

Clash of the Treaties: Responding to Institutional Interplay in EC-Chile
Swordfish Negotiations

Abstract

Scholars increasingly acknowledge that international institutions interact with each other, especially across issue areas such as trade and environment. However, scholars continue to dispute whether, and under what conditions, such regime interplay has positive or negative impacts on the effectiveness of international institutions. Existing scholarship debates whether international regimes may be compromised by inconsistencies, or whether enhanced reputational benefits make governments more likely to uphold commitments across components of a regime complex.

This article examines how institutional complexity affects state behavior. Specifically, it analyzes how governments respond to regime inconsistency, and whether they continue adhering to their commitments in the absence of material or sociological non-compliance costs.

The study tracks how state preferences and behavior changed over time when exposed to inconsistent international legal commitments

regarding trade and regulatory rights in the South Pacific swordfish fishery. In this case, both WTO and UNCLOS rules were at stake, and both dispute settlement forums accepted jurisdiction over the case. Nonetheless, Chile and the European Community resorted to negotiation outside of – but still bounded by – these established rules. Thus, this study finds that when multiple regimes regulate a particular situation, bargaining continues to take place within the boundaries established by those rules.

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In the increasingly legalized setting of international relations, states' legal rights to control natural resources can be in tension with their agreed commitments to limit interference with other transnational relations. The interplay between such institutional rules requires analysis beyond the atomized studies typically pursued (Alter and Meunier, 2009). Scholars argue whether complexity enhances or undermines international institutions. I find that, in the face of such regime inconsistencies,¹ international institutions remain relevant by narrowing the role for power-based bargaining.

As did most countries, Chile developed policies during the 1990s to prevent overfishing in its waters and protect small populations of endangered fish. The United Nations Convention on the Law of the Sea (UNCLOS 1982) requires that countries respect each others' right to control an Exclusive Economic Zone (EEZ) extending 200 miles from the coastline. Because many species swim and migrate great distances, UNCLOS also provides coastal states the opportunity to regulate some fish on the high seas if events beyond the 200-mile zone would impact a fishery within the EEZ.² Furthermore, UNCLOS requires that states "take...such measures for their respective nationals as may be necessary for the conservation of the living resources of the high

seas (UNCLOS 1982, Art. 117).” Chile has attempted to protect swordfish in the South-east Pacific Ocean by banning their import and transshipment through Chilean ports. Though protections for fish seem like a straightforward application of international legal rights and responsibilities, one must consider that UNCLOS is not the only regime in play.

In late 2000, dismayed by the restrictions placed on its vessels, the European Community (EC) filed a complaint against Chile before the World Trade Organization (WTO) Dispute Settlement Body (DSB), claiming that port restrictions constituted discriminatory trade practices (WTO DSB 2000a). In response, Chile filed suit in the International Tribunal for the Law of the Sea (ITLOS), claiming the right to regulate the local swordfish fishery (ITLOS 2000). It seems plausible that the filing party would have won its case in each of the respective courts (Lamy, 2006). Normally, one might expect some set of overarching rules to resolve “conflict of laws” cases such as this one. In fact, most nations have joined the Vienna Convention on the Law of Treaties (VCLT 1969), based on long-standing customary international law. VCLT provides a rubric for determining which laws take precedence in a situation like the Chilean swordfish dispute. However, in this case, the Vienna rules were not sufficient for determining legal hierarchy. Instead, extrajudicial negotiations yielded a settlement that rendered further tribunal proceedings unnecessary (WTO DSB 2001c/2010).

Most literature on international treaties centers on negotiation and enforcement of individual conventions. However, agreements can complement or clash with each other (Oberthür and Gehring, 2006a). For instance, the Convention on Biological Diversity is supported by unrelated negotiations to protect regional fisheries. Conversely, the whaling ban established by the International Whaling Commission requires different actions than the Convention on International Trade in Endangered Species (CITES). The rules created by a diverse range of international institutions form a complex framework of state commitments.

Uncertainty caused by inconsistent international legal provisions³ provides an opportunity to examine compliance bargaining behavior in the absence of sociological (Reus-Smit 2003) or material (Tallberg and Smith, forthcoming; Tomz, 2007; Morrow, 2007) violation costs. I hypothesize that, faced with inconsistent provisions, the parties will resort to a negotiated settlement outside of, but nonetheless constrained by, established institutions. Such settlements, while reflecting the power relationship between parties, remain bounded by expected judgments of the two dispute settlement forums involved.

This paper proceeds by reviewing legal and international relations scholarship on international regime interactions. After deriving hypotheses, I then examine the Chilean swordfish case, and finally review its implications.

Effects of regime interplay

Proliferation and potential conflicts of law

Although states join international regimes to reduce uncertainty in certain subject areas, they continue to face unclear legal results in some situations. One source of uncertainty is inconsistency among different bodies of international law (Raustiala and Victor 2004).

Recent years have witnessed a drastic increase in the number of global regimes to address trade, criminal law, and environmental protection, among other areas. Along with these new regimes have come a host of tribunals to interpret and enforce their rules. The WTO DSB is probably the most detailed and well-respected of the new dispute settlement processes, but criminal tribunals for the former Yugoslavia and Rwanda, and a new judicial tribunal for the UN Convention on the Law of the Sea (UNCLOS/ITLOS) have also played important roles in the implementation of new global rules (Kingsbury, 1999; Cichowski, 2006).

To the extent that these different subjects overlap, we will necessarily encounter situations in which one set of rules must take precedence over another. As Trachtman (2002: 89) suggests, “while there is room for creative ambiguity..., at certain junctures one organization’s norms will have to trump another’s.” As international regimes

increasingly employ legal instruments, the resulting inconsistencies among these instruments provide an opportunity to examine state behavior in a new context.

“Conflict of laws” is the branch of law that discusses what to do when “one or more of [the case’s] constituent elements are connected with more than one [polity] (Symeonides et al., 1998: 1).” We can reasonably expect that the laws of different legal systems will not always agree. As such, jurists have established rubrics for deciding which law should take precedence in a given case, depending on the residence, domicile, or other characteristics of the parties or event in question. These secondary rules create certainty by demonstrating which law holds sway in a given situation (Hart, 1961). By using this information, one can determine which law will apply, allowing educated decisions about the likely legal response to one’s action and removing the need for prolonged extralegal negotiation. Rules guide the choice of law in horizontal (i.e., apply the laws of which state or nation?) and vertical (i.e., apply federal vs. state law in a particular case?) conflicts (Symeonides et al., 1998: 4).

On the other hand, if two laws of the same polity (e.g., US federal laws) conflict, judges apply a straightforward analysis to identify which one takes precedence. They typically analyze lawmakers’ intent because the same legislative body is responsible for making both laws. As a last resort, confusion among federal laws comes before one final arbiter, the federal court system.

However, there has been relatively little discussion of what should happen when two conflicting rules exist at the same level and cover the same geographic area (e.g., the entire world), but are established by *different* governing institutions. International treaties, unlike domestic legislation, involve different decision-makers and different subject areas, and often different final arbiters, but they operate at the same level across the same territory. Therefore, successful coordination would require a secondary rule. Despite attempts (e.g., VCLT), there is currently no consistent rule governing the choice of law when multilateral treaties provide inconsistent guidance.

As D'Amato (1983: 8) explains, increasing complexity of the law, rather than filling in spaces, tends to create space for uncertainty. The same would appear to be true at the international level.

Regime interplay – state of the literature

Recent international relations scholarship has attempted to unpack such interactions among international regimes. As Alter and Meunier (2009: 21) note, international relations scholars have tended to focus on individual issues and institutions rather than exploring the “larger whole of cooperation regimes” that may lead to different outcomes. Raustiala and Victor (2004) consider such interactions within “regime complexes”, while others more generally note the possible impacts of

“regime complexity” (Alter and Meunier, 2009) or “institutional interplay” (Young, 2002; Oberthür and Gehring, 2006b; Gehring and Oberthür, 2009).

Raustiala and Victor (2004) demonstrate that related regimes must be considered because each new provision builds upon existing institutions within the policy area. In other cases, the “institutional complex” is event-specific rather than enduring (Gehring and Oberthür, 2009). That is, multiple policy fields are involved and there was no advance expectation that they should affect each other. In these situations, it would be difficult to consider the complex as rationally designed because different negotiators (often different agencies altogether) took part in their establishment and no overarching mechanism is available to manage their interaction (Gehring and Oberthür, 2009).

Nonetheless, some order must emerge from affected parties’ reactions (Oberthür and Stokke, 2011). Despite the lack of an overarching management scheme, international bureaucracies (Jinnah, 2010; Jinnah, 2011), expert networks (Jungcurt, 2011), informal interorganizational groups (Galaz et al., 2012; Reischl, 2012), and partnerships (Visseren-Hamakers et al., 2011) have developed their own responses to such complexity. Governments also operate within this system, and must determine how to behave in a complicated institutional environment. Typically, the rules put forth in one institution affect certain actors, who then respond by changing their perceptions, preferences, or behavior related to another institution. These altered views

or behaviors subsequently affect how the target institution evolves or how effective that target institution may become (Gehring and Oberthür, 2009: 129-30). This study addresses this sequence of reactions, attempting to understand how one set of rules may affect governments' compliance with another regime.

The interplay literature has grown substantially over the past decade. However, much remains to be done, and this paper advances the field in two important ways.

First, much existing literature focuses on the negotiation stage. This paper, in contrast, further analyzes how compliance behavior towards one regime alters state preferences for compliance with another set of rules (Gehring and Oberthür, 2009), and vice versa.

Second, Oberthür and Gehring (2011: 51) note that scholars need to gain a better understanding of the "governance effects" that result from "several institutions cogoverning an issue area." In response, I provide empirical evidence regarding states' management of institutional interplay. Furthermore, such interactions may result in conflict or symbiosis among regimes (Young, 2002; Oberthür and Gehring, 2006a; Biermann et al., 2009). That is, interplay may strengthen or weaken the impacts of constituent regimes, leading one scholar to question "whether the proliferation of laws, rules, and organizational forms undercuts or augments the institutionalist logic" regarding the influence of international regimes (Drezner, 2009: 66). In response,

rather than suggesting that interplay has homogenous effects, this paper explores the “conditions under which institutions tend to influence each other’s...effectiveness (Oberthür and Stokke, 2011: 335).” More specifically, I ask under what conditions regime interplay supports power-based (“strategic interplay management”) versus law-based (“problem-solving interplay management”) behaviors (Alter and Meunier, 2009; Davis, 2009; Oberthür and Stokke, 2011; Faude, 2011).

The next section explores mechanisms by which regime inconsistencies may enhance or undermine international institutions.

Hypotheses - How does regime interplay impact compliance behavior?

In his foreword to a recent volume on the topic, Young (2011: viii) notes that actors manage institutional interplay by “enhanc[ing] positive interactions and minimiz[ing] interference between and among regimes.” Such management is generally decentralized rather than directed by the institutions themselves. Despite decentralization, interplay management efforts (Oberthür and Stokke, 2011), such as international legal hierarchies (van Asselt, 2011) may also help states achieve the necessary coordination.

On the other hand, such hierarchies are often lacking in the anarchical international system, “making it harder to resolve where political authority over an issue resides (Alter and Meunier, 2009: 13).” Without clear rules, states lack clear rationale for compliance behavior (Guzman, 2008). That is, without knowing what constitutes a violation, they will not face costs for non-compliance such as reputational damage (Tomz, 2007), loss of reciprocal benefits (Keohane, 1986; Morrow, 2007), punishment (Tallberg and Smith, forthcoming), or a sense of identity inconsistency (Reus-Smit, 2003). As a result, self-interested states could exploit the uncertainty, leading to the shift from rule-based to power-based behavior (Drezner, 2009; Faude, 2011).

This lack of legal clarity provides an opportunity to examine whether states also comply in order to strengthen “credibility of the respective legal order (Zangl et al., 2012: 372).” When legal commitments are credible but uncertain, we can observe state behavior driven instead by systemic credibility goals. As Pascal Lamy, at the time representing the European Commission, noted:

parallel dispute settlement procedures under the Convention on the Law of the Sea and the WTO contained the seeds of a serious potential conflict between the multilateral trading system and the multilateral environmental protection system. This unprecedented situation of a possible conflict between two multilateral regimes intended to reinforce each other mutually, and not to cause conflict thereby jeopardizing the credibility of both systems was an issue of interest to all Members (WTO DSB, 2001b: para. 111).”

This section outlines three competing hypotheses about the effects of interplay on compliance behaviors.

Avoiding legal inconsistency – a functionalist approach

The first possibility is that parties faced with inconsistent legal provisions will avoid such difficulties by interpreting away the discrepancy. This hypothesis, often associated with legal commentators, suggests that parties wish to avoid conflict. Trachtman (2002: 85), for instance, asserts that a centralized authority would allow for a more useful international legal system with a “stable equilibrium.”

Political scientists similarly note that institutions can reduce the range of potential outcomes and allow actors to assess the probability of particular outcomes (Przeworski, 1991: 12). Clear legal requirements benefit states by increasing certainty about others’ likely behavior. Institutions also reduce uncertainty by eliminating transaction (bargaining) costs (Keohane, 1983: 155-57). Established pre-dispute decision rules promote legal certainty, thereby reducing transaction costs and power struggles associated with ad hoc diplomatic negotiation. There is a great deal of demand, therefore, for regimes that coordinate legal activity between nations.

A functionalist approach would therefore expect states to resolve regime conflicts by establishing a clear hierarchy (i.e., secondary rule) among international

legal provisions, providing clear direction when faced with inconsistent rules. Indeed, states have long pursued a systemic solution to this problem. The most well-known attempt is the VCLT (1969), which is intended to bring customary international rules of legal interpretation under one guiding body to create a common treaty interpretation code. Although the Convention codifies customary international law that was largely concerned with bilateral treaties, it is applicable to most multilateral agreements as well. It includes regulations for where and when treaties apply, how they enter into force, and how they may be amended.

For treaty inconsistencies, the most important function of the Vienna Convention comes from Article 30 (“Application of successive treaties relating to the same subject-matter”) (VCLT 1969), allowing states to share expectations about which treaty takes precedence when applicable conventions conflict. First, unless parties explicitly agree to retain the status quo, new treaties should be interpreted as replacing old provisions when rules are inconsistent (VCLT 1969, Art. 30, para. 3). Although this “latest in time rule” serves as the default, more than one-third of randomly sampled treaties include “savings clauses” whereby parties explicitly protect earlier rules (Author 2011). These “savings clause” provisions often reflect power dynamics (Author 2012) and issue area differences (Author 2011), but once in place they remove legal ambiguities. In addition to timing, membership also affects the interpretation of inconsistent rules. Specifically, if one state is party to both agreements and another

state is party to only one, “the treaty to which both States are parties governs their mutual rights and obligations (VCLT 1969, Art. 30, para. 4(b)).” Despite these seemingly clear rules, however, we will see below that the interpretation is far from straightforward in practice.

In addition to the Vienna Convention and savings clauses, smaller scale efforts have tried to deal with particular treaty inconsistency problems. First, states sometimes interpret institutional hierarchy on the basis of multi-level relationships. For instance, EU rules are often subordinated to multilateral agreements. However, these “nested” arrangements (Alter and Meunier, 2006) are difficult to establish when, as in the swordfish case, both regimes operate at the global level (Higgins, 2006).

Second, the WTO DSB has tried to avoid inter-regime disputes when possible (Safrin, 2002). However, DSB has not committed to this stance, so it is subject to change at any time, again limiting legal certainty (Lamy, 2006). In addition, this specter of DSB disapproval appears to have a chilling effect on the negotiation of trade measures in new environmental treaties (Eckersley, 2004; Author, 2011). In order to address both problems simultaneously, the WTO’s Doha Agreement instructs the WTO Committee on Trade and Environment to begin negotiations on the relationship between WTO rules and trade requirements in multilateral environmental agreements (MEAs) (WTO, 2001: paras. 31-33). Of course, the Doha Round negotiations have

resolved little in their first decade, leaving open the continued possibility of tension between MEA and WTO rules.

Canons of treaty interpretation also limit regime conflict. That is, “International tribunals, like domestic ones, are loath to interpret treaty provisions in such a way that they extinguish each other, let alone produce the opposite result of what the treaty plainly states (Safrin, 2002: 620).” International tribunals – and participant countries – generally seek to interpret away conflict if possible (Higgins, 2006; Pauwelyn, 2003).

Finally, the WTO Dispute Settlement Understanding encourages countries to find Mutually Agreed Solutions (MAS) outside the litigation process. However, each MAS still must conform to other existing WTO rules (Alvarez-Jimenez, 2011), meaning that MAS does not offer an easy route to solving disputes when other rules are inconsistent with WTO commitments.

These hierarchical solutions are formed in the context of power-based bargaining, and they are not present in many situations. However, states sometimes do enact such solutions. In these cases of successful interplay management, parties avoid legal uncertainty by clarifying relationships among inconsistent treaty rules in advance (van Asselt, 2011). Functionalists would therefore expect legal hierarchy to emerge with some regularity in response to demands for such structure.

Hypothesis 1 (functionalist hypothesis): Governments will avoid legal inconsistency by creating a clear hierarchy when multiple institutions regulate a particular situation.

Fragmentation, complexity, and power

In contrast, other scholars suggest that compliance bargaining will be driven by power relationships, particularly when enforcement certainty is lacking (Tallberg and Smith, forthcoming). Institutionalists expect rule-based behavior only when violations are costly. However, they identify a range of possible rule-driven costs. For example, sovereign borrowers repay loans in order to maintain their reputations and earn better interest rates in the future (Tomz, 2007). Countries facing retaliatory punishments are also more likely to comply with trade rules (Tallberg and Smith, forthcoming), and countries follow the laws of war most consistently when they anticipate that the enemy will stop providing reciprocal benefits in the face of violations (Morrow, 2007). Constructivists, in contrast, expect compliance due to a sense of obligation (Reus-Smit, 2003). Both institutionalist and constructivist compliance rationales depend upon clear identification of legal violations. In a state of legal uncertainty, such as treaty inconsistency, these scholars must anticipate countries avoiding legal commitments in

favor of power-based bargaining. That is, when responding to inconsistent rules, a state could justify otherwise illegal behavior due to its consistency with another regime.

As a result, some scholars of regime interplay suggest that when institutions have different objectives, behavioral interaction between them will undermine institutional performance (Gehring and Oberthür, 2009: 142). Efforts to manage institutional interplay are complicated by conflicting values, or “problem malignancy” (Oberthür and Stokke, 2011). When it is unclear which laws hold sway, the regime complex is compromised. Its impact declines because states shy away from using legal tools to accomplish their goals. When legal constraints are weak, governments must rely on ad hoc diplomacy (Abbott et al., 2000). Without rules of the game, negotiation provides a new context, and outcomes will necessarily depend upon the relative power of each side to enforce their goals. In the case of international regimes, we would expect to encounter ad hoc diplomacy (or war if the issue became serious enough) when uncertainty prevails (Trachtman, 2002).

Although the Vienna rules for treaty hierarchy appear straightforward, their actual use has been open to debate. First, the Vienna rules apply to issues of the same “subject matter”. Although conflict situations rely on events that encompass more than one issue area and are inherently related, the treaties were written to address separate issues (Fox, 2001). In the swordfish case, for instance, maritime and trade law are traditionally viewed as separate legal fields.

However, even if parties were to accept linkage through concurrent use of the treaties, they would encounter other interpretation problems. In applying paragraph 2, one must recognize that the “date” of a treaty is open to interpretation (Fox, 2001). For instance, it is unclear whether we should focus on the date of a treaty or the date of the particular rule in question. In the WTO-UNCLOS dispute, the Uruguay Round negotiations to create WTO were completed in 1994, while the current iteration of UNCLOS was adopted in 1982. However, the Uruguay Round formally annexed GATT rules originally agreed in 1947. As a result, most GATT provisions predate UNCLOS, even though their official (re)-entry into force came after UNCLOS was in effect. In this context, it becomes difficult to consistently determine which set of provisions emerged “later in time”.

Although the Vienna Convention and savings clauses serve a coordinating role, they are often insufficient to resolve inconsistency (Klabbers, 2009). Therefore, uncertainty persists, leading even staunch proponents of legal relevance to anticipate a weakened influence of rules (Higgins, 2006). If international institutions matter primarily because they create focal points for behavioral expectations, then conflicting rules would disrupt that value by creating additional possible focal points among which the parties must select. Indeed, the “creation of overlapping legal mandates with contradictory mandates could weaken all actors’ sense of legal obligation (Drezner, 2009: 66).”

Faude (2011) suggests that treaty conflict should return the parties to this pre-institutional state of nature. We would therefore expect that countries faced with inconsistent treaties will return to power-based ad hoc diplomacy, an opportunity (or perhaps excuse) for stronger parties to avoid past legal commitments. As institutionalists and legal scholars have long noted, successful implementation requires legal certainty. Without clear hierarchy, the result would seem to favor whichever country can exert the strongest influence.

At the very least, without hierarchy one might anticipate forum shopping where parties “strategically select the venue to gain a favorable interim decision for a specific problem (Alter and Meunier, 2009: 16).” As Benvenisti and Downs (2007: 597) explain, a fragmented legal system “limits the ability of weaker states to engage in the logrolling that is necessary for them to bargain more effectively with more powerful states.” The strongest players are better prepared to navigate a complex legal system (Alter and Meunier, 2009). Regime inconsistency also “provides powerful states with the opportunity to abandon - or threaten to abandon - any given venue for a more sympathetic venue if their demands are not met (Benvenisti and Downs, 2007: 597).” This venue shopping exercise may be employed by other actors as well, but in the context of powerful states’ greater material capabilities, “regime complexity endows them with additional agenda-setting and enforcement powers relative to a world defined

by a single regime (Drezner, 2009: 66).” As a result, institutions are undercut most when one of the involved regimes is at odds with great power interests (Drezner, 2009).

Many realists, institutionalists, and constructivists, therefore, would anticipate that inconsistent rules – by creating uncertainty – limit the influence of international institutions. As a result, more powerful actors should achieve their preferred substantive outcome, regardless of existing regimes.

Hypothesis 2 (Power Exploiting Legal Uncertainty Hypothesis):

Avoidance of legal hierarchy will lead to power-based bargaining when multiple regimes govern a particular situation.

Bounded bargaining

Nonetheless, others hypothesize that compliance may result instead from broader concerns about maintaining a coherent international legal system (Zangl et al., 2012). Keohane describes this situation as “diffuse reciprocity” whereby parties comply, with the expectation that others will do so in the future, thereby protecting systemic benefits. Such behavior requires “strong norms of obligation” to avoid exploitation (Keohane, 1986: 24). In most cases, it would be difficult to empirically distinguish this compliance rationale from the institutionalist explanations described above. However, in the case of conflicting regimes, parties have the opportunity to

comply even without expecting costs from violation. That is, compliance *efforts* would demonstrate systemic interests even though legality of the specific behavior remains unclear. If this explanation is accurate, then even conflicting regimes should constrain compliance bargaining. If a desire for compliance with one rule alters preferences relative to compliance with the other provision, then they should both enhance or undermine compliance simultaneously.

As Davis (2009: 29) notes, “Overlapping institutions can also promote greater compliance by increasing incentives to maintain a good reputation.” By bringing players together and affecting perceptions across issue areas, compliance with one regime may actually be necessary for bringing about reciprocal compliance in another issue area (Alter and Meunier, 2009: 18-20; Davis, 2009: 29). The more links develop across regimes, therefore, the more incentive participants have to comply with the rules of both due to systemic benefits.

As a result, inconsistent regimes nonetheless establish parameters within which negotiation can take place. Assuming that country preferences are more extreme than the expected results of either treaty, and that there exists some zone of possible agreement within which countries prefer a negotiated agreement to other alternatives (see figure 1), the negotiated outcome should indicate compliance with both regimes. That is, each participant has given up some amount of their ideal option in order to gain the benefits provided by each regime. If only one of the two legal provisions was in

play, therefore, institutionalists would expect parties to comply with a decision made on that basis.

When confronted with inconsistent rules, then, the diffuse reciprocity approach would expect that countries continue to be constrained by expected treaty outcomes. While power may re-enter the extralegal negotiations, any move beyond the center segment (zone of possible agreement between the two treaty rules) towards either country's true preference would result in the stronger party gaining legal victory in *both* institutions. This result would lead to a requirement for the violator to shift its behavior, face sanctions, or exit both institutions. Assuming that each party still values at least one of the regimes, and would not want to withdraw unilaterally from both, systemic coherence concerns should drive them to comply with both rules. Any negotiated settlement must therefore fall between the outcomes prescribed by these inconsistent rules, meaning that regime conflict could actually strengthen compliance behavior.

[Figure 1 approximately here]

Hypothesis 3 (Bounded Bargaining Hypothesis): Despite the lack of hierarchy, all negotiations will still take place within the bounds of institutional rules when multiple regimes regulate a particular situation.

Evidence – Chile, the European Community, and a regulated swordfish fishery

Downs, Rocke, and Barsoom (1996) criticize institutionalist scholars for assessing cases in which cooperation would be likely even without international institutions. I focus instead on a case in which institutional certainty was diminished, leading to an expectation (H2) that raw state power may triumph even if institutions do matter. The Chilean swordfish negotiations, therefore, provide a difficult test for hierarchical solutions (H1) or compliance with international legal constraints (H3). This analysis demonstrates, however, that international regimes can affect state behavior even in the likely absence of sociological or material punishments for noncompliance, thus supporting the Bounded Bargaining hypothesis (H3).

Tallberg and McCall Smith (forthcoming) address three stages of compliance bargaining: before, during, and after formal dispute settlement. The absence of a final legal ruling eliminates their third stage from this case, but I nonetheless examine the parties' shifting preferences over three different phases: pre-negotiation preferences, litigation demands, and negotiations following dispute initiation. As Gehring and Oberthür (2009: 151) suggest, "complex interaction situations must be analytically decomposed into individual cases with unidirectional causal pathways...subsequently recombined to causal chains and clusters." This "within-case" comparison (King et al., 1994: 217-229; Gerring, 2007: 21) across three time periods allows me to isolate the

influence of UNCLOS and GATT rules on the parties' preferences, demonstrating that position shifts occurred after each regime was called upon. This comparison, which addresses the emerging role of each institution over time, allows me to consider whether "the actors' preferences, analyses, and strategies [would have been] different if the parallel regimes did not exist (Alter and Meunier, 2009: 21)."

Before continuing, I identify expected observations from each hypothesis. First, the functionalist hypothesis (H1) anticipates that the parties will reach agreement about hierarchy among regimes in order to avoid protracted dispute. Second, the legal uncertainty hypothesis (H2) expects that the stronger party will avoid institutional constraints due to legal uncertainty. Tallberg and Smith (forthcoming) suggest that market size and dispute settlement experience are the most important determinants of power in compliance bargaining. In this case, the EC holds advantages in both areas, as a major market for Chile (Nowak-Lehmann et al., 2007) and a highly experienced dispute settlement participant (Shaffer, 2003). Furthermore, the Community also derives bargaining power from its internal political constraints (Meunier, 2005). Therefore, the legal uncertainty hypothesis predicts ad hoc bargaining, with a result closer to the EC's initial preference. Finally, the bounded bargaining hypothesis (H3) suggests that state preferences will shift when legal provisions are introduced, though it allows for power-based bargaining within those constraints. Therefore, the bounded

bargaining hypothesis predicts an outcome closer to EC preferences, but only within the confines of both institutions.

Preference shifts are identified through official government statements and documents, as well as outside reports about the negotiations. I examined all publicly available statements, including ITLOS and DSB proceedings, and government documents from both sides, as well as media coverage and secondary sources. I did not formally code each document for quantitative analysis. Instead, I used all documents to identify each government's position at each stage of the negotiations.

Although the EC is comprised of multiple member states, the supranational European Commission has exclusive competence for fisheries (Ballesteros, 2003) and external trade (Meunier, 2005) policies, meaning that only a qualified majority of member states in the European Council are required to support negotiating positions (Eeckhout 2004). Therefore, EC negotiating activity in these issue areas resembles a multi-institutional state government (Bretherton and Vogler, 1999). I nonetheless recognize the limits to generalizing from EC activity to other governments' expected behavior.

Pre-negotiation preferences

In order to assess each party's preferred outcome in the absence of regime rules, I first identify Chilean and European positions prior to the threat of WTO or UNCLOS

legal action. Although some statements may be viewed as strategic posturing, they provide the best indication of parties' preferences. These early positions should approximate each party's desired outcome before litigation and negotiations.

Chilean position. Chile has "a long history of establishing tight control over its 'coastal waters' (Shamsey, 2002: 519)." UNCLOS creates national property rights, in that it allows each country to control all marine resources within a 200 mile Exclusive Economic Zone (EEZ) from the coast (Alcock, 2011). In accordance with this right, and recognizing that swordfish populations were declining in the EEZ, Chile established rules based on Article 165 of the 1991 Ley General de Pesca y Acuicultura (General Law of Fishing and Aquaculture). The law was consolidated by Presidential Decrees 430 and 598 in 1999. These decrees prohibit anyone from catching swordfish inside Chile's EEZ. Furthermore, in order to slow the overall catch of swordfish, which are not confined to the EEZ, Chile prohibited anyone catching swordfish outside the EEZ from using Chilean ports for trans-shipment (BRIDGES, 21 November 2000/28 November 2000). In addition to the transshipment rules, Chile promoted research to determine appropriate minimum size regulations and "a satellite positioning device was required on all deep-sea fishing vessels (Shamsey, 2002: 524)."⁴ According to Chilean officials, the regulations were intended "to pressure other nations' boats fishing *beyond* the 200-mile limit to pursue the activity in a responsible, transparent and regulated manner (Capdevila, 2000)." The Spanish fleet failed to limit its fishing

in this area, leading Chilean officials to promote even stricter regulations (Shamsey, 2002: 524).

As figure 1 suggests, when acting outside the realm of international institutions, countries may take positions even more extreme than the institution would allow. Indeed, Chile developed the concept of “Mar Presencial” to suggest that regulatory oversight could extend beyond the EEZ in order to protect fisheries resources (European Commission, 1999: 35-38). Although enforcement took place in port, the Chilean approach was clearly intended to restrict fishing by foreign vessels, even beyond the 200-mile Exclusive Economic Zone. As such, the Chilean position goes even further than UNCLOS rules in attempting to regulate a broad swath of ocean outside the EEZ.⁵

In 1995, prior to the decrees, Chile proposed a dialogue with the EC to discuss conservation and European access to its ports. Indeed, as late as November 2000, Chile expressed willingness to negotiate an accord with the EC. However, Chile felt any such compact must be based on catch limitations established in its Galapagos Agreement with Colombia, Ecuador and Peru (WTO DSB, 2001b: para. 107). This agreement is not legally binding on outsiders such as the EC, meaning that Chile’s effort to require EC compliance was more extreme than the UNCLOS rules regulating the Chile-EC relationship.

European Community position. The European Community, on behalf of its member states, was clearly upset by Chilean laws affecting European boats in the southeast Pacific Ocean. Facing pressure from the Spanish National Association of Owners of Deep-sea Longliners (ANAPA), the Community investigated the legality of these Chilean provisions (European Commission, 1998). After an initial evaluation, EC also took an extreme position, looking for a better deal than likely could have been achieved through the WTO DSB process.

First, early EC statements go beyond WTO strictures, suggesting that no limits should be placed on fishing or transshipment even if such measures were intended to “protect human, animal or plant life or health (GATT 1994/1947, Art. XX(b))” or were related “to the conservation of exhaustible natural resources (GATT 1994/1947, Art. XX(g)).” The Commission suggested that these exceptions were irrelevant because the species was not known to be exhaustible (i.e., it was not listed under CITES) (European Commission, 1999: 52) and Chile had not made sufficient efforts to negotiate an agreement with the EC (European Commission, 1999: 55-56). Of course, as noted above, there is evidence of ongoing negotiations, but they began after Chile’s law and decrees were enacted.

Second, despite Chilean attempts to gain more information, and shared information of Chile’s own management practices, the EC was unwilling to provide the requested information (Serdy, 2002: 13). As Chilean representatives noted later, “Chile

had not been able to obtain statistics concerning the EC's catches on the high seas adjacent to Chile and still less on the conservation measures applied by the EC (WTO DSB, 2001a: para. 66).” The EC's unwillingness to supply data exceeds WTO limits on regulatory practice. Instead, the EC's desired outcome was a complete lack of regulation or monitoring.

Finally, in addition to these substantive concerns, the Community also suggested that it deserved damages to compensate for the purported injuries caused by Chilean regulation. In the initial assessment, the Commission claimed that the European fishing industry should be compensated for injuries amounting to costs from using a more distant port (5-7% of total operational costs), lost market share, and harm to the Galician fishing community, among other concerns (European Commission, 1999: 64-73).

The EC requested damages and “immediate access to Chilean ports for Community-registered vessels catching swordfish in the Pacific while bilateral and multilateral negotiations had been initiated (WTO DSB, 2001b: para. 108),” suggesting that the Community – at least in Chile's estimation – wanted even less regulation than the DSB had allowed in previous cases (Serdy, 2002: 13).

[Figure 2 approximately here]

Early negotiations and intransigence. During 2000, two high-level meetings took place, but “the parties would not recede from their positions,” with the Europeans demanding port access “as a matter of right” and Chile refusing to provide such access “in the absence of an adequate management scheme (Orellana, 2002: 68-69).” According to European authorities, “no amicable resolution of the dispute could be reached (European Commission, 2007: 30).”

One imagines that the EC, as a stronger party, could have exerted its will at this stage, perhaps by threatening to discontinue economic cooperation with Chile in other areas. Indeed, Chile and the EC were simultaneously engaged in bilateral trade negotiations (Television Nacional de Chile, 1998). One economic assessment of the eventual agreement suggests that Chile was far more dependent than EC on the market access resulting from proposed cooperation (Nowak-Lehmann et al., 2007). However, the Community turned instead towards legal action.

By this time, Chile, Colombia, Ecuador and Peru signed the Galapagos Agreement to conserve south-eastern Pacific Ocean fisheries. Each country agreed to limit annual catch of certain threatened fish species in the area. The agreement described rights and responsibilities only for its members. As such, fishing within the quotas was effectively limited to these four countries. However, any other interested countries were welcome to accept the rules and join the treaty. That is, the European Community could participate in the Galapagos Agreement, but it would have to follow

rules established by the charter members (WTO, 2000). In the absence of legal proceedings, neither party was willing to move towards agreement.

Litigation demands: legal complaints and shifting preferences

In late 2000, the EC declined an offer to join the Galapagos Agreement, and filed a DSB complaint against Chile. Although Spanish ships had not been fishing within the EEZ, they had been using contiguous international waters to catch swordfish, which they trans-shipped in Chilean ports. The EC claimed that the law would cost European fishermen approximately US\$6.5 million per year. While recognizing the need for conservation, the Community suggested that any conservation measures should be decided by open membership multilateral agreements. As major participants in the fishery, Spanish fishermen claimed that they had been shut out from the decision-making process (BRIDGES, 26 April 2000). A DSB panel was formed to address the issue in the context of WTO requirements. The case gained attention as the first instance of a developed country complaining against a developing world environmental measure in the DSB (BRIDGES, 25 July 2000).

In its request for a Dispute Settlement panel, the European Community requested that the Chilean law be denounced, as it had demanded in earlier bilateral negotiations. The EC argued that the prohibition on transshipment violated GATT

Articles V and XI, regarding freedom of transit and restriction on quotas. However, unlike previous requests to avoid restrictions altogether and collect damages, in this context the Community requested further negotiations regarding the terms of port access (WTO DSB 2000a/b). In shifting the focus towards “an agreement on the long-term conservation and sustainable use of swordfish resources in the South Pacific (WTO DSB, 2001b: para. 102),” the Community dropped its absolute opposition to a regulated fishery and implicitly acknowledged that even GATT rules would allow some barriers to trade if they were intended to conserve natural resources. Although the European Commission had taken pains to examine the legal implications of UNCLOS in this case (European Commission, 1999: 33-44), this body of law was ignored in the European DSB petition.

In response, Chile claimed that the dispute was environmental rather than economic in nature, and should therefore be addressed under UNCLOS (WTO DSB, 2001b: paras. 109, 112). Chile asked ITLOS to decide “whether the European Community has complied with its obligations under the Convention...to ensure conservation of swordfish, in the fishing activities undertaken by vessels flying the flag of any of its member States in the high seas adjacent to Chile’s exclusive economic zone (ITLOS, 2000: para. 3a).” Chile asked the Tribunal to consider whether the Community had “complied with its obligations under the Convention, in particular article 64 thereof, to co-operate directly with Chile as a coastal State for the

conservation of swordfish in the high seas adjacent to Chile's exclusive economic zone as also to report its catches and other information...(ITLOS, 2000: para. 3b)” With these requests, Chile demonstrated that its position was no longer to exclude EC ships altogether, but rather to hold those vessels to conservation practices agreed under UNCLOS.

In this ITLOS pleading Chile continued to note concerns about the European Community infringing on Chile's “sovereign right and duty...to prescribe measures within its national jurisdiction for the conservation of swordfish and to ensure their implementation in its ports, in a non-discriminatory manner (ITLOS, 2000: para. 3c).” However, while the Chilean government maintained its position on the right to regulate, Chile now acknowledged that its regulatory sovereignty could be limited by the requirement for non-discrimination.

Following Chile's request, ITLOS formed a Special Chamber to address the case. Each party accepted jurisdiction of both DSB and ITLOS (ITLOS, 2000), suggesting that Chile and EC had moderated their positions.

Expected litigation outcomes. In order for WTO and UNCLOS rules to affect bargaining behavior, the parties would have to anticipate that their complaints would succeed in the respective forums. To assess the likely outcome in each dispute

settlement forum, I rely on scholarly legal opinion by consulting all law journal articles that reference this dispute.⁶

Many commentators acknowledge the uncertainty created by competing dispute settlement processes (e.g., Broude, 2008-09; Lamy, 2006; Marceau, 2001; Gehring, 2001). Some anticipate that the DSB would support the EC on grounds that a country cannot prevent trans-shipment (GATT Article V) or import (GATT Article XI) (Salama, 2005). As Shamsey (2002: 532) notes, “Chile would probably not have an extremely good chance of winning its case before the WTO” because this unilateral measure could easily have been deemed to adversely affect the trade of another WTO member state. Furthermore, Chile’s defense of Article XX exceptions was questionable because it would require proof that swordfish are a global public good (Hey, 2009) and that the regulation was not applied in an arbitrary or discriminatory manner, a difficult case to make when the results favor one country’s vessels over those of another member state (Shamsey, 2002: 533). Therefore, it was not a stretch to expect that the EC would have won its complaint before the WTO DSB, though this view is not a consensus (Stoll and Vöneky, 2002).

ITLOS, on the other hand, was expected by many to decide in favor of Chile on grounds that Members have the right (probably even the duty) to conserve species within their EEZ (Salama, 2005), based on UNCLOS Articles 117-119. Article 117 presents states with a “duty to take, or to co-operate with other States in taking, such

measures for their respective nationals as may be necessary for the conservation of the living resources of the high seas (UNCLOS 1982, Art. 117).” Article 119 calls on member states to “take measures...to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield (UNCLOS 1982, Art. 119).” As outlined in Article 64, this activity may require attention to, and regulations over, the nearby high seas for straddling and highly migratory stocks. UNCLOS allows a coastal state to further regulate that part of the fishery by creating incentives for catch reduction. Chile did not ban fishing outside of the EEZ altogether, merely instituting legal incentives for avoiding such action (Rau, 2002). The mandate for cooperation in Articles 64 and 117 could therefore result in an ITLOS decision favoring continued negotiations rather than denunciation of Chile’s rules. Without the influence of WTO rules, some commentators suggest that UNCLOS-based deliberations would likely have favored Chile, as evidenced by the Europeans’ eagerness to proceed in the DSB rather than returning to bilateral negotiation (Shamsey, 2002: 538). Again, this conclusion is not certain due to concerns about the legality of the Galapagos Agreement (Stoll and Vöneky, 2002; Boyle, 2005).

Assuming that each party was able to win in the forum it petitioned, the tension between these expected rulings could have been resolved with sufficiently clear second level rules. However, the subject matter differences and timing confusion made VCLT rules difficult to apply in this case. On the whole, then, a lack of hierarchy leaves us

with two potentially inconsistent decisions if both cases were to be litigated. At the very least, the uncertain legal outcome – coupled with each side’s belief that they would win – creates the legal confusion driving all three hypotheses above. The lack of a hierarchical solution at this stage – despite its potential benefits – refutes the functionalist hypothesis.

Position shifts in light of litigation. Both parties’ positions shifted noticeably once DSB and ITLOS became involved. Once forced to demonstrate behavior consistent with an international regime to advance their claims, both parties’ positions softened and moved within the boundaries created by WTO and UNCLOS rules (see Figure 3). As noted above, EC shifted from requesting unfettered access to recognizing that limits could be placed on port access as long as they fell within exceptions allowed in GATT Article XX. However, the EC still rejected the relevance of ITLOS for addressing this case, directly questioning the tribunal’s jurisdiction (ITLOS, 2000: para. 3h). Much of this antipathy towards ITLOS appears to stem from strategic concerns that victory in this forum “would have no consequences in terms of removal of the impugned trade barrier (European Commission, 1999: 44).” Nonetheless, once UNCLOS entered the conversation, European positions shifted to focus on legality under this agreement rather than merely attempting to avoid it. Abandoning its previous claims of ITLOS irrelevance, therefore, the Community pushed for annulment of both Chilean Decree 598 and the Galapagos Agreement based on UNCLOS

provisions regarding freedom of navigation and fishing on the high seas, as well as the prohibition on claims of sovereignty over high seas resources (ITLOS, 2000: paras. 3e/f). This shift demonstrates the stronger party's willingness to accept some constraints on sovereignty and instead work through a tribunal likely to limit its rights.

Chile also shifted its negotiating position after entering the litigation realm. Although Chile continued to note sovereignty concerns in ITLOS pleadings, the government demonstrated a new willingness to negotiate with the EC. Although Chile continued to deny the relevance of WTO rules, the government participated in these proceedings, attempting to demonstrate that its rules did fall under GATT Article XX exceptions for natural resource management (WTO DSB, 2001b: para. 112). Rather than continuing to claim absolute sovereignty over fishing regulations, Chile shifted to a position that allowed port access restrictions based on a need to apply UNCLOS-derived conservation rules outside the EEZ. At this point, Chile took pains to note that its rules were designed to avoid an unfair disadvantage to local Chilean fishers who were already bound by stricter rules (WTO DSB, 2001b: para. 105). These position shifts demonstrate how international commitments softened both parties' claims and brought them closer to a negotiated settlement, as the bounded bargaining hypothesis (H3) anticipates.

[Figure 3 approximately here]

Beneath the shadow of litigation: a negotiated settlement

Consultations continued within these constraints. During this stage, the parties proposed an agreement whereby each could fish, but with limited vessels from each party (BRIDGES, 12 December 2000).

After extensive negotiations and legal threats, the parties finally reached a tentative agreement in January 2001, balancing the goals of UNCLOS and GATT (European Commission, 2007: 30). The settlement allowed four vessels from each party, with scientific observers on board each boat. Each party's fleet was allowed a maximum swordfish catch of 1000 metric tons per year. Participating EC vessels were granted access to three Chilean ports for landing or trans-shipment. They had to notify authorities 72 hours before an expected arrival in port, and they are subject to inspection upon arrival. The newly formed EC/Chile Bilateral Scientific and Technical Commission (BSTC) enforced the agreement, and the parties committed to finalizing "new forms of multilateral cooperation" by 2002 (WTO DSB 2001c).

This agreement represents opening of Chilean ports, but also European acceptance of a satellite-based vessel monitoring system (VMS) and on board scientific observation (Orellana, 2002: 70). In the absence of WTO and UNCLOS constraints, it is hard to believe that either party would have accepted these new rules. While the

agreement does represent a compromise bounded by the two competing regimes, it also appears consistent with the balance of power within those boundaries. In addition to the generally stronger position of the EC based on global economic measures, the result appears responsive to Chilean concerns about ongoing bilateral trade negotiations (Granger, 2007) that had begun in 1998 and yielded agreement in 2002, just after the swordfish dispute reached interim resolution (European Commission, 2012). In fact, Orellana, who has counseled Chile's Ministry of Foreign Affairs on environmental issues, notes that "this issue of port access was thus seen as a 'stone in the shoe' [for Chile], an obstacle to the higher goals of free trade (Orellana, 2002: 69)." This statement is consistent with analyses that Chile would benefit more than EC from resulting trade cooperation (Nowak-Lehmann et al., 2007). The Community's ability to link benefits in another negotiation demonstrates a strong position, leading us to better understand why the EC was able to gain port access while giving up relatively little by accepting monitoring and limited restrictions on vessel numbers.

The interim arrangement remained in place for nearly a decade, with Chile and the EC finally agreeing on similar permanent provisions in 2010 (WTO DSB 2010; ITLOS 2009). Chile agreed to accept EC vessels if they could present evidence of operating outside Chile's EEZ (European Commission, 2007: 31). The resulting arrangement relied on the BSTC to continue its scientific coordination role and develop a further work program on ecosystem management. The agreement provided victories

for Chile because it acknowledged the country's right to regulate this fishery and require monitoring of foreign vessels. However, these victories were narrower than Chile's original preferences (European Communities, 2010). The European Community succeeded in its primary goals to open ports and eliminate any fish size limits (European Communities, 2010). This outcome represents a victory for European aims of limiting Chilean regulation. Nonetheless, this victory was tempered by the acknowledgement of Chile's right to regulate within the bounds of GATT Article XX exceptions. In that sense, following the clash of regimes, each party – including the stronger EC – was willing to be bound by the parameters of the two seemingly contradictory institutions.⁷ However, the result is closer to EC preferences because the ports were indeed opened to vessels carrying swordfish.

[Figure 4 approximately here]

Findings and conclusions – power within bounds

As we have seen, contrary to the functionalist hypothesis (H1), governments did not create a clear hierarchy to deal with regime overlap in the swordfish case despite the benefits that governments might anticipate from such action. The Vienna Convention and other secondary rules are ill-prepared to deal with complex treaty inconsistencies, and the parties did not establish an alternative. Instead, as scholars of international negotiation would anticipate, inconsistent rules pushed bargaining towards

the realm of power-based ad hoc diplomacy, as the legal uncertainty hypothesis (H2) predicts. However, despite the failure of an overarching legal system to provide certainty, international regimes still constrained negotiations, in line with the bounded bargaining hypothesis (H3). Power clearly matters, especially when non-compliance responses are unlikely, but a desire for legal coherence and future systemic benefits still limit ad hoc bargaining behavior.

Before moving on, I address two alternative explanations for compliance behavior. First, a liberal account would suggest that compliance is more likely when two democracies are involved (Slaughter, 1995). Kagan (2003) anticipates that EC participants have an even greater desire to support international law due to the legal basis of the organization itself. However, as with institutionalist and constructivist rationales discussed earlier, this explanation does not address compliance under conditions of legal uncertainty. Furthermore, it cannot explain the EC refusal to shift behavior *before* legal claims were filed, nor can it account for the negotiations that emerged. Nonetheless, I recognize that EC's supranational character may limit generalizability of these findings to other states.

Second, one might consider that this result emerged simply because the EC had a stronger legal case, leading to an outcome closer to the EC preference in the shadow of the law.⁸ However, this hypothesis fails to explain the nine-year delay between interim and final settlements. If the EC was confident of its legal position and

unsatisfied with the interim settlement, it could have returned the case to both ITLOS and DSB for final judgments. This willingness to accept such a delay is in line with the high degree of uncertainty portrayed by legal commentators.

Power matters under regime inconsistency...

When initial negotiations deadlocked, both parties first brought their concerns to formal dispute settlement forums. However, once it appeared that these forums might provide inconsistent results, the parties once again pursued power-based diplomacy. In this context, scholars (e.g., Drezner, 2009; Benvenisti and Downs 2007) anticipate that the stronger party will focus on the forum most deferential to its interests rather than accepting other commitments.

Indeed, despite UNCLOS rules, Chile was unable to maintain its preferred limitations on swordfish harvesting. The EC gained a major victory on the opening of Chilean ports to European vessels, limiting the influence of UNCLOS. European influence continues to play a major role in the new regime that is dependent on scientific expertise, following European desires to control the new situation. The agreement also introduces restrictions on the Chilean fishing industry, despite sovereign control over the EEZ.

This advantage to the more powerful participant reflects the legal uncertainty hypothesis that power-based bargaining will emerge when multiple institutions regulate a particular situation.

But institutions remain influential

However, while power matters in a state of uncertainty, outcomes remain bounded by the rules to which states have agreed. Indeed, UNCLOS and WTO rules continued to influence parties' preferences, even when inconsistent rules challenge the role of dispute settlement forums. This result appears related to parties' interests in retaining other benefits from each regime, along with concerns about systemic damage that could be incurred by ongoing rule inconsistency.

Despite EC bargaining power, Chile was able to achieve a better outcome than it could have expected in an anarchic world. Rather than simply accepting EC demands for open port access, as Chile might have done without rules, the EC was forced to accept Chile's proposed vessel limits and monitoring. Without the robust ITLOS process, and Chile's credible threat to return and reopen ITLOS proceedings, the EC could simply have chosen its preferred fishing rules.

The mixed outcome indicates that institutions still matter, despite regime inconsistency. Without such rules, the more powerful EC could have ignored Chile's

laws altogether. Instead, the negotiations took place within the boundaries of expected institutional outcomes. While the EC could benefit more from a WTO ruling, even that tribunal would not have provided it with the unfettered fishing access it wanted. Had the Europeans negotiated for such an extreme position, they would have lost support within the WTO as well. Similarly, had Chile attempted to ban EC ships altogether from the fishery (outside the EEZ), the Europeans could have challenged their actions in ITLOS. Despite legal uncertainty, the parties overcame regime inconsistency. As such, UNCLOS and WTO served as bookends between which the possible realm of negotiated outcomes stood. Legal constraints were reinforced by regime interplay, lending support to the bounded bargaining hypothesis (H3).

Although such regime conflicts are rare at the international level, they provide a unique opportunity for assessing the role of international institutions in the absence of non-compliance costs. While this ad hoc negotiation may allow for outcomes tailored to the specific situation, the result demonstrates concerns for international regimes even when they lack clarity.

Gilligan et al (2010) anticipate that greater legal precision can lead to pre-trial settlements. The only expectation in this case was that court decisions would produce further uncertainty, thus limiting the potential role for international regimes.

Nonetheless, bounded by two sets of rules, Chile and the EC found common ground. Rather than relying on courts to determine an exact outcome, they turned instead to bounded bargaining, a partial triumph for a fragmented international system.

Figures [Please note figures are also attached separately as .eps files.]

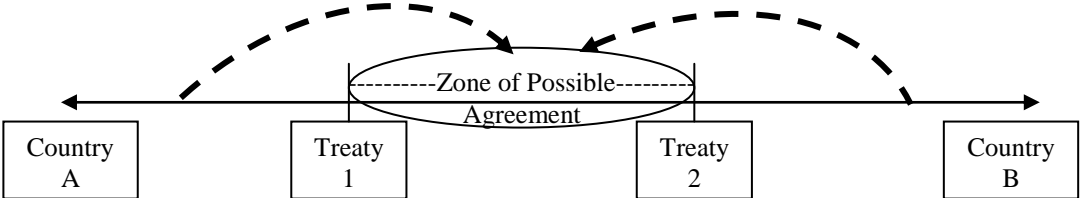


Figure 1. Position of expected outcomes based on conflicting treaties (1/2) and country preferences (A/B).

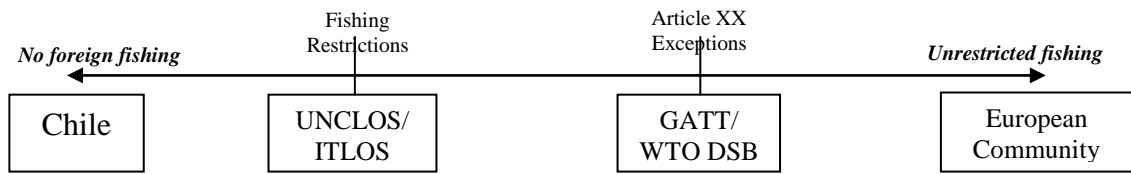


Figure 2. Parties' positions prior to negotiation

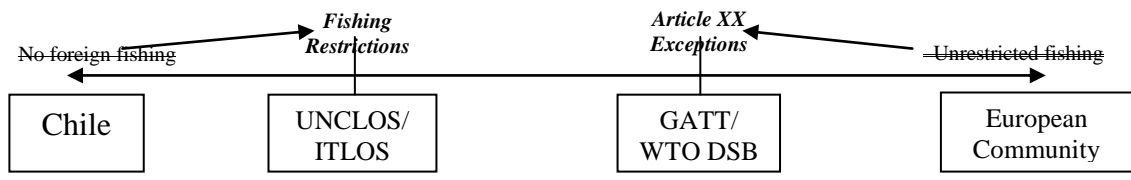


Figure 3. Parties' positions in litigation

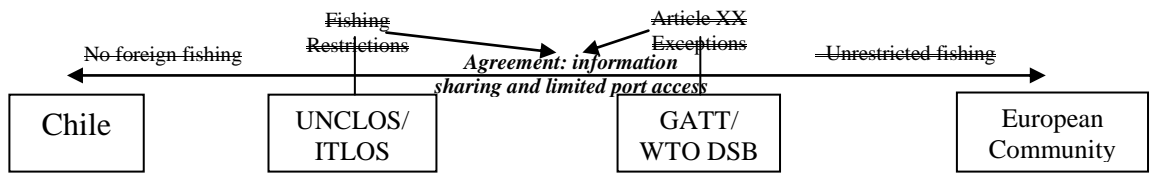


Figure 4. Agreement in the Swordfish case

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¹ A regime is defined as a type of international institution (see, e.g., Levy et al., 1995; Haggard and Simmons, 1987), meaning that regime interplay is one type of institutional interplay (Stokke and Oberthür 2011). Throughout this article, I use “regime” and “institution” interchangeably because all of the referenced institutions are of the regime variety (i.e., they are “social institutions consisting of agreed upon principles, norms, rules, procedures and programs that govern the interactions of actors in specific issue areas (Levy et al., 1995: 274)”).

² UNCLOS Article 63 provides that coastal and fishing states “shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area [emphasis added].” Chile and regional partners therefore established the Galapagos Agreement of 2000 for conserving marine living resources in the Southeast Pacific. The EC declined to participate in this agreement, though the members did seek input. UNCLOS parties have also specified further details in a separate 1995 agreement on straddling and highly migratory fish stocks. However, Chile has not ratified this agreement, leaving the aforementioned rules in place.

³ International law is one tool employed by regimes to govern actors' interactions with each other (Abbott et al., 2000). Therefore, I refer to legal inconsistencies throughout this article as one manner in which regimes interact (see, e.g., Raustiala and Victor, 2004; van Asselt, 2011).

⁴ Quoting from: Communication from Mission of Chile to the General Directorate of Foreign Relations of the European Communities, Embassy of Chile, Washington, D.C., Environmental Section (Sept. 1, 2000).

⁵ Chile has not signed the UNCLOS Agreement on Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, and some EC members also had not yet ratified it when this dispute began (European Commission, 1999: 39).

⁶ Huth et al. (2011) take this approach to develop expectations for territorial disputes. A summary of each scholarly legal opinion is available from the author.

⁷ As one anonymous reviewer noted, UNCLOS and WTO rules are accompanied by other international norms that might limit the EC's desire to retaliate. Nonetheless, these norms did not prevent initial efforts by both sides to harass each other before the simultaneous legal proceedings emerged. However, they may have limited the EC's retaliatory options.

⁸ I thank an anonymous reviewer for raising this possibility.