

SEE YOU IN PORT: AUSTRALIA AND NEW ZEALAND AS THIRD PARTIES IN THE DISPUTE BETWEEN CHILE AND THE EUROPEAN COMMUNITY OVER CHILE'S DENIAL OF PORT ACCESS TO SPANISH VESSELS FISHING FOR SWORDFISH ON THE HIGH SEAS

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[Before it went into abeyance, the dispute between Chile and the European Community over the catch by Spanish vessels of swordfish in the high seas adjacent to Chile's exclusive economic zone, and Chile's consequent refusal to allow Spanish vessels access to its ports, was proceeding towards hearings in two separate fora: a World Trade Organization Dispute Settlement Panel and a Special Chamber of the International Tribunal for the Law of the Sea. Each of these proceedings, if pursued in isolation as though it were capable of disposing of the entire dispute, had the potential to produce a collision between international trade law and law of the sea principles that might have left both ineffective. As third parties before the WTO Panel, Australia and New Zealand would have been well placed — and will continue to be so if the dispute is revived — to advance arguments on how the two sets of principles could be made mutually supportive, underpinning the interest of coastal states in proper management of fish stocks in which they have a legitimate interest, while ensuring that freedom of transit is not denied to distant-water fishing states in a peremptory manner amounting to an unnecessary barrier to trade. This would entail accepting that the dispute had a trade dimension that could be heard by the WTO, while advancing interpretations of articles V:2 and XI:1 of the General Agreement on Tariffs and Trade, on which the EC was relying, that do not disable the port state from performing its 'right and duty' under article 23 of the UN Fish Stocks Agreement to use port state measures to promote sound conservation and management of fish stocks of international interest. Crucially, as parties to the UN Fish Stocks Agreement, Australia and New Zealand could also highlight the relevance of its salient provisions to this dispute.]

CONTENTS

- I Introduction
- II Background to the Case
- III The Proceedings and their Suspension
- IV Possible Arguments of the Parties and Implications of the Dual Proceedings if the Dispute is not Resolved
 - A GATT Article XI
 - B GATT Article V
 - C Possible Article XX Defence
 - D UNCLOS Provisions
- V Australia and New Zealand as Third Parties

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- VI Possible Third-Party Arguments before the WTO Panel and Special Chamber of ITLOS
VII Conclusion

I INTRODUCTION

The interaction between the law of the sea and international trade law in the dispute between Chile and the European Community ('EC') over Chile's closure of its ports to Spanish vessels fishing for swordfish on the high seas is not unique, for these two important branches of international law intersect in more places than one might think. For example, there is specific reference to the rules on subsidies in 'the General Agreement on Tariffs and Trade, its relevant codes and successor or superseding agreements' in the deep seabed mining amendment package,¹ which opened the way for a great many developed countries to become party to the *United Nations Convention on the Law of the Sea* ('UNCLOS').² However, the main area of intersection is in fisheries. This can be seen both in the debates being held in the World Trade Organization ('WTO') on rules of origin,³ and in the recent success of the quaintly named 'Friends of Fish' group in ensuring that disciplines on fisheries subsidies became a specific issue for negotiation in the new round of multilateral trade talks launched at the WTO's Fourth Ministerial Conference in Doha in November 2001.⁴ The Friends

¹ *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*, opened for signature 28 July 1994, 1836 UNTS 3, 33 ILM 1309 (1994) (entered into force 28 July 1996). Sections 6(1)(b) and 6(1)(c) of the annex apply the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1869 UNTS 190, 33 ILM 1154 (1994) (entered into force 1 January 1995), annex 1A (*General Agreements on Tariffs and Trade*) ('GATT') and associated law generally to activities in the area beyond national jurisdiction and stipulate in particular that there may be no subsidisation within the meaning of those instruments of activities in that area except as permitted under those instruments.

² Opened for signature 10 December 1982, 1833 UNTS 3, 21 ILM 1261 (1982) (entered into force 16 November 1994).

³ See below n 65.

⁴ The Doha negotiating mandate on fisheries subsidies is in WTO Doc WT/MIN(01)/DEC/W/1 (14 November 2001) [28]. See also the submissions of the following states: Iceland, WTO, *Submission by Iceland: The Icelandic Fisheries Management System*, WTO Doc WT/CTE/W/103 (25 January 1999); WTO, *Report by the Icelandic Ministry of Fisheries: On the Environmental Impact of Fisheries Subsidies*, WTO Doc WT/CTE/W/111 (11 March 1999); WTO, *Communication from Iceland: Fishing Subsidies and the Environment*, WTO Doc WT/CTE/W/132 (21 February 2000); Australia (as part of a more wide-ranging paper on the environmentally beneficial effects of trade liberalisation): WTO, *Submission by Australia: Trade Liberalization and the Environment: A Positive Agenda for Trade Reform*, WTO Doc WT/CTE/W/105 (2 February 1999) [26]–[31]; New Zealand: WTO, *Submission by New Zealand: Benefits of Eliminating Trade Distorting and Environmentally Damaging Subsidies in the Fisheries Sector*, WTO Doc WT/CTE/W/121 (28 June 1999); WTO, *Communication from New Zealand: Subsidies in the Fisheries Sector: Update on Recent Work Conducted by New Zealand*, WTO Doc WT/CTE/W/134 (24 February 2000); the United States: WTO, *Communication from the United States: Environmentally Harmful and Trade Distorting Subsidies*, WTO Doc WT/CTE/W/154 (4 July 2000) and the United Nations: WTO, *Communication from United Nations Environment Programme: UNEP Fisheries Subsidies Workshop*, WTO Doc WT/CTE/W/187 (15 March 2001). In the lead-up to the WTO's Third Ministerial Conference in Seattle, New Zealand expressed concern at the overexploitation of fisheries resources caused by the subsidisation of the fisheries sector: see, eg, WTO General Council,

of Fish identify those subsidies as a major factor contributing to the overcapacity that is hindering efforts to restore to health the world's many depleted fish stocks.

This article begins by describing in part II the fish at issue in the dispute and recounting how the dispute arose. Part III traces the initiation and subsequent suspension of formal proceedings in the WTO and the International Tribunal for the Law of the Sea ('ITLOS'). In part IV the likely arguments of the two sides (if the dispute had remained on foot) are canvassed, with particular attention to the rules on access to ports as seen first through the prism of *UNCLOS* and then through the *GATT*,⁵ and to the relationship between them. Part V introduces the particular interests of Australia and New Zealand as third parties to the dispute by setting out their legislation and policy on access to ports by foreign fishing vessels, and on landings of fish caught by such vessels on the high seas. Part VI suggests arguments that Australia and New Zealand might have made before the WTO Panel and ITLOS that would have had the effect of reconciling both the relevant rules of the law of the sea with those of international trade law, and their law of the sea interests as coastal states with their trade policy interests. Brief conclusions are then drawn in part VII.

II BACKGROUND TO THE CASE

As the dispute had a gestation period of several years before culminating in litigation, it is worthwhile to examine the background in some detail.⁶

Swordfish (*Xiphias gladius*) is one of the highly migratory species listed in annex I to *UNCLOS*.⁷ It is found throughout the world's oceans between latitudes 45 degrees North and 45 degrees South, and between the surface and a depth of 650 metres.⁸ Individual fish can grow up to 4.45 meters in length and weigh up to 540 kilograms. In the late 1990s global annual landings of swordfish were about 80 000 tonnes.⁹ While their highly migratory nature might be thought to be conducive to relative uniformity in size and growth rate of widely

Preparation for Ministerial Conference, *Communication from New Zealand: Elimination of Trade and Environmentally Damaging Subsidies in the Fisheries Sector*, WTO Doc WT/GC/W/292 (5 August 1999), and a joint proposal to eliminate fisheries subsidies was received from Australia, Iceland, Norway, Peru, the Philippines and the US: see, eg, WTO General Council, Preparation for Ministerial Conference, *Communication from Australia, Iceland, Norway, Peru, the Philippines and the United States: Fisheries Subsidies*, WTO Doc WT/GC/W/303 (6 August 1999).

⁵ Note that *GATT* consists of the text of the original *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187, together with a number of instruments and decisions of the contracting parties to *GATT* as maintained in force by the *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3, 33 ILM 1125 (1994) (entered into force 1 January 1995) ('*Marrakesh Agreement*').

⁶ For a general history of the dispute, see Dispute Settlement Body, *Minutes of Meeting Held in Centre William Rappard on 17 November 2000*, WTO Doc WT/DSB/M/92 (15 January 2001) [100]–[114] ('*Minutes of Meeting on 17 November 2000*').

⁷ *UNCLOS*, above n 2, art 64 details the rules specific to highly migratory species.

⁸ P Garzotti and E Cavarero, European Commission, *TBR Proceedings Concerning Chilean Practices Affecting Transit of Swordfish in Chilean Ports: Report to the Trade Barriers Regulation Committee of the European Communities* (1999) 8 <http://europa.eu.int/comm/trade/pdf/chiswo_rep.pdf> at 30 April 2002.

⁹ *Ibid.*

dispersed specimens, there is evidence that swordfish in the Pacific may grow more slowly and to a smaller average size than those in the Atlantic.¹⁰ This suggests that there are at least two separate stocks, although the Pacific stock may in fact be three separate stocks.¹¹

One (or part of one) of these stocks exists in the south-eastern Pacific Ocean off the coast of Chile, and was at first exploited only by a Chilean artisan fishery, until the development more recently of a commercial fishery further offshore.¹² In 1991, in response to declining catch levels which indicated that the stock was being overfished, Chile imposed catch restrictions¹³ on its own vessels. These quotas included any swordfish caught on the high seas in an area adjacent to Chile's exclusive economic zone ('EEZ').¹⁴

¹⁰ Ibid.

¹¹ Ibid 18.

¹² Chilean catches grew from 103 tonnes in 1984 to 7255 tonnes by 1991: *ibid* 20.

¹³ The Chilean fishery and aquaculture law was consolidated by *Presidential Decree No 430* (28 September 1991) into the *Ley General de Pesca y Acuicultura, Ley No 18.892 1989* (Chile) ('*General Law of Fisheries and Aquaculture*') <<http://www.subpesca.cl/files/legislacion/fishlaw.pdf>> at 30 April 2002 (English version), <<http://www.subpesca.cl/files/legislacion/leyrefund.pdf>> at 30 April 2002 (Spanish version). Article 165 of the *General Law of Fisheries and Aquaculture* authorises the Ministry of the Economy, Development and Reconstruction to suspend registration of vessels when a species of fish is declared to be fully exploited, thus preventing the issue of further fishing licences for that species. While the first such declaration was gazetted in 1991, it is not entirely clear whether it had the effect of limiting the Chilean fleet's catch. Garzotti and Cavarero, above n 8, 55, assert that from 1991 to 1998 'Chilean industrial vessels fished and landed swordfish catches without any quantitative limit in Chilean ports and none incurred any of the major sanctions for violation of the conservation measures set by the Under-Secretary of Fisheries.' However, the two statements are not necessarily mutually exclusive; it could be that the catch limits were on the statute books but were either too high to have had a real limiting effect on the catch or not enforced (though if this were the case, it would severely weaken Chile's ability to defend the measure under art XX(g) of the *GATT*: see below n 88 and accompanying text). The precise nature of Chile's measures is not clear from the information posted on the Undersecretariat of Fisheries website, but a total ban on landing of swordfish caught by Chile's own vessels on the high seas contrary to the management measures for this species is mentioned in Dispute Settlement Body, *Minutes of Meeting Held in Centre William Rapard on 12 December 2000*, WTO Doc WT/DSB/M/94 (15 February 2001) [66] ('*Minutes of Meeting on 12 December 2000*') and in 'EU Likely to Seek WTO Panel with Chile over Port Access for Swordfish' (2000) 18 *Inside US Trade* 9. The measures are listed as a prohibition on use of factory ships and on fishing in the nesting and spawning grounds, and a cap on the level of fishing by limiting fishing licences. While the author's Spanish is insufficient to identify these or any other measures affecting swordfish on the Undersecretariat's website, *Límites Máximos de Captura por Armador, Ley No 19.713* (Chile) ('*Maximum Catch Limit per Shipowner Law*') operates by limiting the amount of a species that the vessels of each shipowner may take. The *Maximum Catch Limit per Shipowner Law* is available at <<http://www.subpesca.cl/files/legislacion/Ley%2019713.PDF>> at 30 April 2002; an English translation up to art 14 only is at <<http://www.subpesca.cl/files/legislacion/limitmax.pdf>> at 30 April 2002. This appears to be Chile's preferred method of limiting catch, though swordfish (in Spanish, *pez espada*) is not among the species mentioned by name in the *Maximum Catch Limit per Shipowner Law*. By limiting the number of licences, a de facto quota equal to the sum of the licensed shipowners' limits would be established. No doubt more complete information would have emerged in the pleadings had the litigation proceeded to that stage.

¹⁴ *Minutes of Meeting on 17 November 2000*, above n 6, [103]. This would have been the combined effect of art 21 of the *Maximum Catch Limit per Shipowner Law*, above n 13 (if applicable to swordfish), and art 165 of the *General Law of Fisheries and Aquaculture*, above n 13. This is not an uncommon device by which a coastal state can limit the catch by its fleet of a stock that straddles the boundary of its EEZ. For example, that is how New Zealand regulated the orange roughy fishery on the Challenger Plateau until its virtual

At the same time the depletion of the swordfish stock in the Atlantic Ocean led to the imposition of catch limits by the International Commission for the Conservation of Atlantic Tunas ('ICCAT').¹⁵ The limit made it uneconomical for the same number of Spanish vessels to continue fishing in the Atlantic Ocean for swordfish, but since demand for the species was not immediately affected, some of the vessels were encouraged by a subsidy from the EC Commission to look for other fishing grounds in the south-eastern Pacific Ocean.¹⁶ In 1990, the first year after the imposition of the limit, there were four vessels fishing in this region. The number reached a peak of 11 in 1992 and thereafter fluctuated between four and seven until 1997.¹⁷

This shift of capacity from one ocean to another was not well received by Chile. Since it is well settled under the law of the sea that it could not actually prevent fishing on the high seas by foreign vessels,¹⁸ what it did instead was ban landing of swordfish in its ports by the Spanish vessels fishing on the high seas

closure in 2000: see Erik Jaap Molenaar, 'The South Tasman Rise Arrangement of 2000 and Other Initiatives on Management and Conservation of Orange Roughy' (2001) 16 *International Journal of Marine and Coastal Law* 77, 107; for the closure, see New Zealand Ministry of Fisheries, *Fisheries Sustainability Decisions for 2000–2001*, Press Release (7 September 2000) <<http://www.fish.govt.nz/current/press/pr070900.htm>> at 30 April 2002.

¹⁵ ICCAT, *Report for Biennial Period 1990–91, Part I: Recommendation on swordfish catch and limits adopted by the Commission at its Seventh Special Meeting* (Madrid, November 1990). The limit was the 1988 level of fishing mortality for swordfish. Recommendations adopted since then are available at <http://www.iccat.es/Documents/Recs/Recs_eng.pdf> at 30 April 2002. Despite being styled 'Recommendations', the measures are binding on the Commission's Member States: *International Convention for the Conservation of Atlantic Tunas*, opened for signature 14 May 1966, 673 UNTS 63, 6 ILM 293 (1967) art VIII (entered into force 21 March 1969). Swordfish is one of the 'tuna-like fishes' managed by the Commission by virtue of art IV(1), which refers to

tuna and tuna-like fishes (the Scombriformes with the exception of the families Trichiuridae and Gempylidae and the genus *Scomber*) and such other species of fishes exploited in tuna fishing in the Convention area as are not under investigation by another international fishery organization.

¹⁶ Garzotti and Cavarero, above n 8, 10; *Minutes of Meeting on 17 November 2000*, above n 6, [112].

¹⁷ Garzotti and Cavarero, above n 8, 27.

¹⁸ *UNCLOS*, above n 2, pt VII deals with the high seas. Under art 87(1)(e), the freedoms of the high seas, which are open to all states, include the freedom of fishing, subject to the conditions of s 2, pt VII. By art 92(1) a ship on the high seas is subject to the exclusive jurisdiction of its flag state, 'save in exceptional cases expressly provided for in international treaties or in this Convention'. For an example of the former, see arts 21 and 22 of the *Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks*, opened for signature 4 December 1995, [2001] ATS 8, 34 ILM 1542 (1995) (entered into force 11 December 2001) ('*UN Fish Stocks Agreement*') (but see Andrew Serdy, 'How Long Has the United Nations Fish Stocks Agreement Been in Force?', forthcoming in *Ocean Development and International Law*). An instance of the latter is hot pursuit begun in the EEZ or waters landward of that zone: art 111(2). Another is boarding, regulated by art 110. This provision lists a number of circumstances in which the crew of a vessel of one state may board that of another, but enforcement of fisheries laws is not among them.

adjacent to Chile's EEZ.¹⁹ From the vessels' point of view, the closest ports to the fishing grounds were in Chile, so to have to go elsewhere for fuel and supplies had a detrimental effect on their overall productivity. The port ban acted, in other words, as a disincentive to fishing those grounds.²⁰

For the next few years there were desultory talks on catch restraint and on the conditions for lifting the ban, but they repeatedly broke down. Not surprisingly, each side blamed the other for their failure to reach an agreement.²¹ In essence, Chile's position was that the two sides should first agree on catch limits, and then talks about port access could follow. The EC wanted it the other way round; it was prepared to discuss limiting its catch only if Chile lifted its port bans first.

III THE PROCEEDINGS AND THEIR SUSPENSION

Tiring of the impasse, on 19 April 2000 the EC made a request for consultations with Chile pursuant to article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ('DSU')²² and article XXIII of *GATT*.²³ In its request, copied to the chairman of the Dispute Settlement Body ('DSB'), the EC alleged violation by Chile of its rights under articles V (on freedom of transit) and XI (on prohibition of quantitative restrictions) of *GATT*. The consultations were held in Geneva on 14 June 2000 but were unsuccessful.²⁴ The EC then made a request for the establishment of a panel at the 17 November 2000 meeting of the DSB,²⁵ which was automatically agreed upon under the 'negative consensus rule' at the next meeting of the DSB on 12 December

¹⁹ *General Law of Fisheries and Aquaculture, Ley No 18.892 1989* (Chile), art 165 authorises the Ministry of the Economy, Development and Reconstruction to prohibit or limit the landing of fish of highly migratory and straddling stocks caught on the high seas in contravention of conservation and management measures, or where the fishing activities of the vessels concerned affect fishery resources of the EEZ or their exploitation by Chilean vessels.

²⁰ Garzotti and Cavarero, above n 8, 64–70: The detour to the Peruvian port of Callao increases total operational costs by roughly five per cent, and to the port of Ilo by roughly seven per cent, and on average adds six days to the time spent at sea.

²¹ Chile's version of events, as recorded in *Minutes of Meeting on 17 November 2000*, above n 6, [106], and not contradicted by the EC, is that in 1998 it had presented the EC with details of its own conservation and management measures for swordfish, the scientific basis for those measures and the catch data for its vessels, but that the EC was unable to reciprocate.

²² *Marrakesh Agreement*, 1867 UNTS 3, 33 ILM 1125 (1994) (entered into force 1 January 1995), annex 2 (*Understanding on Rules and Procedures Governing the Settlement of Disputes*) 1869 UNTS 401, 33 ILM 1226 (1994).

²³ Request from Permanent Delegation of European Communities, *Chile — Measures Affecting the Transit and Importation of Swordfish: Request for Consultations by the European Communities*, WTO Doc WT/DS193/1 (26 April 2000).

²⁴ Request from Permanent Delegation of European Communities, *Chile — Measures Affecting the Transit and Importation of Swordfish: Request for the Establishment of a Panel by the European Communities*, WTO Doc WT/DS193/2 (7 November 2000), recording a communication of 6 November 2000 from the Permanent Delegation of the European Communities to the Chairman of the DSB asking that its request be placed on the agenda of the next meeting of the DSB.

²⁵ *Minutes of Meeting on 17 November 2000*, above n 6, [102].

2000.²⁶ Australia reserved its third-party rights when the Panel was formed,²⁷ and New Zealand did so some time later,²⁸ enabling them to present written and oral argument to the Panel and receive copies of the submissions of the principal parties.²⁹

The most unusual feature of the instant case, however, is that two dispute settlement mechanisms were invoked for the same dispute. Concurrent with the WTO case initiated by the EC, Chile had, by way of counter-attack, launched compulsory dispute settlement proceedings under part XV of *UNCLOS*³⁰ sometime between 27 June and 1 September 2000, having earlier failed to persuade the EC to go voluntarily down that route.³¹ *UNCLOS* allows its States Parties considerable choice among different modes of dispute settlement.³² Chile

²⁶ *Minutes of Meeting on 12 December 2000*, above n 13, [69]. Article 6.1 of the *DSU*, above n 22, states that: 'If the complaining party so requests, a panel shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel' (footnote omitted).

²⁷ *Minutes of Meeting on 12 December 2000*, above n 13, [70]. Canada, Ecuador, Iceland, India, Norway and the US reserved their third-party rights at the same time.

²⁸ WTO Secretariat, *Update of WTO Dispute Settlement Cases*, WTO Doc WT/DS/OV/6 (3 May 2002) 146.

²⁹ *DSU*, above n 22, arts 10(2)–(3).

³⁰ *UNCLOS*, above n 2, pt XV(2) is headed 'Compulsory Procedures Entailing Binding Decisions'. Although under art 282 of *UNCLOS* the rules of pt XV yield to any procedure that entails a binding decision under another treaty that may be invoked by any party to the dispute, the *DSU* is confined to the WTO's covered agreements — see below n 52 — and a panel would therefore lack jurisdiction to decide those claims in this dispute that concern *UNCLOS*. In any event, while the EC challenged the jurisdiction of the Special Chamber to hear one of Chile's claims — see below n 41 and accompanying text — it did not (correctly, it is submitted) challenge its jurisdiction generally under art 282.

³¹ The exact date cannot be established with certainty, as at that early stage of the *UNCLOS* dispute its existence does not appear to have been made public by either side. Although this will typically be the case when the dispute is begun in the 'default' mode of an annex VII tribunal, if the applicant also seeks provisional measures from ITLOS under art 290(5) of *UNCLOS*, the dispute will become public knowledge irrespective of the parties' wishes through ITLOS press releases. Chile did not, however, seek provisional measures, doubtless because it was seeking to preserve the ban on landing of fish already in place, rather than disturb the status quo. In Consejo Nacional de Pesca, *Acta No 03/2000*, (27 June 2000) 13–15 <<http://www.subpesca.cl/files/consejo/03-00.pdf>> at 30 April 2002, in the discussion of the WTO consultations of 14 June, there is mention of an invitation to the EC to take the dispute to ITLOS. There is no mention, however, by the Government representatives present, of any invocation of compulsory procedures under pt XV of *UNCLOS*. The Council did pass a resolution, inter alia, describing *UNCLOS* as the proper instrument under which to resolve the dispute, which would no doubt have been a factor in what may be surmised to have been a subsequent decision by the Chilean authorities to invoke those procedures. That the proceedings must have been launched by 1 September 2000 is evident from the edition bearing that date of *Inside US Trade*, where it is reported that: 'The EU acceded to Chile's request [sic] for an Arbitral Tribunal after rejecting its original proposal that the matter be brought before an [sic] International Tribunal for the Law of the Sea': 'EU Likely to Seek WTO Panel with Chile over Port Access for Swordfish', above n 13, 10.

³² *UNCLOS*, above n 2, art 287(1) allows States Parties to elect at any time, by declaration lodged with the UN Secretary-General as depositary, among ITLOS, the International Court of Justice, an arbitral tribunal constituted in accordance with annex VII or, for disputes concerning a limited number of fields including fisheries, a special arbitral tribunal of experts in the field constituted in accordance with annex VIII. Under art 280, the parties to a particular dispute can agree among themselves at any time to submit the dispute to a procedure of their choice, as the Arbitral Tribunal constituted under annex VII held had occurred in the *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)* (*Award*

initially chose arbitration by an ad hoc tribunal constituted under annex VII to *UNCLOS*, which is the default position if the parties cannot agree on a mode or have elected different modes.³³ At length, after three rounds of meetings and for the first time in the short history of ITLOS, the parties agreed to the formation of a Special Chamber appointed under article 15(2) of the *Statute of the International Tribunal of the Law of the Sea* ('*ITLOS Statute*')³⁴ to hear the law of the sea aspect of the dispute.³⁵ The Special Chamber comprises President Chandrasekhara Rao, Judges Caminos, Yankov, Wolfrum and, appointed under article 17(2) of the *ITLOS Statute*,³⁶ Judge ad hoc Orrego Vicuña.

Chile claimed that the EC had breached its substantive duty of cooperation with Chile as a coastal state in relation to highly migratory species under articles 64 and 117 to 119 of *UNCLOS*,³⁷ as well as a breach of the procedural provisions of article 297(1)(b) and the article 300 obligation to act in good faith.³⁸

One of the more intriguing claims made by Chile was that the EC had challenged, in contravention of *UNCLOS*, 'Chile's sovereign right and duty, as a coastal State, to prescribe measures within its national jurisdiction for the conservation of swordfish and to ensure their implementation in its ports, in a non-discriminatory manner'³⁹ — evidently a reference to the WTO case, though the language is significant in its own right.⁴⁰ For its part, the EC challenged the

on Jurisdiction and Admissibility) (Arbitral Tribunal constituted under annex VII of *UNCLOS*) (4 August 2000) 39 ILM 1359 (2000) ('*Southern Bluefin Tuna*') at 30 April 2002. In *Southern Bluefin Tuna* the Arbitral Tribunal found at [56]–[59] that the compulsory jurisdiction under pt XV over a dispute concerning the fisheries provisions of *UNCLOS* was ousted under art 281(1) because the parties to the dispute had entered into another treaty on the particular species concerned that impliedly excluded recourse to pt XV. For the reasons previously stated, however, no such implication can be read into the *DSU*, see above n 30.

³³ *UNCLOS*, above n 2, art 287(5). Chile has made a declaration electing ITLOS or a special arbitral tribunal under annex VIII as its preferred forum for all disputes concerning *UNCLOS* — see United Nations Office of Legal Affairs, (1997) 35 *Law of the Sea Bulletin* 10–11 — but the EC has made no declaration. Declarations are available at <http://www.un.org/Depts/los/settlement_of_disputes/choice_procedure.htm> at 30 April 2002.

³⁴ *UNCLOS*, 1833 UNTS 561, 21 ILM 1345 (1982), annex VI (*Statute of the International Tribunal for the Law of the Sea*) art 15(2) provides that 'the Tribunal shall form a chamber for dealing with a particular dispute submitted to it if the parties so request. The composition of such a chamber shall be determined by the Tribunal with the approval of the parties.'

³⁵ Chilean Ministry of External Relations, *Para Dirimir Controversia sobre Conservación del Pez Espada: Chile Confirma Demanda de Establecimiento de Sala Especial del Tribunal del Mar*, Press Release (15 December 2000) <<http://www.minrel.cl/prensa/comunicados/15-12-00.htm>> at 30 April 2002.

³⁶ *ITLOS Statute*, above n 34, art 17(2) reads: 'If the Tribunal, when hearing a dispute, includes on the bench a member of the nationality of one of the parties, any other party may choose a person to participate as a member of the Tribunal.' For this purpose any judge of a Member State of the EC — in this case Judge Wolfrum of Germany — would be taken to be a 'national' of the EC.

³⁷ Letter dated 18 December 2000 from the Ambassador of Chile to the Federal Republic of Germany to the Registrar of ITLOS, at [3(b)] and [3(a)] respectively, reproduced in: ITLOS, *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile–European Communities) Order No 3* (20 December 2000) [2] <http://www.itlos.org/case_documents/2001/document_en_100.pdf> at 30 April 2002 ('*ITLOS Order 2000/3*').

³⁸ *Ibid* [2(3)(d)].

³⁹ *Ibid* [2(3)(c)].

⁴⁰ See the *UN Fish Stocks Agreement*, above n 18, art 23.

Special Chamber's jurisdiction to hear this claim⁴¹ and raised substantive counter-claims of its own: that Chile's extension to the high seas of its domestic conservation measures for swordfish was contrary to articles 87, 89 and 116 to 119 of *UNCLOS*,⁴² that the *Framework Agreement for the Conservation of Living Marine Resources on the High Seas of the South Pacific* ('*Galapagos Agreement*')⁴³ signed in Santiago de Chile on 14 August 2000 by Chile, Ecuador, Peru and Colombia was inconsistent with articles 116–19 of *UNCLOS*, as to both its substance and the fact of its negotiation;⁴⁴ and that Chile had itself breached article 300 of *UNCLOS*.⁴⁵ In addition, the EC asked the Special Chamber for a declaration that the EC and Chile remained under a duty stemming from article 64 of *UNCLOS* to negotiate an agreement on cooperation with respect to swordfish.⁴⁶

ITLOS Order 2000/3, made on 20 December 2000, gave both parties 90 days after the institution of proceedings to make any preliminary objections, and six months after the disposal of those objections to submit their memorials. A counter-memorial by each side was due within three months of receiving the other party's memorial.⁴⁷ Although the dispute has not been settled, further diplomatic efforts saw the parties agree in February 2001 (before the first pleadings were due in either forum) to a suspension of both sets of the formal legal proceedings while they conducted joint research on the stock, including participation in the research by four Spanish vessels using Chile's ports.⁴⁸ The legal proceedings in the WTO were suspended by the EC (as complainant) informing the Director-General on 23 March 2001, and then by each of the parties separately notifying the DSB.⁴⁹ The *ITLOS Order* of 15 March 2001 amends the previous *ITLOS Order 2000/3* by providing that the 90 days are deemed to begin running on 1 January 2004.⁵⁰ Although this amounts to a

⁴¹ *ITLOS Order 2000/3*, above n 37, [2(3)(h)].

⁴² *Ibid* [2(3)(e)].

⁴³ Opened for signature 14 August 2000 (not yet in force) <<http://www.oceanlaw.net/texts/galapagos.htm>> at 30 April 2002.

⁴⁴ *ITLOS Order 2000/3*, above n 37, [2(3)(f)]. As to this claim see below nn 108–110 and accompanying text.

⁴⁵ *ITLOS Order 2000/3*, above n 37, [2(3)(g)].

⁴⁶ *Ibid* [2(3)(f)].

⁴⁷ *Ibid* [6(a)]. It is not clear when memorials would be due if there were no preliminary objections (though the EC had clearly signalled one).

⁴⁸ Request from Permanent Delegation of European Communities, *Chile — Measures Affecting the Transit and Importation of Swordfish: Arrangement between the European Communities and Chile*, WTO Doc WT/DS193/3 (6 April 2001) ('*Arrangement of 6 April 2001*'). Note that the *Arrangement of 6 April 2001* contemplates negotiation between the parties of a new treaty covering much the same ground as the *Galapagos Agreement*: at 3. If the *Galapagos Agreement* is superseded in this way its signatories may never have reason to bring it into force.

⁴⁹ The *Arrangement of 6 April 2001*, above n 48, was subtitled 'Communication from the European Communities'. It was confirmed by a brief subsequent Communication from Chile: Addendum Communication from Chile, *Chile — Measures Affecting the Transit and Importation of Swordfish: Arrangement between the European Communities and Chile*, WTO Doc WT/DS193/3/Add.1 (9 April 2001).

⁵⁰ *ITLOS, Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (Chile/European Communities)* Order No 1 (15 March 2001) <http://www.itlos.org/case_documents/2001/document_en_99.pdf> at 30 April 2002 ('*ITLOS Order 2001/1*').

suspension of the proceedings for slightly in excess of three years, it is highly unlikely that they will actually restart at the end of that interval. If the settlement efforts put in train by the parties bear fruit, then the proceedings are likely to be permanently discontinued by 2004. If, on the other hand, they do not succeed, then this should become apparent well before 2004, and the *ITLOS Order 2001/1* provides that either party may restart the clock at any time by notice to ITLOS and to the other party.⁵¹

IV POSSIBLE ARGUMENTS OF THE PARTIES AND IMPLICATIONS OF THE DUAL PROCEEDINGS IF THE DISPUTE IS NOT RESOLVED

If the dispute had not been suspended, or if it were to be revived, the situation would be one in which both the Special Chamber of ITLOS and the WTO Panel are simultaneously being asked to rule, by implication if not directly, on the interaction between *UNCLOS* and *GATT*. There is no guarantee that they would come to the same conclusion in reconciling, or deciding between, Chile's position that the law of the sea accords to the coastal state full sovereignty over its ports, including complete discretion as to which vessels are allowed into them and what they are permitted to unload once there, and the EC's position that such discretion is subject to *GATT* articles V and XI. This problem bears examination in some depth.

It should first of all be stressed that this is not fundamentally a problem of concurrent jurisdiction or conflict between the dispute settlement provisions of the *Marrakesh Agreement* on the one hand and *UNCLOS* on the other. Given that the competence of the DSB does not extend to pronouncing on treaties other than those contained in the *Marrakesh Agreement*,⁵² there is no reason to

⁵¹ *Ibid.*

⁵² *DSU*, above n 22, art 1.1 confines it to the *Marrakesh Agreement* and its annexes 1, 2 and 4. In general, the provisions on jurisdiction in *UNCLOS* and the *Marrakesh Agreement* mean that there is no scope for a defence based on a law of the sea right to a claim of breach of an international trade law obligation, and almost none vice versa. The effect of art 1.1 of the *DSU* is that the only question for the Panel and the Appellate Body is whether the *GATT* or one of the covered agreements has been breached. They sometimes take note of the provisions of other treaties, see, eg, WTO Appellate Body, *Report of the Appellate Body: United States — Importation of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (12 October 1998) ('*Shrimp/Turtle*') in relation to art XX of *GATT* where the Appellate Body discussed some *UNCLOS* provisions but did not actually apply them: at [130]. Other treaties are more apt to be used as a source of fact than of law. For example, at [132], the Appellate Body observed that the listing of all seven species of sea turtles under app 1 of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243, 12 ILM 1085 (1973) (entered into force 1 July 1975) made their exhaustibility 'very difficult to controvert.' Thus if, hypothetically, an EC counter-claim before the Special Chamber were to be heard first and upheld because of Chile's lack of cooperation, this might be taken by the WTO Panel as weakening the factual underpinning of the Chilean art XX defence (however, the near simultaneity of any resumed proceedings would most likely preclude this, and the Panel would be unlikely to suspend proceedings except at the request of all parties for the ITLOS case to be decided first: see Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35 *Journal of World Trade* 1081, 1124). In the converse situation, there is a remote possibility of the Special Chamber encroaching on the WTO Panel's domain. Under the *ITLOS Statute*, above n 34, art 21, the parties to a case can give it ad hoc jurisdiction to determine disputes under any treaty. Article 21 states that 'the jurisdiction of the Tribunal comprises all disputes and all applications submitted to it in accordance with this

suppose that the EC would question before the Panel the legitimacy of Chile's recourse to part XV of *UNCLOS*. Chile's statements, however, raise the possibility that it might invite the Panel to deny its own jurisdiction, or ask the Special Chamber to assert exclusive jurisdiction over the dispute.⁵³

Should Chile pursue in either forum its initial argument that, in going to a WTO Panel, the EC has improperly contested Chile's sovereign right to determine measures relating to its ports, the EC would doubtless counter that such an argument fails to apply the *DSU* according to its terms and, in any event, has no basis in the law of the sea.

Nor is there anything to be said for an alternative version of this argument: that only a forum chosen under part XV of *UNCLOS* may properly hear this case because it concerns not a trade but a fisheries or conservation dispute. There is no reason for one characterisation to exclude the other; this would be a false dichotomy. If, in connection with a law of the sea dispute between States Parties to *UNCLOS*, a trade measure is imposed by one of the disputant parties and complained of by the other as a breach of *GATT* or one of its annexes, then to that extent the dispute is also a trade dispute and a challenge to the measure can properly be heard in the WTO. The fragmentation of jurisdiction at the

Convention and all matters specifically provided for in any other agreement which confers jurisdiction on the Tribunal.' Although if Chile and the EC were to grant such ad hoc jurisdiction in relation to the EC's claims pertaining to arts V and XI of *GATT*, they may well be in breach of what could be an implied agreement not to take the dispute elsewhere in art 23.1 of the *DSU*:

When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

Marceau interprets it so at 1101, citing the WTO Panel, *Report of the Panel: United States — Import Measures on Certain Products from the European Communities*, WTO Doc WT/DS165/R (17 July 2000) [6.23]:

Article 23.1 of the *DSU* prescribes that when a WTO Member wants to take any remedial action in response to what it views as a WTO violation, it is obligated to have recourse to and abide by the *DSU* rules and procedures. In case of a grievance on a WTO matter, the WTO dispute settlement mechanism is the only means available to WTO Members to obtain relief, and only the remedial actions envisaged in the WTO system can be used by WTO Members.

It is submitted, however, that this reads too much into art 23.1, which does not explicitly rule out consensual submission of a dispute to some other forum by the WTO members concerned. Since its rationale is to prevent unilateralism, there is no need for it to do so. Moreover, on which side of the line would 'unilateral' invocation of, say, art 36(2) of the *Statute of the International Court of Justice* fall, which would be available where both parties have consented in advance?

⁵³ See statements of the representative of Chile before the DSB in *Minutes of Meeting on 17 November 2000*, above n 6, [109]:

A dispute like the one under consideration should be governed by special rules established under [*UNCLOS*] and not by trade and general rules of *GATT*. Chile considered that the WTO dispute settlement mechanism was not the proper forum for considering and resolving this dispute ... The environmental dispute on conservation and observance of principles or the precautionary approach could not be placed before any forum other than the dispute settlement mechanism under [*UNCLOS*].

See also *Minutes of Meeting on 12 December 2000*, above n 13, [65]: 'The EC's panel request should remain outside of the WTO and should not have been placed on the DSB's agenda for the second time.'

international level will occasionally mean that only some parts of a dispute can be heard by a single forum. But it would be perverse to elevate this circumstance into a legal rule by treating the fact that one forum hears claims under one treaty as precluding a second forum from hearing claims in the same dispute under another treaty.

These preliminaries aside, we can now turn to the substantive arguments. *UNCLOS* does not purport to be a complete codification of the law of the sea. The last paragraph of its preamble affirms that ‘matters not regulated by this Convention continue to be governed by the rules and principles of general international law’. Access to ports falls into this category of matters. With respect to customary international law, there can be little doubt that there is no general right of access to foreign ports, which the coastal state may deny at will.⁵⁴ This general principle of international law was stated by the International Court of Justice (‘ICJ’) in the *Nicaragua Case*, when it noted that it is ‘by virtue of its sovereignty that a coastal State may regulate access to its ports.’⁵⁵ *UNCLOS* confirms this, but only implicitly — articles 25(2),⁵⁶ 211(3)⁵⁷ and, to a lesser extent, 255⁵⁸ all presuppose that states may impose conditions on entry into their ports. As a consequence, although *UNCLOS* has detailed provisions on its relationship with other treaties,⁵⁹ the fact that the rule is not derived from *UNCLOS* means that these provisions are not applicable in the present circumstances. The question then is, to what extent are the customary international law rules on access to ports overridden by *GATT*?

A GATT Article XI

Of the EC’s two claims under *GATT*, that under article XI (‘General Elimination of Quantitative Restrictions’) has the stronger connection with the

⁵⁴ Louise de La Fayette, ‘Access to Ports in International Law’ (1996) 11 *International Journal of Marine and Coastal Law* 1, 12; A V Lowe, ‘The Right of Entry into Maritime Ports in International Law’ (1977) 14 *San Diego Law Review* 597, 621. De La Fayette reviews the state practice on this issue and observes that ports have been closed for various reasons, including not only public health and safety and national security, but often overtly political reasons. In one case the political reason related to trade: in 1980 an Italian vessel carrying Italian wine was refused entry to the French port of Sète for fear of an incident involving French wine producers protesting against imports of foreign wine: at 7.

⁵⁵ *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep 14, [213].

⁵⁶ The assumption that states have a general power to impose conditions could scarcely be clearer: art 25(2) reads ‘[i]n the case of ships proceeding to ... call at a port facility ... the coastal State ... has the right to take the necessary steps to prevent any breach of the conditions to which admission of those ships ... is subject.’

⁵⁷ The first sentence of art 211(3) assumes a specific power to set conditions relating to marine pollution. It reads:

States which establish particular requirements for the prevention, reduction and control of pollution of the marine environment as a condition for the entry of foreign vessels into their ports ... shall give due publicity to such requirements and shall communicate them to the competent international organization.

⁵⁸ On marine scientific research, art 255 reads: ‘States shall endeavour ... to facilitate, subject to the provisions of their laws and regulations, access to their harbours and promote assistance for marine scientific research vessels which comply with the relevant provisions of this Part.’

⁵⁹ *UNCLOS*, above n 2, art 311, ‘Relation to other Conventions and International Agreements’.

law of the sea and will therefore be considered first. Article XI:1 is couched in the following terms:

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

The fact that the provision is expressed to apply to the ‘product of the territory of any other contracting party’, seems on its face to place an obstacle in the way of the EC’s claim. Despite the well-known rule which gives the flag state jurisdiction on the high seas over vessels flying its flag,⁶⁰ this does not assimilate the vessel to the land territory of the flag state.⁶¹ Hence it is hard to see how swordfish caught on the high seas by a Spanish vessel can be described at first landing as the product of the ‘territory’ either of Spain or of the EC.

This conclusion is supported by the *Convention on International Trade in Endangered Species of Wild Flora and Fauna* (‘CITES’). Article I(c) of CITES defines ‘trade’ as ‘export, re-export, import and introduction from the sea’, while this last is in turn defined by article I(e) as ‘transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State’. The very concept of introduction from the sea would, however, be wholly superfluous if fish caught on the high seas were taken automatically to be imports from the flag state, let alone from the ‘territory’ of that state.⁶²

However, this does not necessarily dispose of the argument. The desire of the Spanish vessels to unload their catch of swordfish in Chile’s ports was not because they wished to sell the fish on the local market, but in order to transfer them to aircraft bound for their own home market in Spain or for export to the US.⁶³ The EC may thus be able to argue that Chile’s ban on the landing of swordfish acts indirectly as a prohibition on the (re-)export of swordfish ‘destined for the territory of’ the EC and the US. A possible counter-argument to this is that the words of article XI:1 of *GATT* on import and export bans ought not to be conflated in this way, since the application of this provision would then turn on the arbitrary factor of where the frustrated importer intended to sell the product. However, one possible reason why a WTO panel might read the provision in such a way would be to prevent a significant portion of the world’s

⁶⁰ See above n 18 and accompanying text.

⁶¹ The consequences of such an heroic extrapolation would be absurd. Pursued to its logical conclusion, it would mean that each vessel generates its own mobile territorial sea, contiguous zone and EEZ, and if vessels of two different flag states come closer than 400 nautical miles to each other, their EEZs would overlap and they would need a temporary and ever-changing delimitation of their maritime boundary.

⁶² See below n 65 and accompanying text.

⁶³ Garzotti and Cavarero, above n 8, 68–71.

trade in fish⁶⁴ from being removed from *GATT* disciplines.⁶⁵ Even so, recent WTO Appellate Body jurisprudence indicates that systemic reasons are unlikely to be sufficient justification in themselves for disregarding the plain words of any provision.⁶⁶

⁶⁴ High seas catches are often said to represent around 10 per cent of the global total: see, eg, Kevin Bray, 'Fish or Foul: Can the Law of the Sea and International Fisheries Co-Exist?' *International Law Downunder: Antipodean Contributions and Challenges* (Paper presented at the 9th Annual Conference of the Australian and New Zealand Society of International Law, Canberra, Australia, 13–14 June 2001) 113 <<http://law.anu.edu.au/anzsil/ANZSIL2001proc.pdf>> at 30 April 2002. Bray states that '[s]ome 90 per cent of global capture fisheries production takes place in areas of national jurisdiction.' It is not clear whether this relies on paragraph four of the paper prepared by the Food and Agriculture Organization of the United Nations ('FAO') for the *UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks*, UN Doc A/CONF.164/INF/4 (15 June 1993), where a range of eight to 10 per cent is given, or on some more recent estimate. Note that it does not follow that only eight to 10 per cent of the world's traded fish is caught on the high seas. Given that in 1998 around 33 per cent of total marine captures entered international trade — see FAO, *The State of World Fisheries and Aquaculture 2000* (2000) 34 <<http://www.fao.org/DOCREP/003/X8002E/x8002e00.htm>> at 30 April 2002 — if for argument's sake 100 per cent of high seas catches were traded, they would account for 24 to 30 per cent by volume of world trade in fish.

⁶⁵ See below n 102 and accompanying text for the rather loose use of 'territory' in WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998). On the surface, the non-application of *GATT* disciplines to the high seas would be a consequence of the drafting of art XI:1, which appears to overlook the possibility that one particular good, fish, might be the product of the high seas. This inadvertence is itself, however, merely one manifestation of a larger underlying problem associated with one of the more surprising omissions from the *GATT*, namely that unlike *CITES*, for example, it makes no attempt at all to define its most central concept: trade. Only now are efforts under way to remedy this problem comprehensively in the WTO's Committee on Rules of Origin, as mandated by the *Marrakesh Agreement*, 1867 UNTS 3, 33 ILM 1125 (1994) (entered into force 1 January 1995), annex 1A (*Agreement on Rules of Origin*), 1868 UNTS 397, 33 ILM 1143 (1994), art 9. Until this process is complete, each WTO Member is left to follow its own rules of origin; that is, its own definition of what transactions count as exports and imports and, therefore, trade. One solution adopted by a number of states for classifying fish caught on the high seas for trade purposes is to treat the fish as imports from the flag state of the vessels from which they are landed. This is also the preference of the Committee; the negotiating text (WTO, *Integrated Negotiation Text for the Harmonization Work Programme: Overall Architecture (Note by the Secretariat) (Revision)*, WTO Doc G/RO/45/Rev.1 (30 April 2001)) has a number of alternative rules of origin for fish proposed by various delegations, which differ on the treatment of fish caught in the EEZ, but for fish caught on the high seas they are identical in assigning origin to the flag state of the vessel that caught them. Such a rule has the virtue of making for tidy accounting, albeit at the price of some artificiality, because the same fish caught in the same place and landed at the same port by a vessel of the port state would be treated as a domestic product, that is, not trade at all. In Australia, the *Customs Act 1901* (Cth) s 131A(1), headed 'Fish Caught by Australian Ships', leaves open the question of whether these fish if caught on the high seas are 'imports' when first landed but prescribes that in practice they should not be treated as such by providing that they 'shall not, when brought into Australia by that ship, or by a tender (which is registered in Australia) of that ship, be liable to any duty of Customs, or be subject to the control of the Customs'. The relevant New Zealand legislation, the *Customs and Excise Act 1996* (NZ) s 2(1), defines importation in relation to goods as 'the arrival of the goods in New Zealand in any manner whatever, whether lawfully or unlawfully, from a point outside New Zealand', though its now repealed predecessor, *Customs Act 1966* (NZ) s 47(1), by referring to goods that are 'brought or come within the territorial limits of New Zealand from any country outside those limits', would have excluded fish caught on the high seas by vessels of any state (emphasis added).

⁶⁶ WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998).

Another reason why article XI might not apply is because the in-built exception in article XI:2 is engaged. This provision is, so far as material, in the following terms:

2. The provisions of paragraph 1 shall not extend to the following:

...

- (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
 - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted.

Two points may be noted. First, as a pre-WTO Panel observed in *Japan — Restrictions on Imports of Certain Agricultural Products*, ‘article XI:2(c)(i) does not permit the prohibition of imports but only their restriction.’⁶⁷ Even so, it is clear that the Chilean measure is a restriction rather than a prohibition, because the ban on landings of swordfish in its ports would not prevent the EC from exporting swordfish from its Mediterranean home waters or elsewhere to Chile.⁶⁸ The fact that it would be commercially unattractive for EC traders to do so lends further weight to the conclusion that it is article V, rather than article XI, against which the ban is to be more meaningfully tested.⁶⁹

Secondly, the restriction must be ‘necessary’ for the enforcement of the domestic measure. As to what this means, the jurisprudence from the pre-WTO era canvassed in the *GATT Analytical Index* is of little assistance.⁷⁰ The same word occurs, however, in certain paragraphs of article XX and, with the caveat that its interpretation in one article may not automatically be applicable to another, here the case law may be more helpful. In *US — Section 337 of the Tariff Act of 1930*, the Panel reasoned that

⁶⁷ GATT Panel, *Report of the Panel: Japan — Restrictions on Imports of Certain Agricultural Materials*, GATT Doc L/6253 (2 February 1988) [6.8], BISD 35th Supp 163, 244. The Panel cited as authority a footnote from another Panel report: GATT Panel, *Report of the Panel: US, Prohibition of Imports of Tuna and Tuna Products from Canada*, GATT Doc L/5198 (22 February 1982) [4.6n], BISD 29th Supp 91, 107.

⁶⁸ According to the Panel that heard two cases on apples together, ‘as the EEC had at no time prohibited all imports of apples, its measures therefore constituted an import restriction, rather than an import prohibition’: GATT Panel, *Report of the Panel: European Economic Community, Restrictions on Import of Dessert Apples — Complaint by Chile*, GATT Doc L/6491 (22 June 1989) [12.5], BISD 36th Supp 93, 125, and GATT Panel, *Report of the Panel: European Economic Community, Restriction on Import of Apples — Complaint by the United States*, GATT Doc L/6513 (22 June 1989) [5.5], BISD 36th Supp 135, 161.

⁶⁹ Significantly, Garzotti and Cavarero, above n 8, 46, devote only eight lines to art XI. Though they assert that the Chilean measure ‘could’ be in breach of art XI, they give two reasons for refraining from any analysis: first, because ‘the Chilean market is very limited and does not have any interesting growth perspective’, and second because the claimant whose complaint prompted the report ‘did not make any reference ... to any interest in exporting to Chile.’ Yet, since the complainant would have stood to benefit from a successful challenge to the ban on landings irrespective of which provision of *GATT* was its basis, it is difficult to imagine that art XI would have been treated in this perfunctory fashion had it presented even a moderately promising line of inquiry.

⁷⁰ WTO, *Analytical Index: Guide to GATT Law and Practice* (6th ed, 1995) 337–9 (*‘GATT Analytical Index’*).

a contracting party cannot justify a measure inconsistent with other GATT provisions as 'necessary' in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.⁷¹

This reasoning was expressly adopted and applied to article XX(b) by the Panel in *Thailand — Restriction on Importation of and Internal Taxes on Cigarettes*.⁷² On the basis that continued landings of swordfish in its ports by EC vessels not restricted in their swordfish catch would inevitably undermine Chile's management measures in its EEZ and beyond, it may be concluded that such a defence would have reasonable prospects of success.

B *GATT Article V*

While the EC written request for the establishment of a Panel cited article V:1 to V:3, only one of these, article V:2, appears actually to create obligations in this case.⁷³ It is in the following terms:

There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or any circumstances relating to the ownership of goods, of vessels or of other means of transport.

The *GATT Analytical Index* indicates⁷⁴ that article V was inspired by the *Convention and Statute on Freedom of Transit* ('*Freedom of Transit Convention*').⁷⁵ This does not, however, take us very far. While it would distort the balance of this study to undertake a close comparison between the *Freedom of Transit Convention* and article V of *GATT*, it is evident that the context of the former (as the product of a time before international transport by air was common) is transit across land boundaries or through rivers and canals of another country in order to avoid a more circuitous route that would involve crossing fewer boundaries. If the *Freedom of Transit Convention* rather than the *GATT* were in force between the EC and Chile, it would offer the EC no support for the proposition that its vessels were entitled to access Chilean ports, because the most direct route (if not the quickest route when shipment by aircraft is taken

⁷¹ GATT Panel, *Report of the Panel: United States — Section 337 of the Tariff Act of 1930*, GATT Doc L/6439 (7 November 1989) [5.26], BISD 36th Supp 345, 392.

⁷² GATT Panel, *Report of the Panel: Thailand — Restrictions on Importation of and Internal Taxes on Cigarettes*, GATT Doc DS10/R (7 November 1990) [74], BISD 37th Supp 200, 223.

⁷³ Article V:1 amounts to no more than a definition of the term 'traffic in transit' appearing in the remaining paragraphs of art V, so it is not obvious how it is possible to breach it. Article V:3 provides that traffic in transit 'shall not be subject to any unnecessary delays or restrictions', but this appears to relate to processing of the goods at the customs barrier, and it is difficult to see what it adds to art V:2, which provides for 'freedom of transit' for such traffic.

⁷⁴ *GATT Analytical Index*, above n 70, 214.

⁷⁵ Opened for signature 20 April 1921, 7 LNTS 11 (1921) (entered into force 8 October 1921).

into account) between the high seas off Chile and either Spain or the US does not run through Chilean territory. While article V of *GATT* appears intended to confer enlarged rights for goods in transit by comparison with the *Freedom of Transit Convention*, and contemplates more clearly their transportation by more than one means as part of a single journey, and thus greater scope for permissible deviation of a single leg of the journey from its overall direction,⁷⁶ the full extent of that enlargement is not clear.

The starting point for any analysis of the text of article V must be that this is not a question of conflict between two legal rules — state sovereignty over ports and freedom of transit — because the former does not require that ports be closed to foreign vessels. If both rules apply in this case, Chile can easily comply with both simultaneously by allowing the Spanish vessels into its ports. Rather, the conflict is between legal policies. To put it another way, in negotiating the *GATT* or subsequently acceding to it, did its contracting parties collectively intend to throw their ports open to all comers? And even if it is not what they intended, is that nonetheless the result they have brought about through an injudicious choice of words?

What little evidence there is on these questions suggests that, from a fisheries conservation perspective, states do not, for the most part, favour a system of open ports.⁷⁷ This is demonstrated in two ways. First, the Chilean ban is by no means unique. For example, in reaction to persistent difficulties with the activities of Icelandic vessels, Norway introduced legislation in 1994 prohibiting the landing of high seas catches taken without a quota, and in practice even port calls were rejected.⁷⁸ Furthermore, Canada has on a number of occasions closed its ports to fishing vessels of several states as a means of combating overfishing.⁷⁹

Secondly, it is instructive to look at how port access is treated in other international instruments. The general rule laid down in the *Convention on the International Regime of Maritime Ports* ('*Maritime Ports Convention*')⁸⁰ will be familiar to trade lawyers. Article 2 of the *Maritime Ports Convention* provides in essence for port access on a most-favoured nation and national treatment basis:

Subject to the principle of reciprocity and to the reservation set out in the first paragraph of Article 8, every Contracting State undertakes to grant the vessels of every other Contracting State equality of treatment with its own vessels, or those of any other State whatsoever, in the maritime ports situated under its sovereignty or authority, as regards freedom of access to the port, the use of the port, and the

⁷⁶ For example, the road or rail leg from a port in northern Chile to Santiago's airport would involve southward travel away from both the US and Europe.

⁷⁷ This is also the conclusion to which Professor Orrego Vicuña comes on port access generally: Francisco Orrego Vicuña, *The Changing International Law of the High Seas Fisheries* (1999) 261–6.

⁷⁸ Olav Schram Stokke, 'Managing Fisheries in the Barents Sea Loophole: Interplay with the UN Fish Stocks Agreement' (2001) 32 *Ocean Development and International Law* 241, 245.

⁷⁹ De La Fayette, above n 54, 9.

⁸⁰ Opened for signature 9 December 1923, 58 LNTS 285 (1923) (entered into force 2 December 1926). As at 30 April 2002 it had 41 parties: see <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partII/Treaty-20.asp>> where Chile and Spain are both listed under 'signatures or accessions not yet perfected by ratification'.

full enjoyment of the benefits as regards navigation and commercial operations which it affords to vessels, their cargoes and passengers.

The equality of treatment thus established shall cover facilities of all kinds, such as allocation of berths, loading and unloading facilities, as well as dues and charges of all kinds levied in the name or for the account of the Government, public authorities, concessionaries or undertakings of any kind.

That is, a party must allow vessels of another party into its ports on the same terms as its own vessels, and if it grants more favourable terms to the vessels of another party than to its own, it must extend those better terms to the vessels of all parties. However, article 14 of the *Maritime Ports Convention* specifically excludes fishing vessels and their catches from its scope. This is a powerful indication of the disinclination on the part of states to be compelled to render assistance of any kind to each other's fishing activities, much less allow free transit across their territory for the unprocessed catch resulting from those activities.

This is not, however, the end of the matter. Those who negotiated the *GATT* would certainly not have done so in ignorance of the *Maritime Ports Convention*. At first sight it might appear that their failure to reproduce its exemption of fishing vessels indicates their desire to end that exemption. It is submitted, however, that precisely the opposite conclusion ought to be drawn. For, whereas the drafters drew perceptibly on the *Freedom of Transit Convention*, they made no use at all of the *Maritime Ports Convention* and hence had no reason to exempt fishing vessels from its rules. Equally, there is no reason to suppose that the negotiators of the *Convention on the Territorial Sea and Contiguous Zone*,⁸¹ one of the precursors to *UNCLOS*, were ignorant of the *GATT*, nor that the participants in the Uruguay Round, which updated the *GATT*, were unaware of *UNCLOS*. And as we saw at the outset, subsequent efforts to bring *UNCLOS* into force relied expressly on application of *GATT* principles. From this it may be concluded that the drafters of the successive texts saw no inherent inconsistency between the two rules they were establishing, so that one could be superimposed on the other.

Some commentators have cast doubt in the past on whether article V of *GATT* applies at all to fishing vessels, as they are not engaged in trade.⁸² This argument is unconvincing. The words of article V themselves offer no support for such a qualifying gloss, which would face the added difficulty that nowhere in the *GATT* is the concept of 'trade' defined.⁸³ Another possible objection to article V might be that it diminishes WTO members' sovereignty over their ports. On this score there is no cause for concern because the partial curtailment of sovereignty is in no way remarkable. Sovereignty is not indivisible; any treaty commitment into which a state voluntarily enters is an abridgement, as often as not reversible, of its pre-existing sovereign right to act inconsistently with that commitment.

⁸¹ Opened for signature on 29 April 1958, 516 UNTS 205 (entered into force 10 September 1964).

⁸² See, eg, de La Fayette, above n 54, 19–20, who admits an exception for transshipment but asserts that art XX would save any port ban.

⁸³ See above n 65. This is the converse type of error to that criticised by the Appellate Body in *Shrimp/Turtle*.

Article V is but one of many such commitments that WTO members have taken upon themselves through the *Marrakesh Agreement* and its annexes.

The *Marrakesh Agreement* is not, however, the last in the series of alternating international trade law and law of the sea instruments bearing on access for fishing vessels to ports. That distinction falls to the *UN Fish Stocks Agreement*. Port state measures are specifically encouraged by article 23 of the *UN Fish Stocks Agreement*; 23(1) and 23(3) in particular are highly germane to this dispute:

- 1 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. When taking such measures a port State shall not discriminate in form or in fact against the vessels of any State.
- ...
- 3 States may adopt regulations empowering the relevant national authorities to prohibit landings and transshipments where it has been established that the catch has been taken in a manner which undermines the effectiveness of subregional, regional or global conservation and management measures on the high seas.

For good measure, article 23(4) reinforces the point about coastal states' sovereignty over their ports in providing that:

- 4 Nothing in this Article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

The *UN Fish Stocks Agreement* attracted 59 signatories,⁸⁴ including the EC and all its member states, but not Chile. Chile's position, it must be said, would be stronger if it had become party to, or at least signed, the *UN Fish Stocks Agreement*. But since, for reasons which are beyond the scope of this article, Chile has declined to do so, it cannot rely on it directly in the present dispute. Chile does, however, appear to be relying on article 23(1) indirectly, by drawing on its language in the formulation of its claim.⁸⁵ It is therefore reasonable to suppose that, had proceedings in this case not been suspended, Chile would have argued before the Special Chamber of ITLOS that article 23 (or something resembling it since, with the *Galapagos Agreement* not yet in force, the reference in article 23 to 'subregional, regional and global conservation and management measures' presents an obstacle to its application) has become a rule of customary international law binding on all states.⁸⁶

⁸⁴ As the *UN Fish Stocks Agreement* closed for signature on 4 December 1996 in accordance with art 37, any non-signatory state wishing to become party to it must henceforth do so by accession under art 39.

⁸⁵ *ITLOS Order 2000/3*, above n 37, [2(3)(c)].

⁸⁶ Note that, in their statements of claim by which they commenced proceedings in *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)* 'Statement of Claim and Grounds on which it is Based' ('Statement of Claim of Australia and New Zealand') <<http://www.worldbank.org/icsid/bluefintuna/SBT-Statement-Claim.PDF>> at 30 April 2002, Australia and New Zealand asserted that the precautionary principle as it applies to marine fisheries by virtue of art 6 of the *UN Fish Stocks Agreement* had been received into customary international law: at [63]. While the point is expressed in a way that suggests art 6 is merely cited as illustrative of what is entailed by the precautionary principle, and neither

Lastly, the international community's concern to prevent use of ports in furtherance of undesirable activities is not confined to fisheries. In November 2001 the 31st Session of the General Conference of the United Nations Educational Scientific and Cultural Organization ('UNESCO') adopted the *Convention on the Protection of the Underwater Cultural Heritage*.⁸⁷ Article 15, headed 'Non-use of areas under the jurisdiction of States Parties', provides that 'states parties shall take measures to prevent the use of their ... maritime ports ... in support of any activity directed at underwater cultural heritage which is not in conformity with this Convention'.

C Possible Article XX Defence

Might article XX of *GATT* offer a defence to any breach by Chile of either article V or article XI? Headed 'General Exceptions', article XX reads, so far as material:

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

...

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

It is only recently that article XX has successfully been pleaded for the first time,⁸⁸ although some unsuccessful attempts,⁸⁹ notably in *Shrimp/Turtle*,⁹⁰ have

ITLOS at the provisional measures stage nor the Arbitral Tribunal in upholding Japan's objection to jurisdiction found it necessary to pass judgment upon this matter, it is but a short step to asserting that many of the other rules for managing straddling and highly migratory fish stocks laid down by the *UN Fish Stocks Agreement* would have achieved the status of custom alongside art 6, among them art 23.

⁸⁷ UNESCO, *Convention on the Protection of the Underwater Cultural Heritage*, UN Doc 31 C/24 (3 August 2001) <<http://unesdoc.unesco.org/images/0012/001232/123278e.pdf>> at 30 April 2002.

⁸⁸ WTO Appellate Body, *Report of the Appellate Body: European Communities — Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001). It was, however, art XX(b) rather than XX(g) under which the measure was successfully defended.

⁸⁹ Article XX(g) had previously been unsuccessfully pleaded in the two *Tuna/Dolphin Cases*: GATT Panel, *Report of the Panel: United States — Restrictions on Imports of Tuna*, GATT Doc DS21/R, 30 ILM 1594 (1991); GATT Panel, *Report of the Panel: United States — Restrictions on Imports of Tuna*, GATT Doc DS29/R, 33 ILM 839 (1994). However, neither of these reports were adopted and they have been subjected to criticism: see, eg, Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd ed, 1999) 406–12. In the second *Tuna/Dolphin Case*, the Panel conceded this point (at [5.16] and [5.20]) but found against the US measure on the ground that it was an effort 'to force other countries to change their policies with respect to persons and things within their own jurisdiction' (at [5.24]), and to allow the provision to be used in this way would impair access to markets (at [5.26] and [5.27]). This too has been criticised (see, eg, Steve Charnovitz, 'Dolphins and Tuna: An Analysis of the Second GATT Panel Report' (1994) *Environmental Law Reporter* 10567, 10574–5) and was implicitly overruled in WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998) [111]–[122], where the Appellate Body emphatically rejected the notion that the object and purpose of the

also been made. The Appellate Body decision in *Shrimp/Turtle* offers a reasonably clear indication that the requirements of article XX(g) are not especially onerous as far as the design of the measure is concerned; in particular, the fact that a measure is unilateral would not of itself take the measure outside the scope of the paragraph.⁹¹ There is some possibility that a panel might find an implied jurisdictional limitation in article XX(g), a question the Appellate Body expressly declined to consider in *Shrimp/Turtle*.⁹² However, this seems improbable in light of both the subsequent decision of the original Panel reconvened under article 21.5 of the *DSU* — which dismissed Malaysia's challenge to the *GATT*-consistency of the unilateral measure that the US enacted to replace that found wanting by the Appellate Body⁹³ — and the Appellate Body's decision in turn dismissing Malaysia's appeal against the Panel's ruling.⁹⁴ Thus it would seem relatively easy for Chile to satisfy a panel that its own conservation measures satisfied the condition in article XX(g).⁹⁵

The greater difficulty lies in the chapeau of article XX, and here it is more difficult to predict how Chile would fare. If, for example, the EC were able to show that Chile admitted to its ports vessels flagged to other WTO members that had on board swordfish caught on the high seas, then it would certainly be open to a panel to conclude that Chile was arbitrarily or unjustifiably discriminating against the EC. In *Shrimp/Turtle*, the Appellate Body referred to the need to strike a balance between the right of a member state to invoke an exception under article XX and the duty of that member to respect other members' treaty rights.⁹⁶ It found the chapeau of article XX to be an expression of the general international doctrine of 'abuse of right',⁹⁷ such that when the invocation of the right 'impinges on the field covered by [a] treaty obligation, it must be exercised

Marrakesh Agreement as a whole placed certain types of measures a priori outside the scope of art XX.

⁹⁰ WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998).

⁹¹ Although art XX(g) was pleaded unsuccessfully in *Shrimp/Turtle*, the Appellate Body found that the US legislation and its implementing guidelines were 'not disproportionately wide in ... scope and reach in relation to the policy objective of protection and conservation of sea turtle species. The means are, in principle, reasonably related to the ends': at [141]. It therefore held that the legislation did relate to conservation of an exhaustible natural resource within the meaning of art XX(g): at [142]. Ultimately the US' defence failed only because, contrary to the chapeau of art XX, the measure as applied discriminated arbitrarily and unjustifiably between countries where the same conditions prevailed. See text accompanying below nn 98–103 and 115–116.

⁹² *Ibid* [133].

⁹³ WTO Panel, *Report of the Panel: United States — Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 by Malaysia*, WTO Doc WT/DS58/RW (15 June 2001).

⁹⁴ WTO Appellate Body, *Report of the Appellate Body: United States — Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*, WTO Doc WT/DS58/AB/RW (22 October 2001) [135]–[138].

⁹⁵ See above nn 13–14 and accompanying text.

⁹⁶ WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998) [156].

⁹⁷ *Ibid* [158].

bona fide, that is to say, reasonably.⁹⁸ Rather than laying down a firm rule, the Appellate Body cautioned that

the location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and shape of the measures at stake vary and as the facts making up the specific cases differ.⁹⁹

Accordingly, the guidance offered by *Shrimp/Turtle* for cases such as the present one may be limited. Even so, it is useful to see why the US measures failed the chapeau test.

On the issue of unjustifiable discrimination, the Appellate Body said that ‘perhaps the most conspicuous flaw in [the US] measure’s application relates to its intended and actual coercive effect on the specific policy decisions made by foreign governments, Members of the WTO.’¹⁰⁰ In effect the measure was an

economic embargo which requires *all other exporting Members*, if they wish to exercise their GATT rights, to adopt *essentially the same* policy (together with an approved enforcement program) as that applied to, and enforced on, United States domestic shrimp trawlers.¹⁰¹

It went on to hold that

it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to *require* other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member’s territory, *without* taking into consideration different conditions which may occur in the territories of those other Members.¹⁰²

Moreover,

shrimp caught using methods identical to those employed in the United States have been excluded from the United States market solely because they have been caught in waters of countries that have not been certified by the United States. The resulting situation is difficult to reconcile with the declared policy objective of protecting and conserving sea turtles. This suggests to us that this measure, in its application, is more concerned with effectively influencing WTO Members to adopt essentially the same comprehensive regulatory regime as that applied by the United States to its domestic shrimp trawlers, even though many of those Members may be differently situated. We believe that discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.¹⁰³

Up to this point of the Appellate Body’s reasoning, the swordfish dispute is easily distinguishable from *Shrimp/Turtle* on its facts. Although functionally the

⁹⁸ Ibid. The Appellate Body is here quoting from Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1953) 125.

⁹⁹ WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998) [159].

¹⁰⁰ Ibid [161].

¹⁰¹ Ibid (emphasis in original).

¹⁰² Ibid [164] (emphasis in original).

¹⁰³ Ibid [165].

ban on landings encourages the EC to adopt a catch limit for its vessels off Chile's EEZ, there is no suggestion that Chile was seeking to dictate any particular limit to the EC. Rather, there had been a history of contacts, albeit unfruitful, between the two sides on this subject, and the simple negotiated catch limit which Chile was seeking hardly equates with the rigid and bureaucratic 'comprehensive regulatory program' that the US adopted for foreign shrimping trawlers. Further, the need for an inquiry into conditions prevailing in EC waters is inapplicable in this instance because, whereas the risk of turtle by-catch may have been quite different in the shrimping grounds of the applicants in *Shrimp/Turtle*, here the controversy was over a single stock in one fishing ground without any element of by-catch of another species. That is, the Chilean measure could be expected to have a real impact on the problem of depletion of the swordfish stock in the south-eastern Pacific Ocean, even if it were not a complete solution to it.

Of more concern for Chile would be the next part of the Appellate Body's reasoning:

Another aspect of the application of [the US] that bears heavily in any appraisal of justifiable or unjustifiable discrimination is the failure of the United States to engage the appellees, as well as other Members exporting shrimp to the United States, in serious, across-the-board negotiations with the objective of concluding bilateral or multilateral agreements for the protection and conservation of sea turtles, before enforcing the import prohibition against the shrimp exports of those other Members.¹⁰⁴

The Appellate Body quoted the relevant factual finding of the Panel:

[T]he United States did not propose the negotiation of an agreement to any of the complainants until ... well after the ... imposition of the import ban ... Even then, it seems that the efforts made merely consisted of an exchange of documents ... As we consider that the measures sought by the United States were of the type that would normally require international cooperation, we do not find it necessary to examine whether parties entered into negotiation in good faith and whether the United States, absent any result, would have been entitled to adopt unilateral measures.¹⁰⁵

This raises some interesting issues. Management of straddling or highly migratory fish stocks is, by definition, a subject requiring international cooperation. The Appellate Body refers on numerous occasions to Principle 12 of the *Rio Declaration on Environment and Development*,¹⁰⁶ which states that:

Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global problems should, as far as possible, be based on an international consensus.

Moreover, Chile's ban predates its negotiations with the EC. If the test is simply whether the measure or the negotiations came first, then Chile will find itself in difficulty. On the other hand, since the ban also predated the entry into

¹⁰⁴ Ibid [166].

¹⁰⁵ WTO Panel, *Report of the Panel: Shrimp/Turtle*, WT/DS58/R (15 May 1998) [7.56].

¹⁰⁶ UN Doc A/CONF.151/26 (vol I) (12 August 1992), 31 ILM 874 (1992).

force of the *Marrakesh Agreement* itself, Chile could argue that this renders the test inapplicable in this instance. While the better view might be that the fact that the impugned measure dates from the early 1990s is no bar to the success of the EC's claim, as article 3.11 of the *DSU* distinguishes between disputes initiated before entry into force of the *Marrakesh Agreement* and those initiated after it, not on when the events at issue in the dispute occurred, it would certainly be worthwhile for Chile to argue the opposite. More pertinently, it could make the point that the history of interaction between the two sides with respect to swordfish in the second half of the 1990s would have justified unilateral action on its part from that time. Hence it would be futile for a panel to make the standard recommendation that the offending measure be brought into conformity with the respondent's obligations,¹⁰⁷ as Chile would now be entitled to re-enact the same measure unchanged.

How a panel would react to such an argument cannot be predicted with any confidence. *Shrimp/Turtle* suggests that Chile would secure its position considerably if it could satisfy the Panel that it had made good faith efforts to reach an agreement with the EC on catch limits (though it need not have succeeded in doing so) before imposing unilateral measures. In this way the operation of article XX is not dissimilar to the obligation to cooperate that articles 64, 117 and 118 of *UNCLOS* impose on the coastal state and other states interested in a highly migratory stock.¹⁰⁸ It would seem that Chile must rely on its efforts to engage the EC up to the time that negotiations began on the *Galapagos Agreement*, given that the EC and other distant-water fishing states were not invited to the table when the latter was being negotiated.¹⁰⁹ That is, Chile would need to demonstrate that, by the time those negotiations began, it had reasonably reached the conclusion that no agreement with the EC would be possible. At any rate, since the failure to cooperate is not described by the

¹⁰⁷ The first sentence of the *DSU*, above n 22, art 19.1 states that: 'Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.' In WTO Appellate Body, *Report of the Appellate Body: United States — Import Measures on Certain Products from the EC*, WTO Doc WT/DS165/AB/R (11 December 2000) [128]–[129] the Appellate Body overturned the Panel recommendation to this effect because the measure at issue was no longer in existence, giving instead what amounted to declaratory relief only.

¹⁰⁸ See below pt IV(D) 'UNCLOS Provisions'. See also William Burke, 'Highly Migratory Species in the New Law of the Sea' (1984) 14 *Ocean Development and International Law* 273. Burke observes, at 284, that: 'If cooperation fails to result in the needed conservation and allocation measures, despite good faith efforts, then ... it should be permissible for coastal states to take action to initiate the needed measures, at least in the EEZ and, probably, for observance beyond the EEZ.' Burke notes further that '[c]oastal states should not be inhibited from acting when "cooperation" can no longer serve a timely purpose': at 286. ITLOS took this view of the law in the provisional measures phase of the *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan) (Requests for Provisional Measures)* (27 August 1999), 38 ILM 1624 (1999) [60]. Burke adds that '[w]hile the coastal state could prescribe [measures] for activity beyond the EEZ, its only enforcement power would be within the EEZ, not beyond': at 287.

¹⁰⁹ Molenaar, 'The South Tasman Rise Arrangement', above n 14, 102.

Appellate Body as sufficient to prevent invocation of article XX(g),¹¹⁰ it may be enough to tip the balance for Chile.

Turning to the issue of arbitrary discrimination, it was the 'rigidity and inflexibility' of the US administrative process that was found by the Appellate Body to constitute arbitrary discrimination in *Shrimp/Turtle*.¹¹¹ This was coupled with the lack of a 'transparent, predictable certification process', of any 'formal opportunity for an applicant country to be heard, or to respond to any arguments that may be made against it', of a 'formal, written, reasoned decision', and of any 'procedure for review of, or appeal from, a denial of an application' for certification.¹¹² Here too the circumstances surrounding the ban on landings of swordfish are distinguishable from those of *Shrimp/Turtle*. In *Shrimp/Turtle* the US set up an internal quasi-judicial procedure effectively sitting in judgement on the turtle conservation policies of other countries, but which was 'conducted in a manner ... that ... could result in the negation of rights of Members.'¹¹³ The Appellate Body's condemnation of the lack of natural justice is understandable in such an elaborate process, but inapplicable in the swordfish dispute where the Chilean authorities were not conducting any sort of inquiry into the comparability of the EC's measures with those of Chile. Rather, they were simply making an objective and factual determination as a condition precedent to the applicability of the ban on landings; namely, that the fishing activities of the vessels concerned affect fishery resources of the EEZ or their exploitation by Chilean vessels.¹¹⁴

More problematic again is whether Chile's ban on landings amounts to a disguised restriction on international trade. The Appellate Body in *Shrimp/Turtle* did not consider this question because it had already found that the reliance of the US on article XX was vitiated by the unjustifiably and arbitrarily discriminatory nature of its measure.¹¹⁵ The available evidence does not suggest

¹¹⁰ To import an obligation of cooperation into article XX(g) would surely be to alter the rights and obligations of member states contrary to art 3.2 of the *DSU*, the third sentence of which provides that '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered Agreements'.

¹¹¹ WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998) [177].

¹¹² *Ibid* [180].

¹¹³ *Ibid* [181].

¹¹⁴ This is the second limb of the test in art 165 of the *General Law of Fisheries and Aquaculture, Ley No 18.892 1989* (Chile). Note, though, that Chile, by relying on the coverage by its legislation of foreign vessels on the high seas under the first limb (that is, on the highly migratory or straddling stock being caught on the high seas in contravention of conservation and management measures) has placed itself in a more difficult position than if it were to rely on the second limb. Under the latter, a subjective unilateral determination seems, by reason of the subject matter, more defensible than under the former, whose 'contravention' element has the quasi-judicial character to which the Appellate Body's reasoning in *Shrimp/Turtle* would more naturally attach. If Chile wished to re-enact the measure after an adverse DSB finding it would be well advised to cite the second limb in its future communications with the EC.

¹¹⁵ WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998) [184]. While this exercise of judicial economy cannot be faulted, it is perplexing why the Appellate Body did not apply the same method in its consideration of arbitrary and unjustifiable discrimination. Having found one, there was no need for it to consider whether the other was also present. It is submitted that 'arbitrary' discrimination is simply a species of 'unjustifiable' discrimination (in that, whereas arbitrary

any intention by Chile to forestall, for instance, a fall in the local market price of swordfish that would be caused by allowing local sale of swordfish brought into port by Spanish vessels. If the phrase ‘disguised restriction on international trade’ were aimed simply at prohibiting measures designed to hinder competition from imports, then the EC would have nothing about which to complain, and in any event the Spanish fleet is not competing with its Chilean counterpart for the Chilean domestic market. But the two fleets are competing for the fish, and are also competing for the US market, and the wording of the phrase is on its face wide enough to encompass that. No obvious line can be drawn between the actions of a government aimed at conserving for future generations a straddling or highly migratory fish stock exploited by its fleet, and actions aimed at bolstering the profitability of its own fleet at the expense of a possibly more efficient foreign fleet. Either purpose might equally well be served by a given measure.¹¹⁶ Ultimately it may hinge on the onus of proof, which lies on the party invoking an article XX defence.¹¹⁷

D UNCLOS Provisions

Article 64 of *UNCLOS*, bearing the heading ‘Highly migratory species’, would almost certainly be central to the arguments of the principal parties, both in relation to article XX and in its own right before the Special Chamber. It provides as follows:

- 1 The coastal State and other States whose nationals fish in the region for the highly migratory species listed in annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals

discrimination can surely never be justifiable, discrimination will often be unjustifiable for reasons other than arbitrariness); in other words, there is an implicit ‘otherwise’ preceding ‘unjustifiable’. If so, then strictly the Appellate Body should first have considered whether the US measure constituted arbitrary discrimination and, having found that it did, ended its inquiry then and there. Instead, the way it chose to proceed reversed the order in which the adjectives occur in the chapeau of art XX and diminishes the force of its reasoning on unjustifiable discrimination because, in a sense, the whole of it constitutes obiter dicta. This is not to take issue with the Appellate Body’s analysis of the US measure; rather, much of it could equally well — and in the author’s view should — have founded a finding of arbitrary instead of unjustifiable discrimination.

- ¹¹⁶ As related by de La Fayette, above n 54, 20, in 1989 the EC requested consultations with Canada under art XXII of *GATT*, objecting to two provisions of Canada’s port access policy providing for denial of access to foreign vessels competing for the same species as Canadian vessels, but for access to be granted where economic benefit for Canada would ensue or the vessels were from countries with which Canada had ‘favourable fishery relations’, a determination apparently left to officials’ virtually unfettered discretion. The EC did not, however, object to a third aspect of the policy which provided for closure of ports for conservation reasons to vessels engaged in the overfishing of depleted stocks, and did not pursue the case once the two aspects of the Canadian policy to which it objected were removed.
- ¹¹⁷ The adopted report in *GATT Panel, Report of the Panel: United States — Measures Affecting Alcoholic and Malt Beverages*, *GATT Doc DS23/R* [5.41] (19 June 1992), *BISD* 39th Supp 206, 282 states that it has been the practice of previous *GATT* Panels to interpret art XX ‘narrowly, placing the burden on the party invoking an exception to justify its use.’

harvest these species in the region shall cooperate to establish such an organization and participate in its work.

- 2 The provisions of paragraph 1 apply in addition to the other provisions of this Part.

Also central to the arguments are the provisions on cooperation as regards high seas fisheries. Articles 117 and 118 provide:

- 117 All States have the duty to take, or to cooperate with other States in taking, such measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas.
- 118 States shall cooperate with each other in the conservation and management of living resources in the areas of the high seas. States whose nationals exploit identical living resources, or different living resources in the same area, shall enter into negotiations with a view to taking the measures necessary for the conservation of the living resources concerned. They shall, as appropriate, cooperate to establish subregional or regional fisheries organizations to this end.

Chile would no doubt argue that the EC's preconditions for discussing a catch limit amount to a failure to cooperate in terms of these articles. The test may be drawn from the ICJ's dicta in the *North Sea Continental Shelf Case*, according to which negotiations must be 'meaningful, which will not be the case when either insists upon its own position without contemplating any modification of it'.¹¹⁸

It is not clear, however, what the EC hopes to achieve by seeking a declaration on this point of a continuing duty to negotiate an agreement. If it is intended to be a defence to Chile's claim of breach of the duty of cooperation in the articles cited, it would seem to require by necessary implication that the obligation in the second sentence of article 64(1) is the first one that interested states must carry out if there is no existing international fisheries organisation with competence over the species in the relevant region. In response, Chile could be expected to argue that the option of cooperating 'directly', mentioned in the first sentence of article 64(1), shows that the duty is a free-standing one, neither conditional on the prior creation of an international organisation nor affected by matters such as bans on port access or landings of fish.¹¹⁹ Another possibility is that the declaration is sought in support of the EC's claim in relation to the *Galapagos Agreement*. The need for some such link to the *Galapagos Agreement* might be required because it is not directly related to the dispute, although if it comes into force it would apply, as between the parties to it, to the swordfish stock in the south-eastern Pacific Ocean. If the essence of the EC's claim is that it was entitled to have been at the negotiating table by virtue of its 'real interest' in swordfish fishery which its fishing history had created for it, on this occasion

¹¹⁸ *North Sea Continental Shelf Case* [1969] ICJ Rep 3, [85(a)].

¹¹⁹ As a practical matter, however, the greater the number of interested states, the more unwieldy direct cooperation among them becomes and, consequently, the more attractive the creation of a fisheries commission becomes. The Commission for the Conservation of Southern Bluefin Tuna ('CCSBT') which came into being on 20 May 1994, for example, had at its inception only Australia, New Zealand and Japan as its members.

it may suit the EC to argue that article 8(3) of the *UN Fish Stocks Agreement*,¹²⁰ from which those words come, reflects customary international law.

The next of Chile's claims, concerning article 297(1)(b) of *UNCLOS*, is a little puzzling, given that the text of the paragraph reads:

- 1 Disputes concerning the interpretation or application of this Convention with regard to the exercise by a coastal State of its sovereign rights or jurisdiction provided for in this Convention shall be subject to the procedures provided for in section 2 in the following cases:
 - (a) when it is alleged that a coastal State has acted in contravention of the provisions of this Convention in regard to ... other internationally lawful uses of the sea specified in article 58;
 - (b) when it is alleged that a State in exercising the aforementioned ... uses has acted in contravention of this Convention or of laws or regulations adopted by the coastal State in conformity with this Convention and other rules of international law not incompatible with this Convention.

This provision does not give rise to a claim, but gives the ITLOS Special Chamber jurisdiction to hear a claim. Yet, since article 58 of *UNCLOS* concerns the rights and duties of other states in the EEZ, the claim itself would have to concern activity of EC vessels within Chile's EEZ. This may be an oblique indication that Chile intended to argue that the fishing activity of the Spanish vessels on the high seas amounts to a constructive violation within the EEZ (since it is not alleged that they fished there) of the laws and regulations applying in that zone. If so, it would be under this claim that another issue on which the litigation may turn would fall: that of the relationship between the coastal state's conservation measures for a species within its EEZ and the different measures (or lack of any measures) applied by a flag state to its vessels fishing for the same species on the high seas. This is dealt with in article 7 of the *UN Fish Stocks Agreement*,¹²¹ headed 'Compatibility of Conservation and Management Measures', which establishes a comprehensive regime aimed at ensuring compatibility of the rules on the high seas with measures previously established by coastal states in their EEZs, while leaving the door open for a coastal state to enact later measures. While it elevates the interests of the coastal state slightly above those of fishing states, displacing the rule in the *North Sea Continental Shelf Case* — inasmuch as the coastal state could reasonably insist

¹²⁰ Article 8(3) provides that:

Where a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall give effect to their duty to cooperate by becoming a member of such organization or a participant in such arrangement, or by agreeing to apply the conservation and management measures established by such an organization or arrangement. States having a real interest in the fisheries concerned may become members of such organizations or participants in such arrangements. The terms of participation of such organizations or arrangements shall not preclude such States from membership or participation; nor shall they be applied in a manner which discriminates against any State or group of States having a real interest in the fisheries concerned.

¹²¹ As previously noted, Chile has declined to sign the *UN Fish Stocks Agreement*.

in the course of negotiations with a flag state that any measure for the high seas not undermine its own measures applying in the EEZ — the more notable effect of article 7 as a whole is to favour a conservative measure over a riskier one, no matter which state proposes it. On either of these bases Chile's position is strengthened by this rule, so that Chile would no doubt wish to argue that article 7 also represents a codification of customary international law.

The last allegation by Chile, that the EC acted in bad faith contrary to article 300 of *UNCLOS*, is too vague to admit of detailed analysis in the absence of particulars that would have formed part of the written pleadings had the case proceeded that far. Since it cannot realistically be denied that the EC has at least a prima facie argument that article V of *GATT* qualifies the coastal state's sovereignty over its ports, even if its position is ultimately found to be incorrect, that alone ought to be sufficient to dispose of any suggestion that the EC's action in bringing this case before a WTO Panel is an abuse of right in the sense of article 300. A second possibility is that, coming shortly after the Award of the annex VII Tribunal in *Southern Bluefin Tuna* in which the Tribunal hinted that it may have found there to be jurisdiction if the applicants had alleged a separate breach by Japan of article 300,¹²² it may be no more than a device to ensure that all possible legal bases for jurisdiction are covered.

The EC's counter-allegation of breach of the same provision by Chile is probably best understood as part of its likely response to Chile's invocation of the defence in article XX of *GATT* in answer to the EC's WTO case.¹²³ Note, however, that if there were an abuse of right, only the ITLOS Special Chamber, not the WTO Panel, could order a remedy for it.

The EC's counter-claim in relation to Chile's extension to the high seas of its domestic conservation measures raises the distinction between legislative and enforcement jurisdiction in international law.¹²⁴ Chile recognises that it has no enforcement jurisdiction against foreign vessels on the high seas.¹²⁵ This leaves open the question of whether the mere existence of legislation purporting to subject foreign vessels fishing in the area of the high seas adjacent to its EEZ to the same requirement for licensing as it applies to its own vessels is in breach of the *UNCLOS* provisions cited by the EC. Oddly, these do not include article 92(1), providing for the flag state's exclusive jurisdiction on the high seas. If it is common ground between the parties that the jurisdiction referred to in article 92 is enforcement jurisdiction only, Chile's instinct may well be to attempt to justify its legislation on the basis of its assertion of a *mar presencial*: a large area of high seas in the south-eastern Pacific in which Chile has a declared policy of participation in, and surveillance of, other states' activities that may affect

¹²² *Southern Bluefin Tuna*, above n 32, [64].

¹²³ See WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998), and see especially the discussion of this aspect of *Shrimp/Turtle*, above nn 88–95, and accompanying text.

¹²⁴ See, eg, Robin Churchill and A V Lowe, *The Law of the Sea* (3rd ed, 1999) 11–12.

¹²⁵ This was all but conceded by the delegate of Chile before the DSB: see *Minutes of Meeting on 17 November 2000*, above n 6, [114].

Chile's interests, in particular the fish stocks of its EEZ.¹²⁶ The prospects of success of such a venture are beyond the scope of this article, but the pleading of this argument may be a decisive factor in triggering intervention by Australia and New Zealand before the Special Chamber.

V AUSTRALIA AND NEW ZEALAND AS THIRD PARTIES

The interests of Australia and New Zealand in this dispute are roughly, though not entirely, parallel and twofold. Both states have been at the forefront of efforts in the Commission for the Conservation of Antarctic Marine Living Resources ('CCAMLR') to bring port state measures to bear in combating illegal, unreported and unregulated fishing for Patagonian toothfish,¹²⁷ and in enforcing fish conservation and management policies generally. They therefore have an interest in ensuring that the dispute does not lead to a finding by either the ITLOS Special Chamber or the WTO Panel that would reduce the effectiveness of port state measures or make them prohibitively difficult to use for their intended purpose. Equally, given the relatively small but growing number of their own high seas fishing vessels,¹²⁸ Australia and New Zealand would not want to see port access controls used unreasonably to restrict their vessels' access to foreign ports simply because the port state has a fishing fleet in competition with theirs.

Secondly, both Australia and New Zealand have an interest in clarifying whether article V of *GATT* does indeed have the far-reaching effect of derogating sovereignty over ports that the EC argues it has. If it does, Australia's port access laws, and both countries' laws on landing of fish, are vulnerable to challenge.

In essence, Australia's relevant law on port access and landings, sections 102 and 103 of the *Fisheries Management Act 1991* (Cth), has the effect of making it

¹²⁶ Francisco Orrego Vicuña, 'Towards an Effective Management of High Seas Fisheries and the Settlement of the Pending Issues of the Law of the Sea' (1993) 24 *Ocean Development and International Law* 81, 88.

¹²⁷ See CCAMLR, 'Conservation Measure 147/XIX: Provisions to Ensure Compliance with CCAMLR Conservation Measures by Vessels, Including Cooperation between Contracting Parties', *Report of the Nineteenth Meeting of the Commission* (2000), annex 6 <http://www.ccamlr.org/English/e_pubs/e_cc_reports/e_cc_00/ann6.htm> at 30 April 2002, which obliges contracting parties, inter alia, to: inspect vessels that intend to land or transship toothfish in their ports: at [1]; deny vessels access to ports, except in emergencies, unless they make a written declaration that they have not engaged or supported illegal, unreported and unregulated fishing in the convention area: at [2]; and not allow landing or transshipment of fish if there is evidence that the vessel has fished in contravention of CCAMLR conservation measures: at [3].

¹²⁸ According to a summary compiled from vessel logbook records, kindly supplied to the author by Peter Neave, Senior Management Officer, Australian Fisheries Management Authority, 120 Australian fishing vessels operated outside the Australian Fishing Zone in 1999 and 126 in 2000. Of these the number in the east coast and west coast tuna long-line fisheries and the south-east trawl and non-trawl fisheries, which would have been most likely to visit foreign ports and land catch there, rose from 71 to 78. The summary does not, however, record the actual number of foreign port calls made. As for New Zealand, permits for 42 vessels were issued in the three months after pt 6A of the *Fisheries Act 1996* (NZ), requiring fishing vessels registered in New Zealand to have a permit to operate on the high seas, commenced on 1 May 2001. Some of these operate in the southern Indian Ocean, so that they are likely to call at foreign ports: see J Haworth, 'High Seas Permits Issued' (14 August 2001) <<http://www.fis.com/fis/worldnews>> at 30 April 2002.

unattractive for most foreign vessels to fish on the high seas near Australia — a regime similar to that which drove the EC to seek legal redress against Chile and, earlier, Canada.¹²⁹ Indeed, whereas article XX(g) of *GATT* may offer a defence to any breach by Chile of article V on transit, it is more likely to leave exposed Australia's prohibition on port entry in section 102 of the *Fisheries Management Act 1991* (Cth) and prohibition on landing of fish in section 103¹³⁰ (the latter backed up by customs regulations¹³¹ which allow the Minister responsible for fisheries to waive the ban on an ad hoc basis). This is because those bans apply across the board, not just to species whose catch is limited by Australian law.¹³² This raises the question of whether in practice the Minister's power can ever be exercised ad hoc, given that the most-favoured nation rule in article I:1 of *GATT*,¹³³ one of the central pillars of the WTO system, would then oblige the Minister to exempt on the same terms landings of at least the same species of fish caught by the fishing vessels of all WTO members. If, in conjunction with the landing of its fish, the vessel were permitted ordinary use of the facilities of the port, this could conceivably indirectly extend the benefit of article I:1 to port calls, even though it applies directly only to 'products', if the provision of those facilities were able to be characterised as an 'advantage, favour [or] privilege' relating to a formality in connection with the importation of the fish.

It appears that this state of affairs has not escaped the notice of at least one Australian Government body. In a submission to the Government made in April 2001 as part of a comprehensive review of Australian fisheries policy, the Australian Fisheries Management Authority ('AFMA') noted that, as the Government's operational arm for the implementation of fisheries management in Australia, it regularly needed to assess applications from foreign fishing vessels seeking access to Australian ports for a range of purposes.¹³⁴ Although there existed guidelines dating from 1988 relating to foreign fishing vessel access to the Australian Fishing Zone, these did not address circumstances under which port access should be considered. The lack of a clear policy on this issue had, according to AFMA, affected its ability to apply a consistent approach to the applications received. The AFMA submission went on to state that it was clear that Australia must consider WTO as well as conservation implications when developing port access arrangements and that, in order to implement an effective port access regime and enable Australia to meet its international

¹²⁹ De La Fayette, above n 54, 20.

¹³⁰ Section 103 is headed 'Foreign Boats Not to Land Fish in Australia'.

¹³¹ *Customs (Prohibited Imports) Regulations 1956* (Cth) reg 4B.

¹³² Note the limited defence relating to trade in s 102(3)(a) of the *Fisheries Management Act 1991* (Cth), which suggests a desire to avoid inconsistency with art V of *GATT*.

¹³³ Article I:1 reads:

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

¹³⁴ AFMA, *Submission by the Australian Fisheries Management Authority to the Commonwealth Fisheries Policy Review* (2001) <<http://www.afma.gov.au/corporate%20publications/reports/fisheries%20policy%20review/default.php>> at 30 April 2002 ('AFMA Submission').

obligations, the Government needed to develop a policy outlining the circumstances under which access to Australian ports would be permitted. Accordingly, AFMA recommended that the Government ‘develop and endorse in policy the conditions under which port access will be granted to foreign fishing vessels’.¹³⁵

The wider fisheries policy review provides a good opportunity for the Australian Government to craft a port access policy for foreign fishing vessels that is capable (within the limits of predictability) of withstanding challenge in the WTO, and it is to be hoped that this opportunity will indeed be taken.

New Zealand law currently has no general prohibition on entry to its ports of foreign fishing vessels, but since 1 May 2001, section 113ZD of the *Fisheries Act 1996* (NZ)¹³⁶ has allowed the authorities to prohibit the entry of vessels if there is reason to believe they have undermined an international conservation or management measure.¹³⁷ New Zealand does, however, by section 113 of the *Fisheries Act 1996* (NZ), require foreign vessels to obtain the consent of the Chief Executive of the Ministry of Fisheries before the landing in New Zealand of fish caught on the high seas.

It should be noted that as the interests of Australia and New Zealand just outlined are not of a direct nature, it is unlikely that either of the countries would have attempted to intervene in the law of the sea aspect of the dispute had it gone by default before an arbitral tribunal constituted under annex VII to *UNCLOS*. The only relevant provision of annex VII is article 5, which states:

Unless the parties to the dispute otherwise agree, the Arbitral Tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case.¹³⁸

However, by removing the case to a Special Chamber of ITLOS, Chile and the EC opened to third-party states the possibility of intervention under articles 31 and 32 of the *ITLOS Statute*. Article 31 states:

- 1 Should a State Party consider that it has an interest of a legal nature which may be affected by the decision in any dispute, it may submit a request to the Tribunal to be permitted to intervene.
- 2 It shall be for the Tribunal to decide upon this request.

¹³⁵ Ibid recommendation 53. The author is indebted to Geoff Rohan, General Manager, AFMA, for the observation that in fact most foreign fishing vessels using Australian ports do not seek to unload catch.

¹³⁶ This is a new provision inserted into the *Act* by s 16 of the *Fisheries Act 1996 Amendment Act (No 2) 1999* (NZ) as part of the legislative package enacted in order for New Zealand to discharge its obligations as a party to the *UN Fish Stocks Agreement*.

¹³⁷ Note the similarity to the first limb of the *General Law of Fisheries and Aquaculture*, above n 13, although ‘undermining’ is a concept wider in scope than ‘contravening’, which has a specifically legal connotation. Section 113B, inserted by s 16 of the *Fisheries Act 1996 Amendment Act (No 2) 1999* (NZ), defines ‘international conservation and management measures’ to mean ‘measures to conserve or manage 1 or more species of living marine resources, which measures are ... [a]dopted by a global, regional, or sub-regional fisheries organisation or arrangement’. While this would not cover a unilateral New Zealand measure, by s 113C it is not necessary for New Zealand itself to be a member of the organisation or arrangement or bound by the measure so defined.

¹³⁸ In the only case heard to date by an annex VII arbitral tribunal, *Southern Bluefin Tuna*, 39 ILM 1359 (2000), there were no formal rules of procedure.

- 3 If a request to intervene is granted, the decision of the Tribunal in respect of the dispute shall be binding upon the intervening State Party in so far as it relates to matters in respect of which that State Party intervened.

Article 32 goes on to provide that:

- 1 Whenever the interpretation or application of this Convention is in question, the Registrar shall notify all states parties forthwith.
- ...
- 3 Every party referred to in [paragraph 1] has the right to intervene in the proceedings; if it uses this right, the interpretation given by the judgment will be equally binding upon it.

It is not likely, however, that either Australia or New Zealand would have sought to intervene in the proceedings before the Special Chamber. Article 31 appears to be aimed at some direct legal interest that a third party might have in a dispute, which neither country has in the instant case. While article 32 looks more to systemic interests of the kind that are often pursued in the WTO, the risk of being bound by an interpretation not to their liking would probably outweigh any benefit that might be gained from presenting arguments on the interpretation or application of the *UNCLOS* provisions at issue in the dispute, particularly if those arguments were not significantly different from those of Chile, a fellow coastal state. Even so, it is possible that Chile would raise arguments that Australia and New Zealand might regard as insufficiently orthodox to safeguard their interests, thereby shifting the balance in favour of intervention.

By contrast, the potential it offers for forestalling future challenges to their own port access and landings policies would have provided Australia and New Zealand with a strong incentive to participate in the WTO Panel proceedings as third parties and, as already noted, they reserved their right to do so. What then might they have argued before the WTO Panel if it had gone ahead, or what might they yet argue if the dispute is revived?

VI POSSIBLE THIRD-PARTY ARGUMENTS BEFORE THE WTO PANEL AND SPECIAL CHAMBER OF ITLOS

That third parties can have significant influence on the outcome of WTO dispute settlement proceedings is demonstrated by *Shrimp/Turtle*, in which Australia's third-party submission to the Appellate Body closely mirrored the latter's eventual decision.¹³⁹ Without direct interests at stake, however, Australia and New Zealand have no reason to join Chile in questioning the Panel's jurisdiction. Instead, they could put forward the view that comity between dispute settlement fora requires that the WTO Panel and ITLOS should, to the extent possible, avoid calling into question each other's jurisdiction or preempting each other's decisions on questions of substance. At the same time, it would make sense for Australia and New Zealand to suggest to the Panel that it ought nonetheless to take cognisance of trends in international fisheries law, as

¹³⁹ Submission by Australia, *United States — Shrimp/Turtle* AB-1998-4 (7 August 1998) <http://www.dfat.gov.au/trade/negotiations/environment/us_shrimp_ausub2.html> at 30 April 2002.

the Appellate Body did in *Shrimp/Turtle*,¹⁴⁰ and to refrain from making findings that run counter to those trends. They could also refer to the negotiations mandated by the Ministerial Declaration at Doha on the relationship between WTO rules and specific trade obligations set out in multilateral environmental agreements,¹⁴¹ and argue that the desirability of allowing these agreements to take their course uninfluenced by dispute settlement proceedings is a further reason for caution in this regard.¹⁴²

Turning to matters of substance, it would seem to be in the third parties' interests to argue for a balanced rather than an absolutist meaning to be given to article V:2 of *GATT*. There has not been any jurisprudence on the meaning of this provision, either before or since the advent of the WTO and its Appellate Body, that would shed light on how it ought to be interpreted. At first sight, the absolute nature of the freedom of transit obligation in the first sentence would appear to leave little room for an argument based on the coastal state's sovereignty over its ports. It is suggested, however, that this is not how article V should be read. If one takes the second sentence as qualifying the first sentence, which seems to follow from the rule of effectiveness in interpreting treaties,¹⁴³ then the maxim of interpretation *expressio unius est exclusio alterius* would prohibit discrimination based on the factors named, but not on other factors such as whether the catch of the vessel is subject directly or indirectly to an internationally binding quota that limits output, or some other type of measure aimed at input (such as restrictions on fishing effort, gear or mesh size of nets).

However, there is no reason to make the lawfulness of discrimination on this ground by a port state dependent on whether its own vessels are likewise subject to an internationally binding limit, as the dispute will often have arisen, as in the *Southern Bluefin Tuna Case*, because of the parties' inability to agree on such a limit.¹⁴⁴ In such a case it should be sufficient for the catch of the port state's vessels to be subject to a voluntary limit, that is, one that the state has imposed on itself. Such an interpretation would suit Australia's and New Zealand's law of the sea interests as coastal and port states without damaging their trade interests.

¹⁴⁰ WTO Appellate Body, *Report of the Appellate Body: Shrimp/Turtle*, WTO Doc WT/DS58/AB/R (12 October 1998) [130].

¹⁴¹ See WTO Doc WT/MIN(01)/DEC/W/1 (14 November 2001) [31(i)].

¹⁴² This may not be a particularly strong consideration, however, given that the mandate's reference to 'obligations' tightly circumscribes it, so that it may well not extend to measures imposed relying on treaty provisions not specifically directed at trade, such as the *UN Fish Stocks Agreement*, above n 18, art 23(1).

¹⁴³ In the first case that came before it, WTO Appellate Body, *Report of the Appellate Body: United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (29 April 1996), the Appellate Body found that the rules on interpretation in the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, 8 ILM 679 (1969) (entered into force 27 January 1980) were generally applicable to the *Marrakesh Agreement*:

One of the corollaries of the general rule of interpretation in the Vienna Convention [on the Law of Treaties] is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility: at [23].

It is submitted that the same principle must apply to give meaning to the second sentence of art V:2, which would be deprived of any purpose if the first sentence were to be treated as absolute.

¹⁴⁴ See Statement of Claim of Australia and New Zealand, above n 86, [10].

With the southern bluefin tuna dispute not long settled at the time of writing, it would hardly be to their benefit to leave unchallenged an EC argument whose logical consequence is that — had the Japanese fishing vessels declared an intention to bring at least part of their high seas catch of southern bluefin tuna into Fremantle, for example, for transport to Perth Airport and thence Japan — the lawfulness of Australia's longstanding policy of allowing Japanese fishing vessels access to its ports only while their catch of southern bluefin tuna was subject to a negotiated limit¹⁴⁵ would have hung only by the uncertain thread of article XX of *GATT*.

More broadly, Australia and New Zealand could have offered the Panel a coherent and more practical view of the interaction between the rules of international trade law and the law of the sea than can be discerned from the

¹⁴⁵ This policy was credited by Japan in *Southern Bluefin Tuna (Australia and New Zealand v Japan)* [53] ('Memorial on Jurisdiction of Japan') <<http://www.worldbank.org/icsid/bluefintuna/memorialonjurisdictionofjapan.PDF>> at 30 April 2002 — and in the oral submissions of its counsel, Professor Ando, 'Transcript of the First Round Presentation of Japan', *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)* (7 May 2000) 34–5 <<http://www.worldbank.org/icsid/bluefintuna/0507icsi.pdf>> at 30 April 2002 — with securing Japan's reluctant agreement in the years leading up to the dispute to leave the total allowable catch and national allocations unchanged. The 'Reply on Jurisdiction of Australia and New Zealand', *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)* <<http://www.worldbank.org/icsid/bluefintuna/replyonjurisdictionofANZ.PDF>> at 30 April 2002 ('Reply on Jurisdiction of Australia and New Zealand') confirms the policy while putting it in a wider context. Carrying its policy into effect, on 1 March 1998 — the day after the last quota year for southern bluefin tuna for which a total allowable catch decided by the CCSBT was in force — Australia withdrew access to its ports for Japanese vessels fishing for tuna, which had previously been granted through port permits under s 94 of the *Fisheries Management Act 1991* (Cth): see Letter from the Australian Minister for Resources and Energy to the Japanese Minister of Agriculture, Forestry and Fisheries on 25 February 1998, as reproduced in the Memorial on Jurisdiction of Japan: at [60]. On 13 July 1998 New Zealand likewise advised Japan that its fishing vessels, other than those under charter to New Zealand operators fishing New Zealand quota, were no longer welcome in New Zealand ports: at [66]. Note that, by contrast with Australia, there appears to have been no basis in New Zealand's domestic law by which a vessel that sought to enter a New Zealand port in defiance of this advice could have been excluded. Japan did not claim that its vessels were entitled to access to Australia's or New Zealand's ports, though it was critical of the ban both in the provisional measures phase of the case, as evidenced by the oral submission of its counsel, Mr Greig, and again more obliquely in the jurisdiction phase through the oral submission of Professor Lowe: see 'Verbatim Record', *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* ITLOS/PV.99/22/Rev.1 (19 August 1999) 16–17 <http://www.itlos.org/case_documents/2001/document_en_141.pdf> at 30 April 2002 and 'Transcript of the Second Round Presentation of Japan', *Southern Bluefin Tuna Case (Australia and New Zealand v Japan)* (10 May 2000) 64–5 <<http://www.worldbank.org/icsid/bluefintuna/0510icsi.pdf>> at 30 April 2002. Two of the ITLOS judges, Judge Yamamoto of Japan and Judge Park of the Republic of Korea, expressed the view that, in conjunction with the relief prescribed by ITLOS as a whole, it would have been appropriate for Australia and New Zealand to reopen their ports to Japanese vessels: see *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)* (Joint Separate Opinion of Judges Yamamoto and Park) <http://www.un.org/Depts/los/itlos_new/Case3_4_SBluefin_Tuna/3Joint_SO.htm> at 30 April 2002. New Zealand ultimately did so on 3 January 2001, as foreshadowed by the New Zealand Minister of Fisheries, *Scientists Brought into Tuna Dispute*, Press Release (22 December 2000) <<http://www.fish.govt.nz/current/press/pr221200.htm>> at 30 April 2002. On 29 May 2001 the Australian Minister for Forestry and Conservation, Wilson Tuckey MP, declared the dispute with Japan over, noting the Australian Government's agreement to lift the port bans, but did not specify whether this took immediate effect: see Wilson Tuckey, Minister for Forestry and Conservation, *Tuckey Announces End to Southern Bluefin Tuna Dispute with Japan*, Press Release, No AFFA01/42TU (29 May 2001).

rather abstract deliberations of the WTO's Committee on Trade and the Environment ('CTE').¹⁴⁶ Such a balanced view would be that a coastal state may not directly regulate the activity of foreign fishing vessels on the high seas, nor is it required to assist that activity, particularly if it believes that it impinges adversely on its own fisheries interests. Just as the underlying principle of international trade law is that states' collective prosperity and development is best served by allowing them as far as possible to derive the benefit of their comparative advantage, a coastal state's relative proximity to a high seas fishing ground is a natural geographical advantage which it should be able to exploit.¹⁴⁷ Thus it ought to be open to the coastal state to make it a condition of entry into its ports by a vessel, or class of vessels, that they act or refrain from acting in a given way on the high seas. This power would not be inherently limited to straddling and highly migratory fish stocks covered by the *UN Fish Stocks Agreement* or stocks under international management, nor would it give the coastal state carte blanche to disregard either the interest of other states in securing an equitable share in the fishery or its own duty to cooperate with them. Plainly, however, where international management of a stock is already a reality, a ban by a coastal state on entry into its ports of foreign fishing vessels falls squarely within its right and duty under article 23(1) of the *UN Fish Stocks Agreement* when the stock it seeks to protect is in fact a straddling stock — that is, one that occurs in its EEZ and in an adjacent area of the high seas — or a highly migratory stock. Swordfish, as we have seen, is both.

¹⁴⁶ The CTE's remit covers the relationship between the *Marrakesh Agreement* and a number of 'multilateral environmental agreements' under which trade-restrictive measures may be imposed. Its early characterisation of *UNCLOS* as one of these was, however, doubly unsatisfactory: first because, while pt XII concerns the protection and preservation of the marine environment, *UNCLOS* is not primarily an environmental instrument; and secondly, *UNCLOS* neither imposes any such measures itself nor requires or encourages them to be imposed by the various subsequent and subsidiary treaties that it envisages: see WTO, *Note by the Secretariat: Environmental Benefits of Removing Trade Restrictions and Distortions*, WTO Doc WT/CTE/W/67 (7 November 1997) and WTO, *Note by the Secretariat: Report of the Meeting Held on 22–24 September 1997*, WTO Doc WT/CTE/M/15 (20 November 1997). Note that the UN Secretariat's submission, made in response to the CTE's invitation, hints at some doubt as to why *UNCLOS* was considered a Multilateral Environmental Agreement (WTO, *The 1994 Agreement Relating to the Implementation of Part XI of the 1982 UN Convention on the Law of the Sea: Provisions Dealing with Production Policy for Deep Seabed Minerals*, WTO Doc WT/CTE/W/62 (16 September 1997) [6]) and confines itself to the *Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982*. More recently, the CTE has ceased to refer to *UNCLOS* and is examining instead — more sensibly, in this author's view — the *UN Fish Stocks Agreement* and measures of individual management bodies such as the catch documentation schemes of CCAMLR, ICCAT and the CCSBT: see the information from the UN Secretariat, CCAMLR and the ICCAT at pts XII, IV and II respectively of the 'Matrix on Trade Measures Pursuant to Selected MEAs' prepared for the Committee by the WTO Secretariat (WTO, *Note by the Secretariat: Revision — Matrix on Trade Measures Pursuant to Selected MEAs*, WTO Doc WT/CTE/W/160/Rev.1 (14 June 2001)). The new mandate for negotiations, launched at Doha, may, however, be too narrow to allow WTO members to pursue under it the relationship between arts V and XI of *GATT* and management measures of regional fisheries bodies.

¹⁴⁷ Note, for example, that pt VII of *UNCLOS*, concerning the high seas, has no equivalent of arts 69 and 70 in pt V, which provide special rules for the benefit of landlocked and geographically disadvantaged states, respectively, in coastal states' EEZs.

Equally, while making it clear that they are not asking it to decide on the matter,¹⁴⁸ Australia and New Zealand as parties to the *UN Fish Stocks Agreement* would be well placed to argue before the Panel that much of that instrument, including article 23, is likely to attain the status of customary international law relatively soon, if it has not done so already.¹⁴⁹ In addition, it could constitute a ‘generally recommended international minimum standard’ within the meaning of article 119(1)(a) of *UNCLOS* for determining conservation measures for the living resources of the high seas.¹⁵⁰ In the negotiations that produced the *UN Fish Stocks Agreement*, some states considered the powers under article 23 already to be part of general international law, and article 23(4) may itself be taken as a reflection of this.¹⁵¹ If that is so, it would be only marginally relevant that Chile has not signed the *UN Fish Stocks Agreement* or that it may not have been in force during the early stages of the dispute.

Moving to the *UNCLOS* part XV proceedings, though less likely to become third parties before the Special Chamber for the reasons outlined earlier, Australia and New Zealand might have cause to put a number of arguments on the claims made by the principal parties. The distinguishing feature of any third-party intervention by Australia and New Zealand in this aspect of the dispute is that they are likely to argue towards the same or similar conclusions as those reached by Chile, if not always for the same reasons. However, with less information on the record about this aspect of the dispute, what follows is necessarily somewhat speculative.

In particular, it would be most unusual if Australia and New Zealand as coastal states were anything but sympathetic to Chile’s probable argument on the cooperation articles of *UNCLOS*. By contrast, the proceduralist view of article 64 which the EC appears to be adopting by implication is unlikely to appeal to either of the third parties.

As to the *UNCLOS* claim relating to article 297(1)(b), it would suit Australia and New Zealand’s overall purpose of promoting the *UN Fish Stocks Agreement* to reformulate this claim in terms of article 7 of that instrument, particularly if Chile does not do so of its own accord.

As to article 300 of *UNCLOS*, Australia and New Zealand’s dismay in the *Southern Bluefin Tuna Case* at Japan’s allegation of bad faith on their part suggests that they view this charge as a very serious one, not to be made lightly

¹⁴⁸ The Panel would not be in a position to do this: see above n 52 and accompanying text.

¹⁴⁹ In the Preamble to their February 2000 *Memorandum of Understanding on the South Tasman Rise Fishery* (Arrangement between the Government of Australia and the Government of New Zealand for the Conservation and Management of Orange Roughy on the South Tasman Rise) reproduced in the annex to Molenaar, ‘The South Tasman Rise Arrangement’, above n 14, 119, Australia and New Zealand affirm ‘the obligation to apply the precautionary approach widely to conservation, management and exploitation of fish stocks’; language drawn from the *UN Fish Stocks Agreement*, above n 18, art 6. Whatever may be the position now, the *UN Fish Stocks Agreement* was certainly not in force in February 2000, hence this obligation can only have arisen at that time by a customary route.

¹⁵⁰ In Statement of Claim of Australia and New Zealand, above n 86, in *Southern Bluefin Tuna*, Australia and New Zealand said that ‘the UN Fish Stocks Agreement is significant as an articulation of the standard that should be applied by parties to *UNCLOS*, and ... [even before its entry into force] cannot be disregarded in the application of *UNCLOS*’: at [68].

¹⁵¹ Molenaar, ‘The South Tasman Rise Arrangement’, above n 14, 100.

among states enjoying friendly relations.¹⁵² Rather, it is more properly reserved for especially grave breaches of the international legal order. If so, they should argue that neither side has breached article 300, and that bad faith, or the allegation of it, is not a condition precedent to any finding by the Special Chamber either as to jurisdiction or on the merits.

If Chile advances the *mar presencial* concept in legitimation of the application of its vessel licensing legislation to foreign fishing vessels on the high seas, Australia and New Zealand would no doubt choose their words carefully. While the initial controversy surrounding the *mar presencial* concept has died down in recent years, as it has become clearer that it does not amount to a claim of jurisdiction over a new maritime zone,¹⁵³ it is probable that Australia and New Zealand would stop short of endorsing the concept. Yet that does not necessarily mean that any conclusion Chile draws from it cannot be reached by another route, and where such an alternative route exists, Australia and New Zealand may well wish to point it out.

In the instant case the formal reason for refusing the Spanish vessels permission to land their catch of swordfish in the Chilean ports to which access was sought was that they lacked the licences that Chilean law required them to hold in order to fish in the *mar presencial*. This makes the ban on landings an indirect way of enforcing compliance with its fishing laws for the *mar presencial*, though it is ineffective against vessels not wishing to have access to Chilean ports. In fact, however, the licensing element is superfluous to the ban on landings imposed on a vessel as a result of its fishing on the high seas, which could just as easily have been based directly on that fishing. As long as no attempt to enforce the need for a licence (or to prevent or interfere with fishing)

¹⁵² See the oral submissions of the Australian Attorney-General, Daryl Williams MP, 'Verbatim Record', *Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan)*, ITLOS/PV.99/20/Rev.1 (18 August 1999) 11 <http://www.itlos.org/case_documents/2001/document_en_139.pdf> at 30 April 2002; and Reply on Jurisdiction of Australia and New Zealand, above n 145, [184] in the jurisdiction phase.

¹⁵³ Given the disavowal of any such intent to create a new maritime zone — see Orrego Vicuña, *The Changing International Law of the High Seas Fisheries*, above n 77, 107 — one could be forgiven for wondering whether the concept might have received better press had it not been accompanied by the unnecessary drawing of a line in the ocean. Nor is Chile's subsequent refusal to become party to the *UN Fish Stocks Agreement* an inevitable consequence of proclaiming a *mar presencial*. Orrego Vicuña argues unexceptionably in 'Towards an Effective Management', above n 126, 84–5, that

conservation measures on the high seas need to ensure the participation of the relevant coastal state as a condition of their effectiveness. This trend in no way diminishes the validity of cooperation and binding dispute settlement as the preferred alternative, but it ensures that if all such mechanisms should fail or prove to be ineffective the interests of the coastal state will not remain ignored.

On the other hand, he expects that 'it can eventually have jurisdictional implications if mechanisms for international cooperation are nonexistent or ineffective': at 88. He discerns that it has 'the potential of evolving into customary international law, reflecting both the interests of coastal states and those of the international community': at 89. He notes the diplomatic reactions and academic criticisms prompted by these last two statements, which are somewhat at odds with the disavowal above: Orrego Vicuña, *The Changing International Law of the High Seas Fisheries*, above n 77, 107–11.

is made by Chile in its *mar presencial*, any objection of impermissible extraterritoriality is without practical foundation.¹⁵⁴

Viewed another way, what order might the Special Chamber make subsequent to a putative finding that the legislative jurisdiction assumed by Chile in its *mar presencial* is impermissible under *UNCLOS* or the customary law of the sea? If it were to hold that the relevant law was not opposable to the EC even within the Chilean EEZ or in Chile's ports, that would be an unfortunate descent into formalism, but we can take encouragement from the recent statement of the President of ITLOS that his institution 'avoided a doctrinaire approach' in its orders.¹⁵⁵ The undesirability of such an approach is all the greater in this case, given that another uncontroversial basis exists for Chile's enforcement of its fisheries laws in its own waters and that the dispute concerns a complaint not against the criminal prosecution of a vessel or its crew for fishing on the high seas without a licence, but merely against the denial of access to the port by the vessel in the first place. Australia and New Zealand may see their role as one of ensuring that the Special Chamber adverts to this alternative basis of coastal state jurisdiction. Whether it is good legal policy for a state to extend legislative jurisdiction beyond its enforcement jurisdiction is, of course, another matter, which there is no need for the third parties to canvass.¹⁵⁶

The remaining EC counterclaim, concerning the *Galapagos Agreement*, is not one on which Australia or New Zealand strictly need to take a position, if only because their vessels are not likely in the foreseeable future to venture as far as the south-eastern reaches of the Pacific Ocean. In the abstract, the proposition that the EC had a right to be at the negotiating table might cause Australia and New Zealand some embarrassment in view of their assent to the confinement of the EC to the status of observer in the series of Multilateral High-Level Conferences that produced the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central*

¹⁵⁴ It is not difficult to see why this should be so. When a state refuses entry to a foreign national because of the person's criminal record or even because of conduct not considered criminal, such as membership of a political party espousing an ideology abhorrent to the state concerned, it does so on the basis of an act or state of affairs occurring in another state. Yet because the immediate issue is one of control over its own borders, and the ban is enforced at the border, the question of extraterritoriality does not arise. Refusal of entry on the basis of activity that occurred not in another state but on the high seas would *a fortiori* be no less lawful, provided that it does not fall foul of *GATT* art V:2. This argument would of course apply equally to any trade-restrictive measure, including those clearly in breach of *GATT*. The point is that the unlawful nature of the measure lies in the failure to comply with some obligation deriving from that instrument, not in the fact of extraterritoriality per se.

¹⁵⁵ ITLOS, Press Release, No 64 (27 March 2002) 2 <http://www.itlos.org/cgi-bin/news/news_press.pl?language=en> at 30 April 2002.

¹⁵⁶ In the law of the sea, where the two do not coincide in extent, it is by no means always the legislative jurisdiction that is the more expansive; for example, enforcement jurisdiction only is entailed in hot pursuit onto the high seas, while the contiguous zone (see *UNCLOS*, above n 2, art 33) is a zone of enforcement only of certain offences that must have been committed within the coastal state's territory or territorial sea.

Pacific Ocean.¹⁵⁷ If the EC's argument were couched in the specific terms of article 8(3) of the *UN Fish Stocks Agreement*, however, this is something to which Australia and New Zealand could be expected to lend enthusiastic support. Presumably they would point out, if either Chile or the EC failed to do so, that, whatever status article 8(3) enjoys, it must be shared by its corollary, article 8(4),¹⁵⁸ as this would decidedly serve their fisheries interests as members of other bodies.¹⁵⁹

VII CONCLUSION

While the EC's case against Chile under article XI of *GATT* is less than convincing, the same is not necessarily true of article V. Though fisheries managers in Chile — and for that matter in Australia and New Zealand — would no doubt see the broad terms in which article V is cast as an obstacle to their pursuit of management measures for species of international interest, it does serve the legitimate (if narrower) purpose of trade facilitation, and cannot simply be wished away. Rather than ignoring it and hoping that article XX will provide a defence, coastal states would serve their fisheries conservation interests better by facing the problem squarely and promoting a narrow reading of article V that confines the proscribed bases of discrimination to those enumerated in the second sentence of article V:2. Since article XX applies only where the impugned measure has been found to be in breach of some other provision of *GATT*, Chile has nothing to lose, and potentially much to gain, by defending its measures on the ground that they do not contravene either of the articles cited by the EC. Though its actions in the swordfish dispute can be distinguished from *Shrimp/Turtle* in several respects, reliance by Chile on an article XX defence alone carries risks. Chile might also find it useful to raise the issue of the futility of WTO proceedings.

¹⁵⁷ Opened for signature on 5 September 2000, 40 ILM 277 (2001) (not yet in force). The text of the Convention is available at <<http://www.austlii.edu.au/au/other/dfat/treaties/notinforce/2000/11.html>> at 30 April 2002. On the EC's exclusion, see Erik Jaap Molenaar, 'The Concept of "Real Interest" and Other Aspects of Co-operation through Regional Fisheries Management Mechanisms' (2000) 15 *International Journal of Marine and Coastal Law* 475, 510–13.

¹⁵⁸ *UN Fish Stocks Agreement*, above n 18, art 8(4) provides that:

Only those States which are members of such an organization or participants in such an arrangement, or which agree to apply the conservation and management measures established by such organization or arrangement, shall have access to the fishery resources to which those measures apply.

¹⁵⁹ Article 8(4), if it has become customary international law, is a powerful tool that would significantly strengthen the hands of CCAMLR, CCSBT and (when it comes into being) the Commission for the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean against states unwilling to join those bodies or to apply their conservation measures to their own fishing vessels. The last-named body is established by the *Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*, above n 157. Australia, New Zealand and the US are among the signatories who have not yet ratified. Although they participated in its negotiation, the major distant-water fishing states of the Pacific Ocean have so far declined to sign it: see Laurence Cordonery, 'A Note on the 2000 Convention for the Conservation and Management of Tuna in the Western and Central Pacific Ocean' (2002) 33 *Ocean Development and International Law* 1, 5.

From the point of view of Australia and New Zealand as third parties, no trade liberalisation purpose is served by letting a broad reading of article V:2, or a loose reading of article XI:1, stand in the way of bans on port access and landing of fish caught on the high seas. These have proved to be useful fisheries management tools for both of them, though they would probably want to take an even-handed position on Chile's article XX defence.

With respect to the law of the sea, the interests of Australia and New Zealand coincide more closely, though not exactly, with those of Chile. In view of their record as coastal states with a relatively long history of conservative fisheries management, both would benefit from Chile's success on the grounds of lack of cooperation with it by the EC contrary to articles 64, 117 and 118 of *UNCLOS*, based on recognition for the first time by an international tribunal of the primacy of the coastal state's interest in a straddling or highly migratory stock not only within its EEZ but also (to a lesser extent) on the high seas.

Finally and perhaps most importantly, given their interest in having the substantive rules of the *UN Fish Stocks Agreement* acquire the status of customary international law sooner rather than later, Australia and New Zealand, as third parties, should support any arguments of either Chile or the EC that hasten this end. Indeed, the main and most distinctive contribution that Australia and New Zealand could make to this case — and to the progressive advancement of international fisheries law — would be to persuade either forum to reflect in its findings that, despite Chile's inability to invoke articles 7 and 23, and the EC's inability to invoke article 8 of the *UN Fish Stocks Agreement*, those provisions are important achievements of modern international fisheries law that ought not to be undermined.