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

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Before commenting on what Dr. Vöneky and Professor Stoll just said, please allow me to make a general remark regarding the subject of today's symposium. Exactly forty years ago, in 1961, when Professor Wolfrum was preparing for his twentieth birthday, Herbert Hart published the first edition of his famous book "The Concept of Law",[1] which has been endorsed as a "cornerstone in legal positivism in the 20th century"[2] or even as "probably the best book in legal philosophy ever written".[3] In this book, Hart describes law as a set of "rules of obligation", the so-called "primary rules", which are supplemented with rules of a different kind, the so-called "secondary rules", the latter including the "rule of recognition" – which ressembles Kelsens basic norm[4] –, "rules of change", and – most importantly for our discussion – "rules of adjudication". Against this background, Hart believes that given the absence of courts with compulsory jurisdiction on the international plane, the old question "Is international law really law?" can hardly be put aside.

Today, forty years after the publication of Hart's epoch-making book, we are faced with a multitude of international courts and tribunals, which is due to the current trend to strengthen the international judiciary system by establishing international courts and additional third-party dispute settlement mechanisms.[5] The most recent example for this is the creation – after decades of preparatory work and difficult negotiations between the members of the international community[6] – of the International Criminal Court (ICC),[7] the statute of which will soon enter

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[1] Herbert L.A. Hart, The Concept of Law, 1961.

[2] Peter Koller, Meilensteine des Rechtspositivismus im 20. Jahrhundert: Hans Kelsens Reine Rechtslehre und H.L.A. Harts Concept of Law, in: Ota Weinberger/Werner Krawietz (eds.), Reine Rechtslehre im Spiegel ihrer Fortsetzer und Kritiker, 1988, 129.

[3] Jeffrie K. Murphy, Kant: The Philosophy of Right, 1970, 180.

[4] For a comprehensive comparison between Kelsen's and Hart's legal thinking see Michael Pawlik, Die Reine Rechtslehre und die Rechtstheorie H.L.A. Harts. Ein kritischer Vergleich, 1993.

[5] See, e.g., Karin Oellers-Frahm, Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions, in: 5 Max Planck Yearbook of United Nations Law 67 et seq. (2001). According to Karin Oellers-Frahm, Internationale Gerichtsbarkeit – gestern und heute. Von der Beilegung zwischenstaatlicher Streitigkeiten zur Aburteilung von Individuen – Grundlagen, Besonderheiten und Grenzen der internationalen Gerichtsbarkeit, in: 34 Verfassung und Recht in Übersee 456, 464 (2001), the international legal system disposes of about 150 permanent judicial bodies today. Cf. the compilation of relevant international documents in: Karin Oellers-Frahm/Andreas Zimmermann, Dispute Settlement in Public International Law. Texts and Materials, 2nd ed., 2001.

[6] For an overview of the history of the international community's attempts to establish an international criminal court, beginning with the aftermath of World War I in 1919, see M. Cherif Bas-

into force.[8] Thus, it seems that the problem today is not so much the lack of "secondary rules of adjudication" in international law, at least as regards large parts of the international legal order, but rather the fragmentation of the international judicial system which threatens, according to some, the coherence of international law.[9] However, it must not be forgotten that essentially, the proliferation of dispute settlement instruments in recent years should be regarded as a success.[10]

Now, when it comes to the *Swordfish* case, we have heard that the underlying dispute mainly concerned the prohibition on unloading of swordfish in Chilean ports established on the basis of article 165 of the Chilean Fishery Law. The European Community (EC) argued that this measure violated articles 87 and 116 of the United Nations Law of the Sea Convention (UNCLOS) as well as articles V and XI of GATT 1994. Hence, the International Tribunal for the Law of the Sea (ITLOS) was seized with questions of freedom of fishing on the high seas, while the WTO panel would have had to deal with questions of freedom of transit and non-tariff restrictions on importation.[11] In my opinion, and I fully endorse what Dr. Vöneky said in this regard, there is no reason why both sets of proceedings should not have taken place in parallel. The *Swordfish* case belongs to the category of jurisdictional overlap that Vaughan Lowe, who has tried to classify the different kinds of overlap between jurisdictions in the international legal order, calls "specific jurisdiction versus specific jurisdiction", i.e. cases where two judicial bodies have jurisdiction in respect of relatively narrow categories of potential disputes within two different specific fields, whereas a single set of facts raises issues that fall within both fields.[12] In such cases, the danger of conflicting jurisdiction only arises when one of the judicial bodies seized, although created within a particular treaty framework and competent only to apply the law as specified in that treaty, will have to consider or interpret the law within the framework of which

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siouni, Historical Survey: 1919-1998, in: M. Cherif Bassiouni (ed.), The Statute of the International Criminal Court: A Documentary History, 1998, 1 et seq.

7 UN Doc. A/CONF.183/9 of 17 July 1998, reprinted in: 37 I.L.M. 999 (1998).

8 Currently, the Statute of the ICC has 139 Signatories and 48 Ratifications, Slovenia having become the 48th State Party on 31 December 2001, see http://www.iccnow.org. Pursuant to its article 126 (1), the Statute will enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

9 See, e.g., Jonathan I. Charney, Is International Law Threatened by Multiple International Tribunals?, in: 271 RdC 101 et seq. (1998).

10 Similarly Oellers-Frahm, Multiplication of International Courts (note 5), 69: "This state of affairs should, and does, essentially cause satisfaction because it shows that the development of peaceful dispute settlement may be regarded as a success story."

11 For a recent comprehensive discussion of the *Swordfish* case see Jan Neumann, Der *Schwertfisch*-Fall und das Verhältnis völkerrechtlicher Ordnungen, in: 61 ZaöRV 529 et seq. (2001). For a general exploration of the trade and environment implications of UNCLOS and the WTO see Richard J. McLaughlin, Settling Trade-Related Disputes Over the Protection of Marine Living Resources: UNCLOS or the WTO?, in: 10 Georgetown International Environmental Law Review 29 et seq. (1997).

12 Vaughan Lowe, Overlapping Jurisdiction in International Tribunals, in: 20 Australian Yearbook of International Law 190, 193 (1999).

the respective other judicial body was established for deciding the case at hand. Otherwise, even though the claims spring from the same facts, they would not overlap.

In the *Swordfish* case, it seems to be quite obvious that GATT law has no bearing on the interpretation of UNCLOS. Furthermore, article 293 of UNCLOS, which states that a court or tribunal having jurisdiction under Part XV UNCLOS shall apply "this Convention and other rules of international law not incompatible with this Convention", can certainly not be interpreted as allowing ITLOS to explicitly rely on the provisions of the GATT 1994. On the other hand, as we have heard, the law of the sea might play a certain role in the interpretation of the "chapeau" of article XX of GATT, which requires that the application of the environmental measure in question must not be in a manner which would constitute a means of arbitrary or unjustifiable discrimination. However, so far, none of the WTO dispute settlement bodies, in dealing with article XX, have interpreted international environmental instruments in detail. Rather, they have relied on the mere existence and the general objective of those instruments in order to justify extraterritorial environmental measures. This can be best seen in the Appellate Body Report in *US Shrimp Turtle*, in which the Appellate Body was content with the fact that CITES,[13] although only dealing with international trade in endangered species, demonstrated that the species in question, the sea turtle, was internationally recognized to be in danger of extinction.[14] Hence, following the standards set by the Appellate Body in the *Shrimp Turtle* decision, in the *Swordfish* case, a WTO panel would not necessarily have had to interprete or apply UNCLOS, the 1994 Straddling Fish Stocks Agreement or the Galapagos Agreement of 14 August 2000, but could have simply referred to the mere fact that either of these instruments expresses the political will, on the part of the members of the international community, to ensure the protection and conservation, on the international plane, of highly migratory species like the "*Xiphias gladius*", the swordfish. Under the "chapeau" of article XX of GATT 1994 it would have only been decisive then whether Chile generally supports the efforts to internationally protect the swordfish.[15] As Professor Stoll just said, this seems to be the case. In sum, the danger that two different judicial bodies might interpret one and the same legal instrument in two different ways does not necessarily arise in the context of the *Swordfish* case.

Another question, of course, is whether, in the end, there will be a conflict between the substantive rules of GATT 1994 on the one hand, and the law of the sea on the other hand. In my opinion, this is also not the case. As regards the provi-

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[13] Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973, 993 U.N.T.S. 243.

[14] *United States-Import Prohibition of Certain Shrimps and Shrimp Products*, WT/DS58/AB/R of 12 October 1998, para. 168. For a discussion of the Report of the Appellate Body see, e.g., Asif H. Querishi, Extraterritorial Shrimps, NGOs and the WTO Appellate Body, in: 48 International and Comparative Law Quaterly 199 et seq. (1999).

[15] See *United States-Import Prohibition of Certain Shrimps and Shrimp Products* (note 14), paras. 161 et seq.

sions of GATT, I can refer to what I just said about the possibility of subsuming Chile's measures under article XX of GATT 1994, which addresses exceptions from the obligations of the States parties of the GATT for purposes of, *inter alia*, animal life and the conservation of exhaustible natural resources.[16] Concerning the law of the sea, it was stated by Dr. Vöneky, and in fact this was also the argumentation of the European Community before the Law of the Sea Tribunal,[17] that the closing of the ports of Chile for fishing vessels flying the flag of a member state of the EC infringed the freedom of fishing on the high seas, as guaranteed in articles 87 and 116 UNCLOS. Nonetheless, this is far from being clear. Given that the Community's fishing vessels are not directly hindered from fishing, the prohibition on unloading of swordfish in Chilean ports would only then affect the freedom of fishing on the high seas if the right of access to ports was an integral part of the freedom of fishing. To my mind, this is not the case.

It is true that at first glimpse, article 23, para. 3, of the Straddling Fish Stocks Agreement,[18] by explicitly empowering the States parties to the Agreement to close their ports for foreign shiping vessels "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", seems to support the view that the right of access to maritime ports generally is part of the freedom of fishing. In my opinion, however, the provision is only of a declaratory nature. In legal literature, it is agreed that under the international law of the sea, coastal States have the sovereign right to deny access to their ports to any foreign vessel.[19] Similarly, in its judgment in the *Nicaragua* case, the International Court of Justice (ICJ) noted that:

> The basic legal concept of state sovereignty in customary international law [...] extends to territorial waters and territorial sea of every state [...]. It is [...] by virtue of its sovereignty that the coastal state may regulate access to its ports.[20]

The Law of the Sea Convention, in its articles 25 para. 2 and 211 para. 3, as well as the legislative history of article 255 of UNCLOS, seem to confirm the right of the coastal States to regulate access to their internal waters.[21] Finally, article 23,

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16 See article XX (b) and (g) of GATT 1994.

17 See ITLOS, Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean (*Chile / European Community*), Constitution of Chamber, Order 2000/3 of 20 December 2000, para. 3.

18 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, UN Doc. A/CONF.164/37 of 8 September 1995, reprinted in: 34 I.L.M. 1542 (1995).

19 See, e.g., Louise de La Fayette, Access to Ports in International Law, in: 11 International Journal of Marine and Coastal Law 1 et seq. (1999); Vaughan Lowe, The Right of Entry Into Maritime Ports in International Law, in: 14 San Diego Law Review 597 et seq. (1977); Erik Jaap Molenaar, Coastal State Jurisdiction over Vessel-Source Pollution, 1998, 101 et seq.

20 Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Judgment of 27 June 1986, ICJ Reports 1986, 14, paras. 212 et seq.

21 See de La Fayette (note 19), 3 et seq.

para. 4, of the Straddling Fish Stocks Agreement also gives strong confirmation of the *opinio juris* of States that there is no general right of entry into ports. The provision reads:

> Nothing in this article affects the exercise by States of their sovereignty over ports in their territory in accordance with international law.

To argue that when it comes to fishing on the high seas, coastal States lose their right to grant or deny access to their ports to any foreign fishing vessel would substantially undermine the sovereign right to regulate access to ports. Hence, the closing of the ports of Chile for fishing vessels flying the flag of a member state of the EC can hardly be regarded as unlawful under UNCLOS, even though it has been primarily intended to protect the swordfish in the high seas adjacent to Chile's EEZ.

As far as the substantial questions of the *Swordfish* case are concerned, my conclusion therefore is that the prohibition on unloading of swordfish in Chilean ports neither infringes Chile's obligations under the GATT 1994 nor does it violate the provisions of UNCLOS relating to the freedom of fishing on the high seas.