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CLIMATE CHANGE AND THE SUSTAINABILITY OF FISHERY RESOURCES IN THE NORTH SEA: THE TRADE DISPUTE BETWEEN THE EUROPEAN UNION AND THE FAROE ISLANDS

Abstract

One of the effects of climate change is that fish stocks may have to move to colder waters. This not only constitutes an important environmental change, it may also have serious economic consequences, and may even prompt changes to States' fishery and trade policies. This is what happened with the mackerel and herring stocks in the North Sea, which led to a trade war between the European Union and the Faroe Islands. The aim of this article is to analyse this dispute, the measures taken by the countries involved, and its recent resolution.

KeyWords

Climate change, sustainable fisheries, the World Trade Organization, European Union, Faroe Islands

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1. INTRODUCTION

The effects of climate change on weather and animal and plant environments are becoming increasingly apparent. The rise in temperature alters the cycle of the climate system and causes meteorological phenomena such as hurricanes and tornadoes, which are becoming ever more frequent and intense. Climate change also causes the acceleration of desertification in areas with low rainfall, and the melting of the polar ice caps, which raises the level of the sea and changes ocean currents.

Furthermore, the effects of global warming are altering the migratory and growth cycles of some animal species, which are being forced to readapt to the gradual change in climate conditions, their natural habitat and the alteration of their food sources. This is precisely what has happened to the mackerel and herring stocks of the North Sea, which have moved from Irish and Scottish waters further north in search of cooler waters, and can now be found in their majority off the coasts of Iceland and the Faroe Islands.[2] In addition to having ecological consequences for, for instance, the marine food chain, given that their predators have had to move with them, this phenomenon has also had extremely important consequences for the legal system and trade.

This article examines the dispute that arose between the EU, the Faroe Islands and Iceland over the most important fish stocks in the northeast Atlantic. We will explain the cause of the dispute, the measures taken by the EU against the Faroe Islands to ensure sustainable fisheries, the submission of the dispute to the WTO dispute settlement and arbitration bodies and how the conflict was resolved with a number of agreements between the opposing parties.

1 This work is part of the DER2012-36026 research project on "La carrera por el Ártico: cuestiones de Derecho internacional surgidas a la luz del cambio climático", funded by the Ministry of Education. The facts were updated on 1 October 2014. The author is grateful for any comments and recommendations that anonymous reviewers can provide on this article prior to publication.

2 Largely because the zooplankton these species feed on has changed geographical location and is now found mainly in colder and more northern waters than in past years.

2. THE CAUSE OF THE DISPUTE: THE MACKEREL AND HERRING WAR

The United Nations Convention on the Law of the Sea (UNCLOS) lays down the obligation for coastal States to cooperate in the joint management of straddling fish stocks in order to ensure their conservation. As is the case with most environmental problems, the protection of natural resources within the borders of a State will only be effective if third countries make a similar effort.

Following this maxim, until recently, the Atlanto-Scandian herring stock and North Atlantic mackerel stock had been managed jointly by Norway, Russia, Iceland, the Faroe Islands and the EU through international agreements that set out the total allowable catch (TAC) for each country in order to maintain the sustainability of these fish stocks.

The Faroe Islands and Iceland's shares in these quotas were initially very small. However, as a result of climate change, mackerel and herring stocks have increased exponentially in the waters off the coasts of these two countries. They therefore wished to take advantage of the situation to obtain a higher quota for these fish stocks, which were largely to be found in their territorial waters. However, Norway and the EU Member States, which had the highest quotas for these stocks, saw no justification for increasing the allowable catches of these two countries.

As a result, Iceland and the Faroe Islands unilaterally decided to break out of these agreements and established autonomous quotas that were significantly higher than the ones they had had up to this point. With regard to mackerel, Iceland decided to unilaterally assign itself a quota of 130,000 tonnes for 2010, compared to the 112,000 tonnes caught in 2009 and 365 in 2005.[3] For its part, the Faroe Islands went from having a quota of 27,830 tonnes of mackerel in 2009 to a self-allocated quota of 85,000 tonnes in 2010. Because this quota was far higher than the country's fishing capacity, it authorised Russian fishing vessels to catch the surplus.[4] With regard to herring,

3 Article in *FIS*, "Pretensiones de Islandia y Feroe ponen en vilo a escoceses", 25.6.2010; available at: http://fis.com/fis/worldnews/worldnews.asp?l=s&id=37048&ndb=1 (last visited: 13.7.2014).

4 Article in *FIS*, "Estados costeros no logran acuerdo sobre cuotas de caballa", 29.10.2012; available at: http://www.fis.com/fis/worldnews/worldnews.asp?monthyear=&day=29&id=56437&l=s&special=&ndb=1%20target= (last visited: 13.7.2014). Iceland considered it unacceptable that the EU and Norway wanted to catch 90% of the fish stock when most of this was in its waters (*vide* Article in *Spiegel on line*, "Island bleibt unbeugsam im Makrelenkrieg", 19.1.2013; available at: http://www.spiegel.de/wissenschaft/natur/streit-um-fischfang-island-bleibt-unbeugsam-im-makrelenkrieg-a-878446.html; (last visited: 13.7.2014). In fact, although 20 to 30% of the mackerel stock could be found in Icelandic waters, this country was only allocated a fishing quota of 16-17% in the agreements with coastal States (*vide* Article in *FIS*, "Una cuota de caballa mesurable y responsable se fija Islandia",

the Faroe Islands allocated itself a quota of 105,230 tonnes in 2013, which more than trebled its previously agreed share.[5]

The EU considered that this unilateral stance was contrary to the recommendations of the International Council for the Exploration of the Sea[6] and jeopardised the sustainability of these fish stocks. It also constituted a significant economic setback for the Community's fishing fleets, which was why it made numerous attempts, together with Norway, to negotiate a new agreement with the Faroe Islands and Iceland on the catch quotas for North Atlantic mackerel and Atlanto-Scandian herring stocks.

However, when the numerous consultation rounds and attempts to reach an agreement with Iceland and the Faroe Islands were unsuccessful, the EU decided to use a trade instrument that would enable the adoption of specific measures against the Faroe Islands in a bid to encourage it to contribute to the conservation of the stock.

3. TRADE MEASURES ADOPTED BY THE EU IN THE AREA OF SUSTAINABLE FISHERIES: REGULATION (EU) NO 1026/2012 AND REGULATION (EU) NO 793/2013

Regulation (EU) No 1026/2012 of the European Parliament and of the Council of 25 October 2012 on certain measures for the purpose of the conservation of fish stocks in relation to countries allowing non-sustainable fishing (hereinafter, Regulation 1026/2012) came into force on 17 November 2012.[7] This Regulation "lays down a

24.4.2014, available at: http://fis.com/fis/worldnews/worldnews.asp?l=s&id=68079&ndb=1; last visited: 13.7.2014). For its part, the government of the Faroe Islands complained that the EU and Norway had not allocated it any mackerel quota, which was why it had unilaterally allocated itself a quota which was, in its opinion, consistent with the scientific recommendation of a total TAC of 572,000 tonnes (*vide* Article in *FIS*, "Los feroeses justifican su cuota de caballa", 10.8.2010, available at: http://fis.com/fis/worldnews/worldnews.asp?l=s&ndb=1&id=37635; (last visited: 13.7.2014).

5 The most recent TAC set for Atlanto-Scandian herring allocated a quota of 61% to Norway, 14.51% to Iceland, 12.82% to Russia, 6.51% to the European Union and 5.16% to the Faroe Islands (*vide* ISHIKAWA,Y., "The EU-Faroe Islands Herring Stock Dispute at the WTO: the Environmental Justification", *American Society of International Law. Insights*, vol. 18, no. 4, 2014).

6 International organisation engaged in the prevention of overfishing through the establishment of sustainability standards for fisheries management. Countries which meet these standards may obtain environmental certification from the organisation for the relevant fish stock. More information available from the organisation's website: http://www.msc.org/?set_language=es.

7 DOUE L 316, 14.11.2012, p. 34. A study of the content of the Regulation can be found in: FERNÁNDEZ EGEA, R.M., "Un paso más en pos de una pesca responsable en la UE: el Reglamento

framework for the adoption of certain measures regarding the fisheries-related activities and policies of third countries in order to ensure the long-term conservation of stocks of common interest to the Union and those third countries" (Article 1 of Regulation 1026/2012).

Article 4 of the Regulation sets out the possibility to impose restrictions on the trade of fish stock caught in non-sustainable conditions by third countries and which affect the EU. The aim of these measures is to encourage countries that engage in non-sustainable fishing to contribute to the conservation of the relevant fish stocks.

On 20 August 2013, the Commission decided to make use of the powers conferred on it in Regulation 1026/2012 and adopted Implementing Regulation (EU) No 793/2013 establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock[8] (hereinafter, the Implementing Regulation).

The Implementing Regulation contains a package of measures to restrict or ban imports of herring and mackerel from the Atlanto-Scandian and North-East Atlantic stocks that have been caught under the control of the Faroe Islands in the belief that this country allows unsustainable fishing of this stock.[9]

The specific measures taken against the Faroe Islands by the EU included the prohibition to introduce into the territory of the Union (including for transhipment purposes at ports) Atlanto-Scandian herring and mackerel stocks (insofar as the mackerel cohabits with herring and is caught together with herring) caught under the control of the Faroe Islands, or products that are made from the former (Article 5.1 of the Implementing Regulation).

In addition, the use of Union ports by vessels flying the flag of the Faroe Islands that fish for Atlanto-Scandian herring or mackerel and by vessels transporting the fish or the fishery products stemming from Atlanto-Scandian herring or mackerel that have been caught either by vessels flying the flag of that country or by vessels authorised by it while flying another flag shall be prohibited (Article 5.2 of the Implementing Regulation). Vessels of the Faroe Islands are not authorised to dock in Union ports except in cases of emergency.

The Faroe Islands responded to these trade measures by filing two suits, one with the dispute settlement body of the World Trade Organization (WTO) and the other with the Permanent Court of Arbitration, which we will discuss later on in this article.

(UE) 1026/2012, Revista General de Derecho Europeo, No. 30 mayo 2013.

8 DOUE, L 223, 21.08. 2013, p. 1. These measures received the support of the Member States at the meeting of the Committee for Fisheries and Aquaculture on 31.7.2013.

9 European Commission press release 20.8.2013 (IP/13/785).

4. POLITICAL AGREEMENTS: AN END TO THE DISPUTE

There had been a rapprochement between the EU and the Faroe Islands in relation to the allocation of fishing quotas in the North-East Atlantic over the past few months, which culminated in the signing of a number of political agreements between the coastal States.

The first of these was reached on 12 March 2014 between the EU, Norway and the Faroe Islands for the conservation and management of mackerel in the North-East Atlantic for the next five years.[10] The arrangement establishes a commitment to sustainable fisheries, a sharing between the Parties, and a commitment to establish a new long-term management plan in 2014.[11] As part of the arrangement, the Parties also agreed reciprocal access to each other's waters.[12] While the agreement was only signed by three of the coastal States concerned, given that Russia and Iceland did not take part in the negotiations, it is still open to third countries, and the UE hopes that Iceland will join it in the near future.[13] While the political agreement of March 2014 failed to address the Atlanto-Scandian herring catches disputed by the Faroe Islands and the EU, it did represent a step forward, although it was not enough to put an end to the conflict.

A political agreement on Atlanto-Scandian herring was reached three months later, on 11 June 2014, although only between the EU and the Faroe Islands. In addition to agreeing to the sustainable management of these resources, the two parties also made a commitment to allow the fishing of these species in their respective territorial waters. However, again this agreement was not signed by Iceland or the other coastal countries engaged in the fishing of these species.

10 *Vide* the article in: http://europa.eu/rapid/press-release_IP-14-265_en.htm (last visited: 13.7.2014).

11 Article in FIS, "Mackerel deal reached with Norway and Faroe Islands", 13.3.2014, available at: http://www.fis.com/fis/worldnews/worldnews.asp?l=e&id=67119&ndb=1 (last visited: 13.7.2014).

12 This agreement was supplemented by another one on 13 March 2014 between the EU and the Faroe Islands on reciprocal exchanges of fishing opportunities in each other's waters for a number of species, including herring. Vide: http://ec.europa.eu/information_society/newsroom/cf/mare/itemdetail.cfm?item_id=15213. (last visited: 13.7.2014).

13 We should bear in mind that Iceland is a candidate country seeking accession to the EU, for which negotiations are already underway, although these have been suspended because of fishery disputes with the EU, among other reasons. *Vide Article in FIS*, "La caballa obstaculiza ingreso de Islandia en la UE", 15.7.2010; available at: http://fis.com/fis/worldnews/worldnews.asp?l=s&id=37287&ndb=1; last visited: 13.7.2014). As it has not signed the political agreement, Iceland has set its own catch quota for mackerel for 2014, which the EU has deemed to be reasonable and within sustainability levels (vide Article in FIS, "Iceland's announcement of mackerel quota welcomed", 24.4.2014, available at: http://www.fis.com/fis/worldnews/worldnews.asp?l=e&id=68098&ndb=1; last visited: 13.7.2014).

The aim of the June 2014 agreement was to put an end to the fishing dispute between the EU and the Faroe Islands.[14] As a result, the EU lifted the trade restrictions through Implementing Regulation (EU) No 896/2014 of 18 August 2014, repealing Implementing Regulation (EU) No 793/2013.[15] This, in application of Article 7 of Regulation (EU) No 1026/2012, provided that the measures shall cease to apply when the country allowing non-sustainable fishing adopts appropriate corrective measures necessary for the conservation and management of the stock of common interest and those corrective measures. The suits filed by the Faroe Islands with the WTO dispute settlement body and the Permanent Court of Arbitration were also withdrawn, as we will see later on.

It can therefore be concluded that the trade war between the EU and the Faroe Islands has ended, although this does not mean that the issue is not without contention or that new disputes will not arise in the future with the Faroe Islands or Iceland or indeed other coastal countries. It is for this reason that we will examine in the following sections the arguments put forward by the parties and the possible outcome of the proceedings had the dispute continued.

5. THE WTO CASE: TRADE RESTRICTIONS ON ENVIRONMENTAL GROUNDS

On 4 November 2013, the Kingdom of Denmark, in respect of the Faroe Islands,[16] requested consultations within the framework of the World Trade Organization with the EU.[17] In the opinion of the Faroe Islands, Regulation (EU) No 1026/2012

14 *Vide* Press release of the European Commission: "Herring dispute between European Union and Faroe Islands nears end", 11.6.2014 (IP/14/668); available at: http://europa.eu/rapid/press-release_IP-14-668_en.htm (last visited: 13.7.2014).

15 DOUE L 244, 19.8.2014, p. 10. In this case, the Faroe Islands set itself a much lower catch limit for herring than the previous year, going from 105,230 tonnes in 2013 to 40,000 tonnes in 2014.

16 The Faroe Islands is a self-governing territory of the Kingdom of Denmark to which the WTO agreement applies but which does not fall within the territorial scope of the European Union, which is why it is represented abroad and also before the WTO by Denmark. Paradoxically, Denmark finds itself filing a suit against measures it was involved in adopting as a Member State of the EU.

17 *Vide* the Communication of Demark (Doc. WT/DS469/1, G/L/1058), available at: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds469/1%20or%20wt/ds469/1/*)&Language=SPANISH&Context=FomerScriptedSearch&languageUIChanged=true#. The consultation was requested pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which is the first step in the submission of a trade

and the implementing measures set out a series of trade restrictions that might pose compatibility issues with the WTO rules and, more importantly, with the free movements of goods provided in the General Agreement on Tariffs and Trade of 1994 (hereinafter, the GATT).

Firstly, it claimed a breach of Article I.1 of the GATT, setting out the most-favoured-nation clause, because the products of the Faroe Islands are not accorded the advantages and privileges granted to like-products from other countries immediately and unconditionally.

Secondly, it also believed there was a breach of Article V.2 of the GATT, which sets out the freedom of transit of goods across the territory of a WTO contracting party, given that the measures imposed by the EU prevent free transit through its territory via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties and the Union makes distinctions based on the flag of vessels, the place of origin, departure, entry, exit or destination, and on circumstances relating to the ownership of goods, of vessels or other means of transport.

Thirdly and finally, it believed there was a breach of Article XI.1 of the GATT, which prevents quantitative restrictions on imports and exports, because the EU measures effectively imposed restrictions and prohibitions on the import of the aforementioned fish stocks and products from the Faroe Islands.

On 23 February 2014, the WTO's dispute settlement body set up a panel to examine the dispute, but the suit was withdrawn in August 2014 after a series of successful negotiations between the Faroe Islands and the EU.[18] Nevertheless, it is interesting to assess whether the EU would have won the suit, when you consider that another country likely to be affected by the coercive economic measures imposed by the EU was Iceland, and this country has not yet reached an agreement with the EU. Taking into account the case law of the WTO, we can speculate as to how the dispute might have been resolved had it followed its course with the dispute settlement body.

While the trade restrictions on goods were evident, there is a possibility that it might have been possible to demonstrate that the Community regulations were not inconsistent with WTO law. The GATT provides for a number of exceptions to justify measures that violate other GATT provisions, provided these are intended to achieve

dispute to the WTO's dispute settlement body. The next step is the establishment of a panel which, after studying the dispute and arguments of the parties, may issue a binding decision. Nevertheless, this decision may subsequently be appealed to the Appellate Body.

18 *Vide* the joint communication presented by Denmark and the European Union (Doc. WT/DS469/3; G/L/1058/Add.1, 25.8.2014; available at: http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds469_e.htm; last visited: 21.8.2014).

legitimate objectives that are envisaged in the Trade Agreement, such as the protection of the environment.[19]

In this case, two provisions could have been invoked: measures that are necessary to protect human, animal or plant life or health (paragraph b), or measures relating to the conservation of exhaustible natural resources (paragraph g). Indeed, this is the provision that has been invoked in most trade disputes that have implications for the environment.[20] Some of these even involved trade in certain fish stocks, such as the tuna and shrimp cases.[21]

Trade measures have to pass a double test: firstly, it is assessed whether they comply with the requirements laid down in the various paragraphs and, secondly, with the common requirements on the adoption of the measure, which are set out in the preamble or chapeau to Article XX of the GATT.

19 While in the past it was very difficult to use environmental grounds to justify trade barriers, recent interpretations of the aforementioned exception requirements by WTO dispute settlement bodies demonstrate greater sensitivity to environmental problems, and recognise the right of GATT contracting parties to choose their own health and environmental policies, even though these may constitute a trade restriction.

20 During the period that the GATT 1947 was in force, a number of disputes involving the environment were resolved by invoking paragraphs (b) and/or (g) of Article XX; noteworthy cases include that of the *United States-Prohibition of Imports of Tuna and Tuna Products from Canada* in 1982 (29S/97); *Thailand—Restrictions on the Importation of and Internal Taxes on Cigarettes* in 1990 (IBDD 37S/222) – case *Thailand-Cigarettes*; and the well known Tuna cases [*United States-Restrictions on Imports of Tuna* in 1991 (IBDD 39S/183) - case *USA-Tuna I*; and *United States-Restrictions on Imports of Tuna* in 1994 (WT/DS29/R) – case *USA-Tuna II]*. After the creation of the WTO, new disputes of an environmental nature arose; of particular note are the cases of the *United States-Standards for Reformulated and Conventional Gasoline* in 1996. (WT/DS2) – case *USA-Gasoline*; *United States–Prohibition of Imports of Certain Shrimp and Shrimp Products* in 1998 (WT/DS58) – case *USA-Shrimp*; *European Communities-Measures Affecting Asbestos and Asbestos-Containing Products* in 2001 (WT/DS135) – case *EC-Asbestos*; *European Communities-Measures Affecting the Approval and Marketing of Biotech Products* in *2006 (WT/DS291, DS292 and DS293) – case EC-Biotech Products; and Brazil-Measures Affecting Imports of Retreaded Tyres* in 2007 *(WT/DS332) –case Brazil-Retreaded Tyres*. Special mention must be given to the case of the *European Communities—Measures Prohibiting the Import and Placement on the Market of Seal Products* in 2014 (WT/DS400 and 401) – case *EC-Seal Products*, given that this was the first time paragraph a) of Article XX of the GATT – measures "necessary to protect public morals" was invoked in a matter that had environmental implications. For more information on this case, *vide* MARTÍNEZ PÉREZ, E. J, Restricciones comerciales por razones éticas: la prohibición de la unión europea a la importación de productos derivados de las focas, *Revista Española de Derecho Europeo*, n. 42, 2012, pp. 25-48 and RIERA DÍAZ, S., Medio ambiente y comercio internacional: el caso de los productos derivados de las focas", *Revista Jurídica de la UAM*, nº. 29, 2014, in the press. The reports of the Panels and the Appellate Body are available on the WTO website (http://www.wto.org).

21 Namely, the *USA-Tuna I* and *II* and *USA-Shrimp* cases.

With regard to the former, the exception set out in GATT Article XX (b) requires that the measure be necessary to protect human, animal or plant life and health, in other words, it has to be verified that the trade measure makes a decisive contribution to the resolution of the problem[22] and that it is the least restrictive for achieving the objective of sustainable management of the fish stocks concerned (known as the "necessity test").[23] Indeed, the Commission itself, in the reasons for the Implementing Regulation, refers to several alternative measures which, while being less restrictive than the measures adopted, would not be effective enough to achieve the sustainable fishing of the stocks concerned.[24] In any event, the Faroe Islands has the responsibility of proving that less restrictive alternatives would allow the objective to be achieved and that these are readily available to this State.[25]

However, in this case it is likely that the exception set out in GATT Article XX (g)[26] would be applied, i.e., that the measures is justified on the grounds of the conservation of exhaustible natural resources, namely, the unsustainable fishing of herring stock. The Appellate Body has pointed out that even though a resource is renewable, this does not mean that it is inexhaustible, particularly considering that the possibility of renewing living resources has been affected in recent decades by the influence of human activity.[27] As a result, this exception has been accepted for the protection of a wide

22 Report of the Appellate Body, case *Brazil-Retreaded Tyres*, paragraph 210.

23 According to the most recent case law, this involves weighing and balancing the relevant factors: "the relative importance of the common interests or values that the challenged measure is intended to protect, the contribution of the measure to the realization of the ends pursued by it and the restrictive impact of the measure on international commerce" (*vide* the panel report in the *Brazil-Retreaded Tyres* case, paragraph 7.104, citing the Appellate Body Reports in the *Korea–Measures Affecting Imports of Fresh, Chilled and Frozen Beef* cases in 2001 (DS161 and DS169), paragraph 164 and *EC-Asbestos*, paragraph 172). On this point, WTO case law has evolved, considering that in the past a least restrictive measure test was conducted, making it very difficult to justify a trade restriction because the challenged measure had to be inevitable, *vide*, for example, the panel report for the *Thailand-Cigarettes* case, paragraph 75.

24 *Vide* "recitals" 24 and 25 of the Implementing Regulation.

25 The burden of proof lies with the countries contesting the measure (*vide* the report of the Appellate Body in the *Brazil-Retreaded Tyres* case, paragraph 156).

26 LESTER, S., "The Faroe Islands Herring Dispute", *International Economic Law and Policy Blog*, November 2013; available at: http://worldtradelaw.typepad.com/ielpblog/2013/11/the-faroe-islands-herring-dispute (last visited 13.7.2014)

27 The Appellate Body felt compelled to make this statement because some WTO members and contracting parties argued that this exception was originally conceived for the conservation of fossil resources. It therefore stated that recalling the explicit recognition by WTO Members of the objective of sustainable development and environmental protection in the preamble of the WTO Agreement, "we believe it is too late in the day to suppose that Article XX (g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources" (*vide* Report of the Appellate Body, case *USA-Shrimp*, paragraph 131).

variety of environmental goods, including salmon, dolphins, gasoline, turtles, clean air and seals, without the need to demonstrate that these are endangered species. This is in line with the precautionary principle, requiring that States anticipate irreversible damage to the lives and health of the living beings of our planet.

The first requirement to be met in order to be able to justify a trade measure under GATT Article XX (g) is to demonstrate that it 'is related' to the conservation of exhaustible natural resources, i.e., that the challenged measure is not merely incidentally aimed at their conservation,[28] and that there is a "close and real relationship" between the challenged measure and the conservation objective.[29] This basically involves verifying that it is appropriate for the conservation of an exhaustible natural resource.[30] This could easily be demonstrated, given that preventing fisheries of common interest from entering the EU market discourages unsustainable fishing.

Finally, invocation of the exception set out in GATT Article XX (g) requires that the measure be applied "in conjunction with restrictions on domestic production or consumption", i.e., that the restrictive measures on products from other States also apply to the economic or productive operators of the country adopting the measure. This does not require the provision of equal treatment, it is enough that they receive "similar" treatment in order to adequately comply with the requirement.[31] In this regard, Regulation No 1026/2012 makes the adoption of restrictive measures conditional upon these requirements;[32] in addition, the Implementing Regulation mentions that the EU decreased the total allowable catch for these fish stocks by 26%, at the recommendation of the International Council for the Exploration of the Seas.[33]

Along with meeting the specific requirements of each paragraph, the measure must also comply with the conditions set out in the preamble to Article XX; that is, the trade measure shall not arbitrarily or unjustifiably discriminate against States in the same

28 Report of the Appellate Body, case *USA-Gasoline,* p. 21.

29 Report of the Appellate Body, case *USA-Shrimp*, paragraph 136. To verify the existence of a substantial relationship, the "relationship between the general structure and design of the measure here at stake (…) and the policy goal it purports to serve" must be examined, that is, the conservation of sea turtles" (*vide id.* paragraph 137).

30 Report of the Appellate Body, case *USA-Shrimp*, paragraph 141.

31 Report of the Appellate Body, case *USA-Gasoline*, paragraph 20 and 21.

32 Article 5 of Regulation No 1026/2012 appears to incorporate the requirements of GATT Article XX (g) in that it requires that the trade measures not only be related to the conservation of the stock of common interest (paragraph 1(a), but that they be "made effective in conjunction with restrictions on fishing by Union vessels, or on production or consumption within the Union, applicable to fish and fishery products made of or containing such fish of the species for which the measures have been adopted" (paragraph 1(b).

33 *Vide* "recital" 27 of the Implementing Regulation.

circumstances and does not constitute disguised protection of domestic production. Article 5 of Regulation 1026/2012 also refers to these requirements, together with the idea that the trade measures shall be proportionate to the objectives pursued.

In reality, the requirements set out in the preamble were conceived to prevent abuse of the exceptions and to ensure that the measures are applied in good faith. For this purpose, various factors tend to be checked, such as the unilateral or extraterritorial nature of the measures, whether their application is sufficiently flexible and whether they serve a protectionist purpose.[34] Let us assess whether the EU measure was likely to have met these requirements.

Although unilateral coercive economic measures are admissible, they should only be adopted as a last resort, once all attempts to negotiate with the country likely to be affected by the measure have been exhausted.[35] There is therefore an obligation to cooperate with the countries concerned prior to adopting the trade measure,[36] a requirement that is also enshrined in the United Nations Convention on the Law of the Sea. According to the EU, the Community regulations and their implementing measures were adopted as a last resort, after several failed attempts to negotiate an agreement with the Faroe Islands and Iceland on the allocation of catch limits for North-Atlantic mackerel and Atlanto-Scandian herring stocks for the aforementioned countries, Norway and the EU.[37] The obligation to cooperate can be inferred from a number of articles of Regulation 1026/2012 (particularly Articles 1 and 3, and the preamble). However, the EU would also have to prove that the terms of the negotiations could be reasonably assumed by the Faroe Islands, which is implicit in the requirement that negotiations be conducted in good faith.

With regard to the extraterritoriality of the measure, invocation of GATT Article XX is admissible when there is a "sufficient link" between resources located outside

34 These factors are assessed in an endeavour to identify the possible causes or grounds for discrimination that is contrary to the GATT rules (*vide* the Report of the Appellate Body, case *EC-Seal products*, paragraph 5.305 *in fine*.

35 Report of the Appellate Body, case *USA-Shrimp*, paragraph 172. For more information on the negotiation requirement, *vide* NI, K.J., "Redefinition and Elaboration of an Obligation to Pursue International Negotiations for Solving Global Environmental Problems in Light of the WTO Shrimp/Turtle Compliance Adjudication Between Malaysia and the United States", *Minnesota Journal of Global Trade*, vol. 14, n. 1, 2005, pp. 111-140.

36 Compliance with the duty to cooperate does not necessarily have to result in an agreement; it is sufficient to demonstrate that negotiations were initiated, conducted in good faith and on an ongoing basis [*vide* The Panel Report in the *United States–Prohibition of Imports of Certain Shrimp and Shrimp Products-Recourse to Article 21.5 of the DSU by Malaysia*– 2001(WT/DS58/RW), paragraphs 5.66 and 5.67].

37 *Vide* the European Commission press release on 20.8.2013 (IP/13/785) and the "recitals" of the Implementing Regulation.

the borders of the State adopting the measure and the State concerned.[38] In this case, the link is more than evident, given that the management of the affected fish stocks requires the cooperation of the EU and the other coastal States. This is in line with international obligations in relation to the protection of straddling fish stocks, which would be the case of the United Nations Convention on the Law of the Sea, for example, insofar as the aim is to promote the sustainability of stocks and cooperation in their management. The existence of international rules that legitimise and provide for such trade measures is an important factor for ensuring that the measure does not arbitrarily or unjustifiably discriminate against States or constitute a disguised restriction on trade.

Another important criteria set by WTO case law to ensure that measures meet the requirements set out in the preamble is that the measure be sufficiently flexible.[39] A trade measure is deemed to meet this requirement when account is taken of the policies of other countries that pursue the same or a similar objective as the domestic measures, without these having to be identical. In this regard, Article 7 of Regulation 1026/2012 provides that trade restrictions shall be lifted immediately "when the country allowing non-sustainable fishing adopts appropriate corrective measures necessary for the conservation and management of the stock of common interest", even when the measures have been adopted unilaterally and provided they do not compromise the measures adopted by the EU - including those adopted in conjunction with other countries - for the conservation of fish species.

Finally, the design and architecture of the trade measure must also be taken into account when assessing whether it constitutes a disguised restriction on international trade.[40] An assessment of these issues should reveal whether protectionism is the real motive behind environmental protection. The EU would have to stress that the measure has only one purpose: the conservation of fish stocks, and that the measure does not constitute disguised protection of Community fishery.

In short, although *a priori* the restrictive measures adopted by the EU breach trade obligations that are binding for the EU, they nevertheless constitute an exception pursuant to GATT Article XX on environmental grounds.

38 Report of the Appellate Body, case *USA-Shrimp*, paragraph 132.

39 Report of the Appellate Body, case *USA-Shrimp*, paragraph 173-175.

40 The Panel Report, case *EU-Asbestos*, paragraph 8.236.

6. THE PERMANENT COURT OF ARBITRATION CASE

Alongside the former case, Denmark, again in respect of the Faroe Islands, brought a case against the EU to the Permanent Court of Arbitration, based in The Hague, on 16 August 2013.[41] In this case, the Faroe Islands claimed that the EU had breached some of its obligations under the United Nations Convention on the Law of the Sea (UNCLOS).[42]

The complaint was filed pursuant to Annex VII of the UNCLOS, which provides that countries may submit disputes in relation to the interpretation and application of the Convention to international arbitration when the parties have not stipulated any other means of resolution. The arbitrators' ruling, as in the case of the report of the WTO's dispute settlement Body, shall be binding for the parties. On this occasion, however, it was not the EU's trade obligations that were called into question, but its management of the Atlanto-Scandian herring stock which, according to the Faroe Islands, breached Article 63.1 of the UNCLOS.

As pointed out earlier, the UNCLOS provides that the stocks occurring within the zones of two or more coastal States shall be jointly managed by these States in the appropriate manner, and that these shall agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks (Articles 63 and 64 of the UNCLOS). The obligation to cooperate in the management of straddling and highly migratory fish stocks is envisaged in a more precise manner in the United Nations Agreement for the Implementation of the Provisions of the UNCLOS on the conservation and management of straddling and highly migratory fish stocks, of 4 August 1995.[43] The aforementioned international instruments also advocate that

41 *Vide* the announcement of the case, the composition of the arbitral tribunal and its decisions on the website of the Permanent Court of Arbitration: www.pca-cpa.orshowpageg/.asp?pag_id=1554. (last visited 13.7.2014).

42 The fact that two complaints were filed with different international bodies for the resolution of the dispute cannot, strictly speaking, be classified as forum shopping given that, while the factual basis was the same in both cases, the obligations and rules invoked in the two forums were different. This is also the opinion of BENITAH, M., "The Faroe Islands Simultaneous Complaints under UNCLOS and the WTO: The Fragmentation of International Law is Well Alive", *International Economic Law and Policy Blog*, 5.11.2013; available at: http://worldtradelaw.typepad.com/ielpblog/2013/11/the-faroe-islands-simultaneous-complaints-under-unclos-and-the-wto-the-fragmentation-of-internationa.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+ielpblog+(International+Economic+Law+and+Policy+Blog) (last visited: 13.7.2014).

43 Cooperation may take the form of bilateral or multilateral agreements or a regional fisheries management organisation. Although the obligation to cooperate initially required that States enter into consultations in good faith, the 1995 Agreement appears to introduce the obligation for international

harvesting shall only be allowed when it can be guaranteed that regeneration and reproduction do not compromise their survival (the principle of maximum sustainable yield).

The political arrangement between the EU and the Faroe Islands led to the suspension of the case with the Arbitral Tribunal,[44] which was terminated when the Arbitral Tribunal issued a termination order on 23 September 2014.[45] Nevertheless, we can speculate as to what arguments might have been put to the Arbitral Tribunal, had the case continued.

It should be pointed out that Atlanto-Scandian herring stock had been managed jointly for many years by the coastal States of Norway, Russia, Iceland, the Faroe Islands and the EU through an agreed long-term management plan and pre-established shares of the Total Allowable Catch (TACs). However, in 2013 the Faroe Islands unilaterally decided to break out of these agreements and established an autonomous quota which exceeded its previously agreed share. Even if these countries are entitled to obtain higher fishing quotas, this should not have been done outside the framework for the joint management of the fish stocks. Therefore, we cannot understand how the Faroe Islands can accuse the EU of breaching the obligation to cooperate in the management of these fish stocks when it was in fact the claimant who ceased to cooperate.

Furthermore, prohibition to access Community ports is a matter that affects the sovereignty of each country, which is a prerogative, recognised by general international law.[46] Therefore, the Faroe Islands could not invoke a breach of the UNCLOS on these grounds. Indeed, some international agreements provide for the denial of access to ports in order to combat non-sustainable fishing, or the prohibition of fish landings in

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cooperation to yield results (*vide* in particular Article 8). For more information on the subject, *vide* BADENES CASINO, M., "Las poblaciones de peces transzonales y altamente migratorias en el Derecho Internacional", *Anuario de Derecho Internacional*, no. 12, 1996, pp. 91-145.

44 On 30 June 2014, in accordance with the Parties' request of 27 June 2014, the Arbitral Tribunal issued Procedural Order No. 2 staying the proceedings for a period of 60 days. Each party was to notify the Arbitral Tribunal, prior to 29 August 2014, of their intention to resume or suspend the proceedings. The termination order is available at: http://www.pca-cpa.org/showpage.asp?pag_id=1554 (last visited: 1.10.2014).

45 The parties requested to terminate the arbitration on 21 August 2014. The termination order is available at: http://www.pca-cpa.org/showpage.asp?pag_id=1554 (last visited: 1.10.2014).

46 The International Court of Justice recalls that the concept of sovereignty extends to the internal waters and territorial sea of every State and that this State is entitled to regulate access to its ports (*vide* the ruling of 27.6.1986 in the *Military and Paramilitary Activities in and against Nicaragua* case, C.I.J. Recueil, 1986, paragraphs 212 and 213, p. 111). Furthermore, Article 25 of the UNCLOS recognises that coastal States have the right to regulate and restrict, where applicable, access to its ports. For more information on the subject, *vide* MOLENAAR, E.J., "Port State Jurisdiction: Toward Comprehensive, Mandatory and Global Coverage", *Ocean Development & International Law*, vol. 38, n. 1, 2007, pp. 225–257.

the event of unsustainable fishing practices (Article 23 of the Agreement on straddling fish stocks and highly migratory fish stocks of 1995) or illegal unreported unregulated fishing (Article 56 of the FAO International Plan of Action for 2001 and Article 9 of the FAO Agreement of 2009).[47] In this regard, the EU trade measures contain rules and strategies aimed at combating this practice,[48] including Regulation 1005/2008 to combat illegal, unreported and unregulated fishing.[49]

In short, the arguments that the Faroe Islands might have used against the EU carry less weight than the ones used in the WTO.

7. CONCLUSIONS: IS THERE A SUSTAINABLE SOLUTION?

In 2010, two countries, namely Iceland and the Faroe Islands, decided not to participate in the multilateral management of certain fish stocks in the North Sea: mackerel and Atlanto-Scandian herring. The reason for this was that they felt their respective catch quotas were not proportional to the increased presence of these stocks in their territorial waters as a direct result of climate change.

After the two countries unilaterally decided to increase their catch quotas for 2013 and several failed negotiations, the EU adopted an instrument that enabled it to take trade measures against countries that engage in non-sustainable fishing. These measures were adopted in late 2013 against the Faroe Islands in respect of Atlanto-Scandian herring.

The Faroe Islands promptly responded to the measures by filing two suits against the EU, one with the WTO dispute settlement body and the other with the Permanent Court of Arbitration, alleging that the EU had breached the obligations laid down in WTO and UNCLOS law respectively.

47 For more information on illegal, unreported and unregulated fishing in general, *vide* TREVES, T., "La pesca ilegal, no declarada y no reglamentada: Estado del pabellón, Estado costero y Estado del puerto, en J. Pueyo Losa y J. Jorge Urbina (coords.), *La cooperación internacional en la ordenación de los mares y océanos*, 2009, pp. 135-158.

48 *Vide* SOBRINO HEREDIA, J. M., "La reforma de la Política Pesquera Común y la pesca ilegal, no declarada y no reglamentada", *Noticias de la Unión Europea*, no. 277, 2008, pp. 79-92; PONS RAFOLS, X.,"La Unión Europea y el acuerdo de la FAO sobre las medidas del Estado rector del puerto destinadas a prevenir, desalentar y eliminar la pesca ilegal, no declarada y no reglamentada", *Revista General de Derecho Europeo*, no. 27, 2012, pp. 1-48.

49 Council Regulation (EU) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (DO L 286, 29.10.2008).

The tension dissipated, however, a few months ago after the European Union and the Faroe Islands entered into a number of political agreements concerning the allocation of catch quotas for mackerel stocks in the North Sea and Atlanto-Scandian herring stocks.

The fact that an agreement has been reached is a positive step towards ending the trade and fishery tensions between the coastal countries and achieving compliance with the obligation to jointly manage the fish stock enshrined in the UNCLOS. However, merely reaching an agreement does not necessarily mean that this will have a beneficial effect on the sustainability of the fish stocks concerned if the catch quotas agreed are unreasonable.

On this point, in the first of the agreements, the Faroe Islands' catch limit for mackerel stock was increased significantly, from 4.6% to 12.6%, and it is expected see a further increase next year.[50] The agreement provides for a catch of 1,047,000 tonnes in 2014, which exceeds the limit recommended by the International Council for the Exploration of the Sea (889,886 tonnes) by 18%.[51]

With regard to herring, the Faroe Islands has set itself a quota of 40,000 tonnes for 2014, which represents a significant reduction over the 2013 quota of 105,230 tonnes.[52] However, with the total quota recommended by the International Council for the Exploration of the Sea being 419,000 tonnes for all coastal States, the Faroe Islands' share should not exceed 21,500 tonnes in order to guarantee the sustainability of this fish stock.[53]

Another important issue is that the agreements provide for catch limits that exceed the minimum sustainability requirements recommended by scientists and, moreover, do not include the catches made by coastal States that are not parties to the agreements.

In response to these criticisms, the EU could well say that the political agreements put an end to the disproportionate quota unilaterally set by the Faroe Islands for

50 Article in *FIS*, "Northwest Atlantic mackerel stock agreement brings about mixed feelings", 14 March 2014; available at: http://www.fis.com/fis/worldnews/worldnews.asp?l=e&id=67161&ndb=1 (last visited 12/7/2014).

51 Article in *FIS*, "Mackerel catches in Northeast not to be increased, recommended ICES", 7 October 2013; available at: http://fis.com/fis/worldnews/worldnews.asp?l=e&id=63957&ndb=1 (last visited: 12/7/2014). Press release from the Icelandic Minister of Fisheries and Agriculture, Mr Sigurdur Johannsson, "The EU, The Faroe Islands and Norway take full responsibility for overfishing", available at http://eng.atvinnuvegaraduneyti.is/publications/news/nr/8094, 13 March 2014 (last visited: 12/7/2014).

52 *Vide* "recital" 3 of Implementing Regulation 896/2014.

53 Article in The Grocer, "Herring wars over as Faroe Islands strikes deal with EU", 12 June 2014, available at: http://www.thegrocer.co.uk/fmcg/fresh/herring-wars-over-as-faroe-islands-strikes-deal-with-eu/358439.article (last visited: 12/7/2014).

mackerel and herring stock in the North Sea. However, when concluding the agreements, it should have guaranteed the sustainability of these stocks, particularly if trade measures need to be adopted in future against a coastal State that engages in the overfishing of these resources. It is only when it practises what it preaches that the EU will be able to use, in a legal (and legitimate) manner, the trade instruments it has created to ensure sustainable fisheries.

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