisdiction in favor of a more suitable GATT/WTO Panel that is substantially more convenient to the parties or appropriate for the task.[165]

On the facts of our hypothetical case, could the UNCLOS tribunal find that the GATT/WTO Panel is more suitable? The result of any such decision must depend on the particular facts of the dispute, and the facts of the instant scenario do not demonstrate that it could be more conveniently tried elsewhere. While there may be a number of reasons for invoking the doctrine of *forum non conveniens* in disputes involving domestic courts,[166] it will generally be difficult to show that one international tribunal is more convenient than another. The difficulties confronted by litigants in domestic courts do not exist in international tribunals because all litigants face a level playing field. It

164. *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Francais"* [1926] Sess. Cas. 13, 20 (H.L.).

165. *See* BORN, *supra* note 62, at 289-318 (surveying the methods used by domestic courts hearing international cases and applying *forum non conveniens*).

166. First, where the parties are from two different countries, one party may enjoy clear advantages in litigating the case in its own domestic forum as compared to a foreign court for obvious economic, cultural, social and legal reasons. Second, even where parties are from the same country, as in the Laker litigation, the substantive, procedural and evidentiary laws in a foreign forum may be more favorable to one litigant for reasons of substantive law, pertaining, for example, to damages. Apart from substantive rules, there may be differences in applicable procedural rules, for example, the service of summons, the enforcement of judgments, and the awarding of costs. Furthermore, evidentiary rules pertaining to the burden of proof and offering of evidence can be quite different. Third, proximity to witnesses and resources may make one forum less expensive than another. Fourth, there may be linguistic and cultural barriers that make one forum preferable to another. Fifth, one tribunal may be willing to assert jurisdiction over parties, in situations where another would not. Finally, *forum non conveniens* is not limited to the parties and may be invoked by the court itself for various public policy reasons, including, for example, that domestic courts should not be choked with foreign actions or that the taxpayers of one country should not bear the costs of litigation instituted by foreigners. See *supra* notes 154-57 and accompanying text (discussing the Laker litigation).

is possible that an international forum may be closer to one country than another, but in this age of mass air transit, that is hardly a significant advantage.

*3. Choice of Law*

A final question relates to the choice of law. We have seen that UNCLOS is considerably more inclusive than GATT/WTO and that it can apply any law that is not contrary to the provisions of UNCLOS. Many proponents of free trade contend that GATT/WTO is not antithetical to environmental protection.[167] If that is indeed the case, the tribunal can take GATT law into account in arriving at its decision. Unlike GATT/WTO panels, which are prohibited from considering international environmental laws, UNCLOS tribunals can consider GATT/WTO law provided it is not contrary to UNCLOS.[168] By bringing trade law within their purview, UNCLOS tribunals will emerge as international forums in which cases involving both trade and the environment can be heard and decided fairly, reasonably and according to comity.

The fact that conflicting jurisdiction does not always give rise to judicial anarchy still does not answer every important question. What about the two interconnected questions of the race to the courthouse and the implementation or enforcement of conflicting orders? The race to the courthouse may make sense in national legal systems built upon a system of vertical authority, where valid court orders are enforced and implemented by the civil (executive) authorities of a country. Such a race does not, however, present the same opportunities in a consensual and horizontal international legal system devoid of institutionalized enforcement of judicial orders.

The enforcement of judicial orders will remain a perennial problem under the present consensual system of international law. Even if a country obtained a judgment under either UNCLOS or GATT/WTO, there is no guarantee that it would be enforced by the countries involved. In the case of our hypothetical

167. *See, e.g.*, Sabrina Shaw, *Trade and Environment: The Post-Singapore WTO Agenda*, 6 REV. EUR. COMMUNITY & INT'L ENVTL. L. 105, 106 (1997) (enumerating a number of provisions in the WTO which provide for the use of trade-related measures to be used in protecting a state's environment). This is also the assumption behind the Report of the Committee on Trade and the Environment (CTE), dated Nov. 12, 1996, which is available through the WTO's web site by visiting <http://www.wto.org/ddf/ep/public.html> and searching for document symbol WT/CTE/1.

168. *See supra* text accompanying note 109.

situation, a number of outcomes are possible. Under the best-case scenario for New Polynesia, UNCLOS assumes and exercises jurisdiction while GATT/WTO declines to do so.

Legally, the parties to an UNCLOS proceeding are obliged to implement the decisions of the Tribunal under Article 296 of UNCLOS, according to which a decision "shall be final and shall be complied with by all the parties." However, there is no enforcement agency to secure compliance. In the final analysis, it must be left to the UNCLOS tribunal to convince all parties that it is a fair and reasonable judicial tribunal that has given them a satisfactory and balanced judicial hearing. The parties should come away from such a proceeding not with a sense of grievance, but with a sense of having received justice in an orderly and impartially administered judicial forum. The onus will be upon the UNCLOS tribunal to demonstrate these attributes. If it does, added psychological weight will attach to the order, and it will be enforced. By a parity of reasoning, the same would apply to the best-case scenario for Kuroshito, where the GATT/WTO assumes and exercises jurisdiction and UNCLOS declines to do so.

But what if both the UNCLOS tribunal and the GATT/WTO panel assumed and exercised jurisdiction, and the UNCLOS tribunal ruled in favor of New Polynesia while the GATT/WTO Panel ruled for Kuroshito? If both parties pressed for implementation, the matter might need to be resolved by the ICJ. The ICJ is not an international appellate court but could assume such a role if called upon to do so.[169] If the parties decided against recourse to the ICJ, a stalemate would have to be resolved according to non-judicial channels of diplomacy and comity.

From the standpoint of IEL, such a worst-case scenario is not a deterrent to invoking the jurisdiction of UNCLOS. Currently, IEL functions without recourse to any particular judicial forum, and the opportunity to avail itself of the jurisdiction of UNCLOS would constitute a major step forward. The worst-case scenario would still leave room for diplomatic maneuvering, which would not have been possible without UNCLOS.

## IV. CONCLUSION

This Article does not purport to predict how UNCLOS tribunals will decide the cases brought before them. The results are by no means a foregone conclusion because these forums will be

169. This could be done through a Special Agreement of *Compromis* under Article 36(1) of the Statute of the ICJ, see *supra* note 11.

called upon to address difficult substantive questions, such as those relating to the legality of treaty-authorized actions and the more controversial unilateral measures taken by the United States to protect the international environment.

The limited objective of this Article is primarily to show that Conflicts principles can be relied upon to answer questions that arise when two international tribunals, such as GATT/WTO and UNCLOS, enjoy concurrent and conflicting jurisdiction. In essence, we have seen that questions of jurisdiction should be resolved according to principles of fairness and reasonableness. This Article concludes that UNCLOS tribunals are able to apply such principles in a way that the GATT/WTO forums cannot.

Because it enjoys a monopoly over trade and environment litigation, GATT/WTO has been used more frequently for settling environmental disputes between states than has any other international dispute settlement mechanism.[170] This is in spite of the fact that the "intention and aspiration"[171] of the drafters of the DSU was to create a self-contained regime. Moreover, many within GATT/WTO view this regime as "a sealed, self-contained set of relationships that have little to do with public international law or international civic society."[172]

Until now, a variety of calls for reform have gone unheeded. The environmental lacunas in GATT have led to suggestions that GATT be "greened"[173] through procedural, textual and substantive reforms.[174] However, the reform initiative did not get

---

170. *See* Steve Charnovitz, *Improving the Trade and Environment Regimes*, *in* ASIAN DRAGONS AND FREE TRADE 154, 163 (Simon S.C. Tay & Daniel C. Esty eds., 1996) (citing ERNEST-ULRICH PETERSMANN, INTERNATIONAL AND EUROPEAN TRADE AND ENVIRONMENTAL LAW AFTER THE URUGUAY ROUND (1996)).

171. *See* Shinya Murase, *Unilateral Measures and the WTO Dispute Settlement*, *in* ASIAN DRAGONS AND FREE TRADE, *supra* note 170, at 137, 141.

172. Charnovitz, *supra* note 170, at 156.

173. A succinct and perceptive summary of these views is found in DANIEL C. ESTY, GREENING THE GATT 205-24 (1994).

174. *See id.* These reforms include

> establishing procedures for environmental assessments of trade agreements; building greater transparency into GATT negotiations to assure the requisite environmental input; restructuring GATT dispute settlement procedures; sanctifying the trade measures used to enforce international environmental agreements; broadening the scope of GATT's environmental provisions (particularly [GATT 1947] Article XX); . . . clarifying the bases on which environmental trade measures may be used to discipline environmentally inadequate production processes and methods; defining appropriate bounds for unilateral trade actions in support of environmental policies; [and] "developing guidelines for eco-labeling and packaging requirements.

*Id.* at 223.

off to a promising start when it was excluded from the Uruguay Round, which resulted in the new WTO in 1994. Soon afterwards, a decision of the Group on Environmental Measures and International Trade (GEMIT) declined to formulate new rules for dealing with trade sanctions mandated by agreements such as the Montreal Protocol, the Basel Convention and CITES. Instead it opted for a case-by-case determination after the event.[175]

Another initiative has fared no better. In 1995, after the conclusion of the Uruguay Round, the GATT Committee on Trade and Environment (CTE) was formed.[176] CTE's mandate was to examine trade and environmental issues within the letter and spirit of the new trade regime and to submit its first report to the first WTO Ministerial Conference held in Singapore in December 1996.[177] Given that its deliberations were governed by trade concerns, effectively ignoring the existence of, and need for, environmental standards,[178] it is not surprising that the CTE failed to make any concessions to multilateral trade agreements containing trade sanctions. While the CTE does profess a post-Singapore agenda, its mandate prevents it from being an engine of reform.

The existence of another forum that can challenge the judicial monopoly of GATT/WTO might generate genuine reform within that organization. Reforming GATT/WTO to include consideration of IEL would advance international comity by heading off a potentially damaging conflict. Moreover, doing so might preserve its judicial hegemony and thereby promote the enlightened self-interest of GATT/WTO.

175. *See* Bill O'Connor & Anthony Van de Ven, *Trade and Environment: An Update on the GATT Agenda*, 4 EUR. ENVTL L. REV. 20, 21 (1995).

176. *See* Trade and Environment, Decision of 15 April, 1994, *reprinted in* THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 469 (1994).

177. *See* Shaw, *supra* note 167, at 106.

178. *See id.* "[T]here is no intention that the WTO should become an environmental agency, nor that it should get involved in reviewing natural environmental priorities, setting environmental standards or developing global policies on the environment . . .". *Id.*