
Fragmentation of International Law: Procedural Issues Arising in Law of the Sea Disputes

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Introduction

Fragmentation of international law

Fragmentation is understood to be a “consequence of the expansion and diversification of international law.”¹ It is not considered a new concept, but rather a characteristic of international law which is “inherently a law of a fragmented world.”² The International Law Commission (ILC) notes that the subject of fragmentation can be examined from two perspectives: procedural and substantive. Procedural issues relate to “institutional questions of practical coordination, institutional hierarchy and the need for ... international courts and tribunals – to pay attention to each other’s jurisprudence.”³ Substantive concerns refer to fragmentation of the law itself into “special regimes which might be lacking in coherence or [are] in conflict with each other.”⁴ The ILC defines three patterns of conflict relevant to the issue of substantive fragmentation. These are:

- (a) conflict between different understandings or interpretations of general law,
- (b) conflict arising when a special body deviates from the general law not as a result of disagreement as to the general law but on the basis that a special law applies, and
- (c) conflict arising when specialised fields of law seem to be in conflict with each other.⁵

This paper examines how procedural issues can exacerbate the third pattern of substantive fragmentation. The paper is limited to the specialised fields of international trade law and international environmental law, and disputes heard before the World Trade Organization Dispute Settlement Body⁶ (WTO DSB) and the International Tribunal for the Law of the Sea⁷ (ITLOS). References to ‘international environmental

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¹ International Law Commission, *Report of the Study Group on Fragmentation of International Law*, 54th Session of the International Law Commission, Geneva, 29 April-7 June and 22 July-16 August 2002, A/CN.4/L.628, para 4.

² Note 1 above, para 6.

³ International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 55th Session of the International Law Commission, Geneva, 5 May- 6 June and 7 July-8 August 2003, A/CN.4/L.644, para 6.

⁴ Note 3 above.

⁵ Note 3 above, para 9.

⁶ Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 353, reprinted in ILM 1125 (1994) (hereinafter ‘DSU’).

⁷ ITLOS is established pursuant to the Statute for the International Tribunal for the Law of the Sea, Annex VI, United Nations Convention on the Law of the Sea 1982, which entered into force 16 November 1994. Available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm, accessed 17 June 2004 (‘Statute of ITLOS’).

law' in this paper refer predominantly to the international law on sustainable development. The jurisprudence of the WTO DSB and ITLOS have been selected as the courts are two pertinent examples of new institutions that apply international law to settle disputes.

The ILC has noted that the jurisprudence on international trade law and international environmental law has not been consistent.⁸ For example, sustainable ecological development and the precautionary principle, while widely recognised in multilateral treaties, are not necessarily considered customary international law by the WTO.⁹

The disputes analysed in this paper are the *Swordfish Stocks* case,¹⁰ the *Southern Bluefin Tuna* cases¹¹ and the *Shrimp-turtle* case.¹² These cases refer to conservation agreements pertaining to the management of fish stocks, in which ecological sustainable development, the precautionary principle and international trade law play an important role due to the high market demands on fish stocks.

Observing the jurisprudence of the above cases, State parties, courts and tribunals are faced with procedural questions such as:

- What happens when more than one institution has jurisdiction to hear the dispute?
- Where parties are offered the choice of dispute resolution through the provision of a regional agreement or the compulsory jurisdiction procedures of an international court, which should take precedence?
- Where one institution has stronger compliance and implementation mechanisms than another, which is the better forum for dispute resolution?
- How will the end result of a decision be affected when one institution grants greater third party rights than another?

This paper addresses the above questions.

The first section queries the implications of the *Swordfish Stocks* case which was brought before the WTO DSB and ITLOS in 2000. Prior to either forum ruling on the matter, the parties withdrew and came to a provisional arrangement. Nevertheless, the issue of multiple jurisdiction between the WTO DSB and ITLOS required an analysis of the extent to which the WTO DSB and ITLOS would inter-relate given that both were able to legitimately establish jurisdiction. The WTO DSB would readily assess the matter according to trade based criteria, while ITLOS would consider the matter according to law of the sea principles.

The second section discusses issues arising when a State is offered a choice between non-binding or binding dispute settlement procedures. It examines the *Southern Bluefin Tuna* cases whose results have serious implications for the leverage of compulsory

⁸ Note 5 above.

⁹ Note 5 above.

¹⁰ Case concerning the conservation and sustainable exploitation of Swordfish stocks in the South-eastern Pacific Ocean, (Chile/ European Community), Case no.7, Order 2000/3, para 3(a)-(d), available at http://www.itlos.org/start2_en.html, accessed 16 June 2004 ('*Swordfish stocks case*').

¹¹ The "Southern Bluefin Tuna" Cases (Australia v. Japan; New Zealand v. Japan), 27 August 1999, ITLOS, Case no.3 & 4, Requests for provisional measures ('*Southern Bluefin Tuna Cases*') – (Note the official version of the cases combine judgments of cases no. 3 and no.4).

¹² WTO Appellate Body Report, 'United States – Import of Prohibition of Certain Shrimp and Shrimp Products,' WT/DS58/R ('*Shrimp-turtle Appellate Body report*') and WTO Panel Report, 'United States – Import Prohibition of Certain Shrimp and Shrimp Products,' WT/DS58/R ('*Shrimp-turtle Panel report*').

jurisdiction procedures under the United Nations Convention on the Law of the Sea 1982¹³ (UNCLOS) when challenged by a regional fisheries agreement.

The third section compares compliance and enforcement procedures of the WTO DSB and ITLOS. The DSB's stronger compliance machinery attracts a greater number of cases. While the Rules of ITLOS 1994¹⁴ have provisions referring to compliance, its lack of implementation machinery prevents its important decisions in environmental law from being enforced.

The fourth section discusses the provisions for third party access and *amicus curiae* briefs before the WTO DSB and ITLOS. It reveals how the WTO initiative to allow greater access to its dispute settlement process is changing adjudication of international environmental law. The Rules of ITLOS, by contrast, are notably conservative. It is foreseeable that, following the *Shrimp-turtle* case, third party access will increase and ITLOS will be urged to take a broad interpretation of its provisions in order to harmonise the handling of international environmental disputes.

The final section addresses the substantive conflict between international trade law and environmental law in relation to the application of the General Agreement on Tariffs and Trade 1994¹⁵ (GATT 1994) principles and the precautionary approach. It also refers to the WTO DSB's discussion of this issue in the *Shrimp-turtle* case.

In conclusion, this paper argues that procedural issues such as those addressed in the first four sections exacerbate the substantive conflict between international trade law and international environmental law as procedural differences create inconsistent decisions thereby leading to fragmentation of international law.

The remainder of this introduction gives a brief overview of the function of the WTO DSB and ITLOS.

Background to the WTO DSB and ITLOS

The WTO DSB and ITLOS are two international dispute settlement bodies with the jurisprudence to promote and enforce the broad scope of international law principles. ITLOS was created under the auspices of the UNCLOS, while the WTO DSB is established under the WTO, which enforces uniform trade relations under GATT 1994.

The WTO was established on 1 January 1995, pursuant to the Marrakesh Agreement Establishing the World Trade Organization¹⁶ (WTO Agreement). GATT 1994 forms part of Annex 1A to the WTO Agreement. It contains the original GATT 1947¹⁷ text as well as six interpretative understandings and an implementing protocol. In general, GATT 1994 comprises the WTO rules governing trade.¹⁸ Annex 2 to the WTO

¹³ United Nations Convention on the Law of the Sea of 10 December 1982, which entered into force 16 November 1994. Available at http://www.un.org/Depts/los/convention_agreements/convention_overview_convention.htm, accessed 17 June 2004 ('UNCLOS').

¹⁴ Rules of the Tribunal, ITLOS/8, as amended on 15 March 2001 and 21 September 2001. Available at http://www.itlos.org/start2_en.html, accessed 17 June 2004 ('Rules of the Tribunal').

¹⁵ General Agreement on Tariffs and Trade 1994. Available at http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm, accessed 17 June 2004 ('GATT 1994').

¹⁶ Marrakesh Agreement Establishing the World Trade Organization, Annex 2, FINAL ACT EMBODYING THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 353, reprinted in ILM 1125 (1994) ('WTO Agreement').

¹⁷ General Agreement on Tariffs and Trade, which entered into force 1 January 1948. Available at http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf accessed 17 June 2004 ('GATT 1947').

¹⁸ D Palmeter and PC Mavrodís, *Dispute settlement in the World Trade Organization*, (2004), Cambridge University Press, 2nd ed., pp. 13-14.

Agreement contains the Understanding on Rules and Procedures Governing the Settlement of Disputes¹⁹ (DSU).

The DSU sets up a system for dispute settlement within the WTO that serves to issue expedient and binding decisions.²⁰ The DSU confers compulsory jurisdiction on the DSB to resolve disputes.²¹ The DSU applies to disputes arising under the agreements listed in Appendix 1 of the WTO Agreement – comprising thirteen individual, multilateral agreements on the trade in goods. It covers the operation of the WTO Agreement within the territory of a Member and measures taken by regional or local governments under, or in contravention to, any of the WTO agreements.²² The DSB's role is to establish dispute settlement panels, adopt panel and appellate body reports, monitor and implement rulings and recommendations and to authorise and suspend concessions.²³

ITLOS was established pursuant to the Statute of the International Tribunal for the Law of the Sea²⁴ (the Statute), under Annex VI of UNCLOS. Article 1(1) of the Statute states that the Tribunal is constituted by and shall function in accordance with UNCLOS and the Statute. Disputes submitted to the Tribunal follow the procedures outlined in Part XI and Part XV of UNCLOS. Part XI relates to the seabed and Part XV provides the framework for dispute resolution before ITLOS. Part XV is divided into three sections. The first two deal with general provisions and compulsory procedures for dispute settlement over issues arising under UNCLOS. The third section deals with the exceptions to the compulsory procedures. The Rules of ITLOS regulate practice and procedure of the court.

ITLOS is composed of 21 independent Members/Judges who are elected on the basis of their reputation for fairness, integrity and competence in maritime law.²⁵ ITLOS is split into three chambers. The Chambers for Summary Procedure, Fisheries Disputes and Marine Environment Disputes hear actions between States. In addition, a fourth chamber comprising 11 Members, the Seabed Disputes Chamber, unlike the other chambers can hear matters between States and private non-State actors.²⁶ It deals specifically with disputes concerning the exploration and exploitation of the seabed.²⁷

ITLOS is one out of four choices of forum for the settlement of disputes arising under UNCLOS.²⁸ Consequently, fewer cases than might be adjudicated before it are listed as States are able to engage in 'forum shopping,' taking their disputes to familiar tribunals such as the International Court of Justice. In contrast, the WTO DSB is the only forum for adjudication of disputes arising under the WTO Agreement. Thus by allowing State parties to engage in forum selection, the law espoused under UNCLOS is more susceptible to fragmentation compared to international trade law espoused under the WTO Agreement.

¹⁹ DSU, note (4).

²⁰ Palmetier and Mavroidis, *Dispute Settlement in the World Trade Organization*, (1999), Kluwer Law International, The Hague, Boston.

²¹ Palmetier and Mavroidis (2004), note 18 above, p. 16.

²² Palmetier and Mavroidis (2004), note 18 above, pp. 21-22.

²³ Palmetier and Mavroidis (2004), note 18 above, p. 19.

²⁴ Statute of ITLOS.

²⁵ Article 2(1), Statute of ITLOS.

²⁶ An *ad hoc* chamber of three members can be formed upon request.

²⁷ ITLOS, "General Overview," available at www.itlos.org/start, last accessed 17 June 2004.

²⁸ Article 187(1), UNCLOS.

Multiple jurisdiction: the Swordfish Stocks case

Due to the proliferation of international dispute resolution bodies in the absence of an overarching framework or plan, numerous conflicts concerning multiple jurisdiction have arisen. Where more than one international court or tribunal is seized of the same dispute, even though presented with the same material facts, conflicting decisions can result, causing fragmentation of international law.²⁹

This section addresses the problem of multiple jurisdiction and examines the implications for the settlement of environmental disputes following the *Swordfish Stocks* case. The law espoused under UNCLOS and GATT 1994 were both relevant, and both ITLOS and the WTO DSB were seized of the same dispute. The fact that the *Swordfish Stocks* case was brought before both forums highlights the tension between international trade law and international environmental law.³⁰ It demonstrates that the parties were able to resort to different international law regimes to support their respective positions and characterise the dispute differently.

Background to the dispute

Swordfish (*xiphias gladius*) are a highly migratory, pelagic species and listed in Annex I of UNCLOS. Annex I lists highly migratory species which are regulated under Article 64 of UNCLOS. Article 64 requires that coastal State and other States whose nationals fish for any of the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organisations with a view to ensuring conservation and promoting the objective of optimum utilisation of such species, both within and beyond the exclusive economic zone (EEZ). Swordfish are distributed widely throughout the Atlantic Ocean and Mediterranean Sea. Females are known to grow faster and larger than males, reaching 130cm by the age of two years and do not sexually mature until five years, making them especially vulnerable to depletion.³¹ Known spawning areas are the warm tropical and subtropical waters. Swordfish fisheries have been operating commercially since the 1950s, generally the fish are caught by longline fishing vessels when they come to the surface to feed.³² Consequently, swordfish are managed under the International Commission for the Conservation of Atlantic Tunas.³³

Chilean conservation measures and the Galapagos Agreement

To ensure the sustainability and conservation of swordfish stocks, Chile enacted *Decree 293 (1990)*³⁴ which implemented a registry for flag States landing swordfish at Chilean ports, established an exclusive fishery zone of 120 nautical miles and regulated the type of equipment with which swordfish could be caught. The following year, the Chilean

²⁹ C Brown, Review of "Manual on International Courts and Tribunals," *Melbourne Journal of International Law* (2002) 3, I.2, 453.

³⁰ MA Orellana, "The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO," *Nordic Journal of International Law* (2002) 71, 55-56.

³¹ ICCAT, "Executive summaries of species status reports (October 2003): Swordfish" from ICCAT website. Available at <http://www.iccat.es/downloads.htm>, accessed 16 June 2004.

³² Swordfish fishing nations include EU-Spain, United States, Canada, Brazil, Morocco, Namibia, EU-Portugal, South Africa, Uruguay and Venezuela. Opportunistic fishing nations are Chinese Taipei, Japan, Korea and EU-France; ICCAT, "Executive summaries of species status reports (October 2003): Swordfish" from ICCAT website. Available at <http://www.iccat.es/downloads.htm> accessed 16 June 2004. For a detailed discussion of the commercial Swordfish fisheries in the South Pacific, see generally Orellana (2002), note 30 above, 56-59.

³³ ICCAT (2003), note 31 above.

³⁴ *Decree 293 (1990)* D.S. No. 293 (Official Journal 15 October 1990).

Fisheries Law was passed through *Decree 598 (1991)*.³⁵ Under *Decree 598*, Article 165, vessels are prevented from trans-shipping or landing catch in Chilean ports that does not comply with Chilean regulations.³⁶ Spanish vessels have been denied access to Chilean ports since the enactment of the decree.³⁷

In 1997 the members of the Permanent Commission for the South Pacific – Chile, Colombia, Ecuador and Peru – drafted guidelines for a framework agreement which third States could join. The agreement sought to conserve the marine resources in the South Pacific and became the basis of the Galapagos Agreement.³⁸ The Galapagos Agreement seeks to conserve the marine living resources of straddling and highly migratory fish stocks, it defines an area of application and it applies principles of conservation and an ecosystem approach to the conservation of marine biodiversity to prevent by-catch and overfishing. It also includes specific provisions to deal with coastal State conservation of stocks beyond coastal State EEZs.³⁹

In May 1998, the Spanish National Association of Owners of Deep Sea Longliners lodged a complaint with the European Commission pursuant to the European Communities Trade Barriers Regulations, stating that their vessels containing swordfish were unable to access Chilean ports. The Commission conducted an investigation and concluded that Chile was in violation of the freedom of transit and quantitative restriction provisions under Articles V and XI of GATT 1994.⁴⁰ Article V states in part:

1. ... vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article 'traffic in transit'.
2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

And Article XI(1) states:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

³⁵ *Decree 598 (1991)* D.S. No. 598 (Official Journal 25 November 1999).

³⁶ J Shampsey, "ITLOS vs. Goliath: The International Tribunal for the Law of the Sea Stands Tall with the Appellate Body in the Chilean-EU Swordfish Dispute," *Transnational Law & Contemporary Problems* (2002) 12, 518.

³⁷ Orellana (2002), note 30 above, 60.

³⁸ Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the Southeast Pacific, signed in Santiago de Chile on 14 August 2000.

³⁹ Orellana (2002), note 30 above, 64.

⁴⁰ Orellana (2002), note 30 above, 66.

Proceedings before the WTO DSB: application of GATT 1994

When heard before the WTO, the EU⁴¹ objected strongly to the application of Chilean conservation measures to swordfish stocks beyond the EEZ and considered them to be a violation of high seas freedoms under UNCLOS Articles 87, 89 and 116 and the freedom of transit provisions under GATT Articles V and XI. The EU claimed that Article 165 of *Decree 598 (1991)* of the Chilean fisheries law prevented them from unloading swordfish in Chilean ports, or landing them for storage or transfer to other vessels, making it impossible for their vessels to transit through Chilean ports.

Chile defended its national legislation under the GATT 1994 general exceptions under Articles XX(b) and XX(g), which state:

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;

...

Proceedings before ITLOS: application of UNCLOS

When heard before ITLOS, Chile argued that the EU failed to manage its fishing vessels and co-operate in the conservation of swordfish stocks. Chile argued that, under Articles 64 and Articles 116- 119 of UNCLOS, the EU had an obligation to ensure conservation of swordfish stocks in the high seas adjacent to Chile's EEZ and to act in a manner other than cooperatively was challenging Chile's sovereign duty and right as a coastal State to prescribe and implement conservation measures.⁴² Article 116 states in part:

All States have the right for their nationals to engage in fishing on the high seas subject to:

(a) their treaty obligations;

(b) the rights and duties as well as the interest of coastal States provided for, *inter alia*, in article 63, paragraph 2, and articles 64 to 67 ..

Articles 63(2) and 64-67 require that States shall protect highly migratory species within and outside the coastal State EEZ. Article 117 imposes a "duty" on member States and their nationals to conserve the living resources in the high seas. Article 118 requires that parties exploiting the same living resources work together to conserve them and Article 119 details acceptable measures States can take to conserve living resources in the high seas. Thus, the Galapagos Agreement appears to be compliant with UNCLOS. Further, under Articles 297(1)(b) and 300, Chile argued that the EU was not fulfilling its obligations of good faith or its duty to comply with coastal State law.⁴³

⁴¹ Both Chile and the European Communities have been members of the WTO since 1 January 1995. WTO, "Understanding the WTO, Members and Observers," available on the WTO website http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm, accessed 17 June 2004.

⁴² Shampsey (2002), note 36 above, 524-525.

⁴³ *Swordfish stocks case*, para 3(a)-(d).

The EU responded by stating that Chile was acting unilaterally and abusing its coastal State power in a discriminatory manner under *Decree 598 (1991)*, the Galapagos Agreement and Articles 116-119 of UNCLOS.⁴⁴ The EU also argued that Chile was infringing on EU high seas freedoms pursuant to Articles 87 and 89,⁴⁵ and was not acting in conformity with Article 300 of UNCLOS.

Jurisdiction

Both the WTO DSB and ITLOS had compulsory jurisdiction to hear the dispute as both were able to deliberate and adjudicate on the issue of port access for fishing vessels. The WTO DSB could have ruled that Chile was required to allow access to EU vessels pursuant to Articles V and XI of GATT 1994. ITLOS, for its part, could have ruled that Chile was entitled to exercise coastal State sovereignty over its ports, in the EEZ and on the high seas to conserve fishery stocks pursuant to UNCLOS.

WTO DSB jurisdiction was established through procedure. On 19 April 2000, the EU requested formal consultations at the WTO, which took place on 14 June 2000 and did not progress.⁴⁶ On 6 November 2000, the EU requested the establishment of a panel to hear the dispute.⁴⁷

ITLOS compulsory jurisdiction was established under UNCLOS Article 282. Article 282 exempts disputes from compulsory jurisdiction where parties have agreed to submit to binding procedure concerning the interpretation or application of UNCLOS. As the parties agreed to submit to the Special Chamber of the Tribunal, and the dispute before the WTO DSB concerned the application of GATT 1994 not UNCLOS, ITLOS jurisdiction was not excluded. On 20 December 2000 a Special Chamber of five judges was formed to hear the dispute.⁴⁸

Article 297(1)(b) states:

“1. Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in Section 2 [Compulsory Procedures Entailing Binding Decisions] the following cases:

...

(b) when it is alleged that a State in exercising the aforementioned freedoms, rights or uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention;”

Article 300 states:

“State Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right.”

⁴⁴ *Swordfish stocks case*, para 3(e)-(h).

⁴⁵ **Article 87** states in part:

“1. The high seas are open to all States, whether coastal or land-locked. Freedom of the high seas is exercised under the conditions laid down by this Convention and by other rules of international law...

2. These freedoms shall be exercised by all States with due regard for the interest of other States in their exercise of the freedom of the high seas...”

Article 89 states:

“No State may validly purport to subject any part of the high seas to its sovereignty.”

⁴⁶ WT/DS 193/1, “Chile – Measures Affecting the Transit and Importation of Swordfish,” Request for Consultations by the European Communities.

⁴⁷ On 21 November 2000, the EU submitted a second request to establish a panel, and the panel was subsequently established: WT/DS 193/2, “Chile – Measures Affecting the Transit and Importation of Swordfish,” Request for the Establishment of a Panel by the European Communities.

⁴⁸ On 17 July 2000, Chile invited the EU to engage in formal arbitration before an UNCLOS Annex VII tribunal. In November 2000, the parties agreed to have the dispute heard before a Special Chamber composed of five members: ITLOS/Press 43, 21 December 2000. Available at http://www.itlos.org/start2_en.html, accessed 16 June 2004.

Provisional arrangement

The parties ceased proceedings in both forums in January 2001 before either ITLOS or the WTO DSB could comment on the relationship of the two courts and how the issue of multiple jurisdiction would be resolved.⁴⁹ Chile and the EU have since come to a provisional arrangement which constitutes a joint programme. Chile permits four EU vessels to land 1000 tonnes of swordfish at three Chilean ports, and the EU is required to participate in data collection and monitoring of stock levels, as well as a multilateral programme to conserve and manage swordfish stocks.⁵⁰

Analysis

Given the different purposes and ideals of UNCLOS and GATT 1994 it is not inconceivable that ITLOS and the WTO DSB would have reached different results. Potentially this multiple jurisdiction could have created a debate over which, if any, international rules apply in relation to forum selection.⁵¹ In addition, it would have been useful to know to what extent ITLOS could be prevented from addressing issues on economics or trade, and the WTO DSB on the law of the sea.⁵² It is now foreseeable that States potentially have obligations under different international agreements, which are not necessarily compatible.

Had ITLOS been given the opportunity to assess the merits of the case, the Tribunal could have addressed the question of a coastal States power to take prescriptive and enforcement action over fisheries in the high seas, assessed the status of regional fishery agreements governing the sections of the high seas and addressed the problem of States which are not party to regional conservation agreements and their duty to cooperate in the conservation and management of migratory stocks.⁵³

The case highlights the tension and fragmentation of international law in the areas of trade and sustainable development depending on which international dispute resolution body hears the dispute. This has made the cooperative conservation of swordfish stocks in international law ambiguous. The spectrum between international trade and environmental law reveals a gap for potential inconsistencies in law to arise. Narrow readings of WTO trade rules could jeopardise efforts to maintain sustainable fishery stocks both commercially and ecologically, while strict application of environmental standards could limit expected trade privileges of WTO Members. A harmonisation of tribunal processes and a common understanding of inter-relationships between dispute settlement mechanisms would serve to reduce fragmentation in international law governing the conservation of fishery stocks arising from the problem of multiple jurisdiction.

Non-compliance provisions of a regional agreement v compulsory jurisdiction procedures of an international court: the *Southern Bluefin Tuna* cases

In the *Swordfish Stocks* case it was demonstrated that the case could be brought before two tribunals. Similarly, the *Southern Bluefin Tuna* cases arbitral arrangements were able to be argued under two agreements; UNCLOS and the Convention on the

⁴⁹ Brown (2002), note 29 above, 453.

⁵⁰ HS Schiffman, "UNCLOS and marine wildlife disputes: big splash or barely a ripple?," *Journal of International Wildlife Law and Policy* (2001) 4, I.3, 257.

⁵¹ Brown (2002), note 29 above, 453.

⁵² P Gautier, "The International Tribunal for the Law of the Sea: activities in 2002," *Chinese Journal of International Law* (2003) 2, I.1, 341.

⁵³ Schiffman (2001), note 50 above, 257.

Conservation of Southern Bluefin Tuna 1993⁵⁴ (SBT Treaty) – a regional agreement. In the *Southern Bluefin Tuna* cases, the parties had the choice of resolving the dispute pursuant to the compulsory jurisdiction procedures of UNCLOS or the non-compliance, dispute resolution provisions under the SBT Treaty.

Non-compliance provisions v compulsory jurisdiction procedures

Where a State's sovereignty is compromised or threatened, it will avoid international adjudication and binding arbitration, and opt for non-compliance. This trend is particularly apparent on a global scale, where disputes centre on species extinction and non-renewable resources. Discussed below are the arguments of Romano and Peel for, and against, the use of non-compliance provisions. Following this is an analysis of the *Southern Bluefin Tuna* cases in the context of their arguments.

Romano argues that arbitral tribunals such as ITLOS and non-compliance provisions are the most tenable means for resolving transboundary disputes over natural resources due to the overarching principle of sovereignty, and together arbitral tribunals and non-compliance provisions serve to produce a win-win outcome.⁵⁵ Romano argues that the reason for the increased use of non-compliance provisions over formalised dispute resolution is that States are rarely comfortable subordinating sovereignty to international adjudication or arbitration - particularly where disputes concern a natural resource whose extinction is regional or even global. Non-compliance provisions provide a multilateral forum to respond to the collective global community to which States are responsible, rather than to respond to a single sovereign rival.⁵⁶ Consequently, disputes will tend to be resolved through negotiations between nations rather than international adjudication, where the court acts as a coercive forum to influence States to resolve their disputes through diplomacy, mediation and conciliation.⁵⁷

On the other hand, Peel argues that regional agreements that provide non-compliance provisions for the resolution of disputes between States have been ineffective in conserving and managing fish stocks due to weak compliance and enforcement as they allow States to opt out of meeting sustainable harvest levels.⁵⁸ Peel contends that it was the lack of enforcement that led to the collapse of the 1958 Law of the Sea regime⁵⁹ and resulted in the creation of UNCLOS between 1958 and 1994.⁶⁰ In addition to codifying the 1958 Geneva Conventions, the United Nations conference discussions sought to set up compulsory procedures for the settlement of disputes

⁵⁴ Convention on the Conservation of Southern Bluefin Tuna, 10 December 1993, which entered into force 20 May 1994. Available at <http://www.oceanlaw.net/texts/ccsbt.htm> ('SBT Treaty').

⁵⁵ Caesare RP Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (2002).

⁵⁶ For example, the 1994-1995 Turbot dispute between Canada and Spain, which was initially brought before the ICJ and finally resolved by negotiation between the two countries resulting in a bilateral agreement.

⁵⁷ Romano (2002), note 55 above.

⁵⁸ J Peel, "A paper umbrella which dissolves in the rain? The future for resolving fisheries disputes under UNCLOS in the aftermath of the Southern Bluefin Tuna arbitration," *Melbourne Journal of International Law* (2002) 3, I.2, 53.

⁵⁹ Convention on the Territorial Sea and Contiguous Zone, opened for signature 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964); Convention on the Continental Shelf, opened for signature 29 April 1958, 499 UNTS 311 (entered into force 10 June 1964), Convention on Fishing and Conservation of the Living Resources of the High Seas, opened for signature 29 April 1958, 299 UNTS 285 (entered into force 20 March 1966); and Convention on the High Seas, opened for signature 29 April 1958, 450 UNTS 82 (entered into force 30 September 1962).

⁶⁰ See generally, RR Churchill and AV Lowe, *The Law of the Sea* (1999), 3rd ed., Manchester: University Press, pp. 1-22.

concerning the interpretation of UNCLOS and disputes over resources beyond the area of coastal State regulation, freeing States from unilateral action by uncooperative States.⁶¹ Peel states that despite efforts to codify compulsory jurisdiction procedures, they did not resolve the problem of high seas fishing disputes. While non-parties to regional agreements fished on the high seas, State parties would seek to enforce regional agreements and UNCLOS, only to be rebuffed by the argument that they were extending their jurisdiction beyond the limits of their EEZs.⁶² This led to the adoption of the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995⁶³ (UN Fish Stocks Agreement). The UN Fish Stocks Agreement accommodated fisheries with straddling stocks.⁶⁴ Peel argues that, given the efforts to create UNCLOS and the UN Fish Stocks Agreement, the arbitral tribunal in the *Southern Bluefin Tuna* cases should have given priority to the Part XV UNCLOS arrangements for compulsory dispute settlement rather than giving priority to a regional agreement that provided non-compliance provisions which excluded the application of Part XV.⁶⁵

Background to the dispute

The global southern bluefin tuna (SBT) fishery was first commercialised during the 1950s. Australia and Japan were the key SBT fishing nations.⁶⁶ In 1982 the first trilateral meeting was held between Australia, Japan and New Zealand concerning biomass depletion and quota limitations for SBT and in 1983 the first catch limits were agreed voluntarily and informally.⁶⁷ Discussions between the countries led to the creation of the SBT Treaty. Under the treaty the Commission for the Conservation of Southern Bluefin Tuna (CCSBT) was set up to ensure the conservation and management of SBT. Each year it decides upon a global, annual, total allowable catch (TAC) and allocates it amongst the treaty members. The SBT Treaty recognises that SBT is a highly migratory species and that it is essential that Member States “cooperate to ensure the conservation and optimum utilisation of southern bluefin tuna.”⁶⁸

In 1996, Japan attempted to implement a joint experimental fishing program (EFP). However, Australia and New Zealand would not agree. The nations had divergent views as to whether the parental stock was rebuilding. Japan believed that sufficient rebuilding was occurring and that it justified a raising of the global TAC set under the

⁶¹ Peel (2002), note 58 above, 53.

⁶² Peel (2002), note 58 above, 53.

⁶³ The United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (entered into force 11 December 2001). Available at http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm, last accessed 17 June 2004.

⁶⁴ Straddling stocks are those species, which travel between EEZs, on the High Seas and between LOS Convention zones.

⁶⁵ Peel (2002), note 58 above, 53.

⁶⁶ H Campbell and S Herrick, “The role of research in fisheries management: the conservation of dolphins in the Eastern Tropical Pacific and the exploitation of Southern Bluefin Tuna in the Southern Ocean,” *Ocean Development & International Law* (2000) 31, 347.

⁶⁷ Campbell & Herrick (2000), note 66 above, 347.

⁶⁸ Preamble, SBT Treaty.

SBT Treaty. Australia and New Zealand disagreed.⁶⁹ Australia and New Zealand initially attempted to resolve the dispute with Japan under the framework of the SBT Treaty by requesting Japan to supply details on the design and tonnage of the proposed EFP, but they were not provided.⁷⁰ In 1998-1999, Japan unilaterally went ahead with the EFP, claiming its purpose was to resolve the uncertainty of the SBT stock levels. The EFP involved an additional harvesting by 65 Japanese vessels off the west coast of Australia of 1,460 tonnes in 1998 and 2,200 tonnes in 1999. In protest, Australia imposed a ban on Japan's longlining access privileges to the Australian EEZ and Australian ports culminating in the *Southern Bluefin Tuna* cases⁷¹ heard before ITLOS in August 1999.

Application of compulsory procedures under the LOS Convention

Australia and New Zealand resorted to the compulsory jurisdiction provisions under Part XV of UNCLOS, requesting provisional measures under Article 290(5) of UNCLOS, namely, the immediate cessation of the EFP by Japan.⁷² Article 290(5) states in part:

...any court or tribunal agreed upon by the parties...may prescribe, modify or revoke provisional measures in accordance with this article if it considers that *prima facie* the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so required...

Before the Tribunal it was argued that Japan focused on maximum utilisation of the species, while Australia and New Zealand actively worked towards the conservation of SBT.⁷³ Australia and New Zealand accused Japan of overfishing SBT in violation of the SBT Treaty, UNCLOS⁷⁴ and customary international law on the precautionary principle. The precautionary principle is defined in the Rio Declaration,⁷⁵ under Principle 15, which states:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

Japan objected on the grounds that ITLOS lacked jurisdiction to hear the dispute, and that the dispute centred on a scientific issue, which should be resolved by the CCSBT as prescribed under the SBT Treaty.⁷⁶

The issues dealt with by ITLOS included the management of commercial fish stocks, resolution of fishery disputes, the capacity of UNCLOS to provide a framework

⁶⁹ Japan believed that the SBT stock had a 60% chance of recovery by the year 2020, while Australia and New Zealand believed it only had a 10% chance of recovery and sought to reduce rather than increase the TAC. Y Sato, "The Southern Bluefin Tuna regime: rebuilding cooperation," *New Zealand International Review* (2001) 26, I.4, 99.

⁷⁰ A working group was established to discuss a possible future joint EFP. They met four times in 1999 without reaching consensus on the issue. See generally, Sato, note 69 above, 99.

⁷¹ *Southern Bluefin Tuna Cases*, note 11 above.

⁷² *Southern Bluefin Tuna Cases*, pp. 2-3.

⁷³ HS Schiffman, "The Southern Bluefin Tuna Case: ITLOS hears its first fishery dispute," *Journal of International Wildlife Law and Policy* (1999) 58, 318.

⁷⁴ In particular, Articles 64, 116 - 119 UNCLOS: *Southern Bluefin Tuna cases*, paras 28-29.

⁷⁵ Rio Declaration on Environment and Development, adopted at Stockholm on 16 June 1972. Available at <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>, accessed 17 June 2004.

⁷⁶ *Southern Bluefin Tuna Cases*, paras 46-47, 53, 56 and 73.

for the development of fishery management schemes, and resolution of disputes. On 27 August 1999, ITLOS found that it had jurisdiction to deal with provisional matters, and ordered an immediate cessation of the EFP pending a full hearing. Japan was ordered to reduce its annual quota by 711 tonnes in the following tuna season which meant that the fish caught through the EFP were to be counted against Japan's TAC for the 2000 fishing year.⁷⁷ The parties then established a five-member arbitral panel to hear the substantive issues.

Application of non-compliance provisions under the SBT Treaty

On 7 May 2000 an ad hoc arbitral tribunal established in accordance with Annex VII of the LOS Convention was convened to reconsider the matter including the question of jurisdiction raised by Japan.⁷⁸ The tribunal agreed with Japan, concluding that it lacked jurisdiction to place a ban on research fishing because the SBT Treaty set up consensus only dispute resolution provisions under Article 16, which therefore excluded the compulsory adjudication by ITLOS of any dispute between SBT Treaty members. Article 16 requires that in the event that parties cannot resolve the dispute by peaceful means they should resort to the International Court of Justice or arbitration by consent.

The tribunal surrendered its jurisdiction to the CCSBT under Article 311 of UNCLOS.⁷⁹ Article 311 suspends the compulsory jurisdiction of UNCLOS to all treaties that are "compatible" with the convention and "do not affect the enjoyment by other States parties of their rights or the performance of their obligations" under the convention. In arriving at this decision, Article 281(1) of UNCLOS was applied.⁸⁰ Article 281(1) states:

1. If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.

Japan argued that applying Part XV of UNCLOS (effectively the jurisdiction of the tribunal) would render the non-compulsory provisions in the SBT Treaty expressly adopted by the parties invalid. Consequently, the ITLOS provisional measures of August 1999 were revoked⁸¹ and Australia, New Zealand and Japan resumed dispute resolution negotiations in April-June 2001, where Australia and New Zealand consented to a joint EFP allowing Japan to increase its quota by 356 tonnes thereby resolving the dispute.⁸²

Analysis

The arbitral tribunal decision to allow a regional agreement to (a) take precedence over Part XV of UNCLOS compulsory jurisdiction procedures, and (b) overturn the ITLOS decision, potentially excludes many disputes coming before ITLOS. This creates a

⁷⁷ *Southern Bluefin Tuna Cases*, para 90(1)(d).

⁷⁸ ICSID, "The Southern Bluefin Tuna Case – Australia and New Zealand v. Japan," *News from ICSID* (2000) 17, 1, .3. Available at <http://www.worldbank.org/icsid/news/n-17-1-3.htm>, accessed 15 June 2004 ('*ICSID SBT Case*').

⁷⁹ *ICSID SBT Case*, para 38(e).

⁸⁰ *ICSID SBT Case*, para 38(h).

⁸¹ *ICSID SBT Case*, para 72(2).

⁸² Y Sato, "Fishy business: A political-economic analysis of the southern bluefin tuna dispute," *Asian Affairs*, (2002) 28, I.4, 11.

situation where it is difficult for States to resolve disputes where non-binding, non-compulsory provisions may be adopted in regional agreements.

The implication of this decision is that the compulsory jurisdiction of UNCLOS and ITLOS has become uncertain and unpredictable. This dispute has set a precedent for the compulsory jurisdiction of UNCLOS to be superseded by a species-specific, regional agreement⁸³ which has caused considerable concern in the international law community.⁸⁴ However, the proactive stance of ITLOS in the *Southern Bluefin Tuna* case cannot be ignored. By applying the precautionary principle when allowing Australia's request for provisional measures, ITLOS demonstrated a positive attitude toward environmental conservation and sustainable development.

In assessing the future of the Part XV UNCLOS compulsory jurisdiction procedures, one must consider how States will choose between non-compliance provisions under a regional agreement and compulsory jurisdiction procedures under UNCLOS. Peel suggests the following options. First, interpret Article 281(1) of UNCLOS Convention strictly. Thus, the exclusion of Part XV of UNCLOS must be express, or the Parties agree to an alternative such as mediation or conciliation. Where the Parties have agreed to abide by the decision reached in mediation or conciliation they cannot invoke Part XV. However, if no decision is reached by way of mediation, conciliation or under the regional agreement, then either party can invoke the Part XV compulsory procedures.⁸⁵

A second option suggested by Peel is to give priority to dispute settlement provisions in the regional agreement where the parties have opted for non-binding dispute settlement. To do otherwise would negate the Parties' intention in the regional agreement.⁸⁶

In the context of Romano's arguments, the importance of regional agreements between States is not lessened because the resolution of disputes is not subject to compulsory jurisdiction. Regional treaties such as the SBT Treaty which set up the CCSBT allow a specialised group to monitor the species and determine a global TAC while taking into consideration estimated catches of non-parties. There is no such facility within UNCLOS.

As a potential solution, future regional agreements could embody the aims of UNCLOS and allow States to choose between compulsory jurisdiction procedures or non-binding provisions. In both instances, a forum such as ITLOS could hear the dispute. Whether or not the parties elected to make the decision binding, it would remain a decision made by a competent body proficient at interpreting UNCLOS and would carry the weight of international recognition. Simultaneously, the decision might serve to increase and harmonise the body of customary international law in the application of regional agreements.

Compliance and enforcement: the WTO DSB and ITLOS

It is argued that one of the reasons for the increased number of international institutions is to secure the compliance of States with their international obligations.⁸⁷ Non-

⁸³ L. Sturtz, "Southern Bluefin Tuna Case: Australia and New Zealand v. Japan," *Ecology Law Quarterly* (2001) 28, I.2, 455.

⁸⁴ See B. Kwiatkowska and B. Oxman, "International Decision: Southern Bluefin Tuna (Australia and New Zealand v. Japan): Jurisdiction and Admissibility," *American Journal of International Law* (2001) 95, at 162.

⁸⁵ Peel (2002), note 58 above, 53.

⁸⁶ Peel (2002), note 58 above, 53.

⁸⁷ Y. Iwasawa, "WTO dispute settlement as judicial supervision," *Journal of International Economic Law* (2002) 5, I.2, 292.

compliance procedures may serve as an incentive to resolve disputes between States by private arbitration. However, those institutions with stronger compliance procedures, such as the WTO, are likely to attract a greater number of cases as they have the legal machinery to deter unilateral action by States, thus encouraging international cooperation. Compliance and enforcement at the WTO DSB is established and well known. Enforcement at ITLOS, however, is generally left to the governments of State parties (as are the decisions of the International Court of Justice). This is concerning for international environmental law as ITLOS has shown support for ecological sustainable development and the precautionary principle,⁸⁸ yet is unable to enforce its significant decisions.

The following discussion outlines the procedures available to WTO members in the resolution of disputes. It reveals a detailed and efficient process for the hearing of disputes, delivery of decisions and enforcement. Of particular relevance is 'Stage 5 – Implementation and Compensation.' It is during this stage that members are afforded stronger compliance and implementation procedures not available in other international courts and tribunals such as ITLOS. Following this is a discussion of the arguably weak compliance provisions of ITLOS.

Compliance and enforcement provisions of the WTO DSB

The DSU sets up a system for dispute settlement within the WTO that serves to issue expedient and binding decisions where proceedings generate reports concerning the matters.⁸⁹ It confers compulsory jurisdiction on the DSB to resolve disputes,⁹⁰ and applies to disputes arising under the agreements listed in Appendix 1 of the WTO Agreement on the trade in goods. The DSU sets up five stages of dispute settlement: consultation, panel, appellate review, arbitration and compensation.⁹¹ (The following discussion uses the terms "members" and "parties" interchangeably).

Stage 1 - Consultation: The complaining party may request consultation to resolve the matter at first instance. If the opposing party does not respond within 10 days of the request, or fails to enter consultation within 30 days or if no resolution is reached within 60 days, the complaining party can request a panel to hear the dispute.⁹²

Stage 2 - Panel: The panel is composed of three qualified individuals who serve in an independent manner, and not as representatives of either their government or third parties.⁹³ Panelists are nominated by the Secretariat from a roster of governmental and non-governmental individuals deemed qualified who cannot be opposed to by the parties except for compelling reasons.⁹⁴ The panel makes an objective assessment on the facts and takes into consideration written submissions, oral arguments, expert witnesses and any other relevant material.⁹⁵ The panel controls the dispute settlement

⁸⁸ As discussed above in the *Southern Bluefin Tuna* Cases.

⁸⁹ Palmetier and Mavrodis (1999), note 20 above.

⁹⁰ Palmetier and Mavrodis (2004), note 18 above, 6.

⁹¹ B Mercurio, "Dispute Settlement in the WTO: Questioning the 'Security' and 'Predictability' of the Implementation Phase of the DSU?," in *The WTO & the Doha Round*, ed. RP Buckley, (2003), Kluwer, Sydney, p 122. In addition to the DSU, there are Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, which outline the formal procedure for conduct for the DSB: WTO/DSB/RC/1, 11 December 1996.

⁹² Articles 4.3 and 4.7, DSU.

⁹³ Articles 8.1, 8.5 and 8.9, DSU. Under Article 8.5, the panel can be increased to five members on request of the parties within ten days of the panel being established.

⁹⁴ Article 8.6, DSU. Under Article 8.7, if the parties can not agree on a panel, the Director-General, DSB and relevant Council or Committee select the panel.

⁹⁵ Article 11, DSU.

process with reference to the rules in the DSU establishing a schedule for procedure and is empowered to request expert opinions on scientific and technical matters.⁹⁶

The panel submits its findings to the parties within six months in the form of an interim report.⁹⁷ If there are no objections to its findings, it becomes the final report and is circulated to members. Twenty days after circulation of the report, members have ten days to raise objections before the meeting at which the report is considered. If no objection or appeal is made, the report is adopted.⁹⁸

Stage 3 - Appellate review: Where a party appeals the panel report, it is referred to the appellate body.⁹⁹ Review is limited to issues of law and the appeal process is limited to 60 days, after which the appellate body must give a report.¹⁰⁰ The DSB considers whether or not to adopt the report and, if it decides in the affirmative, the report will be adopted within 30 days after circulation to members.¹⁰¹

Stage 4 - Binding arbitration (optional): Parties involved agree on procedures to be adopted and agree to abide by the arbitral award. The award is then subject to implementation and compensation under the DSU.¹⁰²

Stage 5 - Implementation and compensation

Implementation: The panel or appellate body reports contain specific recommendations and details on their implementation.¹⁰³ Compliance with the report is required within a reasonable time. A 'reasonable time' may be proposed by a party concerned and approved by the DSB, mutually agreed to by the parties or determined through binding arbitration.¹⁰⁴ Where the breaching party has proceeded to implement recommendations to conform with panel or appellate body reports and the opposing party disputes the new measures, the dispute is returned to the Panel (preferably of the same composition as the original).¹⁰⁵

Compensation or suspension of concessions: Where parties have failed to resolve the dispute within a reasonable period of time, at the request of the opposing party, the breaching party must enter into negotiations to compensate, or suspend concessions in relation to the opposing party.¹⁰⁶

Compensation in the context of the DSU is a prospective remedy. It does not compensate for past losses. Rather, it grants a trade benefit for the nullification or impairment caused by the breaching party.¹⁰⁷ The DSU emphasises that compensation is a temporary remedy and that compliance with recommendations is preferred.¹⁰⁸

An alternative to compensation is suspension of concessions. By this process, one party can suspend rights or benefits to another party. Suspended concessions cannot "exceed the expected amount of nullification or impairment of their obligations" and must be "equivalent in value to the benefits the complaining party expects to lose in the

⁹⁶ Article 13.2, Appendix 4, DSU.

⁹⁷ Article 12.8, DSU.

⁹⁸ Mercurio (2003), note 91 above, p. 122.

⁹⁹ Article 17.1, DSU.

¹⁰⁰ Articles 17.5 and 17.6, DSU.

¹⁰¹ Article 17.14, DSU.

¹⁰² Mercurio (2003), note 91 above, p. 122.

¹⁰³ Article 19.1, DSU.

¹⁰⁴ Articles 21 and 22, DSU; Mercurio (2003), note 91 above, p. 122.

¹⁰⁵ Article 21.5, DSU.

¹⁰⁶ Articles 22.1 and 22.2, DSU.

¹⁰⁷ CM Vazquez and JH Jackson, "Some reflections on compliance with WTO dispute settlement decisions," *Law and Policy in International Business* (2002) 33, 1.4, 560.

¹⁰⁸ Article 22.1, DSU.

future as a result of the nonconforming measure.”¹⁰⁹ However, suspended concessions are generally left to the governments of the parties to negotiate.

Compliance and enforcement provisions of ITLOS

Under Article 296(1) of UNCLOS and Article 33 of the Statute for the International Tribunal for the Law of the Sea (the Statute), where decisions fall under the Part XV compulsory jurisdiction procedures of UNCLOS, the decision of the court “shall be final and shall be complied with by all the parties to the dispute.”¹¹⁰ Decisions of the chambers and *ad hoc* chambers are also afforded the same status by virtue of Article 15(5) of the Statute.

This procedure follows the principle of *res judicata*; any attempt by the parties to submit the same dispute to another judicial body is not allowed. It is also consistent with the principle of *stare decisis*, in that the decision is also binding on the court. The court has a duty to follow judicial precedent. Consequently, the Tribunal will apply the same principles of law in similar, subsequent disputes submitted before it.¹¹¹

Under Article 124(2) of the Rules of the Tribunal¹¹² (the Rules), the judgment is read at a public sitting and becomes binding on the parties. Further, under Article 125(3), copies of the judgment are sent to the State parties and the Secretary-General of the United Nations. This publication of the judgment in the international arena, serves to encourage State parties to comply with the decisions by virtue of reciprocity, knowing that their reputation for international cooperation is under scrutiny.

It is worth noting that there is nothing in UNCLOS, the Statute or the Rules to prevent the Tribunal from making implementation orders of its decisions.¹¹³ Article 128(4) of the rules states:

If the Tribunal decides to make the admission of the proceedings in revision conditional on previous compliance with the judgment, it shall make an order accordingly.

Theoretically, any revision of a judgment depends on previous compliance with the decision, indicating that the initiative of the Tribunal to make implementation orders is consistent with the Rules. Arguably, Article 128(4) of the Rules does not necessarily allow the Tribunal to initiate or participate in the implementation of its decision. To a certain extent, if revision is based on Article 128(4), the party that requested revision of the judgment is indeed “strongly persuaded” to comply with the previous judgment as this is a condition precedent, prior to the process of revision.

In practice, however, ITLOS does not participate in the implementation of its judgments or orders, except in two cases: orders for provisional measures and orders for the prompt release of vessel and crew. In these cases, the participation of the Tribunal is understandable as both are not judgments on the merits and the nature of the cases requires the Tribunal to ensure the implementation of its orders. For example in provisional measures cases, a minimum supervisory role is extended to the Tribunal. Article 95 of the Rules states that each party must inform the Tribunal as soon as possible as to its compliance with any provisional measures prescribed, and must submit an initial report detailing the steps they have taken to ensure compliance. However, the

¹⁰⁹ Vazquez (2002), note 107 above, 561.

¹¹⁰ Article 296(1), UNCLOS.

¹¹¹ F Rocha, *The International Tribunal for the Law of the Sea: Jurisdictional and procedural issues relating to the compliance with and enforcement of decisions*, (2001) Hamburg University, Hamburg, pp. 223-224.

¹¹² Rules of the Tribunal.

¹¹³ Rocha (2001), note 111 above, p. 227.

supervisory role goes no further. If States do not comply with the provisional measures, they bear “international responsibility.”¹¹⁴ This indicates a tendency by the Tribunal toward acceptance of non-compliance with its decisions as it has no enforcement machinery or sanction mechanisms.¹¹⁵

Essentially, compliance is left to the governments of State parties as there is no over-arching judicial supervision to ensure compliance as provided by the WTO DSB. At best, UNCLOS prescribes a “good faith” obligation on State parties to respect their obligations and not abuse their rights under the Convention.¹¹⁶ It is considered that this obligation extends to compliance with decisions.¹¹⁷

Analysis

Implementation of judicial orders and judgments is not part of the work of a court or tribunal. As a general rule, implementation or compliance is a political issue. The WTO DSB is remarkable because it expressly allows the system to take part in the implementation of the order or judgment. On the other hand, the WTO DSB is not a regular court. Regular courts, including the ICJ, do not and cannot take part in the implementation of their own judgments.

It can be argued that the strong compliance machinery of the WTO DSB contributes to the noted frequency with which member States seek to have disputes resolved before the WTO DSB. Between 1995 and 2002, nearly 250 requests for consultations were received and panels were established in over 100 cases.¹¹⁸ By comparison, ITLOS has received thirteen cases since being established in 1996. The WTO DSB goes one step further than dispute settlement by providing judicial supervision over compliance procedures, ensuring that States comply with panel and appellate body recommendations.¹¹⁹

The United Nations General Assembly, when dealing with “Oceans and Law of the Sea,” noted that there was an obligation on States to ensure prompt compliance with decisions given by a court pursuant to the compulsory jurisdiction procedures under UNCLOS.¹²⁰ It is considered that strong public pressure in support of compliance will serve to promote consistent adherence to international court and tribunal rulings easing conflicts in the fragmentation of international law.¹²¹

Summing up, these observations indicate that due to the readily enforceable character of international trade law compared to the weak enforceability of international environmental law the possibility of substantive conflict is likely.

Third party rights and *amicus curiae* briefs: the *Shrimp-turtle* case

As discussed above, the WTO’s provisions allowing third party involvement and the acceptance of *amicus curiae* briefs, though cautious and with limitations, attract more cases to the DSB. By contrast, the ITLOS provisions fall short of welcoming third

¹¹⁴ Judge Vukas, *M/V Saiga* Case (Saint Vincent and the Grenadines v. Guinea), Case No.2, (Provisional Measures), 11 March 1998, para 4.

¹¹⁵ Rocha (2001), note 111 above, p. 229.

¹¹⁶ Article 300, UNCLOS.

¹¹⁷ P Chandrasekhara Rao and P Khan, *The International Tribunal for the Law of the Sea: Law and Practice* (2001) Kluwer Law International, The Hague, p. 11.

¹¹⁸ Iwasawa (2002), note 87 above, 291.

¹¹⁹ For a detailed discussion of WTO judicial supervision, see generally Iwasawa (2002), note 87 above.

¹²⁰ United Nations General Assembly Resolution 55/7 of 30 October 2000, referred to in Rao and Khan (2001), note 117 above, 11.

¹²¹ Rao and Khan (2001), note 117 above, 14.

parties. Conflict in the jurisprudence of international law occurs through procedural inconsistency. In the WTO DSB, third parties can voice their concerns; however, in ITLOS they cannot. Allowing third parties to participate in the settlement of disputes may ultimately alter adjudication and therefore the outcome of a dispute. As a consequence of inconsistent third party policy between forums, fragmentation can occur.

The following discussion deals, firstly with the provisions for third party access before the WTO DSB and ITLOS and, secondly, the acceptance of *amicus curiae* briefs following the *Shrimp-turtle* case. This is followed by an analysis of the significance of third party participation and *amicus curiae* briefs in the fragmentation of international law.

Third parties

Third party provisions of the WTO DSB

The WTO DSB has granted increased participation by non-State actors, including non-governmental organisations (NGOs) in relation to trade disputes that are ultimately linked to the global environment. The DSB panel and appellate body may consider third party complaints submitted by Member Governments. Third parties with a “substantial trade interest” may notify the parties and the DSB of their interest and request to join the proceedings within ten days of circulation of the initial request for consultations. However, third party requests can only be made where Members have lodged a request to engage in consultations under GATT Article XXII. Under Article XXIII, third parties are not afforded this right. Article XXIII refers to complaints where a party alleges that any benefit accruing to it directly or indirectly under GATT 1994 is nullified or impaired as a result of the actions of another Member party. In these circumstances, third party participation is controlled by the complaining party and the opposing party may veto the presence of third parties requested by the complaining party.¹²²

Third parties which have notified the panel of their interest can be heard by, and make written submissions to, the panel.¹²³ They are entitled to receive the first written submissions of the parties (including oral statements made by the parties to the first meeting of the panel),¹²⁴ and may represent their views at a session of the first substantive meeting of the panel.¹²⁵

Third party provisions of ITLOS

UNCLOS recognises access to natural persons and non-State parties in two general situations. The first situation is by agreement between State parties where the parties have agreed to confer jurisdiction on the Tribunal.¹²⁶ In this regard, Article 20(2) of the Statute states that the Tribunal shall be open to entities other than State parties under Part XI, or by agreement conferring jurisdiction to the Tribunal. It is not clear whether “agreement” includes a non-international agreement between private parties.

The second situation is in relation to seabed disputes. The jurisdiction of the Seabed Disputes Chamber recognises access to natural persons in so far as they are effectively

¹²² Palmeter and Mavrodīs (2004), note 189 above, 94.

¹²³ Article 10.2, DSU.

¹²⁴ Article 10.3, DSU.

¹²⁵ Appendix 3.6, DSU.

¹²⁶ Annex 6 Article 37, UNCLOS.

controlled or sponsored by the State.¹²⁷ However, this is limited to the purpose of interpreting contractual obligations. Thus, corporations who establish the seabed mining industry are the only non-State parties with access to the Tribunal. Third parties such as environmental NGOs could only raise environmental issues if those issues constituted part of their contractual subject matter, and generally they do not.¹²⁸

'Amicus curiae' briefs

Provisions for 'amicus curiae' briefs at the WTO DSB: the 'Shrimp-turtle' case

In the *Shrimp-turtle* case,¹²⁹ the Appellate Body overturned a decision by the Panel that held it could not consider environmental briefs submitted by NGOs. It ruled that, while the Panel was not obliged to use the briefs, it was obliged to accept and consider them within its discretion. The Appellate Body of the WTO DSB now accepts *amicus curiae* briefs.

Appellate Body Compliance Report – October 1996

In October 1996 Malaysia, India, Pakistan and Thailand brought an action before the WTO against the United States, arguing that the US import ban of shrimp pursuant to Section 609 of US Public Law 101-162 requiring sea turtle excluder devices (TEDs) on imported shrimp was protectionist and in violation of GATT Article XI.¹³⁰

The US law required that countries exporting shrimp into the US had a comparable marine turtle conservation program, and comparable rates of incidental turtle catch, to that of the US itself.

WTO Panel Report – April 1998 (Adopted November 1998)

The Panel held that the US was being discriminatory and had violated GATT Article XI with respect to the imposition of import restrictions, and that its actions were not justified under GATT Article XX. It held that the US law forced other nations to have comparable practices and policies without addressing local circumstances and was therefore discriminatory.¹³¹

The US appealed the decision of the Panel and in its appeal sought to submit briefs from environmental NGOs. Before the Appellate Body could rule on the appeal they had to consider whether *amicus curiae* briefs could be accepted. The Panel decided that supplementary briefs from NGOs were inadmissible on the basis that the Panel had not requested the submissions. The Panel considered its position in terms of DSU Article 13, which provides the Panel a “right to seek information.” The Panel interpreted this to mean that they could request *amicus curiae* briefs but could not accept unsolicited briefs from private parties or NGOs.¹³² The Panel held that the parties could include these submissions as part of their own submissions. Consequently, the US took advantage of

¹²⁷ Article 187(c), Article 153(2)(b) and Annex XI Article 20, UNCLOS.

¹²⁸ HW McGee Jr and TW Woolsey, “The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach (Book review),” *UCLA Journal of Environmental Law & Policy* (2002) 2, I.1, 109.

¹²⁹ WTO Appellate Body Report, ‘United States – Import of Prohibition of Certain Shrimp and Shrimp Products,’ WT/DS58/R (‘*Shrimp-turtle Appellate Body report*’) and WTO Panel Report, ‘United States – Import Prohibition of Certain Shrimp and Shrimp Products,’ WT/DS58/R (‘*Shrimp-turtle Panel report*’).

¹³⁰ BH Oxman, “International Decision: United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia. WT/DS58/AB/RW,” *American Journal of International Law* (2000), 96, 685.

¹³¹ Oxman, note 130 above, 685.

¹³² *Shrimp-turtle Appellate Body report*, p. 4.

this interpretation and annexed *amicus curiae* briefs from the Center for Marine Conservation and the Center for International Environmental Law to its submissions.¹³³

Appellate Body Report – October 1998 (adopted November 1998)

Malaysia, India, Pakistan and Thailand appealed the Panel report and requested the Appellate Body not take into account the US annexed *amicus curiae* briefs. On appeal the Appellate Body overturned the lower panel ruling. In applying article 12 of the DSU which requires the panels to follow procedures with “sufficient flexibility” to allow “high-quality panel reports” and, under Article 11 of the DSU to make an “objective assessment of the facts,” the Appellate Body stated that the Panel did not have a legal obligation to use NGO briefs, but they did have the discretion to consider them and either accept or reject them. The Appellate Body held further that the interpretation of the phrase “right to seek information” by the Panel in Article 13 was taken too literally. The word “seek,” it was found, did not automatically prohibit acceptance of non-requested information.¹³⁴ Consequently, non-State actors and NGOs may now submit briefs on environmental or other issues to the Panel, and the Panel must consider whether to accept them before dismissing them. Similarly, private parties can provide the Panel with technical and legal guidance on environmental or other matters through supplemental briefs.¹³⁵

Following this ruling the Panel received two additional *amicus curiae* briefs. The first was from the American Humane Society and the Humane Society International and attached to the US submission. The Appellate Body noted that it was an integral part of the US submission; however, it also noted that the arguments and opinions adopted in the *amicus curiae* brief were independent views of the organisations which had written them. The US accepted that the panel would not have to address each of the arguments in the *amicus* submissions but only as it related to the arguments advanced by the US. The second *amicus curiae* brief was submitted by Professor Robert Howse from the University of Michigan Law School. The Appellate Body made an assessment and found that it was not necessary to take this submission into account.¹³⁶

The European Community raised several issues in the *Carbon Steel* case¹³⁷ following the Appellate Body’s decision in the *Shrimp-turtle* case.¹³⁸ In particular, concerns were raised regarding transparency and due process. The time for appellate review is 60-90 days; unless properly structured by procedure the discretion to accept *amicus curiae* briefs could prevent parties from having sufficient time to respond to a brief.¹³⁹ The Appellate Body addressed this issue in the *Asbestos* case.¹⁴⁰ It stated that an application to submit an *amicus curiae* brief should “disclose the nature of the entity

¹³³ *Shrimp-turtle Panel report*, p. 4.

¹³⁴ *Shrimp-turtle Appellate Body report*, p. 4.

¹³⁵ McGee and Woolsey (2002), note 128 above.

¹³⁶ *Shrimp-turtle Appellate Body report*, p. 5.

¹³⁷ WTO Appellate Body, ‘United States-Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom,’ WT/DS128/AB/R, 7 June 2000.

¹³⁸ For a detailed discussion of all the issues raised see, generally, R Howse, ‘Membership and its Privileges: the WTO, civil society, and the *Amicus* brief controversy,’ *European Law Journal* (2003) 9, 4, 499-504.

¹³⁹ Howse (2003), note 138 above, 503.

¹⁴⁰ Working Procedures for Appellate Review, ‘European Communities-Measures Affecting Asbestos and Asbestos-Containing Products,’ AB-2000-11, Additional Procedure Adopted Under Rule 16 91, WT/DS135/9, 8 November 2000.

applying for leave, its interest in the case, and whether it is being financed or supported by the parties.”¹⁴¹

The *Shrimp-turtle* decision has proved to be extremely controversial and acceptance of *amicus curiae* briefs before the WTO DSB in other cases has been met with rigorous debate by WTO members, particularly in the *Asbestos* case.¹⁴² Members argued that the Appellate Body was preempting their right to establish procedures for dispute settlement.¹⁴³ Such a controversy was created that the Appellate Body did not grant leave to any party or third party requesting to file a brief.¹⁴⁴ It was feared that the Appellate Body would submit to Member pressure. However, in the later *Sardines* case¹⁴⁵ the Appellate Body made a strong declaration of judicial independence, clearly stating that it had the authority to accept *amicus curiae* briefs.¹⁴⁶ In so doing it distinguished itself as an independent judicial body from the WTO membership.

Provisions for ‘amicus curiae’ briefs at ITLOS

To date, parties, third parties and NGOs have not submitted *amicus curiae* briefs in the proceedings of any case heard before ITLOS. However, that is not to say that the Tribunal does not accept them as this issue is yet to be tested. Under Article 77 of the Rules the Tribunal can request further documents, under Article 82 of the Rules the Tribunal can request an “expert opinion” and under Article 84 the Tribunal can request additional information from “intergovernmental organisations.” Generally, these provisions may be compared with the DSB’s “right to seek information.” The question is whether the Rules of the Tribunal pertain to individuals, NGOs and third parties.

Arguably, some individuals’ views could fall under the scope of Article 82 as “expert opinion.” The term “intergovernmental organisation”, however, is ambiguous and not defined by the Rules or UNCLOS. The closest interpretation of the expression can be derived from Annex IX Article 1 and Article 305¹⁴⁷ of UNCLOS. Article 305 of UNCLOS refers to signature of the Convention and Annex IX, Article 1 – Use of Terms, states:

For the purposes of article 305 and of this Annex, “international organization” means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters.

This definition would appear to exclude from the natural meaning of the term an “international organisation,” such as Greenpeace, which is an organisation that operates internationally. Rather, the definition is restricted to those organisations to which

¹⁴¹ Howse (2003), note 138 above, 504.

¹⁴² Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) (adopted 5 Apr. 2001).

¹⁴³ Howse (2003), note 138 above, 505.

¹⁴⁴ *Shrimp-turtle Appellate Body report*, p. 13.

¹⁴⁵ WTO Appellate Body Report, ‘*European Communities-Trade Description of Sardines*,’ WT/DS231/AB/R, AB 2002-3, 6 September 2002.

¹⁴⁶ Howse (2003), note 138 above, 507.

¹⁴⁷ Article 305 states in part:

1. This Convention shall be open for signature by:
all States;

....

(f) international organizations, in accordance with Annex IX...

Member States have transferred competence.¹⁴⁸ It has been argued that only the European Community fits the UNCLOS meaning of “international organisation.”¹⁴⁹

Analysis

Increasing third party and non-State party access to the international dispute settlement process expands the concept of international legal personality beyond States and extends it to individuals, corporate entities and NGOs.¹⁵⁰ As third party standing before an international tribunal increases, international lawyers will increasingly need to grasp both private and international law. For international maritime lawyers this will mean international law of the sea, private maritime law and international and domestic environmental standards.

The Appellate Body’s ruling in the *Shrimp-turtle* case recognises that the acceptance of third party briefs in appellate courts is common practice.¹⁵¹ It demonstrates that acceptance of *amicus curiae* briefs allows the Appellate Body to make an “objective assessment” on both the law and facts independent from the parties and the WTO membership. With clear structural procedures on the submission of *amicus curiae* briefs this avenue will allow third parties such as expert individuals, regional fisheries management authorities and NGOs to contribute their views, thereby having greater participation in those WTO processes that may directly affect them.

The *Shrimp-turtle* decision to accept *amicus curiae* briefs also strengthened the application of US environmental law. Having created a precedent, initial concerns that the WTO’s trade focus would override environmental issues are now eased. Drawing an analogy to the procedure at ITLOS, the Tribunal would be encouraged to consider broadening its provisions for accepting *amicus curiae* briefs and increasing third party participation. Such contributions would, for example, provide Tribunal Members with information on international trade and State parties’ obligations under other agreements beyond UNCLOS. Consequently, the possibility of substantive fragmentation between international trade law and international environmental law would be reduced in both forums.

Conflict between international trade law and environmental law: the application of the precautionary approach and GATT 1994 principles

The core principles of UNCLOS and GATT 1994 are in direct and substantive conflict with each other. Underlying the aims of UNCLOS are the principles of ecological sustainable development (ESD) and the precautionary principle. Concurrently, underlying GATT 1994 in its aim to facilitate trade liberalisation are the “most favoured nation” and “national treatment” principles. It is suggested that attempted parallel application of these four principles causes substantive fragmentation, as ESD and the precautionary approach can be interpreted as infringing the intended rights under the “most favoured nation” and “national treatment” principles. The following discussion

¹⁴⁸ MH Nodquist, S Rosenne and LB Sohn, *United Nations Convention on the Law of the sea 1982: A Commentary*, Vol. V, (1989), Martinus Nijhoff Publishers, Dordrecht, pp. 193, 456.

¹⁴⁹ LB De Chazournes, C Romano and R Mackenzie, *International Organizations and International Dispute Settlement: Trends and Prospects*, (2002), Transnational Publishers Inc, New York, p. 40.

¹⁵⁰ Alford, R. P., “The proliferation of International Courts and Tribunals: International Adjudication in ascendance,” *American Society of International Law: Proceedings of the Annual Meeting*, 2000, ABI/INFORM Global, p.162.

¹⁵¹ Howse (2003), note 138 above, 499.

draws further on the *Shrimp-turtle* case as the Appellate Body was required to deal with this substantive conflict.

Application of UNCLOS and GATT 1994

UNCLOS creates a regime for the law of the sea that promotes peaceful uses of the sea, and conservation and utilisation of the living resources of the sea in a just, efficient and equitable way.¹⁵² Its primary functions include regulating within and up to the exclusive economic zone and continental shelf, encouraging States to adopt international principles of conservation management and providing compulsory jurisdiction for the settlement of disputes as an alternative to unilateral action. Central to the aims of conservation management are the internationally recognised concepts of ESD and the precautionary principle.

Articles 61 and 62 of UNCLOS pertain directly to the conservation and utilisation of living resources. Article 61 requires States to determine a total allowable catch (TAC), and adopt conservation and management measures to ensure that fishing stocks in the EEZ are not endangered by over-exploitation.¹⁵³ Article 62 encourages coastal States to promote the objective of optimum utilisation by giving other States access to their EEZs and obliging nationals of other States to adhere to coastal State conservation measures.¹⁵⁴

In contrast, GATT 1994 applies generally to tradable products for sale and consumption between States. The purpose of the WTO multilateral trade system is to achieve economic development by reducing tariffs and liberalising trade.¹⁵⁵

The “most favoured nation” (MFN) and “national treatment” principles under GATT 1994 require each Member of the WTO to treat every nation equally with regard to imports or exports and to grant the same treatment to all other Members’ goods as it gives its own goods, preventing non-tariff barriers to trade.

Article I, the Most-Favoured-Nation Principle of GATT 1994, states in part:

... any advantage, favour, privilege or immunity granted by any contracting party to any product originating or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article III, the National Treatment Principle states in part:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products and internal quantitative regulations, requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

Together, Article I and Article III comprise the principle of non-discrimination. The effect of ESD and the precautionary principle combined with the GATT principle of non-discrimination is that conservation measures can be interpreted as barriers to trade. Yet the term sustainable development in an environmental sense is incorporated into the preamble of the WTO Agreement, which states:

¹⁵² Preamble, UNCLOS.

¹⁵³ RR Churchill and AV Lowe, note 60 above, p. 289.

¹⁵⁴ Note 153 above.

¹⁵⁵ JH Jackson, *The jurisprudence of GATT & the WTO*, (2002), Cambridge: University Press.

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

Thus, even on the face of the WTO Agreement as well as in the parallel application of ESD, the precautionary principle and the principle of non-discrimination, a substantive conflict in law exists. The coexistence of international trade laws and international environmental laws often results in the prevalence of international trade law over environmental law, which challenges traditional norms of national sovereignty and conservation ideals. This situation is considered to be substantive in the fragmentation of international law,¹⁵⁶ and was dealt with by the WTO DSB in the *Shrimp-turtle* case mentioned above.

The 'Shrimp-turtle' case

In the *Shrimp-turtle* case the Appellate Body was required to assess the status of Members' entitlements under Articles I, II, XI and XX of GATT 1994. Effectively, this meant an interpretation of two competing sets of rights: those arising under GATT 1994 and those arising under international environmental law.

It has been argued that the principles espoused by Articles I and II of GATT 1994 are given the status of 'rights' compared to other articles under the Agreement.¹⁵⁷ This was affirmed by the Appellate Body in the *Shrimp-turtle* case:

WTO Members need to maintain a balance of rights and obligations between the right of a Member to invoke one or another of the exceptions in Article XX, specified in paragraphs (a) to (j), on the one hand, and the substantive rights of the other Members under the GATT 1994, on the other hand. Exercise by one Member of this right to invoke an exception, such as Article XX(g), if abused or misused, will, to that extent, erode or render naught the substantive treaty rights in, for example, article XI:1, of other Members.

The term "substantive rights" above denotes that Articles I, II and XI are rights, while implying that the general exceptions under Article XX are not.¹⁵⁸

The Appellate Body further qualified the extent of the application of the Article XX(b) and (g) exceptions. It was not clear whether the exceptions applied exclusively to protect and conserve the environment and animals within the importing country or throughout the world (the issue of extra-territoriality).¹⁵⁹ This required the Appellate Body to discern the meaning of the term "exhaustible natural resources" under Article XX(g). Pursuant to Article 3(1)¹⁶⁰ the Appellate Body applied the rules of customary international law and referred to international environmental law conventions including

¹⁵⁶ International Law Commission, *Report of the Study Group on Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, 55th Session of the International Law Commission, Geneva, 5 May-6 June and 7 July-8 August 2003, A/CN.4/L.644, para 9.

¹⁵⁷ S Charnovitz, "The law of environmental PPMs in the WTO: Debunking the myth of illegality," *Yale Journal of International Law* (2002) 27, 81.

¹⁵⁸ Note 157 above.

¹⁵⁹ Jackson (2002), note 155 above, p. 428.

¹⁶⁰ Article 3(1), DSU requires WTO tribunals to use the rule of interpretation of customary international law.

UNCLOS, the Convention on Biological Diversity,¹⁶¹ Agenda 21¹⁶² and the Convention on International Trade in Endangered Species of Wild Fauna and Flora.¹⁶³ In choosing this course, the Appellate Body went beyond issues of interpretation and examined international environmental law conventions to assess issues of substance.¹⁶⁴

Analysis

The *Shrimp-turtle* case partially resolves the substantive conflict in application of the ESD, the precautionary approach and the principle of non-discrimination in two ways. First, it indicates that before the WTO DSB, environmental rights sought to be enforced under Articles XX(b) or XX(g) will be secondary in status to the principle of non-discrimination under GATT 1994.

Secondly, the decision indicates that, despite the secondary rating of Article XX, the consideration of international customary law and binding international environmental agreements on Member parties are relevant and important considerations in the assessment of disputes arising under the application of Articles XX(b) and XX(g).

Conclusion

The substantive fragmentation in international law in the application of UNCLOS and GATT 1994 is exacerbated by the procedural conflicts discussed above. In the cases analysed, the WTO DSB and ITLOS applied either or both UNCLOS and GATT 1994. It has been shown that differences in procedure can produce different outcomes causing fragmentation of international law.

Article 64 together with Articles 116-119 of UNCLOS bind State parties to cooperate directly with each other or through international and regional organisations to ensure conservation and promote the objective of optimum utilisation of highly migratory fish species.¹⁶⁵ Yet, GATT 1994 recognises tariffs as the only legitimate instruments for the regulation of trade, where restrictions other than duties, taxes or charges are prohibited by Article XI. Thus, quantitative restrictions such as quotas, import or export licences are prohibited, subject to the general exceptions under GATT Article XX.¹⁶⁶ Where ITLOS would have supported UNCLOS, the WTO DSB would have rejected it given exactly the same fact scenario. Were the WTO DSB to consider State parties' obligations under UNCLOS, and ITLOS to consider State parties' obligations under GATT 1994, in conjunction with understanding the limits of their jurisprudence with respect to these agreements, the issue of multiple jurisprudence would be addressed and fragmentation reduced.

The discussion above demonstrates that while regional fisheries agreements, UNCLOS and ITLOS strive to provide a regime for the sustainable management of the

¹⁶¹ Convention on Biological Diversity, entered into force 5 June 1992. Available at <http://www.biodiv.org/doc/legal/cbd-en.pdf>, accessed 26 June 2004.

¹⁶² Agenda 21 adopted at the United Nations Conference on Environment and Development, Rio de Janeiro, Brazil, 3-14 June 1992. Available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>, accessed 26 June 2004.

¹⁶³ Convention on International Trade in Endangered Species of Wild Fauna and Flora, entered into force 3 March 1973, as amended on 22 June 1979. Available at <http://www.cites.org/eng/disc/text.shtml#texttop>, accessed 26 June 2004.

¹⁶⁴ Palmetier and Mavrodís (2004), note 18 above, pp. 73-74.

¹⁶⁵ *Southern Bluefin Tuna* cases p. 16, para 48.

¹⁶⁶ WTO, "QR: Definition & Overview" from WTO website, http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto02/wto02/wto2_58.htm#note1 accessed 15 June 2004.

living resources in the World's oceans, their well intentioned efforts may not only fail but be dominated by international trade law. Trade practices may not be sustainable yet they are enforceable due to the existence of a detailed regime of judicial supervision monitored by the WTO DSB. This demonstrates that simply through a lack of implementation mechanisms, international environmental law is on an unequal footing with international trade law. The most obvious way this conflict can be rectified is for institutions promoting international environmental law such as ITLOS, to implement the requisite rules and supervision.

This article has demonstrated a successful application by the WTO DSB Appellate Body taking into account international environmental law. The WTO's initiative to broaden its procedural provisions to allow the participation of third parties and accept *amicus curiae* briefs thereby reducing fragmentation of international law has been shown. The Appellate Body's direct action of considering the jurisprudence of international environmental agreements in applying Article XX of the GATT 1994 was arguably the best procedure that could have been opted to circumvent fragmentation as it directly addressed the substantive conflict between international trade law and international environmental law.

Admittedly, it may not be possible to eliminate the substantive conflict between international trade law and international environmental law by only addressing procedural issues. If the questions in the introduction remain to be asked, fragmentation caused by procedural issues will continue. However, addressing them by assessing the jurisprudence of courts and tribunals with jurisdiction over the same dispute, encouraging binding dispute settlement procedures, ensuring compliance with court and tribunal decisions, and, increasing third party rights and allowing *amicus curiae* briefs in the adjudication of disputes will serve to minimise fragmentation caused by procedural conflict.

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