

The Enforcement of the International Law of the Sea by Coastal and Port States

*Doris König**

Our symposium in honour of Rüdiger Wolfrum focusses on two subjects that have always been at the centre of Rüdiger's academic interest, namely the enforcement of international environmental law, in particular, the international law on the protection of the marine environment, and the increasing role of the peaceful settlement of disputes between States indicated by a growing number of international courts and arbitral tribunals.

My presentation today deals with the first of those two subjects, that is the enforcement of the law on marine environmental protection by coastal and port States. It is the subject which most closely connects my professional life with Rüdiger Wolfrum. Following his advice, I analysed in my doctoral thesis the legal implications of article 218 of the 1982 UN Convention on the Law of the Sea (LOSC), which regulates port State control, on the principle of the freedom of the high seas. This has been the starting-point of my special interest in the law of the sea.

I. Introduction

After these more personal introductory remarks let me now turn to my legal subject. Why should anyone want to know about what happens somewhere far out on the high seas and what can be done against an enforcement deficit with regard to international rules on the prevention and reduction of marine pollution? A similar enforcement deficit also exists in respect of the conservation of ocean species such as bluefin tuna, swordfish and sea turtles, which are threatened either by over-fishing or by accidental killings in the course of fishing operations. Let me answer this question as follows: The oceans cover some 72 % of the earth's surface. For many people not only in the so-called Third World they are of enormous importance for food supplies, trade and economic growth. Due to the lack of time I cannot spread out before you the scientific data showing the importance of the oceans and its flora and fauna for life on earth. Suffice it to say that the protection of the marine environment and the conservation of the ocean's living resources is in the interest of all States and their inhabitants, or to put it differently, in the interest of the international community of States.

* Dr. jur., Professor Bucerius Law School, Hamburg.

As far as the prevention and reduction of marine pollution is concerned, I will concentrate on the discharge of oil and oily residues or other noxious or harmful substances into the sea by vessels, be it as a consequence of an accident or deliberate – which in terms of the quantity and frequency of such discharges, is far more important – deliberate in every day operating procedures. With regard to operational discharges ships have to comply with international rules regulating and prohibiting such discharges at sea. The most important rules in this respect are to be found in the well-known 1973/78 MARPOL Convention for the Prevention of Pollution from Ships adopted by the International Maritime Organization (IMO). It covers not only accidental and operational oil pollution but also pollution by chemicals, goods in packaged form, sewage, garbage and air pollution. The IMO, which has 160 Member States, can be characterised as an international legislator for the law of the sea.

Other rules ships have to comply with are international standards on the design, construction, equipment and manning of vessels (CDEM standards) and traffic regulations which are designed to guarantee safety at sea. Compliance with such rules is also of paramount importance for the protection of the marine environment, because ship disasters due to CDEM deficiencies often lead to massive marine pollution. These rules and regulations can be found in a number of maritime conventions adopted by the IMO. The most important of these conventions are the 1974 SOLAS Convention for the Safety of Life at Sea and its 1988 Protocol, the 1978 STCW Convention on Standards of Training, Certification and Watchkeeping of Seafarers, and the 1972 COLREG Convention of the International Regulations for Preventing Collisions at Sea. In order to become effective all these international rules, regulations and standards have to be accepted by the majority of States and then properly enforced.

II. Prescriptive and Enforcement Jurisdiction of Coastal and Port States in the 1982 UN Convention on the Law of the Sea

In international environmental law – as in international law in general – a structural enforcement deficit cannot be denied. Since there is no central enforcement agency, enforcement measures must be taken by different actors in a decentralised system. Enforcement powers can either be exercised by international organisations or by the States themselves. States, anxious to preserve their sovereignty, are rarely willing to confer significant enforcement powers upon international organisations. One of the few examples in this respect is the International Seabed Authority, which is, *inter alia*, responsible for the prescription and enforcement of measures to protect the deep sea-bed from pollution. Therefore, the international legal system has primarily to rely on the enforcement powers of the States. In order to improve the enforcement record of States especially in the field of international envi-

ronmental law, a number of innovative mechanisms to ensure compliance and enforcement such as monitoring, reporting systems, *in situ*-inspection or trade restrictions have been developed. Rüdiger Wolfrum has analysed and categorised them in his impressive 1998 Hague Lecture.¹ Under the modern law of the sea, individual States, namely coastal and port States, have been entrusted with enforcement powers on behalf of the international community of States.

In general, there are two different scenarios with regard to the enforcement of community interests by States. In the first scenario a State has been mandated in an international treaty to take enforcement action in order to promote a common interest such as environmental protection. Since that State acts as a kind of “agent” or “trustee”,² it is under the obligation to comply with certain international rules which restrict its enforcement powers. In the second scenario a State takes unilateral action on behalf of the community of States, that is to say, without having been mandated accordingly. In both cases, international law has to develop mechanisms to ensure an effective enforcement of environmental law and, at the same time, prevent an abuse of enforcement powers. On the one hand, it takes carrots (incentives) and sticks (legal obligations and sanctions) to make “trustee States” fulfil their task in a satisfactory manner. On the other hand, international supervision is needed in order to control States acting without a mandate albeit on behalf of the international community. This latter problem arose in relation to trade restrictions under WTO/GATT law.

Let me first turn to enforcement by States that have been mandated by the 1982 Law of the Sea Convention LOSC. In customary international law of the sea, the flag State alone was responsible for ensuring that ships comply with internationally accepted standards in respect of safety at sea and the protection of the marine environment. Accordingly, article 94, LOSC confers upon the flag State the obligation to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. In particular, the flag State has to take all measures necessary to ensure that all of its ships are regularly surveyed by a qualified surveyor to guarantee their seaworthiness. Usually, private classification societies are entrusted by flag States with the competence to fulfil these tasks on their behalf and issue the necessary certificates. Furthermore, the flag State has to ensure that the crew is sufficiently qualified and able to observe the international regulations concerning the safety at sea, the prevention of collisions, and the prevention, reduction and control of marine pollution. In order to prevent vessel-source pollution, flag States have the obligation to adopt appropriate laws and regulations that are at least as effective as those contained in the IMO conventions mentioned above (article 211, para. 1, LOSC) and to enforce them effectively (article 217, LOSC).

¹ R. Wolfrum, Means of Ensuring Compliance with and Enforcement of International Environmental Law, *Recueil des Cours* 272 (1998), 1.

² For details see D. König, *Durchsetzung internationaler Bestands- und Umweltschutzvorschriften auf Hoher See im Interesse der Staatengemeinschaft*, 1989, 204 et seq.

Unfortunately, several flag States do not fulfil their obligations under the Law of the Sea Convention. This problem has been aggravated by – but is by no means confined to – so-called “flags of convenience” where less scrupulous operators register their ships under the flags of States which they know will not require full compliance with international standards. To fill the gap, coastal and port States have been entrusted by the Convention with additional prescriptive and enforcement powers.

In the territorial sea, where ships are entitled to the right of innocent passage, the coastal State can exercise its prescriptive and enforcement jurisdiction only subject to the limitations on this right which is part of customary international law. Accordingly, the coastal State may only adopt such (construction, design, equipment and manning) CDEM standards that give effect to international standards (article 21, para. 2, LOSC). Well-known examples for international CDEM standards that have helped reduce vessel-source pollution by operational discharges (e.g. bilge water, oily residues, chemicals) are so-called segregated ballast tanks (SBTs) which are exclusively used for the carriage of clean ballast water, and load-on-top (LOT) systems in which oily ballast water or tank-cleaning residues are stored in special “slop tanks”.³ This restriction on the prescriptive jurisdiction of coastal States is necessary in order to allow all foreign ships that comply with internationally accepted standards to travel through the territorial waters of all coastal States without undue interference. In contrast, discharge and other environmental protection standards may be more stringent than internationally accepted rules and standards (article 21, para. 1 (f), LOSC) as long as they do not hamper innocent passage by foreign ships (article 24, para. 1, LOSC). As far as enforcement jurisdiction is concerned, a foreign ship in the territorial sea may only be stopped, inspected and detained while in passage if there are clear grounds for a violation of the coastal State’s laws and regulations or a violation of applicable international environmental protection standards (article 220, para. 2, LOSC). These limitations do not apply, however, if there has been an act of wilful and serious pollution, because such an act is not covered by the right of innocent passage (article 19, para. 2 (h), LOSC).

In the exclusive economic zone (EEZ), the coastal State has, *inter alia*, prescriptive jurisdiction with regard to the protection and preservation of the marine environment (article 56, para. 1 (b) (iii), LOSC). Its exercise, however, is restricted to laws and regulations “conforming to and giving effect to generally accepted international rules and standards” established by the IMO (article 211, para. 5, LOSC). The primary purpose of this limitation of the coastal State’s prescriptive jurisdiction is to ensure uniformity in international shipping, on the one hand, and the unimpaired exercise of the freedom of navigation by foreign ships, on the other.⁴ Since foreign ships are entitled to freedom of navigation in the EEZ, the

³ For details see E. J. Molenaar, *Coastal State Jurisdiction over Vessel-Source Pollution*, 1998, 23 et seq.

⁴ *Ibid.*, at 363.

coastal State's enforcement powers are even more restricted than in the territorial sea. The exercise of enforcement measures depends on the seriousness of the damage inflicted on the coastal State's interests. They range from asking a vessel to disclose information on its identity, itinerary and other relevant information in order to establish whether a violation has occurred (article 220, para. 3, LOSC), to undertaking physical inspection in the case of a substantial discharge causing significant pollution if the vessel has refused to give information at all, or if this information is manifestly wrong (article 220, para. 5, LOSC). Only if the illegal discharge is causing or threatening to cause major damage to the coastline or to any resources of the coastal State's territorial sea or EEZ, may that State institute proceedings, including the detention of the vessel. In that case, certain safeguards have to be observed in the interest of the foreign vessel and its crew (article 223 to 233, LOSC). The most important one is the obligation to release the vessel and its crew as soon as a reasonable bond has been posted. If a ship has been detained, the flag State may initiate prompt release proceedings before the International Tribunal for the Law of the Sea in accordance with article 292 LOSC. In addition to enforcement powers with regard to operational discharges, coastal States also have enforcement powers in the EEZ – and even on the high seas – to prevent actual or threatened damage to their coastline or related interests from pollution arising from a maritime casualty (article 221 LOSC). Details are regulated in the 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties. In contrast, in the case of an illegal operational discharge on the high seas, the coastal State is not allowed to take enforcement measures at sea, but is restricted to in-port enforcement.

Port States have the right to prescribe national rules and standards as a condition for the entry of foreign vessels into their ports, internal waters and offshore terminals (article 211, para. 3, LOSC). Since these areas are part of the port State's territory, where the right of innocent passage does not apply, its prescriptive jurisdiction is not restricted. Its CDEM standards do not have to comply with generally accepted international standards; that is to say, they may be stricter and more costly for the ship-owners. With regard to enforcement powers, port States first of all have the right to enforce their national rules and standards against foreign vessels which are voluntarily within their ports, when an illegal discharge has occurred in their own internal waters, territorial sea or EEZ (article 220, para. 1, LOSC). In order to improve the protection of the marine environment in other States' maritime zones and on the high seas, they have been entrusted with the additional right to enforce "applicable international rules and standards", i.e. MARPOL standards, against a foreign vessel in case of any illegal operational discharge in the internal waters, territorial sea or EEZ of third States or on the high seas (article 218, para. 1, LOSC).⁵ Furthermore, port States can enforce "applicable international rules and standards relating to seaworthiness of vessels"

⁵ T.L. McDorman, Port State Enforcement: A Comment on Article 218 of the 1982 Law of the Sea Convention, *Journal of Maritime Law and Commerce* 28 (1997), 305.

(CDEM standards) to prevent severe pollution damage to the marine environment by substandard ships. For this purpose they shall, as far as practicable, take measures to prevent the vessel from sailing or order it to proceed to the nearest repair yard (article 219, LOSC).

Let us now take a closer look at the interests the port State serves when it takes enforcement measures ranging from in-port inspection and detention of the ship to instituting criminal proceedings against the master and the crew. Here, we have to differentiate between discharge violations, on the one hand, and poor safety records, on the other. If the illegal oil discharge occurs in the port State's own maritime zones, it primarily protects its own territorial and economic interests. If the discharge violation occurs in a third State's maritime zones, the port State may not institute proceedings unless requested by that State (article 218, para. 2, LOSC). That coastal State may step in and take over the investigation and proceedings at any time (article 218, para. 4, LOSC). This shows that the port State acts on behalf and in the interest of that third State. But even in these two cases where the protection of the territorial and economic interests of the port State itself or a third State are the main reason for State action, the port State indirectly acts in the interest of the international community as well, because marine pollution does not stop at man-made maritime boundaries.

If the discharge violation occurs on the high seas, territorial and economic interests of the port State or any other State are, if at all, only remotely affected. In this case, port States do not only act on their own behalf, but rather on behalf of the international community of States, which has an interest in preserving the oceans and their resources for future generations. Accordingly, their enforcement powers are restricted. When instituting proceedings against a foreign vessel and its crew, the port State must have due regard to procedural safeguards such as the right of the flag State to take over the proceedings at any time, or the obligation not to impose other than monetary penalties, observe internationally recognised rights of the accused, and release vessel and crew on the posting of a reasonable bond.

As far as the control of safety, equipment and manning standards are concerned, a number of international conventions – the most well-known of which are the 1974 SOLAS Convention and the 1978 STCW Convention – allow port States to inspect and, in cases of grave violations, detain a ship. If the port State exercises its enforcement powers accordingly, it acts in its own interest as well as in the interest of all coastal States in the region and – at least indirectly – in the interest of the international community as a whole. Since port State control helps reduce the number of substandard ships on the world's oceans, it also minimises the risk of major pollution damage in the case of a maritime casualty anywhere on the high seas. To sum up, the Law of the Sea Convention empowers port States – and to a lesser extent – coastal States to utilise their enforcement powers not only in their own interest, but also in the international community's interest. This constitutes, as Rüdiger Wolfrum pointed out at the conclusion of his Hague Lecture, “a profound modification of international law, which can no longer – at least not exclusively – be regarded as merely responding to the interests of individual States”.⁶

There are, however, some reasons that cause port States to refrain from exercising their enforcement powers effectively. First of all, the Law of the Sea Convention does not put the States parties under the obligation to make use of their enforcement powers. And States are not willing to act on a voluntary basis if their own interests are not affected in any way. That means that a cost-benefit analysis must lead to the conclusion that it is advantageous for the State concerned to invest money in personnel, training and equipment in order to establish an efficient maritime administration. Secondly, developing countries often do not have the appropriate means to use their enforcement powers effectively. They need financial and technological assistance. In addition, in order to keep the costs low, the efforts of port States in a certain region should be pooled. And thirdly, port States that undertake strict controls are afraid of a competitive disadvantage. They fear that their ports become less attractive in comparison to the ports in neighbouring countries where controls are lax.

In order to use their enforcement powers in a more efficient and economically sensible manner, port States in various parts of the world have established regional port State control (PSC) regimes. Currently there are eight regional PSC regimes worldwide (Paris Memorandum of Understanding [MOU] [1982]; Viña del Mar MOU [1992]; Tokyo MOU [1993]; Caribbean MOU [1996]; Mediterranean MOU [1997]; Indian Ocean MOU [1998]; Abuja [West and Central African] MOU [1999]; Black Sea MOU [2000]).⁷ Since the Paris MOU of 1982, which has by now been accepted by 19 States⁸, established the first regional port State control regime, it has served as a model for the other regional arrangements.⁹ These regimes have developed independently from the LOSC provisions mentioned above. They are, however, consistent with the Convention¹⁰, and they support its approach to strengthen port State control in order to protect the marine environment from dangers arising from substandard vessels.¹¹

⁶ Wolfrum (note 1), at 154.

⁷ An overview of the different PSC regimes is given by H. Hoppe, Port State Control – an Update on IMO's Work, *IMO News* 1/2000, 9.

⁸ Members are the maritime authorities of Belgium, Canada (1994), Croatia (1997), Denmark, Finland, France, Germany, Greece, Iceland (2000), Ireland, Italy, Netherlands, Norway, Poland (1992), Portugal, Russian Federation (1995/96), Spain, Sweden, and the UK. They cooperate with the International Labour Organisation (ILO), the International Maritime Organization (IMO) and the United States Coast Guard. Other regional PSC regimes can be granted observer status, if they meet certain criteria.

⁹ T.L. McDorman, Regional Port State Control Agreements: Some Issues of International Law, *Ocean and Coastal Law Journal* 5 (2000), 207, at 209; for an overview of the practice under the Paris MOU see G. Kiehne, Investigation, Detention and Release of Ships under the Paris Memorandum of Understanding on Port State Control: A View from Practice, *The International Journal of Marine and Coastal Law* 11 (1996), 217.

¹⁰ McDorman (note 9), at 224.

¹¹ T. Keselj, Port State Jurisdiction in Respect of Pollution from Ships: The 1982 United Nations Convention on the Law of the Sea and the Memoranda of Understanding, *O.D.I.L.* 30 (1999), 127, at 149 et seq.

These Memorandums of Understanding are not based on international treaties, but rather on administrative agreements between the maritime authorities of the States concerned. They are, therefore, informal instruments of cooperation which are not legally binding. States parties had no intent to create legal rights and obligations for themselves. This means that in cases of non-compliance the other parties can only resort to political pressure or economic incentives to make a port State play by the rules.

In the European Union the situation is different. In 1995, the European Community enacted Directive 95/21/EC on port State control (hereinafter: PSC Directive)¹² which is legally binding on all fifteen EU Member States. They had to transpose its provisions into national law by 30 June 1996. Since certain Member States did not act in time, the Commission brought several infringement procedures before the European Court of Justice (ECJ).¹³ The most important obligation for the EU Member States is the obligation to carry out an annual total number of inspections corresponding to at least 25 % of the number of ships which entered their ports in a given year (article 5, para. 1). As under the Paris MOU, port authorities shall give priority to potential substandard ships (article 5, para. 2; criteria are listed in Annex I). In order to guarantee an effective control, Member States have to provide enough professional inspectors to reach the 25 % target. If deficiencies are revealed, the PSC officer can take measures ranging from an order to rectify those deficiencies before departure to the detention of the ship (article 9). In the case of deficiencies, all costs for inspection shall be covered by the shipowner or the operator (article 16, paras. 1 and 2), which is a deterrent for economic reasons. The detention will not be lifted until full payment has been made or a sufficient guarantee has been given (article 16, para. 3). If the deficiencies cannot be removed in the port of inspection, the authority may allow the ship to proceed to the nearest repairyard available. If the ship does not comply with the conditions set for its departure, or if it does not call into the repairyard as required to, it shall be refused access to any port within the EU (article 11, para. 4). This banning of substandard ships from EU ports is the most rigorous sanction for shipowners or operators, because it means the loss of a substantial amount of money to them.

In reaction to the so-called "Erika" disaster – you might remember that in December 1999 the single-hull tanker "Erika" broke in two some 40 nm off the coast of Brittany and, as a result, French coastal waters and beaches were heavily pol-

¹² Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control), O.J. L 157 of 7 July 1995, 1, amendments in O.J. L 133 of 7 May 1998, at 19, O.J. L 184 of 27 June 1998, at 40, and O.J. L 331 of 23 December 1999, at 67. For the political reasons for its adoption see R. Salvarani, *The EC Directive on Port State Control: A Policy Statement*, *The International Journal of Marine and Coastal Law* 11 (1996), 225.

¹³ E.g., on 11 November 1999 the ECJ issued a judgment against Italy, because Italy had not fully implemented Directive 95/21/EC, Case C-315/98, *Commission v. Italian Republic* [1999], ECR I-8001.

luted by more than 10,000 tons of heavy fuel oil – the European Commission made several proposals to strengthen EC regulations in respect of ship safety and the protection of the marine environment. It proposed to amend the 1995 PSC-Directive¹⁴ in order to improve inspection and control in all EU ports, e.g. by making a thorough inspection of “high risk ships” mandatory, including more than 15-year-old tankers or bulk carriers. Furthermore, the possibility of banning ships with a high risk potential from all EU ports shall be increased. Ships that have been detained more than twice in the preceding two years, and fly the flag of a State that figures on the Paris MOU “black list” of flags with an above-average number of detentions,¹⁵ shall be prohibited from entering Member States’ ports. In the legislative process the European Parliament also required that ships not fitted with Voyage Data Recorders (VDRs or so-called “black boxes”) should be refused access to EU ports. The Council of Ministers refused to accept this rigorous proposal. In October this year, a compromise on this contentious issue could be reached in the Conciliation Committee. It was agreed that ships calling at EU ports should be detained if they were not equipped with a functioning “black box”.¹⁶ If this deficiency cannot be remedied in the port of detention, the port authority can allow that ship to proceed to the nearest appropriate port to have the matter dealt with. These amendments to the PSC Directive will enter into force in early 2002.

To sum up, the PSC regimes under the 1982 Paris Memorandum of Understanding and under the 1995 PSC Directive, although still far from being perfect, are – apart from port State control in U.S. ports – the most effective ones in the world. The supranational legal order of the European Community, in particular, is very useful with regard to a more effective enforcement of internationally accepted IMO standards. The EU Member States are under a legal obligation to establish efficient administrative structures in order to fulfil the 25 % inspection target. If they do not comply, they can be brought before the ECJ and – as *ultima ratio* – be sanctioned under article 228, para. 2, TEC. In addition, the proposed European Maritime Safety Agency (EMSA) could support the action of Member States and the Commission in applying and monitoring EC legislation and evaluating the effectiveness of enforcement measures.¹⁷ For these reasons the European Community could – as Graf Vitzthum suggested in his learned presentation on ship safety in the Baltic Sea in Rostock last month¹⁸ – be characterised as a sword in the

¹⁴ COM (2000) 142 final; COD/2000/0065.

¹⁵ The Black, Grey and White Lists are published once a year in the Paris MOU Annual Reports. According to the Annual Report 2000, at 21, there are 26 flag States on the Black List, among them 13 States whose ships are categorised as “very high risk” ships.

¹⁶ The use of VDRs will become compulsory for:

- passenger ships built on or after 1 July 2002;
- ships other than passenger ships, of 3000 gross tonnage and upwards, built on or after 1 July 2002;
- old cargo ships from 2007/2008 onwards.

¹⁷ COD/2000/0327, awaiting Council common position.

¹⁸ W. Graf Vitzthum, *Ostsee-Schiffssicherheit: Völker- und europarechtliche Entwicklungslinien*, at 9. Rostocker Gespräch zum Seerecht on the subject “Ship Safety on the Baltic Sea – Recent Developments”, 5 November 2001, not yet published.

hands of the IMO which is used to enforce IMO standards properly (“Durchsetzungsdegen” der IMO). Apart from this specific situation in Europe, in all other parts of the world common efforts are needed to remedy the enforcement deficit. In my view these efforts will only be successful, if the rich industrial countries of the North are willing to share their know-how with and give financial assistance to the developing countries in the South.

III. Unilateral Enforcement Measures in the Common Interest

Now I want to draw your attention to a different but closely related problem, namely the enforcement of environmental protection standards by unilateral measures of individual States. Due to the lack of appropriate international agreements or enforcement deficits, States have been tempted to act unilaterally. In order to justify unilateral action they claim to act in the interest of the international community rather than their own national interests.¹⁹ The case that immediately springs to mind in this respect is the so-called *Shrimp* case, decided by the WTO Appellate Body in October 1998.²⁰ The United States had imposed a ban on the importation of shrimp and certain shrimp products from countries that harvested shrimp with commercial fishing technology which adversely affected sea turtles.²¹ Under U.S. law, United States fishing vessels had to use special Turtle Excluder Devices (TEDs) in order to significantly decrease the number of incidental killings of sea turtles during shrimp harvesting operations. The import ban did not apply to those countries which adopted regulations on the incidental taking of sea turtles that were comparable to the U.S. regulatory programme and which could prove that the average rate of incidental taking of sea turtles by their vessels was comparable to that of U.S. vessels.²² India, Malaysia, Pakistan and Thailand brought a complaint against the United States before a WTO panel. They argued that the import ban on their shrimp products was a discrimination that could not be justified under the exception of article XX (g) of the GATT 1994. Under certain conditions this provision allows trade restrictions “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption”. The United States defended its unilateral action, *inter alia*, by pointing out that sea turtles were threatened with extinction

¹⁹ For the justification of environmental protection measures under the GATT see M. Hilf, Freiheit des Welthandels contra Umweltschutz?, NVwZ 2000, 481, at 485 et seq.; P. I. Hansen, Transparency, Standards of Review, and the Use of Trade Measures to Protect the Global Environment, Virginia Journal of International Law 39 (1999), 1017; H. Ginzky, Garnelen und Schildkröten – Zu den umweltpolitischen Handlungsspielräumen der WTO-Mitgliedstaaten, ZUR 1999, 216.

²⁰ United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R of 12 October 1998, reprinted in: ILM 38 (1999), 118.

²¹ Public Law 101-162, 16 United States Code (U.S.C.) § 1537, Sec. 609.

²² Ibid., Sec. 609 (b) (2) (A) and (B).

worldwide and that most nations recognised the importance of conserving these endangered species.²³

The Panel came to the conclusion that the United States could not invoke the exception clause of article XX (g)²⁴, because such a unilateral measure raised a serious threat to the WTO multilateral trading system.²⁵ It stated that even though the preamble of the WTO Agreement acknowledged “the objective of sustainable development”, its main purpose was the liberalisation of world trade. This goal could easily be undermined if a Member State were allowed to adopt measures conditioning access to its markets for a given product upon the adoption by the exporting State of certain conservation policies comparable to its own environmental protection legislation. In this context the Panel pointed out that the United States was not mandated by any international agreement to enact unilateral trade restrictions in order to protect sea turtles from extinction. It underlined the object and purpose of GATT and the WTO Agreement, namely the establishment of a multilateral trading system. This system allows Members to derogate from GATT provisions only as long as they do not undermine the system’s multilateral character by taking unilateral measures. Such measures were deemed to threaten the security and predictability of trade relations, because other Members would then also have the right to adopt similar measures on the same subject but with differing, or even conflicting requirements.²⁶ In short, the Panel regarded unilateral trade restrictions *a priori* as unjustifiable under the exception clause of article XX, GATT 1994.

The Appellate Body (AB), on the contrary, took the view that article XX allowed unilateral measures, provided that certain conditions were met. It stated that all the exceptions spelled out in article XX comprised measures that could be justified as derogations from substantive GATT obligations, because the domestic policies embodied in such measures had been recognised as important and legitimate in character.²⁷ The AB stressed that “the policy of protecting and conserving the endangered sea turtles here involved is shared [...] by the vast majority of the nations of the world”.²⁸ This statement was based on the fact that all the seven recognised

²³ For details see C. Joyner/Z. Tyler, *Marine Conservation versus International Free Trade: Reconciling Dolphins with Tuna and Sea Turtles with Shrimp*, O.D.I.L. 31 (2000), 127, at 133 et seq.

²⁴ Article XX of the GATT 1994 reads, in its relevant parts:

Article XX

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 Member of measures: ...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; (emphasis added).

²⁵ Panel Report, WT/DS58/R of 15 May 1998, para. 7.44; reprinted in: ILM 37 (1998), 832.

²⁶ *Ibid.*, para. 7.45.

²⁷ Appellate Body Report (note 20), para. 121.

species of sea turtles were listed in Appendix I of the Convention of International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), which includes all species threatened with extinction.²⁹ This reference to CITES shows that the Appellate Body does not *a priori* exclude unilateral measures from the scope of article XX, provided that such measures are taken in order to serve a common interest of the international community. A domestic environmental policy which promotes community interests is *per se* a legitimate policy that might justify a derogation from GATT obligations. In addition, with regard to measures aimed at the protection of resources outside the importing State's territorial jurisdiction there must at least be a sufficient nexus between the regulating State and the protected resource.³⁰ Since all sea turtle species concerned were known to occur in waters over which the United States exercised jurisdiction, the AB was satisfied that there was a sufficient nexus between the migratory and endangered sea turtle populations involved and the United States.³¹

The Appellate Body, nevertheless, dismissed the United States' appeal, because the import ban failed to meet the requirements of the introductory clause – the so-called "chapeau" – of article XX. The rationale of this clause is to ensure that the exceptions should not be applied so as to frustrate or defeat the legal obligations under GATT. Unilateral measures may, therefore, not constitute an arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Furthermore, such measures may not be applied in a manner which amounts to an abuse or misuse of an exception under article XX. The AB deduced from the "chapeau's" rationale that a State relying on the exception clause had to take into account not only substantive but also procedural requirements.³² It then pointed out that the United States had made no attempt at negotiating with the exporting States concerned with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles before imposing the import ban. In the AB's view, the protection and conservation of highly migratory species such as sea turtles is a transboundary or global problem that demands cooperative efforts of many countries, thus requiring a multilateral rather than a unilateral approach.³³

²⁸ Ibid., para. 135.

²⁹ For details on the threat of extinction of sea turtles see S. L. Sakmar, Free Trade and Sea Turtles: The International and Domestic Implications of the Shrimp-Turtles Case, Colorado Journal of International Environmental Law 10 (1999), 345, at 346 et seq.

³⁰ In contrast, in the *Tuna-Dolphin Case I*, United States – Restrictions on Imports of Tuna, 16 August 1991, reprinted in: ILM 30 (1991), 1594, the Panel held that the article XX exceptions did not permit GATT Members to impose trade measures to protect living resources – such as the Eastern Tropical Pacific dolphins – that are located outside their territorial jurisdiction. In the *Tuna-Dolphin Case II*, United States – Restrictions on Imports of Tuna, 16 June 1994, reprinted in: ILM 33 (1994), 839, another Panel rejected the notion that GATT rules *per se* prohibited extra-territorial measures. For further details see P. C. Mavroidis, Trade and Environment after the Shrimps-Turtles Litigation, JWT 34 (2000), 73, at 75 et seq.; D. Ahn, Environmental Disputes in the GATT/WTO: Before and After US-Shrimp, Michigan Journal of International Law 20 (1999), 819, at 830 et seq. and 845 et seq.

³¹ Appellate Body Report (note 20), para. 133.

³² Ibid., para. 160.

Unilateral measures such as import bans can, therefore, only be justified under GATT law if serious efforts to reach an international agreement have failed.³⁴ In the AB's view, the fact that the United States had negotiated and concluded the 1996 Inter-American Convention, a regional agreement for the protection and conservation of sea turtles, demonstrated that consensual and multilateral procedures were available to the appellant. Since the United States negotiated with shrimp-exporting WTO Members of the western Atlantic and Caribbean region, whereas it did not seek an agreement with other WTO Members including the appellees, the import ban resulted in an unjustifiable discrimination. Its unilateral character heightened, as the AB put it, "the disruptive and discriminatory influence of the import prohibition and underscores its unjustifiability".³⁵

Furthermore, the AB stated that even if unilateral measures are permitted, the fundamental requirements of due process have to be fulfilled. That means that States whose products are banned must be heard and the final decision has to be taken in a fair, transparent and predictable process.³⁶ In this respect, the AB found that the certification process, which under certain conditions exempted exporting countries from the import ban was applied to different countries in different ways and, therefore, resulted in an unjustifiable discrimination as well. Moreover, the rigidity and inflexibility of the certification process, which did not even give an applicant country a formal opportunity to be heard or to respond to any arguments made against it, constituted an "arbitrary discrimination" within the meaning of the "chapeau".³⁷

Since the United States did not act in accordance with these international requirements, the import ban could not be regarded as justified under article XX (g) of the GATT 1994.³⁸ In this context, the Appellate Body once again underlined its view that unilateral measures serving a recognised, legitimate environmental purpose can qualify for an exemption under GATT law as long as they comply with the requirements of the "chapeau" of article XX.³⁹

In the meantime, Malaysia brought before the Panel and the AB a dispute under article 21, para. 5 of the Understanding on Rules and Procedures Governing the Settlements of Disputes (the "DSU").⁴⁰ Malaysia argued that the United States had failed to comply with the rulings of the Dispute Settlement Body (the "DSB") in

³³ *Ibid.*, paras. 168 et seq.

³⁴ *Ibid.*, para. 171.

³⁵ *Ibid.*, para. 172.

³⁶ *Ibid.*, paras. 180 et seq.

³⁷ *Ibid.*, paras. 177 et seq.; for a critique of the interpretation of the "chapeau" by the Appellate Body see B. Simmons, In Search of Balance: An Analysis of the WTO Shrimp/Turtle Appellate Body Report, *Columbia Journal of Environmental Law* 24 (1999), 413, at 432 et seq.

³⁸ For an analysis of the Appellate Body's decision from the U.S. perspective see Ahn (note 30), at 836 et seq.; J. B. Berger, Unilateral Trade Measures to Conserve the World's Living Resources: An Environmental Breakthrough for the GATT in the WTO Sea Turtle Case, *Columbia Journal of Environmental Law* 24 (1999), 355, at 371 et seq.; S. Pyatt, The WTO Sea Turtle Decision, *Ecology Law Quarterly* 26 (1999), 815, at 831 et seq.

³⁹ Appellate Body Report (note 20), para. 186.

the *Shrimp* case. In its appeal, Malaysia asserted, *inter alia*, that the United States had the duty not only to negotiate but also to conclude an international agreement on the protection and conservation of sea turtles before upholding the import ban against Malaysia and other shrimp-exporting countries. The Appellate Body confirmed the Panel's finding that the serious, good faith efforts made by the United States since 1998 to negotiate an international agreement with a number of countries of the Indian Ocean and the South-East Asia region are sufficient to comply with the requirements of article XX. Therefore, the import ban no longer constituted a means of unjustifiable or arbitrary discrimination.⁴¹

IV. Conclusion

In international environmental law, we are confronted with a considerable amount of non-compliance with international rules and an enforcement deficit. To remedy this situation, a number of new enforcement mechanisms have been created in international treaty law. They encompass confrontational means such as counter-measures or trade restrictions, on the one hand, and non-confrontational means such as economic incentives or financial and technological assistance, on the other. In his Hague Lecture, Rüdiger Wolf rum has shown that one of these innovative approaches to improve enforcement is a mandate for individual States to take enforcement action on behalf of the international community of States.⁴²

This new approach can be found in article 218 LOSC on port State control. As far as marine environmental protection is concerned, the enforcement deficit is even more difficult to cope with, because under traditional law of the sea only the flag State could exercise enforcement jurisdiction in respect of violations of international rules and regulations on the high seas. Under the 1982 Law of the Sea Convention, coastal and port States have been entrusted with certain enforcement powers in order to supplement flag State enforcement which is often insufficient. When a coastal State makes use of these enforcement powers in respect of illegal discharges in its own territorial sea or EEZ, it primarily serves its own territorial and economic interests. When a port State takes enforcement measures under article 218, para. 1, LOSC in respect of illegal discharges on the high seas, it primarily serves a common or public interest. It acts as a "trustee" or "mandatee" on behalf of the international community of States. The problem with this new approach is, however, that port States need some kind of incentive to make use of their enforcement powers for the common good. Here, port State control regimes on a volun-

⁴⁰ Article 21.5 of the DSU reads in pertinent part: Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. ...

⁴¹ United States – Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia, AB-2001-4, WT/DS58/AB/RW of 22 October 2001, paras. 115 et seq.

⁴² Wolf rum (note 1), at 153 et seq.

tary basis and – even better – legal obligations under EC law play an important role. In order to further improve the efficiency of port State control in Third World countries, in particular, access to know-how as well as additional financial and technological means should be made available.

The lack of motivation to act for the common good is one issue. Another closely related issue is the phenomenon of doing too much of a good thing in the name of the international community. This problem arises when States impose unilateral trade sanctions in order to pursue environmental purposes which are recognised by the majority of States. Here, the enthusiasm of individual States has to be curtailed and controlled by international law. The appropriate legal obligations are to be found in WTO/GATT law. Since unilateral trade restrictions for environmental objectives always lead to economic conflicts with other States, an effective dispute settlement system is needed. This brings us to the second subject of our symposium, which will be dealt with by Silja Vöneky and Tobias Stoll, who will further elaborate on the dispute settlement issue.

