DOES THE PROTECTION OF OCEANS, A WORLDWIDE KEY ISSUE, CONTRADICT THE LIBERTY OF TRADE AND UNDERTAKING?

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The conflict between the goal of protecting the ocean environment and promoting fisheries conservation and the aims of international trade is not new. This article discusses the tension between ocean protection and liberty of trade, outlining how the dispute resolution processes of the WTO and UNCLOS approach it. The lack of a UNCLOS provision regarding the use of living resources found on the seabed is also addressed.

Le débat sur la nécessité de protéger les océans tout en assurant une bonne gestion des ressources halieutiques n'est guère nouveau. Cet article en est une illustration s'agissant de la manière dont l'Organisation Mondiale du Commerce et la Convention des Nations Unies sur le Droit de la Mer, qui ne comprend aucune disposition relative au régime qu'il convient d'appliquer aux ressources naturelles du fond de l'océan, règlent les conflits nés de cette difficile cohabitation.

I INTRODUCTION

A What is Ocean

Ocean can be defined either as "1. The entire body of salt water that covers more than 70 percent of the earth's surface" or as "Any of the principal divisions of the ocean, including the Atlantic, Pacific, Indian, Arctic, and Antarctic oceans In practice, these definitions will likely yield similar results for most cases. There will, however, be disputes about whether or not cases that deal with the estuaries between rivers and oceans are topical. Also, whether or not places like the Gulf of Mexico – which are part of the "entire body of salt water" but not usually referred to as part of the Atlantic Ocean – are topical are also at issue

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B Liberty of Trade

The World Trade Organization (WTO) is an international organization designed by its founders to supervise and liberalize international trade. The organization officially commenced on 1 January 1995, under the Marrakesh Agreement, succeeding the 1947 General Agreement on Tariffs and Trade (GATT).

Principles of particular importance in understanding both the pre-1994 General Agreements on Trade and Tariff and the WTO:

1. **Non-Discrimination**. It has two major components: the most favored nation (MFN) rule, and the national treatment policy.

2. **Reciprocity.**

C History

The revelation that the desire to protect ocean environment and promote fisheries conservation sometimes comes into conflict with the stated goals of international trade is not new.

The origins of the trade and environment debate date as far back as 1972 when, environmental protection concerns were just coming into the forefront of domestic and international policy considerations.

The tension came into the spotlight in 1999 with the convergence of thousands of protestors in Seattle for the gathering of the World Trade Organization's Third Ministerial Conference illustrated the growing divide between free traders and environmentalists this signaled a new round in a conflict that has grown exponentially since the creation of the WTO.

The WTO dispute resolution mechanism is one of the most significant in international law and there are important cases where the WTO addressed the conflict between trade and ocean protection including the dolphin tuna cases and turtle shrimp cases

To many in the world, the WTO is an organization that has exceeded its mandate; it not only sets the rules for international trade, but it establishes the environmental protection standards for its member governments as well.

The ocean environment and marine conservation is important to pacific islands;

The ocean environment is key to health;

The ocean environment is key to food supply/food security;

The ocean environment is important for indigenous peoples;

Some coastal waters are not environmentally sound; and

Pollution in Oceans is a problem that appears to be getting worse, coral reefs are threatened.

Overfishing is a problem in certain jurisdictions and many marine species are threatened, if not endangered including whales, certain types of sharks, turtles, dolphins and seals.

II SOURCES OF OCEAN PROTECTION

A UNCLOS III

The United Nations Convention on the Law of the Sea (UNCLOS), also called the Law of the Sea Convention or the Law of the Sea treaty, is the international agreement defines the rights and responsibilities of nations in their use of the world's oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources.

To date, 158 countries and the European Community have joined in the Convention. However, it is now regarded as a codification of the customary international law on the issue.

While the Secretary General of the United Nations receives instruments of ratification and accession and the UN provides support for meetings of states party to the Convention, the UN has no direct operational role in the implementation of the Convention.

There is, however, a role played by organizations such as the International Maritime Organization, the International Whaling Commission, and the International Seabed Authority (the latter being established by the UN Convention).

B UNCLOS Dispute Resolution

UNCLOS has a built-in preference for settling disputes through peaceful settlement and negotiation. However, if no agreement can be reached, UNCLOS provides for a compulsory dispute settlement system that issues binding decisions.

Unlike the WTO, however, there is no single dispute resolution body. Rather, parties may choose between four different forums: the International Court of Justice, the International Tribunal for the Law of the Sea, an international arbitral tribunal, or a special technical arbitral tribunal. As such, UNCLOS dispute resolution is both comprehensive and remarkably flexible.

Although the WTO dispute resolution mechanism is one of the most significant in international law. Certain commentators have suggested that UNCLOS dispute resolution mechanisms have the potential to eclipse the WTO in importance.

C Hot Topics

One is consideration on marine genetic resources found on the deep seabed in areas beyond national jurisdiction. While UNCLOS articulates a special regime for mineral resources found on the seabed of the high seas and a framework for fisheries resources found in the water column on the high seas, it makes no specific provision for living resources on the seabed of the high seas, including genetic resources.

International interest in these resources has grown, however, as biotechnological applications advance for material found in organisms living there.

III GUAM

A Background on Turtle Dolphin-Shrimp Tuna Cases

1 Tuna-dolphin, son of tuna-dolphin

The trouble began in the 1950s when fishermen in the Eastern Tropical Pacific (ETP) began encircling groups of dolphins in purse seine nets in order to harvest the tuna that swam below them. This practice depleted dolphin populations.

The US imposed strict limits on dolphin kill rates for domestic fisheries and banned tuna imports from countries with higher average kill-rates.

Mexico, which suffered a major loss to its tuna exports, brought the US to the GATT dispute settlement body in 1991 and accused the US of violating the principals of non-discrimination (Art. XIII) and national treatment (Art. III) and imposing barriers to trade (Art. XI). Mexico also claimed that the US practice of labelling tuna imports as "dolphin safe" was an illegal discrimination. A second case levied by the EU and the Netherlands followed suit in 1994 in which the same charges were made.

In both cases the US claimed that if it had inhibited free trade, it was justified in the name of environmental concerns, an exception outlined in Article XX of GATT. These cases were the first to test the legitimacy of using Article XX to defend restrictive trade measures.

The panel ruled against the US and the article XX exception was not upheld. However, the panel declared that the US practice of labeling tuna as "dolphin safe" was justified since any competitive advantage it gives to US fisheries depends on consumers.

The panel rulings were never formally adopted. Instead, the US "settled out of court" with Mexico. The embargos were eventually dropped in lieu of a US

government sponsored "dolphin safe" labeling system that excludes tuna caught in purse seine nets.

On October 24 2008, Mexico requested consultation under the WTO dispute settlement understanding regarding the legality of "dolphin-safe" labels for tuna products in the US. Mexico says these are construed in a way that effectively and unfairly keeps Mexican producers out of the US market.

A large part of Mexico's fishing fleet still uses purse seine nets but new nets have been developed to allow dolphins to easily escape. Mexico now requires independent onboard observers to verify that no dolphins are killed Since it can verify that no dolphins are killed, Mexico's tuna exports qualify for an internationally agreed upon dolphin safe label established by the Agreement on the International Dolphin Conservation Program (AIDCP). The US is a member of this Agreement yet still does not allow a dolphin safe label to be used on any tuna imports caught using purse seine nets, even if no dolphins are killed.

Some of the largest tuna brands, will still not buy or sell tuna that has been caught using purse seine nets even if the government labeling requirements were charged.

2 Shrimp Turtle

In 1994, the WTO intervened to address member concerns regarding the import of shrimp and its impact on turtles. This became known as the Shrimp and Turtle case. In circumstances similar to those in the Tuna-Dolphin case.

The use of nets in the harvesting of shrimp resulted in the incidental death of sea turtles. US law required shrimp trawlers to use "turtle excluder devices" (TED's) in their shrimp nets and restricted the importation of shrimp and shrimp products to countries with comparable regulations in place, or who could demonstrate that their fishing practices did not pose a threat to turtles.

The patented trap door was very effective but one of the hurdles in adopting the shrimp/turtle trap door was the prohibitive cost. Many fishermen from overseas, some of them earning a yearly income equivalent to the trap doors could not afford the trap door, the farmers/fishermen refused to acknowledge the US's demands and later, their respective countries, Malaysia, India, and Pakistan jointly filed suit with the WTO.

Initially, the WTO ruled against the United States. According to the WTO, the United States could not discriminate between each country by providing the Caribbean countries with "financial and technical assistance," but not all countries.

The US later amended the EPA. Unsatisfied, Malaysia continued to assert the United States banned the import of shrimp. After further review, a WTO compliance panel ruled in favour of the USA in 2001. They stated the US was justified under GATT because the USA no longer discriminated in the application of their exception under Article XX(g)

B Comply or Not

If the United States complied with the decisions of the GATT panel, it would be forced to retreat on conservation policies that reflected the prevailing public sentiment of its citizenry. By refusing to follow the Panel's decision, however, the U.S. would jeopardize its standing in the international community and risk suffering sanctions from affected nations. These rulings underscore the tension between environmental protection efforts on the one hand and international trade on the other.

IV WHAT TO EXPECT IN FUTURE

A Japan- Australia

Australia's relationship with Japan is of undeniable importance. Japan is Australia's largest trading partner, constituting Australia's top export market for more than forty years.

When it comes to questions of the utilization and conservation of ocean resources Australia and Japan's positions have been polarized. Australia's strong opposition to Japan's current program of scientific whaling in Antarctica. The prospect of litigation currently hangs over this dispute, with Australia challenging Japan's adherence to its conservation and management obligations relating to whales

Sanctions as a punishment for continuing whaling, may arguably be acting in contravention of the General Agreement on Tariffs and Trade (GATT) and the United Nations Convention on the Law of the Sea (UNCLOS).

B So Where is International Law Going

I have tried to describe some of the key factors that are influencing the new directions which international law regarding protection of oceans and trade is taking. Three developments in particular challenge some of the most basic assumptions of traditional conceptions of international law: the increased role of non-state actors; the implications of the increase in the body of rules of international law; and the proliferation of international courts and tribunals.

1 New Actors

We can begin with the role of the new "actors," since in many ways this underpins many of the other changes which seem to be underway. Beyond its substantive importance, the Shrimp/Turtle case also illustrates the trend towards establishing procedural changes which accommodate the views of non-state actors in international legal processes. This was the first WTO or GATT case in which written statements of NGOs became part of the written record on the basis of which the Appellate Body reached its decision.

Like its predecessor, the GATT, the WTO is an intergovernmental institution. Both institutions envisaged no role for non-state actors, whether corporation or interest group.

2 System of International Law

A second challenge for the future, closely connected to the first, is how to deal with the great increase in the norms of international law, which address an ever greater range of activities with increasing specificity.

It used to be the case that there were relatively few rules of international law. . International laws now address a broad and growing range of economic, political, and social matters. It is not possible to keep up with all the new treaties, decisions of international organizations, and cases of international courts and tribunals.

3 Courts

The international judiciary has evolved beyond recognition in the past two decades. In 1893, there were no standing international courts. In 1946, there was just one standing international court, the International Court of Justice in The Hague. Today, there are over twenty-five permanent international courts and tribunals, competent to hear cases brought by one state against another and, increasingly, providing for a forum within which non-state actors can litigate internationally

These and other regional and global judicial bodies have transformed the landscape of international law regarding protection of oceans and free trade.