

Can Port State Measures taken against RMFO Partners be reconciled with International Trade Law? A Critical Analysis of the EU Shared Stocks Regulation in light of the Herring Dispute.

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List of Acronyms

AB	Appellate Body
CBD	Convention on Biodiversity
CCAMLR	Convention on the Conservation of Antarctic Marine Living Resources
CDS	Catch documentation scheme
CITES	Convention on International Trade in Endangered Species
CTE	Committee on Trade and Environment
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EEZ	Exclusive economic zone
EC	European Communities
EU	European Union
FAO	Food and Agriculture Organization
GATT	General Agreement on Tariffs and Trade
GMOs	Genetically modified organisms
ICES	International Council for the Exploration of the Seas
ICJ	International Court of Justice
IGO	Intergovernmental Organisation
ILC	International Law Commission
IPOA-IUU	International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing
ITLOS	International Tribunal for the Law of the Sea
IUU	Illegal, unreported and unregulated

MEAs	Multilateral environmental agreements
MERCOSUR	Mercado Común del Sur (Southern Common Market)
MFN	Most favoured nation
MSY	Maximum sustainable yield
NEAFC	North-East Atlantic Fisheries Commission
NSF	Non-sustainable fishing
PPMs	Processes and production methods
PSMA	Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing
PSMs	Port state measures
PTAs	Preferential Trade Agreements
RFMO	Regional fisheries management organisation
SPS	Agreement on Sanitary and Phytosanitary Measures
SSB	Stock spawning biomass
TAC	Total allowable catch
TBT	Agreement on Technical Barriers to Trade
TEDs	Turtle excluder devices
TPP	Trans-Pacific Partnership
UNCLOS	United Nations Convention on the Law of the Sea
UNFSA	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
US	United States

VCLT Vienna Convention on the Law of Treaties

WTO World Trade Organization

Chapter I - Introduction

The Faroe Islands (hereafter referred to as the Faroes) is a small self-governing fishing nation situated in the North Atlantic Ocean. It is under the sovereignty of Denmark but is not part of the EU. Its economy is almost entirely dependent on its fishing and agriculture industries and, because of the particular movement of currents in the area, the Faroes is surrounded by some of the cleanest seas in the world. This also keeps the seas at a constant temperature. As a result, fish from the Faroes, particularly groundfish which do not migrate, has a distinct taste and texture and is particularly prized. The Faroes also has a strong record when it comes to conservation, with strict laws in place including regulated fishing days, constant inspections, closure of specific marine areas year round or for specific periods to protect spawning areas, regulation of mesh sizes in nets, size of fish caught and tracking of fishing vessels.¹

In order to conserve Atlanto-Scandian herring stock (hereafter referred to as herring) in the North-East Atlantic, the EU, Faroes, Iceland, Norway and the Russian Federation have a long-term fisheries management plan for herring (herring management plan)², concluded under the auspices of the North-East Atlantic Fisheries Commission (NEAFC), a regional fisheries management organisation (RFMO) of which the five states in question are members.³ This plan gives effect to the parties' obligations under Article 63 of the United Nations Convention on the Law of the Sea (UNCLOS) to conserve straddling fish stocks in their waters. Under this plan the members agree on a total allowable catch (TAC) for herring based on recommendations of the International Council for the Exploration of Seas (ICES), an IGO set up to provide scientific advice on the sustainable use of marine ecosystems.⁴ The NEAFC member states meet once a

¹ Faroe Islands 'Sustainable Fisheries' available at <http://www.faroeislands.fo/economy-industry/fisheries/>, accessed on 14 February 2016 (video).

² Pelagic AC 'Coastal States management plan Atlanto-Scandian herring 1999' available at <http://www.pelagic-ac.org/media/pdf/Atlanto-Scandian%20herring%201999.pdf>, accessed on 7 March 2016 (**Herring Management Plan**). Also see for an example of a Recommendation adopted in terms of the Plan NEAFC 'Recommendation 18:2015', available at http://www.neafc.org/system/files/Rec.18_Herring-2015.pdf, accessed on 8 August 2015.

³ NEAFC 'Contracting Parties' available at <http://www.neafc.org/>, accessed on 23 April 2015.

⁴ Council Regulation (EC) No. 793/2013 of 20 August 2013 establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock (**Implementing Regulation**) Preamble 6; Kaj Leo Holm Johannesen 'Government of the Faroes: Coercive economic measures are illegal and counterproductive' available at <http://www.government.fo/news/news/government-of-the-faroes-coercive-economic-measures-are-illegal-and-counterproductive/>, accessed on 12 June 2015.

year to determine how the TAC should be allocated amongst themselves for the following year.⁵ In 2013, however, the Faroes set a unilateral catch far above the share allocated to it in the 2012 consultations, in which it did not participate.⁶

According to the EU, the Faroes withdrew from the 2012 consultations because it had not been allocated a large enough share of the TAC, but at no point had the Faroes presented a proposal or otherwise specified what its new share should be.⁷ The Faroes alleged that it had been excluded from the decision-making process after it requested a larger share. It argued that it deserved a larger share because of the increased incidence of herring in its waters, due to altered migratory patterns,⁸ a phenomenon of global warming,⁹ which assertion the EU disputed.¹⁰

In 2013 the EU banned imports of herring and Northeast Atlantic Mackerel (hereafter referred to as mackerel), a species that associates with herring to such an extent that it is virtually impossible to catch one type of fish without catching the other.¹¹ The EU further restricted access to its ports, including for transshipment purposes, for Faroese vessels and vessels authorised by the Faroes that were engaged in the herring and mackerel fisheries or transporting products containing herring and mackerel.¹² The EU took this action after identifying the Faroes as a ‘country allowing non-sustainable fishing’, alleging that the Faroes had failed to comply with the management measures for herring decided on by the NEAFC contracting parties.¹³ It imposed these restrictions through the promulgation of Council Regulation (EC) No. 793/2013 (Implementing Regulation), and was authorised to do so by Council Regulation (EC) No. 1026/2012 (Shared Stocks Regulation).¹⁴ The Shared Stocks Regulation allows the EC to impose restrictions of this nature where third countries allow non-sustainable fishing of common

⁵ Implementing Regulation Preamble Recitals 2-7; *EU-Measures on Atlanto-Scandian Herring: Request for Consultations by Denmark in respect of the Faroe Islands* of 7 November 2013 (WT/DS469/1) (**Request for Consultations**) para 8.

⁶ Implementing Regulation Preamble 9; Request for Consultations para 9.

⁷ Implementing Regulation Preamble 7-8.

⁸ Johannesen (Note 4).

⁹ Rosa M. Fernández Egea ‘Climate Change and the Sustainability of Fishery Resources in the North Sea: The Trade Dispute between the European Union and the Faroe Islands’ (2014) 4 *Journal of the Spanish Institute for Strategic Studies* at 2.

¹⁰ Implementing Regulation Preamble 17.

¹¹ *Ibid* Preamble 23.

¹² *Ibid* art 5.2.

¹³ *Ibid* art 4.

¹⁴ Council Regulation (EC) No. 1026/2012 of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing (**Shared Stocks Regulation**).

stocks, including straddling and highly migratory stocks, which they have a duty to conserve and manage through cooperation with other states.¹⁵

In 2014 Faroese exports were divided more or less equally between EU and Non-EU countries.¹⁶ 95% of these exports were fishery products.¹⁷ In 2013 over half the Faroese catch was made up of herring and mackerel,¹⁸ and in 2012 70% of these fish were exported to the EU.¹⁹ This makes trade with the EU in herring and mackerel extremely important to the Faroes and, because of the Faroese economy's dependence on fish exports, the EU trade ban particularly harmful.

This action by the EU led the Faroes to challenge the Shared Stocks and Implementing Regulations (collectively "EU Regulations"), under both the Dispute Settlement Understanding (DSU) of the World Trade Organization (WTO),²⁰ and Article 287 of UNCLOS, allowing for disputes to be brought in one of four international forums.²¹ In its request for consultations, the Faroes alleged that the EU Regulations contravened Articles I, V and XI of the General Agreement on Tariffs and Trade (GATT),²² setting out the most favoured nation (MFN) principle, freedom of transit and prohibition on quantitative restrictions respectively.²³ The dispute between the parties will be referred to throughout this dissertation as the herring dispute.

A. Illegal, unreported and unregulated (IUU) fishing

Through a number of regulations, including the Shared Stocks Regulation, the EU attempts to prevent the phenomenon known as IUU fishing.²⁴ IUU fishing is a growing problem. It has

¹⁵ United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS) arts 63-64.

¹⁶ Hagstova Føroya 'Faroe Island in Figures 2015' available at http://www.hagstova.fo/sites/default/files/Faroe_Islands_in_figures_2015.pdf, accessed on 20 December 2015 at 34.

¹⁷ Faroe Islands 'Trade and Industry' available at <http://www.visitfaroeislands.com/en/about-the-faroe-islands/trade-and-industry/>, accessed on 20 December 2015.

¹⁸ Hagstova Føroya (Note 16) at 28.

¹⁹ Svein Magnason 'Faroese Fish Needs New Markets' *Nora Region Trends* 26 July 2013 available at <http://www.noraregiontrends.org/marineresources/marinereports/article/faroese-fish-needs-new-markets/193/neste/7/>, accessed on 3 March 2016.

²⁰ Understanding on Rules and Procedures Governing the Settlement of Disputes of 1994 (DSU).

²¹ The International Court of Justice (ICJ), International Tribunal for the Law of the Sea (ITLOS), an UNCLOS Part VII Arbitral Tribunal or an UNCLOS Part XIII Special Arbitral Tribunal (Seabed and Area disputes).

²² Request for Consultations para 18.

²³ General Agreement on Tariffs and Trade of 1994 (GATT) arts I, V and XI.

²⁴ These include Council Regulation (EU) No. 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (**IUU Regulation**); Council Regulation (EC) No 1006/2008 of 29 September 2008 concerning authorisations for fishing activities of Community fishing vessels outside Community waters and the access of third country vessels to Community waters, and Council

been estimated to account for between 13% and 31% of catches, amounting in 2003 to a loss of between 5 and 11 billion US dollars worldwide.²⁵ The overfishing caused by IUU fishing undermines attempts by states to manage fish stocks within sustainable limits which can lead to stock collapse. IUU fishing has also been linked to drug, arms and human trafficking and forced labour.²⁶ There have been several important developments in this area in the last twenty years, as states and international bodies, particularly the Food and Agriculture Organization (FAO), attempt to deal with the problem.

One way to combat IUU fishing is through port state measures (PSMs). According to the FAO these ‘typically include requirements related to prior notification of port entry, use of designated ports, restrictions on port entry and landing/transshipment of fish, restrictions on supplies and services, documentation requirements and port inspections, as well as related measures, such as IUU vessel listing, trade-related measures and sanctions.’²⁷

For many of these controls to work, there needs to be cooperation and information sharing between the flag state (the state on whose shipping registry a vessel is registered) and the port state (the state in which the ship docks either for the purpose of unloading or transshipping fish or to refuel and take on supplies), as well as between states cooperating to conserve common stocks or a common area, often through an RFMO. An example of cooperation is the use of IUU vessel lists. These include details of vessels which have engaged in IUU fishing previously and allow states to tailor inspections of fishing vessels accordingly.²⁸

The FAO has facilitated the negotiation and promulgation of a number of ‘soft’ and ‘hard’ law instruments, including its Code of Conduct for Responsible Fisheries (‘FAO Fisheries Code’)²⁹,

Regulation (EC) No 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy (**Control Regulation**).

²⁵ David Agnew, John Pearce, Ganapathiraju Pramod et al *Estimating the Worldwide Extent of Illegal Fishing* (2009).

²⁶ Directorate-General for Internal Policies ‘Illegal, Unreported and Unregulated Fishing: Sanctions in the EU’ available at [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/529069/IPOL_STU\(2014\)529069_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/529069/IPOL_STU(2014)529069_EN.pdf), accessed on 12 February 2016 s2.2.

²⁷ Food and Agriculture Organization (FAO) ‘Port State Measures’ available at <http://www.fao.org/fishery/psm/en>, accessed on 1 June 2015.

²⁸ See eg IUU Regulation art 27; North East Atlantic Fisheries Commission (NEAFC) ‘NEAFC A and B Lists’ available at <http://www.neafc.org/mcs/iuu>, accessed on 14 February 2016; Northwest Atlantic Fisheries Organisation (NAFO), ‘Illegal, Unregulated and Unreported Fishing’ available at <http://www.nafo.int/fisheries/frames/fishery.html>, accessed on 14 February 2016.

²⁹ FAO Code of Conduct for Responsible Fisheries of 1995 (**FAO Fisheries Code**).

International Plan of Action to prevent, deter and eliminate illegal, unreported and unregulated fishing ('IPOA-IUU')³⁰, Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas ('FAO Compliance Agreement')³¹, and Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (PSMA)³², which is not yet in force. It also recently convened an expert group to create guidelines for catch documentation schemes, which attempt to trace fish products from capture to market through the exchange of information and issuing of certificates setting out catch allowances, information on the vessel, as well as the importer and exporter of the fish (CDS Guidelines).³³ Similar certification schemes are set up by the Convention on International Trade in Endangered Species (CITES)³⁴ and certain RFMOs.³⁵ RFMOs also attempt to reduce IUU fishing in their areas, or of the particular species they are set up to manage, through other types of PSMs.³⁶ Another important development in the area of fisheries conservation was the promulgation in 1995 of the the United Nations Fish Stocks Agreement (UNFSA).³⁷ UNFSA is arguably an interpretation of Articles 63 and 64 of UNCLOS³⁸, which set out a duty to cooperate in conserving straddling and highly migratory fish stocks³⁹ – something which is often done through RFMOs.⁴⁰ Finally, based on their obligations under these agreements, many states have,

³⁰ FAO International Plan of Action to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 2001 (**IPOA-IUU**).

³¹ FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 1993 (**FAO Compliance Agreement**).

³² FAO Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing of 2009 (**PSMA**).

³³ FAO 'Report of the Expert Consultation on Catch Documentation Schemes (CDS) Rome, 21–24 July 2015' available at <http://www.fao.org/3/a-i5063e.pdf>, accessed on 30 January 2016 (**CDS Guidelines**).

³⁴ Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973 (**CITES**) art VI and the articles mentioned therein.

³⁵ See eg Commission for the Conservation of Antarctic Marine Living Resources, 'Conservation Measure 10-05 (2015): Catch Documentation Scheme for *Dissostichus* spp.' available at <https://www.ccamlr.org/en/measure-10-05-2015>, accessed on 6 February 2016.

³⁶ See eg NEAFC Scheme of Control and Enforcement of 2010 (latest version 2016) available at <http://www.neafc.org/scheme/2016>, accessed on 14 February 2016 (**NEAFC Scheme**); Adriana Fabra & Virginia Gascón 'The Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Ecosystem Approach' (2008) 23 *International Journal of Marine and Coastal Law* 567 at 589-590.

³⁷ 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 (1995) (**UNFSA**).

³⁸ Peter-Tobias Stoll and Silja Vöneky 'The *Swordfish* Case: Law of the Sea v. Trade' (2002) *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht* 21 at 25.

³⁹ UNCLOS arts 63 and 64.

⁴⁰ For example the International Commission for the Conservation of Atlantic Tunas (ICCAT) seeks to conserve tuna stocks which are highly migratory and is often targeted in IUU fishing operations and NEAFC seeks to conserve Atlantic herring which is a straddling fish stock.

like the EU, promulgated domestic legislation to prevent IUU fish entering their markets.⁴¹ These are important instruments in light of the failure of ‘flags of convenience’ states to effectively police IUU fishing by vessels on their registries.⁴²

A good example of domestic PSMs are found in various regulations promulgated by the EU to combat IUU fishing, including the Shared Stocks Regulation.

Council Regulation (EU) No. 1005/2008 (IUU Regulation) is a broad instrument which includes many different types of PSMs. The IUU Regulation, like many instruments dealing with IUU fishing,⁴³ takes its definition of IUU fishing from IPOA-IUU.⁴⁴ This provides, in relevant part, that illegal fishing includes:

*activities conducted by vessels flying the flag of States that are parties to a relevant regional fisheries management organization but operate in contravention of the conservation and management measures adopted by that organization and by which the States are bound, or relevant provisions of the applicable international law.*⁴⁵

The definition of unregulated fishing provides in relevant part that unregulated fishing:

*refers to fishing activities in areas or for fish stocks in relation to which there are no applicable conservation or management measures and where such fishing activities are conducted in a manner inconsistent with State responsibilities for the conservation of living marine resources under international law.*⁴⁶

The Shared Stocks Regulation, under which the measures were imposed on the Faroes, deals specifically with these aspects of IUU fishing. It further provides that measures set out in the IUU Regulation should be taken into account in applying the Shared Stocks Regulation in order to ensure that action taken to conserve EU fish stocks ‘is effective and coherent’.⁴⁷ This defines

⁴¹ See eg IUU Regulation; Illegal, Unreported and Unregulated Fishing Enforcement Act H.R. 774 of 2015 (**US IUU legislation**); FAO ‘International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing’ available at <http://www.fao.org/fishery/ipoa-iuu/npoa/en>, accessed on 15 February 2016.

⁴² Agnew, Pearce & Pramod (Note 25).

⁴³ See eg PSMA art 1(e); US IUU legislation s303(2); NEAFC Scheme art 1(l).

⁴⁴ IPOA-IUU s3; IUU Regulation art 2.2

⁴⁵ IPOA-IUU s3.1.2.

⁴⁶ Ibid s3.3.2.

⁴⁷ Shared Stocks Regulation Preamble 7.

the distinct competences of the two regulations and ensures there is no overlap in the enforcement of the EU's policy to conserve fish stocks through PSMs.

Council Regulation (EC) No 1224/2009 (Control Regulation) sets out a comprehensive set of control and monitoring mechanisms to allow EU States to comply with the EU's common fisheries policy. Although the Control Regulation does not focus specifically on PSMs, it does provide for measures which fall into this category.⁴⁸

B. Port state measures and international trade law

It is clear from the FAO's definition of PSMs for IUU fishing that trade measures are an important way to prevent IUU fishing. Indeed, the purpose of PSMs is to prevent IUU fish from getting into a country, either to be sold in that country, or to be transported through that country for sale elsewhere. This deters IUU fishing by reducing the number of 'ports of convenience' that such fish can be brought into, which is one of the means available to states to combat IUU fishing.⁴⁹ As fish perishes rapidly, the closure of all ports in a particular area is the best way to prevent IUU fishing in that area. However, as shown in the herring dispute, use of trade measures in this manner may very well contravene the laws of the WTO, particularly those in the GATT and, possibly, the Agreement on Technical Barriers to Trade (TBT)⁵⁰.

The fact that the herring dispute was referred to both the WTO and UNCLOS indicates the close relationship between trade and fisheries law, and illustrates the potential for a clash of trade agreements and environmental agreements in the international sphere. This is an issue which has led to a number of cases being brought to the WTO Dispute Settlement Body (DSB) and its GATT predecessor in the context of fishing.⁵¹ Indeed, the herring dispute was not the first time a

⁴⁸ Control Regulation - see eg Title IV, chap I, art 19 and chap III, art 43.

⁴⁹ Others include capacity reduction (cutting subsidies and/or re-training fishermen) – see Directorate-General for Internal Policies (Note 26) at 27; Margaret A. Young 'Trade-Related Measures to Address Illegal, Unreported and Unregulated Fishing' (2015) *E15 Expert Group on Oceans, Fisheries and the Trade System* at 7, and consumer information initiatives such as ecolabelling – for a good exposition of the features these initiatives need to succeed see Trevor J. Ward 'Measuring the Success of Seafood Ecolabelling' in Trevor Ward and Bruce Phillips (eds) *Seafood Ecolabelling: Principle and Practice* (2009).

⁵⁰ Agreement on Technical Barriers to Trade of 1994 (TBT).

⁵¹ *US-Prohibition of Imports of Tuna and Tuna Products from Canada* (L/5198-29S/91) Report of the Panel adopted on 22 February 1982 (**US-Canada Tuna**); *Canada-Measures Affecting Exports of Unprocessed Herring and Salmon* (L/6268-35S/98) Report of the Panel adopted on 22 March 1988 (**Canada-Herring and Salmon**); *Chile-Measures Affecting the Transit and Importation of Swordfish: Request for Consultations by the European Communities* of 26 April 2000 (WT/DS193/1 G/L/367) (**Chile-Swordfish**).

complaint had been lodged at the WTO alleging that domestic PSMs put in place for the purpose of conserving fish contravened provisions of the GATT. In *Chile-Swordfish*, which was also referred to both the WTO and an UNCLOS body, the International Tribunal for the Law of the Sea (ITLOS),⁵² Chile alleged that various Spanish fishermen had made catches on the high seas bordering Chile's exclusive economic zone (EEZ) in contravention of conservation rules contained in Chile's national fisheries law.⁵³ Interestingly, the EU was the WTO complainant in that case, which was brought in 2000, before the IUU Regulation and EU Regulations came into effect.

Both *Chile-Swordfish* and the herring dispute were settled before the tribunals could pronounce on the merits of the issue.⁵⁴ This is unfortunate from an international law standpoint as there is no guidance on a number of important questions raised by these cases, particularly around the relationship between WTO law and the various IUU fishing laws that have been negotiated internationally and in RFMOs, and whether there is any chance of a procedural conflict between a WTO Panel or Appellate Body (hereafter referred to as a DSB body) and the UNCLOS Tribunals where both are seized with the same matter.

This dissertation will use the facts of the herring dispute to shed light on the question of whether PSMs imposed on state partners in an RMFO for IUU fishing are compatible with international trade law. In light of the increasing standardisation of IUU fishing measures through instruments such as the CDS Guidelines and PSMA, an analysis of the EU Regulations may also be directly applicable to an analysis of legislation of other states. The US, for example, has promulgated measures to incorporate the PSMA into its domestic law⁵⁵ and a number of countries have notified to the FAO plans of action to prevent IUU fishing.⁵⁶

⁵² ITLOS 'Case No.7', available at <https://www.itlos.org/cases/list-of-cases/case-no-7/>, accessed on 8 August 2015.

⁵³ *Chile-Swordfish* (Note 51); Stoll & Vöneky (Note 38) at 21.

⁵⁴ World Trade Organization (WTO) 'Chile — Measures affecting the Transit and Importing of Swordfish' available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm, accessed on 8 August 2015; ITLOS *Order 2009/1*, available at https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_7/Ord.2009.1-16.12.09.E.pdf, accessed on 8 August 2015; WTO 'European Union — Measures on Atlanto-Scandian Herring', available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds469_e.htm, accessed on 8 August 2015; Permanent Court of Arbitration (PCA) *Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. The European Union)*, available at <http://www.pcacases.com/web/view/25>, accessed on 8 August 2015 (**Atlanto-Scandian Herring PCA**).

⁵⁵ US IUU legislation Title III.

⁵⁶ FAO (Note 41).

Chapters II and III of the dissertation consider the consistency of the EU Regulations with the GATT. Chapter II finds that the EU Regulations contravene one or more of Articles I, V and XI of the GATT (the substantive provisions). Chapter III considers whether these measures, having contravened one of the GATT substantive provisions, may be justified under Article XX of the GATT (the exceptions provision). Chapter III concludes that, although well-crafted, the EU Regulations may still not be justifiable under the Article XX Chapeau in the particular circumstances of the herring dispute, based on principles in previous WTO cases. Chapter IV considers the relationship between multilateral environmental agreements (MEAs) relevant to IUU fishing and WTO agreements, to determine whether the EU Regulations could be considered GATT-consistent by reference to these MEAs or whether the MEAs could override WTO law.⁵⁷ Chapter V concludes.

⁵⁷ The referral of the herring dispute to both the WTO and UNCLOS also raises issues of jurisdictional conflict. An analysis of jurisdictional conflict is beyond the scope of this dissertation. However, it should be noted that it is unlikely that either the WTO or UNCLOS could have claimed exclusive jurisdiction over the herring dispute – in this regard see Stoll & Vöneky (Note 38) at 26-27 and Karin Oellers-Frahm ‘Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions’ in *Max Planck Yearbook of United Nations Law* 5 (2001) at 86-88.

Chapter II – GATT and the TBT

The Shared Stocks Regulation allows the EU to declare a country one which allows non-sustainable fishing (NSF country),⁵⁸ and to impose quantitative restrictions on imports of fish caught under its control. These restrictions extend to imports of fishery products made of or containing such fish, including fishery products made by other countries.⁵⁹ The Shared Stocks Regulation envisions that the idea of ‘control’ will be decided on a case-by-case basis,⁶⁰ and the Implementing Regulation provides that herring and mackerel caught under the control of the Faroes is that caught by vessels flying the Faroese flag or those vessels flying the flag of other states that are authorised to fish in the Faroes EEZ, or chartered by a Faroese firm or authorities.⁶¹ The Shared Stocks Regulation further allows the EU to prohibit exports of fishing vessels flying the flag of EU states to the NSF country,⁶² impose restrictions on the use of EU ports for vessels flying the flag of the NSF country that fish the common stock or associated species as well as those transporting such fish, whether flying the flag of the NSF country or not.⁶³ Private trade arrangements between EU ‘economic operators’ and the NSF country to allow an EU-flagged vessel to ‘use fishing opportunities’ of the NSF country, are also prohibited,⁶⁴ and there are a number of other measures, such as prohibitions on re-flagging of vessels (registering the vessel on a different shipping register),⁶⁵ which are designed to prevent evasion of these restrictions.⁶⁶

On this basis the Implementing Regulation was adopted, leading the Faroes to allege that the EU had breached Articles I, V and XI of the GATT.

A. Article I

GATT Article I provides for MFN treatment. ‘(A)ny advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country’

⁵⁸ Shared Stocks Regulation art 4.1(a).

⁵⁹ Ibid art 4.1(c).

⁶⁰ Ibid art 4.1(d).

⁶¹ Implementing Regulation art 3(d).

⁶² Shared Stocks Regulation art 4.1(i).

⁶³ Ibid art 4.1(e).

⁶⁴ Ibid art 4.1(j).

⁶⁵ Ibid art 4.1(g).

⁶⁶ Ibid – see eg arts 4.1(h) (chartering agreements) and 4.1(k) (joint fishing operations).

must be ‘accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties’ in respect of, *inter alia*, ‘all rules and formalities in connection with importation and exportation’.⁶⁷

Article I thus requires that products be like before there can be any discriminatory trade effect from favouring another trading partner – in this case the question is whether herring fished unsustainably is ‘like’ herring fished sustainably. DSB bodies consider products to be like when they have similar physical characteristics and end uses, when consumers are likely to consider the products interchangeable, and when they have the same or similar classifications under Member’s tariff schedules.⁶⁸ Generally the issue of tariff classification is used to bolster a finding made using the other three factors, and the less precise the product description in the schedule, the less relevant the tariff classification is.⁶⁹

Consumer tastes and preferences is often given a lot of weight in the analysis. In *EC-Asbestos* the AB, in reversing the Panel’s findings that the cement-based products containing asbestos fibres were not like those containing non-carcinogenic fibres, found that ‘a determination on the "likeness" of the cement-based products cannot be made...in the absence of an examination of evidence on consumers' tastes and habits.’⁷⁰ However, this finding was made under Article III of the GATT. Although Article III also requires a like product analysis, it is generally more focused on economic and competitive forces than Article I, as its purpose is to ensure that domestic and imported like products are not treated differently once imported products enter a country.⁷¹ Article I analyses are often based more on physical characteristics, in acknowledgment of the fact that WTO Members are still able to discriminate in a curtailed

⁶⁷ GATT art I(1).

⁶⁸ *Japan-Taxes on Alcoholic Beverages* (WT/DS8/AB/R; WT/DS10/AB/R; WT/DS11/AB/R) Report of the Appellate Body adopted on 1 November 1996 (**Japan-Alcohol AB**) at 20-22; *EC-Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/AB/R) Report of the Appellate Body adopted on 5 April 2001 (**EC-Asbestos AB**) at 39, amongst many others.

⁶⁹ Japan-Alcohol AB at 22.

⁷⁰ EC-Asbestos AB para 145.

⁷¹ Japan-Alcohol AB at 21; Robert E. Hudec “‘Like Product’: The Differences in Meaning in GATT Articles I and III” in Thomas Cottier & Petros Mavroidis (eds) *Regulatory Barriers and the Principle of Non-Discrimination in World Trade* (2000).

fashion using tariffs.⁷² Indeed, tariffication (requiring countries to change quantitative restrictions to equivalent tariffs) was an important issue in previous negotiating Rounds at the WTO.⁷³

Herring caught in Faroese waters may be physically different from that caught in the waters of other NEAFC parties like Norway or Iceland, because of the unique ocean conditions prevailing in the Faroes. However, this appears to apply more to groundfish species like haddock and cod which do not migrate. As the seas are a constant temperature around the Faroes, fish which do not migrate are exposed to one temperature for the duration of their lives. This gives them a particular texture.⁷⁴ Herring, which do migrate, do not consistently remain in one temperature. Fish from the Faroes also has a particular taste because of the diversity of food sources in the seas surrounding the Faroes, and is seen to be of high quality by those countries that trade with the Faroes, such as Spain.⁷⁵ This particular characteristic of Faroese fish would also seem to apply to herring caught in the Faroes, and may be a basis for differentiating Faroese herring from herring exported from other NEAFC countries.

These physical differences could also have an impact on consumer tastes and preferences and possibly even end uses. If Faroese fish is prized for its taste it may be sold fresh to eat, while other herring may be used in fisheries products. Conversely, consumers may not wish to eat fish caught unsustainably, although this would depend on whether there was an appropriate ecolabelling scheme in place to differentiate these products, as in the case of dolphin-friendly tuna. A full analysis is impossible without the benefit of empirical research on consumer preference. The OECD High Seas Taskforce also points out that it is unclear whether consumer demand for sustainable fish products in developed countries is driving corporate interest in these products (such as campaigns initiated by Whole Foods Markets in the US and J Sainsbury in the UK) or whether it is the other way around.⁷⁶

⁷² Hudec (ibid).

⁷³ Particularly the Tokyo and Uruguay Rounds.

⁷⁴ Faroe Islands (Note 1).

⁷⁵ Ibid.

⁷⁶ High Seas Task Force (2006) (Governments of Australia, Canada, Chile, Namibia, New Zealand, and the United Kingdom, WWF, IUCN and the Earth Institute at Columbia University) 'Closing the net: Stopping illegal fishing on the high seas' (2006) at 33.

It should also be noted that the EU does not differentiate Faroese herring from other herring in its tariff schedules, and nor do other countries.⁷⁷ Although tariff classification will generally not be the deciding factor in a like product analysis, it may carry more weight in an Article I than an Article III analysis, as the former deals specifically with tariffs.

A like product analysis therefore does not give a clear answer as to whether these products would be considered like under Article I of the GATT. If they are like, there would have been a violation of Article I in the herring dispute as the EU Regulations put Faroese imports at a disadvantage compared to like imports from other NEAFC countries. However, the argument could also be made that Faroese fish and fish of other NEAFC countries is not like, based on the physical characteristics of the herring, and the impact of this on consumer preferences and possibly end uses.

B. Article V

Article V of the GATT provides for freedom of transit for WTO Members through the territory of other Members. Under Article V:2 '(n)o 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.'⁷⁸

For these purposes, goods are also deemed to be in transit when they are being transported across a state to a destination outside that state (traffic in transit).⁷⁹ A WTO Member is required to give freedom of transit to all goods of another Member, including traffic in transit, which must be extended to all Members on an MFN basis.⁸⁰

Article V:2 does not appear to require a like product analysis. Article V refers to like products only in Ad Article V:5, which deals with transportation charges. In *Colombia-Ports of Entry* the Panel held that no like product analysis was necessary for Article V:6. Article V:6 provides that no less favourable treatment should be accorded to goods which have been in transit through the territory of another Member than that accorded to goods which have been transported directly

⁷⁷ WTO 'Current Situation of Schedules of WTO Members' available at https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm, accessed on 8 March 2016.

⁷⁸ GATT art V:2.

⁷⁹ Ibid art V:1; *Colombia-Indicative Prices and Restrictions on Ports of Entry* (WT/DS366/R), Report of the Panel adopted on 20 May 2009 (**Colombia-Ports of Entry Panel**) para 7.397.

⁸⁰ *Colombia-Ports of Entry Panel* para 7.401.

from their place of origin. The comparison under this Article was, therefore, between any type of good shipped from its place of origin and any good that has been in transit through another country, rather than between different types of goods.⁸¹ The same is true of Article V:2 which prohibits distinguishing between goods on the basis of their flag, port of origin, ownership and other bases unrelated to characteristics of the good itself. Certainly the *Colombia-Ports of Entry* Panel did not conduct a like product analysis in coming to its conclusion that Colombia's measures were inconsistent with Article V:2.⁸²

The ban on imports of herring and mackerel imposed by the Implementing Regulation included a ban on transshipment of these fish and fishery products within EU Ports,⁸³ as well as the general ban on entry into EU ports. The Shared Stocks Regulation defines 'transshipment' as 'the unloading of all or any fish or fishery products on board a fishing vessel to another vessel.'⁸⁴ Although this does not necessarily mean that the goods will then be taken to a place outside of the EU, the purpose of transshipment is to take goods to a place other than where they are transhipped, which may be outside the EU. Fisheries products may also be unloaded in EU ports for the purpose of being transported overland to a destination outside the EU. Thus, at least some of the banned products would, but for the ban, be in transit through the EU rather than having the EU as their final destination.

The EU Regulations therefore discriminated on the basis of origin and the flag of the vessel for the purposes of Article V:2 by refusing to allow vessels flying the flag of the Faroes or transporting its fish and fishery products access to EU ports for transshipment purposes, or to unload the vessel and transport goods through the EU to another destination.

C. Article XI

Article XI(1) of the GATT provides for a general prohibition on quantitative trade restrictions, including import bans and quotas. A total import ban would appear to be in contravention of

⁸¹ Ibid para 7.477.

⁸² Ibid paras 7.404-7.431.

⁸³ Implementing Regulation art 5(1).

⁸⁴ Shared Stocks Regulation art 2(e).

Article XI(1) based on past WTO jurisprudence in cases such as *Brazil-Tyres*⁸⁵ and *US-Tuna I* and *II*.⁸⁶

There is, however, some debate about whether this article is still applicable in cases similar to the *US-Tuna* cases.⁸⁷ Both *US-Tuna I* and *II* dealt with a US measure restricting imports of tuna which had been harvested using purse-seine fishing methods which involved setting on dolphins (surrounding schools of dolphins to catch tuna swimming below), a fishing technique used by the majority of the Mexican tuna fishing fleet.

In *US-Tuna I* the US argued that its measures should be analysed under Article III of the GATT, rather than Article XI. Article III provides for domestic and imported goods to be given equal treatment once they enter a domestic market. Ad Article III extends this requirement of equality to the situation where a product is imported into a state and a law applicable to both domestic and imported goods is imposed on the imported goods at the border. Because of Ad Article III the US argued that its measures should be analysed on the basis of Article III and not Article XI, as an enforcement of an internal measure at the point of importation, rather than an import ban on foreign goods. As the US applied similar, and in fact slightly more onerous, dolphin conservation measures to its own fishing vessels, there was no discrimination in applying import restrictions based on whether the tuna to be imported into the US was caught in a dolphin-friendly manner.⁸⁸ The Panel found, however, that Article III could not apply in this manner where products can be distinguished only by virtue of their process and production methods (PPMs), rather than by product characteristics,⁸⁹ and reiterated this finding in *US-Tuna II*.⁹⁰ PPMs refer to the manner in which a product is made or harvested. In *US-Tuna I* and *II* the tuna was physically identical but the US sought to differentiate Mexican tuna because of the way that it was harvested.

⁸⁵ *Brazil-Measures Affecting Imports of Retreaded Tyres* (WT/DS332/R) Report of the Panel adopted on 17 December 2007 para 7.34. This was an effective import ban brought about through the refusal to issue import licenses.

⁸⁶ *US-Restrictions on Imports of Tuna* (DS21/R) unadopted Report of the Panel of 3 September 1991 (**US-Tuna I**) para 5.18; *US-Restrictions on Imports of Tuna* (DS29/R) unadopted Report of the Panel of 16 June 1994 (**US-Tuna II**) para 5.10.

⁸⁷ Michael Trebilcock, Robert Howse & Antonia Eliason *The Regulation of International Trade* (2013) at 681.

⁸⁸ *US-Tuna I* para 5.10.

⁸⁹ *Ibid* paras 5.14-5.15.

⁹⁰ *US-Tuna II* para 5.8.

Trebilcock, Howse and Eliason argue that in the wake of the *US-Shrimp* and *EC-Asbestos* decisions, the product-process distinction drawn in *US-Tuna I* and *II*, which despite being dubious even at the time it was handed down was adopted by WTO Members as law, may have fallen away.⁹¹ In *US-Shrimp* US legislation conditioned access to the US shrimp market on the use by countries of turtle excluder devices (TEDs) on shrimp vessels, which allow turtles to escape from shrimp nets.⁹² In deciding the case, the AB stated that if WTO Members were not allowed to pass domestic measures conditioning access to its markets which required other countries to change their internal policies,⁹³ most of Article XX of the GATT would be rendered inutile.⁹⁴ Article XX allows certain measures even if they violate substantive GATT provisions, and is discussed in Chapter III below. According to Trebilcock, Howse and Eliason, the pronouncement of the AB that Article III would be rendered inutile suggests that measures based on process, rather than policy, such as a measure which requires all shrimp to be caught in a way which does not harm turtles, would not violate Article III at all. This is because, if it did violate Article III, it would need to be justified under Article XX. Article XX would therefore have a purpose and not be ‘rendered inutile’ by its inability to justify measures aimed at changing other country’s policies.⁹⁵ The authors also point to the case of *EC-Asbestos* as providing further evidence that process-based measures which are non-discriminatory do not violate Article III. The AB in *EC-Asbestos* found that there are two parts to an Article III analysis – whether the domestic and imported products are like products and, if they are, whether imported products receive less favourable treatment than like products. Thus, even when products are considered so closely competitive that they are like (as mentioned above Article III focuses on the competitive relationship between products) they may still be distinguished in domestic legislation, provided imported products are not treated less favourably.⁹⁶ In this regard the AB

⁹¹ Trebilcock, Howse and Eliason (Note 87) at 681.

⁹² *US-Import Prohibition of Certain Shrimp and Shrimp Products* (WT/DS58/AB/R) Report of the Appellate Body adopted on 6 November 1998 (**US-Shrimp AB**).

⁹³ The Panel in *US-Tuna II* found that the US measures could not be justified under GATT Article XX(b) or (g) – discussed in Chapter III(A) below – because the measures required countries like Mexico to put in policies to reduce dolphin mortality in tuna fishing – *US-Tuna II* para 5.27.

⁹⁴ *US-Shrimp AB* para 121.

⁹⁵ Trebilcock, Howse and Eliason (Note 87) at 681.

⁹⁶ *Ibid* at 158 and 681.

has noted in cases like *Korea-Beef*⁹⁷ and *Dominican Republic-Cigarettes*⁹⁸ that different treatment is not necessarily unequal treatment. Provided that equally restrictive regulations are imposed on domestic products and imported products therefore, there is no violation of Article III.

The explicit recognition of PPMs as a basis on which to differentiate goods in the TBT⁹⁹ appears to be further recognition of the falling away of this distinction, if it ever existed. Although there may be a product-process distinction drawn in an application of other provisions in the TBT, the Panel in *US-Tuna III*, regarding access to a US label for dolphin-safe tuna, remarked that consumer preferences based on the dolphin-safe status of products might be relevant to an assessment of likeness under Article 2.1 of the TBT¹⁰⁰, using the same criteria as those relevant in a GATT Article III analysis.¹⁰¹ This suggests that, where products are not like because they have different PPMs, there would be no discriminatory effect in differentiating between such products.

The EU Regulations do not deal with fish caught by EU state vessels. However, the IUU and Control Regulations do deal with this, subjecting EU state vessels to catch restrictions, suspension or cancelling of financial assistance, closed fisheries and reduction of catch quotas to EU states where there has not been compliance with conservation and management methods and overfishing.¹⁰² EU state vessels are not denied access to their home ports if they exceed catch restrictions.¹⁰³ However, the IUU Regulation does provide for sanctioning of nationals and EU state vessels for IUU fishing, including seizing catches and fishing gear,¹⁰⁴ not allowing access to EU ports apart from the vessel's home port,¹⁰⁵ suspension or withdrawal of fishing rights,¹⁰⁶ and,

⁹⁷ *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (WT/DS161/AB/R; WT/DS169/AB/R) Report of the Appellate Body adopted on 10 January 2001 para 137.

⁹⁸ *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* (WT/DS302/AB/R) Report of the Appellate Body adopted on 19 May 2005 para 96.

⁹⁹ TBT Annex 1(1).

¹⁰⁰ *US-Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381/R) Report of the Panel, as modified by the Appellate Body Report adopted on 13 June 2012 (**US-Tuna III Panel**) para 7.249.

¹⁰¹ *Ibid* paras 7.224-7.225.

¹⁰² Control Regulation Title XI.

¹⁰³ IUU Regulation art 37(5).

¹⁰⁴ *Ibid* art 43(e).

¹⁰⁵ *Ibid* art 37(5).

¹⁰⁶ *Ibid* art 45(4).

in serious cases, administrative and criminal sanctions.¹⁰⁷ These are harsh penalties and in certain cases (e.g. refusal of access to ports) directly comparable to those applied to an NSF country.¹⁰⁸ EU nationals in violation of the IUU Regulation may, therefore, be deprived of their fishing rights and livelihood, just as a trade ban will deprive nationals of third party countries of their livelihood. If the product-process distinction really has fallen away therefore, the EU Regulations may be considered non-discriminatory under Article III of the GATT, rather than a violation of Article XI of the GATT.

Given that no DSB body has explicitly stated that the *US-Tuna* cases were wrongly decided, it is not clear whether a Panel or the AB would, in future, decide this sort of question under Article III or Article XI of the GATT. This would depend largely on the issues. In *US-Tuna III* the Panel ultimately decided that the products were like, because to decide otherwise would be to pre-empt the question it was faced with – namely whether Mexican tuna qualified for a dolphin-safe label or not.¹⁰⁹ If the matter had gone to a Panel in the herring dispute and it was found that Article III did not apply, the Panel would likely have found that the EU Regulations violated Article XI, on the basis of past jurisprudence.¹¹⁰ Although there are a limited number of exceptions in GATT Article XI:2, none of these are applicable in the herring dispute. In the herring dispute the contravention of Article XI:1 may also very well have been conceded by the EU had the matter come before a Panel, as this has been done in the past.¹¹¹

D. TBT Agreement

Measures such as the EU Regulations potentially contravene the TBT if they can be considered technical regulations. A technical regulation is defined in Annex 1.1 of the TBT as a ‘(d)ocument which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory.’

¹⁰⁷ Ibid art 44.

¹⁰⁸ Ibid arts 39-47.

¹⁰⁹ *US-Tuna III* Panel para 7.250.

¹¹⁰ See Notes 85 and 86 above.

¹¹¹ See eg *India-Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (WT/DS90/R) Report of the Panel adopted on 22 September 1999 para 5.123. See also *US-Tuna II* para 5.7 where the US did not put forward any evidence to refute the XI:1 violation.

In *EC-Seals* the AB found that regulations prohibiting trade in seal products and products containing seals, with an exception for subsistence but not commercial sealing by indigenous communities (the IC exception), were not technical regulations.¹¹² According to the AB, the existence of the IC exception meant that the trade restrictions imposed by the regulations relied not only on the fact that the products contained seal but also on the identity of the hunter and nature of the hunt, which are not product characteristics.¹¹³ The fact that seal was an input in these products was, therefore, not enough to bring the products within the import ban – they also had to be hunted in a particular manner (i.e. commercially). However, the AB declined to conduct a similar analysis with regard to whether the regulations laid down related PPMs. This was because of due process concerns, as the issue of PPMs had not been argued at Panel stage and the Panel had not made any findings in this regard.¹¹⁴

As noted by Bhala, Gantz and Keating et al, the *EC-Seals* case appears to be ‘results-oriented jurisprudence’ in that its interpretation was geared at a particular outcome (narrowing the ambit of the TBT agreement). According to the authors, the AB emphasised the importance of the various exceptions as integral parts of the Seal Regime to avoid over-inclusion of Member’s legislative measures under the TBT, which is more onerous to comply with than the GATT.¹¹⁵ The AB similarly interpreted Article 2.1 of the TBT to render the TBT less stringent in *Clove-Cigarettes*,¹¹⁶ reading in a requirement that a measure may be considered discriminatory provided it stems exclusively from a legitimate regulatory distinction, such as protection of the environment or animal life and health. Prior to this, if a measure was discriminatory it was irrelevant if it was taken for one of these purposes, unlike in the GATT, where measures may be justified by reference to such purposes under Article XX. The AB’s careful interpretation of the TBT in these cases is possibly in response to criticism by commentators such as Trebilcock,

¹¹² *EC-Measures Prohibiting the Importation and Marketing of Seal Products*, (WT/DS400/AB/R; WT/DS401/AB/R) Report of the Appellate Body adopted on 18 June 2014 (**EC-Seals AB**) para 5.59.

¹¹³ *Ibid* para 5.45.

¹¹⁴ *Ibid* para 5.69

¹¹⁵ Raj Bhala, David A Gantz, Shannon B Keating et al ‘WTO Case Review 2014’ (2015) 32 *Arizona Journal of International & Comparative Law* 2 at 515.

¹¹⁶ *US-Measures Affecting the Production and Sale of Clove Cigarettes* (WT/DS406/AB/R), Report of the Appellate Body adopted on 24 April 2012 (**US-Clove Cigarettes AB**) paras 174-175.

Howse and Eliason, who noted that unless the TBT was interpreted ‘with great caution and sensitivity’ it ran the risk of being overly intrusive on domestic regulatory choices.¹¹⁷

The EU Regulations banning the import of products containing herring and mackerel caught by Faroese vessels similarly does not restrict all imports of herring and mackerel, but only those caught by Faroese fishers, or those fishers operating under the control of the Faroes. The fact that herring and mackerel are in the product is, therefore, not a sufficient condition to prevent their import into the EU. The fish must also have been caught by a defined class of fishers. Thus, on the strength of the findings in *EC-Seals*, the EU Regulations do not fall under the first part of the definition of a technical regulation in the TBT as they do not differentiate between herring mackerel only on the basis of product characteristics. Drawing on the analysis of Bhala, Gantz and Keating et al it is also probable that the AB will interpret the second part of the technical regulation definition cautiously to avoid every measure aimed at preventing some sort of undesirable conduct, such as environmental degradation, being challenged under the TBT. It therefore appears that the EU Regulations do not fall under the TBT, a conclusion which is bolstered by the fact that the Faroes did not cite any provisions of the TBT in its request for consultations.¹¹⁸

¹¹⁷ Trebilcock, Howse & Eliason (Note 87) at 316.

¹¹⁸ Request for Consultations.

Chapter III – Article XX Exceptions

Article XX of the GATT provides a list of exceptions which may be used to justify measures which are inconsistent with substantive provisions of the GATT. Those exceptions which have been successfully invoked to justify environmental measures are Articles XX(a) (measures necessary to protect public morals), XX(b) (measures necessary to protect human, animal or plant life or health) and XX(g) (measures related to the conservation of exhaustible natural resources). After deciding that a measure is provisionally justified under one of these provisions, the measure must then be tested against the Article XX Chapeau (hereafter referred to as the Chapeau) to determine whether it is applied in a manner which constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.¹¹⁹

A. Provisional Justification

(i) Article XX(a)

Article XX(a) was successfully invoked in *EC-Seals* (AB Report) to justify measures banning the import of seal products into the EU because of the inhumane methods employed to kill seals.¹²⁰ Certain findings of the Panel Report were reversed by the AB in its decision. However, aspects of the Panel Report, such as its evaluation of what constituted public morals in the circumstances of the case, remain relevant to the interpretation of Article XX(a).

In *EC-Seals* the public morals at issue were those of the EU public.¹²¹ The public morals test takes into account the preferences of consumers. It does not consider economic factors, as with Article III, but rather the ‘standards of right and wrong conduct maintained by or on behalf of a community or nation’¹²² which can ‘vary in time and space, depending upon a range of factors,

¹¹⁹ See US-Shrimp AB paras 118-122, where the AB criticised the Panel for reversing the steps in the Article XX test and considering the Chapeau first.

¹²⁰ EC-Seals AB para 5.290.

¹²¹ *EC-Measures Prohibiting the Importation and Marketing of Seal Products* (WT/DS400/R; WT/DS401/R) Report of the Panel, as modified by the Appellate Body Report, adopted on 18 June 2014 (**EC-Seals Panel**) para 7.409.

¹²² *US-Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, Report of the Panel adopted on 20 April 2005 para 4.465.

including prevailing social, cultural, ethical and religious values'.¹²³ A WTO Member is not required to show that public morals are actually at risk to invoke the exception, or to identify the exact content of the public morals at issue.¹²⁴ A Member may also decide that different levels of protection are appropriate in similar situations (for example seal hunting and deer hunting).¹²⁵

The Panel, in evaluating what constituted the public morals of the EU, considered the measures themselves and the drafting history of the seal regulations. It based its assessment primarily on the fact that these documents referred to strong public feelings about the manner in which seals are killed and the pain and suffering they experience.¹²⁶ It also noted that a number of EU countries and the EU itself had passed measures that aimed to protect animal welfare, demonstrating the importance of the issue to the EU.¹²⁷ These provisions of the Panel Report suggest that it is necessary to show that a measure is in fact taken for reasons of public morality in order to fall under Article XX(a), as demonstrated in the measure itself and surrounding circumstances.

The issue of IUU fishing of herring and mackerel does not provoke the same emotional response as the killing of seals, especially given the inhumane methods of killing to which seals are subjected.¹²⁸ It is also likely that the issue is not as well known to the EU public as something like dolphin mortality in the killing of tuna, as this is often the subject of eco-labels. In addition, the introductory language of all the EU Regulations shows clearly that their purpose is to comply with the EU's international obligations, as well as to manage and conserve fish stocks,¹²⁹ rather than protect public morals. It is, therefore, highly unlikely that a Panel would have found Article XX(a) to be applicable in the herring dispute.

¹²³ Ibid para 4.461 – these findings were made in the context of Article XIV of the General Agreement on Trade in Services of 1994 (GATS) and approved in EC-Seals Panel para 7.380 for the purposes of Article XX(b) of the GATT.

¹²⁴ EC-Seals AB paras 5.198-5.199.

¹²⁵ Ibid para 5.200.

¹²⁶ EC-Seals Panel paras 7.386-7.398.

¹²⁷ Ibid paras 7.405-7.408.

¹²⁸ Ibid - the Panel noted at para 7.222 that it may not be possible to plan to kill a seal humanely because of the circumstances of the hunt.

¹²⁹ Shared Stocks Regulation Preamble; Implementing Regulation Preamble.

(ii) Article XX(b)

Whether a measure protects human, animal or plant life or health has never been a particularly contentious issue and the DSB bodies have recognised that the protection of humans from cancer caused by asbestos fibres,¹³⁰ protection of humans and animals from diseases and smoke inhalation caused by tyre fires and the breeding of mosquitoes in used tyres,¹³¹ protection of dolphins¹³² and restrictions on cigarettes¹³³ may all fall under this exception. It is possible that the EU could have argued that the EU Regulations aim to protect herring and are therefore justified under XX(b). However, the EU Regulations are not specifically aimed at protecting the life of herring, but rather at managing the herring stock to preserve it as a future resource. Indeed, those pre-WTO cases dealing with measures put in place to conserve management of tuna and herring stocks were decided under Article XX(g), rather than XX(b). The Implementing Regulation, in examining the consistency of its own measures with international law, also refers specifically to the fact that the measures imposed on the Faroes relate to an exhaustible natural resource. This suggests that the Article XX(g) is the more appropriate exception to raise in these circumstances. However, the EU Regulations do, arguably, also seek to preserve the lives of herring, and the possibility of an argument under Article XX(b) cannot be discounted as a possible defence to the GATT violations discussed.

Under the second aspect of the Article XX(b) analysis, the question is whether the EU Regulations would be considered *necessary* to protect Atlantic herring. Factors relevant to determining necessity include the importance of the interests at stake, the contribution to the fulfilment of the objective at issue, the trade restrictiveness of the measure and whether there are reasonable less trade-restrictive alternatives that achieve the WTO Member's desired level of protection, to which a DSB body will defer.¹³⁴ These factors must be weighed holistically.¹³⁵

In the herring dispute the important interest at stake would have been the prevention of IUU fishing and therefore the conservation of the fish stocks, the prevention of the collapse of an

¹³⁰ EC-Asbestos AB.

¹³¹ *Brazil-Measures Affecting Imports of Retreaded Tyres* (WT/DS332/AB/R), Report of the Appellate Body adopted on 17 December 2007 (**Brazil-Tyres AB**) para 156.

¹³² US-Tuna II.

¹³³ *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes* (DS10/R-37S/200) Report of the Panel adopted on 7 November 1990.

¹³⁴ Brazil-Tyres AB para 156.

¹³⁵ *Ibid* para 156.

important fish stock with its implications for both food security and ecological diversity associated with IUU fishing. Many of these are seen as important values by WTO Members.¹³⁶ This would have to be balanced against the highly trade-restrictive nature of the total import ban.

The EU's desired level of protection, as reflected in the Implementing Regulation, relates to the ICES recommendations and the allocation key for 2012.¹³⁷ The purpose of following ICES' recommendations is to avoid collapse of the herring stock. The EU's desired level of protection was, therefore, directly related to keeping the Faroes within their 5% catch limit to avoid collapse of the stock. Because herring and mackerel are associated species, to the point at which is difficult to catch one without catching the other, the EU also needed to prevent imports of mackerel to achieve its desired level of protection.¹³⁸

This led to a total import ban being imposed on Faroese herring and related products which is highly trade restrictive. In *Brazil-Tyres* the AB found that, while a total import ban is permissible, the measure imposing the ban must make a material contribution to the objective at issue.¹³⁹ However, the AB did recognise that a measure may simply be one of a series of measures designed to deal with a complex environmental problem, in which case it could be difficult to determine the contribution which one particular measure might make in dealing with the problem.¹⁴⁰

In order to effectively combat IUU fishing the EU has promulgated the Shared Stocks and IUU Regulations, which includes a number of PSMs. Implementing Regulations or Decisions are imposed in specific cases, and there have been several designating a country a non-cooperating country under the IUU Regulation (those countries which cannot effectively police IUU fishing in their own waters).¹⁴¹ The Control Regulation also provides for measures to be taken by EU states to control and monitor fisheries.¹⁴² These Regulations do appear to be having an impact

¹³⁶ Note eg US-Shrimp AB; Brazil-Tyres AB. See also the Agreement on Agriculture of 1994 and the Doha Ministerial Declaration (WT/MIN(01)/DEC/1) adopted on 14 November 2001 s13, regarding the importance of food security in the WTO.

¹³⁷ See Chap I.

¹³⁸ Implementing Regulation Preamble 23.

¹³⁹ Brazil-Tyres AB para 151.

¹⁴⁰ Ibid para 151.

¹⁴¹ See eg Council Implementing Decision of 24 March 2014 establishing a list of non-cooperating third countries in fighting IUU fishing pursuant to Regulation (EC) No 1005/2008.

¹⁴² See Note 48 above.

on IUU fishing as they have led a number of countries to implement and enforce IUU fishing measures.¹⁴³

It also appears that there are no less trade-restrictive means that could be taken in this situation. The Shared Stocks Regulation provides for a number of measures that may be taken by the EU to sanction states which must be ‘proportionate to the objectives pursued’.¹⁴⁴ The Implementing Regulation sets out a number of alternatives in this regard and provides cogent reasons as to why none of the less-restrictive options are feasible. For example, the restrictions on both herring and mackerel are justified by the fact that these species cohabit in spring and summer to such an extent that it is impossible to catch one without catching the other. Allowing mackerel imports from the Faroes into the EU would, therefore, mean that high numbers of herring continued to be caught by the Faroes.¹⁴⁵

Arguably, the EU could have imposed a less-restrictive trade measure in these circumstances in the form of a quota on herring shipped from the Faroes, limited to the 5% catch limit assigned to the Faroes by the NEAFC contracting parties in 2012.¹⁴⁶ In 2012 around 70% of Faroese mackerel and herring catches were exported to the EU.¹⁴⁷ This represents about 36000 tonnes of herring¹⁴⁸, slightly more than the 31000 tonne limit imposed on the Faroes by the NEAFC parties for 2013.¹⁴⁹ It appears, therefore, that the imposition of a quota of 5% would not be effective in preventing stock collapse as the EU would be importing only slightly less herring than it had imported in the previous year while the surplus herring could be sold to other markets. The Faroes was indeed attempting to find markets in Africa and Russia after the EU restrictions were announced.¹⁵⁰ This, of course, raises the issue that all the herring and mackerel caught by the Faroes could be sold to other markets, in which case even a full import ban would be ineffective.

¹⁴³ Thailand eg was awarded a yellow card in 2014 and is currently working with the EU to improve the policing of its waters to prevent the imposition of trade sanctions – see Lamonphet Apisitniran ‘Cleaner’ image for Thai fish industry’ *Bangkok Post* 14 January 2016, available at <http://www.bangkokpost.com/news/general/825572/cleaner-image-for-thai-fish-industry>, accessed on 6 February 2016. See further European Commission Press Release Database ‘EU acts on illegal fishing: Yellow card issued to Thailand while South Korea & Philippines are cleared’ available at http://europa.eu/rapid/press-release_IP-15-4806_en.htm, accessed on 6 February 2016.

¹⁴⁴ Shared Stocks Regulation art 5(1)(c).

¹⁴⁵ Implementing Regulation 23-25.

¹⁴⁶ See Chap I.

¹⁴⁷ Magnason (Note 19).

¹⁴⁸ Hagstova Føroya (Note 16) at 28.

¹⁴⁹ Implementing Regulation Preamble 7.

¹⁵⁰ Magnason (Note 19).

Without the EU market however, the export value of the herring would decrease.¹⁵¹ The Faroes would then have to decide whether selling a greater amount of herring at a lower price or a smaller amount at a higher price would yield the greatest amount of revenue. Allowing the same amount of herring to be imported to the EU as had been imported in the previous year would give access to these higher prices and render the decision a simple one. The imposition of a total import ban was therefore the only way to achieve the EU's objective of preventing IUU fishing of herring. In determining whether this would have been effective in the circumstances, the cost-benefit analysis discussed would have to be conducted.

In addition, the lack of a quota on mackerel, the associated species, would, as pointed out by the EU, mean that mackerel, and therefore herring, continued to be caught in high amounts. If such herring could not be imported to other trading partners it would be wasted, neither of which would assist in the protection of the herring stock.

The proposed less-restrictive measure should also be reasonable in the circumstances. In *Brazil-Tyres* the AB stated that the ability of a country to implement particularly costly measures may be relevant in assessing whether these measures are reasonably available alternatives to the challenged measure.¹⁵² In the herring dispute the monitoring of a quota would put a heavy administrative and cost burden on the EU, particularly as the quota would extend to fisheries products which are often made up of a number of components.

This analysis suggests that there are indeed no less trade-restrictive alternatives available in the herring dispute. As the EU Regulations also make a contribution to the EU's policy of combatting IUU fishing, which serves a number of important interests, it is likely that, on the basis of past jurisprudence¹⁵³, a Panel would have found these factors to outweigh the trade restrictiveness of the ban. The EU Regulations would therefore be provisionally justified under Article XX(b) if they were also found to have been promulgated for the purpose of protecting herring life or health.

¹⁵¹ Ibid.

¹⁵² Brazil-Tyres AB para 171.

¹⁵³ Ibid.

(iii) Article XX(g)

There are three parts to Article XX(g) – a measure must be for the conservation of an exhaustible natural resource, must be reasonably related¹⁵⁴ to the objective of the WTO Member of conserving such resource and must be even-handed, in that it either applies to, or similar measures are applied to, domestic production or consumption.¹⁵⁵

In two pre-WTO cases tuna, herring and salmon were held to be exhaustible natural resources¹⁵⁶ and in *US-Shrimp*, the AB made it clear that an exhaustible natural resource may be one that is renewable, but is susceptible to ‘depletion, exhaustion and extinction’.¹⁵⁷ The AB also relied on CITES¹⁵⁸ and UNCLOS¹⁵⁹ to find that the turtles the US were trying to protect were exhaustible natural resources.

Although herring is not in the CITES appendices, it is recognised by ICES and NEAFC as in need of management to prevent stock collapse. The EU and Faroes are also required to cooperate to conserve straddling fish stocks under UNCLOS and UNFSA.¹⁶⁰ A number of FAO Agreements further provide for cooperation to conserve fish stocks.¹⁶¹ The FAO has traditionally been closely related to the WTO with the Agreement on Sanitary and Phytosanitary Measures (SPS) specifically directing WTO Members to rely on the standards of the FAO and WHO body, Codex Alimentarius, when creating SPS measures.¹⁶² Coupled with the explicit recognition in earlier GATT-era cases that fish, including herring, is an exhaustible natural resource, a Panel would almost certainly find herring to be an exhaustible natural resource.

In *US-Shrimp*, the AB did not comment on the issue of extra-territoriality, finding instead that there was a ‘nexus’ between the United States and the turtles the measure aimed to protect, as the turtles passed through US waters while migrating.¹⁶³ It is possible that the Faroes would have

¹⁵⁴ *US-Shrimp* AB para 141

¹⁵⁵ *US-Standards for Reformulated and Conventional Gasoline* (WT/DS2/AB/R) Report of the Appellate Body adopted on 20 May 1996 (**US-Gasoline AB**) at 20-21.

¹⁵⁶ *US-Canada Tuna* para 4.9; *Canada-Herring and Salmon* para 4.4.

¹⁵⁷ *US-Shrimp* AB para 128.

¹⁵⁸ *Ibid* para 132.

¹⁵⁹ *Ibid* para 130.

¹⁶⁰ See part B(i) below.

¹⁶¹ FAO Fisheries Code arts 11.2.9 and 11.2.14; PSMA arts 6 and 15; IPOA-IUU ss9.1 and 68.

¹⁶² Agreement on Sanitary and Phytosanitary Measures of 1994 (SPS) Annex A(3).

¹⁶³ *US-Shrimp* AB para 133.

raised this argument had the herring dispute gone to a panel, as it alleged in its 2014 statement on the herring dispute that there is a ‘virtual absence of Atlanto-Scandian herring in EU waters’.¹⁶⁴ However, it seems that herring do pass through EU waters but have simply been overfished.¹⁶⁵ It was also recognised in *US-Tuna II* that under general international law a state may regulate its nationals, including its fishermen and vessels flying its flag, with regard to natural resources outside its territory. The US therefore pursued its policy to conserve dolphins in the eastern tropical Pacific ‘within its jurisdiction over its nationals and vessels’.¹⁶⁶ Another potential argument to an allegation that there is no nexus between a state and fish stocks is that the oceans are inter-connected, with actions taken in one part invariably affecting the whole. Although the AB in *US-Shrimp* did not need to deal with the issue of extra-territoriality as sea turtles migrate through US waters, the argument could be made, especially in light of the recognition that the ocean is a shared resource in UNCLOS.¹⁶⁷ Certainly, Tanaka is of the view that the ocean ‘is one unit, at least in a physical sense’ and that many species do not respect man-made boundaries, such as the EEZs provided for in UNCLOS.¹⁶⁸

The second issue – whether a measure is related to a Member’s policy objective – is satisfied by considering whether there is a reasonable relationship between means and ends. In other words the measure must not be too broad in scope to achieve its policy objective.¹⁶⁹ In *US-Tuna II* the Panel found that a measure which attempts to force another state to change its policies could never be justified under the GATT.¹⁷⁰ However, the AB in *US-Shrimp* found that this would render many of the Article XX exceptions ineffective, and that such measures should be allowed in principle.¹⁷¹ In *US-Shrimp* the legislation was found not to be overbroad to achieve its objective as it took into account that in some areas there was a low risk of catching sea turtles

¹⁶⁴ Johannesen (Note 42).

¹⁶⁵ Kat Willson, Mar Cabra & Marcos Garcia Rey ‘Nearly €6 Billion in Subsidies Fuel Spain’s Ravenous Fleet’ in *Looting the Seas: Part II Digital Newsbook* (2012) available at http://cloudfront-4.icij.org/sites/icij/files/looting_the_seas_0.pdf, accessed on 16 February 2016 at 54.

¹⁶⁶ *US-Tuna II* paras 5.17-5.20.

¹⁶⁷ See eg arts 63, 64 and 87.

¹⁶⁸ Yoshifumi Tanaka *The International Law of the Sea* 2 ed (2015) at 4.

¹⁶⁹ *US-Shrimp* AB para 136.

¹⁷⁰ *US-Tuna II* para 5.27.

¹⁷¹ *US-Shrimp* AB para 121.

and that countries could use a regulatory program comparable to that used by the US with a comparable rate of incidental sea turtle take.¹⁷²

The purpose of promulgating the EU Regulations was to ensure the long term conservation of straddling fish stocks, in this case the herring stock.¹⁷³ Such a purpose is permissible in light of *US-Shrimp*. As mentioned, the Shared Stocks Regulation follows a proportionality approach when imposing sanctions for non-compliance. This allowed the EU to tailor the Implementing Regulation to the circumstances of the case, and justify its reasons for imposing it.¹⁷⁴ The EU Regulations therefore take a nuanced approach, and do not appear overbroad to achieve their objective of preventing IUU fishing.

Motive was another issue raised in the context of the ‘related to’ criterion in *US-Shrimp*.¹⁷⁵ The AB pointed out that the policy of conserving sea turtles was shared by the parties and third parties to the dispute and that ‘none of the parties...question the genuineness of the commitment of the others to that policy.’¹⁷⁶ This is a potential issue that may arise in Article XX(g) cases.

It is unlikely that the EU’s commitment to its policy objective of preventing IUU fishing is not a legitimate one. Its actions to prevent IUU fishing in other areas, including the sanctioning of non-cooperating countries¹⁷⁷ and efforts to assist these countries¹⁷⁸ certainly do not appear to be protectionist in any way. However, in the particular circumstances of the herring dispute, the EU may have had another basis on which to impose the sanctions – namely to prevent the Faroes receiving a higher share of the TAC. Had the Faroes been given a higher allocation this would likely have reduced the EU’s share. The EU has been accused of taking advantage of poor countries in the past, notably regarding the buying of fishing rights in developing countries such as Mozambique, Morocco and Ivory Coast¹⁷⁹ and its motives could potentially have been in question if the herring dispute had gone to a Panel. However, it is more likely that a panel would

¹⁷² Ibid paras 139-141.

¹⁷³ Shared Stocks Regulation art 1(1); Implementing Regulation art 2.

¹⁷⁴ Implementing Regulation Preamble.

¹⁷⁵ *US-Shrimp* AB para 135.

¹⁷⁶ Ibid para 135.

¹⁷⁷ IUU regulation chap VI.

¹⁷⁸ See *Apisitniran* (Note 143).

¹⁷⁹ See Kat Willson & Mar Cabra ‘Spain Doles Out Millions In Aid Despite Fishing Company’s Record’ in *Looting the Seas: Part II Digital Newsbook* (2012) available at http://cloudfront-4.icij.org/sites/icij/files/looting_the_seas_0.pdf, accessed on 16 February 2016 at 52.

have dealt with this issue under the Chapeau in the context of discrimination, as there is only passing mention of this issue in *US-Shrimp*, and therefore little guidance on the matter in WTO jurisprudence.

The third requirement of Article XX(g) is that a measure must be even-handed. The Shared Stocks Regulation provides specifically for the sanctioning of other countries for non-cooperation through trade measures, which cannot be applied to its member states. However, the IUU and Control Regulations, as noted above,¹⁸⁰ place catch restrictions on EU states and nationals, and provide sanctions if these restrictions are not adhered to. Thus, the EU Regulations, IUU regulation and Control Regulation together appear to satisfy the requirement of even-handedness on their face. Whether the measures are applied evenhandedly in practice is an aspect which the DSB bodies deal with under the Chapeau.

B. The Chapeau

Based on the foregoing, a DSB body could certainly find that the EU Regulations are preliminarily justified under at least Article XX(g) of the GATT, although there is a slight possibility that the EU's motives for imposing the EU Regulations may be questioned. A DSB body would then go on to analyse the EU Regulations under the Chapeau.

The purpose of the Chapeau is to prevent a WTO Member using the Article XX exceptions to derogate from its basic WTO obligations of non-discrimination and non-protectionism. The task of a DSB body is to balance the right of WTO Members to take measures to protect the important interests recognised in Articles XX(a)-(j), against the rights of other Members under substantive GATT provisions. This balance may shift depending on the facts of the case.¹⁸¹ For example, if the issue at stake is particularly important, such as the protection of humans from cancer-causing asbestos fibres, the rights of Members to prevent the importation of these fibres may shift the balance in favour of the right to take measures under Article XX.

¹⁸⁰ See Chap II(C), particularly notes 102-108.

¹⁸¹ *US-Shrimp AB* paras 156-159.

In analysing a measure under the Chapeau, a DSB body will consider whether the legislation is applied evenhandedly in practice¹⁸² (which can often be ascertained by a consideration of the measure itself),¹⁸³ and whether a measure is a disguised restriction on international trade.

(i) Unjustifiable discrimination between countries where the same conditions prevail

There has often been an amalgamation of the concepts of unjustifiable and arbitrary discrimination by DSB bodies,¹⁸⁴ but in *US-Shrimp* the AB distinguished these concepts. The AB found that the US measures unjustifiably discriminated between certain countries¹⁸⁵ for a number of reasons.

First, the US legislation was inflexible. It accorded different treatment to countries where the same conditions prevail by negotiating with, and assisting, only certain poor Caribbean countries to implement TEDs. It also applied the *same* treatment to countries where *different* conditions prevail by imposing the same import ban on all countries which had not yet implemented TEDs, with a warning period of only four months. This meant that poorer countries with limited resources were held to the same standard as those with greater resources which could equip their shrimp vessels with TEDs in a shorter time period. In addition, although the legislative measure recognised that it was acceptable for countries to adopt different regulatory programs to conserve turtles, as long as these programs had results comparable to the US program, in practice the legislation was applied in such a way that only countries that used TEDs were allowed to import shrimp into the US.¹⁸⁶

The AB clarified its position on the flexibility issue in *US-Shrimp 21.5*. The AB stated that it was only necessary to create legislation that was flexible in the sense that it allowed for countries in different situations to adapt or put in place policies different to those of the US, provided these

¹⁸² Ibid para 160.

¹⁸³ EC-Seals AB para 5.302.

¹⁸⁴ US-Gasoline AB; EC-Seals AB.

¹⁸⁵ US-Shrimp AB para 176.

¹⁸⁶ Ibid paras 163-165; 173-174.

met the level of protection required by the US. There was, therefore, no need to take into account the situation prevailing in each and every country that imported shrimp into the US.¹⁸⁷

On this basis of the findings in the *US-Shrimp* cases, the EU regulations may be discriminatory in their application. Spanish fishers are some of the worst offenders when it comes to IUU fishing¹⁸⁸ yet, despite this, the EU and Spain continue to subsidise not only the Spanish fishing industry but specific offenders,¹⁸⁹ and it has been estimated that a third of the fish caught by Spanish fleets is subsidised.¹⁹⁰ As an EU state, Spain is subject to EU fishing quotas, including those for herring and mackerel,¹⁹¹ but has been found guilty of failing to enforce catch limits by the European Court of Justice.¹⁹² Due primarily to capacity building through subsidies, the Spanish fleet is very large,¹⁹³ and catches many types of fish. Spanish vessels fish not only on the high seas and in Spanish waters but also in the waters of other EU states¹⁹⁴ and, by agreement, countries such as Morocco and Mauritania.¹⁹⁵ Some of its main catches include mackerel and other straddling and highly migratory species such as tuna and sardines,¹⁹⁶ which are the type of stocks covered by the Shared Stocks Agreement. Subsidising Spanish vessels which catch these species creates greater potential for overfishing and flouting of quotas,¹⁹⁷ the very issue that the EU is attempting to prevent through its Shared Stocks Regulation. In addition, by continuing to give subsidies to those vessels engaged in IUU fishing, the EU is incentivising, rather than punishing, those engaged in IUU fishing. This is at odds with its conduct towards third parties engaged in IUU fishing, such as the Faroes.

¹⁸⁷ *US-Import Prohibition of Certain Shrimp and Shrimp Products-Recourse to Article 21.5 of the DSU by Malaysia* (WT/DS58/AB/RW) Report of the Appellate Body adopted on 21 November 2001 (**US-Shrimp 21.5 AB**) paras 145-148.

¹⁸⁸ See The University of British Columbia Fisheries Centre 'An estimate of the total catch in the Spanish Mediterranean Sea and Gulf of Cadiz Regions (1950-2010)' available at <http://www.seararoundus.org/doc/publications/wp/2015/Coll-et-al-Spain-Med-and-Gulf-of-Cadiz.pdf>, accessed on 3 March 2016, at 6 and 21; Willson, Cabra & Rey (Note 165) at 50-51.

¹⁸⁹ The University of British Columbia (ibid) at 4; Willson, Cabra & Rey (ibid) at 58-59.

¹⁹⁰ Willson, Cabra & Rey (ibid) at 51.

¹⁹¹ European Commission 'Fishing TACs and Quotas 2015' available at http://ec.europa.eu/fisheries/documentation/publications/poster_tac2015_en.pdf, accessed on 3 March 2016.

¹⁹² Willson, Cabra & Rey (Note 165) at 58.

¹⁹³ Ibid at 51.

¹⁹⁴ Harry Brown 'Where will they get the fish?' (2008-9) 33 *The Dublin Review* available at <https://thedublinreview.com/fish/>, accessed on 3 March 2016 s1.

¹⁹⁵ University of British Columbia (Note 188) at 10.

¹⁹⁶ Ibid at 8.

¹⁹⁷ See Margaret A. Young *Trading Fish, Saving Fish* (2011) at 87-88.

In *US-Gasoline* the AB made it clear that it is possible for a country to discriminate unfairly not only between different third party countries but also between a third party country and itself.¹⁹⁸ It is therefore possible that the EU's different treatment of its own citizens and those of third party countries could lead to a finding that the EU Regulations constitute unfair discrimination under the Chapeau.

The second problem the AB in *US-Shrimp* identified was a lack of multilateral cooperation. This was required by the US legislation itself, and had been undertaken with regard to the Caribbean countries in negotiating to the Inter-American Convention for the Protection and Conservation of Sea Turtles.¹⁹⁹ The fact that the US had not entered into multilateral talks with other countries meant that it had unjustifiably discriminated between the Caribbean states and other states.²⁰⁰ The issue of multilateral cooperation was also clarified in *US-Shrimp 21.5*, with the AB finding that this referred only to 'serious, good faith efforts' to reach agreement, and that it was not necessary to show that an agreement had actually been concluded.²⁰¹

Trebilcock, Howse and Eliason argue that the issue of multilateral cooperation may become irrelevant where a measure is sufficiently flexible to take account of different conditions in different countries. This argument is based on the failure of the AB in *US-Shrimp 21.5* to mention the importance of multilateral cooperation in regard to environmental trade measures.²⁰² The AB also made it clear in *US-Shrimp 21.5* (clarifying its finding in *US-Shrimp*) that unilateral measures are permissible in certain instances.²⁰³

However, the AB in *US-Shrimp* did emphasise that conservation of common resources will usually require some level of multilateral cooperation to be effective.²⁰⁴ It also clearly differentiated this reasoning from its points that the US measure specifically advocated cooperation, and that the lack of cooperation constituted discrimination because the US had

¹⁹⁸ *US-Gasoline* AB at 28.

¹⁹⁹ *US-Shrimp* AB paras 166-167.

²⁰⁰ *Ibid* para 172.

²⁰¹ *US-Shrimp 21.5* AB paras 123-124.

²⁰² Trebilcock, Howse & Eliason (Note 87) at 678. This also appears to be bolstered by the AB's finding in *US-Shrimp* that 'aspects of unjustifiable discrimination are considered in their "cumulative effects"' - see Paul O'Brien 'Unilateral Environmental Measures after the WTO Appellate Body's *Shrimp-Turtle* Decision' in Edith Weiss, John H Jackson & Nathalie Bernasconi-Osterwalder (eds), *Reconciling Trade and Environment* (2008) at 471.

²⁰³ *US-Shrimp 21.5* AB paras 137-138.

²⁰⁴ *US-Shrimp* AB para 168.

already negotiated with various Caribbean states. Multilateral cooperation also appears to be a theme in cases where the impugned measure deals with a common resource. In *US-Gasoline* a failure on the part of the US to cooperate with Venezuela and Brazil to calculate baselines for foreign gasoline producers to preserve air quality also led to the US contravening the anti-discrimination provisions of the Chapeau.²⁰⁵ The WTO Ministerial Decision on Trade and Environment, in establishing the terms of reference of the Committee on Trade and Environment (CTE), provided that the CTE should make recommendations on changes to the multilateral trading system to promote ‘adherence to effective multilateral disciplines to ensure responsiveness of the multilateral trading system to environmental objectives set forth in Agenda 21 and the Rio Declaration, in particular Principle 12.’²⁰⁶ Principle 12 provides that ‘(e)nvironmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.’²⁰⁷ The CTE subsequently stated that it supported ‘multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature.’²⁰⁸ The Ministerial Decision was also referred to by the AB in *US-Shrimp*²⁰⁹ in its finding that the protection of highly migratory sea turtles required ‘concerted and cooperative efforts on the part of many countries’.²¹⁰ Even in *EC-Seals*, a case which was concerned more with the prevention of cruelty to animals than the sharing of a common resource, the AB found that the EU’s failure to pursue ‘cooperative arrangements’ with Canadian Inuit under the IC exception, as it had done with Greenlandic Inuit, contributed to the inconsistency of the seal regulations with the Chapeau.²¹¹

In the herring dispute the EU and Faroes were required to cooperate under the auspices of UNCLOS and UNFSA, and did so through NEAFC. UNCLOS obliges state parties to cooperate in the conservation of living resources, including shared resources,²¹² and resources in the high

²⁰⁵ *US-Gasoline* AB at 27.

²⁰⁶ WTO Ministerial Decision on Trade and Environment, adopted in Marrakesh on 15 April 1994.

²⁰⁷ *Ibid.*

²⁰⁸ See WTO Committee on Trade and Environment (CTE) *The Relationship between WTO Rules and MEAs in the Context of the Global Governance System (TN/TE/W/39)* of 24 March 2004.

²⁰⁹ *US-Shrimp* AB para 154.

²¹⁰ *Ibid* para 168.

²¹¹ *EC-Seals* AB paras 5.337-5.338.

²¹² UNCLOS art 63.

seas.²¹³ Under Articles 63(1) and (2) of UNCLOS states must ‘seek to agree’ on conservation measures for shared stocks. ITLOS, in its Advisory Opinion on IUU Fishing (*IUU Fishing Opinion*), found that Article 63(1) requires states to consult meaningfully with each other to ensure conservation of shared stocks.²¹⁴ This is similar language to that used in *US-Shrimp 21.5*²¹⁵ and ITLOS was clear that states should make a substantial effort in this regard.²¹⁶ These findings are reiterated and expanded upon in UNFSA.²¹⁷ Many other international fishing instruments also advocate for cooperation and consultation in the creation of measures to conserve species.²¹⁸

UNFSA and UNCLOS, as interpreted in the *IUU Fishing Opinion*, both place an obligation on parties to consult with each other to conserve fish stocks and, furthermore, give each party a right to consult in an RFMO.²¹⁹ This bolsters the argument that there was a duty on the parties to attempt multilateral cooperation in the herring dispute, as the straddling nature of the herring stock, as with the migratory turtles in *US-Shrimp*, means that cooperation is necessary for its conservation and management. This suggests that there was a duty to cooperate in conserving the stock in this case, which a DSB body could have taken into account in line with its use of external sources to interpret the GATT in *US-Shrimp*. The use of non-WTO sources to interpret WTO law will be discussed further in Chapter IV.

A final point which may make the EU Regulations unjustifiable, and possibly also arbitrary, is the fact that the EU based its designation of the Faroes as an NSF country on the precautionary approach adopted in the herring management agreement. Adopting a precautionary approach is in line with Article 6 of UNFSA which provides that states should apply this approach to the

²¹³ Ibid art 118.

²¹⁴ ITLOS *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission* (Request for Advisory Opinion Submitted to the Tribunal) of 2 April 2015 (**IUU Fishing Opinion**) para 210.

²¹⁵ *US-Shrimp 21.5* AB paras 123-124.

²¹⁶ *IUU Fishing Opinion* para 210.

²¹⁷ UNFSA arts 5, 6 and 8.

²¹⁸ See eg FAO Fisheries Code arts 11.2.9 and 11.2.14; PSMA art 6; IPOA-IUU ss9.1 and 68; FAO Compliance Agreement art 5. See also *US-Shrimp* AB paras 130 and 132 where the AB pointed to the fact that the US did not raise the issue of turtle conservation with the CITES standing committee, despite the fact that all seven species of turtles were listed in Annex I to the CITES Agreement and had not signed the Convention on Biological Diversity or UNCLOS or ratified the Convention on the Conservation of Migratory Species of Wild Animals, all of which could have been potential forums for a cooperative effort at turtle conservation.

²¹⁹ *IUU Fishing Opinion* para 205.

conservation of straddling and highly migratory fish stocks.²²⁰ This includes ‘stock-specific reference points’²²¹ which may be imposition of a limit on fishing within which maximum sustainable yield (MSY) can be produced.²²² The NEAFC parties agreed that a precautionary approach should be taken in the herring management plan in order to ensure sustainability of the herring stock.²²³ This was in line with ICES recommendations that allowing the herring stock to fall below the stock spawning biomass (SSB) necessary to produce MSY (5 million tonnes) would make the plan non-precautionary.²²⁴ The parties decided that fishing of the stock should be restricted by a TAC based on a mortality rate of less than 0.125 and, should the SSB fall below 5 million tonnes, fishing mortality would be reduced further to allow it to recover.²²⁵ The catch quota of 105230 tonnes set unilaterally by the Faroes would have increased the mortality rate to 0.15 and caused the SSB to fall to 4.2 million tonnes.²²⁶

The DSB bodies were unwilling to recognise the precautionary principle as a general principle of customary international law in *EC-Biotech*²²⁷ and *EC-Hormones*,²²⁸ although the latter did find that a truncated version of the principle had been negotiated by WTO Members and incorporated in the SPS. Because of this however, the AB stated that the precautionary approach could not override an obligation negotiated by WTO Members. The AB did also appear willing to recognise that the precautionary principle had become a general principle of international environmental law.²²⁹ Priess and Pitschas are of the view that this principle has no place in a GATT Article XX(b) or TBT Article 2.2 analysis, based on statements made in the case of *EC-Asbestos* that there must be evidence of a risk to invoke the Article XX(b) exception.²³⁰ This makes sense, as the precautionary principle allows measures to be imposed even in the absence

²²⁰ UNFSA art 6(1).

²²¹ Ibid art 6(3)(b)

²²² Ibid Annex II(2).

²²³ Implementing Regulation Preamble 4-5

²²⁴ Ibid Preamble 12.

²²⁵ Herring Management Plan ss2-3.

²²⁶ Implementing Regulation Preamble 11-12.

²²⁷ *EC-Measures Affecting the Approval and Marketing of Biotech Products* (WT/DS291/R; WT/DS292/R; WT/DS293/R) Report of the Panel adopted on 21 November 2006 (**EC-Biotech Panel**) para 7.89.

²²⁸ *EC-Measures Concerning Meat and Meat Products* (WT/DS26/AB/R; WT/DS48/AB/R) Report of the Appellate Body adopted on 13 February 1998 (**EC-Hormones AB**) paras 123-125.

²²⁹ Ibid para 123.

²³⁰ Hans-Joachim Priess and Chrisitan Pitschas ‘Protection of Public Health and the Role of the Precautionary Principle under WTO Law: A Trojan Horse Before Geneva’s Walls? (2000) *Fordham International Law Journal* at 552.

of a known risk if the science is uncertain. However, Priess and Pitschas also believe that if a treaty between parties is shown to encompass the precautionary principle this should be respected and WTO obligations accordingly modified through rules of treaty interpretation.²³¹ This will be discussed further in Chapter IV.

In applying Article XX, the DSB bodies have stated that a WTO Member is free to decide its own level of protection when passing a measure, provided the measure has as its goal one of the permissible exceptions.²³² This means that, in the context of Article XX(g), a Member is given a significant amount of freedom in determining their own environmental policies and domestic measures. Although there must be a risk to life or health for Article XX(b) to be applicable, this is not the case with XX(g). There seems to be no reason that an environmental measure which bases its conservation targets on a precautionary approach should contravene Article XX(g), provided the purpose of the measure is the conservation of an exhaustible natural resource and similar domestic restrictions are put in place. Based on the findings of the AB in *EC-Hormones*, a Panel may very well be open to the argument that a precautionary approach could be applied to determine a Member's desired level of protection under Article XX(g), as there is no contrary intention evident in the GATT and the principle is contained in a number of MEAs. It is also present in the specific agreement between the parties to conserve the stock, and should, therefore, be given effect to, according to Priess and Pitschas.

(ii) Arbitrary discrimination between countries where the same conditions prevail

Arbitrary discrimination was also an issue in *US-Shrimp*. The AB found that the manner in which the US dealt with requests by applicants to be placed on the list of countries that could import shrimp into the US, contravened this aspect of the Chapeau.²³³ Applicants were not informed if they were unsuccessful and no written decisions were issued to either successful or unsuccessful applicants. There was no possibility of review or appeal of the decisions, and no opportunity for the rejected applicant to be heard or respond to any arguments against it.²³⁴ This meant that there was no way to tell if the rejected state was being treated fairly or not, an issue which the AB also highlighted in *EC-Seals* when it found the terms 'subsistence' and 'partial

²³¹ Ibid at 550-551.

²³² See eg *Brazil-Tyres* AB para 140; *EC-Asbestos* AB para 168.

²³³ *US-Shrimp* AB para 177.

²³⁴ Ibid paras 180-181.

use', in describing seals subject to the IC exception, to be ambiguous and open to interpretation. According to the AB, this could lead to unfairness in the application of the measure.²³⁵

In *US-Shrimp* the conduct of the US was also held to be contrary to Article X:3 of the GATT which establishes certain minimum standards for transparency and procedural fairness.²³⁶ This imported a due process requirement into the Chapeau, although the extent of the requirement is not clear from the case.²³⁷ Urakami is of the view that this will depend on the trade restrictiveness of the measure.²³⁸

Arbitrary discrimination may also occur in other ways. In *Brazil-Tyres*, the AB found that a measure to prevent the importation of retreaded tyres into Brazil, while justifiable under Article XX(b) of the GATT, contravened the Chapeau because of an exception to the ban for a number of MERCOSUR countries, which Brazil had to include in its measure because of a MERCOSUR Tribunal ruling. Despite Brazil having no choice in the matter, the AB reasoned that the exception undermined the purpose of the ban, as retreaded tyres could be imported into Brazil through the MERCOSUR countries.²³⁹ In interpreting Article 2.1 of the TBT, the AB in *US-Tuna III 21.5* found the principle that a measure must not be applied in a manner that undermines the purpose of the measure, is one of the most important factors when considering the issue of unjustifiable or arbitrary discrimination.²⁴⁰

The Shared Stocks Regulation provides for NSF countries to be heard before any trade measures are taken,²⁴¹ and the Implementing Regulation set out the Faroese arguments and why these were not accepted by the EC.²⁴² It described the process followed in detail and provided comprehensive reasons why the most restrictive trade measure had to be imposed in this case.²⁴³ In doing so, the Implementing Regulation set out a written, reasoned decision which was then made public. However, what constitutes an NSF country in the Shared Stocks Regulation is

²³⁵ EC-Seals AB paras 5.325-5.328.

²³⁶ US-Shrimp AB paras 182-183.

²³⁷ See Kenichiro Urakami 'Unsolved Problems and Implications for the Chapeau of GATT Article XX after the Reformulated Gasoline Case' in Edith Weiss, John H Jackson and Nathalie Bernasconi-Osterwalder (eds) *Reconciling Trade and Environment* (2008) at 296.

²³⁸ Ibid at 296.

²³⁹ Brazil-Tyres AB paras 231-234.

²⁴⁰ US-Tuna III 21.5 AB para 7.316.

²⁴¹ Shared Stocks Regulation art 6(3).

²⁴² Implementing Regulation Preamble 16-18.

²⁴³ Ibid Preamble.

vague in certain respects. One of the criteria is that the country ‘fails to adopt necessary fishery management measures’²⁴⁴ with no explanation of what these would entail, which denotes a level of ambiguity. However, there is scientific data from bodies like ICES showing the level at which stocks need to be maintained to prevent their collapse. It may be, therefore, that if the matter was before a Panel, recourse to its DSU Article 13 power to seek scientific data would show that such criteria is not in fact ambiguous in the circumstances.²⁴⁵ Certainly there is clear evidence of the MSY for herring from ICES, which would provide context as to which measures should have been adopted by the Faroes to conserve the herring stock. If so, the many due process elements in the EU Regulations would appear to make them fair, despite the trade restrictiveness of the measure. Regarding the interpretation given to arbitrary discrimination in *Brazil-Tyres*, the EU Regulations do not appear to undermine the purpose of preventing IUU fishing on their face. In practice, however, the EU’s subsidies to its fishing fleets, increasing their ability and incentive to exceed quotas and engage in IUU fishing, could be said to undermine the EU Regulations and amount to arbitrary discrimination.

(iii) Disguised restriction on international trade

There have been very few WTO cases dealing with the third element of the Chapeau. In *US-Canada Tuna* (a pre-WTO case) the Panel decided that, to be compliant with this element of the Chapeau, a measure must be taken as a trade measure and publicly announced as such.²⁴⁶ However, after the creation of the WTO, the AB in *US-Gasoline* found that publicly announcing a trade measure is not enough to satisfy the third requirement of the Chapeau.²⁴⁷

In *US-Gasoline*, the AB found that a disguised restriction on international trade may also encompass restrictions amounting to arbitrary and unjustifiable discrimination.²⁴⁸ The concept also had a distinct role to play in this case however, as the US measure alleviated certain costs for domestic but not foreign gasoline producers. According to the AB, this suggested a disguised

²⁴⁴ Shared Stocks Regulation art 3(b)(i).

²⁴⁵ Article 13 gives Panels a ‘right to seek information and technical advice from any individual or body which it deems appropriate.’

²⁴⁶ *US-Canada Tuna* para 4.8.

²⁴⁷ *US-Gasoline* AB at 25. This was affirmed in *EC- Measures Affecting Asbestos and Asbestos-Containing Products* (WT/DS135/R) Report of the Panel adopted on 5 April 2001 paras 8.234-8.235.

²⁴⁸ *US-Gasoline* AB at 25.

restriction.²⁴⁹ Based on the AB's reasoning, it appears that this element of the Chapeau is designed to prevent protectionism.

The demand in the EU for fish surpasses its fishing capacity, and the EU is therefore dependent on imports from third countries to meet demand.²⁵⁰ However, given that fishing of herring is restricted, the purpose of the EU Regulations may arguably have been to protect the EU's share of the TAC and the fishing potential of its own fishing fleets. There are certainly indications of protectionism in the fact that the EU continually subsidises its own fishing fleet, thereby increasing capacity, while the EU Regulations attempt to curtail fishing by third country vessels. This, like many of the issues raised in the Chapeau analysis, requires further information to resolve. As mentioned, Panels have the power to seek information under Article 13 of the DSU.²⁵¹ Had the herring dispute gone to Panel, it could have resolved these issues by recourse to this Article.

²⁴⁹ Ibid at 28-29.

²⁵⁰ House of Ocean 'The US, the EU and IUU-Part 2' (17 May 2015) available at <https://houseofocean.org/2015/05/17/the-us-the-eu-and-iuu-part-2/>, accessed on 16 February 2016.

²⁵¹ See note 245.

Chapter IV – Conflict of Norms

Based on the analysis in the preceding two chapters there is a possibility that the EU Regulations will not be compliant with WTO law, based on principles extrapolated from WTO jurisprudence. This may be because of a lack of multilateral cooperation between the parties, or because the measures are discriminatory.

However, the EU based its Regulations on a number of multilateral environmental agreements (MEAs) to which it is a signatory. These agreements allow, and sometimes require, state parties to take the sort of measures found in the EU Regulations. This means that, if the violation of Articles V, and potentially I and XI of the GATT, cannot be justified under Article XX of the GATT, there may be a conflict of norms between provisions of the MEAs and the GATT.

A. Potential conflicts

As discussed in Chapter I, there are a number of MEAs dealing with IUU fishing. Certain of these MEAs, such as UNFSA and the herring management plan, were specifically referred to in the EU Regulations,²⁵² and the IPOA-IUU was used as a basis for the IUU Regulation.²⁵³ Others are the PSMA, NEAFC Scheme of Control and Enforcement (NEAFC Scheme) which specifically regulates herring²⁵⁴ and the FAO Fisheries Code.

The EU, in its Implementing Regulation, alleged that the Faroes had contravened Articles 61(2), 63(1) and (2), 118, 119 and 300 of UNCLOS and Articles 5, 6, 8(1) and (2) of UNFSA.²⁵⁵ Had the herring dispute gone before a Panel, the EU may have raised these provisions as a defence to a finding that the EU Regulations are GATT-inconsistent. Article 300 provides that states should fulfil their UNCLOS obligations in good faith. This is fairly open-ended and does not really lend itself to any concrete obligations. Article 61(2) requires that states conserve stocks in their own EEZ and cooperate with other states to do so. Articles 63(1) and (2) require that parties cooperate to conserve straddling fish stocks. Articles 118 and 119 similarly provide that states should cooperate through RFMOs to maintain stocks found on the high seas. Articles 5, 6

²⁵² Shared Stocks Regulation Preamble 1; Implementing Regulation Preamble 9-10.

²⁵³ IUU Regulation Preamble 1 and 4.

²⁵⁴ NEAFC Scheme.

²⁵⁵ Implementing Regulation Preamble 10.

and 8 of UNFSA expand on the UNCLOS common stocks provisions, creating more detailed methods of conservation.

The UNCLOS common stocks provisions in Articles 63, 118 and 119, and Article 8 of UNFSA appear to accord with WTO law. As discussed, the AB in *US-Shrimp* found that parties relying on Article XX of the GATT should use best efforts to come to an agreement prior to imposing unilateral measures, where they seek to protect a common resource.

The situation may be different regarding Articles 5 and 6 of UNFSA, under which parties must use a precautionary approach in conserving fish stocks. The herring management agreement also provides for a precautionary approach. A precautionary approach has not been recognised as a valid defence to non-compliance with WTO law by DSB bodies in the past.²⁵⁶ One way to reconcile the precautionary approach with the GATT in the herring dispute was suggested in Chapter III – namely that a DSB body may allow a precautionary approach to be adopted by a Member when assessing consistency with Article XX(g). It was also noted that Priess and Pitschas believe that a precautionary approach specifically provided for in a treaty should be respected, and that the AB in *EC-Hormones* appeared willing to recognise a precautionary approach as applicable in international environmental law.²⁵⁷ Other international tribunals, such as ITLOS in its advisory opinion on the Area (seabed),²⁵⁸ and the ICJ in the recent *Pulp Mills* case,²⁵⁹ appear to recognise the precautionary principle in environmental cases.

The precautionary approach is also closely related to the ecosystem approach, which aims to create conservation measures based not only on the levels of the fish stock in question but also the impact that catching the fish stock has on its environment and other fish species. The ecosystem approach is increasingly being recognised as a better means than MSY to conserve and manage fish stocks in RFMOs such as CCAMLR,²⁶⁰ as well as in UNFSA²⁶¹ and the FAO

²⁵⁶ See Chap III(B)(i).

²⁵⁷ Ibid.

²⁵⁸ Seabed Disputes Chamber *Responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area* (Request for an Advisory Opinion Submitted to the Seabed Disputes Chamber) of 1 February 2011 paras 132-135; IUU Fishing Opinion para 208(ii).

²⁵⁹ ICJ *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Advisory Opinion) Judgment of 20 April 2010 para 164.

²⁶⁰ Convention on the Conservation of Antarctic Marine Living Resources of 1980 art II(3)(b).

²⁶¹ UNFSA arts 7(2)(d) and (f).

Fisheries Code.²⁶² A precautionary approach is, therefore, particularly important in conserving fish stocks. This provides further evidence that a DSB body should recognise the development of a precautionary approach in the context of fisheries law, despite not yet recognising it as a general principle of international law.

Apart from those provisions mentioned by the EU in its Implementing Regulation, there are a number of other MEAs which the EU could have raised as a defence in the herring dispute.

Article 23(3) of UNFSA provides that states may prohibit landings and transshipments where fish have been taken in a manner which ‘undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas’.²⁶³ This provision appears to conflict with at least Article V of the GATT as it allows states to prevent transit of goods and transshipment within their ports. It is also possible that this Article conflicts with Articles XI and I of the GATT if, by preventing entry into its ports to certain vessels, it discriminates between like products from WTO Members, or can be said to be imposing quantitative restrictions on imports.²⁶⁴ Article 23(3) of UNFSA only applies to fish taken on the high seas. However, Article 23(1) provides that a port state has ‘the right and the duty to take measures in accordance with international law, to promote the effectiveness of subregional, regional and global conservation and management measures’.²⁶⁵ This provision, while not as specific as Article 23(3), does include catches taken in the EEZ.

Article 23(4) of the NEAFC Scheme obliges a NEAFC party to prevent another NEAFC party’s vessel from landing, transshipping a catch or using its ports when the vessel is in breach of local regulations dealing with fisheries resources in the Convention Area. Local regulations would include the EU Regulations. Similarly, Articles 9(4) and 11 of the PSMA oblige contracting parties to deny entry to ports to those vessels engaged in IUU fishing. These NEAFC and PSMA provisions, like Article 23(3) of UNFSA, are likely to contravene Article V, and possibly Articles I and XI of the GATT.

²⁶² FAO Fisheries Code arts 6.1, 6.2 and 6.4.

²⁶³ UNFSA art 23(3).

²⁶⁴ See Chap II(A)-(C).

²⁶⁵ UNFSA art 23(1).

The IPOA-IUU, like the PSMA, provides that states should deny entry to their ports to vessels involved in IUU fishing,²⁶⁶ and the FAO Fisheries Code also provides that PSMs should be taken to achieve the objectives set out therein.²⁶⁷ While these soft law instruments are not binding on the EU and Faroes, it should be noted that they have been highly influential documents in the management of fisheries by states.²⁶⁸

The above analysis has shown that there are a number of provisions of relevant MEAs which appear to conflict with the GATT, and could have been relied upon by the EU in the herring dispute as a defence to GATT-inconsistency. This raises the issue of how conflict of norms is dealt with in international law and, specifically, how DSB bodies deal with conflict.

B. Conflict resolution in international law

Conflict in international law is generally more difficult to resolve than conflict in domestic law as international law is largely made up of overlapping treaties and, apart from *jus cogens* and *erga omnes* norms, has no obvious hierarchy of norms. Commentators have put forward different views as to how international tribunals faced with conflicting law should resolve a clash and there appear to be two broad approaches to addressing conflict at the stage of dispute resolution.

(i) Conventional Method

The conventional method is that advocated by the International Law Commission (ILC) in its 2006 recommendations on the fragmentation of international law (ILC Study). The ILC drew widely on the practice and jurisprudence of international bodies and academic works to provide guidance on how to resolve conflicts in international law.²⁶⁹

²⁶⁶ IPOA-IUU s56

²⁶⁷ FAO Fisheries Code art 8.3.1.

²⁶⁸ For example, the NEAFC Scheme as well as PSMs of other RFMOs like the North Atlantic Fisheries Commission (NAFO) are based on the IPOA-IUU, and the FAO Fisheries Code for adopted unanimously by the FAO which has wide membership, including many WTO Members.

²⁶⁹ Report of the Study Group of the International Law Commission 'Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law' (2006) available at http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, accessed on 17 February 2016 (**ILC Study**).

The ILC Study stressed that conflict rules cannot be divorced from the process of interpretation as it is interpretation of norms which gives rise to conflicts.²⁷⁰ It therefore appears to advocate reconciliation of law through interpretation here, although it did warn that this should not be taken too far, as reconciliation cannot resolve cases of genuine conflict.²⁷¹

In cases of genuine conflict the ILC Study provides a series of presumptions to determine when one law should override the other, including the presumption against conflict and the presumptions that the *lex superior*, *lex specialis* and *lex posterior* trump other international laws (collectively the conflict presumptions).²⁷²

Lex superior are obligations under the UN Charter, and *jus cogens* and *erga omnes* norms, which are non-derogable norms. A hierarchy is created by differentiation between *lex superior* and other norms, and *lex superior* will override all other international norms.²⁷³

Lex posterior are those laws that arise later in time and are presumed to override laws entered into earlier in time, as the later law is seen as a better reflection of the current intention of the parties. In the Vienna Convention on the Law of Treaties (VCLT) this rule is reflected in Articles 30 (application of successive treaties dealing with the same subject matter) and Article 41 (where certain parties to the treaty purport to modify a provision of that treaty in a later treaty – an *inter se* agreement - applicable only amongst themselves). For the purposes of the herring dispute, only Article 41 is relevant, as none of the MEAs discussed are successive treaties to the GATT or vice versa. Because of the potentially far-reaching consequences of *inter se* agreements, Article 41 is worded to ensure that, where the treaty does not specifically prohibit *inter se* agreements, the rights of third parties are not impacted, and the object and purpose of the treaty is not undermined.²⁷⁴ This embodies the *pacta tertiis* principle, under which the conclusion or modification of a treaty should not affect the rights of third parties.²⁷⁵

A *lex specialis* is a law which deals specifically with the subject matter in question, and this will prevail over general law on the issue, again because the *lex superior* better reflects the intention

²⁷⁰ Ibid para 412.

²⁷¹ Ibid paras 42-43.

²⁷² Ibid para 36.

²⁷³ Ibid para 327.

²⁷⁴ Vienna Convention on the Law of Treaties of 1968 art 41(1)(b).

²⁷⁵ See ILC Study paras 268-269.

of the parties. It is therefore presumed that the parties intended to regulate a certain aspect of the law in the different manner.²⁷⁶ This relationship can be seen in an example by Pauwelyn, who compares the SPS (the general law), dealing with all sanitary and phytosanitary measures, regardless of the health concern, and the Cartagena Protocol on Biosafety (the *lex specialis*) which deals only with specific health concerns, such as genetically modified organisms (GMOs).²⁷⁷ ‘General law’ in this context includes customary law, but the ILC Study did not deal with soft law such as FAO Fisheries Code or IPOA-IUU and, as such, these instruments do not appear to be relevant in a conventional conflict analysis.²⁷⁸

The conflict presumptions are not always easy to apply in practice. A common problem in determining the *lex posterior* is that it is often difficult to tell which law is later in time. If, for example, Agreement X was entered into in 2001, and Agreement Y in 2003, but Agreement X was revised in 2005, which agreement is considered the *lex posterior*?²⁷⁹ Another issue is the fact that states may become parties to agreements at different times so that State A becomes a party to Agreement X before Agreement Y, and vice versa for State B.²⁸⁰ There is also no tie-breaker rule when conflicting results arise in an application of these conflict presumptions.²⁸¹

These problems have led the ILC to conclude that the way these presumptions are applied is dependent on the relevant aspects of each case.²⁸² It has also suggested that, in order to resolve problems in applying the *lex posterior* presumption, parties should include conflict clauses in their agreements detailing what should be done with prior or subsequent conflicting agreements.²⁸³ However, the various conflict presumptions enumerated in the report provide ‘a basic professional tool-box that is able to respond in a flexible way to most substantive fragmentation problems.’²⁸⁴

²⁷⁶ Ibid para 85.

²⁷⁷ Joost Pauwelyn *Conflicts of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (2003) at 389.

²⁷⁸ ILC Study paras 66 and 490.

²⁷⁹ Ibid para 232.

²⁸⁰ Ibid para 232.

²⁸¹ Ibid para 233.

²⁸² Ibid para 410.

²⁸³ Ibid para 267.

²⁸⁴ Ibid para 492

(ii) Institutional method

The institutional method emphasises cooperation and coordination between regimes, although this is often at the level of law making rather than dispute settlement.²⁸⁵ Specifically in the context of trade and fisheries, Young has developed a method of ‘regime interaction’ applying to both law making and application, including at the level of dispute settlement.²⁸⁶ This involves taking cognisance of relevant non-WTO international law in deciding a case, in order to avoid fragmentation between non-WTO law and WTO law. Non-WTO law can be brought to the attention of a DSB body through consultation with IGO secretariats²⁸⁷ and acceptance of *amicus* briefs from NGOs and other bodies.²⁸⁸ Young therefore advocates for greater collaboration with secretariats, and transparency regarding the use by DSB bodies of *amicus* briefs, to assist both DSB bodies and other actors in the WTO to better understand when non-WTO law is relevant to a dispute.²⁸⁹

Cooperation by the WTO with IGOs and NGOs is also advocated by Perez.²⁹⁰ However, Perez points to several problems in doing so, including the fact that IGOs are susceptible to pressure from national government and that the choice of issues by NGOs may depend on certain institutional pressures, such as stable funding and the recruitment of new members.²⁹¹ Perhaps because of these types of issues, Young suggests that DSB bodies should take into account the transparency and accessibility of the internal processes of IGOs when accepting evaluating norms produced by these bodies.²⁹² In determining the relevance of non-WTO law produced by IGOs and NGOs, DSB bodies should also consider the breadth of an organisation’s support, where it gets its funding, demonstrated expertise in the area, and the balance of its membership between developed and developing countries.²⁹³

²⁸⁵ See Young (Note 197) at 14-16.

²⁸⁶ Ibid chap 5.

²⁸⁷ Ibid at 215.

²⁸⁸ Ibid at 220.

²⁸⁹ Ibid at 237.

²⁹⁰ Oren Perez *Ecological Sensitivity and Global Legal Pluralism: Rethinking the Trade and Environment Conflict* (2004) at 96-100.

²⁹¹ Ibid at 96-102.

²⁹² Young (Note 197) at 239.

²⁹³ Ibid at 237-239.

Importantly, the institutional method does not require that parties to the conflicting agreement be identical, because the agreements are part of international law and may therefore be relevant to the dispute.²⁹⁴ On this view the ILC ‘toolbox’ is not entirely discounted²⁹⁵ but Young believes that it is not particularly useful in the trade and fisheries context. This is because environmental law, and especially fisheries law, is comprised of a large number of overlapping treaties and international bodies which have memberships that do not correspond exactly. There are also no norms that could be considered hierarchically superior in these regimes.²⁹⁶

Young is of the view that the AB applied the institutional method in *US-Shrimp* as it took into account non-WTO sources in deciding the dispute,²⁹⁷ stated clearly that Panels could accept *amicus* briefs²⁹⁸ and, in applying non-WTO law, did not look at whether the parties to the dispute were also parties to the non-WTO agreements.²⁹⁹ Indeed, the US is not a party to UNCLOS, which was one of the agreements used by the AB to interpret Article XX(g). Young also points to the fact that, In *US-Shrimp 21.5*, the Panel took this a step further and explicitly stated that the parties were bound by the international law rules cited in *US-Shrimp*.³⁰⁰

The institutional view is important in the context of fisheries because it is such a sensitive area, as evidenced by the emotional nature of the various issues that accompany the problem of IUU fishing (food security for example). This is also reflected in the WTO itself, in the large number of fisheries disputes that have been brought to the DSB bodies,³⁰¹ and the negotiations currently underway on fisheries subsidies in the Doha Round.³⁰²

This raises the issue of whether a Panel dealing with the herring dispute would have applied either of these methods in resolving conflict between WTO law and those MEAs dealing with PSMs for IUU fishing.

²⁹⁴ Ibid chap 5.

²⁹⁵ See Margaret A. Young ‘Regime Interaction in Creating, Implementing and Enforcing International Law’ in Margaret A. Young (ed) *Regime Interaction in International Law: Facing Fragmentation* (2012) at 89-90.

²⁹⁶ Young (Note 197) at 12-13.

²⁹⁷ Ibid at 200-201.

²⁹⁸ Ibid at 220-221.

²⁹⁹ Ibid at 201.

³⁰⁰ Ibid at 202.

³⁰¹ See Note 51.

³⁰² WTO ‘Introduction to fisheries subsidies in the WTO’ available at https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_intro_e.htm, accessed on 8 March 2016.

C. Conflict in the WTO

In determining how DSB bodies approach conflict of norms there are two questions that need to be addressed. First, when do the DSB bodies consider there to be a conflict between norms? Second, if there is a conflict, how do they resolve such conflict?

(i) *When is there a conflict between norms?*

The first issue when dealing with conflict of laws is determining whether a conflict exists at all. A wide view of conflict considers there to be a conflict in the case where one provision prohibits a certain action while another permits it. Compliance with the former therefore does not lead to non-compliance with the latter. A narrow view considers that two provisions are only in conflict when both impose obligations, and compliance with one therefore leads to non-compliance with the other.

Vranes considers the cases of *Indonesia-Automobiles* and *Turkey-Textiles* (Panel Report) to take a narrow view.³⁰³ In both these cases the respective Panels found that a special provision could prevail over a general provision only if it is impossible to apply these two provisions simultaneously.³⁰⁴ According to Vranes, *EC-Bananas III* takes a wide view, although he states that this case appears to deal more with norms of competence (those norms which confer competence to make other norms) than norms of conflict.³⁰⁵ However, the Panel in *EC-Bananas III* did state that a narrow definition of conflict ‘would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A,’³⁰⁶ an indication that it would accept a wide definition of conflict in future.

WTO jurisprudence on this issue is therefore contradictory. It should also be noted that all these cases deal with conflicts between WTO agreements, rather than WTO and non-WTO law.

³⁰³ Vranes, Erich *Trade and the Environment: Fundamental Issues in International Law, WTO Law and Legal Theory* (2009) at 14-15.

³⁰⁴ *Turkey-Restrictions on Imports of Textile and Clothing Products* (WT/DS34/R) Report of the Panel adopted on 19 November 1999 para 9.92 (**Turkey-Textiles Panel**) (the AB did not deal with this issue on appeal); *Indonesia-Certain Measures Affecting the Automobile Industry* (WT/DS54/R; WT/DS55/R; WT/DS59/R; WT/DS64/R) Report of the Panel adopted on 23 July 1998 (**Indonesia-Automobiles Panel**) at 329, fn 649.

³⁰⁵ Vranes (Note 303) at 15-16.

³⁰⁶ *EC- Regime for the Importation, Sale and Distribution of Bananas* WT/DS27/R (*Bananas III*), Panel Report adopted on 25 September 1997 para 7.159.

Bartels believes that, while the AB has never explicitly ruled on the issue, it is unlikely that it will decide that obligations somehow trump rights.³⁰⁷ He points to the fact that the WTO agreements ‘represent a carefully negotiated “balance of rights and obligations”’,³⁰⁸ a proposition which has been accepted by the AB.³⁰⁹ It is also reflected in the DSU, in terms of which the recommendations and rulings of the DSB ‘cannot add to or diminish the rights and obligations provided for in the covered agreements’.³¹⁰ This suggests that, in the WTO, obligations do not necessarily trump rights in all cases.³¹¹

Of course, Bartels’ conclusion that a wide approach to conflict should be taken when dealing with conflict between WTO agreements does not provide much insight into the issue of conflict between WTO and non-WTO norms.

Vranes’ also conducts an analysis, which, unlike Bartels’, goes beyond WTO law. Vranes finds that ‘a broad definition of conflict has arguably not yet unequivocally asserted itself in international law’.³¹² However, he does suggest that, by not recognising a conflict in such a situation, a tribunal may violate an obligation to apply valid law.³¹³

Pauwelyn gives a similar reason as to why tribunals should adopt a wide definition – namely that adopting a narrow definition of conflict ‘solves part of the problem by ignoring it.’³¹⁴ He also points to the drafting history of Article 30 of the VCLT. Article 30 was changed based on a comment by Israel that reference should be made to both *the rights and obligations* of States (my emphasis).³¹⁵ DSB bodies referred to Article 30 in *Japan-Film*³¹⁶ and *EC-Poultry*³¹⁷ and this

³⁰⁷ Lorand Bartels ‘Treaty Conflicts in WTO Law – A Comment on William J. Davey’s Paper ‘The Quest for Consistency’’ in Stefan Grillier (ed) *At the Crossroads: The World Trading System and the Doha Round* Vol 8 (2008).

³⁰⁸ *Ibid* at 135-136.

³⁰⁹ See US-Shrimp AB paras 156-157.

³¹⁰ DSU arts 3.2 and 19.2.

³¹¹ Bartels (Note 307) at 145.

³¹² Vranes (Note 303) at 23.

³¹³ *Ibid* at 34.

³¹⁴ Pauwelyn (Note 277) at 171.

³¹⁵ *Ibid* at 171-172.

³¹⁶ *Japan-Measures Affecting Consumer Photographic Film and Paper* (WT/DS44/R) Report of the Panel adopted on 22 April 1998 para 10.65.

³¹⁷ *EC-Measures Affecting the Importation of Certain Poultry Products* (WT/DS69/R) Report of the Panel adopted on 23 July 1998 (**EC-Poultry Panel**) para 205.

acknowledgement of Article 30 by DSB bodies suggests that its drafting history may be accepted as interpretative guidance by DSB bodies.

The ILC also adopted a wide definition of conflict in its Fragmentation Study, interpreting it as ‘a situation where two rules or principles suggest different ways of dealing with a problem.’³¹⁸

In the herring dispute, an analysis of those MEAs which appear to have provisions conflicting with the GATT reveals the potential for conflict on an application of both the narrow and wide definition. As discussed, Article 23(3) of UNFSA gives states a *right* to close their ports.

Although academic opinion is in favour of a wide definition of conflict, WTO jurisprudence on the issue is contradictory. If DSB bodies consider conflict to be defined narrowly, they would not consider there to be a conflict between Article 23(3) of UNFSA and Articles I, V and XI of the GATT, which create obligations. Articles 23(4) of the NEAFC Scheme, 9(4) and 11 of the PSMA and Section 65 of the IPOA-IUU conflict with the GATT even on the narrow definition, as they oblige states to close their ports to vessels engaged in IUU fishing.³¹⁹

(ii) How do the DSB bodies resolve conflict?

DSB bodies have often been resistant to the idea that non-WTO norms can override WTO norms,³²⁰ or indeed even be relevant in interpreting provisions of WTO agreements.³²¹ This is perhaps because of the structure of the WTO, which has sometimes been referred to as a ‘self-contained regime’³²² This means that, in addition to specific rules within its area of competence, it also has secondary rules which relate to the settlement of disputes³²³ and, thus, does not allow unilateral determination of breach of such rules outside the framework of the WTO.³²⁴ The implication is that WTO law is somehow separate from general principles of public international law and need apply only WTO law to a dispute before it.

³¹⁸ ILC Study paras 24-25.

³¹⁹ See part A above.

³²⁰ See eg EC-Hormones AB; *Peru-Agricultural Duty on Imports of Certain Agricultural Products* (WT/DS457/AB/R) Report of the Appellate Body adopted on 31 July 2015 (**Peru-Agricultural Products AB**).

³²¹ See eg EC-Biotech Panel para 7.92.

³²² ILC Study para 134.

³²³ *Ibid* paras 124-125.

³²⁴ *Ibid* para 134.

However, the ILC believes that no international regime can ever be entirely self-contained, and that ‘when elucidating the content of the relevant rights and obligations, WTO bodies must situate those rights and obligations within the overall context of general international law (including the relevant environmental and human rights treaties).’³²⁵ Pauwelyn also points out that the idea that WTO law is separate from international law is held by virtually no academic author and cannot be found in any WTO decision or document.³²⁶ The idea of self-contained regimes is not sanctioned outside the WTO, with the ICJ and other bodies dismissing the notion that general international law does not affect certain specialised areas of international law.³²⁷ However, many DSB bodies still appear reluctant to deal with conflicts between WTO and non-WTO law and the majority of DSB bodies have embraced only certain of the presumptions and methods advocated by commentators for resolving conflict.

(a) Reconciliation through interpretation

The idea of reconciling agreements through interpretation appears to be advocated by both the conventional and the institutional methods. Under the conventional method it is easier to separate the idea of reconciliation from the conflict presumptions, as these appear to be relevant only once reconciliation has failed. The division is less clear under the institutional method, which uses a variety of methods in an attempt to harmonise international law, a large part of which is reconciliation of agreements through interpretation. However, the institutional method also advocates consultation with IGOs and NGOs to further understand the relevance of non-WTO law. For the purposes of clarity and comparison with the conventional method, reconciliation through interpretation will be dealt with separately from other aspects of the institutional method in the analysis that follows. However, it is important to bear in mind that there is not a clear division between the various approaches to harmonising international law in the institutional method.

³²⁵ Ibid para 170.

³²⁶ Pauwelyn (Note 277) at 25.

³²⁷ See ILC Study para 161 with regard to human rights regimes such as the European and the Inter-American Courts of Human Rights. See further as an example in the law of the sea regime PCA *Chagos Marine Protected Area Arbitration (Mauritius v United Kingdom) (Award)* of 18 March 2015 paras 208 and 220 where the majority relied on a number of ICJ cases.

It is also important to note that, because the conventional method attempts to resolve conflict between specific laws, rather than generally attempting to harmonise international law, reconciliation through interpretation under the conventional method would only appear to be necessary where a potential conflict exists. The institutional method, on the other hand, would attempt to harmonise all relevant international laws, regardless of whether a potential conflict exists or not.

Under Article 3.2 of the DSU, DSB bodies appear to be restricted to deciding claims which arise under the WTO covered agreements.³²⁸ Article 3.2 requires the DSB to clarify the provisions of WTO agreements ‘in accordance with customary rules of interpretation of international law.’ The customary rules of interpretation refer, according to innumerable DSB bodies,³²⁹ to Articles 31 and 32 of the VCLT. Under Article 31, a treaty should be interpreted in good faith in accordance with its ordinary meaning, in context (including taking into account subsequent agreements and relevant rules of international law) and in light of the treaty’s object and purpose. Article 32 provides that supplementary means of interpretation, such as the preparatory work of the treaty, may be taken into account if an analysis under Article 31 leads to an obscure or absurd result. The endorsement of these provisions by DSB bodies³³⁰ suggests that the only constraint faced by such bodies in deciding which law to apply is whether or not the law is relevant to the dispute before it. There appears to be nothing in the DSU which contradicts this interpretation.

The AB in *US-Shrimp* used these provisions to determine whether Members considered that exhaustible natural resources included living resources by considering a number of MEAs, such as UNCLOS.³³¹ In doing so, it reconciled WTO law and non-WTO law by interpreting WTO law to bring it in line with MEAs dealing with the conservation of living resources. It also advocated for the conclusion of MEAs in order to conserve common resources.³³²

Similar findings regarding multilateral agreement were made in other WTO cases and documents.³³³ However, in *EC-Biotech*, the Panel refused to take into account MEAs such as

³²⁸ DSU art 3.2; Vranes (Note 303) at 84.

³²⁹ See *US-Gasoline AB* at 17; *Japan-Alcohol AB* at 10 among many others.

³³⁰ *Ibid.*

³³¹ See Chap III(A)(iii).

³³² See Chap III(B)(i).

³³³ *Ibid.*

the Convention on Biodiversity (CBD) when determining the WTO-consistency of the EU's importation measures on GMOs. It found that a DSB body could use international laws to determine the ordinary meaning of treaty terms but was not obliged to do so.³³⁴ However, the Panel's reasoning on this point has been criticised by Young who argues that this leads to the selection of arbitrary sources of non-WTO law, rather than those relevant to the dispute.³³⁵ Although there is no formal hierarchy of cases or rules of precedent in the WTO system, AB jurisprudence has made it clear that Panels are expected to follow AB reports.³³⁶ Given that *US-Shrimp* is an AB case, it would likely be seen as more influential than *EC-Biotech*.

This suggests that any relevant non-WTO can, and should, be used to interpret provisions of WTO agreements, where these are relevant to the dispute. This accords with the institutional method of reconciling conflict.

Another aspect of *US-Shrimp* and *US-Shrimp 21.5* which gives further weight to the idea that any relevant non-WTO law can be used to resolve a WTO dispute, is the fact that the AB did not consider whether the parties in the case were also parties to the non-WTO agreements it drew on to interpret GATT Article XX(g).³³⁷ This suggests that, when reconciling WTO law with non-WTO law, there is no need to determine whether the parties in the case intended to be bound by the non-WTO law drawn upon. However, this is at odds with findings in *Indonesia-Automobiles* and *EC-Biotech*. In *Indonesia-Automobiles* the Panel held that, for a conflict to exist between two treaties, both treaties must have the same parties.³³⁸ In *EC-Biotech* the Panel also found that for a non-WTO agreement to be relevant to a WTO dispute, all WTO Members must also be parties to the non-WTO agreement.³³⁹ These findings in *EC-Biotech* have been criticised by commentators however,³⁴⁰ and were not followed in *EC-Civil Aircraft* where the AB held that 'a delicate balance must be struck between, on the one hand, taking due account of an individual WTO Member's international obligations and, on the other hand, ensuring a consistent and

³³⁴ EC-Biotech Panel paras 7.92-7.95.

³³⁵ Young (Note 197) at 235.

³³⁶ *US-Sunset Review of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina* (WT/DS268/AB/R) Report of the Appellate Body adopted on 17 December 2004 para 188; *US-Final Anti-Dumping Measures on Stainless Steel from Mexico* (WT/DS344/AB/R) Report of the Appellate Body adopted on 20 May 2008 paras 161-162.

³³⁷ See part B(ii) above.

³³⁸ *Indonesia-Automobiles* Panel at 329 fn 649.

³³⁹ EC-Asbestos Panel para 7.68.

³⁴⁰ See ILC Study para 471; Trebilcock, Howse & Eliason (Note 87) at 699-700.

harmonious approach to the interpretation of WTO law among all WTO Members.’³⁴¹ Both *Indonesia-Automobiles* and *EC-Biotech* were decided by Panels. *US-Shrimp* and *EU-Civil Aircraft* were decided by the AB. This suggests that future DSB bodies would give more weight to the findings in the latter two cases.

Flett, considering the issue from the point of view of a WTO litigator, believes that DSB bodies sometimes use non-WTO agreements as context for their decisions, without explicitly mentioning these in their judgments,³⁴² and that ‘the WTO is, in fact, relatively open to interaction with other international law regimes’³⁴³. This is a further indication that, from a practical perspective, the DSB bodies use non-WTO agreements to resolve conflict even when certain parties to the case before them are not parties to the agreement in question. Thus, reconciling WTO law with non-WTO law through interpretation, regardless of whether there is a potential conflict between these laws, probably best reflects the actual approach of DSB bodies to resolving conflicts.

(b) The conflict presumptions

As noted, the conflict presumptions come into play under the conventional method if it is not possible to reconcile agreements through interpretation. These presumptions have only a limited role to play in resolving conflict using the institutional method. However, they may be relevant in determining the intention of the parties to conflicting agreements under both methods.

Presumption against conflict

This aspect of conflict resolution is closely related to reconciliation through agreement. The presumption against conflict promotes the idea that agreements should be read together, thereby harmonising these agreements.

There is a strong emphasis on the prevention of conflict in the WTO. In a number of cases, the DSB has held that WTO Members intended provisions of WTO agreements to be applied

³⁴¹ *EC and Certain Member States-Measures Affecting Trade in Large Civil Aircraft* (WT/DS316/AB/R) Report of the Appellate Body adopted on 1 June 2011 paras 844-845.

³⁴² James Flett ‘Importing Other International Regimes into World Trade Organization Litigation’ in Margaret A. Young (ed) *Regime Interaction in International Law: Facing Fragmentation* (2012) at 303.

³⁴³ *Ibid* at 303.

cumulatively, except where there is a specific conflict between provisions.³⁴⁴ DSB bodies in fact appear to actively avoid conflict, as in the case of *Brazil-Tyres*, where the AB's findings suggested that, because there was a clause in MERCOSUR, a preferential trade agreement (PTA), which corresponded with GATT Article XX(b) and allowed Brazil to raise human health issues before a MERCOSUR Tribunal, Brazil's obligation to comply with the ruling of such Tribunal did not affect whether or not its measures were consistent with Article XX.³⁴⁵

However, The AB in *Peru-Agricultural Products* pointed out that a non-WTO agreement could not be used to interpret WTO agreements where the former 'subvert(s) the common intention of the treaty parties'.³⁴⁶ Where there is a direct conflict between provisions of agreements therefore, in that the provisions cannot co-exist, a DSB body would have to engage in a conflict analysis, on the strength of this finding. This accords with the statement in the ILC Study that reconciliation cannot resolve cases of genuine conflict.

Lex posterior

The other presumptions in the ILC 'toolbox' to resolve conflict, namely the *lex posterior*, *lex specialis* and *lex superior* (the *lex specialis* and *lex superior* presumptions are discussed below), have received only limited recognition by DSB bodies. However, they have been subject to analysis by commentators, none more so than the controversial *lex posterior* presumption.

On the basis of the *lex posterior* presumption, Pauwelyn believes that MEAs, if raised as a defence, rather than for interpretative purposes, will override WTO rules, although this does not apply to 'continuing treaties' (the situation where A ratifies treaty X first and treaty Y second, and B ratifies treaty Y first and treaty X second).³⁴⁷ Others also take Pauwelyn's view and this has been influential enough to cast doubt on the purpose of the MEA negotiations currently underway as part of the Doha Round.³⁴⁸ However, the Panel in *EC-Poultry* did state that past

³⁴⁴ See eg *Argentina-Safeguard Measures on Imports of Footwear* (WT/DS121/AB/R) Report of the Appellate Body adopted on 12 January 2000 para 89 (**Argentina-Footwear AB**); *Guatemala-Antidumping Investigation regarding Portland Cement from Mexico* (WT/DS60/AB/R) Report of the Appellate Body adopted on 25 November 1998 para 65, amongst others.

³⁴⁵ *Brazil-Tyres AB* para 234.

³⁴⁶ *Peru-Agricultural Products AB* para 5.94.

³⁴⁷ Pauwelyn (Note 277) at 350-351.

³⁴⁸ Young (Note 197) at 79.

panels had been cautious is applying the *lex posterior* presumption in interpreting Member's tariff schedules and that this presumption could not override the intention of the parties.³⁴⁹

With regard to Article 41, which is a specific formulation of the *lex posterior* presumption, no DSB body has specifically stated that it considers Article 41 of the VCLT to reflect international customary law. However, Rigaux and Simon, in their commentary on the VCLT, are of the view that '(e)ven if no tribunal and no State has formally pronounced on the customary character of Article 41, constant practice resolutely points in favour of the recognition of such character.'³⁵⁰ The ILC is also of the view that the VCLT reflects international customary law.³⁵¹ The DSB bodies too have referred to more than twenty other provisions of the VCLT in various judgments³⁵² and, in addition to findings by DSB bodies on the customary nature of Articles 31 and 32, the Panel in *EC-Poultry* found that Articles 30(3) and 59(1) of the VCLT represent a codification of customary international law.³⁵³ This shows that DSB bodies do recognise provisions of the VCLT other than Articles 31 and 32 to reflect international customary law.

The ILC points out that there is nothing in the text of the WTO agreements suggesting that Members cannot conclude *inter se* agreements modifying their rights and obligations in line with Article 41, provided that the *inter se* agreement *restricts* trade amongst the parties or does not contravene rules in the original agreement, and the agreement is notified to other Members.³⁵⁴ Pauwelyn also believes that *inter se* agreements are acceptable in the WTO, because suspension of concessions against one party is an acceptable form of retaliation in the WTO, and the majority of WTO obligations must, therefore, be bilateral rather than multilateral or *erga omnes* agreements.³⁵⁵

Vranes too holds the view that WTO treaties may be modified *inter se*, provided that such modification does not prejudice the rights of third parties and the other requirements of Article

³⁴⁹ EC-Poultry Panel para 206.

³⁵⁰ Anne Rigaux & Denys Simon 'Article 41: Agreements to modify multilateral treaties between certain of the parties only' in Olivier Corten & Pierre Klein (eds) *The Vienna Convention on the Law of Treaties: A commentary Volume II* (2011) at 994.

³⁵¹ ILC Study para 17.

³⁵² Flett (Note 342) at 269-272.

³⁵³ EC-Poultry Panel para 206.

³⁵⁴ ILC Study paras 306-318. Modification need not be overt if the intention to modify is 'universally apparent' from the modifying agreement.

³⁵⁵ Pauwelyn (Note 277) at 52-54.

41 are met.³⁵⁶ Writing in 2008, Vranes points to a number of cases which contain indications that the DSB bodies would be willing to consider arguments that raised non-WTO law as a defence to non-compliance with a WTO provision.³⁵⁷ Vranes also acknowledged, however, that in several cases DSB bodies took ‘distinctly restrictive stances’ of the role international law can play in WTO proceedings’.³⁵⁸ Vranes therefore concluded that there was no explicit signal either way in the case law³⁵⁹ but ultimately decided, on the basis of academic writing, that there is no indication in the WTO Agreements that WTO Members intended to prevent the modification of WTO provisions *inter se*.³⁶⁰

Trachtman takes the opposite view. He argues on the basis of Articles 3:2, 7 and 11 of the DSU that WTO Members intended that DSB bodies would only apply WTO law, a stance which he believes was confirmed by the AB in the cases of *EC-Poultry* and *Argentina-Footwear*.³⁶¹ However, he appears to be in the minority with this view³⁶² and himself admits that ‘(w)hile present WTO law seems clearly to exclude direct application of non-WTO international law, this position seems unsustainable as increasing conflicts between trade values and non-trade values arise.’³⁶³

The AB dealt briefly with Article 41 in *Peru-Agricultural Products*. Peru raised Article 41 in an attempt to justify its ‘Price Range System’ for the calculation of duties on certain agricultural products, which contravened both Article 4.2 of the Agreement on Agriculture and Peru’s

³⁵⁶ Vranes (Note 303) at 91.

³⁵⁷ Ibid at 80-82. These cases include *Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items* (WT/DS56/AB/R) Report of the Appellate Body adopted on 22 April 1998 paras 65-74 and *Korea-Measures Affecting Government Procurement* (WT/DS163/R) Report of the Panel adopted on 19 June 2000 (**Korea-Government Procurement Panel**) para 7.96.

³⁵⁸ Vranes (Note 303) at 70. These cases include *US-Imports of Sugar from Nicaragua* (L/5607 - 31S/67) Report of the Panel adopted on 13 March 1984 para 4.1; *Canada-Herring and Salmon* para 5.3 and *Canada-Administration of the Foreign Investment Review Act* (L/5504-30S/140) Report of the Panel adopted on 7 February 1984 para 1.4.

³⁵⁹ It should be noted that all the cases against the proposition are GATT-era (pre-WTO) cases. As illustrated in *US-Tuna I and II* the GATT Panels favoured a more trade-oriented approach.

³⁶⁰ Vranes (Note 303) at 82.

³⁶¹ Joel Trachtman ‘The Domain of WTO Dispute Resolution’ (1999) 40 *Harvard International Law Journal* 333. Trachtman allows only for the possibility of other international law being applied by WTO tribunals when it is incorporated by reference in a WTO Agreement. He acknowledges the AB’s acceptance of customary rules of interpretation but believes these are given only a limited role in WTO dispute resolution.

³⁶² Vranes (Note 303) at 83-84. Trachtman’s view implies that WTO law is divorced from general international law, which, as discussed above, is not generally accepted.

³⁶³ Trachtman (Note 361) at 376.

Schedule of Concessions.³⁶⁴ Peru had argued before the Panel that a PTA concluded between Guatemala and Peru, in which Guatemala had apparently waived its right to challenge the Price Range System, precluded Guatemala from bringing proceedings in the WTO challenging this system.³⁶⁵ However, the AB found that the WTO agreements contain specific provisions dealing with amendments, waivers and exceptions for PTAs³⁶⁶ ‘which prevail over the general provisions of the Vienna Convention, such as Article 41’.³⁶⁷

Prima facie the AB did not appear to limit its findings on Article 41 to PTAs. A wider application is suggested by the mention of waivers, which can also allow unilateral conduct. If so, the finding is dubious at best, given the recognition by DSB bodies of the international customary character of many provisions of the VCLT, and the views expressed by commentators that Article 41 reflects international customary law. However, the vast number of PTAs which have been negotiated in recent years, including the recent Trans-Pacific Partnership (TPP), representing a third of all trade,³⁶⁸ do appear to constitute a threat to the multilateral trading system.³⁶⁹ Countries frustrated with the Doha Round have turned to PTAs to facilitate their trade goals, and the attention of trade ministers has also turned in this direction.³⁷⁰ Because of this, it is clear that the WTO struggles with its role in cases involving PTAs³⁷¹ and its ultimate refusal to allow Peru and Guatemala’s PTA to modify WTO provisions was possibly for reasons which involve its perceived role as the multilateral trading body under which PTAs are allowed only as an exception subject to strict conditions.

A DSB body may, therefore, not apply this restrictive reasoning to the case of a conflict between an MEA and a WTO agreement, especially after cases like *US-Shrimp* and *US-Gasoline*, where the AB stated that ‘the General Agreement (GATT) is not to be read in clinical isolation from

³⁶⁴ Peru-Agricultural Products AB para 6.6.

³⁶⁵ Ibid paras 5.20 and 5.85.

³⁶⁶ GATT art XXIV and GATS art V.

³⁶⁷ Peru-Agricultural Products AB paras 5.97 and 5.112.

³⁶⁸ Office of the United State Trade Representative ‘Trans-Pacific Partnership: Summary of U.S Objectives’ available at <https://ustr.gov/tpp/Summary-of-US-objectives>, accessed on 18 February 2016.

³⁶⁹ See generally Jagdish Bhagwati *Termites in the Trading System: How Preferential Agreements Undermine Free Trade* (2008) chap 3; WTO *Understanding the WTO* 5ed (2015) available at https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf, accessed on 19 February 2016 at 86.

³⁷⁰ Ibid at 87.

³⁷¹ See eg *Mexico-Tax Measures on Soft Drinks and other Beverages* (WT/DS308/AB/R) Report of the Appellate Body adopted on 24 March 2006 and *Brazil-Tyres* AB.

public international law'.³⁷² On the other hand, Article XIV specifically provides that PTAs are an exception to compliance with GATT obligations.³⁷³ If not even PTAs can trump WTO obligations in the event of a conflict there appears to be little hope for any other agreement outside the WTO. A Panel may also feel bound to follow the AB reasoning regarding Article 41 in *Peru-Agricultural Products*. Indeed, not doing so would seem to undermine security and predictability in the multilateral trading system.³⁷⁴ The reasoning in *Peru-Agricultural Products* therefore suggests that the use of Article 41 to justify *inter se* agreements modifying WTO provisions is not approved of by DSB bodies and that internal WTO negotiation should be used to modify WTO provisions.

Lex specialis

DSB bodies have not dealt with the *lex specialis* presumption as it applies in a conflict between WTO and non-WTO law, but only between WTO laws. The ILC has stated that the presumption appears to only have a limited role in conflict resolution in the WTO.³⁷⁵ However, this view is based on the cases of *Indonesia-Automobiles* and *Turkey-Textiles* which advocate a narrow view of conflict.³⁷⁶ These cases also endorse the presumption against conflict.³⁷⁷ The ILC's reasoning therefore appears to conflate the *lex specialis* presumption with the presumption against conflict.

Rather, DSB bodies do not discount the fact that the *lex specialis* presumption may apply where a conflict does exist. Rather, a number of WTO cases have pointed to Annex 1A of the Marrakesh Agreement³⁷⁸ as the relevant provision to apply when there is a conflict between WTO provisions.³⁷⁹ The General Interpretative Note to Annex 1A provides that where there is a conflict between the GATT and another Annex 1A Agreement, such as the TBT and SPS, the Annex 1A Agreement prevails to the extent of the conflict.³⁸⁰ In turn, pursuant to Article 1(5) of the TBT, the SPS takes precedence over the TBT in the event that a measure is one that falls

³⁷² US-Gasoline AB at 17. See also Korea-Government Procurement Panel para 7.96.

³⁷³ GATT art XIV(5).

³⁷⁴ This is one of the objectives of the dispute settlement system-see DSU art 3.2.

³⁷⁵ ILC Study para 75.

³⁷⁶ See part C(i) above.

³⁷⁷ *Indonesia-Automobiles* Panel at 329; *Turkey-Textiles* Panel para 9.92.

³⁷⁸ Agreement Establishing the WTO of 1994.

³⁷⁹ *Argentina-Footwear* AB para 89; *India-Measures Affecting the Automotive Sector* (WT/DS146/R; WT/DS175/R) Report of the Panel adopted on 5 April 2002 para 7.158 and fn 380.

³⁸⁰ General Interpretative Note to Annex 1A of 1994.

under Annex A of the SPS.³⁸¹ However, this reasoning is based on specific WTO provisions and does not give much insight into whether a DSB body would apply this principle to reconcile WTO law and non-WTO law.

Lex superior

Young takes the view that in the context of trade and environment, particularly fisheries obligations, there does not appear to be any obvious hierarchy between norms.³⁸² Indeed, the DSB bodies do not appear to have used this concept in the past to resolve disputes.

Pauwelyn too has argued that the idea advanced by commentators like Delbrück that some MEAs, including UNFSA, create *erga omnes* obligations or are binding on third parties because they are in the ‘public interest’, cannot be correct.³⁸³ This, according to Pauwelyn, would violate the *pacta tertiis* principle and import an unacceptable level of subjectivity into international law (i.e. who decides what is in the public interest?)³⁸⁴ It is therefore doubtful that an MEA like UNFSA can be considered a *lex superior* for the purposes of resolving conflict.

(c) Consultation with IGOs and NGOs

As discussed, the institutional method advocates that DSB bodies consult with IGOs and NGOs and accept and use *amicus* briefs and reports from these bodies. This allows DSB bodies to understand the relevance of the laws, rather than attempting to discern this from international agreements.

However, as Young points out, DSB bodies have been reluctant to consult with IGOs in the past, and have done so in only a limited number of cases.³⁸⁵ In addition, while the AB in *US-Shrimp* decided that Panels could accept *amicus* briefs,³⁸⁶ DSB bodies rarely rely on these in their reasoning,³⁸⁷ a practice which Perez has termed ‘incorporate but ignore’.³⁸⁸ It is possible, as Flett suggests, that DSB bodies take these briefs into account without actually mentioning them

³⁸¹ TBT art 1(5).

³⁸² Young (Note 197) at 12.

³⁸³ Pauwelyn (Note 277) at 102.

³⁸⁴ *Ibid* at 102-103.

³⁸⁵ Young (Note 197) at 215-216.

³⁸⁶ *US-Shrimp* AB para 110.

³⁸⁷ See eg *EC-Asbestos* AB.

³⁸⁸ Perez (Note 290) at 102.

in their judgments. As there is no clear evidence of this however, not possible to determine when or if the AB will use these briefs.

D. Application to the herring dispute

As the above analysis has shown, DSB bodies are reluctant to apply conflict presumptions to the cases before them, and prefer to reconcile agreements through interpretation. To the extent that this is not possible however, other conflict presumptions or methods will need to be employed to resolve disputes.

In analysing the various agreements in issue in the herring case, it should be noted that the Faroes, while it can become a party to a treaty or organisation in its own right, and has done so in the case of NEAFC, was not a WTO Member or an UNCLOS party at the time of the dispute. Rather, the disputes at the WTO and the Permanent Court of Arbitration (PCA), an UNCLOS tribunal, were ‘lodged on its behalf’ by Denmark.³⁸⁹ Both UNCLOS and the WTO accepted this by taking the cases, at least provisionally. Thus, for the purposes of this dissertation, it will be accepted that the Faroes is a party to all agreements to which Denmark is a party.

(i) Reconciliation through interpretation

As discussed, DSB bodies appear to allow the use of all relevant international law to interpret WTO agreements, in line with the institutional method. In the herring dispute, this would include all those agreements allowing PSMs to be taken against those states engaged in IUU fishing, particularly those which specifically regulate IUU fishing of herring, such as the NEAFC Scheme.

The AB in *US-Shrimp* found that, in the circumstances of the case before it, the US had an obligation to enter into multilateral negotiations with countries to preserve sea turtles.³⁹⁰ As discussed in Chapter III, the Chapeau would likely have been interpreted in a similar manner had the herring dispute gone before a Panel, based both on the AB’s reasoning and the fact that there are a number of MEAs in international law which advocate multilateral cooperation to conserve fish stocks, including UNCLOS, UNFSA, the PSMA and others.³⁹¹ This suggests that

³⁸⁹ Request for Consultations para 1; *Atlanto-Scandian Herring* PCA.

³⁹⁰ See Chap III(B)(i).

³⁹¹ *Ibid.*

cooperation is particularly important in conserving fish stocks. In using these agreements to interpret the Chapeau, a Panel would reconcile WTO law and non-WTO law, thereby creating greater harmonisation between trade and fisheries law.

A number of the MEAs under discussion could have been used as evidence of such multilateral cooperation amongst the parties. As the EU and Faroes agreed to regulate the conservation of fish stocks through these MEAs, it is also arguable that they agreed to all measures taken by the other party to conserve the fish stocks, provided these are allowed by the MEAs. This would include the use of PSMs. In determining evidence of multilateral cooperation however, only those MEAs to which the EU and Faroes (or Denmark) are parties would be relevant as only these can show that the parties cooperated to resolve the dispute.

Article 23 of UNFSA allows, and may even require, states to restrict access to their ports for the purpose of landing and transshipping fish, where vessels have not complied with fisheries conservation and management measures of regional bodies. However, these provisions are very general, and do not cover the specific fish in dispute. They also do not specifically allow for PSMs to be used. Thus, the very general nature of Article 23 may make the use of this provision as evidence of agreement to conserve herring stocks through the use of PSMs somewhat strained, especially because of the failure by the parties to cooperate on the specific issue of the allocation key for herring.³⁹²

PSMA Articles 9(4) and 11 require states to close their ports to vessels involved in IUU fishing. Although also not dealing specifically with herring, the PSMA is more specific than UNFSA, as it expressly obliges states to use PSMs to prevent IUU fishing. However, if we are looking for evidence of multilateral cooperation, it appears that the PSMA would not be relevant, as neither the Faroes nor Denmark is a party to this agreement.

Article 23(4) of the NEAFC Scheme requires that PSMs be imposed on NEAFC contracting parties for non-compliance with NEAFC agreements. This shows the clear intention of the NEAFC parties to regulate their own agreements to conserve and manage stocks in the NEAFC Convention Area, including herring, through the imposition of PSMs like those contained in the

³⁹² See Chap I.

Shared Stocks Regulation. However, this provision was inserted into the NEAFC Scheme only in 2015 and would not have been applicable in the herring dispute.

The FAO Fisheries Code, while not binding, was adopted unanimously by the FAO,³⁹³ of which both the EU and Denmark are Members.³⁹⁴ The IPOA-IUU has also been widely accepted by states and RFMOs³⁹⁵ and was used as a basis for the NEAFC Scheme. These instruments therefore provide some evidence that the EU and Faroes approve of the use of PSMs to prevent IUU fishing.

UNFSA, the FAO Fisheries Code and the IPOA-IUU may cumulatively provide enough evidence of cooperation to show that there was agreement between the EU and Faroes on how to best conserve the herring stock, including using PSMs to prevent IUU fishing of the stock.

The above analysis suggests that MEAs advocating PSMs to combat IUU fishing could be used as evidence of multilateral cooperation under the GATT, thereby avoiding conflict between the GATT and these instruments. However, at the time of the herring dispute, there was no provision in NEAFC specifically requiring NEAFC states to impose PSMs on their NEAFC trading partners for IUU fishing in the Convention Area. The PSMA, which allows for PSMs to conserve fish stocks also cannot be used as evidence of multilateral cooperation. This may mean that the remaining provisions are too general to provide sufficient evidence of cooperation between the EU and Faroes to regulate their relationship with regard to the herring stock. In this case there would be a conflict between the GATT and these MEAs. Using these agreements as evidence of multilateral cooperation also does not address the problem that the EU Regulations may be inconsistent with the Chapeau because the measures are protectionist.

(ii) Conflict presumptions

In applying the conflict presumptions, only those agreements to which the EU and Faroes (or Denmark) are parties are relevant to the analysis, as these presumptions are used to resolve actual

³⁹³ See David J. Douman 'The Code of Conduct for Responsible Fisheries: The Requirements for Structural Change and Adjustment in the Fisheries Sector' available at <http://www.fao.org/docrep/006/AD364E/AD364E00.HTM>, accessed on 9 March 2016.

³⁹⁴ FAO 'FAO Members' available at <http://www.fao.org/legal/home/fao-members/en/>, accessed on 9 March 2016.

³⁹⁵ See Mary Ann Palma 'Combatting IUU Fishing: International Legal Developments' available at http://ancors.uow.edu.au/images/publications/Navigating%20Pacific%20Fisheries%20Ebook/Chapter_3_Navigating_Pacific_Fisheries.pdf, accessed on 9 March 2016 at 74.

conflict between agreements. The ILC Study also did not deal with soft law, and it would seem that the FAO Fisheries Code and IPOA-IUU should not be part of a conventional conflict analysis, despite providing evidence of the intention of the parties to the dispute. This means that, in applying the conflict presumptions, only UNFSA is potentially in conflict with the GATT.

UNFSA was entered into by the parties later in time than the GATT.³⁹⁶ It is, therefore, the *lex posterior* and, on Pauwelyn's view, would trump the GATT in a conflict. UNFSA could also potentially be considered an *inter se* agreement between the parties modifying the GATT, under Article 41. However, given the findings in the case of *Peru-Agricultural Products* rejecting the application of Article 41 in WTO disputes, a Panel may not be willing to accept an *inter se* modification of a WTO agreement, despite the fact that the majority of commentators believe that WTO law would allow such modification.

As mentioned in part B(i) however, the ILC is of the view that conflict clauses dealing with the status of later or earlier agreements should be included in a new agreement, in order to resolve problems in applying the *lex posterior* presumption. Although the GATT does not appear to have a conflict clause, UNFSA does have such a clause.³⁹⁷

Article 31(1) of UNFSA provides that the rights and duties of parties to UNFSA arising from other agreements to which these states are already parties are not affected by the coming into operation of UNFSA, provided these rights and duties are not incompatible with UNFSA. Under this clause UNFSA takes precedence over prior concluded agreements between state parties, where there is a conflict of norms between UNFSA and these prior agreements. The GATT was initially concluded in 1947 and revised in 1994 when the WTO was created. UNFSA was concluded only in 1995. UNFSA was therefore concluded later in time than the GATT. This suggests that, if the Panel did engage in a conflict analysis in the herring dispute, there would be clear evidence from the UNFSA conflict clause that the intention of the parties to both UNFSA and the GATT is that a provision in UNFSA would override a provision in the GATT. Whether a DSB body would take this into account is unclear. Although Pauwelyn believes that it would,

³⁹⁶ UNFSA in 2003 (Denmark and the EU) and GATT in 1950 (Denmark) and 1995 (EU).

³⁹⁷ UNFSA art 31(1).

WTO jurisprudence has, in fact, indicated that DSB bodies are cautious in applying the *lex posterior* presumption.

In the management of straddling fish stocks, and particularly herring, it certainly seems that UNFSA is also the *lex specialis*. However, the fact that the EU used trade measures to enforce these agreements may potentially make the GATT the more specialised law. The problems evident in resolving conflict through this sort of analysis are the reason that conflict rules like the *lex specialis* presumption may be inappropriate for resolving trade and environment disputes. As discussed, there is also no indication in the case law as to whether a DSB body would apply this presumption to resolve a dispute between WTO and non-WTO law.

(iii) The institutional method

If the institutional method was used by a Panel to resolve the herring conflict, it would take into account the expressions of state intent arising from the analysis of conflict presumptions above, as well as the potential for reconciliation of agreements. However, it would also consider the findings of IGOs like FAO and ICES regarding the devastating impact of IUU fishing, the necessity of PSMs to prevent IUU fishing and the need for the protection of the herring stock.³⁹⁸ In determining whether the findings of ICES and the FAO are relevant, it should be noted that the majority of ICES member states are from Europe and include the NEAFC parties. ICES also consults a network of over 4000 scientists from many different countries, in conducting its research.³⁹⁹ It aims to be transparent in the projects it takes on, providing information not only on the project itself, but also on which states or organisations are funding the project.⁴⁰⁰ The FAO has an extremely wide membership, made up of both developed and developing countries⁴⁰¹ and is transparent about its processes.⁴⁰² It is also a highly respected international organisation.⁴⁰³

³⁹⁸ See Chap I.

³⁹⁹ ICES 'Who we are' available at <http://www.ices.dk/explore-us/who-we-are/Pages/Who-we-are.aspx>. Accessed on 10 March 2016.

⁴⁰⁰ See ICES 'ICES Project Policy' available at <http://www.ices.dk/explore-us/projects/Pages/ICES-Project-Policy.aspx>, accessed on 10 March 2016, and the projects set out under 'current projects'.

⁴⁰¹ FAO (Note 394).

⁴⁰² See eg FAO Fisheries Code Annex 1; CDS Guidelines.

⁴⁰³ For example, SPS Annex A(3) provides that WTO Members should use Codex Alimentarius standards, a food safety body created and administered by the FAO and WHO, as a basis for their SPS measures – see Chap III(A)(iii) above.

However, the reluctance of DSB bodies to consult with IGOs may have led a Panel to overlook findings by these bodies in the herring dispute.

(iv) Conclusion

It is possible that reconciliation of MEAs and the GATT could occur in the herring dispute although this may not be possible. However, application of the conflict presumptions and institutional method suggest that PSMs to prevent IUU fishing in domestic legislation of WTO Members should be recognised by DSB bodies as GATT-consistent. If a Panel had engaged in a conflict analysis in the herring dispute, it may very well have found for the EU.

The most progressive approach by DSB bodies to conflict resolution to date has been that of the AB in the *US-Shrimp* dispute. However, there appeared to be no direct conflict between the non-WTO agreements relied on by the AB and the GATT in *US-Shrimp*, and no defence based on these agreements was raised by the parties. In contrast, DSB bodies faced with direct conflict⁴⁰⁴ have shied away from any sort of conflict analysis. This suggests that a Panel faced with the herring dispute would not have engaged in a direct conflict analysis and would not have allowed an MEA to override the GATT.

⁴⁰⁴ EC-Biotech Panel; Peru-Agricultural Products.

Chapter IX – Conclusion

The herring dispute raises a number of interesting questions regarding the relationship between trade and fisheries in international law. The growing number of agreements and soft law instruments attempting to prevent IUU fishing and thereby alleviate some of the pressure on a diminishing resource, illustrate the importance of this issue to the international community. However, there are other areas of international law, such as trade, which also regulate important issues, including the alleviation of poverty through economic growth. This inevitably leads to conflict, but it need not necessarily lead to fragmentation of international law. It is important that international tribunals find ways to reconcile these provisions and to confront conflicts directly, rather than ignoring them.

We have seen in Chapters II and III that the EU Regulations, while well-crafted, may still be GATT-inconsistent in the circumstances of the herring dispute, at least on an application of principles enumerated in WTO jurisprudence. The provisions may be discriminatory on their face, as they treat the Faroes differently to other NEAFC parties importing herring and mackerel into the EU. They also prevent freedom of transit through the EU and transshipment in EU ports. The EU Regulations do appear to be provisionally justified under Article XX(g) of the GATT. However, they may contravene the Article XX Chapeau because of the way they are applied. In this regard, the EU did not appear to effectively consult with the Faroes prior to imposing the EU Regulations. The EU may also be discriminating against third party states by providing subsidies to its own states, and thereby building up the capacity of its own fishing fleets. This increases the potential for IUU fishing by its own fleets while it simultaneously attempts to prevent IUU fishing in the waters of third party states.

However, there are a number of MEAs that allow the types of PSMs taken in the EU Regulations. The MEAs conflict with GATT Articles V, and possibly I and XI. Chapter IV considered whether these MEAs could be reconciled with the GATT through interpretation and, if not, whether methods developed for resolving conflict in international law could be used to resolve conflict between these agreements. This analysis suggested that MEAs could possibly be reconciled with the GATT by providing evidence of multilateral cooperation between the parties, as required by the Article XX Chapeau. However, this would still not render the EU Regulations GATT-consistent if they were found to be protectionist.

A conflict analysis was then conducted. The analysis suggested that the PSMs imposed by the EU Regulations should be allowed by a Panel hearing the herring dispute. This is because the intent of the parties to the GATT and the MEAs analysed, particularly UNFSA, appears to be that WTO Members should be allowed to use PSMs to prevent IUU fishing. This is bolstered by the fact that IUU fishing poses a significant threat to a valuable resource, upsets attempts to sustainably manage fish stocks and is linked to a number of other crimes, such as drug trafficking, arms trafficking and human trafficking. However, an analysis of the practice of DSB bodies showed that DSB bodies are wary of applying conflict presumptions such as the *lex posterior* and *lex specialis* and generally engaging in outright conflict analysis.

Thus, should a DSB body be faced with the Shared Stocks Regulation and a specific implementing regulation in a case where a WTO Member applies measures against an RFMO partner, it would likely find such regulations to be inconsistent with the GATT and not justifiable with reference to a conflict analysis. This suggests that measures taken against RFMO partners to prevent IUU fishing are not reconcilable with international trade law unless they are found to be GATT-consistent, and raising MEAs as a defence to a GATT contravention is unlikely to assist WTO Members. It would therefore be prudent for WTO Members applying these sorts of measures against RFMO partners, including the EU, to address the problems identified in the analysis of the EU Regulations set out in Chapter III.

To this end, a WTO Member should ensure that it engages properly with an RFMO partner with which it has a dispute before imposing unilateral measures against such partner. This would require best efforts to come to an agreement. It should also ensure that it defines important concepts in its measures as clearly as possible, to avoid findings of arbitrary discrimination. Finally, it should focus on preventing IUU fishing of its own nationals to the same extent as it does third party states, to avoid allegations of unfair discrimination and disguised protectionism.

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