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Abstract

The problem of the competing jurisdictions of international courts and tribunals is increasingly gaining the attention of the academia and some studies have already been conducted on the topic. This dissertation, however, explores the question from the perspective of the WTO Agreement and the UNCLOS, while focusing on the interplay between the substantive and procedural legal regimes embodied in these treaties.

The interplay between the WTO Agreement and the UNCLOS forms part of the broader discussion on the fragmentation of international law. The view upheld in this dissertation is that the fragmentation of international law is not necessarily a negative phenomenon and, indeed, it contributes to the cross-fertilisation of international law. The dissertation, however, takes into account that the main cause for the tension surrounding the debate on the fragmentation of international law is the lack of clarity on the rules that govern the interplay between different treaties, that is the interplay between their dispute settlement rules and their substantive law rules. Also, the fragmentation of international law goes hand in hand with the proliferation of international courts and tribunals of competing jurisdictions which are often perceived as inclined to favour their own discipline and adopt an isolationist approach. Such concerns nourish the fear that their pronouncements may lead to controversial interpretations of the same law, incompatible judicial outcomes, repetitive adjudication of the same issues which ultimately threaten the finality of the decisions, the stability of the legal regimes involved, the legal certainty and predictability. Thus, the procedural conflicts arising from the fragmented manner in which international law is being created have the potential to endanger additionally the unity of international law.

One route for tackling these issues is minimising the risk of occurrence of incompatible judicial outcomes by curbing the re-litigation of the matters adjudged. The logical way to achieve this target is to identify the legal tools that can help avoiding duplicate proceedings and can govern the interaction of different international courts and tribunals. The systematisation of these rules by shedding light on their interconnection and scope of operation injects clarity in international adjudication and could militate against the fragmentation of international law. Also, the adoption of a harmonised approach to similar procedural issues and multiple proceedings

among international courts and tribunals reduces the risks of duplicate proceedings, controversial pronouncements and incompatible judicial outcomes.

A detailed study of the procedural challenges faced by international tribunals of limited jurisdiction in the context of multifaceted disputes can display the typology of the procedural problems that such disputes are capable of posing to such tribunals which call for assessment, resolution and regulation. Such a study is helpful for identifying solutions of practical significance because the existing practice provides context in which the operation of the various proposed rules can be tested and assessed. This is the nature of the study embodied in this dissertation.

Problems: The compulsory jurisdiction of the UNCLOS courts and tribunals under the UNCLOS covers a particular category of disputes, that is disputes concerning the interpretation and application of the UNCLOS, whereas the compulsory jurisdiction of the WTO DSB covers only disputes concerning the rights and obligation under the WTO Agreement. Thus, they are vested with limited jurisdiction. There are several major problems relating to international courts and tribunals of such limited jurisdiction when faced with a multifaceted dispute straddling different treaty regimes and different branches of international law which in turn are addressed in the dissertation. *First*, lack of certainty as to how far their subject-matter jurisdiction stretches within such a multifaceted dispute; what disputes qualify as disputes concerning the interpretation and application of the said treaties. *Second*, to what extent they can refer to other treaties and other rules of international law, given their limited subject-matter jurisdiction and specialized competence and what findings they can make in this respect. *Third*, how should they approach such a multifaceted dispute especially if it is characterised differently by the parties based on the weight the latter attach to the different issues intertwined in the dispute. *Fourth*, how should they approach such a multifaceted dispute if it is brought under a different cause of action to different dispute settlement fora, thus giving rise to multiple proceedings; what rules govern such multiple proceedings and, hence, what rules govern the interaction of the international courts and tribunals involved. *Fifth*, what are the implications of the pronouncements of each of these courts for the other courts seized of the multifaceted dispute. *Sixth*, do the decisions of each of these courts carry the weight of *res judicata* for the other courts seized of the multifaceted dispute.

Goals of the Dissertation: One of the goals of this dissertation is to examine and systematize the rules that can govern the interaction of interna-

tional courts and tribunals. One of the fundamental tenets of the dissertation is that this interaction is a matter of interaction of dispute settlement rules and in principle is governed by the customary international law on treaties as reflected in the VCLT in the absence of a special regulation in the respective treaties. Thus, Article 31 (3) (c) VCLT is applicable to the interpretation of a jurisdiction conferring treaty provision just as to any other provision within the same treaty, and similarly requires from the law interpreter to take into account other relevant rules, including other relevant jurisdiction conferring rules. The effect of the Article 31 (3) (c) VCLT is that it guides international courts to look into each other`s competence, while providing them with the normative basis to take into account other relevant dispute settlement regimes. As far as conflicts of jurisdictions are concerned, it is maintained in the dissertation that these conflicts stem from the conflict of dispute settlement rules and must be classified as conflict between treaty norms since the jurisdiction of each adjudicatory body has its basis in the treaty. Thus, the relevant rules on normative conflict resolution found in the treaties at hand and in general international law are capable of resolving some jurisdictional conflicts. In addition, there are rules which can be classified neither as rules on interpretation, nor as rules on normative conflict resolution, which relate to conflicts of jurisdictions and have an impact of the administration of proceedings and as such are relevant for the co-ordination of multiple proceedings. Apart from forum selection rules, which are treaty based, these rules include *res judicata*, *lis pendens*, waiver, potentially estoppel, acquiescence, comity, forum non conveniens. The latter have their basis in general international law and form part of a crystallising body of procedural international law. Their legal status, content, scope of operation, including cross-sectoral operation in international law is underexplored. Thus, apart from the treaty rules relating to conflicts of jurisdictions and regulation of proceedings, the dissertation examines the mentioned notions with a view to elucidating on their meaning and application. While primarily focusing on the practice of UNCLOS courts and tribunals and the WTO DSB, the study goes beyond their jurisprudence and includes the practice of some other international courts and tribunals. Particular attention has been paid to the practice of the ICJ not only because it is the oldest standing international judicial institution which has developed a solid body of case law frequently referred to by more recently established international courts and tribunals, both standing and *ad hoc*, with an obvious persuasive power over the international litigation, but also because it is one the courts operating under the dispute settlement mechanism created by the UNCLOS. This study includes in the

discussion on the aforementioned notions the perspectives of the UNCLOS, the WTO treaty, and the adjudicatory bodies they have created which are helpful in clarifying the meaning and the scope of operation of the said notions. The dissertation focuses, among other things, on *res judicata*. It tackles the questions what the status and meaning of *res judicata* is in international law, what its essential components are, to what types of preclusive pleas it can give rise to in international law, with respect to 'what' and with respect to 'whom', given the current state of affairs; whether issue estoppel can be said to form part of the doctrine of *res judicata* dominating in international law and which of the pronouncements embodied in the decision (be it in the form of a judgement, report or an award) carry the weight of *res judicata*; whether it can operate as an inter-systemic rule. In this respect reference has been made to the UNCLOS and to the WTO law relevant to *res judicata* as well as to the practice of the UNCLOS courts and tribunals and the WTO DSB as they are helpful in identifying the essential components of this notions and its scope of operation. The study also addresses the notion of incidental jurisdiction and its impact on the understanding of *res judicata*. In addition, it elaborates on the procedural consequences which *res judicata* entails once it is established that the conditions for its application are met. With the same considerations in mind and the same methodology, the notions of *lis pendens*, comity, waiver, estoppel, acquiescence have been explored in the dissertation. The ultimate goal from a more theoretical perspective has been to establish how these rules relate to each other and differ from each other and how they can be utilized in a coherent and orderly manner so as to construct the 'international process'. Thus, the findings in the dissertation contribute to the formation and elucidation of the crystallising body of procedural international law. As a result, the dissertation has a normative component. This study also takes into account the doctrine, including the latest developments, and while building on it, engages in and contributes to the discussion on these notions.

Seen from a more practical perspective, the dissertation tackles the question how to approach a multifaceted dispute straddling different treaty regimes and how to choose among several competing characterisations of such a dispute arising from the different types of treaties that touch upon it. In this regard, the attempts of the litigants to characterise a multifaceted dispute differently so as to challenge the jurisdiction of a specialized adjudicatory body having limited jurisdiction over a particular category of disputes only and the attempts by the courts to resolve this question by establishing where the core of the multifaceted dispute lies have been taken into account. The dissertation subjects the latter approach

to a multifaceted dispute to a critical assessment and offers a different approach instead. In this respect, it purports to identify the principles that should guide an international adjudicatory body of limited jurisdiction seized of a multifaceted dispute involving different treaties when seeking to establish whether it has jurisdiction, i.e., whether the dispute submitted by the applicant is covered by its limited subject-matter jurisdiction. Put differently, whether the dispute as defined through the submissions of the parties, while bearing in mind the limits of the claim determined by the applicant, can be characterised as a dispute falling within the category of disputes which the adjudicatory body is competent to decide. Attention should be drawn in this regard to the formulation through which the subject-matter jurisdiction of the UNCLOS courts and tribunals is defined: it includes the term concerning (the interpretation and application of the UNCLOS) which is not unknown to treaty drafting and, in particular, to compromissory clauses. It leaves uncertainty as to how far the term 'concerning' within that formulation can be stretched and whether it can be interpreted so as to encompass all the issues intertwined within the broad multifaceted dispute which 'concerns' the respective treaty. The same considerations apply to the subject –matter jurisdiction of the WTO DSB, which, albeit through a different wording, covers disputes concerning the rights and obligations under the WTO Agreement. The findings and propositions in this regard can be relevant for all instances when the subject-matter jurisdiction of an international court or tribunal is defined through such language. The dissertation proposes a methodology for identifying what the proper characterisation of a dispute submitted for resolution is and identifies a set of steps in addressing the question of jurisdiction.

In addition, the usefulness of the dissertation lies in providing answers to the questions whether the decisions of UNCLOS courts and tribunals with respect to disputes involving law of the sea and WTO law issues would *be res judicata* for the WTO adjudicatory body and *vice versa* and what the implications of their pronouncements will be with respect to each other; what rules should govern the parallel and successive proceedings brought before them on the basis of an identical set of facts and to what extent *res judicata* can curb the duplicate litigation of the matters addressed in the course of prior proceedings. These questions are not just of an academic interest but have practical significance in the light of the parallel proceedings initiated under the DSU and under the UNCLOS with respect to both the *EU-Chilean Swordfish* dispute and the *Atlanto-Scandian Herring* dispute both of which involve the WTO Agreement and the UNC-

LOS. Given the probability such situations to occur in the future, the dissertations provides in advance some ideas as to how to proceed. Also, it takes into account the treaty provisions that lied at the heart of the mentioned disputes and offers considerations that might be of relevance in assessing the interaction of the respective rules.

Structure of the Dissertation: **Chapter B** discusses the overlaps between the jurisdictions of the WTO DSB and the UNCLOS courts and tribunals and the manner in which these jurisdictions can compete, despite their seemingly different scopes. It contains an assessment of the substantive law rules embodied in these treaties which can be mutually applicable to a particular life situation and which may appear hard to reconcile. It discloses areas of tension between the regulations embodied in the said instruments which may give rise to multifaceted disputes involving both the WTO Agreement and the UNCLOS and which, on their part, can result in separate proceedings under a different cause of action. It also contains an overview and assessment of the disputes settlement regimes embodied in these treaties with a view to delineating the competences of the adjudicatory bodies established by them and the potential areas and causes of overlap in their jurisdictions. The applicable law has been identified as an area of overlap. The notions of incidental jurisdiction and extended jurisdiction have been utilized to demonstrate areas of overlap of jurisdictions in the context of a multifaceted dispute.

While building on the findings in Chapter B, **Chapter C** elaborates on the challenges that multifaceted disputes pose to the adjudicatory bodies of limited jurisdiction of the kind at hand and the problems that still need to be addressed and call for regulation. It stresses the need to distinguish between jurisdiction and applicable law so as not to perceive the expanded scope of the applicable law as a means for expanding the subject-matter jurisdiction of a specialized international adjudicatory body. It also stresses the need to distinguish between interpretation and application of the law and elaborates on the consequences therefrom. It discusses the special role of the customary rule of interpretation reflected in Article 31 (3) (c) VCLT in the process of interpretation of both substantive law provisions and disputes settlement treaty rules and as a means for achieving coherence of international law and emphasizes the unsettled meaning and scope of operation of this rule which necessitate further clarification. It highlights the need the problems posed by the multifaceted disputes to be addressed in a coherent manner, while taking into consideration the normative environment, instead of adopting an isolationist approach. By introducing policy considerations, it asserts that international law should encourage the regu-

lation of multiple related proceedings and the coherent approach to multifaceted disputes and that international courts and tribunals should pay due regard to each others` competences.

Chapters D and E embody a case-study which is concerned with two major issues: *first*, the approach of the adjudicatory bodies at hand to multifaceted disputes and the manner in which they have dealt with the question of jurisdiction in the context other potentially relevant dispute settlement mechanisms, and, *second*, the manner in which they have referred to other rules of international law, namely, to what extent, for what purposes, and what considerations were relevant. Particular attention has been devoted to the manner in which they have utilized Article 31 (3) (c) VCLT so as to establish what types of rules meet the threshold requirements under Article 31 (3) (c) VCLT, to what extent other rules of international law have been scrutinized and have been 'pulled into the content' of the interpreted rule. On this basis, inferences were made as to how they perceive the limits of their subject-matter jurisdiction, whether and to what extent they are inclined to engage in a judicial dialogue and take into account the competences of other international courts and tribunals over the issues arising in the proceedings. Chapter D is devoted to the WTO jurisprudence and focuses primarily but not only to the cases involving law of the sea related instruments. Special attention has also been paid to the still debatable question on the law applicable within the WTO dispute settlement system. Chapter E explores the jurisprudence of the UNCLOS courts and tribunals. It draws attention to the approach developed by these adjudicatory bodies, while building on the ICJ case law, to characterisation of a dispute. UNCLOS tribunals have been consistently faced with complex disputes straddling different treaty regimes characterised differently by the parties and have developed a methodology relevant for identifying the characterisation of the dispute submitted for resolution, i.e., whether it constitutes, indeed, a dispute concerning the interpretation and application of the UNCLOS or an instrument relating to its purposes. On this basis, conclusions have been drawn as to the trend discernible in the mentioned case-law with respect to the approach to multifaceted disputes, the implications of the limited jurisdiction, the operation of Article 31 (3) (c) VCLT, the extent and the manner in which non-WTO, respectively non-UNCLOS rules have been utilized in the respective proceedings. The findings are relevant for identifying an approach to multifaceted disputes that could be applicable in both dispute settlement systems and for assessing its feasibility. Also, the findings are relevant for the assessment on the scope

of the notion of *causa petendi* which on its part touches upon the understating and the scope of operation of *res judicata*, *lis pendens*.

Chapter F addresses the rules governing the interaction of the WTO adjudicatory body and the UNCLOS courts and tribunals. The starting point are their constituent instruments. It thus embodies a survey of the jurisdiction conferring rules so as to define the type of jurisdiction they have been vested with – exclusive, compulsory, residual, and the implications therefrom for the conflicts of jurisdictions, and the limits of their general subject-matter jurisdiction. It also contains an assessment of the forum selection rules embodied in these treaties and their potential role in case a multifaceted dispute involving the WTO treaty and the UNCLOS is brought to their respective dispute settlement mechanisms. Apart from the treaty rules addressing and resolving conflicts of jurisdictions, that is forum selection rules, Chapter F considers other rules relevant to the coordination of multiple proceedings, namely *res judicata, lis pendens*, comity, while taking into account also the role of estoppel, acquiescence, waiver. The primary focus of this chapter, however, is *res judicata*. Various aspects of this notion, ranging from its legal status, content, the understanding of *persona*, *petitum* and *causa petendi*, its scope of operation, including the preclusive pleas it can give rise to and whether issue preclusion forms part of the generally accepted notion of *res judicata* in international law have been assessed. The law relevant to *res judicata* in the DSU, the UNCLOS and the statutes of the adjudicatory bodies operating within the UNCLOS disputes settlement system, has been assessed with a view to establishing the common denominator and the differences in order to draw conclusions about the general principle of *res judicata* and the special arrangements in the examined treaties which expand its scope of operation or introduce exceptions to it. The findings are relevant for answering one of the major questions addressed by the dissertation, namely whether the decisions of UNCLOS courts or tribunals with respect to a multifaceted dispute involving law of the sea and WTO law issues would be *res judicata* for the WTO DSB and what the implications of their pronouncements would be for the WTO DSB and *vice versa*. The findings concerning the remaining rules addressed in this chapter are relevant for the discussion on the rules that can govern multiple proceedings arising from a single set of facts.

Chapter G is devoted more generally to the rules governing the interaction of the WTO treaty and the UNCLOS, while distinguishing between the rules of interpretation and the rules on normative conflict. Concerning interpretation, it assesses the applicability of Article 31 (3) (c) VCLT within the examined dispute settlement systems. Concerning normative con-

flict resolution, it assesses the role of the conflict resolution rules, both the general conflict clauses, and the forum selection rules applicable to conflicts of jurisdictions, embodied in the treaties at hand and their relationship with the customary rules on successive treaties as reflected in the VCLT. Whereas Chapter G does not purport to establish and resolve all possible substantive law conflicts, it notes the difficulty of applying the principle of *lex posterior* to multilateral treaties open for accession such as the ones at hand and points to the potential effectiveness of the principle of *lex specialis* despite its underexplored nature. It also draws attention to the rule on modification *inter se*. One aspect this rule has been highlighted as potentially relevant for assessing the relationship between particular types of provisions under the WTO treaty and under the UNCLOS. Namely, this rule suggests that rules imposing obligations *erga omnes partes* cannot be modified and prevail over conflicting rules of a bilateral nature and, consequently, this rule could have implications for the relationship between the UNCLOS provisions imposing obligations of an *erga omnes partes* character, that is the obligation to preserve and protect the marine environment for example and the obligations related to it, and the competing obligations of a bilateral nature under the WTO Agreement such as the obligation not to impede the freedom of transit of goods, vessels and other means of transport.

Chapter H contains a summary of the conclusions and findings in the aforementioned chapters and on this basis proposes an approach applicable to a multifaceted dispute submitted for resolution under a different cause of action before the WTO DSB and an UNCLOS court of tribunal either simultaneously or successively.

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Chapter H: Solution

Chapter A: Introduction

I. Introduction to the Research Theme: Multifaceted Disputes Involving before WTO and UNCLOS Dispute Settlement Fora

A legal measure adopted by Chile which aimed at the conservation of swordfish and prohibited EU vessels from unloading their swordfish (caught both within and outside of its EEZ) on Chilean ports gave rise to a dispute between the EU and Chile. In 2000, this dispute was brought by the EU to the WTO dispute settlement system (the WTO *Chile-Swordfish* case[1]) and by Chile to the UNCLOS dispute settlement system (the ITLOS *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South -Eastern Pacific Ocean*[2]), thus leading to parallel proceedings with respect to a single set facts between the same parties. Before the WTO DSB the proceedings were initiated on the basis of allegations for violation of obligations under the WTO Agreement, whereas the UNCLOS dispute settlement procedure was open on the basis of an alleged breach of obligations stemming from the UNCLOS. A similar situation arose more recently, in 2013, with respect to a dispute between the EU and the Faroe Islands concerning Atlanto-Scandian herring. In this case, the legality of EU measures aimed at ensuring the conservation of the stock (i.e., aimed at ensuring that the maintenance of the stock is not endangered by over exploitation) was challenged before the WTO DSB and an UNCLOS Annex VII Arbitral Tribunal, which resulted in the WTO *EU – Herring* case[3] and the *Atlanto-Scandian Herring Arbitration* under the UNCLOS dispute settlement procedure[4]. Thus, law of the sea and trade law issues were intertwined in the cases pending before the different fora.

These situations exemplify the parallel litigation of a multifaceted dispute straddling different treaty regimes before two distinct specialized adjudicatory bodies operating within separate dispute settlement systems. Although these situations are not uncommon to international life they are

1 *Chile — Measures affecting the Transit and Importing of Swordfish*, WT/DS193.
2 *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, Chile/European Union.*
3 *European Union — Measures on Atlanto-Scandian Herring,* WT/DS 469.
4 *Atlanto-Scandian Herring Arbitration, The Kingdom of Denmark in respect of the Faroe Island v The European Union*, PCA Case No 2013–30.

somewhat novel insofar as the challenges they pose are unsettled. They give rise to grave practical concerns such as forum shopping, parallel litigation, lack of finality of decisions, incompatible judicial outcomes, controversial interpretation of the law.

Linked to the Phenomenon of Competing Jurisdictions

Seen from a broader perspective they signal the phenomenon of competing jurisdictions of international courts and have to be placed in the context of the discussion on this phenomenon. In particular, they demonstrate that the apparently different subject-matter jurisdictions of the WTO DSB and the UNCLOS courts and tribunals can indeed compete.

Among the various practical and theoretical questions these situations can trigger, some more general questions of a rather procedural nature stand out: should not these parallel, obviously related proceedings, be handled in a coherent manner and if so, what rules should govern the interaction of the adjudicatory bodies concerned, and, moreover, would a decision of one of the fora be *res judicata* for the other and what the implications of their pronouncements would be for each other?

The problems associated with concurrent jurisdictions do not only raise concerns of procedural nature. The division of competences of international courts and tribunals compels one to assess the nature of the international legal system. The logical question that ensues is whether there is a coordinated system of international law.

Why the Regulation of Competing Jurisdictions is Good

The dissertation will show that the regulation of competing jurisdictions and multiple proceedings arising from a single set of facts can minimize the procedural conflicts stemming from the existing fragmentation of international law, which on its part would serve to minimize the further fragmentation of international law caused by the procedural conflicts. Thus, the regulation of the competition of jurisdictions can help mitigating the tensions operating against the unity of international law and can assist the legal certainty, predictability, effectiveness and credibility of the legal regimes involved and of international law more generally. This is because this regulation can curb parallel litigation of the issues ajudged, the

rendering of conflicting decisions and can minimize the controversial interpretations of the law.

The novelty of the phenomenon of concurrent compulsory jurisdictions of international courts and tribunals, the ever growing number of international disputes involving more than one branch of international law, the practical difficulties arising therefrom, the potentially ensuing fragmentation of international law, the lack of clarity on the consequences and the rules that can govern the competition of jurisdictions and the multiple proceedings arising from a single set of facts, all justify the need to study this phenomenon and look for possible methods for regulating it.

The Focus of the Dissertation – the Interplay between the WTO Treaty and the UNCLOS

The problem of the competing jurisdictions of international courts and tribunals is increasingly gaining the attention of the academia and some studies have already been conducted on the topic. This dissertation, however, explores the question from the perspective of the WTO Agreement and the UNCLOS, while focusing on the interplay between the substantive and procedural legal regimes embodied in these treaties. The aforementioned cases demonstrate that there could be tension between the rights and obligations, both substantive and procedural, stemming from the WTO Agreement and from the UNCLOS which can result in the parallel litigation before separate fora of a multifaceted dispute with a WTO law and a law of the sea component thus raising the question of their competing jurisdictions.[5]

This question as well as the question of the conflicting rights and obligations stemming from the UNCLOS and the WTO Agreement concern the interplay between these treaties, and more precisely, the interplay between their dispute settlement regimes and between their substantive law rules. The view upheld in this dissertation is that the rules applicable to these types of interplay are not identical.

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5 For a detailed treatment of the question of competing jurisdictions see YShany, *The Competing Jurisdictions of International Courts and Tribunals* (Oxford Oxford University Press 2003).

The Context of the Discussion – the Fragmentation of International Law

Notably, the interplay between the WTO Agreement and the UNCLOS forms part of the broader discussion on fragmentation of international law.[6] Here it is to be highlighted that one of the main concerns regarding the fragmentation of international law relates namely to the proliferation of international courts and tribunals of limited jurisdiction and the fear that they might interpret and apply international law differently and in an incoherent manner which is perceived as threatening the unity of international law.[7]

The view upheld in this dissertation is that the fragmentation of international law is not necessarily as a negative phenomenon. Rather, this is a factual occurrence, resulting from the increased specialisation of international law which can be seen as a sign for the development of international law and for adherence to the rule of law in international relations. Further-

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6 Fragmentation is a frequently addressed topic. In this regard, see Study Group of the International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by M Koskenniemi, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006); "Symposium: The Proliferation of International Tribunals: Piecing together the Puzzle", New York Journal of International Law and Politics, vol. 31 (1999) pp. 679–993; A Zimmermann and R Hoffmann, with assisting editor H Goeters, Unity and Diversity of International Law (Berlin: Duncker & Humblot, 2006); Karel Wellens & Rosario Huesa Vinaixa (eds.), L'influence des sources sur l'unité et la fragmentation du droit international (Brussels: Bruylant, 2006); R Wolfrum and V Röben (eds.), Developments of International Law in Treaty-making (Berlin: Springer, 2005) pp. 417–586 and R Lipschutz and C Vogel, "Regulation for the Rest of Us? Global Civil Society and the Privatization of Transnational Regulation", in R.R. Hall & T.J. Bierstaker, The Emergence of Private Authority in Global Governance (Cambridge: Cambridge University Press, 2002) pp. 115–140; A Fisher-Lescano and G Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", Mich. J. Int'l L., vol. 25 (2004) pp. 999–1046.

7 Study Group of the International Law Commission, Report on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, finalized by Martti Koskenniemi, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006), para 489. On the risks relating to the fragmentation of international law see: G Hafner, 'Risks Ensuing from Fragmentation of International Law', Official Records of the General Assembly, Fifty-fifth session, Supplement No. 10 (A/55/10); M Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) 11 EJIL, 489; PM Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice' (1999) 31 New York Journal of International Law and Politics, 791.

more, neither are the divergent interpretations of the law necessarily a negative development. The principle of *stare decisis* does not apply in public international law: international tribunals are not bound by earlier rulings and they are free to adopts decisions pertaining to the interpretation and application of the same law in deviation from the existing jurisprudence. In practice, the international tribunals tend to adhere to the earlier jurisprudence, while deviating from it if there are compelling reasons to do. These compelling reasons may include the evolution of international law, the appearance and general acceptance of new concepts and customary rules which may injects new perspectives in the interpretation of the law and change the old understanding of particular legal terms and concepts. This said freedom enables international courts and tribunals to contribute to the development of international law. In this regard, it is to be noted that the WTO Agreement and the UNCLOS are both perceived as 'umbrella treaties'[8] or 'living organisms'[9] framed often in general terms open to accommodate new developments in international law in line with the change of the priorities of the international community. For example, whereas environmental considerations have played a much minor role 40 years ago, the increasing awareness of the detrimental impact of the human activity on the environment and the increasing concerns for its protection and conservation, reflected also in the development and consolidation of new concepts such as the 'precautionary principle', allow such considerations to influence more seriously the decision-making process. If well

8 The relation of the UNCLOS as an umbrella convention to an implementing agreement was raised in the *Southern Bluefin Tuna case, Australia and New Zealand/ Japan*, Award, Jurisdiction and Admissibility, 4 August 2000, UNRIAA vol. XXII (2004), 1–571.The WTO agreements fall into a structure with six main parts: an umbrella agreement (the Agreement Establishing the WTO); agreements for each of the three broad areas of trade that the WTO covers (goods, services and intellectual property); dispute settlement; and reviews of governments' trade policies. https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm1_e.htm.

9 See ME Footer, 'The WTO and a "Living Instrument": The Contribution of Consensus Decision-Making and Informality to Institutional Norms and Practices' in T. Cottier and M. Elsig (eds.), *Governing the World Trade Organisation: Past Present and Beyond Doha* (Cambridge: Cambridge University Press, 2011), 217–240; J Barrett and R Barnes, Law of the Sea -UNCLOS as a Living Treaty (London British Institute of International and Comparative Law 2016). On the use of the "living Instrument' Metaphor see D Moeckli and Nd White, 'Treaties as Living Organisms' in MJ Bowman and D Kritsiotis (eds) *Conceptual and Contextual Perspectives on the Modern Law of Treaties* (Cambridge University Press 2018) 136- 171.

substantiated, a deviation from the earlier practice which results in divergence in the interpretation of the law is not to be attached a negative sign.

Tension Surrounding the Fragmentation – Stems from the Lack of Clarity on the Rules that Can Govern Multiple Proceedings and the Interaction among International Courts

The main cause for the tension surrounding the debate on fragmentation of international law, indeed, is the lack of clarity on the rules that govern the interplay between different treaties, including the interplay between their dispute settlement regimes. The procedural conflicts arising from the fragmented manner in which international law is being created can further threaten the unity of international law and thus can run counter to the stability of the international legal order.

Study of the Procedural Challenges with the Purpose of Identifying the Problems and Look for Solutions/Rules

The view upheld in this dissertation is that the detailed study of the procedural challenges faced by international tribunals of limited jurisdiction, such as the ones at hand, including in the context of multiple proceedings, displays procedural problems common to international courts and tribunal which call for resolution and regulation. Identifying the rules applicable to such problems injects clarity in international adjudication and procedure, whereas the adoption of a harmonised approach to similar procedural issues and multiple proceedings among international courts and tribunals serves to minimise the procedural conflicts occurring as a result of the fragmentation of international law which ultimately serves legal certainty and predictability and, hence, the integrity of the international legal order.

Also, it is maintained in this dissertation that the conflict of jurisdictions of international courts and tribunals stems from a conflict of dispute settlement rules and must be classified as conflict between treaty norms because the legal basis of their jurisdictions are treatis. Thus, the rules on normative conflict resolution found in general international law should and will be discussed in the search for possible solutions. Also, similarly to any other substantive law treaty rules, dispute settlement rules are subject to interpretation under the same rules of interpretation. Thus, Article 31 (3) (c)

VCLT should be equally employed when interpreting treaty rules concerning jurisdiction and dispute resolution more generally. Albeit not a normative conflict resolution rule, among the rules of general international law particular attention will be given to *res judicata* as the classical rule governing the conflict of jurisdictions arising from successive proceedings.

Res Judicata

Res judicata affirms the finality of the adopted decision and the resolution of the dispute incorporated in it and thus guarantees that the dispute will not be re-opened, i.e., re-litigated again and again. As such, it serves legal certainty and predictability and the maintenance of peace in international relations which underlie every legal order and every dispute settlement system and is therefore of utmost significance for the proper functioning of the international legal order.

Several points merit attention in this regard. First, the question of *res judicata* in international adjudication is underexplored. In particular, neither the material scope of the *res judicata* force of a decision, and this includes the scope of the concept of *causa petendi* which is commonly regarded as essential to *res judicata*, nor the scope of operation of *res judicata* or the consequences from its application are well identified. In this regard, it is to be pointed out that although a restrictive view on *causa petendi* appears to dominate the practice of the ICJ, the issue has not been given thorough consideration. Neither has this issue been examined in the context of the WTO and UNCLOS dispute settlement systems. Moreover, the practice of submitting a multifaceted dispute to different adjudicatory bodies under different legal grounds with the ensuing multitude of proceedings has triggered an academic debate in which the opinion has been voiced that *res judicata* and *lis pendens* should apply to such a situation so as to discontinue this practice.[10] Such an approach is suggestive of a wider view on the scope of *causa petendi* and indeed deserves some share of attention as it is part of the legal thinking and moreover, it is influenced by the notion of issue preclusion operating in the common law world. For example, in the English Common Law the doctrine of *res judicata* incorporates the concept of issue preclusion, which is not confined to claim preclusion, and extends to

10 A Reinisch, 'The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 The Law of International Courts and Tribunals 1, 37–77.

the reasoning. Moreover, the notion of claim preclusion can be of wider scope and may comprise all claims arising from a single event and relying on the same evidence, hence it is not confined to the procedural claims which the parties lay before the court. If transposed to international law, this would mean that once a court has rendered a decision it will preclude the litigation of a dispute arising from the same facts but on the basis of different legal grounds and, hence, the court seized of the matter subsequently cannot exercise jurisdiction.

Given that the common law system is of one the major legal systems in the world, this view is likely to find its way in the future practice of international courts and tribunals as part of objections to the jurisdiction, thus posing questions relating to *causa petendi* and *res judicata*. These questions will arguably appear with an increasing frequency in international adjudication as the dissemination of knowledge about the existing dispute settlement systems and the attempts of utilizing them continue. Traces of the common law approach to *res judicata* and issue preclusion can be discerned in the manner the UK addressed the question of jurisdiction in the *MOX Plant* dispute. In its jurisdictional objections the attempt was made to shift the focus from the dispute arising under the UNCLOS and rather blend it into a dispute under the OSPAR Convention by arguing that the main elements of dispute submitted to the UNCLOS Annex VII Arbitral Tribunal are governed by the compulsory dispute settlement procedures of the OSPAR Convention (and the EC Treaty and the Euratom Treaty) thus somewhat evading the claims under the UNCLOS.[11] The same approach could be observed in the jurisdictional objections in the *Southern Bluefin Tuna* where Japan, despite the claims under the UNCLOS submitted to the Part XV compulsory procedure, maintained that the dispute dividing the parties concerns the 1993 Convention and not the UNCLOS.[12] To this end, both the UK and Japan referred to the dispute as 'this matter'[13]. The words 'matter' and 'dispute' will sometimes be used to interchangeably in this dissertation, although strictly speaking 'matter' is a generic term of broad scope which can encompass issues that go beyond a legal dispute. As

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11 *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order, 3 December 2001, ITLOS Reports 2001, paras 39–43.

12 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order, 27 August 1999, ITLOS Reports 1999, para. 33.

13 *Southern Bluefin Tuna (New Zealand v. Japan; Australia v. Japan)*, Provisional Measures, Order, 27 August 1999, ITLOS Reports 1999, para. 33; *MOX Plant (Ireland v. United Kingdom)*, Provisional Measures, Order, 3 December 2001, ITLOS Reports 2001, para. 39.

such, the word 'matter' in principle can be used to denote a bundle of intertwined issues and legal disputes that can arise from a particular factual situation and if so, it can support a broader understanding of *causa petendi* and consequently of *res judicata*.

This is where the issue of characterization of a dispute comes into play. UNCLOS tribunals have often been confronted with different views on the characterisation of the multifaceted dispute submitted to them. They have adopted a specific approach to such multifaceted disputes by determining, first, whether the dispute submitted for resolution can be characterized as a dispute concerning the interpretation and application of the UNCLOS. To this end, they have identified a set of criteria or principles on the basis of which to establish whether (and to ensure that) the dispute submitted for resolution is, indeed, a dispute concerning the interpretation and application of the UNCLOS. Their approach enables one to identify a methodology for determining the existence of a dispute concerning the interpretation and application of the UNCLOS. Such methodology has practical implications since the convention is silent on the matter and does not explain what a dispute concerning the interpretation and application of the UNCLOS within the meaning of Article 288 (1) UNCLOS is and whether a dispute involving the UNCLOS and another treaty falls within the scope of the subject-matter jurisdiction of UNCLOS courts and tribunals as defined under that provision. The additional value of this methodology is that it provides a logical justification for choosing one among the various characterisations of the dispute submitted for resolution. The approach of the UNCLOS courts and tribunals (as it will be demonstrated) is indicative of a narrow understanding of *causa petendi* as it implies that disputes based on different legal grounds are not to be regarded as the same disputes or the same matters for the purposes of jurisdiction. This approach underlies the practice WTO adjudicators as well and it will be given consideration in the relevant sections of the dissertation.

Second, even if it is clear that a decision rendered within a particular dispute settlement system produces a *res judicata* effect within that system and consequently with respect to the courts and tribunals operating in it, it is unclear whether it can produce the same effect across jurisdictions, i.e., whether the *res judicata* force of a decision rendered in an external dispute settlement system can preclude a court operating as a part of a separate dispute settlement mechanism from exercising jurisdiction.

Third, with the proliferation of international courts and tribunals and the increasing complexity of the international disputes, multiple proceedings with respect to a single multifaceted dispute is not an uncommon oc-

currence. As a result, the same issues appear to arise with an increasing frequency in separate proceedings before different adjudicatory bodies, whereas uncertainty as to the implications of their pronouncements and their links and interaction has survived. This uncertainty can, indeed, encourage forum shopping and race to the court.

If accepted as operating across jurisdictions, *res judicata* can curb the relitigation of the same dispute or the issues adjudged. Although it is arguably clear that the *res judicata* force attaches to the operative part of a judgement, it is still unclear what the effect of the judgement is over the various issues addressed in it. Shedding more light on the precise scope of the *res judicata* force of a judgement can curb the abusive attempts to reopen proceedings with respect to the issues adjudged and can prevent courts from reconsidering issues determined by other courts and thus can be helpful in minimizing the instances of conflicting interpretations and incompatible judicial outcomes.

Due to its importance, the frequency with which the same legal issues arise in separate proceedings and the lack of clarity surrounding its application and precise content, *res judicata* in international law certainly necessitates further exploration and this is one of the main goals of the dissertation.

The dissertation will also address the concept of *lis pendens*, which is equally underexplored and equally significant in international adjudication as a tool helpful in preventing contradictory interpretations and incompatible judicial outcomes. It serves the same goal as *res judicata* and has the same rationale but complements it insofar as it operates in a different temporal context.

Why the Interplay between the UNCLOS and the WTO Agreement

The purpose of this dissertation is to examine the phenomenon of concurring jurisdictions and the interplay of treaties from the perspective of the UNCLOS and the WTO Agreement but the results can have theoretical implications in a broader context and can find resonance in the wider debate on the fragmentation of international law, the interplay of treaties and the competing jurisdictions of international courts and tribunals.

Nonetheless, it is worth explaining further why the relationship between the UNCLOS and the WTO Agreement deserves attention and elaborate on the motivation for undertaking this particular research project.

Although to date, only two disputes involving the WTO Agreement and the UNCLOS have been submitted simultaneously to the WTO DSB and an UNCLOS tribunal the relationship between these adjudicatory bodies is worth examining for the following reasons:

First, the *Atlanto-Scandian Herring* dispute is a very recent one which indicates that the existing tension between the rights and obligations stemming from the two treaties and the awareness of this tension is ongoing, respectively, there is no reason not to expect a similar situation to arise in the future.

Moreover, in the context of accelerated globalization and intensified international trade, including by sea, the increasing number of the world`s population and the corresponding increasing demand for food, the growing concerns for the world`s oceans and sea which are an important source of food, the climate change threat and the public awareness of the vulnerability of the marine ecosystems in the face of climate change, the efforts to preserve, conserve the marine resources and to protect the marine environment are likely to strengthen by way of adopting stricter measures to that effect. The practice demonstrates that such measures tend to involve closure of ports or ban on landing of the capture as a means for curbing overfishing and destructive fishing techniques which logically affect the free movement of trade goods: fish and fish products. The clashes between such efforts and the economic interests of a State engaged in trade in fish and fish products are not only unavoidable but are likely to multiply, the greater the efforts to protect the marine environment are. This will result in a growing number of disputes involving both law of the sea and trade issues. It remains to be seen whether such trend is to occur. The likelihood of this trend is confirmed by the evergrowing concerns of the international community, on the one hand, for the preservation of the environment where a significant share of these concerns is focused on the seas and oceans being an important source of food and potential source of energy and, on the hand, the significant economic interests in the exploitation of the marine resources.

However, no clear boundaries exist between denominations as 'trade law', 'environmental law' or 'law of the sea'. Fishing activities which inevitably include maritime transport of fish and fish products are linked to trade, the environment, and the law of the sea. These activities can be regarded as commercial activities or environmentally dangerous activities, depending on the perspective chosen. Consequently, a dispute relating to a trade measure aimed at the protection of the marine environment could easily be framed as a 'trade dispute' and as a 'marine environmental dis-

pute'. If characterised as a trade dispute, the WTO dispute settlement system would appear to be the appropriate dispute resolution forum for it. If categorized as a marine environmental dispute, an UNCLOS court or tribunal would be better suited to resolve it. Should a multifaceted dispute, however, be given a single a characterization, or rather international tribunals of limited jurisdiction should opt for a different approach when seized of a multifaceted dispute straddling different treaty regimes? This is one of the core question that this dissertation seeks to address and resolve by proposing a methodology thereof.

Seconds, the compulsory jurisdiction of the WTO and UNCLOS adjudicatory bodies renders each of them an easily accessible forum for the resolution of a multifaceted dispute involving WTO law and law of the sea.

Indeed, in the absence of in international environmental tribunal, UNCLOS courts and tribunals are perceived as attractive fora for the settlement of marine environmental disputes, given that the UNCLOS regulates among others the protection and preservation of the marine environment. It is worth mentioning in this regard that the ITLOS jurisprudence itself[14] reinforces the environmental credentials of the ITLOS.[15] Also, it demonstrates the potential the Tribunal has not only as a mechanism for the settlement of marine environmental disputes but also in making substantial contribution to the marine environmental jurisprudence especially because UNCLOS tribunals tend to consult each other`s practice. The UNCLOS dispute settlement fora can be used for voicing environmental concerns as environmental considerations prove to play a significant role in the decision-making of the adjudicatory bodies involved. Notably, the IT-

14 I refer to the ITLOS as it is the most commonly used UNCLOS dispute settlement forum so far.

15 For example, the ITLOS has consistently referred to the 'precautionary approach' thus adding a building block towards the evolvement of this notion as customary law. See *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber)*, Advisory Opinion, 1 February 2011, ITLOS Case No 17, pp. 45–47. See also *Southern Bluefin Tuna* Case: the ITLOS accepted the need for provisional measures, given the potential impact
of Japan`s EFP upon the fishery and in doing so made important observations about the precautionary approach. Similarly, *The MOX Plant* Case *(Ireland v. United Kingdom)*, Provisional Measures, Order, 3 December 2001, ITLOS Case No. 10. See also DR Rothwell, 'The Contribution of ITLOS to Oceans Governance through Marine Environmental Dispute Resolution' in TM Ndiaye and R Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes, Liber Amicorum Judge Thomas A. Mensah* (Leiden; Boston: Nijhoff, 2007), 1023.

LOS and the Seabed Disputes Chamber were granted compulsory jurisdiction over 168 States Parties to the UNCLOS[16] over several narrowly defined matters (see Arts 187, 287, 290, 292 UNCLOS), whereas all the States Parties have subjected themselves to the compulsory dispute settlement mechanism enshrined in Part XV. This factual occurrence signifies the potential which the UNCLOS dispute settlement system has so as to be effectively utilized with respect to a wide variety of disputes, including marine environmental disputes even if they have a trade related dimension.

Despite its current institutional problems, the WTO and its dispute settlement system prove to be quite viable and appealing for the WTO members, given the fact that since 1995 more than 500 disputes have been brought to the WTO with almost 40 disputes only for 2018 although this year marks a serious crisis in the WTO. The WTO AB was invested with broad compulsory subject-matter jurisdiction over all 164 members[17] and this has resulted in an enormous body of case law which turns the WTO dispute settlement mechanism into one of the most active ones in the world. Although a small share of the aforementioned disputes concerns the marine environment, some of the landmark 'environmental' WTO disputes relate namely to the marine resources and involve measures pertaining to the conservation of the marine living resources (*US-Shrimp*, *Tuna Dolphin* cases as well as *Chile-Swordfish*, *EU-Herring* concern marine living resources such as sea turtles, dolphins, swordfish, Atlanto Scandian herring, etc.) and, notably, contain references to the UNCLOS and other law of the sea related legal instruments. These instances are a signal that marine environmental disputes with a trade dimension can be effectively brought to the WTO dispute settlement system.

In sum, both the UNCLOS and the WTO dispute settlement systems offer convenient fora for the resolution of marine environmental disputes with a trade dimension/trade disputes with a marine environmental dimension. In addition, the compulsory jurisdiction of the WTO and the UNCLOS adjudicatory bodies over a large number of States and a large variety of issues signifies the accessibility and the potential of these dispute settlement systems to accommodate one and the same multifaceted dispute involving trade law and law of the sea issues.

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16 Information about the States Parties to the UNCLOS is available on the ITLOS website. https://www.itlos.org/jurisdiction/competence/.

17 Information about the members of the WTO is available on the WTO website. https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm.

Such situations have already occurred and there is no reason not to assume that they will repeat in the future. The aforementioned disputes will be given further consideration in the dissertation. In particular, the positions of the parties will be studied in greater detail because they are indicative and can provide valuable insights as to the precise areas of tension between the rights and obligations stemming from the WTO Agreement and the UNCLOS and the provisions that give rise to this tension. The dissertation does not aim at addressing all the possible conflicts that the rules embodied in the WTO Agreement and the UNCLOS can generate. As far as the interplay between the substantive law rules of these treaties is concerned, however, the goal of the dissertation is to appraise the rules that can and should govern this interaction, while addressing, in particular, the provisions that have already given rise to controversies in practice, and to offer a solution as to how this interaction should or can be approached.

One of the fundamental tenets of the proposal embodied in this dissertation is that a multifaceted dispute involving different branches of international law should not be given a single characterisation as either a trade dispute or a law of the sea dispute as the case may be, respectively, it is not the predominant element in the dispute that should be sought when addressing the question of jurisdiction and admissibility. Rather, a multifaceted dispute can be given different characterisations for jurisdictional purposes and the question of jurisdiction should be approached differently.

II. Scope of Research

This research project is predominantly concerned with two questions of practical significance. First, how international courts of limited jurisdiction should tackle a multifaceted dispute involving different branches of international, while purporting to **propose a scheme** of the methodological steps to be adopted and device a coherent approach. Second, what the implications of their pronouncements should be for other international tribunals, thus contributing to the discussion on *res judicata* in public international law, without limiting the scope of the research to *res judicata*.

In the process of the above examination, the dissertation **addresses the rules** that can govern (1) the interplay between the procedural and substantive law rules embodied in the WTO treaty and the UNCLOS and (2) the interaction of the adjudicatory bodies established by them.

In this regard, the dissertation offers an (re)assessment of the procedural tools that can govern the interaction of international courts and tribunals and which can apply to similar procedural situations across jurisdictions. Thus, the findings embodied in the dissertation, of course, can have **resonance in the wider debate on the fragmentation** of international law and on the proliferation of international courts and tribunals and the rules that govern their relationship. Seen from this perspective, the dissertation has a normative dimension. As a result, the research project contributes to the development of procedural public international law which is an underexplored field of international law. The latter is gaining greater significance for the international adjudication, given the evergrowing complexity of the international disputes which tend to straddle different branches of international law.

The research project is also concerned with the question of the law applicable within the examined dispute settlement systems and the extent to which the adjudicatory bodies involved can refer to other rules of international law, given their limited jurisdiction. The way they perceive their mandate and the interplay between the treaties they are designed to interpret and apply, on the one hand, and other rules of international law (including treaties and general international law), on the other hand, is helpful in identifying a trend in their approach (which serves predictability and legal certainty) and can provide valuable insights on the rules that can govern the interplay of treaties. This is so because the practice contributes to

the better understanding and clarification of the law and signals the areas of interaction of norms that require further attention, appraisal or rethinking. In this regard, the research project will include an assessment of conflict of law rules applicable to the interaction between the substantive law embodied in the UNCLOS and the WTO Agreement.

III. Methodology and Research Questions

To achieve this goal, the research starts with an empirical study of the jurisprudence of the WTO and UNCLOS adjudicators but it is not limited to it. Significant degree of attention is paid to the relevant jurisprudence of the ICJ, as it is helpful in identifying the points of convergence among the international adjudicatory bodies concerned and in resolving relevant questions not addressed by the WTO Agreement and the UNCLOS and/or not encountered in the practice of the WTO and UNCLOS adjudicators. The research project contains some occasional reference to the jurisprudence of other international courts or tribunal insofar as it is necessary for the purposes of the project. The focal points in this empirical study are identified below.

The research project also embodies a normative study with a particular focus on the DSU and the UNCLOS. More precisely, it contains a careful examination of their dispute settlement rules, and in particular their rules relating to jurisdiction, applicable law, forum selection provisions, conflict of law rules, *res judicata*. The drafting history of the UNCLOS as the dissertation will demonstrate, has necessitated reference to the Statute of the ICJ and its Rules of Procedure whose relevant provisions have also been assessed with a certain degree of precision. Various other treaties and soft law have also been referred to for the purposes of the research.

The research projects inevitably involves a doctrinal research.

The approach adopted in this research has two main dimensions: jurisdiction of the adjudicatory bodies concerned and the law applicable within the WTO and the UNCLOS dispute settlement systems. This approach is governed by the typology of the questions that the parallel litigation before UNCLOS and WTO fora of the *Swordfish* dispute between Chile and the EU and of the *Herring* dispute between the EU and the Faroe Islands logically pose, namely:

- Which is the competent adjudicatory body?
- What should be the solution in such a scenario?
- Would a decision of the WTO adjudicatory body be *res judicata* for UNCLOS courts and tribunals and *vice versa*?
- Whether and to what extent can the WTO adjudicators refer to treaties relating to the law of the sea, respectively whether and to what extent UNCLOS adjudicators can refer to the WTO Agreement?

These questions obviously relate to the interplay between the UNCLOS and the WTO Agreement insofar as they concern the jurisdiction of the adjudicatory bodies involved, the limits of their jurisdiction, the potential legal impediments to the exercise of their jurisdiction, the special competences and functions of the WTO and the UNCLOS adjudicators, the interaction between them and the dispute settlement mechanisms within which they operate and the rules that can govern this interaction, the law they can apply. These questions as the research has unfolded had been decomposed to subsets of further questions to which the research project provides answers.

Jurisdiction: Research Questions and Methodology

The question of jurisdiction includes but is not limited to the following cluster of questions which in turn are addressed in the dissertation:

- What is the scope of the general subject-matter jurisdiction of the examined adjudicatory bodies and its limits?
- What categories of disputes fall within the scope of their jurisdiction *ratione materiae*?
- What are the legal impediments to the exercise of jurisdiction?
- Which is the competent adjudicatory body in relation to a multifaceted dispute straddling these treaty regimes?
- Are the adjudicatory bodies to be regarded as seized of the same dispute in such a scenario?
- What is the proper characterisation of a dispute involving law of the sea and WTO law issues – a law of the sea dispute or a trade dispute?
- What are the limits of their jurisdiction and do they cover the entire multifaceted dispute?
- What are the implications of their limited jurisdiction in respect of the effect of their pronouncements?
- Would a decision of the WTO adjudicators constitute *res judicata* for an UNCLOS forum?
- Should the adjudicatory body seized later in time stay its proceedings and await the decision of the forum first seized of the dispute?
- What is the effect of the dispute settlement rules embodied in another treaty or the initiation of separate proceedings under another treaty over the jurisdiction of the forum already seized of the multifaceted dispute?

The answer to these questions has been provided through an assessment of the jurisdictional provisions embodied in the constituent instruments of the WTO and UNCLOS adjudicatory bodies which includes assessment of the treaty rules, if any, governing the interaction of dispute settlement regime embodied in the treaty with other dispute settlement regimes.

The answer to these questions has also necessitated an appraisal of the potential legal impediments to the exercise of jurisdiction, including the application of *res judicata*, *lis pendens*, comity, waiver, estoppel, acquiescence. In this regard, the research has included a normative research, while attempting to identify whether and to what extent these concepts have been reflected in the treaties under examination, and an empirical study tracing the articulation of these concepts in the practice of the respective adjudicatory bodies, while attempting to identify the convergence in their conception and approach. In this process, the limits and the efficacy of these tools as rules governing the interaction of different dispute settlement regimes, have been assessed.

The empirical study has also included an assessment as to how these adjudicatory bodies approach the question of their jurisdiction if the dispute submitted for resolution straddles different treaties. The findings have been helpful in devising a proposal as to how to approach a multifaceted dispute submitted before different dispute settlement bodies with limited jurisdiction.

The question of characterisation of a dispute has also formed a part of the research. In this regard, it has been examined what the approach of the adjudicatory bodies concerned is in cases where the parties characterise the dispute differently. The goal of this examination has been to establish whether there are principles that can help identifying the proper characterisation of a dispute.

In this regard, it is to be highlighted that there is no international procedural code, different international courts operate under different procedures which are developed with a different degree of complexity and often leave various procedural questions unresolved. Moreover, international courts do not function as part of a formal unified dispute settlement system and it is not clear what rules may govern their relationship.

The research findings are helpful in identifying convergent approaches to similar procedural issues while shedding light on the tools that can be of assistance in avoiding or resolving conflicts of jurisdictions which on its part is useful for avoiding incompatible judicial outcomes. Apart from contributing to the clarification of the content of procedural international law, these findings are useful in devising a workable harmonized approach

to multiple related proceedings initiated in separate dispute settlement systems.

Applicable Law: Research Questions and Methodology

Concerning the question of the applicable law, it is to be highlighted that, although the limits of the subject-matter jurisdiction of WTO and UNCLOS adjudicatory bodies can be well defined it is less clear to what extent they can refer to other rules of international and, in particular, to other treaties.

This is a general problem for international tribunals of limited jurisdiction. Both in WTO and UNCLOS proceedings issues concerning other rules of international law, including treaties other than the UNCLOS and the WTO Agreement, have arisen.

These adjudicatory bodies have often been called upon to examine the relationship between the UNCLOS substantive rights and obligations and other treaties, respectively between the WTO Agreement and non-WTO treaties. Their approach has not always been consistent. Notably, rights and obligations stemming from other treaties have been invoked as defence.

In this regard, the research project has aimed at establishing:

- how these adjudicatory bodies appear to read and perceive their mandate under their constituent instruments, by assessing
- for what purposes, to what extent they refer to other rules of international law, especially other treaties, focusing particularly on law of the sea related instruments in WTO proceedings, given the enormous case law of the WTO adjudicators, and what considerations were relevant;
- what avenues they use to refer to other rules of international law: do they and how they utilize Article 31 (3) (c) VCLT and the applicable law provisions embodied in their constituent instruments;
- do they address allegations for violations under other treaties;
- how do they approach the interaction between rights and obligations under different treaties, including both the substantive and procedural rights.

The ultimate goal of this empirical study is by observing and systematising the approach of the respective adjudicatory bodies to identify a trend in their practice and the commonalities in their approach. The results from this study are helpful in identifying and studying the legal tool that can and govern the interaction between different treaty rules, what their ad-

vantages, scope of operation and limitations are and how the adjudicatory bodies at hand conceptualise and utilise them. The results have also contributed to an elucidation on the scope of operation and limits of Article 31 (3) (c) VCLT.

This theme includes an assessment of the law applicable within the WTO and the UNCLOS dispute settlement systems and apart from the practice, the research covers the relevant treaty provisions and the doctrine.

The question of the applicable law is also linked to the questions of interaction of norms. Since it is still necessary to keep the research project within a manageable scope the question of the rules governing the substantive law conflict arising from the WTO Agreement and the UNCLOS will be addressed only to a certain extent by rather flagging the treaty rules and rules of general international law which can be of assistance. Consideration will also be given to particular WTO and UNCLOS provisions which led to the parallel proceedings pertaining to the dispute between the EU and Chile and the dispute between the EU and the Faroe Islands.

The results contribute to the discussion on the interplay between different treaties and this includes the interplay between their substantive law provisions and dispute settlement rules. The way the adjudicatory bodies designed to interpret and apply the rules embodied in these treaties see this interaction is an important element in this discussion. The findings concerning their approach shed light on the manner they see themselves and these treaties in the larger context of international law and international dispute resolution.

III. Objectives

The overall objectives of the research project have been to:

- identify a trend or trends in the approach adopted by the examined adjudicatory bodies with respect to two main issues:
  - jurisdiction in the context of multifaceted disputes and
  - applicable law (or what role other treaties and other rules of international law play in their decision-making);
- identify and systematise the rules that govern the interaction between:
- the dispute settlement regimes embodied in these treaties, with a particular focus on *res judicata*, and the
- their substantive law rules;
- propose a solution by identifying the chronological steps to be taken, in the following scenarios:
  - *first*, where an adjudicatory body of limited jurisdiction is faced with a multifaceted dispute straddling different treaty regimes,
  - *second*, where a single set of facts gives rise to a dispute which is brought before different adjudicatory bodies under a different cause of action simultaneously,
  - *third*, where a single set of facts gives rise to a dispute which is brought before different adjudicatory bodies under a different cause of action successively (hence when the adjudicatory body first seized of the dispute has rendered its decision),

    thus, distinguishing among three temporal situations: proceeding in the absence of another proceeding; parallel proceedings and successive proceedings.

Chapter B: Overlap between the Jurisdictions of the WTO and UNCLOS Courts and Tribunals

I. Introduction

The purpose of this chapter is to demonstrate in what way the jurisdictions of the WTO and the UNCLOS dispute settlement fora can compete and how a single multifaceted dispute can give rise to separate proceedings within the separate dispute settlement mechanisms established under the WTO Agreement and the UNCLOS. First, it will be shown that despite their apparently different subject-matter and purposes, both of these treaties can be applicable to a particular life situation, i.e., there is an overlap in their subject-matter which can result in multiple proceedings. Second, it will be shown that there is an overlap in the law applicable within these dispute settlement mechanisms which can potentially lead to controversial interpretation and application of the same law and contradictory adjudicatory results. Third, examples from the practice of these adjudicatory bodies will be brought to demonstrate that a multifaceted dispute involving trade and law of the sea issues can be submitted to both dispute settlement mechanisms, while giving rise to multiple proceedings with no clear-cut answers as to how to proceed. These examples will confirm that the issue of the concurrent jurisdictions of these adjudicatory bodies is not a mere theoretical possibility but has practical significance and calls for further examination.

II. Subject-Matter: Overview and Overlap

The UNCLOS and the WTO Agreement are two treaties which belong to **different branches** of international law and are almost of universal participation. Members of the WTO, which are also parties to the UNCLOS, and this is the vast majority of the States, apart from their obligations under the WTO Agreement, are also subjected to their obligations stemming from the UNCLOS. Also, they have the dual capacity of an exporting or importing State, on the one hand, and a coastal or a landlocked State or a flag State, on the other hand, with the respective rights and obligations.

The **UNCLOS** is commonly regarded as the constitution for the oceans and sets out the legal framework within which all activities in the world`s oceans and seas must be carried out.[18] It aims at establishing an international legal order for the seas and oceans and embodies rules governing all uses of the oceans and their resources. It contains, among others, a legal regime on the protection of the marine environment, while imposing various obligations relating to the exploitation of the marine living resources, including the obligation to ensure their conservation.

The WTO Agreement, on the other hand, aims at establishing an international legal order relating to international trade and although the *objectives of sustainable development and protection and preservation of the environment* are enshrined in the Preamble of the Agreement establishing the WTO, its core objective is raising standards of living and expanding the production of and trade in goods and services with the liberalisation of trade as a key instrument in achieving this objective.

Two points merit attention in this regard. First, despite these apparently different subject-matter and objectives, the wide scope of these treaties renders their partial overlap unavoidable and, as the practice demonstrates, they both can apply to an identical life situation. Fish and fish products are trade goods and as such their movement is regulated by the WTO Agreement. At the same time, they are predominantly transported by sea thus falling within the geographical scope of the UNCLOS and, moreover, they

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18 See J Barrett and R Barnes, *Law of the Sea -UNCLOS as a Living Treaty* (London British Institute of International and Comparative Law, 2016); RR Churchill and AV Lowe, *The Law of the Sea* (3rd edn Manchester: Manchester University Press, 2010), 24.

originate from marine living resources whose exploitation is regulated, respectively sanctioned by the UNCLOS. Thus, trade in fish and fish products (which forms an enormous part of international trade) is closely linked to fishing activities which concern the uses of the seas and oceans and their resources and as such are governed by the UNCLOS. The exploitation, preservation and protection of the marine living resources regulated by the UNCLOS and its implementation agreements can result in the adoption of legal measures by coastal States involving closure of ports or prohibiting particular fish and fish products from landing even for the purposes of transshipment. Such measures, albeit permitted under the mentioned legal instruments effectively impede international trade and run contrary to the rights and obligations stemming from the WTO Agreements. In particular, to the obligation not to hamper the freedom of transit for goods through the territory of each contracting party on their way to or from other contracting parties and not to impose quantitative restrictions on imports and exports. These obligations and the obligation stemming from the UNCLOS to ensure the conservation and protection of the marine living resources, coupled with the obligation to adopt legal measures to this effect (including the closure of ports) may be not easily reconciled. The full compatibility of the UNCLOS and the WTO Agreement is not to be presumed and the practice, indeed, reveals areas of tension in the regulation embodied in them. This tension is particularly visible in the context of the protection of the marine environment, all the more so, the tension between trade and the trade objectives and environmental protection is not new. In sum, the treatment of the marine living resources and their uses, coupled with the adoption of legal measures aimed at their protection, preservation and conservation which impede international trade, can come within the scope of both treaties and give rise to a dispute involving both of them.

1. Articles 61, 63, 64 UNCLOS v. Article V and XI GATT 1994 (the duty to ensure the conservation of the living resources and the duty to cooperate in ensuring conservation v. the duty not impede international trade)

A more careful look at the *EU–Chilean Swordfish* dispute and the *Atlanto-Scandian Herring* dispute between the EU and the Faroe Islands reveal additional areas of overlap between the substantive law provisions of the UNCLOS and the WTO Agreement. The potential conflicts of these norms and their possible resolutions will be briefly addressed in the dissertation.

More generally, these disputes relate to the obligations of the States Parties to the UNCLOS concerning the conservation of straddling and highly migratory fish stocks and the obligations of the WTO members aimed at the liberalization of trade. The obligations stemming from the UNCLOS comprise two main sets of obligations: obligation of *ensuring through the adoption of legal measures* the *conservation* of these species and a *duty to cooperate* with a view to ensuring their conservation. The WTO Agreement safeguards the freedom of transit of goods and requires from the WTO member not to impede international trade (Arts V and XI). At the same time, Article XX GATT envisages exceptions to the general GATT obligations and permits the adoption of GATT–inconsistent measures relating, among others, to the conservation of exhaustible natural resources.

Under the UNCLOS and its implementation agreements States are under an obligation to protect and preserve the marine environment (Art 192 UNCLOS) and to ensure the conservation of the marine living resources and in this regard they are provided with the discretion to choose such conservation measures that would allow them to fulfil their obligation of ensuring conservation (Arts 61, 63, 64 UNCLOS). More importantly, the UN FSA explicitly enables them to prescribe closure of ports in their domestic legislation, where it has been established that the catch has compromised the effectiveness the subregional, regional or global conservation and management measures on the high seas. Such measure, albeit permitted under the respective agreement and ensuring the fulfilment of an obligation stemming from the UNCLOS, runs contrary to the obligations under Articles V and XI GATT. Notably, a defendant in WTO proceedings may choose as part of its defence to refer to its obligations under the UNCLOS thus inviting an assessment by the adjudicatory body involved of the interaction between the respective UNCLOS and GATT rules and the rights and obligations stemming from them.

Furthermore, although there is an increasing recognition that international cooperation is the most effective means to address global transboundary environmental problems, and, moreover, there is a growing recognition of a general duty to cooperate in the conservation of the highly migratory species and the UNCLOS explicitly imposes such an obligation and directs the States involved in the exploitation of such species to negotiate, this international demand for cooperation does not in principle exclude the adoption by a State of unilateral measures aimed at the conservation of such species. Unilateral measures are not prohibited *per se* although they appear to be strongly discouraged. It is not clear what extent of effort a State must undertake in negotiations before its unilateral mea-

sure may be found to square with the terms of UNCLOS and Article XX GATT.

Article 63 UNCLOS distinguishes between two groups of resources: stocks and associated species that occur within the EEZ of two or more coastal States and stocks and associated species which occur both within the EEZ and the adjacent high seas and imposes the obligation to seek to agree upon measures necessary to ensure the conservation of the respective stocks which creates an obligation to enter into negotiations. With respect to the first group of fish stocks this obligation applies to the coastal States. As far as the second group of stocks is concerned this obligation applies to the coastal State and the States fishing in the adjacent area.

Under **Art 64 UNCLOS** coastal and other States whose national harvest these highly migratory species have the obligation to cooperate with a view to ensuring their conservation and promoting the objective of their optimum utilization throughout this region both within and beyond the EEZ.

Articles 116–119 impose the obligation to cooperate in ensuring conservation of the living resources of the high seas and prescribe that:

- all States have
- the right for their nationals to engage in fishing and
- the duty to adopt measures with respect to their nationals for the conservation of the living resources of the high seas or to cooperate with other States in taking such measures with respect to their nationals as may be necessary for the conservation of the living resources on the high seas;
- the duty to cooperate in the conservation and management of the living resources on the high seas.
- States whose nationals exploit identical living resources or different living resources in the same area have
- the duty to enter into negotiations with a view to taking such measures as may be necessary for the conservation of the respective living resources and the duty to cooperate to establish subregional and reginal organisations to this end.

The obligations under **Articles 63 and 64 UNCLOS** are given more concrete shape in the United Nations Fish Stocks Agreement (**UN FSA**) which is an implementation agreement and which prescribes that the conservation of such species is to be achieved through the adoption of measures ensuring their long-term sustainability (Art 5 UNFSA). Under Article 23 (1) UNFSA a port State has the right and duty to take measures, in accordance with international law, to promote the effectiveness of subregional, regional or global conservation and management measures and to this end it is

entitled to prohibit landing and transshipment where it has been established that the catch has been taken in a manner which undermines the effectiveness of the respective subregional, regional or global conservation and management measure. Hence, a coastal State has the right to prohibit landing and transshipment of catch which has compromised the effectiveness of a subregional, regional or global conservation management measure.

As a result, coastal State`s legislation *prohibiting landing and transshipment* of the catch of such species appears to be in line with the UNCLOS and its implementation agreement but may run *contrary to* the freedom of transit for goods through the territory of each contracting party on their way to and from other contracting safeguarded by Article V GATT 1994 and to the general elimination of quantitative restrictions under Article XI GATT 1994 which imposes the obligation not to prohibit or restrict the importation of a product of the territory of any other contracting party and exportation of a product destined for any other contracting party. There may be tension between the obligations stemming from the UNCLOS and its implementation agreements, namely the obligation to protect and preserve the marine environment and obligation to cooperate in ensuring the conservation of the marine living resources and to adopt measure to promote the effectiveness of subreginal, regional and global measures, on the one hand, and the obligations under the GATT to secure and not to impede the freedom of transit for goods, on the other hand. At the same time, it is unclear whether such measures could fit into the exceptions under Article XX and thus be permissible under the WTO Agreement on the basis of this provision.

It is this tension and respectively the interaction between the rights and obligations under Articles 64, 116–119 UNCLOS on the one hand and Articles V and XI GATT 1994, on the other hand, that was at issue in the ***EU-Chilean Swordfish*** dispute.

EU-Chilean Swordfish Dispute

Swordfish are highly migratory species which migrate through the vast waters of the Pacific Ocean and along their journey they cross the jurisdictional boundaries of many states and the high seas. Whereas they recognize no maritime boundary lines or entitlements, the UNCLOS imposes on coastal States as well as on all States whose nationals fish in the region of highly migratory species certain obligations aimed at their conservation.

Chile has long argued that swordfish stocks were seriously depleted due to over-fishing by commercial vessels. Chilean Fisheries Law has made provisions to conserve depleted stocks, whereas the EU disregarded standards laid out in it. In response, Chile prohibited vessels of the EU to land swordfish (caught both inside and outside of its Exclusive Economic Zone (EEZ)) in Chilean ports even for the purpose of transshipment. The ban effectively made transit through its ports impossible for swordfish. Impossible also was the importation of the affected catches in Chile.

In April 2000, the EU requested consultations with Chile with respect to this measure, while asserting that it was inconsistent with Article V (providing for freedom of transit for goods through the territory of each contracting party on their way to or from other contracting parties) and XI (prohibiting quantitative restrictions on imports or exports, *subject to some exceptions for imports of agricultural or fisheries products*) GATT 1994.[19] Underlying the EU`s request for consultations was its aspiration to re-export swordfish to the markets of NAFTA member-states, particularly the US.

Subsequently, in November 2000 Chile instituted dispute settlement procedure under the UNCLOS which led to the *Swordfish* case before the ITLOS and a special five-judge Chamber of the ITLOS was established. Both parties continued to explore alternative avenues to achieve settlement.

Chile asserted that:

- the EU had not fulfilled its obligations under the UNCLOS:
- **Article 64** (calling for **cooperation in ensuring conservation of highly migratory species**),
- **Articles 116–119** (relating to **conservation of the living resources of the high seas**),
- **Article** 297 (concerning dispute settlement) and
- **Article** 300 (calling for good faith and no abuse of right)
- EU had **failed to enact and enforce substantive conservation measures on its vessels** fishing in the area, that the EU has **failed to report its** captures to the relevant international organization (in this case the Food and Agriculture Organization),
- EU had failed to cooperate with the coastal state in ensuring the conservation of highly migratory species.

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19 Request for Consultations by the European Communities, WT/DS193/1, G/L/367, 26 April 2000, available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm

- the EU was in violation of the UN Fish Stocks Agreement and maintained that the measure was justified on the basis of Article 23 (3) of this agreement allowing a member state to prohibit landing where the capture has compromised the effectiveness of a multilateral conservation measure.[20]

In its defence the EU asserted that:

- Chile has violated UNCLOS **Articles 64, 116–119** and 300, mentioned above,
- **Article 87** (on freedom of the high seas including freedom of fishing, subject to conservation obligations) and
- **Article 89** (prohibiting any State from subjecting any part of the high seas to its sovereignty)
- The EU contended that Chile unilaterally applied its EEZ conservation measures to the adjacent high seas and that Chile negotiated the Galapagos Agreement, under the auspices of the Permanent Commission of the South Pacific (CPPS), without the participation of all interested States.[21]

In January 2001, the EU and Chile reached an agreement that effectively suspended proceedings at the WTO and at the ITLOS.[22]

The dispute is indicative of the tension between unilateralism and the duty to cooperate. The latter has not yet been given clear meaning and, moreover, no certainty exists as to when can this duty be considered fulfilled. Notably, the ITLOS has subsequently dealt with this duty.[23] The dispute also signifies the problem of extraterritoriality as the measure was seen as an attempt to extend the effect of the fisheries laws applicable in the EEZ beyond the EEZ, i.e., the jurisdiction of the coastal State beyond the limits established under the UNCLOS (Article 56). In addition, it sig-

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20 *Case Concerning the Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, Chile/European Community*, Order, 20 December 2000, ITLOS Case No. 07, p. 150.

21 Ibid.

22 *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean, Chile/European Union,* Order, 15 March 2001, ITLOS Case No. 07. See also *Chile-Measures affecting the Transit and Importing of Swordfish*, DS 193.
https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds193_e.htm.

23 See *Responsibilities and Obligations of States Sponsoring Persons and Entities with respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber),* Advisory Opinion, 1 February 2011, ITLOS Case No 17, para. 210. See the assessment of the *Atlanto-Scandian Herring* dispute below.

nals the interrelationship and even the potential clash between the UNCLOS obligation to ensure the conservation of the fish stock at hand and the obligations concerning the liberalization of trade under the WTO Agreement.

Atlanto-Scandian Herring Dispute

In the same vein, the *Atlanto-Scandian Herring* dispute between the EU and the Faroe Islands brought into the light the tension between similar obligations under the UNCLOS concerning the conservation of the living resources, in particular, shared fish stocks, and the same obligations under the WTO Agreement, thus triggering a discussion on the interaction between the respective treaty provisions.

Atlanto-Scandian herring is **shared between the respective exclusive zones** of five coastal States, namely the Faroe Islands, Iceland, Norway, the Russian Federation, and, to some extent, the European Union. As such it comes within the scope of Article 63 UNCLOS. **Article 63 UNCLOS** imposes an obligation on the coastal States to **seek to agree upon the measures** necessary to coordinate and ensure the conservation of the shared stocks. This fish stock (it collapsed in the past due to overexploitation and this resulted in cessation of all fisheries between the 1970s and 1990s) was managed jointly by the 5 aforementioned States according to a long-term management plan and pre-determined shares of the Total Allowable Catch (TAC) and since 2007 they have agreed on an annual basis on the sharing of the TAC.

The Faroe Islands asserted that the migration patterns of the stock have changed and that the occurrence of Atlanto-Scandian herring in its EEZ had increased. It therefore sought an increase in its catch limit for 2013 but was unable to receive support from the remaining 4 States. In March 2013 the Faroe Islands, nonetheless, announced a higher unilateral setting of a catch limit as compared to their former share of the total allowable catch TAC.

In response, the EU asserted that after setting a unilateral catch limit, the Faroe Islands had been conducting unsustainable fisheries for the stock in 2013 and adopted a set of measures aimed at addressing the alleged unsustainable fishing of herring by the Faroe Islands, i.e., aimed at ensuring the conservation of the fish stock. These measures:

- prohibited the introduction into the territory of the EU of Atlanto-Scandian herring and certain Northeast Atlantic mackerel (*Scomber scombrus*) caught under the control of the Feroe Islands and
- prohibited from EU ports vessels:
  - that fly the flag of the Faroe Islands which fish Atlanto-Scandian herring and mackerel;
  - which transport fish and fish products stemming from Atlanto-Scandian herrings and mackerel that had been caught by vessels flying the flag of the Faroe Islands or other vessels authorized by the Faroe Islands, while flying the flag of a third country.

The Kingdom of Denmark, in respect of the Faroe Islands, initiated proceedings under the WTO Agreement (November 2013)[24] and arbitral proceedings under Annex VII UNCLOS (March 2014) against the EU,[25] challenging certain the EU 'coercive' measures, including closure of EU ports to Faroese vessels.

It asserted that the measures were inconsistent with Article 1 (1) (fails to accord immediately and unconditionally to like products originating in the Faroe Islands relevant advantages, favours, privileges or immunities that are granted by the European Union to Atlanto-Scandian herring and Northeast Atlantic mackerel products originating in other countries), V (2) (denies freedom of transit through the territory of the European Union, and each of its Member States, via the routes most convenient for international transit, for traffic in transit to or from the territory of other WTO Members) and XI (institutes or maintains prohibitions or restrictions, other than duties, taxes or other charges, on the importation of certain products of the territory of the Faroe Islands) GATT 1994,[26] respectively

24 *European Union-Measures on Atlanto-Scandian Herring* dispute between the EU and the Denmark in respect of the Faroe Island, short title EU-Herring.
For further information see: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds469_e.htm.

25 *The Atlanto-Scandian Herring Arbitration, The Kingdom of Denmark in respect of the Faroe Islands v the European Union.* For further information see: https://pca-cpa.org/en/cases/25/.

26 *European Union-Measures on Atlanto-Scandian Herring*, Request for the establishment of a panel by Denmark in respect of the Faroe Islands, WT/DS469/2, 10 January 2014.
file:///Users/elena/Downloads/469–2.pdf.

amounted to a breach of the EU`s obligation to co-operate in relation to shared fish stocks laid down in Article 63 (1) UNCLOS.[27]

On the 21 August 2014, both parties informed the WTO DSB that the matter raised in the dispute was settled.[28] On the same date they submitted joint request for the termination of the arbitral proceedings under UNCLOS Annex VII and the latter was accordingly terminated short after that (September 2014).[29]

In this case, multiple proceedings were initiated by one of the disputants and they bring several problems upfront. First, the unsettled question what extent of a negotiation effort is sufficient to meet the international cooperation duty requirement concerning the conservation of the living resources so that a unilateral conservation measure to not be regarded as illegitimate under a treaty embodying this duty or under general international law. This question can and has arisen in UNCLOS proceedings, given the duty to cooperate enshrined in the UNCLOS.

The duty to cooperate or seek to agree has in principle been understood as implying an obligation to enter into negotiations.[30] In its Advisory Opinion the ITLOS has classified the obligation to cooperate, hence to enter into negotiations as a due diligence obligation and has held that:

> the consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view of adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.[31]

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27 *The Atlanto-Scandian Herring Arbitration (The Kingdom of Denmark in respect of the Faroe Islands v. the European Union)*, Procedural Order No 1, 15 March 2014, PCA Case No 2013–30. Available at: https://pca-cpa.org/en/cases/25/.

28 *European Union-Measures on Atlanto-Scandian Herring*, Joint communication from Denmark in respect of the Faroe Islands and the European Union, WT/DS469/3, 21 August 2014.
Available at: https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds469_e.htm.

29 *The Atlanto-Scandian Herring Arbitration(The Kingdom of Denmark in respect of the Faroe Islands v the European Union),* Termination Order, 23 September 2014, PCA Case No 2013–30. Available at: https://pca-cpa.org/en/cases/25/.

30 J Harrison and E Mogera, 'Article 63' in A Proelss, AR Maggio, E Blitza and O Daum (eds), *United Nations Convention on the Law of the Sea: A Commentary* (Hart Oxford, 2017), 507.

31 *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC) (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, 2 April 2015, ITLOS Case No 21, para. 210.