PART I

Trading Fish, Saving Fish

1 Introduction

International law is a legal system.[1]

International trade law, international environmental law and the law of the sea have been conceived and developed, for the most part, independently. States have agreed to the progressive multilateral liberalisation of trade through the auspices of the GATT, later the World Trade Organization (WTO). They have addressed environmental issues such as the protection of biological diversity through a range of multilateral environmental agreements known collectively as MEAs. The use of ocean resources has been negotiated in various instruments grouped under the 'law of the sea', culminating in the United Nations Convention on the Law of the Sea (UNCLOS) and related agreements. Meanwhile, collective action to ensure freedom from hunger has focused on the utilisation of fisheries and marine products as major goals of the UN Food and Agriculture Organization (FAO). Thus have arisen separate 'regimes' of laws and institutions.[2]

But global problems do not fall neatly within a single regime. The emerging worldwide crisis in fish stocks calls for diverse international legal and political responses. Scientific studies have emphasised that global fisheries are at real risk of collapse. An adequate rate of replenishment of fish, as was commonly achieved pre-industrialisation,[3] is now

[1] ILC, Report of the Study Group, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Conclusions (A/CN.4/L.702) (18 July 2006), Conclusion (1) at 7. See also associated Analytical Study finalized by the Chairman (A/CN.4/L.682 and Corr.1) (13 April 2006).

[2] For a more detailed discussion of the definition of regimes, see below n. 83 and accompanying text.

[3] Simon Jennings, Michel Kaiser and John Reynolds, *Marine Fisheries Ecology* (2006) 10.

usually exceeded by catch capacity. Scientists have projected the collapse of seafood-producing species stocks by 2048,[4] and have noted that 63 per cent of assessed fish stocks worldwide require rebuilding, and even lower exploitation rates are needed to reverse the collapse of vulnerable species.[5] The collapse of a fishery leads to massive and lasting social, economic and ecological ramifications.[6]

For the stock groups monitored by the FAO, the estimates are equally alarming:[7]

> 20 per cent are under-exploited or moderately exploited;
> 52 per cent are fully exploited; and
> 28 per cent are either over-exploited, depleted or recovering from depletion.

Within the latter category, there is a high concentration of high seas fishery resources. For example, 50 per cent of the stocks of highly migratory oceanic sharks are thought to be over-exploited or depleted.[8] These figures may be much higher given the possibility of under-reported catch data provided to the FAO.[9] Moreover, although high seas fishery resources are only a fraction of the global fishery resources, they are considered to be 'key indicators of the state of an overwhelming part of the ocean ecosystem'.[10] As such, it is not species but entire ecosystems that are under threat. Overall, it may be an understatement that the 'maximum wild capture fisheries potential from the world's oceans has probably been reached'.[11]

[4] Boris Worm *et al.*, 'Impacts of Biodiversity Loss on Ocean Ecosystem Services', (2006) 314 *Science* 787 (3 November 2006) (defining collapse as 10 per cent of unfished biomass). For an alternative definition of collapse, which relies on economic indicators, see Jennings *et al.*, above n. 3, 11 ('Following collapse, the fishery will no longer be profitable'). The latter definition will presumably be subject to the variable conditions affecting economic viability.

[5] Boris Worm *et al.*, 'Rebuilding Global Fisheries' (2009) 325 *Science* 578.

[6] See e.g. the situation of the Newfoundland cod fishery, which was fished under management at low but increasing levels from 1977 until it collapsed in 1992, leaving an entire industry without employment. Jennings *et al.* state that the size of the spawning stock had fallen from an estimated 1.6 million tonnes in 1962 to 22,000 tonnes in 1992: above n. 3.

[7] FAO, *The State of World Fisheries and Aquaculture* (2008) 7 (SOFIA).

[8] FAO, *FAO Fisheries Technical Paper No. 495*, 'The State of World Highly Migratory, Straddling and Other High Seas Fishery Resources and Associated Species' (2006).

[9] *FAO Fisheries Technical Paper No. 389*, Stefania Vannuccini, *Shark Utilization, Marketing and Trade*, (1999), para 3.4.

[10] FAO, SOFIA (2008) 35.

[11] Ibid. 7. The Report calls for 'a more closely controlled approach to fisheries management'.

Meanwhile, the international trade in fish and fish products is increasing rapidly, and fish is one of the most highly traded food and feed commodities.[12] The yearly value of exports of fish and fish products was last recorded as US$85.9 billion, representing a 32.1 per cent increase in the period 2000 to 2006.[13] Apart from value increases, the volume of exported fisheries product now represents 37 per cent of the total estimated yearly production of 144 million tonnes.[14] Globally, the per capita average fish consumption is almost double that of fifty years ago.[15]

This growing international fish trade has a serious negative effect on fish stocks and marine ecosystems.[16] For example, although causation is difficult to establish, the dramatic increase in the international trade in sharks corresponds to a massive decline in shark species, of which several are now critically endangered.[17] Depletion of marine resources has multiple impacts, including on ecology, global food security, culture and economic prosperity. This book explores the ways in which international law, fragmented into regimes and applied by diverse institutions, governs the trading and 'saving' of fish.

A Trade law and fisheries sustainability

The growing awareness of the ecological crisis and the increased level of trade in fish products has led to a proliferation of legal and institutional responses. The sustainability of global fish stocks is impacted by, if not a direct objective of, more than one international regime. Three examples are illustrative of the trend: the growing multilateral effort to discipline fisheries subsidies that have harmful environmental effects; the decision by participating states to restrict the trade in certain endangered marine

[12] FAO, *The State of World Fisheries and Aquaculture* (SOFIA) (2006) 7.
[13] FAO, SOFIA (2008) 8 (figures are adjusted for inflation).
[14] Ibid., 8.
[15] The FAO records world apparent per capita fish consumption as an average of 9.9 kg in the 1960s, 11.5 kg in the 1970s, 12.5 kg in the 1980s, 14.4 kg in the 1990s, and 16.4 kg in 2005: ibid., 8.
[16] Caroline Dommen, 'Fish for Thought: Fisheries, International Trade and Sustainable Development' (1999) *Natural Resources, International Trade and Sustainable Development Series, No. 1* (ICTSD and the IUCN) 2–3 (pointing to perceptions of a negative effect of international trade on fish stocks, but noting that empirical evidence is lacking in this debate). See also Marc Allain, *Trading Away Our Oceans* (2007). Other effects on fish species include climate change and ocean acidification: see e.g. Duncan E J Currie and Kateryna Wowk, 'Climate Change and CO_2 in the Oceans and Global Oceans Governance' (2009) 4 *Carbon and Climate Law Review* 387.
[17] See further Chapter 4, p. 136.

species through the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES); and the use of unilateral trade measures for the preservation of marine species.

The first example of the increasing relevance of trade principles to fisheries relates to subsidies.[18] A major contributing factor to the global fisheries crisis is overfishing. That so many fish are being caught is a function of the sheer size, concentration and technological capacity of the global fishing fleet. In the development of policies aimed at reducing overfishing and overcapacity, attention has focused on the current economic structure and behaviour of the fishing industry. The sector is heavily supported by national governments. This support takes the form of a range of subsidies, including financial transfers, infrastructure development, income support and provision of access rights. Although the levels are difficult to quantify, a range of studies indicate that subsidies could amount to a quarter of the value of revenues in the fisheries sector or even higher.[19]

The potential for these subsidies to have trade-distorting and environmentally harmful effects has led to proposals for new international policies within the international trade regime. The 153 members of the WTO are currently considering reforms to the Subsidies and Countervalling Measures Agreement (SCM Agreement).[20] This Agreement disciplines the use by WTO members of subsidies and regulates the actions other WTO members can take to counter the effects of subsidies. As currently framed, the Agreement is inadequate to deal with fisheries issues. In negotiations to amend the Agreement, WTO negotiators have been forced to differentiate between subsidies that are environmentally harmful, such as state aid to increase vessel capacity, and subsidies that are beneficial to fisheries sustainability, such as the provision of management or research resources. This attempt by the WTO to incorporate environmental objectives gives rise to questions about its mandate, its expertise and the existence of an institutional 'trade' bias. These questions, in turn, give rise to issues about the degree of deference shown to other regimes such as UNCLOS and FAO fisheries instruments in the framing and implementation of the subsidies disciplines.

The second example of the use of economic policies in fisheries is through controlling trade in selected species.[21] CITES is the international

[18] See generally Chapter 3. [19] See further Chapter 3 n. 7.
[20] WTO Doha Declaration (2001) para 28; see also para 31.
[21] See generally Chapter 4.

regime that restricts trade in identified endangered species. The regime allows for the listing of species that are being depleted at unsustainable levels. As popularly conceived, CITES is aimed at curbing the destruction of prominent species such as elephants and tigers, through making the trade in ivory and game-trophies unlawful. However, it is open for any party to propose the listing of any wildlife species, including marine species.

Increasingly, some of the Convention's parties have sought to safeguard threatened marine species such as sharks, seahorses, queen conch and bluefin tuna through proposals for listing. This intervention is not supported by major fishing nations, which perceive CITES to be an inappropriate tool to conserve and manage marine species. In providing Secretariat support for listing proposals of marine species, the CITES Secretariat is reliant on the expertise of the FAO, although this collaboration is treated suspiciously by some states, as manifest in difficulties surrounding a Memorandum of Understanding (MOU) between the two intergovernmental organizations (IGOs).[22]

Apart from restricting trade through CITES, some countries are increasingly using unilateral trade measures to achieve environmental goals, and these provide a third example of the growing influence of trade law.[23] These trade restrictions are not necessarily targeted at the trade in endangered species. Instead, they may address the trade in certain products, which has observable impacts on the sustainability of other species. For example, the United States has sought to conserve sea turtles by banning the import of shrimp harvested using nets known to cause sea turtle mortality.[24] It has also sanctioned the use of labels that bear information about the ecological impact of certain products, such as dolphin logos on canned tuna to signify that dolphins were not harmed by the tuna harvesting methods.[25] The WTO-consistency of

[22] The Memorandum of Understanding between the FAO and the CITES Secretariat (2006) is considered in detail in Chapter 4.

[23] See generally Chapter 5.

[24] Apellate Body Report, *US-Shrimp*. The United States' restrictions on the import of tuna caught using techniques harmful to dolphins were the subject of challenge in GATT Panel Report, *US – Tuna I* and GATT Panel Report, *US-Tuna II*.

[25] Such 'eco-labels' are often supplied by NGOs such as the Maritime Stewardship Council (MSC), which was originally founded as a partnership between Unilever and the WWF, and which now operates independently to certify fisheries and to 'harness consumer preference': see www.msc.org. Consumer guides to seafood, which list species that are fished sustainably and species that are not, are also increasingly available around the world: see e.g. www.panda.org/what_we_do/how_we_work/conservation/marine/sustainable_fishing/sustainable_seafood/seafood_guides/.

these labels is uncertain,[26] and the issue is currently the subject of discussions between WTO members.[27]

The trade measures relating to fish products are an observable response to the environmental sustainability of the fishing sector and give rise to many questions about consistency with the WTO agreements and cohesiveness with fisheries regimes. This has led to disputes at the WTO, where panels and the Appellate Body have been asked to rule on questions relating to fisheries and fisheries sustainability.

B Fragmentation of international law

The largely autonomous and uncoordinated growth of regimes such as trade law, law of the sea, and species protection is part of a more general proliferation of laws and institutions. Regimes such as international investment,[28] international human rights[29] and international criminal law[30] have developed rapidly and independently.

These regimes represent parts of the 'system' of international law.[31] Yet, like the problem of fisheries sustainability, current issues do not implicate just one regime. For example, the problem of state corruption, which is addressed by a specialised UN Convention,[32] demands to be tackled by other institutions, including international arbitration tribunals called on to enforce suspect investment contracts. Restraints on the use of nuclear weapons under the laws of armed conduct are accompanied by

[26] But note that the US labelling programme for dolphin-safe tuna survived the GATT challenge in *US – Tuna I*, at 204. See generally Arthur Appleton, *Environmental Labelling Programmes: International Trade Law Implications* (1997). The issue has re-emerged in a current dispute at the WTO: see *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (DS 381) (panel composed 14 December 2009).

[27] See WTO Doha Declaration (2001) para 32 (iii).

[28] This amorphous body of law is most holistically discussed when disputes arise: see the International Centre for Settlement of Investment Disputes: www.icsid.worldbank.org.

[29] As contained in a number of international and regional instruments: see e.g. *Universal Declaration of Human Rights* (1948).

[30] The most significant development of international criminal law has been the establishment of the International Criminal Court and its associated cases: see www.icc-cpi.int.

[31] See ILC Study Group, above n. 1. Cf H. L. A. Hart, *The Concept of Law* (1961) 230–1 ('it is submitted that there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties').

[32] UN Convention against Corruption (2003).

trade restrictions and principles of environmental law.[33] The protection of individuals in times of armed conflict varies according to international human rights law and international humanitarian law.

The diversification and specialisation of international law gives rise to challenges of 'fragmentation', where there is potential for

> conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective on the law.[34]

The proliferation of the regimes that seek to address fisheries sustainability gives rise to the possibility that the governance of fisheries is fragmented. It is unclear how international laws and institutions cohere, and indeed whether they could or *should* do so.[35]

The possibility that fisheries governance is fragmented gives rise to specific legal questions. For example, what is the legal basis for the WTO to cooperate with the FAO in the trade-related aspects of fisheries policies? Is it relevant that only some of the WTO members have joined the FAO? Do FAO Secretariat staff have observer-status at the WTO and if not, why not? Moreover, when fishery subsidy laws are negotiated at the WTO, under what conditions should states and secretariats collaborate with and scrutinise other regimes? Is such institutional interaction appropriate in the implementation of existing laws, such as recommendations to list endangered species on the appendices of CITES? What is the role of Memoranda of Understanding between secretariats? What about such collaboration in the resolution of disputes? Can adjudicating bodies within one regime, such as the panels of the WTO, apply laws, interpret treaties or establish relevant facts using the principles and evidence of another regime? What happens if the law of the sea and international environmental law advance conflicting principles, such as the precautionary approach to species protection versus a strict quantitative test? Which has priority? And which body should decide?

Uncertainty about the interaction between these regimes presents practical and conceptual problems for those responsible for maintaining,

[33] See *Use or Threat of Nuclear Weapons* (1996) ICJ Rep 226; See also Nuclear Supplier Group (NSG) *Guidelines for Transfers of Nuclear-Related Dual-Use Equipment, Materials, Software and Related Technology* (INFCIRC/254, Part 2), which govern the export of nuclear related dual-use items and technologies.

[34] ILC Analytical Study, above n. 1, para 8.

[35] A timely warning not to address the challenges of fragmentation with unreflective calls for coherence was provided by Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.

understanding and complying with international law, and for international law's beneficiaries. To address this uncertainty, it is important to investigate the relevant laws and institutions in order to ascertain whether there is indeed fragmented global fisheries governance. The next step is to determine strategies to address problems associated with such fragmentation, not to contribute to coherence in international law (which may not be a useful goal in itself, given possible advantages of diversity),[36] but to promote effective efforts, for both institutions and the law, in achieving fisheries sustainability.

In domestic systems of law, overlapping or conflicting laws are resolvable by the 'sovereign' or even by the constitution itself,[37] and the courts act as a check on the domestic government's choices for public policies and the interaction between such policies. International law has a radically different structure, with scant notions of hierarchy.[38] Beyond pleading with states to have regard to the 'effect on the international statute book as a whole'[39] before entering into new laws, international lawyers gain little from domestic analogies in promoting solutions to the problems of fragmentation. Indeed such analogies may simply mislead.

In response to the international phenomenon of fragmentation, recent literature has concentrated on one particular aspect, namely the problem of conflicting norms.[40] This problem is usually manifest at the stage of dispute settlement in international law, when states have already negotiated and implemented relevant laws. For example, if the International Court of Justice (ICJ) is called upon to adjudicate the retaliation by one state against an alleged abuse of another state's diplomatic mission, it will permit the retaliation only if it is within the accepted law of diplomatic immunities and, as the Court did in 1980, may even go so far as to suggest that such law constitutes a 'self-contained regime'.[41] Disputing states may disagree over the applicable law relevant to their disputes, which may extend to the filing of disputes within different international

[36] Ibid.
[37] See e.g. section 109 of the Constitution of Australia, which provides that the laws of the Commonwealth shall prevail over those of a state to the extent of any inconsistency.
[38] Notions of hierarchy are implicit in a limited set of norms: see further below nn. 50 and 52.
[39] Wilfred Jenks, 'Conflict of Law-Making Treaties' (1953) 30 *BYIL* 401, 452.
[40] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003).
[41] *Consular Staff in Tehran (USA* v. *Iran)* [1979] ICJ Rep 7.

tribunals.[42] Even if the dispute is filed in only one tribunal, there may be disputes about whether the norms of a particular regime, such as WTO law, should have priority over the norms of another.[43]

The question of conflicting norms was considered by the International Law Commission (ILC) as part of its mandate to contribute to the progressive development and codification of international law. In 2002, it convened a Study Group to consider 'The Fragmentation and Diversification of International Law'.[44] The Study Group, chaired by Martti Koskenniemi, concentrated on situations where international norms operated in a relationship of interpretation or conflict.[45]

The report of the ILC Study Group in 2006 contained a series of recommendations to determine the primacy of existing international norms. For example, the Study Group discussed the rule of *lex specialis derogat legi generali*, which is based on the primacy of the specific over the general, and observed that a more specific treaty will usually trump the general treaty.[46] According to the same principle, a more specific regime will usually have priority over general international law.[47] The Study Group also discussed the principle of *lex posterior derogat legi priori*, which gives primacy to a more recent treaty over an earlier one,[48] and the harmonising effect of treaty interpretation under the Vienna Convention on the Law of Treaties (VCLT) Article 31(3)(c).[49] The Study Group pointed also to peremptory norms, norms 'accepted and recognized by the international

[42] See e.g. the dispute between the EU and Chile over swordfish: Marcos Orellana, 'The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO' (2002) 71 *Nordic Journal of International Law* 55; see also the dispute between Ireland and the UK filed at an OSPAR arbitral tribunal, the ECJ and an UNCLOS Annex VII Tribunal: Robin Churchill and Joanne Scott, 'The Mox Plant Litigation: The First Half-Life' (2004) 53 *ICLQ* 643.

[43] In *EC – Biotech*, the United States, Argentina and Canada claimed that the relevant laws were the WTO agreements. It was arguably open to the EC, as respondent, to claim that various environmental Conventions had precedence: see further Chapter 5.

[44] See above n. 1.

[45] ILC Study Group Conclusions, above n. 1, Conclusion (2), 7–8 (distinguishing between situations where one norm assists in the interpretation of another and where the application of two norms would lead to incompatible decisions).

[46] Ibid., Conclusion (5), 8–9, citing, in particular *Mavrommatis Palestine Concessions* case, PCIJ Series A, No. 2 (1924) 31.

[47] Ibid., Conclusions (11)–(16), 12–13.

[48] VCLT, Art. 30. See ibid., Conclusions (24)–(30), 17–19.

[49] The Study Group called this a principle of 'systemic integration': see ILC Study Group Conclusions, Conclusions (17)–(23), 13–17. See further Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 *ICLQ* 279.