

# The *Swordfish* Case: Law of the Sea v. Trade

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## I. Introduction

It is because of a fish with the nice Latin name *Xiphias gladius*, in English called swordfish that for about ten years the European Community (EC) and Chile have been arguing over their rights. Swordfish can reach a size of up to 4 m and their meat is low in fat, rich in vitamins and nearly boneless. This explains the commercial interest States have in harvesting swordfish; more important for the law of the sea, however, is the fact that swordfish are a highly migratory species, which, in the case at hand, roams the waters of Chile's exclusive economic zone (EEZ) and the adjacent high seas. As the EC, in form of Spanish fishermen, fishes for swordfish on the high seas near Chile's EEZ, Chile fears an overharvest of swordfish to such an extent that the stock in its EEZ may be diminished and its preservation endangered.<sup>1</sup>

In order to reduce over-fishing for swordfish, the Chilean National Fisheries Law<sup>2</sup> prohibits the unloading and transit of swordfish catches, taken from the high seas bordering Chile's EEZ, from foreign and Chilean vessels in Chile's ports, when the catches are made in contravention of Chilean conservation rules. The prohibition on unloading swordfish in Chile's ports is seen as a significant obstacle to the fishing of swordfish on the high seas by the EC, because it hampers the export of the fish<sup>3</sup> and makes the fishing of swordfish economically unreasonable.<sup>4</sup> The EC – like Chile member of the WTO and party to the Law of the Sea Convention (UNCLOS)<sup>5</sup> – reacted to this prohibition by initiating a WTO dispute settle-

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<sup>1</sup> In regard to the economic relevance of swordfish and other mackarel for Chile, see P. St. Kibel, *Alone at Sea: Chile's Presencial Ocean Policy*, *Journal of Environmental Law* 12 (2000) 1, 43 et seq., 53 et seq.

<sup>2</sup> Chilean National Fishery Law (*Ley General de Pesca y Acuicultura*) article 165, as consolidated by the Supreme Decree 430 of 28 September 1991 and extended by the Decree 598 of 15 October 1999.

<sup>3</sup> See Commission Decision of 5 April 2000 (following: Commission Decision 5/4/2000) under the Provisions of Council Regulation No. 3286/94, Document 300D0296, para. 17: "The investigation confirmed that the challenged Chilean practices prevent the Community fishing vessels to access third country markets. In particular, Chilean ports are essential bases for exporting especially fresh swordfish, to the United States of America because of the close commercial relationship in this field between Chile and the USA"; [http://europa.eu.int/eur-lex/en/lif/dat/2000/en\\_300D0296.html](http://europa.eu.int/eur-lex/en/lif/dat/2000/en_300D0296.html).

<sup>4</sup> Commission Decision 5/4/2000, para. 15 et seq.: "The Chilean prohibition on the transshipment of swordfish obliges the Community vessels to land or tranship their catches in the ports of other third countries in the region, which necessitates at least a six-day trip and cause them injury consisting of (inter alia) additional operational costs, potential loss of catches".

ment proceeding against Chile in April, 2000.<sup>6</sup> The EC claimed the violation of article V paras. 1-3, GATT 1994, which guarantees freedom of transit, and of article XI para. 1, GATT 1994, which prohibits non-tariff import barriers.<sup>7</sup> After the failure of consultation between the two parties, the EC requested a WTO panel,<sup>8</sup> which was granted in December, 2000. Chile, however, denied the WTO's competence over the case and asserted, pursuant to the law of the sea, concerning its substantive as well as procedural rules, the status of *lex specialis*.<sup>9</sup> Chile started proceedings against the EC by instituting an arbitral tribunal in accordance with article 287 para. 3, UNCLOS in the summer of 2000. This was done although the case was pending before the WTO. Eventually in December, 2000, the parties asked the International Tribunal for the Law of the Sea, instead of the arbitral tribunal, to set up a special chamber to deal with the case.<sup>10</sup> In this proceeding the EC accused Chile – *inter alia* – of challenging their right to fish on the high seas;<sup>11</sup> Chile argued – *inter alia* – that the commencement of the WTO dispute settlement proceedings was a breach of UNCLOS.<sup>12</sup>

If we look upon the WTO proceeding and the UNCLOS proceeding in the *Swordfish* case, we can see clearly the whole set of problems this case evokes: First, the question arises, what are the substantive rules which are decisive to the case according to WTO law on the one hand and according to the law of the sea on the other hand? And furthermore, do these substantive rules interrelate, intermingle or are they separate and unconnected? Second, in regard to the procedural aspects, one has to ask what kind of proceeding can or must be chosen by the State parties to settle their dispute; must it be either the WTO panel or the UNCLOS tribunal? Or might there be a duty to cooperate between these two instruments?

There is still room for argument in regard to these questions, as neither the WTO panel nor the chamber of the Tribunal for the Law of the Sea has decided the *Swordfish* case yet. In March 2002 Chile and the EC reached a provisional arrangement. They agreed to suspend the parallel proceedings in favor of a political solution: four Chilean and four EC vessels, which will participate in a joint research fisheries programme on swordfish, are allowed to catch swordfish up to one thou-

<sup>5</sup> ILM 21 (1982), 1261.

<sup>6</sup> 26 April 2000, WTO WT/DS193/1; Chile – Measures Affecting the Transit and Importation of Swordfish, Request for Consultations by the European Communities; [http://www.wto.org/english/tratop\\_e/dispu\\_e/distabase\\_wto\\_members1\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm). See also Commission Decision 5/4/2000, article 1 (2.).

<sup>7</sup> Ibid., WT/DS193/1.

<sup>8</sup> 7 November 2000, WTO, WT/DS193/2, Chile – Measures Affecting the Transit and Importation of Swordfish, Request for the Establishment of a Panel by the European Communities.

<sup>9</sup> See note 38.

<sup>10</sup> See International Tribunal for the Law of the Sea, Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (*Chile / European Community*), Constitution of Chamber, Order 2000/3 (following: Order 2000/3), 20 December 2000, para. 2.

<sup>11</sup> Ibid., para. 3 *lit. e*.

<sup>12</sup> Ibid., para. 3 *lit. d*.

sand tons per year and to enter three Chilean ports and unload the fish;<sup>13</sup> besides this the parties will initiate a multilateral agreement on the protection of swordfish.<sup>14</sup> However, the discussion of the *Swordfish* case today is not purely academic; as each party reserved its right to revive the proceedings at any time<sup>15</sup> it could be necessary to decide this case in the very near future.

We will start to clarify the meaning of the rules of the law of the sea; in a first step the substantive rules and secondly the procedural rules (II.). After this, in the second part, the problems of the case in regard to WTO law and, in more detail, the question of the interrelation of the two global regimes will be discussed (III.).

## II. Law of the Sea

### 1. Substantive Rules

The core question in regard to the substantive rules of the law of the sea is whether the prohibition on the unloading of swordfish in Chilean ports can be regarded as lawful. The prohibition on unloading swordfish is a unilateral measure of a coastal State, taken in order to preserve the swordfish in its EEZ. The prohibition, however, has the effect of hindering swordfish fishing on the high seas.<sup>16</sup>

According to article 116 UNCLOS, in principle, all States have the right to ensure that their nationals are free to engage in fishing on the high seas.<sup>17</sup> This right, however, is, *inter alia*, subject to the restriction of the rights and duties of coastal States.<sup>18</sup> Rights and duties of coastal States in regard to the protection of highly migratory species like the swordfish are laid down in article 64 of UNCLOS. According to this provision "(t)he coastal State and other States whose nationals fish in the region (...) shall cooperate (...) with a view to ensuring conservation and pro-

<sup>13</sup> See 6 April 2001, WTO, WT/DS193/3. The programme shall be carried out over a two year period.

<sup>14</sup> Ibid. See also [http://europa.eu.int/comm/fisheries/news\\_corner/press/inf01\\_05\\_en.htm](http://europa.eu.int/comm/fisheries/news_corner/press/inf01_05_en.htm).

<sup>15</sup> See in regard to the International Tribunal for the Law of the Sea, Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-eastern Pacific Ocean (*Chile / European Community*), Constitution of Chamber, Order 2001/1 (following: Order 2001/1), 15 March 2001, para. 6 and in regard to the WTO Panel Report, see WT/DS193/3.

<sup>16</sup> This is *de facto* the case if one takes the premise for granted that fishing swordfish on the high seas bordering Chile's EEZ is economically senseless and unreasonable for the EC fisheries States as long as Chile prohibits the unloading of swordfish in its ports; in this case the effect of Chile's prohibition is the same as if Chile would prevent the fishing of swordfish at this part of the high seas by its warships. Besides this objective effect, it has to be taken into account that it is the aim and intention of Chile to hinder the overharvest of swordfish on the high sea by its Fishery Law and hence to determine the behavior of fisheries States on the high seas. However, whether the assumption is right that fishing swordfish is economically senseless because of Chile's national law must be proved by the EC if the proceedings before ITLOS are revived; cf. note 3, 4 above.

<sup>17</sup> See also article 87 para. 1 *lit. e*, UNCLOS.

<sup>18</sup> Article 116 *lit. b* UNCLOS.

moting the objective of optimum utilization of such species throughout the region (...).<sup>19</sup> This means that UNCLOS obliges coastal States and fishing States to co-operate in the protection of swordfish stocks – which qualify as highly migratory species – in order to restore them to a level that guarantees the maximum use of them. But as this is only a duty to interact, this rule does not give a clear answer to the question whether Chile's unilateral prohibition on unloading is lawful.<sup>20</sup>

The way in which the duties of coastal and fisheries States in regard to highly migratory species must be fulfilled is laid down in greater detail in the “UN Agreement on the implementation of the provisions of the Law of the Sea Convention relating to the conservation and management of Straddling Fish Stocks and Highly Migratory Fish Stocks” (UN Fishstock Agreement),<sup>21</sup> which was adopted in 1995 and entered into force in December 2001. According to article 23 of the UN Fishstock Agreement, unilateral measures taken by a port State, e.g., the prohibition of landings, are lawful when it has been established that the catch “undermines the effectiveness of sub-regional, regional or global conservation and management measures on the high seas.”<sup>22</sup> Therefore, *conditio sine qua non* for a lawful prohibition of unloading is, according to that agreement, the existence of a multilateral conservation measure. Before August, 2000, no such multilateral conservation measure existed; but on August 14<sup>th</sup> of last year, Chile adopted, together with Colombia, Ecuador and Peru, the Galapagos Agreement.<sup>23</sup> This is a framework agreement for the conservation of living marine resources on the high seas of the South Pacific.<sup>24</sup>

In principle, as these four coastal States constitute the full length of the Pacific coast of South America, the Galapagos Agreement can be considered multilateral in the sense of a subregional measure. However, the UN Fishstock Agreement states expressly in its article 8 that multilateral measures must be made by “an organization or arrangement” to which all States “having a real interest in the fisheries concerned” may become members and must not be treated discriminatorily.<sup>25</sup>

<sup>19</sup> Similar duties to co-operate in the conservation and management of living resources are entailed in arts. 118 and 119 UNCLOS. Article 119 UNCLOS additionally provides that the States concerned shall “take measures which are designed to maintain or restore harvested species at levels which can produce the maximum sustainable yield.” Besides this, according to article 117, all States have the duty to take “(...) such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.”

<sup>20</sup> The same is true in regard to article 73 UNCLOS; according to this a coastal State may “in the exercise of its sovereign rights to explore, exploit, conserve and manage the living resources in the EEZ, take such measures, including boarding, inspection, arrest (...) – as may be necessary to ensure compliance with the laws and regulations adopted by it in conformity with this Convention” (emphasis added). This provision leads us back to our starting point only, i.e. the question whether the prohibition of unloading is in conformity with UNCLOS.

<sup>21</sup> 4 August 1995, ILM 34 (1995), 1542.

<sup>22</sup> Article 23 para. 3, UN Fishstock Agreement (emphasis added).

<sup>23</sup> Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific, 14 August 2000; see <http://www.oceanlaw.net/texts/summaries/galapagos.htm>.

<sup>24</sup> See articles 1 and 3 para. 1, Galapagos Agreement.

<sup>25</sup> Article 8 para. 3, UN Fishstock Agreement.

These conditions are not met by the Galapagos Agreement: The Agreement is open for signature by non-coastal States only, once it entered into force and only for a twelve-month period (article 16 para. 1). More importantly, it states that decisions on substantive questions shall either be made by consensus or by the vote of at least two-thirds of the States present, including the majority of the coastal States (article 12 para. 1).<sup>26</sup> In the end this means that coastal States get a veto-right in regard to all substantive questions such as setting limits on the catch and fishing licences. The Galapagos Agreement is, therefore, discriminatory towards non-coastal States and cannot be regarded as a multilateral measure in the sense of the UN Fishstock Agreement.<sup>27</sup>

It is, however, debatable whether it is appropriate to measure Chile's fisheries law against the UN Fishstock Agreement. Chile has not signed the Agreement and its rules do not yet reflect customary law. On the other hand, article 2 of the Fishstock Agreement clearly states that its objective is the "effective implementation of the relevant provisions of the Law of the Sea Convention for the conservation of highly migratory fish stocks". One might argue therefrom that the UN Fishstock Agreement serves as an authentic interpretation of UNCLOS. More convincing is the view back to the wording of UNCLOS itself: as article 64 of UNCLOS<sup>28</sup> provides for the non-discriminatory cooperation between coastal and fisheries States, no agreement giving a veto-right to coastal States for the protection of swordfish could be seen as lawful according to UNCLOS.

This conclusion can be further supported by another argument: since the objective of the Galapagos Agreement is to establish an objective regime<sup>29</sup> for a part of the high seas<sup>30</sup> for the protection of highly migratory species, for State parties as well as for non-party States,<sup>31</sup> the Agreement aims to promote a common interest. But treaty rules, which are aimed to protect a common interest or common good, must be based – so to speak – on a "common ground", at least if they shorten the rights of non-party States.<sup>32</sup> This means nothing else but that all interested States have to have the right to get involved equally in the negotiations regarding the

<sup>26</sup> "The States Parties shall make all necessary efforts to ensure that decisions on issues considered to be substantive are reached by consensus. The determination of whether or not an issue is substantive shall also be considered a substantive question. If all efforts at conciliation are exhausted, however, and no consensus can be reached by the end of the day following the examination of the issue in question, the decision shall be made through the favourable vote of at least two-thirds of the representatives of the States present, including a majority of the coastal States (...)" (emphasis added).

<sup>27</sup> See also J. Neumann, *Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen*, ZaöRV 61/2-3, 529 et seq., 546; Kibel, note 1, 60 et seq.

<sup>28</sup> See at note 19.

<sup>29</sup> Treaties creating an objective regime establish a territorial order in the common interest of the international community, such as treaties providing for the demilitarization or neutralization of zones or the internationalization of waterways; see E. Klein, *Statusverträge im Völkerrecht – Rechtsfragen territorialer Sonderregime*, 1980, 22 et seq. and slightly different H. Mosler, *The International Society as a Legal Community*, RdC 140 (174 IV), 236.

<sup>30</sup> Article 3.

<sup>31</sup> Article 13.

agreement and in the decisions about conservation measures.<sup>33</sup> An objective order to promote a common interest cannot be based on discriminatory rules. Chile's prohibition on unloading swordfish is, therefore, unlawful, according to the law of the sea – even if it serves the best intentions and although it treats Chilean ships and foreign ships equally.

## 2. Procedural Rules and Dispute Settlement

But even if Chile's prohibition is unlawful according to UNCLOS, the question remains whether the *Swordfish* case lies within the jurisdiction of the Tribunal for the Law of the Sea (ITLOS) or even whether ITLOS has the exclusive jurisdiction to decide the case. Two obstacles could be brought in the way of the legal power of ITLOS: the first is that the case was already pending at the WTO, when it was brought before the tribunal; the second is that the core question of the case, the lawfulness of the prohibition on unloading swordfish, is covered by GATT rights and obligations.

As the conflict of jurisdiction is a conflict of treaty regimes, it is, in the first instance, up to the parties to the treaties to solve the conflict. In that sense, we have to look first to the rules of the treaties concerned, and for my part, to UNCLOS, to come to a solution. The parties to the *Swordfish* case asked ITLOS in December, 2000, to set up a special chamber to deal with the case. Article 15 of the Statute of the Tribunal provides for the formation of a special chamber, if so requested by the parties. The decisive rule in regard to the jurisdiction of ITLOS, however, is article 288 of UNCLOS, specified only by article 297 para. 1 for coastal States. According to article 288 the tribunal "shall have jurisdiction over any dispute concerning the interpretation or application of this convention which is submitted to it in accordance with this part".<sup>34</sup> As far as the interpretation and application of UNCLOS is concerned in the *Swordfish* case, the jurisdiction of the tribunal seems clear.<sup>35</sup>

In regard to the question whether the case pending at the WTO is an obstacle to the admissibility of the claim, the Convention contains no express regulation. In article 287, para. 7, of UNCLOS, the opposite circumstance is regulated only. Ac-

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<sup>32</sup> In contrast to treaties providing for the demilitarization, neutralization or internationalization, i.e. the "traditional" treaties creating an objective regime, the substantive rules of the Galapagos Agreement shorten the rights of (fisheries) States, as they prohibit the catch of swordfish on the high seas.

<sup>33</sup> As there is a dispute between the States – even if they agree that the protection of highly migratory species is a common interest – how and by which means the swordfish has to be protected there has to be a procedure to reach an "overlapping consensus" by all interested States in regard to the choice of the means to reach the common aim.

<sup>34</sup> Emphasis added.

<sup>35</sup> Clear cut is the regulation of article 288, UNCLOS, as well, if the jurisdiction of the court is denied. Article 288 para. 4 states for this case that "the matter shall be settled by decision of that court (...)", i.e. the tribunal itself.

ording to this rule, proceedings already pending before the Tribunal, in principle, are not affected by a new declaration of the parties.

Even the rule of article 282 of UNCLOS cannot help in our case. There it is stated that agreements by the parties to a conflict, which provide for the settlement of disputes that entails a binding decision, shall apply instead of the UNCLOS procedures; but this shall only be the case in regard to agreements concerning a dispute about the application and interpretation of UNCLOS itself. The dispute settlement system under WTO law, however, is designed to settle disputes concerning the interpretation and application of that law and not concerning UNCLOS.<sup>36</sup>

A more general rule with respect to the relation of the Law of the Sea Convention to other conventions is laid down in article 311 para. 2, of UNCLOS. There it is stated that UNCLOS does not alter the rights and duties of the States parties arising from other agreements, as long as they are compatible with UNCLOS. Concerning agreements concluded before UNCLOS, like the relevant WTO law,<sup>37</sup> this rule states priority in case of treaty conflicts. The decisive question in the present case is, when could the WTO dispute settlement procedure be seen as being incompatible with the UNCLOS dispute settlement procedure. In my opinion, this would be the case if, and only if, the competence of the tribunal laid down in article 288 of UNCLOS to decide over any dispute concerning the interpretation or application of UNCLOS would be diminished. As long as this competence of the tribunal is not affected the *lex posterior* rule has no application; as a result in the present case the possibility of parallel dispute settlements procedures would remain.<sup>38</sup>

Therefore, the possibility of parallel dispute settlements procedures in the *Swordfish* case cannot be disputed with the argument, which was brought forward by Chile that the EC would be in breach of article 300 of UNCLOS and abuse their rights when it brought the dispute before a tribunal other than those provided in UNCLOS. An abuse of rights could only occur if UNCLOS itself limited the rights to bring the case before another dispute settlement organ. This, however, is not the case, as long as the other organ is not deciding about the interpretation and application of UNCLOS.

It is, therefore, convincing to decide, as the tribunal did in the *Mox Plant* case one month ago – substantiated in Judge Wolfrum's separate opinion – concerning the jurisdiction of the tribunal in that case. There the UK had challenged the jurisdiction of the tribunal because parts of the case could have been or have already been the subject of other dispute settlements procedures. The tribunal, how-

<sup>36</sup> In regard to this argumentation see the Order of the International Tribunal of the Law of the Sea (ITLOS) in the *Mox Plant* case (*Ireland v. United Kingdom*), 13 November 2001, para. 52.

<sup>37</sup> See Neumann, note 27, 564.

<sup>38</sup> No other result is given because of the general principle of international law of *lex specialis derogat leges generali* (specific laws govern over general laws), which was brought forward by Chile (see at note 9). As in the case at hand there is no obvious specialty the hierarchy depends on the will of the parties; as this will is laid down in the treaty, i.e. UNCLOS itself, the general principle leads us back to the rules of article 282, 311 et seq. UNCLOS.

ever, stated that “the rights and obligations of other agreements have a separate existence from those under the Convention”,<sup>39</sup> and that “since the dispute before the tribunal concerns the interpretation or application of the Convention and no other agreement, only the dispute settlement procedures under the Convention are relevant to that dispute.”<sup>40</sup> This means that the tribunal agreed to the possibility to invoke other dispute settlements procedures besides UNCLOS – and this seems convincing, as long as these procedures are compatible to UNCLOS.

### III. The WTO Perspective

From the point of view of the WTO, the case highlights a number of aspects concerning the issue of trade and environment, which has been intensively debated over the last years (1). Furthermore, questions arise in view of a possible dispute settlement under the WTO vis-à-vis the proceedings in ITLOS initiated by Chile (2).

#### 1. Chile's Measures under the WTO

As a starting point, it may be recalled that Chile's action has been claimed to violate articles V paras. 1-3, and X para. 1, of GATT 1994 by the EC when requesting consultations.<sup>41</sup> There is hardly any doubt that the measures were indeed not in conformity with those rules. However, the GATT/WTO legal system contains a number of exceptions, which might justify the measure.

##### a. Preference for a binding agreement between parties?

Before addressing the issue of exceptions, however, it has to be briefly noted that the case would have to be looked upon quite differently if the measure would have been based on some agreement between the parties at hand. In this case, no such relationship existed between the parties as the EC was not a member to the Galapagos Agreement and Chile is not a party to the UN Fishstock Agreement, which furthermore has not yet entered into force.<sup>42</sup> The UN Fishstock Agreement, however, envisages multilateral conservation measures und a participation of States “having a real interest in the fisheries concerned”.<sup>43</sup> This would equally apply to

<sup>39</sup> *Mox Plant case (Ireland v. United Kingdom)*, note 36, para. 50.

<sup>40</sup> *Ibid.*, para. 52; see *ibid.* as well Judge Wolfrum's Separate Opinion: “It is well known in international law and practice that more than one treaty may bear upon a particular dispute. (...) However, a dispute under one agreement (...) does not become a dispute under the Convention on the Law of the Sea by the mere fact that both instruments cover the issue.”

<sup>41</sup> See *supra* at note 7.

<sup>42</sup> See *supra* at note 21.

<sup>43</sup> See *supra* at note 25.

the EC as a regional economic integration organization. Hopefully, the relationship between coastal States and States with such interest in fisheries will be governed by such agreements in the foreseeable future.

If that were the case, the WTO legal order would clearly and widely respect such agreement between parties and measures taken thereunder.<sup>44</sup> In this case, however, one might argue that a potential treaty provision covering Chile's action could take preference over general WTO rules on the basis of a *lex posterior* or *lex specialis* point of view.<sup>45</sup>

## b. Justification of Chile's measures under article XX GATT 1994

However, in order to justify its measures, Chile could rely on the provisions of article XX. Article XX contains general exceptions, which allow States to adopt or enforce certain measures as specified in that provision. Among these, article XX *lit.* b and g merit a closer look. Article XX *lit.* b relates to "measures necessary to protect human, animal or plant life or health" and article XX *lit.* g to "the conservation of exhaustible natural resources".<sup>46</sup> The interrelationship between the two provisions has been often discussed, but is not yet fully explored.<sup>47</sup>

### i. Exhaustible natural resources – article XX *lit.* g GATT 1994

*Litera* g is often considered the more specific provision and will therefore be discussed first.<sup>48</sup>

<sup>44</sup> At its website, the WTO has voiced the following views: "WTO and environmental agreements: how are they related? ... The problem should not be exaggerated. So far, no action affecting trade and taken under an international agreement has been challenged in the GATT-WTO system. There is also a widely held view that actions taken under an environmental agreement are unlikely to become a problem in the WTO if the countries concerned have signed the environmental agreement, although the issue is not settled completely. The Trade and Environment Committee is more concerned about what happens when one country invokes an environmental agreement to take action against another country that has not signed the environmental agreement" ([http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey4\\_e.htm#MEAs](http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey4_e.htm#MEAs), last visited January 25, 2002). R. E. Hudec, *GATT Legal Restraints on the Use of Trade Measures against Foreign Environmental Practices*, in: J. Bhagwati/R. E. Hudec (eds.), *Fair Trade and Harmonization*, Vol. 2, Legal analysis, 2nd print, 1997, 95-174, at 99 considers such an agreement between parties to take the effect of a waiver.

<sup>45</sup> See Hudec, *ibid.*, at 121.

<sup>46</sup> Article XX GATT reads in part: "General Exceptions ... Subject to the requirement that such measures are not applied in a manner which would 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: ... (b) necessary to protect human, animal or plant life or health; ... (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption ...".

<sup>47</sup> In the first *Tuna-Dolphin* case, for instance, both provisions were discussed and considered inapplicable, *United States: Restrictions on Imports of Tuna*, GATT Doc. DS21/R, 3 September 1991, now known as *Tuna/Dolphin I*, paras. 5.29 and 5.34. See also *Tuna/Dolphin II* – *United States: Restrictions on Imports of Tuna*, GATT Doc. DS29/R, 16 June 1994, paras. 5.38 et seq.

## (a) The swordfish stocks qualify as an exhaustible natural resource

Today, there is hardly any serious doubt that living resources and marine living resources in particular qualify as exhaustible natural resources. This has recently been affirmed by the reports of the Panel and Appellate body in the *Shrimps* case. Interestingly enough, UNCLOS has been referred to in that regard.<sup>49</sup>

## (b) Sufficient nexus between Chile and the swordfish stocks to be protected

The more difficult question is whether the nexus between those stocks largely found beyond the EEZ and Chile, which acts for their conservation, is close enough to entitle her to resort to article XX *lit. g*. GATT and WTO panels more than once had an opportunity to address such a question and answered it in the affirmative. They did so, however, on quite different grounds. In the *Shrimp-Turtle* case, the measures aimed at the conservation of sea turtles, the different species all being endangered and listed in Annex I of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).<sup>50</sup> The panel and the Appellate body considered it sufficient in this regard that such sea turtles also passed through waters under US jurisdiction.<sup>51</sup> In this case, the link between the stocks at hand and Chile are even closer, as the swordfish populations live in an area which comprises Chile's EEZ and the adjacent high seas. Furthermore, as a coastal State, Chile

<sup>48</sup> In the *Shrimp* case, the US stated that article XX *lit. g* should be considered first, as it is the "most pertinent" of the Article XX exceptions, see para. 25 of the Report of the Appellate Body, WT/DS58/AB/R. It acted accordingly, and for reasons of judicial economy did not address Article XX *lit. b*, para. 125.

<sup>49</sup> In the words of the Appellate Body, WT/DS58/AB/R, para. 131: "Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources."

<sup>50</sup> Washington, 3 March 1973, 993 U.N.T.S. 243, 12 International Legal Materials 1085, see the report of the Appellate Body, para. 130.

<sup>51</sup> In the *Shrimp* case, the Appellate Body, WT/DS58/AB/R, had to address a similar question and noted in para. 133: "Finally, we observe that sea turtles are highly migratory animals, passing in and out of waters subject to the rights of jurisdiction of various coastal states and the high seas. In the Panel Report, the Panel said: '... Information brought to the attention of the Panel, including documented statements from the experts, tends to confirm the fact that sea turtles, in certain circumstances of their lives, migrate through the waters of several countries and the high sea.' ...The sea turtle species here at stake, i.e., covered by Section 609, are all known to occur in waters over which the United States exercises jurisdiction ... Of course, it is not claimed that all populations of these species migrate to, or traverse, at one time or another, waters subject to United States jurisdiction. Neither the appellant nor any of the appellees claims any rights of exclusive ownership over the sea turtles, at least not while they are swimming freely in their natural habitat – the oceans. We do not pass upon the question of whether there is an implied jurisdictional limitation in Article XX(g), and if so, the nature or extent of that limitation. We note only that in the specific circumstances of the case before us, there is a sufficient nexus between the migratory and endangered marine populations involved and the United States for purposes of Article XX(g)."

has rights to harvest and some authority and obligation to conserve swordfish stocks.<sup>52</sup>

(c) Measures related to conservation

In addition, in order to be exempted from general GATT regulations a State would have to show that its measures are related to conservation. In the *Shrimp* case the relationship between the general structure and design of the measure at hand was examined, considering the policy goal it purports to serve. Means and ends and their reasonable relation have to be considered here taking into account some measures of proportionality.<sup>53</sup> As the information on the case at hand is limited, no definite answer is possible. However, one may conclude that very likely, it is possible to design measures similar to those adopted, which meet this standard. It is by no means excluded that panels and the Appellate Body will at this point turn to international agreements and the UN Fishstock Agreement in particular to get an idea about practice and options at hand.<sup>54</sup>

(d) In conjunction with restrictions on domestic production or consumption

Article XX *lit. g* also requires that such measures are made effective in conjunction with “restrictions on domestic production or consumption”. The requirement is met in the case at hand, as Chile had provided for similar restrictions for its own fishing vessels.<sup>55</sup>

ii. The article XX, GATT 1994, “chapeau” test

When a measure can be considered to serve one of the legitimate policy goals under article XX *lit. a* to *j* and to meet the respective requirements, it can be justified if it also complies with the conditions set out in the introductory clauses of article XX.<sup>56</sup> They are designed to prevent an abuse of the exceptions contained in article XX GATT 1994 by requiring that the application of the measure may neither amount to, first, an arbitrary discrimination between countries where the same conditions prevail, second, an unjustifiable discrimination between countries

<sup>52</sup> See *supra* at note 18.

<sup>53</sup> WT/DS58/AB/R, paras. 135 et seq. The Appellate Body stated in para. 141: “Focusing on the design of the measure here at stake, it appears to us that Section ... is not disproportionately wide in its scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends.”

<sup>54</sup> In the *Shrimps-Turtle* case, the panel in its report, WT/DS58/AB/R, did refer frequently to the LOS Convention, see para. 7.59 which – interestingly enough – has apparently been introduced in the proceedings by the US; see para. 7.57.

<sup>55</sup> See *supra*, text accompanying note 2.

<sup>56</sup> See the views of the Appellate Body in the *Shrimps-Turtle* case, WT/DS58/AB/R, paras. 146 et seq.

where the same conditions prevail, and third, a disguised restriction on international trade.

iii. Cooperation and consensus: the development of implicit procedural requirements of article XX *lit. g* GATT 1994

In light of the structure and objective of article XX of GATT 1994, the type of measure adopted by Chile needs a closer look. Article XX, can be generally understood as a means to safeguard the right of States to pursue policies which aim at protecting certain resources, goods and values. If the conditions of article XX are met, other States will have to accept the resulting trade restrictions. Article XX in general is built on the understanding that States can pursue their proper and legitimate objectives by their own means.

In cases like the one discussed here, other Members, aside from their trade interest, have a direct interest in the resources or goods whose protection is sought by the measure at hand. In order to achieve the objectives aimed at, such third States are necessarily required to take action as well.<sup>57</sup> Thus, in this case, the EC, apart from its general interest in trade, has a “real interest in the fisheries concerned”. To achieve its conservation aims, Chile would have to persuade the EC to agree to, adopt and implement conservation measures. The effective conservation of marine living resources or – in the *Shrimp* case – marine endangered species requires cooperation and a consensus in regard to such measures. The same applies to many environmental components. As the case at hand amply shows, this is hard to achieve.

In this situation, article XX *lit. g* and the rather broad understanding of the “sufficient nexus” as explained above allow Members to link their interest in the conservation of even quite remote stocks of marine living resources with the exemption clause of article XX *lit. g*, and thus enjoy an authority to take trade measures exempt from general GATT rules.<sup>58</sup> It goes without saying that such measures not only seek to frustrate the harvesting or use of resources and stocks by restricting related trade but at the same time aim at persuading other Members to agree to the

<sup>57</sup> See the second *Tuna-Dolphin* panel, GATT Doc. DS29/R at 5.38: “The Panel ... recalled that Article XX, as a provision for exceptions, should be interpreted narrowly and in a way that preserves the basic objectives and principles of the General Agreement. If Article XX *lit. b* were interpreted to permit contracting parties to deviate from the basic obligations of the General Agreement by taking trade measures to implement policies within their own jurisdiction, including policies to protect living things, the objectives of the General Agreement would be maintained. If however Article XX *lit. b* were interpreted to permit contracting parties to impose trade embargoes so as to force other countries to change their policies within their jurisdiction, including policies to protect living things, and which required such changes to be effective, the objectives of the General Agreement would be seriously impaired.”

<sup>58</sup> The first *Tuna-Dolphin* panel considered this an “extrajurisdictional interpretation of Article XX and on this basis denied the applicability both of Article XX *lit. b*” and *lit. g*: “The Panel considered that if the extrajurisdictional interpretation of Article XX *lit. g* suggested by the United States were accepted, each contracting party could unilaterally determine the conservation policies from which other contracting parties could not deviate without jeopardizing their rights under the General Agreement.”

conservation measures sought. Furthermore, the Member adopting such measures imposes relevant protection standards on other WTO members. The *Tuna-Dolphin* panels and the *Shrimp* dispute settlement have developed criteria to clarify the legitimate use of trade measures in this situation.<sup>59</sup> They have voiced the urgent preference for a consensus and agreement between parties. In the absence of such consensus it has been required that a State make *bona fide* efforts to reach an agreement prior to adopting trade measures.<sup>60</sup> This kind of a procedural approach somehow parallels the concept of the UN Fishstock Agreement.<sup>61</sup> As there is hardly any information on the details of negotiations, the proposals made and the fairness of the procedure, a final judgment in this regard cannot be made.

## 2. Aspects of Dispute Settlement

As has been seen, the EC has initiated WTO dispute settlement proceedings in this case, while Chile later brought the case to ITLOS. According to what has been said above from a law of the sea perspective, Chile was by no means hindered to do so but hardly can claim that ITLOS proceedings assume exclusivity.<sup>62</sup> Almost the same conclusion applies from the WTO point of view. There is no legal basis for an exclusivity of WTO dispute settlement, which could prevent Chile from bringing the case to ITLOS by arguing that the EU has violated rules and obligations under the law of the sea.

Seen from a detailed perspective, WTO rules would offer a number of means to take into account and accommodate law of the sea provisions and the interpretations and findings of relevant institutions, including ITLOS. In substance, as has been seen, article XX of GATT 1994, assigns some considerable authority to Members to deviate from WTO rules in order to take action to conserve exhaustible natural resources or protect human, animal or plant life or health.<sup>63</sup> The provision covers measures based on national policies as well as those taken to implement some international agreement. When addressing the various conditions and prerequisites for such authority under article XX *lit. g* and *b*, panels and the Appellate body may take into account international agreements and have often done so.

<sup>59</sup> See the report of the Appellate Body in the *Shrimp-Turtle* case, AB WT/DS58/AB/R at para. 161 et seq. The first *Tuna-Dolphin* panel observed: "The Panel considered that the United States' measures, even if Article XX(b) were interpreted to permit extrajurisdictional protection of life and health, would not meet the requirement of necessity set out in that provision. The United States had not demonstrated to the Panel ... that it had exhausted all options reasonably available ... in particular through the negotiation of international cooperative arrangements, which would seem to be desirable in view of the fact that dolphins roam the waters of many states and the high seas." GATT Doc. DS21/R at para. 5.27.

<sup>60</sup> See the Appellate Body in the *Shrimp-Turtle* case, AB WT/DS58/AB/R., para. 171 et seq.

<sup>61</sup> See *supra* at notes 22, 25.

<sup>62</sup> See *supra* at note 38.

<sup>63</sup> Earlier, this had been sometimes doubted as evidenced in statements that the drafters of article XX *lit. g* had minerals and other non-living resources in mind.

As far as the dispute settlement procedure is concerned, a number of options are at hand. It has to be recalled that the mandate and timetable, and the way to take into account expertise and evidence, can be largely determined by parties, the panels and ultimately, the dispute settlement body.<sup>64</sup> One could even go a step further and consider the parties concerned and even the dispute settlement institutions to be under a duty to explore and make use of those options, within the limits of their proper discretion, in order to accommodate the rules and the work of institutions of other international regimes.

In sum, the relevance of both the law of the sea and trade rules, and the lack of hierarchy and exclusivity, results in a coincidence of proceedings in different international fora. Such a coincidence is likely to cause irritations and concerns. Hearing the same case in different international tribunals and dispute settlement institutions in parallel may be considered to easily result in incompatible findings, interpretations and conclusions. As far as this case is concerned, the substantial rules at hand are not necessarily incompatible and the procedure may be designed in a way which accommodates a coherent approach. Thus, from a detailed perspective, it becomes clear that the potential for conflict is limited and may be further minimized.

#### IV. Conclusions

When duly taking into account the fact that the settlement might have prevented some of its details from becoming public, the *Swordfish* case is a case worth studying in some depth. It raises the issue of potential conflicts between international legal regimes and their respective dispute settlement mechanisms. This issue has been vividly discussed after the establishment of the WTO and the strengthening of its dispute settlement system.

From the point of view of the law of the sea and its enforcement, the case may show that the application of LOS rules and the work of the Tribunal are not necessarily put into question by the applicability of WTO rules and establishment of a panel. It becomes equally clear that the LOS system cannot claim exclusivity. The interrelationship between applicable rules is much more subtle here. It will allow for measures, which do not conform with general GATT rules on the basis of the exemption contained in article XX of GATT 1994. However, such measures are subject to conditions set out in that article requiring *inter alia* a legitimate policy goal in the sense of article XX *lit. g* or *b*, some measure of consistency or necessity, and strict observance of non-discrimination.

In the law of the sea and trade area, States opted for specific and effective dispute settlement institutions. They will have to deal with this interrelatedness of substantive rules and the resulting duplication of procedures. There are means and options to do so. However, some concerns will remain. On first glance, exclusivity of one of the two procedures or a competence by another international institution to hear

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<sup>64</sup> See articles 7, 12.3, 13 of the Dispute Settlement Understanding.

the case will provide a clear-cut solution. However, any suggestion in this regard would have to take into account the clear will of parties to establish specialized dispute settlement systems and the existing interrelatedness of substantive provisions. In the end, the problem seems to be deeply rooted in the structure of today's international legal system which allows for a diversity of rule-making and institution-building bodies without indicating a clear hierarchy. It cannot be overlooked that those bodies have all developed their own approaches, have their proper constituencies and agendas, notwithstanding an atmosphere of rivalry which might sometimes occur.

