UNIVERSITÉ DE NEUCHÂTEL
FACULTÉ DE DROIT ET DES SCIENCES ÉCONOMIQUES

CONFLICT OF NORMS
IN PUBLIC INTERNATIONAL LAW

THE EXAMPLE OF THE WORLD TRADE ORGANIZATION: INTERNAL HIERARCHY AND HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW

THÈSE

PRÉSENTÉE À LA FACULTÉ DE DROIT ET DES SCIENCES ÉCONOMIQUES
POUR OBTENIR LE GRADE DE DOCTEUR EN DROIT

PAR

JOOST PAUWELYN

NOVEMBRE 2001

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Monsieur Joost Pauwelyn est autorisé à imprimer sa thèse de doctorat en droit intitulée: "Conflict of norms in public international law, The example of the World Trade Organization: internal hierarchy and how WTO law relates to other rules of international law".

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Le Doyen
de la Faculté de droit
et des sciences économiques

Ernest Weibel

PREFACE

At heart, this study is inspired by a willingness to see more to life than money. Trade is a money-making exercise. The statistics show that trade liberalisation, the WTO's *leit-motif*, does increase welfare. The WTO is "good for you". This cannot, and has not, been stressed enough. There is nothing to be ashamed of when supporting the WTO's efforts in liberalising trade. It makes the world a better place. But at the same time, trade is but an instrument to achieve nobler goals: truly global welfare, political freedom, social protection, etc. Given the diversity of WTO members, these goals must be set by each member individually, preferably, of course, in cooperation with other members. When genuinely pursued, such goals must trump the instrument of trade, even if they are not set out in the WTO treaty itself. WTO law is not a secluded island but part of the territorial domain of international law. The WTO, important as it may be, must thus be put in perspective. For public international law at large, this approach pleads for the unity of international law, not its fragmentation. However, to achieve this unitary view, rules must be developed on how norms of international law interact. This is what this study attempts to do.

I am much indebted to the supervisors of this thesis, Joseph H.H. Weiler, Jan Wouters and, particularly, Petros C. Mavroidis, who has supported me enormously throughout the production of this work. This is an opportunity also to thank those who nurtured my fascination for the law: Alan E. Boyle, Ian Brownlie, William J. Davey and Cornelius Van der Merwe. Thanks also to my colleagues at the WTO legal affairs divisions. Without the support and motivation offered by Fanny and Luka, my wife and daughter, as well as my parents, this thesis would not have seen the light of day.

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ABBREVIATIONS

AJIL	American Journal of International Law
ASIL	American Society of International Law
BISD	Basic Instruments and Selected Documents
BYIL	British Yearbook of International Law
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CTE	Committee on Trade and Environment
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Community
ECHR	European Convention (Court) on Human Rights
ECJ	European Court of Justice
ECR	*Recueil* of the Judgements of the ECJ
EJIL	European Journal of International Law
FAO	Food and Agriculture Organization
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GYIL	German Yearbook of International law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IIL	Institute of International Law
ILC Draft 1996	Draft Articles on State Responsibility adopted on first reading, ILC 48nd session, 1996
ILC Draft 2000	Draft Articles on State Responsibility provisionally adopted by the Drafting Committee on Second reading, ILC 52nd session, 2000
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Office
ILR	International Law Reports
IMF	International Monetary Fund
ITLOS	International Tribunal on the Law of the Sea
JIEL	Journal of International Economic Law
JWT	Journal of World Trade
MEA	Multilateral environmental agreement
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
PCIJ	Permanent Court of International Justice
RECUEIL DES COURS	Recueil des cours de l'Académie de droit international (The Hague)
RGDIP	Revue Général de Droit International Public

SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Intellectual Property Rights
UN	United Nations
UNCLOS	United Nations Convention on the Law of the Sea 1982
UNCTAD	United Nations Cooperation on Trade and Development
UNEP	United Nations Environmental Programme
UNTS	United Nations Treaty Series
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
YILC	Yearbook of the International Law Commission

CHAPTER I. THE TOPIC

"In due course the international legal order will no doubt either have to be equipped with a more clearly established hierarchy of norms, and more powerful sanctions, or decline and perish. The present is an era of either dawn or twilight".[1]

"The measure of success which is achieved in eliminating and resolving conflicts between law-making treaties will have a major bearing on the prospect of developing, despite the imperfections of the international legislative process, a coherent law of nations adequate to modern needs".[2]

What follows is about "conflict", more particularly conflict between "norms" of "public international law". The prime example referred to will be the law of the World Trade Organization. The crucial question in this example is: how does WTO law relate to other rules of public international law? The internal hierarchy between norms part of the WTO treaty[3] is also addressed. We not only examine these questions *in abstracto*. We also assess them in the more concrete context of WTO dispute settlement.

A. Conflict

The scope of this work is limited to situations of "conflict" between legal norms. The main question is, therefore: when there is a conflict between two norms, which of the two norms should be applied? This question relates to the hierarchy of norms in international law.

Before suggesting ways to resolve conflict of norms, we shall have to define first what is meant by "conflict". In many instances, what may *seem* like a conflict will not *be* a conflict but only a divergence which can be streamlined by means of, for example, treaty interpretation. This necessary exercise of identifying when exactly two norms are "in conflict" means that we cannot limit this study to setting out a number of rules of priority in international law. In addition, we shall need to address the definition of conflict and the different avenues that may lead to convergence of norms in a conflict that is apparent only, not real.

B. Conflict of *Norms*

1. Norms versus the pre-normative and norms versus process

Crucially, only conflict between *legally binding "norms"* is dealt with. We use the notion of "norms" and that of "rules" interchangeably. We shall not address the inter-play between norms and elements of a pre-normative character. As a result, this work does not generally address, for example, the influence of pre-normative elements (such as the *travaux préparatoires* of a treaty or state practice) on the interpretation, modification or termination of norms.[4] Nor shall we address the impact of what is referred to as "soft law" even though an increasing number of authors consider this "soft law" to be of a normative value, albeit not legally binding in and of itself.[5] Others, in contrast, are of the opinion

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[1] WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 88 (1964).
[2] Wilfred Jenks, *Conflict of Law-Making Treaties*, 1953 BYIL 401-453, 453 (hereafter "Jenks, *Conflict ...*").
[3] When referring to "WTO treaty" we mean the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, concluded in Marrakesh, Morocco, on 15 April 1994. The sources of the wider notion of "WTO law" are discussed below, Chapter II, Section C.
[4] For an overview of the impact of subsequent practice on treaties, see WOLFRAM KARL, VERTRAG UND SPÄTERE PRAXIS IM VÖLKERRECHT (1983).
[5] See, for example, Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 22-53. Pellet concludes that: "1. law is normative,

that "soft law" is of a pre-normative value only and is, in fact, not "law" at all.[6] Pre-normative elements, as well as norms that are not legally binding, may well be crucial in treaty interpretation so as to resolve apparent (but not genuine) conflicts. Yet, our focus here will be on what to do in case such harmonious interpretation is *not* possible, i.e., on what to do in case an international adjudicator is faced with a genuine legal conflict between two legally binding norms.

This focus on legally binding norms, and the conflicts that may arise between them, results from the need to delimit the scope of this study. It does not in any way imply that international law is, or should be, limited to a number of positive rules. As Rosalyn Higgins expressed in the first two sentences of her The Hague general course: "International law is not rules. It is a normative system … harnessed to the achievement of common values".[7] That international law is not just "rules" (or what Higgins refers to as "accumulated past decisions"), but rather a continuous "process" (from the formation of rules to their refinement by means of application in specific cases, with multiple actors, institutions and legally relevant instruments and conduct at play) will become apparent across this work.[8] Still, the topic of this thesis is conflict and hierarchy between legally binding norms, in particular, *as they may be invoked before an international court or tribunal*. The hierarchy of actors, institutions and values will shed valuable light on this examination, but is not our main concern here.[9]

In the words of Bos, the standpoint taken in this study is that of the "consumer" of international law, not that of the "producer" of international law.[10] States before an international court or tribunal, where conflicting norms may be invoked, are, indeed, "consumers" of international law or "law-takers". From that perspective, it is crucial to know what the law is, where it can be found and how the judge will apply it in case there is, for example, a conflict of norms. However, given the lack of a centralised "legislator" in international law, as well as the optional nature of international adjudication, states are also, even mostly, "producers" of international law or "law-givers". From that perspective, clearly circumscribing what international law is and is not, is of less importance. The "law-giver" can give her own interpretation to existing norms and always produce new norms to her liking. International law from this abstract "producer's" viewpoint is more open to extra-legal considerations and corresponds perhaps better with every-day reality in international relations. Nevertheless, the narrower "consumer's" approach, increasingly important in fields, such as the WTO, with compulsory

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not positive; 2. it is made of binding and non-binding norms; 3. State will can create obligations (binding rules); and 4. it can also create non-binding norms of conduct". Elsewhere, Pellet makes a distinction between « le juridique » et « l'obligatoire », "soft law" being part of the former, not the latter (NGUYEN, Q. D., DAILLER, P. and PELLET, A., DROIT INTERNATIONAL PUBLIC 1999, para. 254, hereafter "Nguyen, *Droit …*").

[6] In this sense, see, particularly, Prosper Weil, *Towards Relative Normativity in International Law?*, 1983 AJIL 413-442. Weil notes that "it is no simple matter for a jurist to determine what may be called the normativity threshold: *i.e.*, the line of transition between the nonlegal and the legal, between what does not constitute a norm and what does". He is of the view that acts that "do not create rights or obligations on which reliance may be placed before an international court of justice or of arbitration" and acts "failure to live up to [which] does not give rise to international responsibility" are of a pre-normative character only (ibid., 415).

[7] Rosalyn Higgins, *General Course on Public International Law*, 230 RECUEIL DES COURS 23 (1991-V).

[8] Criticising the traditional theory on the sources of international law, Abi-Saab phrased it thus: "Elle [the traditional theory] représente le développement du droit en termes d'explosions et de ruptures, plutôt que de transitions et de transformations, ou comme un processus continu et en constante évolution … Nous aboutissons ainsi à une théorie de création juridique par 'big bang' … En réalité cependant, le droit international, comme tout droit, ne provient pas d'un 'néant' ou d'un vide social » (Georges Abi-Saab, *Les Sources du Droit International: Essai de Déconstruction*, in LE DROIT INTERNATIONAL DANS UN MONDE EN MUTATION, MELANGES E.J. DE ARECHAGA, 1994, 29-49, at 47).

[9] As Weiler and Paulus remarked on the question put to them "Is there a hierarchy of norms in international law?": "Should we not also be thinking of international law as process rather than, or as well as, norms? Operationally, does the image of the lawyer determining the content of norms and actors behaving or misbehaving accordingly really capture international legal process? Normatively, is the hierarchy of norms going to tell the true story of what is important and what is unimportant in international law rather than, say, the hierarchy of actors or of institutions?" (Weiler, J.H.H., and Paulus, A.L., *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law*, 8 EJIL 1997, 545-565, at 554).

[10] Maarten Bos, *The Recognized Manifestations of International Law*, 20 GYIL 1977, 9-76, at 11-13.

dispute settlement procedures, is what will preoccupy us in this study. As Peter Hulsroj warned: "Clearly a question on how a state can be expected to react in a given situation cannot be answered by purely analysing the norms that would follow from Art. 38 of the Statute of the ICJ, but must embrace norms dictated by history, self-interest, potential political fall-out, etc. Only, I believe that law pragmatically must be understood to be the norms that an ultimate arbiter, the courts, will find to apply to a given legal conflict – and this again means that legal norms are the ones that in some form or another can be derived from the source definition in Art. 38 of the Statute of the ICJ. All other norms are then extra-legal norms and it would be dangerous to ask an ultimate arbiter to disregard this distinction … since predictability will be lost and the ultimate arbiter will be put on an almost impossible task, namely to define norms based on all-encompassing empiricalism".[11]

2. ***Norms*** **versus** ***laws and norms*** **versus** ***obligations***

As far as the title of this study is concerned, it was tempting to use the term "conflict of international *laws*", as opposed to "conflict of *norms* in public international law". The temptation is there, for the term "conflict of international *laws*" would echo the more familiar field of study known as "conflict of laws" or "private international law". That is, the discipline dealing with conflict between different *domestic* laws in disputes having links with two are more *domestic* legal systems.[12] Modern international law is, indeed, composed increasingly of treaty-based *sub-systems* (such as that of the WTO, the Framework Convention on Climate Change or the World Intellectual Property Organization). These sub-systems could be said to have their own sector-specific "international law", law-maker and law-enforcement mechanism. Like national laws within the discipline of "conflict of laws", these sub-systems of public international law interact and may give rise to conflict. It is, indeed, this type of conflict (say, between WTO law and the law developed under the Framework Convention on Climate Change) that inspired this work and will attract most of our attention. Nevertheless, to talk of these sub-regimes as being separate "international laws" which may "conflict" would give the wrong signal. Firstly, it would lose sight of *general* international law in creating the impression that these sub-regimes are "self-contained regimes" to be evaluated exclusively with reference to norms created *within* the particular sub-regime. Secondly, it could be understood by some as elevating what are basically treaty norms (say, WTO provisions) of a *contractual* nature to the status of "law" in the strict domestic law sense of norms imposed by an independent "legislator" on all subjects (i.e. states) of the sub-regime independently of their will.[13]

Another alternative to "conflict of norms" (besides "conflict of international laws"), could have been "conflict of obligations". However, to talk of conflict of *obligations* would obscure the fact that international law is composed of obligations *and* rights. As we shall see below, a conflict may consequently arise not only as between two contradictory obligations, but also as between an obligation and an explicit right.[14] At the same time, it is worth noting that in practice a conflict of norms will always boil down to, and need examination in terms of, a conflict between *rights* and/or *obligations* resting on one or several states. There is no such thing as norms "in the air". Norms, at least those we shall further examine (e.g., those that are legally binding), are imposing obligations on,

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[11] Peter Hulsroj, *Three Sources – No River, A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and 'General Principles of Law*', 54 ZEITSCHRIFT FUR OFFTENTLICHES RECHT 219-259, 236 (1999).

[12] Wilfred Jenks seems to have succumbed to this temptation when entitling his seminal piece "Conflict of Law-Making Treaties". He noted, for example, that "some of the problems which [law-making treaties] involve may present a closer analogy with the problem of the conflict of laws than with the problem of conflicting obligations within the same legal system".

[13] Sir Gerald Fitzmaurice has argued, for example, that treaties, including so-called "law-making treaties", are not, in the proper sense of the word, formal sources of *law*: "They may, according to circumstances, afford evidence of what the law is, or they may lead to the formation of law and thus be material sources. But they are in themselves sources of obligation rather than sources of law" (Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in SYMBOLAE VERZIJL 153-176, at 154 (1958)).

[14] See Chapter IV, Section B.2.

or granting rights to, particular states. They are in that sense "subjective". But this does not mean that norms can always be reduced to the form of bilateral right-duty relations between two states, of a contract-type nature. Increasingly, the rights and obligations set out in norms of international law are of a collective or communitarian character. As a result, their breach can then, for example, be invoked by all (participating) states.[15]

The fact that a conflict of norms can hence be reduced to conflict of rights and/or obligations resting on one or several states (albeit not always of a *contract*-type nature) is another reason *not* to talk of "conflict of international *laws*", or "conflict of *treaties*". Although the general nature of the treaties in question may well determine whether or not a given norm in one treaty should prevail over that in another treaty, in the end, conflict must be narrowed down to a conflict between two given norms. More particularly, the rights and/or obligations set out by these norms as they apply between particular states. A conflict is rarely one between treaties or sub-systems of international law *in their entirety*, where one treaty or sub-system *in its entirety* needs to give way to another treaty or sub-system, i.e., the way one domestic law may need to give way to another domestic law in the field of conflict of laws.[16] Although some conflicts may lead to the invalidity, termination or non-application of an entire treaty[17], all conflicts require at least some examination of the specific rights and obligations set out in the relevant treaties.

C. Conflict of Norms in Public International Law

Importantly, this study is *not* about the vertical conflict between *national law* and *international law* (such as the question of whether a *national* regulation enacted to protect the environment is in conflict with WTO rules). We deal only with the horizontal conflict between two norms of international law (for example, a provision in an environmental convention which contradicts a WTO rule).

We shall, in addition, focus on specific subjects of international law, namely states and separate customs territories (such as Hong Kong or the European Communities), the latter also being able to join the WTO.[18] The rights and obligations incumbent on other subjects of international law (such as international organisations or, in some instances, individuals), and their potential for conflict, will not be addressed.

The norms of international law subject to examination will not, however, be limited to those derived from treaties.[19] We shall address also norms produced by other sources of international law.[20] What

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[15] This development towards rules of a collective nature, away from the bilateral, contract-type relationships in traditional international law, is highlighted also in the Third Report on State Responsibility by Professor James Crawford, Special Rapporteur to the ILC, A/CN.4/507, especially at para. 84. It is reflected further in Article 43 (defining the injured state) and Article 49 (on invocation of responsibility by states other than the injured state) of the ILC's Draft Articles on State Responsibility provisionally adopted by the Drafting Committee on Second reading, ILC 52nd Session, 2000, A/CN.4/L.600 (hereafter ILC Draft Articles 2000).

[16] For an exception, see Article 59(1) of the Vienna Convention on the Law of Treaties (hereafter "Vienna Convention") dealing with the termination of a treaty implied by the conclusion of a later treaty (for example, in case "the provisions of the later treaty are so far incompatible with those of the earlier treaty that the two treaties are not capable of being applied at the same time").

[17] See, for example, Arts. 53, 59 and 63 of the Vienna Convention.

[18] The *Explanatory Notes* to the Marrakesh Agreement Establishing the WTO (hereafter "Marrakesh Agreement") defines the term "country", as it is used in WTO agreements, "to be understood to include any separate customs territory Member of the WTO". Article XII of the Marrakesh Agreement allows for any state or "separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements" to accede to the WTO. Hereinafter when the word "state" or "country" is used in the context of the WTO treaty, it should be read as including separate customs territories.

[19] Some of the major contributions in the field of conflict of norms in international law were, however, limited to conflict of treaty norms. See, in chronological order: Charles Rousseau, *De la Compatibilité des Normes*

these sources are, and how they may influence the outcome of conflict of norms, is what we examine in Chapter III.

D. The Importance of the Topic

There are a number of variables that cause conflict between norms of international law. Four such variables or reasons why conflict arises are inherent in the nature of international law (section 1). The first three relate to the law-*making* process of international norms. A fourth reason relates to their law-*enforcement*. In addition to those inherent reasons, four additional reasons can be pointed at which have emerged more recently with the development of modern international law (section 2). They are particularly relevant to conflict involving WTO rules.

1. Four reasons inherent in the nature of international law

a. Multitude of law-makers at the international level

Firstly, international law does not have a central legislator, nor a central executive. It has essentially as many law-makers as there are states. As a result, since each state is largely its own law-maker, the legal relationship between states varies enormously depending on the states involved (much more, for example, than the relationship between individuals under domestic law where legislation and other generally applicable law largely outweighs private contracts). This multitude of law-makers and legal relationships obviously increases the risk of conflict between norms. But this is not necessarily a bad thing. Given the diverse interests and characteristics of the almost 190 states that exist today, it is only normal that as many legal relationships exist. Because of that diversity, the time is not ripe for international law to become a monolithic bloc of rules created by some world legislator or government, equally applying to all states (the way, for example, Belgian law applies to all Belgians). The *equality* between states and the resulting equality between the law they create, as well as the *neutrality* of international law (other than *jus cogens*) resulting in all norms being of the same legal value are, indeed, essential elements for international law to fulfil its dual function. This dual function is (i) ensuring the peaceful co-existence between states and (ii) enhancing the co-operation between states in pursuit of goals they consider as common between them. However, the price to be paid for this diversity in international law is the increased risk of conflict between norms.

A more practical consequence of international law essentially being created only by state consent is that many international norms are left unclear and in potential conflict with other norms. The need for consensus among a wide variety of states for norms to be enacted, combined with an often heavy time pressure for conclusion of a treaty, may, indeed, explain a great number of the inconsistencies in international law.

Juridiques Contradictoires dans l'Ordre International, 1932 RGDIP 133-192; Hans Aufricht, *Supersession of Treaties in International Law*, 1952 CORNELL LAW QUARTERLY 655-700; Wilfred Jenks, *Conflict of Law-Making Treaties* 1953 BYIL 401-453; M. Zuleeg, *Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten*, 1977 GYIL 246-276; and Quoc Dinh Nguyen, *Evolution de la Jurisprudence de la Cour Internationale de La Haye Relative au Problème de la Hiérarchie des Normes Conventionnelles*, in MELANGES OFFERTS A MARCEL WALINE, LE JUGE ET LE DROIT PUBLIC, Tome I, 215-233 (1974).

[20] This wider approach to conflict in international law so as to include other sources of international law was adopted also by: Michael Akehurst, *The Hierarchy of the Sources of International Law*, 1974-75 BYIL 273-285 (hereafter, "Akehurst, *Hierarchy ...*"); Maarten Bos, *The Hierarchy among the Recognized Manifestations ("Sources") of International Law*, 1978 NILR 334-344; Emmanuel Roucounas, *Engagements Parallèles et Contradictoires*, 206 RECUEIL DES COURS (1987-VI), hereafter "Roucounas, *Engagements ...*"; and Czaplinski, W., and Danilenko, G., *Conflict of Norms in International Law* 1990 NYIL 3-42, hereafter "Czaplinski and Danilenko, *Conflict ...*".

b. The time factor

Secondly, international law is not only made by a multitude of states, resulting in a multitude of legal relationships. As any law, *it may change over time*. The fact that all international norms have essentially the same binding value makes time an even more important variable in international law than it is in domestic law. As a result, any later norm can, in principle, overrule an earlier one (*lex posterior derogat legi priori*). To put it differently, international law is not only dependent, in one way or the other, on the consent of (some or all 190) states. These states can, in addition, change their mind *at any point in time* (subject to *jus cogens* and the principle *pacta tertiis nec nocent nec prosunt*). Hence, the potential for conflict to arise must be multiplied by a factor time: an earlier norm may conflict with a later one (even if created by the same states), the same way an older norm may need to be interpreted and applied in the background of a newer norm.

c. Multitude of law-makers at the domestic level

Thirdly, and still within the process of law-*making*, not only elements at the *international* level enhance the potential for conflict, also *domestic* factors must be considered. Most prominently, there is the fact that states, although considered under international law to constitute one single entity, are, in practice, represented by a multitude of domestic actors in the international law-making process. Even if for most treaties parliament's approval may be required, the fact remains that treaties are not normally negotiated by members of parliament but diplomats or civil servants. And the delegates representing a state in the WTO context are mostly not the same as those representing the same state in UNEP, the WHO or WIPO. These different negotiators operating in different law-making contexts are often tempted, as Jenks put it, "to secure fuller satisfaction for their own views on debatable questions of detail at the price of conflict between different instruments and incoherence in the body of related instruments".[21] Especially in highly technical fields such as GATT/WTO law, negotiators have, indeed, felt the urge to portray "their" treaty as something that is de-linked from the wider *corpus* of international law, be it out of professional jealousy or ignorance. In this respect, Jenk's call for negotiators to "form the habit of regarding proposed new instruments from the standpoint of their effect on the international statute book as a whole"[22] has not always been heard. It must be repeated here.

When it comes to the creation of customary international law, the variety of actors is even wider. Customary international law does not require approval by parliaments. It simply emerges as a result of state practice, recognised as binding. All actors on the international scene may play a role in this custom-creating process (including lower state officials, international organisations and its civil servants as well as international adjudicators, NGOs and academics).

The multitude of actors at play in the construction of one and the same state's "consent" is, therefore, another factor that increases the risk of inconsistencies arising as between *different* norms or expressions of the same state's consent. This consent may, indeed, find its source either in a different setting (parliament, the ministry of foreign affairs or that of trade), at a different point in time (parliaments as well as civil servants change over time) or at a different level (higher versus lower state officials).

d. No centralised adjudicator

Fourthly, and focusing now on law-*enforcement*, international law does not only lack a centralised legislator and executive. In addition, it does not have a centralised court system with general and compulsory jurisdiction. Such court system, especially if combined with a centrally organised sanctions regime, could have created some order in the multifaceted international law-making process.

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[21] Jenks, *Conflict …*, 452.
[22] Ibid.

There is, of course, the ICJ, the "principal judicial organ of the United Nations".[23] But this court only has compulsory jurisdiction as between some states and in respect of certain subject matters (as, for example, defined under the optional clause system of Art. 36.2 of the ICJ Statute). In addition, international law knows of a multitude of international enforcement mechanisms, most of them treaty-based (such as the WTO dispute settlement system under the WTO treaty), others being set up on an *ad hoc* basis.

This lack of a centralised international adjudicator means, firstly, that there is, in most cases, no judge to bring order in the multiple legal relationships present in international law. Secondly, the existence of different international tribunals creates the risk that conflict arises also in the way international law is construed or enforced. At worst, it may lead even to conflict of norms being resolved in favour of one norm by one adjudicator and in favour of the other norm by another tribunal.

2. Four additional reasons in the context of modern international law

The above four variables at the origin of conflict between international norms are inherent in the system of international law. They have been present ever since international law emerged as a system of law. Four additional elements can be pointed at which show that, in modern times, the potential for conflict is even more significant. It is under these elements that the particular importance of conflict in the WTO context becomes apparent. What follows contradicts Akehurst's 1976 statement that "the problem of hierarchy of the sources of international law has seldom given rise to difficulties in practice". Akehurst was careful and right, however, to add that "there is no guarantee that that state of affairs will continue".[24]

a. The move from a law on « co-existence » to a law on « co-operation »

Firstly, international law has witnessed a shift from being a law on "co-existence" between sovereign states (dealing with issues such as territorial sovereignty, diplomatic relations, the law on war and peace treaties), to a law regulating also the "co-operation" between states in pursuit of common goals (such as the law created under the auspices of international trade, environmental and human rights organisations). Under the traditional law on co-existence between states, composed mainly of a myriad of bilateral agreements, the typical case of conflict arose in the form of conflicting obligations held *by one state towards two or more different states* (for example, under different peace, neutrality or mutual assistance agreements). This type of conflict (referred to below as AB/AC conflicts[25]) can be compared to a conflict between two contracts concluded by one and the same person A with two different persons B and C under domestic law. The two contracts are only common to person A and conflict arises because A promised something to B that is not consistent with what it promised to C (for example, the cession by A of sovereignty over the same piece of land to both B and C or a promise by A to assist B in case it is at war with C there where the same promise is made towards C in the event that country is at war with B).

Under more recent international law on co-operation, constituted increasingly of *multilateral* treaties dealing with different *common* goals, additional types of conflict arose. Today the typical conflict between norms is, indeed, that between norms deriving from different treaty-based sub-systems (say, a conflict between a WTO rule and rule of an environmental convention). Here, both conflicting norms are binding on states A and B but state A invokes one norm in its favour, there where state B relies on the other, contradictory norm. Hence, we are no longer faced with a conflict between two contracts concluded by one state vis-à-vis two different states, but two sub-systems, binding on all states involved, under which contradictory law was made. The best domestic law analogy may be that of two legislators, each creating contradictory laws.

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[23] UN Charter, Art. 92.
[24] Akehurst, *Hierarchy* ..., 274.
[25] See, in particular, Chapter VII, Section B.

Besides such conflict of norms part of *different* sub-systems, conflict increasingly arises also as between norms within the *same* sub-system (say, between two norms of WTO law) or between a norm of general international law (say, customary law on the law of treaties) and a norm of a given sub-system (say, a WTO rule on how to amend the WTO treaty). Of course, the old type of conflict (state A making one promise to state B but another, contradictory promise to state C) continues to exist. It is of importance, for example, when state A concludes an environmental agreement with state B in which A promises B to restrict certain trade flows also with third parties (including state C), there where state A has, in another context (say, the WTO), made a contradictory promise towards state C not to restrict those same trade flows.

In sum, with the transformation of international law into a law on both co-existence and co-operation, the potential as well as different types of possible conflict between norms has increased significantly. As Jenks put it: "the conflict of law-making treaties, while obviously an anomaly which every possible precaution should be taken to avoid, must be accepted as being in certain circumstances an inevitable incident of growth, and it becomes an essential part of the duty of international lawyers, while encouraging the adoption of procedures which will minimize the occurrence of such conflict, also to formulate principles for resolving such conflict when it arises".[26]

b. Globalisation

Secondly, and related to the need for co-operation between states so as to tackle today's global problems (of protecting the environment, human rights or stimulating economic development), the ever increasing inter-dependence between states *as well as regulatory areas* has resulted in a proportional boost of the potential for conflict between norms of international law in different sectors. This is the case particularly for WTO rules. WTO rules regulate the *trade* relations between states. In today's highly interdependent world, a great number, if not most, state regulations in one way or another affect trade flows between states. Hence, WTO rules, essentially aimed at liberalising trade, have a potential impact on almost all other segments of society and law. For example, liberalising trade may sometimes jeopardise respect for the environment or human rights. Equally, enforcing respect for human rights or environmental standards may sometimes require the imposition of trade barriers. Moreover, trade restrictions are resorted to increasingly in pursuit of all kinds of non-trade objectives, ranging from respect for human rights[27] and the environment[28] to confirmation of territorial borders.[29] As a result, the potential for inter-play and conflict between WTO rules and other rules of international law is huge: WTO rules are rules that cut across almost all other rules of international law.

c. An emerging hierarchy of values

Thirdly, the emergence of the concept of *jus cogens* (essentially in the second half of the 20th century) corresponds to an awareness that not all norms of international law should have the same status. Some of them protect so important and universal a value, such as the prohibition on genocide, that they have a hierarchical standing that is higher than other norms. In addition, it is recognised also that certain

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[26] Jenks, *Conflict …*, 405.

[27] See, for example, the disputes on *United States – Measures Affecting Government Procurement* (WT/DS88 and 95, involving US trade sanctions against Myanmar); and *United States – The Cuban Liberty and Democratic Solidarity Act* (WT/DS38, involving US trade sanctions against Cuba).

[28] See the Panel and Appellate Body reports on *US –Shrimp* and the dispute on *Chile – Measures Affecting Transit and Importation of Swordfish*, WT/DS193 (panel suspended on 23 March 2001) (hereafter *Chile – Swordfish*), brought also before the International Tribunal for the Law of the Sea (now suspended, on the basis of a provisional arrangement, by Order of 15 March 2001, http://www.un.org/Depts/los/ITLOS/Order1-2001).

[29] See the dispute on *Nicaragua – Measures Affecting Imports from Honduras and Colombia*, WT/DS188 and 201 (this panel was never activated), involving trade sanctions as a result of a maritime delimitation dispute, pending also before the ICJ (*Maritime Delimitation between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras*), http://www.icj-cij.org.

norms, though not part of *jus cogens*, are there for the protection of "global commons". These norms create obligations binding *erga omnes partes* (but not necessarily binding on all states) and cannot be suspended or modified *inter se*.[30] They are, in that sense, of an "integral" character. Those norms as well have a standing that is, in many respects, higher than norms establishing mere reciprocal or concessionary obligations. As explained below[31], most WTO obligations are of this reciprocal nature. Other norms, such as many norms of environmental or human rights treaties, as well as some norms part of the law of the sea, are of this "higher" integral nature.

The shift from all norms of international law being equals towards the recognition that some norms, based on their substantive content, are more important than others, has further contributed to the potential for conflict between norms. One norm can no longer replace any other norm, even with the mutual consent of the states involved. *Jus cogens* cannot be deviated from and *inter se* deviations from integral obligations are illegal.[32] On the one hand, this development increased the potential for conflict. On the other hand, it has offered new solutions to contradictory evolution in the law and brought about a certain normative order in the often chaotic world of contractual freedom of states.

d. An increase in the judicial settlement of disputes

Fourthly, modern times has seen an increase in compulsory dispute settlement systems as well as a renewed eagerness to resort to international courts or tribunals for the *ad hoc* resolution of disputes. The fact that international adjudicators are hence more frequently asked to resolve matters of international law means also that issues of conflict between norms are more likely to arise *in concreto*, before these adjudicators. In a first instance, this will accentuate the problem of conflict and make the establishment of coherent rules on conflict an urgency. At the same time, decisions by international adjudicators on how to resolve particular conflicts will contribute to the establishment of such conflict rules.

In this respect, the importance of the WTO judiciary holding compulsory jurisdiction for all claims under WTO covered agreements cannot be over-estimated.[33] As noted earlier, WTO rules have an "all affecting" character.[34] Because of this, even disputes with only a relatively limited trade aspect can be brought to the WTO (such as the trade aspects of human rights disputes or disputes over high seas fishing or territorial borders[35]). In addition, compulsory jurisdiction is available to a state *against which* trade restrictions are imposed. But a state wanting to enforce compliance, for example, with most environmental rules, often has no recourse to international adjudication. In the alternative, trade sanctions could be imposed, but there again the *victim* of the sanction (i.e., the alleged violator of the environmental rule) may complain at the WTO. The state imposing the sanction cannot, in most instances, resort to, say, UNEP for judicial settlement.[36]

These factors as well increase the potential and importance of inter-play between norms, in particular WTO and other rules of international law in WTO dispute settlement.

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[30] See Chapter VI, Section C.2.
[31] See Chapter II, Section E.
[32] Pursuant to Art. 41 of the Vienna Convention, discussed below.
[33] Also, for example, as compared to Part XV of UNCLOS. See, in particular, the recent Arbitration Award in the *Southern Bluefin Tuna case* (Australia and New Zealand v. Japan), 4 August 2000 (www.worldbank.org/icsid) where the arbitrators held *not* to have jurisdiction.
[34] See *supra* text at note 27.
[35] See *supra* notes 27-29.
[36] But see *supra* note 191.

3. Why is conflict between *WTO norms a problem?*

When assessing the potential for intra-WTO conflicts, or problems of internal hierarchy between WTO norms, two additional factors that have given rise to such conflicts must be pointed at.[37]

Firstly, the WTO treaty, although it constitutes a "single package" binding on all WTO members, is composed of some 60 different legal instruments. These instruments range from the Marrakesh Agreement itself, to agreements on goods, services and intellectual property rights and understandings or decisions on dispute settlement, financial services or the interpretation of specific GATT provisions. In addition, one has the country-specific schedules of commitments which also form an integral part of the WTO treaty. Many of these instruments were negotiated during the Uruguay Round. Others, such as the GATT 1947, were simply incorporated without change. Obviously, the more legal instruments one is faced with, the greater the chance for conflict.

Secondly, during the Uruguay Round many of these multiple legal instruments were negotiated side by side with the original intention that they would operate as autonomous agreements much the same way the so-called Tokyo Round Codes did. These Codes were binding only on a number of like-minded states, not even necessarily GATT Contracting Parties, that wanted to liberalise further in a certain area. As autonomous legal instruments, created subsequently to the original GATT 1947, these Uruguay Round agreements sometimes derogated from, and often repeated, partly or fully, their parent GATT provisions. Only at a very late stage of the negotiations was it decided to bring all the results of the Uruguay Round together under one umbrella agreement, to be binding equally on all WTO members. This had the unintended result of creating repetitions, omissions, and possible conflicts. No time was left to work out the complex inter-relationship between the different legal texts. To re-open the negotiations for that purpose would have jeopardised the delicate consensus reached under each of these legal instruments. This separate consensus was, moreover, not always reached by the same negotiators. GATT, GATS and TRIPS negotiators are, in most WTO members, different people. This may explain also why, in particular, the relationship between the three WTO pillars (GATT-GATS-TRIPS) is not explicitly addressed in the WTO treaty.

In sum, the potential for intra-WTO conflict is a text book example of a variety of law-makers at work, both internationally (124 states with widely diverging interests) and internally (representatives coming from diverse domestic backgrounds), at different points in time (GATT 1947 and a succession of trade negotiation rounds culminating in the 1994 WTO treaty), in different substantive contexts (goods, services and intellectual property rights, as well as different sub-sectors in each of those fields) and operating under serious time pressure in order to come to a consensus on a wide variety of issues. It provides an ideal example for this study on conflict of norms.

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[37] On the causes of intra-WTO conflicts, see Elisabetta Montaguti and Maurits Lugard, *The GATT 1994 and Other Annex 1A Agreements: Four Different Relationships?*, 2000 JIEL 473-484, in particular at 474-475.

CHAPTER II. THE EXAMPLE

"the globalization of the world economy has led to ever-growing interactions between the economic policies pursued by individual countries, including interactions between the structural, macroeconomic, trade, financial and development aspects of economic policymaking. The task of achieving harmony between these policies falls primarily on governments at the national level, but their coherence internationally is an important and valuable element in increasing the effectiveness of these policies at national level".[38]

A. WTO law as "just" another branch of public international law

For WTO law to be a relevant example in this study on conflict of norms in public international law, it should be established first that WTO law is, indeed, part of public international law.

With one possible exception, no academic author, WTO decision or document disputes that WTO rules are part of the wider *corpus* of public international law.[39] Like international environmental law and human rights law, WTO law is "just" a branch of public international law. To public international lawyers, my call in the April 2000 issue of the AJIL for WTO rules to "be considered as creating international legal obligations that are part of public international law"[40] is a truism. As one author noted in response: "It is difficult … to envisage any other possible status for rules emanating from a treaty concluded among States under international law, as the WTO Agreement".[41] To many negotiators and other WTO experts in Geneva, however, the fact that WTO law is "just" a branch of the wider *corpus* of international law comes as a surprise. Not a single legal argument has been (or, in my view, can be) put forward in their support. The fact that many negotiators of the WTO treaty (in numerous countries representatives from a trade ministry de-linked from that of foreign affairs) did not *think* of public international law when drafting the WTO treaty is not a valid legal argument. At most, it amounts to an excuse for the WTO treaty not to have dealt more explicitly with the relationship between WTO rules and other rules of international law.[42]

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[38] Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking, Paragraph 1, in WTO SECRETARIAT, THE RESULTS OF THE URUGUAY ROUND, THE LEGAL TEXTS 442-3, at 442 (1995).

[39] See JOHN JACKSON, THE WORLD TRADING SYSTEM, 25 (1997); Ernst-Ulrich Petersmann, *Dispute Settlement in International Economic Law – Lessons for Strengthening International Dispute Settlement in Non-Economic Areas*, 2 JIEL 189 (1999); Donald McRae, *The WTO in International Law: Tradition Continued or New Frontier?*, 3 JIEL 27 (2000) and *The Contribution of International Trade Law to the Development of International Law*, 260 RECUEIL DES COURS 111 (1996). For earlier sources confirming that the GATT was no more than a specialised branch of public international law: Georg Schwarzenberger, *The Principles and Standards of International Economic Law*, 87 RECUEIL DES COURS 1 (1966-I); Société Française pour le Droit International, Colloque d'Orléans, *Aspects du droit international économique*, 1972 (the Rapporteur, Prosper Weil, concluding that "[s]ur le plan scientifique, le droit international économique ne constitue qu'un chapitre parmi d'autres du droit international général"); and IGNAZ SEIDL-HOHENVELDERN, INTERNATIONAL ECONOMIC LAW 1989.

[40] Joost Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach*, 94 AJIL 335-347, 336 (2000), hereafter "Pauwelyn, *Enforcement …*".

[41] Mariano Garcia Rubio, *Unilateral Measures as a Means of Enforcement of WTO Recommendations and Decisions*, The Hague Academy of International Law, Centre for Studies and Research in International Law and International Relations on "Economic Sanctions in Public and Private International law", note 22 (2001, forthcoming), hereafter "Garcia Rubio, *Unilateral Measures …*".

[42] Compare, for example, the WTO treaty to UNCLOS, an equally broad and universal regulatory treaty that carefully regulates its relationship with other rules of international law in Art. 311 (containing no less than six paragraphs).

1. The Bello-Jackson Debate

The possible exception referred to in the previous paragraph is Judith Bello. She expressed the view that "WTO rules are simply not 'binding' in the traditional sense. When a panel established under the WTO Dispute Settlement Understanding issues a ruling adverse to a member, there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement".[43] In her opinion "[t]he only truly binding WTO obligation is to maintain the balance of concessions negotiated among members".[44] As a result, when a law or measure of a WTO member is successfully challenged in WTO dispute settlement, the member concerned has, in Bello's view, three choices: to withdraw the law or measure, to provide compensatory benefits or to suffer retaliation against its exports.

Firstly, it is unlikely that Bello thereby wanted to classify the WTO treaty as one that is *not* part of public international law (the only issue of interest for present purposes). Rather, her point was directed more specifically at the question of whether WTO dispute settlement decisions are legally binding in the sense that they oblige a losing member to cease WTO inconsistent conduct. Secondly, as pointed out by John Jackson in a direct response to Bello, the enforcement of rules in international law is inherently different from that in domestic law and may, indeed, not always be as effective.[45] However, "that is a different issue from the question of whether the 'WTO rules are … 'binding' in the traditional sense'. Certainly they are binding in the traditional *international law* sense".[46]

That WTO rules are legally binding rules part of international law must, indeed, stand beyond doubt. They derive from a treaty and pursuant to Art. 26 of the Vienna Convention "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" (*pacta sunt servanda*). Whether WTO rules are as effectively enforced and complied with as domestic law or other rules of international law is another issue. Also the question of whether WTO *dispute settlement decisions* are legally binding as between the parties (which, in my view, they are[47]) must be distinguished from the nature of the *WTO treaty* as a legally binding treaty part of international law.

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[43] Judith Bello, *The WTO Dispute Settlement Understanding: Less is More*, 90 AJIL 416-418 (1996), hereafter "Bello, *Less is More …*".

[44] Ibid., 418.

[45] Bello is, of course, correct when pointing out that "[t]he WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas" (ibid., 417).

[46] John Jackson, *The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation*, 91 AJIL 60-64, 63 (1997).

[47] On the real debate between Bello and Jackson – do WTO dispute settlement decisions create a legally binding obligation to cease WTO inconsistent conduct? – the answer must be yes, as Jackson pointed out (with reference to DSU Arts. 3.7, 19.1, 21.1, 22.1, 22.8 and 26.1(b)). As I stated elsewhere: "WTO rules, as well as DSB recommendations, should be considered binding legal obligations. That is, if the DSB finds a breach of WTO rules, the member concerned should be considered to be violating its obligations under international law, as a consequence of which the member would be obligated, in turn, to stop the violation by bringing the inconsistent measure into conformity with WTO rules. This approach accords with the DSU's unambiguously providing that compensation and retaliation are only 'temporary measures' that are not to be preferred to full compliance [DSU Arts. 22.1 and 3.7] … residual international law rules … make clear beyond doubt that in case wrongful conduct is found, the state concerned has to stop that conduct. The DSU determines, in turn, the means by which the prevailing WTO member is authorized to obtain fulfilment of that secondary legal obligation of cessation" (Pauwelyn, *Enforcement …*, 341). It is important, moreover, to distinguish two issues in this respect. Firstly, there is the secondary law obligation of cessation which necessarily follows breach of a WTO obligation. The fact that if cessation does not immediately occur the opposing party may retaliate, does not mean that somehow the rule breached is not legally binding, let alone not a rule of international law ("Can there be no decision that a *binding* international treaty has been breached, just because the injured party can, in response to such breach, suspend the treaty (equalize the balance), in whole or in part? Obviously not", ibid., 342). Secondly, another issue is the question as to whether a WTO dispute settlement decision conclusively establishes breach, i.e., whether such decision is a judicial one, binding on the parties, having the character of *res judicata*. In my view it is. As the Appellate Body noted in *Japan – Alcoholic Beverages*: adopted panel reports "are not binding, *except with respect to resolving the particular dispute between the parties to that dispute*" (at 14, emphasis

2. Confirmation in the definition of international law, the law of treaties and the WTO treaty itself

To be entirely sure that WTO law is public international law, let us consider briefly the abstract definition of public international law. Take Guggenheim's uncontroversial definition: "public international law is the aggregate of the legal norms governing international relations"[48]; or that of Nguyen, Daillier and Pellet: "le droit international se définit comme le droit applicable à la société internationale".[49] No one can deny that WTO agreements govern a particular aspect of "international relations" and, in that sense, are relevant for, and apply to, the "société internationale". They regulate and govern the *trade* relations of states and independent custom territories. No one can deny either that WTO agreements set out "legal norms" or "droit", not merely a collection of gentlemen's agreements, usages or rules of étiquette. That WTO agreements are, indeed, international "legal norms" or "droit" is confirmed in the Vienna Convention on the Law of Treaties. The concept of "treaty" – a recognised source of public international law[50] -- is defined there as: "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".[51] Turning next to the concrete text of the WTO treaty itself, all doubts as to whether WTO law is part of public international law are cleared. Article 3.2 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) explicitly directs panels and the Appellate Body to "clarify the existing provisions of [the covered WTO] agreements in accordance with customary rules of interpretation of public international law". For those maintaining that WTO rules are *not* rules of international law this is, indeed, a death-blow. For if WTO rules must be *interpreted* in accordance with rules of public international law, surely, they must *be* rules of public international law. What is more, Article 3.2 of the DSU proves not only that WTO law is a part of public international law, it indicates also that WTO law is to be considered, not in isolation, but with reference to other, non-WTO rules part of public international law. As the Appellate Body acknowledged in its very first report "[t]hat direction [in Article 3.2 of the DSU] reflects a measure of recognition that the *General Agreement* [GATT] is not to be read in clinical isolation from public international law".[52]

3. Why has GATT/WTO law often been seen as distinct from public international law?

Donald McRae in his 1996 Hague lecture examined why "the field of international trade law [has nonetheless] traditionally been regarded as outside the mainstream of international law".[53] He provides three reasons.

Firstly, McRae points at social traditions ("In some countries the idea of commerce, of buying and selling, or of economic matters generally, was not viewed with favour") and the view often held by

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added, confirmed in the Appellate Body report on *US – FSC*, para. 108). See further *infra* section C.2 and 4 (where acts of WTO organs and judicial WTO decisions are discussed as sources of WTO law).

[48] PAUL GUGGENHEIM, TRAITE DE DROIT INTERNATIONAL PUBLIC 1 (1967).

[49] Nguyen, *Droit …*, 35.

[50] See Chapter III.

[51] Article 2.1(a). The criterion "governed by international law" in this definition of a "treaty" arguably begs the question we try to answer here, namely is WTO law part of public international law. Any doubt in this respect is taken away though by the other considerations set out in this section which do prove that this question is to be answered in the affirmative.

[52] Appellate Body report on *US – Gasoline*, at p. 17. John Jackson refers to this report as one where "the Appellate Body stated flatly that WTO/GATT law is part of international law generally" (John Jackson, *Comments on Shrimp/Turtle and the Product/Process Distinction*, 11 EJIL 303-307, 305 (2000)).

[53] Donald McRae, *The Contribution of International Trade Law to the Development of International Law*, 260 RECUEIL DES COURS 111 (1996), hereafter "McRae, *Contribution*…".

traditional international lawyers that trade law is too "technical" and that held by trade lawyers that their field is "special".[54] One could add to this set of reasons that trade relations are in many countries overseen by the economic, trade or commerce ministry which is detached from that of foreign affairs, the former being staffed largely with economists, the latter being the traditional feeding ground of public international lawyers.

Secondly, McRae refers to the "insidious distinction between the public and the private" pursuant to which "trade was a matter for the private sphere, not a matter for Governments". McRae himself refers to the "emergence of the 'economic' state" based on socialist theories to show that governments as well engage in commerce. However, one need not go that far. Governments not only trade themselves (albeit decreasingly so), more importantly, it is governments that regulate by their laws and regulations the conduct of private commercial transactions including transactions across borders. State regulations imposed in respect of imports and exports and other commercial transactions that may affect foreigners or foreign products represent a major part of domestic law. Commerce is, hence, a matter also for governments and *public* international law. The rules concluded in the WTO are not contractual rules applying as between two private traders in respect of a certain transaction. WTO rules discipline government regulations affecting trade, not private commercial contracts. But it remains true that often GATT/WTO law has been seen as "private" in nature in that it affects mainly private economic operators subject to the government regulations involved (more so than they affect government to government relationships such as, for example, diplomatic law does). In addition, GATT/WTO rules are negotiated quite often as a direct result of lobbying on behalf of private operators (often one company or one sector), i.e., actors that are not always well-versed in public international law. Hence, the private aspect of WTO law is easily overrated and the wider context to which it belongs -- *public* international law -- often overseen.

Thirdly, and in McRae's view most importantly, there is "the problem of fitting international trade and economic law into a discipline that defined itself in terms of peace and security, in terms of the territorial integrity and political independence of States, in terms of sovereignty. The rationale of international trade law has nothing to do with sovereignty. International trade law does not rest on that primary assumption of international law, that the world is composed of sovereign nation States, each surrounded by territorial borders within which it exercises plenary authority. International trade law is founded on the primary value of promoting individual economic exchanges, about the value of specialization and the economic welfare that results from specialization and exchange. Rather than focusing on the independence of States, international trade law highlights the concept of interdependence. In fact, when we talk of international trade law and of international law we are dealing with two régimes, with two systems that in quite a fundamental way are talking about different things".[55]

Whereas McRae's first and second reason explaining why GATT/WTO law has been kept on the sidelines of public international law are convincing, this third reason is both misleading and erroneous. It falls into the very trap McRae himself has warned about, namely the trap for trade lawyers to portray "their" discipline as something "special". He thereby risks perpetuating the erroneous viewpoint that GATT/WTO law is really a different "regime" and not international law at all.

Firstly, McRae uses the wrong benchmark to compare trade law to international law. The international law he refers to is the international law of "co-existence" prevalent up to the end of the first world war ("a discipline that defined itself in terms of peace and security … territorial integrity and political independence"[56]). Since then international law has expanded its scope so as to include also law on "co-operation". Together with disciplines such as international human rights law and

[54] This mutual distrust is aptly illustrated by Antonio Cassesse's statement in his INTERNATIONAL LAW IN A DIVIDED WORLD: "international economic relations are usually the hunting ground of a few specialists, who often jealously hold for themselves the key to this abstruse admixture of law and economics" (317, 1986).
[55] McRae, *Contribution*…, 116-117.
[56] Ibid., 117

environmental law, international trade law is testimony of this expansion into new fields where states realised the need to "co-operate" in order to tackle common problems (i.e., fields that "highlight the concept of interdependence"[57]). Hence, the "different assumptions" McRae is referring to are those underlying, on the one hand, the traditional international law of "co-existence" and, on the other hand, the modern international law of "co-operation" *including GATT/WTO law*. In other words, McRae is not comparing international law to trade law, but old international law to new international law. It is not because GATT/WTO law does not fit well in the 19th century mould of international law (a time at which GATT/WTO law did not even exist), that it is not part of today's international law (where, indeed, many of its branches highlight not so much independence and sovereignty, but interdependence and co-operation across borders that may well limit sovereignty). If international trade law were, on these grounds, not international law, then also talking about international law, on the one hand, and international human rights and environmental law, on the other, would be "dealing with two régimes, with two systems that in quite a fundamental way are talking about different things".[58]

Secondly, notwithstanding the evolution of international law from a law on "co-existence" to one on "co-operation", the basic principles of this international law, including those underlying GATT/WTO law, have remained the same, in particular the presumption of sovereignty of a state over its own territory until prove to the contrary is provided. Two random examples in WTO jurisprudence prove this point. In *Chile –Taxes*, the Appellate Body stated: "Members of the WTO have the sovereign authority to determine the basis or bases on which they will tax goods, such as, for example, distilled alcoholic beverages, and to classify such goods accordingly, provided of course that the Members respect their WTO commitments".[59] In *US – FSC* it made clear that the WTO does not "somehow compel Members to choose a particular tax system … A Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes".[60] Accordingly, McRae's statement that "international trade law … is a discipline whose rationale is inconsistent with or even fundamentally opposed to the idea of sovereignty"[61] is wrong. As Bello noted, the WTO is there for a reason: "sovereign nations choose to cooperate across borders because, without such cooperation, in the interdependent global economy they are helpless to promote economic growth and prosperity most effectively".[62] In other words, the WTO is driven by sovereign states who, in the exercise of self-interest, realized that co-operation with a view to mutual trade liberalisation, is beneficial for all of them even if it implies curtailing their rights to impose certain trade barriers. The WTO is not a construct detached from the sovereignty or self-interest of its members. It is not something states have agreed to against their national interests, but rather a trade-off between limiting their sovereign rights

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[57] Ibid.

[58] The same is true when McRae refers to the fact that « trade is not, or at least primarily not, an inter-State activity", but "about voluntary exchanges between individuals that take place across borders" (123). To derive from this that trade law is not public international law would necessitate the same conclusion for international human rights and environmental law where private individuals are the subjects of protection and, in terms of environmental degradation, even the perpetrators.

[59] Appellate Body report on *Chile* – Taxes, para. 60. In *EC - Hormones*, the arbitrators examining a US proposal to retaliate against the EC, remarked: "WTO Members, as sovereign entities, can be presumed to act in conformity with their WTO obligations. A party claiming that a Member had acted *inconsistently* with WTO rules bears the burden of proving that inconsistency" (WT/DS26/ARB, 12 July 1999, para. 9).

[60] Appellate Body report on *US – FSC*, para. 90. In the same vein, see the Appellate Body reports on *US – Shrimp*, at para. 121 ("It appears to us, however, that conditioning access to a Member's domestic market on whether exporting Members comply with, or adopt, a policy or policies unilaterally prescribed by the importing Member may, to some degree, be a common aspect of measures falling within the scope of one or another of the exceptions (a) to (j) of Article XX") and *Australia – Salmon*, at para. 199 ("The determination of the appropriate level of protection … is a *prerogative* of the member concerned and not of a panel or the Appellate Body".

[61] McRae, *Contribution*…, 118.

[62] Ibid., 417.

to regulate their territory (including products entering their territory) and increasing their economic well-being.[63]

McRae confuses the *assumption* underlying international trade law with the *consequence* of international trade law. The underlying *assumption* is *not* as McRae puts it "the *irrelevance* of the sovereignty of States"[64]. As is the case for *all* international law, the assumption underlying trade law is the sovereignty and self-interest of states. The limitation on state sovereignty is only the *consequence* of certain international trade law. The *consequence* of *traditional* international law (such as the law on the use of force) may safeguard and increase this sovereignty. However, the consequence of most *modern* international law, including WTO law, is to limit sovereignty so as to tackle cross-border problems internationally. This limitation on sovereignty is a consequence of the exercise of sovereignty, in pursuit of self-interest, *not* the underlying assumption of international trade law.[65]

B. The WTO legal system is not a closed legal circuit

Although everyone seems to agree that WTO law is part of public international law, some confusion exists as to whether the WTO legal system is a closed or self-contained regime. It is one thing to say that WTO law is international law, quite another to determine whether international law has a role to play in the WTO.

As soon as states contract with one another, they do so automatically and necessarily *within* the system of international law. This is why WTO law is international law. It is not a "self-contained regime" in the sense of a regime *existing outside of international law*. As Pieter Jan Kuijper noted: "The GATT, as is the case with all those international organizations which have their own substantive law and are not merely vehicles for international negotiation and co-ordination, inevitably is a special branch of international law. As with all such branches it develops rules which deviate from general international law and which further refine and adapt the rules and principles of international law".[66]

As we shall see below[67], in their treaty relations, states can, indeed, contract out of one, more or, in theory, all *rules* of general international law (other than those of *jus cogens*), but they cannot contract out of the *system* of international law. The question hence becomes one of degrees: to what extent has WTO law *not* contracted out of international law, i.e., to what extent is international law still relevant to WTO law? Following Riphagen's distinction between a "system" and a "subsystem" WTO law is, therefore, not a "system" in and of itself but a "subsystem" of international law. The remaining question is: to what extent is this "subsystem" influenced by (1) the general features of the "system" to which it belongs (i.e., "general international law") and (2) the *other* "subsystems" of international law (say, international environmental law or the law of the sea).[68]

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[63] For an economic account of why states co-operate in the WTO (i.e., why it is in their economic interest to do so) and why they would not otherwise (i.e. unilaterally) achieve the same economic benefits, see Kyle Bagwell and Robert Staiger, *GATT-Think*, NBER Discussion Paper No. 8005, November 2000.

[64] McRae, *Contribution*…, 123.

[65] If trade law is not international law because it limits state sovereignty to regulate trade with other countries, what then about human rights law? There, states go much further: they do not only limit their powers to regulate foreigners, but also restrict themselves in what they can do vis-à-vis *their own nationals* (without any foreign element involved).

[66] Pieter-Jan Kuijper, *The Law of GATT as a Special Field of International Law, Ignorance, further refinement or self-contained system of international law?*, 1994 NYIL 227-257, 228 (hereafter "Kuijper, *Law of GATT …*")..

[67] See Chapter IV, section C.

[68] Riphagen provides the following definitions: "a system was an ordered set of conduct rules, procedural rules and status provisions, which formed a closed legal circuit for a particular field of factual relationships. A subsystem, then, was the same as a system, but not closed in as much as it had an interrelationship with other subsystems" (Riphagen, Special Rapporteur, Fourth Report, YILC 1982, Vol. 1, at p. 202, para. 16).

This question is, both in the literature and international case law[69], mostly addressed from the angle of state responsibility, i.e., to what extent are general international law rules on state responsibility (in particular, countermeasures) still relevant for the enforcement of WTO rules? Some authors have argued in this respect that WTO law is a "self-contained regime" in the sense of "a certain category of subsystems, namely those embracing, in principle, a full (exhaustive and definite) set of secondary rules … which is intended to exclude more or less totally the application of the general legal consequences of wrongful acts".[70] James Crawford, for example, submits that the DSU is, in terms of state responsibility, an example where it is "clear from the language of a treaty or other text that only the consequences specified flow".[71] Pieter Jan Kuijper as well expressed the view that "[t]he intention to move further towards a self-contained system certainly underlies the WTO Agreement and its Dispute Settlement Understanding, but it remains to be seen how the WTO Members will make it function".[72] Other authors, in contrast, argue that general international law remedies are still relevant also in WTO dispute settlement.[73]

Crucially, however, the fact that WTO law may exclude general international law rules on state responsibility -- something we further examine below[74] -- (and may, in that specific sense, be a "self-contained regime"), does not mean that the *entire field* of general international law no longer applies to the WTO treaty, nor that other "subsystems" of international law, such as international environmental law or human rights law, cannot influence the WTO treaty. It is one thing to be self-contained in terms of state responsibility, quite another to be self-contained in terms of, for example, the law of treaties or judicial dispute settlement (two other branches of "general international law").[75] As much

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[69] The ICJ endorsed the notion of "self-contained regime" in the *Teheran Hostages case* (ICJ Reports 1980, 3, at para. 86). It did so exclusively in terms of state responsibility: "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions [in particular, measures of declaration of *persona non grata* and the breaking-off of diplomatic relations] … The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious …". But see Bruno Simma (*Self-Contained Regimes*, 1985 NYIL 115, at 120-123) for arguments that even diplomatic law is not a "self-contained regime", not even in the limited sphere of state responsibility. In the same sense, see also L.A.N.M. Barnhoorn, *Diplomatic Law and Unilateral Remedies*, 25 NYIL 39-81 (1994). The concept "self-contained" was first referred to by the PCIJ in the *Wimbledon case* (PCIJ Reports, Series A, No. 1, at 24), where the provisions relating to the Kiel Canal in the Treaty of Versailles were labelled as "self-contained" in the sense that they could not to be supplemented or interpreted by the aid of other provisions referring to the inland navigable waterways of Germany. In the *Nicaragua* case, the ICJ made another reference to certain regimes of international law that provide for their own enforcement mechanism. There, the ICJ noted that "where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves … The mechanisms provided for therein have functioned … In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect" (ICJ Reports 1986, paras. 267-268). The ICJ did, however, not use the word "self-contained regime" in that case, nor did it make a general statement to the effect that no remedy other than those provided for in human rights conventions could be resorted to. It only found that the use of force was not an "appropriate method".

[70] This is the definition of "self-contained regime" introduced by Bruno Simma, *Self-Contained Regimes*, 1985 NYIL 115, 117 (hereafter "Simma, *Regimes …*").

[71] Third Report on State Responsibility, ILC, A/CN.4/507/Add.4, para. 420.

[72] Kuijper, *Law of GATT …*, 257. But for a plausible interpretation as to what was meant here with "self-contained", see *infra* note 701.

[73] Petros Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 2000 EJIL 763 and Garcia Rubio, *Unilateral Measures …*.

[74] See Chapter IV, section C.3.c.

[75] As Dominique Carreau pointed out at the 1971 Colloque d'Orléans: "M. Weil s'est battu conte une conception qui voudrait faire du droit international économique une discipline tout à fait autonome, qui emprunterait peut-être au droit international classique, mais qui devrait être autonome, avec des modes de

as no one seems to argue that WTO law is not international law, no one has submitted so far that the WTO legal system is self-contained in terms of international law other than state responsibility. Pieter Jan Kuijper, for example, although he expressed the view that the WTO was intended to be self-contained in terms of state responsibility, is a strong proponent of examining "subsystems" of international law (including WTO and, even, EC law) in the wider context of general international law, in particular the law of treaties.[76] In addition, one must consider these different "subsystems", not only in the light of the overall "system" of international law, but also as they play out against each other, one subsystem being capable to influence and change another.

The WTO treaty has contracted out of parts of international law (and this contracting out is an important situation of "conflict" which we examine below). But contracting out of *some rules* of international law, does not mean contracting out of *all* of them, let alone contracting out of the *system* of international law.

C. The Sources of WTO law

We know now that WTO law is but a special branch of public international law. The problem examined in this work is how this WTO law relates to other international law. In order to conduct this exercise we must define up front what we understand by WTO law. Below, it will be explained that all international law can be relevant as applicable law before a WTO panel.[77] However, when referring to WTO law we do not mean all law that may be relevant before a WTO panel. Rather, we limit the concept of WTO law to the law created within and special to the WTO context. This law consists mainly of the WTO treaty. But it is composed also of other elements, in particular, acts of the WTO as an international organisation.[78]

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création autonomes, des règles propres, des techniques propres. C'est là être très exigeant, et effectivement si on prend de tels critères la réponse ne peut être négative : le droit international économique est un mythe ». (Société Française pour le Droit International, Colloque d'Orléans, *Aspects du droit international économique*, 124 (1972)).

[76] See Kuijper, *Law of GATT ...*, and also: Pieter Jan Kuijper, *The Court and the Tribunal of the EC and the Vienna Convention on the Law of Treaties 1969*, 25 LEGAL ISSUES OF EUROPEAN INTEGRATION 1 (1998). In support of examining also EC law in the wider context of public international law, see: Judgements in *Racke v. Hauptzollamt Mainz* (C-162/96, REC. 1998, 1-3655) and *Opel Austria v. Council* (CT – 115/94, REC. 1997, 11-39).

[77] See Chapter VIII, section C.

[78] For an interesting approach to the sources of GATT law, see WOLFGANG BENEDEK, DIE RECHTSORDNUNG DES GATT AUS VÖLKERRECHTLICHER SICHT (1990), hereafter "Benedek, *Rechtsordnung ...*". Based on the law of international organisations (and, it would seem, in particular the law of the EC) Benedek divided the sources of GATT law into primary and secondary sources (ibid., 94-125). As primary sources he sees the GATT itself, together with the Tokyo Round Agreements and the what he calls "interpretative codes", like the Antidumping Code and the Subsidy Code. The secondary sources of GATT law referred to by Benedek, in contrast, are based on decisions of the GATT contracting parties acting as *de facto* organs of an international organisation. These secondary sources are brought into being on the basis of authority derived from primary GATT law. Under this secondary law he classifies the various forms of decisions taken by GATT and Tokyo Code bodies, including decisions taken by these bodies in the field of dispute settlement. Benedek also regards accessions agreements as secondary GATT sources. In separate chapters he then discusses GATT custom and general principles of law (ibid., 123-131). He characterises these two additional sources as sources of a primary nature (ibid., 94). He submits that GATT custom has filled certain lacunae that arose because of the institutional weakness of GATT ("both by creating new rules and procedures through subsequent practice and eroding others by way of *desuetudo*", ibid., 470). As examples of GATT custom he refers to the recognition of *de facto* GATT membership of certain developing countries and the EC; the practice of consensus decisions instead of majority voting; and the relaxation of reciprocity conditions under GATT Art. XXIV. Prominently, he refers also to the practice developed under GATT Arts. XXII-III on dispute settlement which was later codified in 1979. Benedek submits that general principles of law are rarely referred to in the GATT (nonetheless, he points at "the case of *bona fide* implementation of obligations or the principle of

The single most important dividing line between elements of WTO law is that between WTO law part of WTO "covered agreements" and WTO law that does not belong to these "covered agreements".[79] This dividing line is crucial since only claims under WTO "covered agreements" fall within the jurisdiction of WTO panels and the Appellate Body. WTO "covered agreements" include only a number of *WTO agreements*. *Non*-WTO rules are excluded and so are WTO rules that do *not* derive from the WTO treaty itself.

1. WTO agreements

WTO treaty provisions are by far the main source of WTO law. The results of the Uruguay Round negotiations constitute around 30.000 pages of text. One must distinguish, first, the Final Act[80] which includes all of the results of the Uruguay Round, as concluded on 15 April 1994, second, any subsequent, post-1994 agreements that may emerge in the WTO context.

a. The Final Act, the Marrakesh Agreement, WTO "covered agreements" and WTO "schedules"

The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations includes some 60 "treaties" (two of which have been terminated by now).[81] The drafters used varying terms to designate the more or less 60 legal instruments, such as agreement, understanding, protocol, decision, declaration or even mechanism. However, according to the Vienna Convention[82], whatever the denomination given, they can all be considered as "treaties".

Even if some 60 different instruments or "treaties" were negotiated, the combined result of the Uruguay Round negotiations is set out and part of one single framework agreement, namely the "Final Act". This Final Act incorporates all WTO agreements. All WTO members have adopted and are bound by this so-called "single package" (with the exception of the two so-called plurilateral agreements to which less than half of the WTO membership is a signatory).

Some 30 of the 60 "treaties" part of the Final Act constitute what is called the Marrakesh Agreement Establishing the WTO (referred to here as the "Marrakesh Agreement"). Those 30 "treaties" are by far the most important ones. They range from the Marrakesh Agreement itself, to the GATT 1994 with its specific Understandings, the specific agreements on trade in goods, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Intellectual Property Rights (TRIPS), the DSU, the Trade Policy Review Mechanism and the two remaining plurilateral agreements. The remaining 30 legal instruments, not part of the Marrakesh Agreement, are mainly Ministerial decisions and declarations.

The single most important distinguishing feature among WTO treaties is whether or not they are listed in Appendix 1 to the DSU as "covered agreements", that is, agreements that are subject to, and can be

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proportionality", ibid., 471). He concludes, however, that general principles of law "are *per se* part of the legal order of the GATT although they derive their existence from sources outside the GATT legal order" (ibid.).

[79] See Annex 1 to the DSU. Palmeter and Mavroidis, in their article on sources of WTO law (David Palmeter and Petros Mavroidis, *The WTO Legal System: Sources of Law*, 1998 AJIL 398-413, hereafter "Palmeter and Mavroidis, *Sources …*"), somewhat overlooked this major dividing line between WTO covered agreements and other sources of WTO law. They also create the impression that the sources of WTO law which give rise to legally binding norms (such as WTO agreements), are somehow on the same legal footing as other sources of WTO law that do not, in and of themselves, constitute legal norms, such as judicial decisions, doctrine and other non-normative elements (such as subsequent practice).

[80] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, concluded in Marrakesh, Morocco, on 15 April 1994.

[81] The International Dairy Agreement and the International Bovine Meat Agreement.

[82] The Vienna Convention defines the term "treaty" without reference to its particular designation, i.e., "whatever its particular designation" (Article 2.1(a)).

invoked before, the WTO dispute settlement mechanism.[83] Of the 60 or so WTO treaties, only the treaties incorporated in the Marrakesh Agreement (with the exception of the Trade Policy Review Mechanism) are "covered agreements". The other 30 or so treaties part of the Final Act, but not part of the Marrakesh Agreement, are not "covered agreement" and cannot, therefore, be enforced under the DSU.

Besides the treaty provisions themselves, some WTO agreements part of the Final Act -- more specifically those incorporated in the Marrakesh Agreement (such as GATT 1994, GATS and the agreement on agriculture) -- include annexes setting out, not multilateral treaty text applying to all WTO members, but member-specific schedules specifying so-called trade concessions or specific commitments. These concessions take the form, for example, of tariff or export subsidy reduction commitments or national treatment commitments in specific services sectors. They are the result of mainly bilaterally negotiated trade deals which under the MFN clause are then "multilaterilised". They are drafted by the WTO members negotiating the concessions, but thereafter verified and accepted by the entire WTO membership as a full part of the Marrakesh Agreement.

In 1998 the Appellate Body made an important statement when declaring that these country-specific schedules of concessions set out *treaty text* to be interpreted like any other norm of the WTO treaty, i.e., in line with the Vienna Convention rules on treaty interpretation (and this notwithstanding the special features of these member-specific schedules).[84]

b. Agreements concluded in the WTO context subsequent to 15 April 1994

WTO agreements are not static. Firstly, pursuant to the Marrakesh Agreement, the WTO treaty concluded in 1994 can be amended[85] and new members can accede to it.[86] Amendments, in so far as they relate to "covered agreements", would then become themselves, per definition, an integral part of the "covered agreement" in question and fall thereby under the DSU's coverage.[87] Accessions result, in turn, to the annexing of a Protocol of Accession and new country-specific schedules of concessions to the Marrakesh Agreement, making the Protocol and schedules an integral part of WTO "covered agreements".[88] Both these post-1994 amendments and accessions are thus enforceable as "covered agreements" under the DSU.

Secondly, separate protocols or entirely new WTO agreements may be concluded post-1994. Under GATS, for example, new protocols on financial services and telecommunications have been added. The actual substantive obligations under these protocols are reflected, though, in the country-specific schedules of commitments where new commitments have been made in the areas of financial services and telecommunications. Also entirely new WTO agreements, say, a treaty on trade and competition, could be added to, for example, the Annex 1A list of Multilateral Agreements on Trade in Goods. To do so, the amendment procedures in Art. X of the Marrakesh Agreement must be followed, in particular, those relating to amending the Marrakesh Agreement itself, since adding a new multilateral

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[83] Article 1.1 of the DSU provides : « The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the « covered agreements ») ».

[84] Appellate Body report on *EC –Computer Equipment*, para. 84 ("the only rules which may be applied in interpreting the meaning of a concession [being part of WTO covered agreements] are the general rules of treaty interpretation set out in the *Vienna Convention*").

[85] Article X of the Marrakesh Agreement.

[86] Article XII of the Marrakesh Agreement.

[87] At the time of writing, not a single amendment was made to the 1994 WTO treaty.

[88] In principle, the report of the Working Party that negotiated the accession does not become a "covered agreement". But in practice the important paragraphs of that report are explicitly referred to and incorporated in the Protocol of Accession so that indirectly those paragraphs of the Working Party report can also be enforced through the DSU.

trade agreement is not explicitly regulated in Art. X.[89] In case the new agreement is to be binding only on a limited number of WTO members, Art. X:9 explicitly regulates the adding of so-called plurilateral agreements. This can occur only in case there is a consensus among all WTO members. The agreement as between the parties to a plurilateral agreement suffices to *delete* such agreement from Annex 4 to the Marrakesh Agreement, it does not suffice to *add* such new agreement to Annex 4 (the former can be done "exclusively by consensus").

There may also be post-1994 treaties concluded in the WTO context that do not become part of the Marrakesh Agreement nor, *a fortiori*, of WTO covered agreements enforceable under the DSU. One may think here especially of bilateral agreements between disputing members, such as a mutually agreed solution, an agreement in respect of the reasonable period of time for implementation of reports or an agreement on the procedures to be followed in case of an implementation dispute.[90]

2. Acts of WTO organs

As opposed to GATT 1947, the WTO is an international organisation with legal personality, specific functions and an organic structure. Its organs are law-creating bodies. The law they create must be clearly distinguished from that created by the WTO treaty itself. A treaty concluded as between WTO members does not have the same legal standing as an act by a WTO organ, even if this organ is constituted of delegates of all WTO members. In practice, this distinction and the importance of the WTO now being a fully-fledged international organisation is often overlooked. Too often, it is considered that a consensus of WTO members acting, for example, in the form of the Council for Trade in Services, can simply overrule or amend a WTO treaty provision, without respecting the amendment provisions in the Marrakesh Agreement. The agreement of WTO members *as states*, required, for example, to amend the WTO treaty, cannot be equated to an agreement among WTO members *acting as a WTO organ*. As explained below, acts of a WTO organ must respect and are subject to their constituent WTO treaty instruments. They cannot change them. On the contrary, acts of WTO organs taken in disrespect of the relevant WTO treaty provisions are invalid. In that sense, the WTO is not a "member-driven" organisation where the will of members, whatever form it takes, can overrule previous state consent.

The distinction between actual WTO treaty norms and acts of WTO organs is crucial in terms of the substantive jurisdiction of WTO panels. Only claims under WTO covered agreement, not claims under acts of WTO organs, fall within this jurisdiction. As noted below, however, the fact that claims under such acts of WTO organs do not fall within a panel's jurisdiction, does not mean that these acts cannot be part of the applicable law before a panel, the be resorted to in order to decide on the validity of claims under WTO covered agreements.[91]

Examples of norms enacted by WTO organs are: waivers granted by the WTO Ministerial Conference to a specific WTO member, decisions adopted by specialised WTO committees (such as the adoption by the SPS committee of Guidelines under Article 5.5 of the SPS agreement) or decisions taken by the DSB in respect of dispute settlement. In addition, reference could be made to the increasing number

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[89] In the absence of such explicit rules, adding a new agreement (assuming that this new agreement is to be an integral part of the Marrakesh Agreement binding on all WTO members), then involves, indeed, amending the Marrakesh Agreement itself, not any of the other more specific multilateral trade agreements.

[90] The fact that such agreements cannot be enforced under the DSU represents a serious flaw. It would, indeed, be very beneficial for the implementation of WTO rules in case a WTO member who, for example, obtained concessions in a mutually agreed solution and, as a result, withdrew its request for a panel, to enforce that solution through the DSU mechanism in case of non-respect by the other member. When agreeing on such solution, parties could, however, include an arbitration clause to this effect (say, an agreement to arbitrate any disputes under the mutually agreed solution pursuant to DSU Art. 25).

[91] See Chapter VIII. For example, a WTO waiver cannot itself be the subject of a WTO claim before a panel, but it may be invoked in defence against another claim of, say, violation of GATT Art. I, as it was done by the EC in *EC – Bananas* in respect of the Lomé waiver.

of international agreements the WTO as an institution concludes with other international institutions, such as the World Bank, the IMF, the International Office for Epizootics, etc.

DSB decisions may be of a general nature, such as the adoption of rules on how to count DSU deadlines or imposing a 10 days deadline for requests to be a third party in panel proceedings. They may also relate to particular disputes, such as the decision to refer a matter to a panel or arbitrator. DSB decisions that actually adopt panel or Appellate Body rulings and recommendations, on the other hand, ought to be classified rather as decisions of the WTO judiciary, not decisions of WTO political organs. This was confirmed by the Appellate Body in respect of decisions by GATT Contracting Parties in which GATT panel reports were adopted. The panel on *Japan – Alcoholic Beverages* found that such decisions are an integral part of GATT 1994 since they are « other decisions of the CONTRACTING PARTIES to GATT 1947 » which, pursuant to Article 1(b)(iv) of GATT 1994, have been incorporated in GATT 1994.[92] In other words, the panel considered such decisions and, hence, indirectly, GATT panel reports, to be fully-fledged WTO treaty norms, applicable and binding as to a particular set of circumstances.[93] The Appellate Body reversed this panel finding, concluding instead that adopted reports are "an important part of the GATT *acquis*" but that "they are not binding, except with respect to resolving the particular dispute between the parties to that dispute".[94] The same reasoning must, *a fortiori*, apply to DSB decision in which WTO panel and Appellate Body reports are adopted. Such decisions, taken virtually automatically pursuant to the negative consensus rule, are not decisions of the DSB as a political WTO organ binding on all WTO members. They are a mere rubber-stamping or confirmation of the work conducted by the judicial branch of the WTO. To that extent, the DSB can, indeed, be said to be part of the WTO judiciary. The fact that the Appellate Body confirmed that panel reports and the decisions adopting them are binding only on the parties to the dispute does not only mean that such decisions cannot be seen as acts of WTO political organs. At the same time, it confirms that such decisions, and hence panels and the Appellate Body, are judicial in nature since bestowed with the power to make legally binding rulings as between the disputing parties.

3. GATT/WTO "custom" and "subsequent practice"

It is questionable whether there exists any GATT/WTO-particular customary international law, as referred to, for example, by Benedek[95] and Palmeter and Mavroidis.[96] In terms of "GATT custom", Benedek makes reference to the practice of consensus decisions instead of majority voting or the practice on dispute settlement under GATT Arts. XXIII-III later codified in 1979. Palmeter and Mavroidis, make reference to the "customary practices" cited in Article XVI:1 of the WTO Agreement, which provides:

> "Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to the GATT 1947 and the bodies established in the framework of GATT 1947" (underlining added).[97]

In the view of Palmeter and Mavroidis, "[i]t is doubtful that the 'customary practices' referred to would be recognized as customary international law. Although the customary practices of GATT

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[92] Panel report on *Japan – Alcoholic Beverages*, para. 6.10.
[93] Benedek seems to have made the same mistake, classifying decisions by GATT Contracting Parties in the field of dispute settlement as "secondary law", instead of judicial decisions binding only on the parties to the dispute. See *supra* note 78.
[94] Appellate Body report on *Japan – Alcoholic Beverages*, p. 14.
[95] See note 78.
[96] Palmeter and Mavroidis, *Sources …*, 407.
[97] Note that DSU Art. 3.1 as well incorporates certain GATT "principles": "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947 …".

might meet some of the requirements of custom, it is doubtful that they were accepted by the parties to GATT or are viewed by the members of the WTO 'as law'".

However, that it is quite difficult for there to be GATT/WTO custom is not so much linked to the absence of the psychological or subjective element for custom to exist, namely *opinion juris* or the existence of a general practice "accepted [by GATT Contracting Parties/WTO members] as law" (Art. 38, paragraph 1(b) of the ICJ Statute). It is related rather to the fact that custom is a source of law *independent of treaty norms*. The ICJ in the *Nicaragua case* made it clear that custom and treaty are two sources of law that exist independently of each other.[98] The fact that a norm of customary international law (in that case, the principle of non-use of force) was codified in a treaty does not therefore extinguish the customary norm. Both norms continue to exist side by side. Equally, in case subsequently the treaty were to be terminated, this does not mean that also the custom automatically ceases to exist. Custom cannot be completely dependent on the existence and operation of a particular treaty (*in casu*, the WTO treaty). If WTO custom were, indeed, to exist as a source of law independent of GATT/WTO treaties, it would mean, for example, that in case a WTO member were to leave the WTO, it would no longer be bound by WTO treaties, but still be bound by GATT/WTO custom. It is difficult to imagine that such GATT/WTO custom exists today.

The fact that it is, on these grounds, difficult to see any WTO specific custom emerge, leading a life independent of the WTO treaty, is not to say though that there can be no custom in the area of trade all together. Such custom could emerge *with reference to GATT/WTO law*, such as, arguably, basic principles of non-discrimination or be constituted of parts of the so-called *lex mercatoria*.[99] Such custom would then be binding on all states, irrespective of whether they are WTO members. This is a question not further examined in this work.

The normative elements that may have developed under the operation of GATT or now the WTO are better described as "subsequent practice" to be taken into account in the interpretation of GATT/WTO treaty rules, in the sense referred to by Art. 31.3(b) of the Vienna Convention ("subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"). Article XVI:1 of the WTO Agreement itself uses the words "shall be guided by … customary practice" (not, for example, "shall abide by"). If these practices were to constitute custom they would not only "guide" the WTO, but "bind" WTO members.[100] Some of the other normative elements often alleged to be WTO custom, such as the 10 day deadline for requests to join panel proceedings as a third party, are a mix of "subsequent practice" under the DSU and normative value to be attributed to General Council and DSB decisions as acts of WTO organs.[101]

In *Japan – Alcoholic Beverages*, the Appellate Body explained what it understood under "subsequent practice" as referred to in Art. 31.3(b) of the Vienna Convention: "the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant".[102]

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[98] ICJ Reports 1986, 95.

[99] See S. Zamora, *Is there Customary International Economic Law*, 22 GYIL 9-42 (1989).

[100] For WTO practices (as opposed to pre-1994 GATT practices) there is no provision similar to Art. XVI:1. This may lead to the rather odd result that somehow old GATT practices are given more weight in the WTO than new WTO practices. In the WTO context, it may, indeed, be increasingly difficult to prove that a WTO practice meets the Art. 31.3(b) condition of establishing "agreement of the parties regarding its interpretation", especially now that the Marrakesh Agreement itself, in Article IX.2, explicitly provides that only the Ministerial Conference and General Council have the authority to adopt interpretations and this by ¾ majority.

[101] A 1994 decision of the GATT General Council makes reference to this rule as a practice. Moreover, each time the DSB establishes a panel, the DSB chairperson reminds WTO members that they have 10 days to exercise their third party rights under DSU Art. 10.

[102] Appellate Body report on *Japan – Alcoholic* Beverages, p. 13, footnotes omitted.

It is important to recall that in the context of international organisations, evidence of "subsequent practice" may be found either in *state* practice or the practice of the international organisation itself, *in casu*, WTO organs. It is generally accepted today (and confirmed by the ICJ in, for example, the *Certain Expenses* and *Namibia* cases[103]) that the constituent instruments of international organisations must be interpreted not only with reference to subsequent practice of the *individual states* that are members to the organisation, but also the subsequent practice of the international organisation itself or its organs. The latter is understood to occur pursuant to customary international law, not part of the law of treaties but part of international institutional law.[104] As a result, the discussion often heard in WTO circles as to whether a decision or practice is one of WTO members or one of the WTO as an institution (for example, the General Council or the DSB) is not relevant for purposes of determining the normative value of "subsequent practice". Both practice of WTO members and practice of the WTO as an institution can be referred to in the interpretation of WTO law.[105]

Subsequent practice can lead to further clarification of treaty rules, certain treaty gaps being filled or even to the *desuetude* of WTO obligations.[106] Following international case law, such "subsequent practice" is capable also to actually change treaty norms.[107] In that instance, subsequent practice can be equated with an implicit agreement to change the law and operates, not pursuant to Art. 31 of the Vienna Convention on treaty *interpretation*, but pursuant to the rule of customary international law allowing for the *modification* of treaties by means of subsequent practice.

4. WTO judicial decisions and doctrine

Academic writings are increasingly referred to in panel and Appellate Body decisions. Such decisions refer even more frequently to previous panel and, in particular, Appellate Body reports. Reference has been made also to judicial decisions of other courts or tribunals, such as the ICJ and the ECJ.

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[103] Respectively, ICJ Reports 1962, 168 and 1971, 22.

[104] See Lauterpacht, *The Development of the Law of International Organization by the Decisions of International Tribunals*, 152 RECUEIL DES COURS 379 (1976) and TETSUO SATO, EVOLVING CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS 232-243 (1996). Support for the fact that the practice of WTO organs (such as the Ministerial Conference, the General Council or the DSB), as opposed to the practice of individual WTO members, must play a role also in the interpretation of WTO provisions can be found in Art. IX:2 of the Marrakesh Agreement. This provision grants the "exclusive authority" to the Ministerial Conference and the General Council "to adopt interpretations of this Agreement and of the Multilateral Trade Agreements" by ¾ majority. According to Tetsuo Sato "[i]n these cases [where internal political organs have been granted the explicit competence of authoritative interpretation], therefore, the mechanism that the practice of the organs would determine the meaning of their constituent instruments is furnished in advance. In other words, it is legally recognized by the State members that the practice of the organs affects their constituent instruments".

[105] The Panel on *US – Shrimp*, operating under DSU Art. 21.5 to check whether US implementation of the original DSB recommendations was consistent with WTO rules, made reference, for example, to the 1996 Report of the CTE in its interpretation of GATT Art. XX. Doing so, it noted the following: "Insofar as this report can be deemed to embody the opinion of the WTO Members, it could be argued that it records evidence of 'subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation' of the provisions concerned. However, even if it is not to be considered as evidence of a subsequent practice, it remains the expression of a common opinion of the Members and is therefore relevant in assessing the scope of the chapeau of Article XX" (*US – Shrimp*, implementation panel, para. 5.56).

[106] Kuijper has questioned, for example, whether as between European states, the freedom of road transit as prescribed in GATT Art. V cannot be said to be fallen into *desuetude* (Kuijper, *The Law of GATT …*, 231). In the DSU context, one could refer, for example, to DSU Art. 4.11 which requires that the acceptance of a request to join consultations as a third party be notified to the DSB by the third party in question or the defending member ("In that event they shall so inform the DSB"). Such notification does not occur in practice. Either WTO members continuously violate DSU Art. 11.4 by not so informing the DSB, or the provision is no longer seen as binding.

[107] See the ICJ *Namibia case*, ICJ Reports 1971, 22 (in respect of voting practices of the UN Security Council which were effectively found to have changed the UN Charter provisions).

As far as judicial decisions is concerned[108], we noted earlier that GATT and WTO panel and Appellate Body reports, as well as the DSB decisions adopting these reports, are not acts of WTO political organs nor "subsequent practice" legally binding on all WTO members, but rather judicial decisions binding only on the parties to a particular dispute.[109] As explained below, judicial decisions and teachings of publicists do *not* in and of themselves constitute legal norms.[110] Nonetheless, they are influential in the process of determining what the law is. The same applies in the context of WTO law. As the Appellate Body stated in *India – Shirts and Blouses*: "Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that … the *DSU* is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute".[111]

Be this as it may, the Appellate Body made it equally clear that "[a]dopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute".[112] The Appellate Body, in a footnote, referred explicitly to Art. 59 of the ICJ Statute (pursuant to which ICJ decisions are binding only as between the parties to the particular dispute), adding that this provision "has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible".[113] In the WTO, no equivalent to Art. 59 can be found, nor is there an equivalent to Art. 38, paragraph 1(d), explicitly stating that judicial decisions are "subsidiary means for the determination of rules of law". Nonetheless, through its case law the Appellate Body has clearly incorporated this "subsidiary means" into WTO law.

5. Other Sources of WTO law

Unilateral acts of WTO members have occasionally played a role in WTO dispute settlement. In the panel report on *US – Section 301*, for example, a US declaration solemnly made and repeated several times during the panel's proceedings -- to the effect that the US administration would not use its discretion under section 301 to act contrary to the DSU -- was accepted as a US undertaking that confirmed the panel's interpretation of section 301 in a way that was consistent with DSU provisions. As a result, the EC's challenge failed, but the panel added that this result was only warranted in so far as the US undertakings were maintained.[114]

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[108] That WTO panels and the Appellate Body are judicial organs, see Chapter VIII, section A, below.
[109] See section C.2 above on acts of WTO organs and *supra* note 47.
[110] See Chapter III, section C.
[111] Appellate Body report, p. 19. In *US –FSC* (footnote 127), the Appellate Body stressed the importance of distinguishing between authoritative interpretations under Art. IX of the Marrakesh Agreement and interpretations by the WTO judiciary in a particular case. Elsewhere, the Appellate stressed that "it is certainly not the task of either panels or the Appellate Body to amend the DSU … Only WTO Members have the authority to amend the DSU … Determining what the rules and procedures of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO" (Appellate Body report on *US – Certain Products*, para. 92).
[112] Appellate Body report on *Japan – Alcoholic Beverages*, p. 14. As far as unadopted GATT panel reports are concerned (non-adoption being virtually excluded under the WTO's DSU), the Appellate Body stated that these "have no legal status in the GATT or WTO system" but that "a panel could nevertheless find useful guidance in the reasoning of an unadopted panel report that it considered to be relevant" (ibid., 14-15). In *Argentina – Footwear* (at para. 43), it specified that panels may not go beyond deriving "useful guidance" from the reasoning employed in unadopted panel reports, bashing the panel in that case on the ground that it "in fact, *relies* upon the [unadopted] *Bananas II* panel report".
[113] Appellate Body report on *Japan – Alcoholic Beverages*, footnote 30.
[114] Panel report on *US Section*, in particular at para. 7.118.

D. Special features of WTO law

WTO law is international law. The WTO legal system is not a closed legal circuit. But, of course, WTO law does have special features, both in terms of the rights and obligations it imposes on WTO members and its general structure and characteristics. It is the latter that will be elaborated in this section. The special features of WTO law have had a decisive influence on how it has been considered in the wider context of public international law. They will also be influential when resolving certain conflict of norms involving WTO rules.

1. The Private/Contractual Background of the WTO

a. The GATT/WTO: a "club" where "trade concessions" are exchanged[115]

The WTO, like the GATT, is not an international agreement that can be invoked by mere acceptance. A state or independent customs territory does not become a WTO member simply in virtue of having signed the WTO treaty. An additional "entry fee" is required to become part of the WTO club. This "entry fee" consists of a series of trade concessions – tariff reductions, market-access commitments in respect of foreign services, and so on – that have to be granted to existing WTO members. These concessions are in addition to the multilateral obligations set out in the WTO agreements and are written into the so-called "schedule" of concessions, a list of commitments specific to each WTO member. Membership is secured only after these concessions are accepted by existing members as balancing the concessions that they will be giving to the newcomer through WTO membership. Consequently, at the foundation of a member-member relationship lies a delicately negotiated balance not only of rights and obligations explicitly enshrined in WTO agreements, but also of trade concessions exchanged at entrance and through a series of subsequent trade rounds. These trade concessions or "benefits" can even be re-negotiated outside of the context of a multilateral negotiating round as long as the overall balance is maintained.[116] Hence, a WTO member can withdraw a given concession as long as it either makes up for it by granting a concession in another field or tolerates an equivalent withdrawal of concessions by its trading partners.

Especially in the early days of GATT 1947 the focus was largely on country-specific tariff concessions, the function of the actual provisions of the GATT being mainly to avoid circumvention of these tariff concessions. Consequently, GATT rules were seen as ephemeral and negotiable, with ample scope for derogation and exceptional circumstances, not as a set of regulatory provisions on the basis of which traders could predict long term economic activities. The focus of the early GATT was, moreover, centered on governments. GATT rules were negotiated, implemented and re-negotiated by trade diplomats in Geneva, to a great extent de-linked from public scrutiny by individual economic operators, in particular consumer interests. In this sense, GATT was a private/contractual matter between governments.

b. GATT/WTO dispute settlement: redress against "nullification and impairment" of benefits, not breach

As a result of the GATT/WTO essentially upholding an overall balance of trade concessions, the GATT's dispute settlement system, like that of the WTO today, focused on the "nullification or impairment" of benefits, instead of tackling breaches of obligations under international law.[117] By the same token, the GATT/WTO's remedy of last resort is to "suspend concessions or other obligations". In other words, what is actionable under the WTO is not, in the first place, breach of obligations, but

[115] Parts of this section are taken from Pauwelyn, *Enforcement* … .
[116] Pursuant to GATT Art. XXVIII or GATS Art. XXI.
[117] GATT Art. XXIII(1). It also refers to impeding the attainment of GATT objectives.

the upsetting of the negotiated balance of benefits consisting of rights, obligations, and additional trade concessions.

The dispute settlement provisions in the WTO, all copied from or referring to GATT Art. XXIII, require "nullification or impairment" of benefits, even when it comes to so-called violation complaints.[118] What counts is whether a violation nullifies or impairs benefits, not the violation as such. DSU Art. 3.8 specifies, however, that "[i]n cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment". This provision adds: "This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge". In other words, a breach can only be condemned in case it causes "damage".[119] It can be questioned, however, whether in the event a WTO-inconsistent trade restriction is, indeed, applicable to the trade of a particular WTO member, the presumption of nullification remains rebuttable. In that instance, case law shows that even potential trade effects or missed trade opportunities are enough to establish nullification.[120] Hence, in most cases where an illegal restriction does apply to trade from a WTO member, the presumption of nullification of benefits due to that member will be irrebutable, even if no actual trade is being diverted.[121]

This approach of requiring "nullification of benefits", even in WTO dispute settlement, is a direct result of the old enforcement mechanism under GATT 1947 where one had basically two possible remedies of more or less equal value to restore the negotiated balance of benefits – in much the same way there are two possible ways to equalise unbalanced scales. Either the party being challenged *removes* the upsetting, trade restricting act – that is, some weight is *taken out* on one side of the scales – or the party challenging enacts its own trade restriction by removing an earlier trade concession – that is, some weight is *added* on the other side. The resulting enforcement regime was, however – and somewhat paradoxically – both lenient and strict. On the one hand, the system was lenient: the customary consequences linked to a breach of an international law obligation – in legal terms, cessation and reparation, and in political terms, the shunning linked to a non-law-abiding party – were avoided. On the other hand, however, the system was uniquely strict: parties were held "responsible" not only for breaches of GATT obligations, but also for "nullification or impairment" caused by conduct that did *not* conflict with any specific GATT provision – the so-called "non-violation nullification or impairment", a cause of action still available under the WTO treaty. Even though rebalancing the scales (that is, trade retaliation) is, within the WTO, stated to be only a temporary solution (the ultimate goal being compliance), these historical origins in the GATT are still haunting the WTO legal system today. Recall, in particular, Judith Bello's statements that "WTO rules are simply not 'binding' in the traditional sense"[122] and that "[t]he only truly binding WTO obligation is to maintain the balance of concessions negotiated among members".[123]

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[118] Note, however, that in respect of violation complaints under GATS, no reference is made to nullification of benefits. GATS Art. XXIII.1 refers to situations where "any other member fails to carry out its obligations or specific commitments under this Agreement".

[119] This constitutes a deviation from general international law where damage is not a requirement for there to be wrongful conduct (see Art. 2 of the ILC Draft Articles 2000).

[120] See, for example, the GATT 1947 panel reports on *Japanese Measures on Imports of Leather*, L/5623, adopted on 15/16 May 1984, BISD 31S/94, 112-113 and *US – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, 155-157.

[121] However, as explained below, this does not mean that all breaches of WTO law necessarily nullify benefits of all WTO members, nor, *a fortiori*, that all WTO members can complain about each and every breach of WTO law.

[122] Bello, *Less is More …*, 417.

[123] Ibid., 418.

2. The WTO as a public/rules-based system

a. WTO rules are increasingly "regulatory" in nature

As compared to the GATT (based largely on country-specific tariff concessions), the character and underlying foundation of most WTO rules has changed. WTO agreements such as the SPS or TRIPS agreement are unrelated to the idea of balancing trade concessions that are (like in GATT or GATS) additional to the rules set out in the agreement itself. Increasingly, WTO rules are of a "regulatory nature", setting out general standards and conditions for state conduct, which are binding not as part of some ephemeral balance of concessions, but as a result of their inherent and indefinite juridical force. In that sense, the WTO treaty is increasingly a "law-making treaty" or *traité-loi*.[124]

In this sense, two major types of WTO obligations emerged:

(1) obligations with an inherent and indefinite juridical force derived from multilateral treaty rules that cannot be exchanged for other trade concessions nor be re-negotiated under, for example, GATT Art. XXVIII;
(2) obligations that are supplementing the provisions in WTO agreements in the form of tariff concessions or other member-specific commitments set out in schedules which are of a more temporal nature in that they can be exchanged subject to the overall balance of concessions.

Note, however, that also the first type of obligations (regulatory provisions), although not subject to re-negotiation under GATT Art. XXVIII or GATS Art. XXI, may be the subject of "suspension" or trade retaliation under the current DSU, i.e., in case a WTO member fails to conform to WTO rules. In *EC – Bananas*, for example, Ecuador obtained authorisation to suspend its obligations vis-à-vis the EC under the TRIPS agreement. Although this enables developing countries to have some cloud in enforcing DSB decisions[125], it risks undermining the "regulatory" nature of WTO treaty provisions. WTO members should, hence, reconsider whether trade retaliation can be taken under all possible WTO obligations, or whether it should, for example, be limited to commitments set out in country-specific schedules.

b. The "indirect effect" of WTO rules (or their increasing impact on individuals)

Ever more precise and expanding WTO rules increasingly affect not only WTO members as governments, but also individuals, consumers, and other economic operators in domestic and global marketplaces. The idea that GATT rules affect economic operators and not just states was already acknowledged in GATT case law.[126] But with the advent of new WTO agreements it has been accentuated and expanded so as to include prominently not only private traders, but also consumers.[127] To revert to the examples of the SPS and TRIPS agreements, a WTO panel decision condemning an EC ban on the use of certain growth hormones in beef-production is as much an issue for EC *consumers* as it is for US and EC producers of, and traders in, meat and meat products. Equally, respect for intellectual property rights is a matter of *individual rights* (not so much state rights), as is a DSB authorisation to suspend TRIPS obligations as a form of trade retaliation against, say, the EC's

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[124] See *infra* Chapter III, section E.1. Even WTO obligations set out in country-specific schedules have taken the form of regulatory provisions. Refer to the so-called reference paper including competition rules for the telecom-sector incorporated in the schedule of a number of WTO members.
[125] Note, though, that Ecuador never exercised the DSB authorisation.
[126] See, for example, the Panel report on *US - Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD 34S/136, para. 5.2.2 referring to GATT Art. III as a provision "not only to protect current trade but also to create the predictability needed to plan future trade", thereby giving significant importance to the interests of *traders*, rather than states. On this basis, the panel found, indeed, that discriminatory tax legislation that was not yet in effect was in violation of GATT Art. III because it created this "chilling effect" for traders.
[127] This was categorically acknowledged in the panel report on *US – Section 301*.

non-compliance with WTO rules in respect of trade in bananas. Whereas a reciprocal balancing act in completely unrelated areas (say, the suspension of copyrights for EC music producers in retaliation of the EC's GATT inconsistent banana import regime) may be acceptable to *governments*, legal rules affecting *individuals* call for greater predictability and stability. Such rules are better enforced as multilateral obligations, not as some temporal legal promise that can be withdrawn or exchanged for another.

Against this background, to portray WTO rules as a private/contractual matter as between governments only will become increasingly difficult. WTO rules have entered the public domain, both in the sense that they set regulatory disciplines and increasingly affect all sectors of society. They can no longer be negotiated and implemented like some form of "private contract".

This being said, as acknowledged by the panel on *US – Section 301*, WTO obligations have not so far been interpreted by GATT/WTO institutions as "creating legally enforceable rights and obligations for individuals" or "a legal order producing direct effect". Consequently, the WTO "did *not* create a new legal order the subjects of which comprise both contracting parties or Members and their nationals".[128] Hence, contrary to the obligations of EC member states deriving from large parts of EC law, as well as obligations imposed on states in certain human rights treaties, WTO obligations cannot be directly enforced by individuals before WTO institutions. But as the panel on *US – Section 301* remarked: "it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish".[129] The panel continued as follows: "Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that Members benefit from WTO disciplines. The denial of benefits to a Member which flows from a breach is often indirect and results from the impact of the breach on the market place and the activities of individuals within it … It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect".[130]

Although private operators *at large* are the main beneficiaries of WTO law -- the same way as international human rights law is there for the benefit of individuals (albeit, like the WTO, framed in international norms binding on *states*) -- the WTO's starting point remains, however, a *producer* and *exporter* point of view, rather than a consumer or importer's standpoint. In other words, its focus is on those able to benefit from trade protectionism, instead of those generally benefiting from free trade. To give one example, increasing the access for foreign goods or services to one's domestic market is referred to in the WTO as a "trade concession". More imports will, indeed, be bad news for (un-competitive) local *producers* (and from their point of view be a "concession"). But for local *consumers*, nothing has been "conceded". To the contrary, they will gain from an increase in imports (consumer surplus increases), by virtue of lower prices and more choice.[131] This approach clouds the benefits linked to increased trade. It depicts WTO rules as something against national interests (explaining also McRae's flawed theory discussed above[132]). Another example is the consumer interest in environmental or health protection. No WTO rule, not even the SPS agreement, imposes an *obligation to restrict trade* in order to meet, for example, minimum health standards. This is, to some

[128] Ibid., para. 7.72.
[129] Ibid., para. 7.73.
[130] Ibid., paras. 7.77 and 7.78.
[131] As noted by Bagwell and Staiger, "the consumer gain that comes from freer trade is not the liberalising force that has been harnessed by the WTO. Instead, much as labour and environmental interests claim, the WTO is driven by exporter interests" (*Labor, Environment and The World Trading System*, December 2000, on file with the author, 2).
[132] See section A.3.

extent, only normal for the WTO is about trade not health. But the bias goes further and, as we shall see below[133], GATT as well as WTO dispute settlement decisions have more generally neglected the *right* accorded to states to *restrict trade* (e.g., in order to protect consumers or even local producers), championing instead (and giving legal preference to) *obligations to free trade* (being obligations in favour of export and producer interests). This approach is reflected, for example, in the current WTO definition of "conflict", focusing exclusively on obligations and, more generally, in the view that the evolution of WTO law can only add up obligations to free trade and not grant certain new rights to restrict trade.[134]

c. Trade liberalisation is in the interest of all WTO members

The fact that the WTO is not only about governmental deals and trade-offs as between trade diplomats is perhaps best explained with reference to the objective of the WTO: trade liberalisation. According to universally accepted economics, trade liberalisation should, indeed, work to the benefit of *all* WTO members and their populations, including the member which is granting the so-called trade "concession". In that sense, the WTO is in the "public interest" of all WTO members.[135]

The immediate self-interest of states may well favour and lead to protectionism, export of unemployment and other beggar-your-neighbour policies (the opposite of WTO rules). WTO members nevertheless signed the WTO agreements. They did so to avoid escalating protectionism which at its origin my provide some benefits to the protecting state, but once followed by other states, is disastrous for each and every state. Trade not only prevents economic conflict which, in turn, may lead to outright war. It also translates itself in the biggest overall increase in welfare for all players involved, mainly as a result of a more efficient use of the world's resources. Economic theory shows that trade, and thus liberalising trade, brings about gains to *both* partners, the exporting state (increase in producer surplus) and the importing state (increase in consumer surplus), even if one of the trading partners does not have an *absolute* advantage in respect of any product (a comparative advantage suffices). Game theory and its prisoners' dilemma instruct also that open markets bring about a gain for *both* partners *individually* as well as the biggest *overall* welfare increase (a welfare increase that is higher than in any other situation, including that of protectionism by some and open markets by others).[136]

Trade liberalisation is, therefore, in the national interest of all states.[137] The central question is then: if liberalising trade, even unilaterally, is, indeed, in the national interest of all states, why is there a

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[133] See Chapter IV, section B.2.d.

[134] See, for example, the Appellate Body report on *EC - Asbestos*, para. 80, construing the TBT Agreement as an agreement with only "additional obligations" as compared to GATT 1947.

[135] On the dichotomy between a "private interests" model and a "public interests" model, see Kenneth Abbott, *GATT As a Public Institution: The Uruguay Round and Beyond*, 18 BROOKLYN JOURNAL OF INTERNATIONAL LAW 31-85 (1992).

[136] The prisoners' dilemma is generally depicted as follows (taking the trade relation between the EC and the US as an example, both having to opt either for protectionism or free trade):

	European Communities		
		Protectionism	Free Trade
United States	Protectionism	(0;0)	(3;-1)
	Free trade	(-1;3)	**(2;2)**

It shows that when both players opt for free trade they will both gain 2 and the overall welfare gain is 4. If both opt for protectionism and no trade occurs, no one gains and there is no overall welfare increase. If only one opens its markets, while the other remains protectionist, the former (free trader) loses 1, the latter (protectionist) gains 3, but the overall welfare increase remains lower than that in a situation were both open up their markets (2 instead of 4).

[137] Contrary to what McRae has argued, it is not *against* a state's national interest. As noted already in section A.3 above, McRae is, therefore, wrong when stating that WTO law is not based on the concept of the

need for the WTO? As Paul Krugman put it: "If economists ruled the world, there would be no need for a World Trade Organization. The economist's case for free trade is essentially a unilateral case: a country serves its own interests by pursuing free trade regardless of what other countries may do".[138] Instead, under the auspices of the WTO, we see states negotiate and exchange "concessions". But as Krugman remarked: "Never mind that the 'concessions' trade negotiators are so proud of wrestling from other nations are almost always actions these nations should have taken in their own interest anyway: in practice, countries seem willing to do themselves good only if others promise to do the same".[139] Hence, in the eyes of Krugman, "the economic theory underlying trade negotiations is nonsense" and WTO rules "are a game scored according to mercantilist rules, in which an increase in exports – no matter how expensive to produce in terms of other opportunities foregone – is a victory, and an increase in imports – no matter how many resources it releases for other uses – is a defeat".[140]

So what explains the existence of WTO obligations, obliging countries to do something they should do naturally, in their own interest? Krugman would blame it on "the failure of the public to buy the classical case for free trade"[141] and sees the WTO as a second best solution, acknowledging though that "in practice this particular set of bad ideas has led to pretty good results".[142] What else could explain the need for a WTO? We referred earlier to the prisoners' dilemma in which some WTO members may find themselves. Faced with an asymmetry of information, they may expect to gain something from protectionism (at least in the short term and for certain sectors within the country). At the same time, they must realise, however, that co-operation will benefit them more as well as lead to the biggest overall welfare increase. Hence the need for a WTO as an instrument of co-operation. Public choice theory further explains why governments impose trade restrictions, namely in pursuit not so much of overall national interest but in the interest of certain sectors of the economy, representative of a sufficient number of votes and in need for protection from import-competition. The so-called terms-of-trade effects of trade restrictions offer another explanation why certain countries (in particular large ones whose trade policies have an impact on world supplies and world prices), may consider it beneficial to restrict trade and to impose the so-called "optimal tariff".[143]

Nonetheless, to state that trade liberalisation is beneficial to all WTO members is one thing, to say that each and every WTO rule is of this "public interest" nature, quite another. As Benedek pointed out: "the relevance of the 'legal economics' in international economic law is questioned in view of the often strong political element involved in international economic relations which makes it unrealistic to regard the GATT rules from the perspective of a kind of 'economic law of nature'".[144] Witness, for example, WTO rules on anti-dumping which for many do not make economic sense and the GATT/WTO's reluctant incorporation of the agricultural and textiles sector into mainstream trade liberalisation rules, both as a result of strong political lobbying by developed country interests.

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sovereignty of states and national interests. He argues, for example, that "[a] sovereign state is inherently a mercantilist institution" (Donald McRae, *The WTO in International Law: Tradition Continued or New Frontier?*, 3 JIEL 27, 29 (2000)). Assuming that states aim at achieving the highest welfare for their population, this cannot be true.

[138] Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 JOURNAL OF ECONOMIC LITERATURE 113-120, 113.

[139] Ibid., 113.

[140] Ibid., 114.

[141] Ibid., 116.

[142] Ibid., 115.

[143] Kyle Bagwell and Robert Staiger pursue this terms-of-trade perspective as a justification for why the WTO exists and why its reciprocal exchange of market access concessions makes economic sense. See Kyle Bagwell and Robert Staiger, *GATT-Think*, NBER Discussion Paper No. 8005, November 2000.

[144] Benedek, *Rechtsordnung ...*, 468.

E. The Nature of WTO Obligations: Reciprocal or Integral?

In the previous section we addressed certain features of WTO law that make it special as opposed to other international law. These features have marked and continue to mark the WTO's relationship to other rules of international law. Next, we focus more particularly on the legal nature of WTO obligations. As shown below[145], a decision as to whether WTO obligations are of the reciprocal or integral type will be decisive in a great number of conflict of norms involving WTO rules.

1. The distinction generalised

The words "reciprocal" *versus* "integral" cannot be found in any codified rule of international law. Nonetheless, the distinction has major consequences and is reflected in a number of provisions on the law of treaties and state responsibility. In each of these provisions (such as Art. 41 of the Vienna Convention or Arts. 43 and 49 of the ILC Draft 2000), more precise wording is used or explicit examples are given. For an application of the distinction in a particular area to a given dispute one must, therefore, examine the precise terms of these provisions. It is useful, however, to transcend these specific provisions and to attempt to generalise the definition of reciprocal *versus* integral obligations and the consequences attached to it. These consequences are relevant only for rules deriving from multilateral treaties or rules otherwise binding on more than two states. *A priori*, the fact that a norm is set out in a multilateral treaty does not, therefore, mean that it cannot be "reciprocal".

The distinction between reciprocal and integral obligations boils down to the following. Reciprocal obligations are those where the legal matrix can be limited to a bilateral legal relationship between two states. Even if the obligation derives from a multilateral treaty rule binding on a large number of states, such reciprocal obligations can always be reduced to a compilation of bilateral state-to-state relationships. Hence, to affect or alter one of these bilateral relationships does not normally impunge on the other bilateral relationships, each of these relationships being detachable one from the other. The binding effect of integral obligations, on the other hand, is collective in nature. The different relationships between states bound by an integral obligation cannot be separated or detached into bilateral components. Hence, to affect or alter an integral norm will necessarily have an impact on all states bound by that norm. It cannot be limited to the bilateral relationship between two states.

A more precise legal criterion to distinguish between reciprocal and integral obligations, workable also for most of the provisions implicitly referring to this distinction, is to focus on breach. The central question is then: Does breach of the obligation in question necessarily affect the rights or obligations of all other states bound by the rule concerned? If so, the obligation is of the integral type. If breach may affect the rights or obligations of only one, more or sometimes all other state parties, then it is of the reciprocal type. This criterion shows that it is impossible to define a treaty in its entirety as reciprocal or integral in nature. One must look at every provision and every obligation individually

2. The legal consequences attached to the distinction

a. Four consequences

The distinction between reciprocal and integral obligations has four major legal consequences. Two in the field of the law of treaties; two in the area of state responsibility.

Firstly, and for present purposes most importantly, an *inter se* modification to a multilateral treaty agreed upon by only some of the parties to that treaty (either alone or with third parties) is only

[145] See Chapter VI, section C.2.

permissible when such modification relates to obligations *of the reciprocal type*. This is expressed in Art. 41 of the Vienna Convention, discussed at length below.[146] Art. 41 renders illegal *inter se* modifications to a multilateral treaty which "affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations" or relates to "a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as whole" (Art. 41.1(b)(i) and (ii)). If either of these two conditions are met, the treaty rule modified must be seen as one of an integral nature and no *inter se* deviations from it are allowed.[147] Art. 58 provides for similar rules in respect of the *inter se* suspension of multilateral treaties. In the same vein, Art. 19(c) of the Vienna Convention, prohibits reservations to a treaty that are "incompatible with the object and purpose of the treaty".

Secondly, and still within the field of the law of treaties, Art. 60.2(c) of the Vienna Convention provides that, in case of material breach by one party, any other party to the multilateral treaty (not just the party specially affected by the breach) may suspend the treaty, in whole or in part, "if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty". In other words, in case of breach of a multilateral treaty *of the integral type*, each and every party to that treaty can suspend the treaty, in whole or in part. Breach of treaty *of the reciprocal type* will enable only the "specially affected" party, i.e., the party at the other end of the bilateral relationship, to suspend the treaty.

Thirdly, and moving now to the field of state responsibility, legal standing to invoke the responsibility for breach *of a reciprocal obligation*, is limited only to the state at the other end of the bilateral relationship. Breach *of an integral obligation*, in contrast, can be invoked by each and every one of the other parties to the multilateral treaty (albeit sometimes to a lesser extent, e.g., limited to claims of cessation only). This is reflected in Arts. 43 and 49 of the ILC Draft 2000.

Fourthly, and linked to the limited scope for *inter se* suspension of multilateral treaties set out in Art. 58 of the Vienna Convention, the taking of countermeasures as a remedy in the field of state responsibility as against a defaulting state cannot take the form of a suspension of obligations *of the integral type*. Indeed, suspending such obligations would not only affect the defaulting state, but all other state parties to the multilateral treaty in question. Art. 50.2 of the ILC Draft 2000 makes clear that "countermeasures are limited to the suspension of performance of one or more international obligations of the State taking the measures *towards the responsible State*". Moreover, Art. 51 explicitly prohibits the suspension of certain obligations, most of which are integral in nature. In the field of the law of treaties as well Art. 60.5 prohibits the termination and suspension of treaty obligations, as a result of material breach, in case of "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular provisions prohibiting any form of reprisals against persons protected by such treaties".

b. What the distinction is not about

First of all, the problem of identifying whether an obligation is of a reciprocal or integral nature is not linked to the source of the obligation concerned. It is, in particular, not sufficient that an obligation derives from a *multilateral treaty*, for that obligation to be of the integral type (e.g., for all parties to that treaty to have standing to invoke breach of the treaty). The very question at issue is to distinguish

[146] Ibid..

[147] In particular the first condition (effect on the rights or obligations of third parties) coincides with the notion of integral obligations. The second condition (object and purpose) does so partly to the extent it is copied from the *Genocide Convention case*, discussed in section 3.A below. To the extent an *inter se* modification or suspension that goes against the object and purpose can also be said to be prohibited by the treaty itself, the illegality is not related to the integral nature of the provision involved. It flows then from the prohibition in the treaty itself.

between different types of obligations all of which derive from a multilateral treaty.[148] Hence, the fact that WTO rules derive from a multilateral treaty is not enough for WTO obligations to be of the integral type.

Secondly, the notion of integral obligations should not be equated with obligations that are binding on states *without their consent*. Some integral obligations are binding on all states, irrespective of their consent, namely obligations deriving from norms of *jus cogens*. However, most integral obligations (such as those in the field of environmental protection) are binding only *erga omnes partes*, i.e., binding only on the state parties to the treaty. They do not bind third states. Below we further discuss the allegation that some of these norms are "public interest norms" binding even on third states.[149]

Thirdly, to say that obligations are reciprocal in nature does not necessarily mean that they are affecting only two *governments* in their bilateral relations. They may well affect also individuals or economic operators other than public authorities. The fact that obligations have a direct or indirect effect on individuals does not make them integral (although most integral obligations, being obligations "in the collective interest" will have a beneficial effect on individuals also). As clarified below, WTO rules are a perfect example of rules of a mainly reciprocal type that nonetheless have a clear effect on individual economic operators.[150]

Fourthly, obligations of the reciprocal type should not be confused with obligations performance of which is inherently conditional on reciprocity. Although reciprocal in nature, reciprocal obligations may well be (and mostly are) *unconditional*, objective and self-existent in the sense that they must be complied with irrespective of compliance by other state parties (unless, of course, non-performance is justified as a suspension under Art. 60 or as a countermeasure). Here again, WTO rules are a perfect example. The WTO obligation to accord MFN treatment is an unconditional one: A WTO member must grant MFN status to imports of all other WTO members irrespective of how these other WTO members treat its own exports. MFN is, in that sense, not conditional on reciprocity. Nonetheless, although certain breaches of the MFN obligation may well affect all other WTO members, the MFN obligation is not as such an obligation of an integral type. A breach of the MFN principle does not necessarily affect the rights of all WTO members (the discrimination may well be targeted at only one state). MFN is essentially a collection of equivalent bilateral legal relationships in respect of which no discrimination is allowed to take place. It is, in other words, an obligation of the reciprocal type.

3. Background of the distinction

The distinction between reciprocal and integral obligations can be traced back to the 1951 ICJ Advisory Opinion on *Reservations to the Genocide Convention*.[151] It was further elaborated by Fitzmaurice in his reports to the ILC on the law of treaties, in particular in the area of termination or suspension of multilateral treaties as a result of breach.[152] The distinction finds reflection also in the

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[148] Moreover, technically speaking also an obligation deriving from a bilateral treaty could be of the integral type. Imagine, for example, that at the origin of the 1948 Genocide Convention, two states had first concluded a bilateral treaty outlawing genocide.

[149] See Chapter III, section B.4.d.

[150] See section D.2.b above.

[151] It can be traced back even further to the Dissenting Opinions of Judges Van Eysinga and Schücking in the *Oscar Chinn* case (PCIJ, Series A/B, No. 63 (1934)) discussed below in Chapter VI, section C.2.a.i.

[152] See Second Report on the Law of Treaties by Gerald Fitzmaurice, UN doc. A/CN.4/107, YILC, Vol. II, 16 (hereafter, "Fitzmaurcie, Second Report"), in particular Arts. 19 and 29 on termination and suspension of treaties based on fundamental breach and Third Report on the Law of Treaties by Gerald Fitzmaurice, UN doc. A/CN.4/115, YILC, Vol. II, 20 (hereafter "Fitzmaurice, Third Report"), in particular Arts. 18-19 on conflict with previous treaties.

current work of the ILC on state responsibility, in particular where it aims at defining the notion of "injured state" or states which can invoke state responsibility for breach of a multilateral treaty.[153]

a. The 1949 Genocide Convention Case

In the *Reservations to the Genocide Convention* case, the ICJ gave particular importance to the "objects" of the Convention. It noted that "[t]he Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality".[154] With reference to these "objects", the ICJ lay the foundation of what was to become the distinction between reciprocal and integral obligations: "In such a Convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions".[155] It was with reference, *inter alia*, to these "objects" that the Court made its main finding: "The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation".[156] Already in that case, the problem of "free-riding" by non-parties arose. The Court's acceptance of reservations *not* incompatible with the very object and purpose of the treaty was inspired largely by "the intention of the General Assembly and of the States which adopted [the Convention] that as many States as possible should participate".[157] Elsewhere, the Court referred to "the universal character both of the condemnation of genocide *and of the co-operation required* 'in order to liberate mankind from such an odious scourge'". The ICJ's approach to treaty reservations was incorporated subsequently in Art. 19(c) of the Vienna Convention, prohibiting reservations to a treaty that are "incompatible with the object and purpose of the treaty".

b. The ILC reports on the law of treaties by Sir Gerald Fitzmaurice

Fitzmaurice refined the distinction introduced by the ICJ and re-phrased it as one between "reciprocal" or "concessionary" obligations, on the one hand, and "integral" obligations, on the other. Multilateral treaties of the "reciprocating type" are those "providing for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually".[158] Whereas multilateral treaties of the "integral type" are those "where the force of the obligation is self-existent, absolute and inherent for each party".[159] In other words, "integral obligations" are those "towards all the world rather than towards particular parties"[160] and "do not lend themselves to differential application, but must be applied integrally".[161]

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[153] See Third Report on State Responsibility by James Crawford, UN doc. A/CN.4/507, 10 March 2000, paras. 99-108 (hereafter, "Crawford, Third Report") and Arts. 43 and 49 of the ILC Draft 2000.
[154] ICJ Reports 1951, 23.
[155] Ibid. In his Dissenting Opinion, Judge Alvarez went even further, classifying treaties of the type of the Genocide Convention as follows: "To begin with, they have a universal character; they are, in a sense, the *Constitution* of international society, the *new international constitutional law*. They are not established for the benefit of private interests but for that of the general interest" (ibid., 51, emphasis in the original).
[156] Ibid., 24.
[157] Ibid.
[158] Fitzmaurice, Third Report, 27, Art. 18, para. 2.
[159] Ibid., 27, Art. 19.
[160] Fitzmaurice, Second Report, 54.
[161] Ibid., 55.

The standard example given by Fitzmaurice of a treaty of the reciprocating type was the 1961 Vienna Convention on Diplomatic Relations; that of the integral type, the 1948 Genocide Convention.

Fitzmaurice attached two important legal consequences to this distinction, one in the field of termination/suspension of treaties, the other in the field of conflict between treaties. Treaties of the reciprocating type could, in Fitzmaurice's view, be suspended or terminated as a result of fundamental breach.[162] Moreover, later treaties conflicting with previous ones of the reciprocal type were, in his view, *not* null and void (instead, priority rules applied).[163] Integral treaties, in contrast, could, under Fitzmaurice's draft, *not* be terminated or suspended by the other parties as a result of breach ("the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty").[164] In addition, any subsequent treaty concluded *inter se* by the parties to such integral treaty which "conflicts directly in a material particular with the earlier [integral] treaty will, to the extent of the conflict, be null and void".[165]

Fitzmaurice also added a third type of multilateral treaties, namely those of an "interdependent nature", where "the participation of all the parties is a condition of the obligatory force of the treaty".[166] He gave treaties on disarmament as an example of interdependent treaties. In terms of termination/suspension as a result of breach, interdependent treaties could, in Fitzmaurice's view, be terminated in their entirety by the other parties in case of fundamental breach (not just suspended or terminated partly as was the case for reciprocal treaties), since for these treaties "performance by any party is necessarily dependent on an equal or corresponding performance by all the other parties".[167] However, much like "integral treaties" (and unlike "reciprocal treaties"), a later *inter se* treaty which "conflicts directly in a material particular with the earlier [interdependent] treaty will, to the extent of the conflict, be null and void".[168] This notion of "interdependent treaties" will not be further referred to here. Unlike the notions of reciprocal and integral treaties, the concept of interdependent treaties has not been generally used as a distinct category subsequently to Fitzmaurice's reports.[169] For purposes of conflict of norms (essentially, the legality of *inter se* modifications), these interdependent treaties can, indeed, be equated with integral treaties.

c. The Vienna Convention

Fitzmaurice's distinction between reciprocal, integral and interdependent treaties was not maintained in the Vienna Convention as it was finally concluded. Nonetheless, it left its traces in not less than six different provisions. The Convention deals with termination/suspension as a result of "material breach" in its Art. 60 and conflict with earlier treaties in its Arts. 30, 41, 53, 58 and 64.

Firstly, under Art. 60.5 termination/suspension as a result of material breach is *not* allowed in case of "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular provisions prohibiting any form of reprisals against persons protected by such treaties". These treaties can, indeed, be seen as an example of integral treaties in respect of which Fitzmaurice precluded termination and suspension (although not *all* integral treaties have been kept outside the scope of Art. 60, contrary to what Fitzmaurice originally proposed). Secondly, Art. 60.2(c) allows any other party (not just the party specially affected by the breach) to suspend the treaty, in whole or in part, with respect to itself "if the treaty is of such a character that a material breach of its

[162] Ibid., Art. 19.
[163] Fitzmaurice, Third Report, Art. 18.
[164] Fitzmaurice, Second Report, Art. 19(iv).
[165] Fitzmaurice, Third Report, Art. 19.
[166] Fitzmaurice, Second Report, Art. 29.1(iii).
[167] Ibid., Art. 19.1(ii)(b). Or as he noted in respect of the example of disarmament treaties: "the obligation of each party to disarm … is necessarily dependent on a corresponding performance of the same thing by all the other parties, since it is of the essence of such a treaty that the undertaking of each party is given in return for a similar undertaking by the others" (Ibid., 54).
[168] Fitzmaurice, Third Report, Art. 19.
[169] Crawford, in his Third report, talks about reciprocal and integral obligations, not about interdependent ones.

provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty". This provision resembles what Fitzmaurice wanted to see in respect of interdependent treaties.[170] Thirdly and fourthly, the reference in Arts. 53 and 64 to "peremptory norms", conflict with which invalidates other treaties, is reminiscent of Fitzmaurice proposal to invalidate treaties in conflict with *any* treaty of an integral or interdependent nature. However, Arts. 53 and 64 do not cover *all* conflicts with integral treaties, only conflicts with integral treaties of a particular type, namely those of *jus cogens*. Fifthly and sixthly, Arts. 41 and 58 recalls Fitzmaurice proposal to invalidate *inter se* agreements in conflict with integral or interdependent treaties, when it outlaws (though not invalidates) *inter se* modifications to a multilateral treaty that "affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations" or relates to "a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as whole" (Art. 40.1(b)(i) and (ii)). Art. 58 provides for similar rules in respect of the *inter se* suspension of multilateral treaties.

d. The ILC Drafts on state responsibility

Much aligned along Fitzmaurice's distinction between reciprocal and integral/interdependent obligations, James Crawford in his Third Report to the ILC on state responsibility distinguishes between "bilateral" obligations and "multilateral" obligations.[171] In his view, "bilateral obligations can arise from a variety of sources, including general international law, bilateral or multilateral treaties or unilateral acts". Crawford, like Fitzmaurice, refers to the Vienna Convention on Diplomatic relations as an example of a multilateral treaty setting out legal relations that are essentially bilateral in character.[172] As opposed to bilateral obligations, Crawford posits the notion of multilateral obligations.[173] Such multilateral obligations are subdivided into three classes.

Firstly, multilateral obligations of the *erga omnes* type, "owed to the international community as a whole, with the consequence that all States in the world have a legal interest in the compliance with the obligation".[174] This is the type of obligation *erga omnes* referred to by the ICJ in the *Barcelona Traction* case, itself distinguishing between reciprocal/bilateral obligations and integral/*erga omnes* obligations taking diplomatic relations as the standard example of the former type of obligations: "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States".[175] *Erga omnes* obligations are, in

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[170] In contrast, for integral treaties, Fitzmaurice wanted to outlaw any termination or suspension. Hence, it is incorrect for the ILC in its commentary to Art. 40 (para. (19)) of the 1996 draft and Crawford in his Third Report (at para. 91) to refer to Art. 60.2(c) as an expression of Fitzmaurice's theory on "integral obligations". The consequences in Art. 60.2(c) are rather those Fitzmaurice wanted to see in respect of "interdependent" treaties.

[171] Art. 40 on « Meaning of injured State » of the ILC Draft 1996, does *not* make an explicit distinction between reciprocal and integral obligations (nor between bilateral and multilateral obligations), but implies the existence of integral obligations in multilateral treaties when it labels any other state party to the multilateral treaty as "injured state" in case (1) the right infringed "necessarily affects the enjoyment of the rights or the performance of the obligations of the other States parties to the multilateral treaty" (Art. 40.2(e)(ii)); (2) "the right has been created or is established for the protection of human rights and fundamental freedoms" (Art. 40.2(e)(iii)); and (3) "it is established that the right has been expressly stipulated in that treaty for the protection of the collective interest of the States parties" to the multilateral convention. The ILC Draft 1996, in Art. 40.3, also defines "all other States" as injured State "if the internationally wrongful act constitutes an international crime".

[172] Art. 43(a) of the ILC Draft 2000, states the following in respect of bilateral obligations: "A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) That State individually".

[173] Given that "bilateral obligations" could be confused with all obligations in a bilateral treaty, "multilateral obligations" then being those derived from a multilateral treaty, it seems preferable to speak of reciprocal *versus* integral obligations. This is what we shall do in this work, unless we are specifically referring to Crawford's reports.

[174] Crawford, Third Report, para. 106 (a).

[175] ICJ Reports 1970, 3, at 32 (paras. 33-35).

Crawford's view, "virtually coexistensive with peremptory obligations (arising under norms of *jus cogens*)".[176]

Secondly, multilateral obligations owed *erga omnes partes*, i.e., owed, not to all states, but to all the parties to a particular regime (*in casu*, multilateral treaty). In Crawford's view, this class concerns "obligations which are expressed (or necessarily implied) to relate to matters of the common interest of the parties". In other words, the performance of the obligations of each and every state party is recognised as being in the common interest of all state parties, common interest being defined as an interest "over and above any individual interest that may exist in a given case".[177] As examples he refers to obligations that arise "in the fields of the environment (for example, in relation to biodiversity or global warming) and disarmament (for example, a regional nuclear free zone treaty or a test ban treaty)".[178] Elsewhere Crawford rightly points out that "human rights obligations are not the only class of international obligations whose performance cannot be considered as affecting any 'particular State' considered alone. This is also true of some obligations in such fields as human development, world heritage and environmental protection".[179]

Thirdly, multilateral obligations in respect of which particular state parties are recognised as having a "specific legal interest". Such obligations may be of the *erga omnes* or *erga omnes partes* type (i.e., affect all states or all state parties, but "specially affect" certain targeted states).[180] It is unclear whether, under the ILC Draft 2000, multilateral obligations exist breach of which specially affects certain states but which are neither *erga omnes* nor *erga omnes partes*. It would seem that such distinct category should *not* exist. If obligations, even those deriving from a multilateral treaty, affect only one or certain states, and not all states or all state parties to the treaty, then they ought to be regarded as bilateral obligations, not multilateral obligations.

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[176] Crawford, Third Report, para. 106 (a). Obligations *erga omnes* are dealt with in Art. 49.1(b): "… any State other than an injured Sate is entitled to invoke the responsibility of another State if … (b) The obligation breached is owed to the international community as a whole". Nonetheless, the claims of state responsibility allowed under Art. 49.1 are limited and not as wide as those granted to "injured States" (essentially cessation only unless other claims are made on behalf of the victim/specially affected state, see Art. 49.2 and table 2, ibid., 57).

[177] Ibid., para. 92.

[178] Ibid., para. 106 (b). In note 195, Crawford submits that « integral obligations » are a sub-category of obligations *erga omnes partes*. As noted earlier, he seems to be incorrect when referring to the treaties mentioned in Art. 60(2)(c) of the Vienna Convention as "integral treaties". Rather, they are what Fitzmaurice called "interdependent treaties". The way Fitzmaurice saw "integral treaties" should classify them rather across both obligations *erga omnes* (Fitzmaurice's prime example of an integral treaty was, after all, the Genocide Convention) and obligations *erga omnes partes* (such as most human rights and environmental provisions).

[179] Ibid., para. 88. On that basis, Crawford rightly criticises the ILC Draft 1996 for singling out "human rights and fundamental freedoms" in its Art. 40.2(e)(iii). The ILC Draft 2000 deals with obligations *erga omnes partes* as follows: (1) all states party to the multilateral treaty are defined as "injured State" if the obligation breached "[i]s of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned" (Art. 43(b)(ii)) (this is what Crawford refers to as "integral obligations", but see note 178); (2) even if not an "injured State" as defined in Art. 43, states party to the multilateral treaty may nonetheless invoke state responsibility in case the obligation breached "is established for the protection of a collective interest" (Art. 49.1(a)) (albeit to a lesser extent than "injured States", see Art. 49.2 and table 2, Crawford Third Report, 57; essentially limited to claims of cessation only, unless other claims are made on behalf of the victim/specially affected state).

[180] Crawford makes the analogy with Art. 60.2(b) of the Vienna Convention which also refers to a "party specially affected", allowing that party to suspend the treaty, in whole or in part, with respect to the defaulting state. This type of multilateral obligation is addressed in Art. 43(b)(i) of the ILC Draft 2000 referring to an obligation owed to a group of States or the international community as a whole, a breach of which "specially affects" a particular state. In that event, the particular state is seen as an "injured State".

4. WTO obligations are reciprocal Obligations

As hinted at earlier, WTO obligations are of the reciprocal type. They are not integral in nature. Under the criterion set out earlier, a breach of WTO obligations does not necessarily affect the rights of all other WTO members. More than one, and in some instances all, WTO members may be so affected. But if all WTO Members are, indeed, affected this is not necessarily so, based on the nature of the WTO obligation. It is a consequence rather of WTO obligations being trade-related and trade restrictions, in turn, being capable of affecting the economic interests (not necessarily the rights) of many WTO members. That WTO obligations remain reciprocal and are not integral is, however, not always clearly discerned. The one author who, to my knowledge, examined this issue came to the same conclusion as we do here. Michael Hahn, after considering the hypothesis that GATT obligations are to be fulfilled *erga omnes partes* (and could, hence, be qualified as integral) reaches the conclusion that the basic structure of these obligations is against such qualification. He as well is of the view that both GATT and the WTO treaty remain treaties establishing bilateral right-obligation relationships between WTO members.[181]

We next set out the three main reasons why WTO obligations are reciprocal. We then attempt to explain why it is sometimes (mistakenly) thought that they are integral.

a. The object of trade: state-to-state

Firstly, and most importantly, trade is and remains a bilateral happening. Goods or services from one country are being exported or transferred to one other country.[182] The rights and obligations negotiated in the WTO are aimed at ensuring market access for a given product from member A into the market of member B. In that sense, the WTO treaty is not all that different from the Vienna Convention on Diplomatic Relations (the standard example of a multilateral treaty imposing obligations of a reciprocal nature): in the Vienna Convention, rights and obligations relate to diplomats sent from one country to another; the WTO treaty is about market access for goods from one country into another country. In the end, all WTO members may have similar market access rights (because of the MFN principle), but the rights thereby obtained remain trade-related, hence bilateral, in nature. Equally, a breach of WTO trade liberalising obligations may have economic effects on more than one WTO member, because of the increased economic interdependence between states. But this is not the same as saying that a breach of WTO obligations *necessarily* affects the *rights* of *all* other WTO members, the way, for example, human rights or certain environmental law breaches do. A breach of WTO trade rules may affect a number of members individually, but it does not amount to an offence of the collective right or conscience of *all* state parties, the way a human rights breach does.

Trade (and hence WTO obligations) are international *par excellence*. A state cannot trade with itself. All WTO obligations relate, indeed, to foreign goods, foreign services or foreign service suppliers. Necessarily international, trade is also inherently bilateral. It takes the form of a physical or economic transfer of a unit from one country to another country. The benefits of WTO market access rights, as well as the welfare effects of compliance with WTO obligations, are spread over all WTO members (respectively, because of the MFN principle and a more efficient allocation of resources world-wide). But this collective *effect* does not negate the inherently bilateral character of trade and trade obligations.

The object and implementation of human rights and environmental treaties are, in contrast, a national matter. Especially respect for human rights is a matter between public authorities of a state and *its*

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[181] MICHAEL HAHN, DIE EINSEITIGE AUSSETZUNG VON GATT-VERPFLICHTUNGEN ALS REPRESSALIE 396 (as well as Part 3) (1995).

[182] Several countries may, of course, have been involved in the production of a particular good, but rules of origin are exactly there to determine *the* origin of each and every particular good. The fact that a good can, legally speaking, originate only in one country confirms the bilateral nature of trade.

own nationals. Steps taken to protect the environment are also national: laws and regulations are passed that set internal environmental standards within the territory of a particular state. Obviously, although human rights and environmental obligations are, in terms of object and implementation, a national or domestic matter, they are international and collective in terms of the values they protect and the effects they want to avoid. Respect for human rights has been elevated to the international level mainly because of the collective/universal values it seeks to achieve. Protection of the environment has been "internationalised" for reasons of effectiveness: environmental pollution knows no borders, hence for a country to effectively protect its environment it must co-operate with other countries.[183] As a result, breach of environmental and, especially, human rights obligations becomes of international interest, *but this interest is essentially collective; generally speaking not one particular state will be more affected than another.* The interest protected is collective, not bilateral. In sum, although trade is inherently *international* its obligations are *bilateral*; whereas human rights and environmental protection are inherently *national*, its obligations are *collective*.

b. The objective of trade: an instrument, not a value

Secondly, unlike, for example, the prohibition of genocide or the protection of human rights or the environment, trade and the liberalisation of trade *is not a value*. It is not sought after for the achievement of some "global common" that transcends the sum total of individual state interests. Trade is not a value, it is only an instrument. It is an instrument to increase the *economic* welfare of all states. But the increase in welfare thus created by trade does not exceed the sum of economic welfare experienced by its composite members. Of course, it can be expected that higher economic welfare will translate itself also into social and other benefits, but this would be the result mainly of what states themselves to with their welfare, not a direct consequence of trade or WTO rules.

Trade and WTO provisions seeking to enhance trade are, therefore, not like, for example, the Genocide Convention where, in the words of the ICJ: "the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages to States, or of the maintenance of a perfect contractual balance between rights and duties".[184] The same has been said in respect of human rights treaties. As the Inter-American Court of Human Rights pointed out: "human rights treaties … 'are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States'; rather 'their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States'".[185] Or as the ECHR noted: "the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations in pursuance of their individual national interests but to realise the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a common public order … [I]t follows that the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves".[186]

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[183] Often a triple distinction is made between MEAs : they may seek to regulate trade in a particular category of products (such as wildlife), to protect states from substances harmful to their domestic environment (such as hazardous waste) or to protect so-called global commons such as the ozone layer or the global climate system. All three types require cooperation across borders. Especially the third type must be classified as being of an integral nature (protecting global commons).

[184] ICJ Report 1951, 23.

[185] Inter-American Court of Human Rights, Advisory Opinion of 8 September 1983, quoted in Rudolf Bernhardt, *Thoughts on the Interpretation of Human-Rights Treaties* in PROTECTING HUMAN RIGHTS: THE EUROPEN DIMENSION, STUDIES IN HONOUR OF G. J. WIARDA (ED. F. MATSCHER AND H. PETZOLD), 65-71, at 68-69.

[186] Case 788/60, 4 YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 138, at 140 (1961).

The same objective or "integral" nature has been attributed to EC treaties. This was done not so much because of the "higher values" protected by EC treaties, but because EC law was construed as setting up a "new legal order" that confers rights on individuals and is supreme to national law.[187] In addition, under EC law elements of exclusive competence have been granted to EC institutions (e.g., to regulate areas such as external trade).[188] In that sense, EC treaties have become a form of domestic law, in respect of which member states (much like individuals in internal law) have no competence to deviate from *inter se*. To that extent, obligations under EC law can, indeed, be characterised as integral in nature.

WTO obligations, in contrast, give states an instrument to achieve other "nobler" goals. Since, therefore, the WTO treaty is only an instrument to achieve certain other goals, agreements modifying the WTO treaty *inter se* in pursuit of these other goals must, generally speaking, be accepted as long as they do not affect the rights of third parties.

c. The negotiation, re-negotiation and enforcement of WTO obligations

Thirdly, the fact that WTO obligations are reciprocal in nature can be deduced from the way they are negotiated and re-negotiated and, in particular, with reference as to how they are enforced. Above we already pointed at the private/contractual roots of the GATT/WTO system and the fact that WTO dispute settlement does not, in the first place, tackle *breach*, but rather nullification of benefits *that accrue to a particular state* (even if under the DSU such nullification is presumed once breach is established).

WTO obligations, in particular those set out in schedules of concessions, were negotiated first state-to-state, on a bilateral level: state A gives and takes; state B does the same. This bilateral and mutual reduction in trade restrictions is then multilateralised and applied, respectively, by state A and state B in their bilateral legal relationships with all other WTO members. As the Appellate Body remarked: "Tariff negotiations are a process of reciprocal demands and concessions, of 'give and take'".[189] Also the way GATT and GATS concessions are re-negotiated under GATT Art. XXVIII and GATS Art. XXI proves the reciprocal nature of WTO obligations. Essentially, only other WTO members with a substantial trade interest must be involved and agree to the re-negotiated list of concessions. Re-negotiation, once again, happens largely on a bilateral level.

In support of WTO obligations not being "integral" in nature, one could mention also the many and relatively broad exceptions that can be invoked to justify breach of WTO obligations. There is not only GATT Art. XX, but also the possibility to impose safeguard measures to resist a sudden influx of imports (GATT Art. XIX and the Safeguards Agreement) as well as the option to impose anti-dumping duties to react against imports at "dumped" prices or countervailing duties to offset subsidies. In this context, it is hard to maintain that WTO obligations are integral in that they must be complied with in all circumstances.

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[187] See Case 26/62 *Van Gend en Loos* [1963] ECR 1. The importance of the new legal order in separating the EC from other international organisations was reiterated in the ECJ's *Opinion on the draft Agreement on a European Economic Area*, Opinion 1/91, [1991] ECR I-6079, [1992] I CMLR 245.

[188] See Case 6/64 [1964] ECR 585, at pp. 593-4 (Costa v. ENEL): "By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves. The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity".

[189] Appellate Body report on *EC – Computer Equipment*, para. 109.

Crucially, however, the taste of the pudding comes with the eating: the way WTO obligations are enforced is exclusively bilateral. Panel and Appellate Body proceedings only examine claims made by a state against one other state. Importantly, in case the defendant looses and does not comply within a reasonable period of time, the winning state will be authorised to impose *state-to-state countermeasures against the loosing state* (DSU Art. 22). This exclusively bilateral modality of enforcement of WTO rules is an important indication that most WTO obligations are reciprocal in nature. Especially the fact that the WTO treaty allows one member to *suspend its WTO obligations* as a form of countermeasure towards one other member proves that WTO obligations are generally speaking not of the integral type. *If WTO obligations were of the integral type, their inter se suspension would necessarily affect the rights of all other WTO members* and thus fall afoul of the *pacta tertiis* principle (confirmed in Art. 58 of the Vienna Convention) and the general rule that countermeasures may suspend only rights of the violating state, not of any third state.[190] Although third states may well feel an economic effect of the *inter se* suspension, their WTO rights will not normally be affected. In respect of integral obligations the situation is different: their *inter se* suspension or modification cannot be tolerated. The obligation there is of an "integral" type in that it ought to be respected in all circumstances, irrespective of the conduct of other states.[191]

d. Features of WTO obligations which could mistakenly lead to the conclusion that they are integral in nature

i. Trade liberalisation is beneficial to all WTO members

A first confusion that could arise is to take the increase in global welfare that trade liberalisation (and thus most WTO obligations[192]) brings about, as evidence that WTO obligations are a "global common", in the collective interest, and, for that reason, must be integral in nature. As pointed out above, trade liberalisation is, indeed, in the general interest in that it should increase overall global welfare as a result of a better allocation of the world's resources, including the welfare of the state making a particular trade "concession". Much like environmental obligations of an integral nature, WTO rules are, therefore, in the "general interest". However, unlike environmental obligations, the interest achieved by WTO obligations remains a compilation of individual welfare increases, not the

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[190] See Art. 50.2 of the ILC Draft 2000.

[191] However, apart from the acceptability of *inter se* suspension of WTO obligations as a form of countermeasures, the general bilateral mode of enforcement of WTO rules cannot as such be seen as conclusive proof that all WTO obligations are reciprocal in nature. Human rights and environmental obligations (generally accepted as being of an integral nature) can also be enforced on a purely bilateral, state-to-state basis (although under these regimes a collective non-compliance mechanism is more common). What such integral obligations would, nonetheless, not allow for is the suspension of obligations as a form of retaliation, the way WTO suspension works. In that sense, WTO suspension as a form of countermeasures is, in and of itself, sufficient proof that WTO obligations are *not* integral in nature. At the same time, although WTO obligations are reciprocal in nature, nothing prevents WTO members from setting up a collective non-compliance mechanism along the lines of certain environmental treaties (to some extent, the trade policy review mechanism does exactly that). Such collective non-compliance mechanism would not alter the character of WTO obligations and somehow transform them into integral obligations simply because the are *enforced* collectively. The efficient implementation of WTO rules may, indeed, be well, if not better, served by a collective compliance mechanism, instead of the current bilateral, state-to-state litigation system centred around breach and bilateral countermeasures. See M. Pinto, *From Dispute Resolution to Dispute Avoidance: Some thoughts on collective management of treaty* performance, in LIBER AMICORUM GUNTHER JAENICKE (VOLKMAR GÖTZ ET AL. EDS) 353-374 (1998) and Thomas Gehring, *International Environmental Regimes: Dynamic Sectoral Legal* Systems 1 YIEL 353-374 (1990). On the relative merits of a "managerial approach" to compliance problems, as opposed to an "enforcement approach", see ABRAHAM CHAYES and ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY – COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995) and George Downs, David Rocke and Peter Barsoom, *Is the Good News About Compliance Good News About Cooperation?* 50 INTERNATIONAL ORGANIZATION 379-406 (1996).

[192] Recall, in this respect, the caveat made earlier that although trade liberalisation is in the general interest, not all WTO rules may be of that character, some of them still being inspired more by trade protectionism rather than free trade. See text at note 144.

achievement of a "global common", such as the preservation of the planet's climate system, which transcends the individual benefits of individual states. The fact that engaging in an obligation is *to everyone's benefit, including the one engaging in the obligation* does not mean that it is in the collective interest in the sense of a common interest "over and above any individual interest that may exist in a given case".[193] After all, the fact that the WTO treaty, with its trade liberalising obligations, is in the interest of *all WTO members* may not be that special. Is not every international treaty concluded by states supposed to be in the mutual interest of these states? If not, why would the states in question have signed the treaty in the first place?[194]

ii. MFN "multilateralises" all trade advantages, but it does not transform these advantages into a "global common"

The multiple MFN obligations set out in the WTO treaty, the cornerstone of the multilateral trading system, ensure that any trade advantage a country gives to another must be "multilateralised" and granted to all WTO members. As a result, MFN surely makes bilateral concessions collective in the sense that they must go to all other WTO members. But in substance, this "collectivisation" is nothing more than a duplication by the number of WTO members of the original bilateral concession. The bilateral concession is thereby granted from state to state to all other WTO members. It does not, by means of MFN, transcend into some "global common", more valuable than the sum total of the individual benefits it procures to each WTO member. Looked at from a different angle, MFN is, of course, an obligation owed towards all WTO members, but when member A discriminates only member B (e.g., by banning all imports coming from B), this MFN breach can hardly be said to affect the MFN right of members C, D and E (who can continue to export to member A, arguably even more so than before given that the ban has stopped the supply coming from member B).

iii. Breach of a WTO obligation by one member is likely to affect many other WTO members

Finally, given that (i) compliance with WTO rules normally achieves an increase in welfare world-wide and (ii) the economic inter-dependence between states is ever increasing, a breach of WTO obligations by one member is likely to affect, directly or indirectly, the economic interests of many, sometimes all, other WTO members. This may wrongly be interpreted as granting a form of *actio popularis* to all WTO members for each and every breach of WTO rules, irrespective of the states involved. In turn, given that all WTO members could then (under this wrong assumption) complain about any WTO breach, this element could be mistakenly seen as proof that WTO obligations are of an *erga omnes partes* or integral nature.

In *EC – Bananas* the Appellate Body decided that the United States could bring a case under GATT even though it hardly produces bananas and has not yet exported any. The Appellate Body quoted with approval the following remark from the panel report: "with the increased interdependence of the global economy … members have a greater stake in enforcing WTO rules than in the past since any

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[193] Crawford, Third Report, para. 92.

[194] Realists would note, indeed, that even norms for the benefit of so-called "global commons" find their origin in purely national interests. As Graf Vitzhum noted: "I doubt whether we could ever point out one single norm in our books which can really be called a norm created in the public interest. Let me take the principle of the freedom of the seas. It is *ius cogens*, therefore in the hierarchy of public interest norms -- such as they are -- certainly top of the top. The high seas freedom principle, however, was advanced solely in the Dutch national interest in 1608. It served the interests of the Dutch latecomer against the Portugese and Spanish monopolists. Forty years after Grotius' *mare liberum*, however, the Dutch diplomats … took almost the opposite position … In the end, as we all know, … it turned out over the centuries that the freedom principle served national interests of the majority of nations. But that was neither the perception nor the strategy at its creation" (in JOST DELBRUCK, NEW TRENDS IN INTERNATIONAL LAWMAKING – INTERNATIONAL 'LEGISLATION' IN THE PUBLIC INTEREST 118 (1997)). Looked at from a different perspective, all rules could be seen as in the "public interest", even those generally conceived as purely private (e.g., the construction of a fence between two neighbours may serve the public interest).

deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly".[195]

One must, however, distinguish three issues: firstly, when does a WTO member have legal standing to bring a WTO complaint (the matter at issue in *EC – Bananas*); secondly, what is required for a WTO complaint to be validly established; thirdly, what are the consequences of validating a WTO complaint? We examine these three distinct issues in turn.

Standing

On the first issue of standing, the Appellate Body in *EC – Bananas* made the rather astonishing finding that in order to bring a case under the DSU, no "legal interest" is required. In particular, it did "not read any of [the PCIJ/ICJ] judgements [referred to by the EC] as establishing a general rule that in all international litigation, a complaining party must have a 'legal interest' in order to bring a case".[196]

Looking at the cited international case law[197] and the ILC Draft 2000, it may be so that not much reference is made there to "legal interest" (in the sense of an interest to see the law abided by), but this is so because *normally more than a "legal interest" is needed for a state to have standing, namely one must prove the existence of a "legal right"*. Any breach of international law could be said to affect the legal interest of all other states, that is, the interest of states to see respect for the rule of law in general (even if these states draw no individual rights from this law).[198] But this "legal interest" is not normally enough for a state to invoke responsibility for breach.[199] Even if the ILC Draft 2000 grants certain rights to enforce state responsibility to states that are not "injured states", but merely have a legal interest, this occurs only for international norms of a certain nature, e.g., obligations *erga omnes* or *erga omnes partes*; not for obligations of a reciprocal nature, such as most WTO obligations. As Crawford noted in his Third Report: "outside the field of 'integral' obligations, or obligations *erga omnes partes*, … it is doubtful that States have a right or even a legally protected interest, for the purposes of State responsibility, in the legal relations of third States *inter se*".[200] Hence, even for those breaches of international law in respect of which the most lenient rules on standing apply (say, *erga omnes* or *jus cogens* obligations), standing is granted *because of the existence of a "legal interest"*. Hence, in all cases where standing is acknowledged, *at least* a "legal interest" must be pointed at. Therefore, the only way to make legal sense of the Appellate Body finding that no "legal interest" is required, is to assume that the Appellate Body did not mean to refer to "legal interest" in its usual sense of "interest to see the law abided by", but understood this term to mean, for example, a requirement of proof of actual damage or trade diversion.

It is important to recall what the Appellate Body did *not* state in *EC - Bananas*. It did not say that a purely "legal interest" to see WTO rules abided by is sufficient for any WTO member to have standing

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[195] Appellate Body report on *EC* – Bananas, para. 136.
[196] Ibid., para. 133.
[197] Ibid., footnote 66.
[198] As Philip Jessup put it in 1948: "[T]here must be basic recognition of the interest which the whole international society has in the observance of the law … More broadly, the acceptance of the hypothesis of community interest should be considered to vest in all members of the international community a legal interest in respect for treaties … Respect for the maxim *pacta sunt servanda* and the development of treaty law will be matters of concern to all states, and an infringement of the law will affect the interests of all" (PHILIP JESSUP, A MODERN LAW OF NATIONS 2, note 2, and 154 (1948)).
[199] Nor is it the way the Vienna Convention has been drawn up (i.e., it has been drawn up on the basis of bilateral state relations, not in light of community interests). See Shabtai Rosenne, *Bilateralism and Community Interest in the Codified Law of Treaties,* in TRANSNATIONAL LAW IN A CHANGING SOCIETY, ESSAYS IN HONOR OF PHILIP C. JESSUP (ED. W. FRIEDMANN, L. HENKIN AND O. LISSITZYN) 203-227 (1972), hereafter "Rosenne, *Bilateralism …*".
[200] Crawford, Third Report, para. 104.

in respect of all possible breaches of WTO law.[201] On the contrary, it stated that there is *no* requirement of "legal interest". Of course, like any WTO member (and arguably even non-WTO members) the United States did have a "legal interest" to see GATT rules abided by. In addition, however, the Appellate Body was careful enough to base its conclusion that the United States did have standing under GATT on other factors as well (not related to purely "legal interest"): the United States was a producer of bananas and hence a potential exporter, the US market for bananas was potentially affected by the EC regime in terms of world supplies and prices and the GATT claims were inextricably interwoven with those under GATS for which the United States did unmistakably have standing.[202] The Appellate Body stressed that "taken together, these reasons are sufficient justification … This does not mean, though, that one or more of the factors … would necessarily be dispositive in another case".[203]

The Appellate Body forgot, however, to mention one other obvious but crucially important factor, namely the fact that the EC import regime for bananas, if found to be discriminatory the way the US claimed it to be, was favouring ACP countries and hence, at least in theory, discriminating *all other WTO members, including the United States*. The measure at issue was not a measure discriminating only one other WTO member (e.g., a member other than the United States), nor a trade restriction that did, on the books, not apply to US exports, the way, for example, an allegedly WTO inconsistent anti-dumping duty imposed by the EC on cement from Mexico would have nothing to do with US rights under the WTO.

In sum, the mere fact that a WTO member breaches WTO rules does not suffice for all other WTO members to have standing to seek redress for this breach. A purely "legal interest" is not enough.[204] For a member to have standing the inconsistent measure must, at least in theory, *apply to the trade of that member*. An anti-dumping duty imposed by the US on steel from Japan only cannot be challenged by the EC; nor can the United States complain about Zambia discriminating exports from Nigeria only). In addition, even if the measure does *de jure* apply to the trade from that other member, some proof must be provided that either actual or potential trade flows are being restricted and/or that the member is otherwise economically affected (e.g., by an increase in world prices, as referred to in *EC - Bananas*). The first condition will, in effect, constitute a bigger hurdle than the second. Indeed, if the measure does, on the books, apply to the complainant, trade potential or missed trade opportunities will be easily proven, in particular given the economic inter-dependence of WTO members.[205] The fact that these two conditions do exist, and hence the WTO does *not* know an *actio popularis*, shows that WTO obligations are reciprocal in nature, not integral.

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[201] The main argument against giving standing on the basis of such general legal interest, is the risk one runs thereby of effectively appointing a number of powerful states as public prosecutors or policemen, with the result that only obligations in the particular national interest of those states would be enforced. In the WTO, granting such *actio popularis* could mean that WTO rules such as TRIPS and services are more often judicially enforced than, for example, the Agriculture and Textiles Agreement.

[202] Appellate Body report on *EC – Bananas*, paras. 136-137

[203] Ibid., para. 138.

[204] That there is hence scope for a *locus standi* doctrine in WTO dispute settlement (along the lines of ILC Draft 2000 Art. 43(b)(i)) see: Rodrigo Bustamante, *The Need for a GATT Doctrine of Locus Standi: Why the United States Cannot Stand the European Community's Banana Import Regime*, 6 MINN. J. GLOBAL TRADE 533-583 and William Davey, *Has the WTO Dispute Settlement System Exceeded its Authority?*, 2001 JIEL 95, 97-99.

[205] Hence, even WTO transparency provisions or DSU obligations prohibiting legislation calling for the unilateral enforcement of WTO rights, outside of the DSU mechanism, are not integral in nature. Measures in violation of these obligations may well, on the books, apply to all other WTO members as well as all imports so that the first condition for standing is easily satisfied. But under the second condition, a member wanting to challenge a violation of, say, GATT Art. X on publication of certain trade measures or US Section 301 allegedly imposing the unilateral enforcement of US rights under the WTO in violation of the DSU, must show the existence of some trade flows or at least trade potential being effected by these measures. In practice, this second condition will be easily met by most WTO members, assuming that they all have some trade flows or at least some trade potential in their relationship with the member imposing the measure. Nonetheless, the fact that all WTO members may then have standing to challenge these measures does not flow from their integral nature,

Breach

The second condition for a member to have standing (proof of trade effects or, at least, trade potential or opportunities) is directly related to the conditions for a breach of WTO rules to be established. Since standing in respect of breach of obligations other than *erga omnes* obligations essentially depends on the existence of a legal right, proof of a legal right will be inextricably linked to proof of breach. Now, for a breach of WTO rules to be established, it is generally accepted in GATT/WTO case law that a complainant is not required to prove that actual trade flows have been diverted.[206] Proof of trade opportunities being effected will be enough. This explains, at the same time, why prove of trade effects is not a requirement either in terms of standing.

Nonetheless, as pointed out earlier, for a complainant to prove that a measure violates WTO rules is not enough for that measure to be condemned by a panel. In addition, the complainant must point at nullification or impairment of benefits accruing to it.[207] As noted above, this element supports the view that WTO obligations are reciprocal in nature. However, DSU Art. 3.8 provides for a presumption to the effect that breach "is considered *prima facie* to constitute a case of nullification and impairment". This is further explained to mean that "there is normally a presumption that a breach of the rules has an adverse impact on other Members". However, as the Appellate Body noted, Art. 3.8 is about "what happens after a violation is established".[208] It does not relate to the issue of standing required in order to be allowed to invoke breach. In other words, to say that nullification of benefits is presumed once breach is established (as Art. 3.8 does) is not the same as saying that all WTO members have a right to complain about any WTO breach.

Nonetheless, the second criterion referred to above for a member to have standing (proof of at least trade potential or opportunities) must run parallel with the requirement for there to be nullification. In *EC – Bananas*, for example, the Appellate Body referred to the same factors under both standing and nullification under DSU Art. 3.8, namely the United States being a producer and potential exporter and the possible effects on the US internal market. It noted that "[t]hese matters that we have already decided are relevant to the question of the standing of the United States under the GATT 1994. They are equally relevant to the question whether the European Communities has rebutted the presumption of nullification or impairment".[209]

Consequently, once a WTO member has been granted standing, in particular, once it has met the second criterion for it to have standing, it must necessarily meet also the nullification and impairment condition in DSU Art. 3.8.[210] As a result, once standing accorded and once breach established, the presumption of nullification must, for all practical purposes, be irrebutable.

Consequences of breach

Although breach of WTO rules may be successfully invoked by a number of WTO members (meeting, first, the two rather lenient conditions for standing and, second, the relatively wide definition of

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but from the fact that all WTO members are affected in their bilateral legal relationship with the member allegedly breaching WTO rules.

[206] See *supra* note 126.

[207] See GATT Art. XXIII. Note, in this respect, that the Appellate Body found also that for procedural objections in respect of a panel ruling to be upheld, the member invoking them must show prejudice (*EC – Hormones*, footnote 138).

[208] Appellate Body report on *India – Shirts and Blouses*, p. 13

[209] Appellate Body report on *EC – Bananas*, para. 251.

[210] Another reason not to allow complaints without a measure causing nullification to the member in question is that otherwise a claim could succeed on purely legal grounds but once implementation does not follow, the complainant (having a legal interest only) would not be able to retaliate since retaliation must be "equivalent" to the nullification caused (DSU Art. 22.4). If there is no nullification, the complainant could then not suspend any concessions in retaliation.

breach, both referring to trade opportunities, not trade effects), a finding of breach of WTO rules is a purely bilateral matter. Quite often, whether or not there is a finding will actually be dependent on the complainant (are its exports, for example, "like products" as compared to the domestic products allegedly protected in breach of, say, GATT Art. III:4?). A finding of WTO breach is bilateral also in the sense that only the complainant, not other WTO members, may directly rely on it. Only the complainant may suspend concessions if no implementation follows, not other WTO members. In addition, the fact that other WTO members have exactly the same measure in place as the one found to be in breach does not give other WTO members any rights to suspend concessions. A new state-to-state complaint must be lodged against these equivalent measures for their WTO illegality to be conclusively established.[211]

These bilateral consequences of breach, combined with the requirements for standing set out above and the state-to-state definition of breach (including the condition of member-specific nullification), are proof that WTO obligations are not integral, but reciprocal.

e. Conclusion on WTO obligations as reciprocal obligations

That WTO obligations must be qualified as reciprocal in nature bears crucially important consequences for the topic assessed in this work. The fact that they are not integral obligations puts them in perspective. It stresses their relative importance as obligations of an essentially contractual type that can, in principle, be deviated from *inter se*.[212] They are not integral in the sense of being immutable obligations to be respected at all times and as between all WTO members, irrespective of other norms of international law. WTO obligations are, in this sense, framework obligations only or *lex generalis* that can be supplemented or deviated from, as between some or all WTO members, by other rules of international law (especially, rules that are of an integral type).

WTO law is but a branch of public international law. Given its reciprocal nature, WTO law will, moreover, have to allow for and give way to a number of other rules of international law. The fact that some WTO members agree to deviate from WTO obligations in their *inter se* relations only (e.g., by mutually agreeing to condition their trade on respect for human rights) must, in principle, be accepted, given the reciprocal nature of WTO obligations. Below, we further examine the conditions for valid *inter se* deviations.[213] As long as their rights are not affected, other WTO members, not party to such *inter se* deviation, cannot complain about these purely *inter se* contractual changes. The requirements for other members to have standing to challenge such *inter se* deviations will then, indeed, not be met (on the books, the measure does not even apply to their trade, not even their potential trade). If WTO obligations were, however, of the integral type, no such *inter se* modifications could have been tolerated.

Finally, it must be recalled that the reciprocal *versus* integral distinction does not normally apply to treaties in their entirety. Indeed, even some rules in the WTO treaty are of the integral type, not because they are substantively more important than others, but for internal procedural/institutional reasons. The WTO integral rules in question are those relating to the operation of WTO bodies. When it comes to WTO rules setting out, for example, voting procedures, procedures on accession, the

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[211] The *EC – Bed-linen* case provides a good example. In it, the anti-dumping mechanism of "zeroing" adopted by the EC was found to be WTO inconsistent. Many other WTO members use the same system. However, none of them have so far changed their regime implying, it would seem, that they consider that the EC mechanism was condemned, not theirs, so that at this stage they are not under an obligation to change their regime.

[212] As long as such deviations are not prohibited by the WTO treaty itself (such as regional arrangements not meeting GATT Art. XXIV) and do not affect the rights of third parties. For the exact conditions for *inter se* deviations from the WTO treaty to be legal, see Art. 41 and the discussion below.

[213] See Chapter VI, section C. Crucially, the fact that WTO obligations are not normally of an integral nature does not mean that in their respect Art. 41 of the Vienna Convention (setting out the conditions for *inter se* deviations to be legal) cannot be breached. As we examine in detail below, it may well be so that the *inter se* deviation is prohibited by the WTO treaty itself (say, it does not meet the MFN requirement) or that it negatively effects third parties rights. In those cases, the *inter se* deviation is illegal.

nomination of chairpersons or composition of certain WTO bodies, such rules must necessarily apply equally to all WTO members. The very nature of these procedural rules implies that their breach or *inter se* deviation would necessarily constitute breach towards all other WTO members (irrespective of trade or trade potential). As Schermers pointed out: "An organization can have only one constitutional structure. An amendment, for example, which expands the Executive Board of the organization from 18 to 24 members cannot be applied for some member States only".[214] Hence, *inter se* modification of such institutional/procedural provisions cannot be tolerated, nor can state-to-state suspension of the obligations deriving from these provisions be legal as a form of countermeasures.[215] However, the importance of these provisions being of the integral type are theoretical only (why would WTO members, *inter se*, want to change, for example, the election procedure of chairpersons?). What counts is that the substantive trade provisions in the WTO treaty are reciprocal in nature.

[214] Schermers, *The Legal Basis of International Organization Action*, in A HANDBOOK ON INTERNATIONAL ORGANIZATIONS (ED. RENE-JEAN DUPUY), 401-411, at 409 (1998).

[215] Art. X:2 of the Marrakesh Agreement confirms this in respect of Art. IX on "decision-making", providing that amendments to Art. IX "shall take effect only upon acceptance by all Members".

CHAPTER III. HIERARCHY OF SOURCES

A. The continuing uncertainty as to the sources of International Law

1. The problem of identifying the sources of international law

It is generally recognised that norms of international law may derive from the following five sources: treaties, custom, general principles of law, unilateral acts of states and acts of international organisations. Obviously, a distinction must be made between these five "sources" of law and the infinite number of "norms" they may produce.

The first three of these sources (treaties, customary law and general principles of law) are explicitly confirmed as part of the "applicable law" before the International Court of Justice (ICJ). Article 38, paragraph 1 of the Statute of the ICJ provides as follows:

> "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
> (b) international custom, as evidence of a general practice accepted as law;
> (c) the general principles of law recognized by civilised nations;
> (d) subject to provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

Based on Article 38, paragraph 1(d), it is equally accepted that judicial decisions and teachings of publicists are *not* sources of international law, at least not in the strict sense of creating themselves new norms.[216]

In theory, Article 38 simply sets out the "applicable law" before a given court.[217] In practice, of course, this court happens to be the "principal judicial organ of the United Nations"[218], the latter being the world's most important international organisation, an organisation to which almost all countries in the world are a member and one that deals with all possible subject matters of international law. As a result, this statement on "applicable law" before the ICJ has been construed as a summing up of the sources of international law more generally.

Still, it should be remembered that Article 38 is but a treaty provision focusing on one given, although crucially important, court. It is in that sense *part* of international law, not *defining* international law. Article 38 could, for example, be amended. Hence, Article 38 has *not* been viewed as an exhaustive statement, valid for all times, on all possible sources of international law. State practice, confirmed by the ICJ itself, shows that new sources of international law have arisen since, in particular unilateral acts of states and acts of international organisations. In the *Nuclear Tests cases*, for example, the ICJ

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[216] Se section C below.
[217] In this sense, see Gerald Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in SYMBOLAE VERZIJL, 153, at 160 (1958) (hereafter "Fitzmaurice, *Some Problems ...*") and PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW, 15 (1965).
[218] Article 92 of the UN Charter.

considered a unilateral French statement to be the source of a binding obligation resting on France.[219] In the *Lockerbie cases*, the ICJ took account of resolutions adopted by the UN Security Council, i.e., acts of an international organisation.[220] The direction in Article 38 itself that the ICJ's function is to "decide in accordance with international law" confirms the dynamic potential and non-exhaustive character of Article 38.[221] Consequently, Article 38 is exhaustive neither within the ICJ's precinct nor *a fortiori* outside the ICJ as a general statement on the sources of international law.[222]

This open character of the sources of international law, to be contrasted to the clearly defined number of sources in domestic law, is a first element of uncertainty we should be aware of when conducting this work: uncertainty as to what the sources of law are necessarily reflects on the completeness of any theory on conflict of norms derived from these sources.

The open and uncertain character of the sources of international law means, essentially, that any attempt to sum up these sources implies taking a position on the very nature of international law, its normative concept and the reason why international law is binding. As Bos has remarked: "it is the normative concept of law which decides about the need for, and the number of, 'sources' of law … no single normative concept of law exists for international relations, but a plurality of such concepts leading to different theories on 'sources'".

One could refer, for example, to the old Soviet doctrine for which the concept of international law (including the basis of its obligatory nature) and the sources of international law were one and the same thing, namely: the consent of states.[223] As a result, Soviet doctrine was very sceptical towards custom and general principles of law as sources of international law.[224] A more moderate "voluntarist" approach to international law is still very much present today. For Brownlie, for example, the only source of international law is basically "the principle that the general consent of states creates rules of general application."[225] For these more moderate "voluntarists", state consent explains, indeed, why both treaties and customary law are international law (the former, created by explicit consent, the latter recognised with reference to, at least, tacit consent or acquiescence reflected in state practice and *opinio juris*). "Naturalist" doctrine counters, however, that the principle of "state consent" does not explain why, for example, general principles of law are considered to bind states and, more importantly, does not explain *why* the consent of states gives rise to binding obligations.[226]

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[219] ICJ Reports 1974, 267. See further below, Chapter III, section F.

[220] ICJ Reports 1992 (order on provisional measures), para. 42.

[221] This phrase is the only element that was added in 1945 with the establishment of the ICJ. For the rest, Article 38 of the ICJ Statute copies what was Article 38 of the Statute of the PCIJ.

[222] Of the same view, see for example: the authors referred to in note 217; Maarten Bos, *The Recognized Manifestations of International Law*, 20 GYIL 1977, 9-76, 18 (hereafter "Bos, *The Recognized …*") and Georges Abi-Saab, *Les Sources du Droit International: Essai de Déconstruction*, in LE DROIT INTERNATIONAL DANS UN MONDE EN MUTATION, MELANGES E.J. DE ARECHAGA, 1994, 29-49, at 36 (hereafter « Abi-Saab, *Les Sources …*").

[223] See, for example, TUNKIN, INTERNATIONAL LAW, Ch. I and III (1990).

[224] In this sense, see, for example, the Hungarian writer and present member of the ICJ Geza Herczegh who comes to the conclusion that general principles of law are *not* a source of international law because they are not derived from the agreement of the wills of states (GEZA HERCZEGH, GENERAL PRINCIPLES OF LAW AND THE INTERNATIONAL LEGAL ORDER, 97-100 (1969)). Other authors rejected custom as a source of international law with reference to yet another concept of international law. Barberis concludes, for example, that custom is *not* a source of public international law since not created by legal process nor based on any legal norm (J. Barberis, *Reflexions sur la Coutume Internationale*, 1990 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL, 9, at 17).

[225] IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 2 (1998), hereafter "Brownlie, *Principles …*".

[226] See, for example, Nguyen, *Droit …*, at para. 57 ("les volontaristes … se montrent incapables de trouver un fondement convaincant aux règles, pourtant indiscutables, qui limitent la compétence internationale des Etats et, surtout, ils n'expliquent pas pourquoi la volonté de ceux-ci les lie »). For a recent discussion of the different doctrinal positions, ending with a plea in favour of natural law, see E. Penalver, *The Persistent Problem of Obligation in International Law*, 2000 STANFORD JOURNAL OF INTERNATIONAL LAW 271.

"Naturalists", in the very wide sense portrayed here, base the formal validity of international law on elements other than consent, such as the natural order of things, moral principles or sociological grounds.[227]

Nevertheless, knowing that the sources of international law may evolve and realising that listing the sources of international law necessarily reflects an opinion on the concept of international law, to come back to Bos, "within each normative concept of law there can be but one conviction at a time with regard to the 'sources' of law and their number. Anybody staying within the limits of his own normative concept of law, therefore, should be able exhaustively to enumerate the 'sources' of the law as he sees it".

Indeed, from the "consumer's" or law-takers perspective that we adopted[228], it is of crucial importance to know the law one is subject to. As it was put by Jennings: "although lawyers know that the quality of certainty of law is one on which there must be much compromise, not least in the interest of justice, it is a desideratum of any strong law that there is reasonable certainty about where one should look to find it".[229] In the specific field of WTO law, for example, it is of crucial importance for WTO members, as well as their producers, traders and consumers generally, to know what WTO law consists of and for what norms and obligations they can be held liable.[230] In this respect, it is important for WTO panels and the Appellate Body to pay close attention to clearly identifying the legal or other basis for referring to certain instruments, acts or statements as sources of WTO law in support of their decision.

2. Uncertainty as to the normativity threshold

A second element of uncertainty in respect of sources (besides the problem of summing them up), stems from the difficulty of identifying exactly when the sources of international law that have to date been recognised, create legally binding norms. This raises the question of the "normativity threshold" for each of the sources of international law.[231] No problems arise to identify treaty norms. The same could be said of acts of international organisations. In contrast, identifying when something becomes a norm part of customary law or general principles of law is a much more difficult task. This is so because the criteria for these norms to be recognised are less clear (in respect of custom, for example: (1) uniform and consistent state practice which has been (2) generally accepted as law, also referred to as *opinio juris*).[232] Pointing at unilateral acts of states which create binding obligations may be

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[227] See, for example, M. KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989); David Kennedy, Theses About International Law Discourse, 23 GYIL 353 (1980); and M. MCDOUGAL, STUDIES IN WORLD PUBLIC ORDER (1960).

[228] See Chapter I, section B.1.

[229] Robert Jennings, *What Is International Law and How Do We Tell It When We See It*, XXXVII ASDI 59-88, at 59 (1981). Van Hoof, as well, starts out his book on sources with the following sentence: "As law is primarily a device for regulating and ordering relations in society, any system of law should be able to answer clearly the question of what the law is or where it can be found" (VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 1 (1983).

[230] On the sources of WTO law, see *supra* Chapter II, section D.

[231] This difficulty of knowing when something becomes part of international law or *how* international law is created and what formal steps or procedures are required for international law to exist as law relates to what most authors refer to as the "*formal* sources of international law". They contrast these "formal sources" to "*material* sources", the latter relating to *where* the law can be found in its material form and the instruments or acts in which international law finds its expression. See, for example, Nguyen, *Droit …*, paras. 58 ff. and Brownlie, *Principles …*, 1-2 (who questions the usefulness of this distinction).

[232] The insecure nature of customary law has prompted Charles De Visscher to hold that it is a judicial authority's word which creates custom, never the uniformity or regularity in actual behaviour (CHARLES DE VISSCHER, PROBLÈMES D'INTERPRÉTATIONS JUDICIAIRE EN DROIT INTERNATIONAL PUBLIC 220 (1963). For a forceful critique on customary international law and its lack of authority: P. Kelly, *The Twilight of Customary International Law*, 2000 VIRGINIA JOURNAL OF INTERNATIONAL LAW 449-543, stating, for example, at 539: "Customary law discourse is an exercise in the manipulation of legal materials, not

equally difficult, since depending on factual circumstances that may not always be clear (such as: was there an intention to be bound and was the statement made publicly?[233]).

In domestic legal systems, recognising when a norm is validly created is much easier. It can be done with reference to constitutional law (defining, for example, how new constitutional rules can be enacted, how statutes are made and by whom, and what else the law of the land is composed of, such as governmental decrees, local decisions, etc.). In international law, in contrast, the question of what the law consists of, is much more difficult to answer. In international law, there is no centralised legislator nor any division of powers between different organs or institutions that fit within an overall hierarchy. As remarked by Abi-Saab in the context of his view on international law as a «long processus de transformation progressive à travers la zone grise qui sépare la valeur sociale émergente de la règle du droit bien établie » : « le seuil du droit positif (ou la frontière entre le droit et le pré-droit, la *lex lata* et la *lex ferenda*) ne peut pas toujours être clairement défini ».[234]

The resulting difficulties for conducting this work are obvious. Indeed, when faced, for example, with an alleged conflict between instrument A and instrument B, how can one decide whether there *is* conflict and, if so, *resolve* that conflict if it is not even clear whether instrument A and/or B is a norm of international law to which the parties in question can be held?

3. The often vague content of norms of international law

Finally, a third element of uncertainty, inherent in all legal norms including those of domestic law, arises when trying to define the exact *content* of an instrument, act or series of acts that have been recognised as constituting a legally binding norm. This problem arises in respect of all sources of international law, including treaties, and more so, it would seem, in international law than in domestic law. Given the high number of participants and widely divergent interests that each state negotiating a treaty may have, treaty norms, requiring a *consensus of all states* involved for their adoption (not a simple majority as is the case for most domestic laws), are often left vague and ambiguous. To clearly circumscribe the rights and obligations that derive from the other sources of international law, in particular custom and general principles of law, and to apply them to a given case, may even be more difficult.

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of determining empirical law". See also J. Goldsmith and E. Posner, *A Theory of Customary International law*, on file with the author ("CIL [customary international law] remains an enigma. It lacks a centralized lawmaker, a centralized executive enforcer, and a centralized, authoritative decision-maker. The content of CIL seems to track the interests of powerful nations. The origin of CIL rules is not understood. We do not know why nations comply with CIL, or even what it means for a nation to comply with CIL. And we lack an explanation for the many changes in CIL rules over time").

[233] In this sense, the fact that in 1997 the ILC decided to put the topic of "unilateral acts of states" on its agenda can only be applauded. Codification on how customary international law is created and revised could also be very useful.

[234] Abi-Saab, *Les sources ...*, 48. On the distinction between *lex lata* and *lex ferenda* see, ANTONIO CASSESSE and JOSEPH WEILER, CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING, 66-72 (presentation by Ian Brownlie) and 72-92 (discussion) (1988) (hereafter, "Cassesse and Weiler, *Change ...*"). The distinction between *lex lata* and *lex ferenda* is particularly blurred in respect of customary law. The following statement made in 1938 by Lazar Kopelmanas is still very much pertinent today. He remarked that the creation of customary law "qui ne permet pas de préciser nettement le moment où une règle sociale devient règle de droit, ne remplit que partiellement les fonctions de source formelle, puisque la fonction essentielle des sources formelles est de servir de critère de distinction – pour le juge – entre les règles juridiques et les autres règles sociales » (Lazar Kopelmanas, *Essai d'une théorie des sources formelles de droit international*, 1938/1 REVUE DE DROIT INTERNATIONAL 101-150, at 119-120).

In that sense, norms of international law are seldom "finished products"[235], requiring only implementation and nothing else. The function of the international adjudicator in "completing" the norm as it applies in a particular dispute should not be underestimated.[236] As noted earlier, international law is not composed only of rules, it is a continuing process in which international adjudication plays an important role. As Jennings remarked in respect of both judicial decisions and commentators: "it is these two sources which are most likely to bring certainty and clarity in the places where the mass of material evidences is so large and confused as to obscure the basic distinction between law and proposal".[237] Or as it was put by Fastenrath: "According to modern legal theory, each judicial decision involves further development and, thereby, also the creation of law. Each decision defines the normative content of a legal rule and thus has far-reaching effects on the general interpretation of the rule, regardless of the limited binding force of the specific decision".[238]

The often vague nature of norms of international law has one positive side, though: it will prove to be a welcome feature when attempting to resolve apparent conflicts between such norms. If norms are ambiguous, a harmonious interpretation of what may seem at first sight contradictory norms becomes more likely.[239]

B. Are there any *a priori* hierarchies in international law?

1. There is no formal "hierarchy of sources" in international law

There is no inherent hierarchy between the sources of international law. A norm derived from one source is *not a priori* of a higher value than a norm formed under another source based, for example, on the organ creating the norm or the procedure followed.[240] The enumeration of the traditional sources of international law in paragraphs 1 (a) to (c) of Article 38 of the ICJ Statute (treaty, customary law and general principles of law) is not regarded as setting out any *a priori* hierarchy.[241]

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[235] MAARTEN BOS, A METHODOLOGY OF INTERNATIONAL LAW, 22 (1984), referred to in Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EJIL 305-340, at 308 (1993).

[236] See, in respect of the confirmation of a custom, note 232.

[237] Robert Jennings, *What Is International Law and How Do We Tell It When We See It*, XXXVII ASDI 59-88, at 79.

[238] ULRICH FASTENRATH, LÜCKEN IM VÖLKERRECHT: ZU RECHTSCHARAKTER, QUELLEN, SYSTEMZUSAMMENHANG, METHODENLEHRE UND FUNKTIONEN DES VÖLKERRECHTS, English summary, 291, German text, 108-109 (1991), hereafter "Fastenrath, *Lücken ...*". In the same sense: Abi-Saab, *Les Sources ...*, 34 ("c'est du pur formalisme artificiel que de dire que [la jurisprudence] ne fait qu'interpréter la matière normative déjà existante, sans ajouter en ce faisant à sa substance") ; Georges Abi-Saab, *De la jurisprudence: quelques réflexions sur son rôle dans le développement du droit international*, MELANGES MANUEL DIEZ DE VELAZCO, 1-8 (1993); and Ian Brownlie, *General Course on Public International Law*, 255 RECEUIL DES COURS 21 (1995) (« My general outlook is that of the objective positivist … However, my positivism is supplemented by an awareness of the significant role of international tribunals in making law »).

[239] See Chapter V, section B.

[240] There is wide support for this proposition. See, for example, NANCY KONTOU, THE TERMINATION AND REVISION OF TREATIES IN THE LIGHT OF NEW CUSTOMARY INTERNATIONAL LAW, 21 (1994), hereafter "Kontou, *The Termination ...*" ("it is accepted that the binding force of conventional and customary rules is the same"); Nguyen, *Droit ...*, para. 60 (« pour les sources, il n'existe pas de hiérarchie en droit international »); Brownlie, *Principles ...*, 3 ; MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES, A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES, para. 84 (1997) ("an *a priori* hierarchy of sources is an alien concept » to the structure of the international legal order), hereafter "Villiger, *Customary ...*"; Akehurst, *Hierarchy ...*, 274-275; Roucounas, *Engagements ...*, para. 72 ("le système est fondé largement sur l'égalité entre les deux sources formelles (traités et coutume) »; and Czaplinski and Danilenko, *Conflict ...*, 7 ("[t]he predominant majority of authors … reject every formal hierarchy of international law").

[241] In respect of the drafting history of Article 38, Akehurst noted the following: "The Committee of Jurists which drafted the Statute of the Court in 1920 included in their draft a provision that the items listed in the first

The fact that a norm derives from a treaty does not *necessarily* mean that it prevails over customary law and general principles of law. Nor does customary law *necessarily* prevail over general principles of law. To put it differently, a conflict of norms in international law cannot be decided simply by reference to the respective *source* from which the norms originate (that is, the way a conflict of norms is generally resolved in domestic law).

In domestic law, the hierarchy of norms is determined by *whom* and *how* the norm was enacted (for example, by constitutional procedure, the federal legislature or the local commune). Not so in international law where a centralised legislature is lacking and formal sources of law are not as clearly defined as in domestic law. As we shall see below, what matters in international law is not so much who or how the norm was created, but rather what the norm is about, what the norm itself says about its hierarchical status and when it was established. An exception to this rule is the hierarchy of norms created within an international organisation (so-called acts of international organisations) where the organ which created the norm will normally, as in domestic law, determine the hierarchical status of that norm.

International law, unlike domestic legal systems, is, indeed, "decentralised" in that it has no central legislator creating its rules. The *creators* of international law are at the same time the main *subjects* of international law, namely states. States as *subjects* of international law, unlike individuals in domestic law, do not elect an "international legislator" which is then mandated to make law on their behalf. Moreover, states as *creators* of law are complete equals. The law created by state A and state B has the same legal value as that created by state C and state D. International law is a law of cooperation, not subordination.[242] Its creation depends essentially on the consent of states, be it explicit or only implicit. The lack of such consent by a given state generally means that it cannot be held to the rule in question (*pacta tertiis nec nocent nec prosunt*).[243] The absence of formal hierarchy in international law is a direct consequence of this assumption that all international norms, in one way or another, derive from state consent. Since, therefore, all norms essentially derive from the same source (state consent), they must have the same binding value.

2. Given the absence of inherent hierarchies: lex posterior derogat legi priori

Since, in principle, all rules of international law have, as an expression of state will, the same legal status, the later expression of state will must logically prevail over an earlier one. This rule, related to the contractual freedom of states, corresponds to the adage *lex posterior derogat legi priori*. In respect of treaty norms, the *lex posterior* rule is set out in Art. 30 of the Vienna Convention.[244] However, in respect of other conflicts (such as conflict between treaty and custom), the *lex posterior* rule equally applies and this on the ground that all rules of international law are, in principle, of the same binding

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paragraph of Article 38 should be applied *en ordre successif*. However, it is not clear whether these words were intended to establish a definite hierarchy of sources, or whether (as Phillimore argued) they merely reflected the logical sequence in which the rules would occur to the judge's mind. The words *en ordre successif* were deleted by the Sub-Commission of the Third Committee of the First Assembly of the League of Nations, but it is not clear whether the deletion was inspired by a feeling that the idea contained in the words was wrong, or that the idea was so obviously right as not to need stating" (Akehurst, *Hierarchy ...* 274, who does refer in note 1 on the same page to some authorities who do think that Article 38 lays down a hierarchy of sources). On the same issue, Brownlie noted that the sources in Article 38 "are not stated to represent a hierarchy, but the draftsmen intended to give an order and in one draft the word 'successively' appeared (Brownlie, *Principles ...*, 3).

[242] See Charles Rousseau, *De la Compatibilité des Normes Juridiques Contradictoires dans l'Ordre International*, 39 RGDIP 133, 150 (1932), hereafter « Rousseau, *Compatibilité ...* » ("Le droit des gens est un droit de cooperation et non de subordination. L'accord des sujets de droit y est la seule source de droit et les normes qui résultent de cet accord de volontés sont d'égale valeur juridique").

[243] See, for example, Arts. 34-38 of the Vienna Convention on treaties and third parties.

[244] See Chapter VII, section A.2 below. Art. 30.3 provides the core of the *lex posterior* rule: "When all the parties to the earlier treaty are parties also to the later treaty … *the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*".

force. As a result, any later rule (i.e., any later expression of state consent) overrules an earlier contradictory rule. The theory of *acte contraire* (by which a norm could only be modified by another norm originating from the same source) is not known in international law.[245]

It must be pointed out though that whereas treaties and acts of international organisations may have a precise date on which they were concluded (on this more below in Chapter VII, section A.2), it is quasi impossible to point at the precise date on which a general principle of law or custom emerged. The same could be said to some extent in respect of unilateral acts of states which may consist of a series of acts which, only taken together, constitute a binding undertaking. All of these norms of international law do not, like most rules of domestic law from which the *lex posterior* rule is borrowed, come to being at a determinate point in time. They emerge over time and change gradually. They are, in this sense, more a "process" in which other norms of international law may play a role, rather than a definite "rule" with which other norms may conflict. The main result of this "process" is that genuine conflicts between treaty, on the one hand, and custom or general principles of law, on the other, will be rather exceptional. Another reason why the *lex posterior* rule does not work well in respect of sources other than treaties (and, as we shall see, even as amongst certain treaty-norms[246]), is that the *lex posterior* rule assumes that the two conflicting norms emanate from the same law-maker in that the latest expression of the law-maker should prevail. But in international law divergent law-making processes exist and overlap, some of them based explicitly on consent, others only implicitly or not at all; some with reference to all actors in the international arena (such as custom), others only with reference to state conduct at the highest level (such as treaties). To talk, in this context, of a later expression overruling an earlier one, when the forms, characteristics and even authors of the expression are so divergent, is rather awkward. *Lex posterior* is copied from domestic law where the sources of law are formally organised and clearly defined. To transpose *lex posterior* by analogy to international law, with its decentralised features and divergent sources of law, may not always meet success.

3. The absolute priority of jus cogens

The only instance of *a priori* hierarchy between norms of international law is when one norm (derived from any source) contradicts another norm part of *jus cogens*.[247] The Vienna Convention defines a norm of *jus cogens*, i.e., "a peremptory norm of general international law", as one "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character" (Article 53). Nowhere does the Vienna Convention refer to, let alone restrict, the source of either norms of *jus cogens* or the contradictory norms which may not derogate from *jus cogens*. In other words, the higher value of *jus cogens* is not grounded with reference to its source (how it was created or by whom), but rather with reference to its acceptance and recognition as a norm from which no derogation is permitted. The latter relates to the substantive content of the norm (is it of such fundamental value that no derogation from it can be tolerated?) rather than the formal creation or source of the norm. As the ILC noted: "It is not the form of a general rule of international law, but the particular nature of the subject-matter with which it deals that may … give it the character of *jus cogens*"; "pre-eminence of [certain] obligations over others is determined by their content, not by the process by which they were created".[248]

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[245] See, for example, Nguyen, *Droit ...* para. 185. An exception to the absence of *acte contraire* in international law is *jus cogens*. Article 53 of the Vienna Convention states that a rule of *jus cogens* "can be modified only by a subsequent norm of general international law having the same character".

[246] See Chapter VII, section A.2.e below.

[247] See Chapter VI, section B.1 below.

[248] Quoted in Prosper Weil, *Towards Relative Normativity in International Law?*, 1983 AJIL 413-442, at 425, hereafter "Weil, *Normativity ...*"..

Views as to what sources of international law may create *jus cogens* are widely divergent.[249] Most authors acknowledge that customary law can create *jus cogens*. Some maintain that *only* custom can give rise to *jus cogens*.[250] Others give a role also to treaties and general principles of law as possible sources of *jus cogens*.[251]

We come back to the theory of *jus cogens* as a conflict rule below. Note that norms of *jus cogens* are, as James Crawford noted, "virtually coextensive"[252] with obligations to the international community as a whole or *erga omnes* obligations.[253] In the former notion of *jus cogens*, the focus is on the higher hierarchical status of certain norms, in the latter notion of *erga omnes* obligations, the focus is on who can invoke responsibility for breach of the norms concerned.

4. Other norms that are allegedly "more important"

There are norms of international law, other than those of *jus cogens*, which are, in one way or the other, also given a higher legal status. Their increased importance is, however, *not* related to the source of the norms concerned nor does it necessarily lead to these norms prevailing over all other norms. Nonetheless, since these norms distinguish themselves from other norms on the basis of their content or substantive nature, they are briefly surveyed in this section. Some of them are dealt with in more detail in subsequent chapters.

a. UN Charter obligations

As further explained below[254], Art. 103 of the UN Charter results in "obligations of the members of the United Nations under the [UN] Charter" to prevail over all other obligations "under any other international agreement". This is a consequence of an explicit conflict clause in the UN Charter itself. Nonetheless, this conflict clause is given added importance in Art. 30.1 of the Vienna Convention which dis-activates the *lex posterior* rule in its regard. In the *Lockerbie cases*, the ICJ defined UN Charter obligations in the sense of Art. 103 so as to include also obligations under UN Security Council resolutions. UN Charter obligations could be said to include also ICJ judgements and any other legally binding decision derived from the UN Charter.

To that extent, some part of international law, namely "UN Charter law", could be said to be of higher legal standing based on its source, namely the UN Charter.[255] Still, one cannot on that basis equate UN Charter obligations with norms of *jus cogens*. Whereas *jus cogens* cannot be derogated from (it can only be modified by a subsequent norm of *jus cogens*[256]), the UN Charter can be amended and so can UN Charter obligations, e.g., by means of the UN Security Council reviewing its resolutions.

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[249] For an overview of doctrinal positions on the issue, see Akehurst, *Hierarchy …*, 282.
[250] Reasoning in this direction, see, V. DEGAN, SOURCES OF INTERNATIONAL LAW, 83 (1997), hereafter Degan, *Sources …*".
[251] See, for example, H. Mosler, *General Principles of Law*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (ED. BERNHARDT), VOL. 7, 89 (1984).
[252] Crawford, Third Report, para. 106 (a).
[253] On the notion of *erga omnes* obligations, see RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES (2000).
[254] See Chapter VII, section A.1.
[255] As Lauterpacht noted in respect of Art. 20 of the Covenant of the League of Nations, the precursor to what is now Art. 103 of the UN Charter: "Article 20 is not a knife blunted by the cutting of the dead wood of inconsistent treaties in force when states enter the League. It is a perpetual source of legal energy possessed of a dynamic force of its own and calculated to ensure the effectiveness of the Covenant unhampered by any treaties between Members, whenever concluded" (Hersh Lauterpacht, *The Covenant as The "Higher Law"*, 17 BYIL 54-66, at 58-9 (1936)).
[256] Art. 53 of the Vienna Convention.

Moreover, in so far as the 15 members of the UN Security Council can overrule the obligations of any UN member under any other earlier or later international agreement, the UN Security Council can be portrayed as a form of "global executive" which, within its limited sphere of competence, has the power to enact law on behalf of all other UN members, not having a seat on the Security Council.

b. Norms that cannot be suspended or deviated from *inter se*

One other instance where a norm is somehow given priority over other norms because of its "fundamental" substantive content, occurs in the event of suspension of obligations as a result of breach (either in the form of suspension/termination on the ground of material breach under Art. 60 of the Vienna Convention, or in the form of countermeasures under the law of state responsibility). Here the special status of certain norms results in the impossibility of suspending the operation of these norms. Unlike *jus cogens*, it does not mean, however, that these norms always prevail over other norms.

Suspension of obligations under the norms concerned is *not* allowed even if there was a prior material breach or even if the taking of countermeasures would be justified. Under Art. 60 (suspension or termination because of material breach) this impossibility arises in case of "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular provisions prohibiting any form of reprisals against persons protected by such treaties". Hence, even if a material breach of a provision within a humanitarian treaty were established, other state parties to this treaty are not allowed to suspend, in turn, the operation of such humanitarian obligation.

Under the law on countermeasures, set out in Art. 51 of the ILC Draft 2000, the taking of countermeasures is prohibited in respect of the following obligations: (a) "The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations"; (b) "Obligations for the protection of fundamental human rights"; (c) "Obligations of a humanitarian character prohibiting any form of reprisals against persons protected thereby"; (d) "Other obligations under peremptory norms of general international law"; and (e) "Obligations to respect the inviolability of diplomatic or consular agents, premises, archives and documents".

The special status given under Art. 51.1(e) to elements of diplomatic law finds reflection also in the *Teheran Hostages* case where Iran tried to justify the occupation of the US embassy and detention of US diplomatic staff in Teheran as a legitimate response to alleged criminal activities of the United States in Iran. The ICJ refused to accept this argument and noted the following:

> "the principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime [of diplomatic law] … The fundamental character of the principle of inviolability is, moreover, strongly underlined by the provisions of Articles 44 and 45 of the Convention of 1961 … Even in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State".[257]

Elsewhere, the Court reiterated the fundamental nature of diplomatic law:

> "In recalling yet again the extreme importance of the principles of law which it is called upon to apply in the present case, the Court considers it to be its duty to draw the attention of the entire international community … to the irreparable harm that may be caused by events of the kind now before the Court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex international

[257] ICJ Reports 1980, 3, at 41 (para. 86).

> community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected".[258]

It is also in this context that the Court's statement that diplomatic law constitutes a "self-contained regime"[259] must be understood ("self-contained" in the sense that "diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions"[260], including declaring such persons *persona non grata*, but excluding the occupation of the embassy or the detention of its staff). Respect for diplomatic law, notwithstanding other breaches, is, indeed, of crucial importance to maintain the possibility of a peaceful settlement. If all diplomatic channels were interrupted, communication so to achieve a settlement would become difficult, if not impossible.[261] But this does not mean that in instances where, for example, a diplomatic agent is caught in the act of committing an assault, his or her immunity must be sacredly respected. The Court recognised that in this event the agent can be briefly arrested so as to prevent commission of the crime.[262] In that sense, diplomatic law is *not* a self-contained regime (not even in the field of remedies), although in the particular circumstances of the *Teheran Hostages case* it was. In that specific case, Iran should have resorted to the remedies provided by diplomatic law, not any other remedies, such as occupation of the embassy.

In the same vein, reference could be made to so-called integral obligations of international law, that is, the general category of obligations from which *inter se* deviations are not tolerated for the reasons explained above.[263] These obligations as well prevail over certain other norms (in particular, *inter se* modifications to the integral obligation) on the ground of their substantive content or nature.

c. International crimes of states

Another type of norms given increased importance are those breach of which constitutes a so-called international crime. The notion of international crimes of states can be found in Art. 19 and Chapter IV (Articles 51 to 53) of the ILC Draft 1996, adopted by the ILC on first reading in 1996. The ILC Draft 2000 adopted on second reading in 2000 omitted this notion but refers instead to "a serious breach by a State of an obligation owed to the international community as a whole and essential for the protection of its fundamental interests" (Article 41).[264] Both versions of the ILC Draft Articles attach more serious consequences to "crimes" of states or "serious breaches of essential obligations to the international community" than to other breaches of international law. Although this provision does not relate to conflict of norms addressed here, it shows that the international community of states is moving towards acceptance of the proposition that some norms of international law are more important than others.[265]

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[258] Ibid., 42-43, para. 92.
[259] Ibid., 41, para. 86. See note 69 *supra*.
[260] 39, para. 83.
[261] Some authors have even characterised all international treaties relating to international communications as setting out norms of a "fundamental nature". See J.-A. Salmon, *Les Antinomies en droit international public*, in LES ANTINOMIES EN DROIT (ED. CHAIM PERELMAN), 285, at 290 (1965), hereafter « Salmon, *Antinomies ...* »: "Dans ce droit fondamental on trouve également un certain nombre de règles dont l'effet *erga omnes* est justifié par leur caractère '*objectif*' ou '*constitutionnel*'. C'est la *sécurité* des relations juridiques qui attribue ici le caractère fondamental à certaines normes. Les traités relatifs aux communications internationales (régimes des détroits ou des canaux internationaux) se voient souvent reconnaître un tel caractère) ». For words of caution in respect of so-called « objective regimes » and declaring treaties « in the public interest », see below section d.
[262] ICJ Reports 1980, 41, para. 86. See also L.A.N.M. Barnhoorn, *Diplomatic Law and Unilateral Remedies*, 25 NYIL 39-81 (1994).
[263] See Chapter II, section E and Chapter VI, section C.2.
[264] See *supra* note 15.
[265] Prosper Weil considers that this tendency towards what he calls "graduated normativity" threatens the ideological neutrality of international law, a neutrality which he considers to be "necessary to guarantee the

d. So-called "public interest norms"

Even more controversial than crimes of states, is the notion of "public interest norms". Some authors have argued in favour of giving *erga omnes* effect to these norms even though they are not part of *jus cogens*. More particularly, they want to make those norms binding on all states, even without their consent, on the ground that they serve a "public interest" and should hence be seen as benefiting also non-parties. This approach is essentially proposed as a way out of the free-riders problem faced in respect of many international norms. Already in the *Genocide Convention* case, the problem of free-riders was pointed at: how to ensure that as many states as possible sign up to the convention (since, if certain states keep out, the objective of eradicating genocide, something that requires co-operation, cannot be achieved). On that basis, the Court accepted reservations to the convention that were not incompatible with its object and purpose. The same issue arises in the WTO: how to ensure that trade liberalisation moves on, but at the same time avoid that non-participating parties "free-ride" too much on further *inter se* liberalisation (since, indeed, *inter se* liberalisation must, in principle, be extended to all WTO members pursuant to the MFN principle[266]). Especially in the field of environmental protection this free-riders problem is prominent: given that, for example, global warming knows no borders, how to ensure that as many states as possible sign up to the MEA (its very object and purpose may be completely undermined by some free-riders that keep polluting)? It explains why many MEAs include obligations in respect of non- parties.

Jost Delbrück, for example, defends the position that "the *erga omnes* effect of particular norms is based on the special character of such norms; they articulate basic interests and needs as well as fundamental values of the international community as a whole".[267] This may be so in respect of norms of *jus cogens*, but he takes it one step further so as to cover also other obligations: "the core principle of the international regime created for the protection of the ozone layer and the regime created by the [1995 Fish Stocks] Agreement …. give rise to obligations *erga omnes*. The *ratio legis* is that the common interest in protecting the ozone layer, protecting the environment from grave pollution, for instance, intentional oil spills as a means of warfare, and protecting endangered species is so overwhelming that no State may be permitted not to comply with the protective regimes regardless of whether or not it has consented to the creation of the regime".[268]

Such approach, in so far as it steps beyond the boundaries of *jus cogens*, is both risky and unfounded. Firstly, it brings an inherently subjective element into the binding nature of international law. Indeed, when is a norm in the public interest and who decides this matter? Prosper Weil warned against importing such subjective value judgements into international law, which, in his view, would threaten its very function of providing a neutral framework for co-operation. His critique may not have been convincing in respect of *jus cogens*, but it seems convincing for "lower" so-called "public interest norms". The cultural, social and economic diversity of states makes it impossible to proclaim a convention negotiated by some states as reflecting the "public interests" of all, in particular when it comes to the detailed technical provisions.[269] All states may have an interest in the environment and

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coexistence of heterogeneous entities in a pluralistic society" (Weil, *Normativity …*, 20-21). For recent discussions on the concept of international crimes, see the First Report on State Responsibility by Special Rapporteur James Crawford, Addenda 1 and 2, A/CN.4/490/Add. 1 and Add. 2 and Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 EJIL 425-434 (1999).

[266] With the exception, of course, of regional arrangements meeting the requirements in GATT Art. XXIV.

[267] Jost Delbrück, *« Laws in the Public Interest » - Some Observations on the Foundations and Identification of* erga omnes *Norms in International Law*, LIBER AMICORUM GUNTHER JAENICKE (VOLKMAR GÖTZ ET AL. EDS) 17, 18 (1998).

[268] Ibid., 26-27. Reminiscent of the statement by the Inter-American Court of Human Rights, quoted *supra* at note 185, Delbrück characterises these obligations as follows : « They are not conceived in terms of traditional rights and duties in the national interest of the parties involved but they are meant to constitute objective guidelines or norms in the public interest of the international community as a whole » (ibid., 28).

[269] On this issue of diversity, see Robert Jennings, *Universal International Law in a Multicultural World*, in INTERNATIONAL LAW AND THE GROTIAN HERITAGE, TMC INSTITUTE, 187-197 (1985).

an orderly regulation of fisheries, but they may want to go about in achieving these interests in different ways. To recognise protection of the environment as a "global common" is one thing, to impose detailed treaty obligations on non-parties to achieve that "global common" is quite another.

Secondly, there is not only the problem of subjective value judgements. The principle *pacta tertiis* constitutes the main legal obstacle to recognising treaty norms (other than those of *jus cogens* or those that have developed into custom) as binding on non-parties. Delbrück refers to the existence of so-called objective regimes, which were considered in certain cases to be binding also on non-parties.[270] However, the Vienna Convention has not incorporated this idea of objective regimes[271] and categorically confirmed the principle of *pacta tertiis*.[272] Much has been written about the allegedly binding nature on third parties of certain provisions of the 1995 Fish Stocks Agreement. However, the *pacta tertiis* principle prevents this from happening.[273] This convention introduces, for example, the principle that access to the fishery resources in a particular region of the high seas is restricted to states which are either members of the competent subregional or regional fisheries management organisation, or agree to apply the conservation and management measures established by such organisation, or, in the absence of such regional organisation, participate in conservation and management arrangements directly entered into by the interested parties.[274] But this provision must remain ineffective towards states not parties to the 1995 agreement. The same applies in respect of the convention's principle that ships may be boarded and inspected on the high seas by member states of an existing subregional or regional organisation or arrangement, whether or not the flag state of the boarded or inspected vessels is a member of that organisation or is a participant in such an arrangement.[275] Here again, this principle can only apply towards fishing vessels flying the flag of parties to the 1995 agreement. Other vessels can continue to invoke the customary law principle which provides that on the high seas only the flag state is competent.[276]

The same problem arises under certain MEAs. The fact that they impose an obligation on parties to, for example, restrict trade also with non-parties[277] does not make the MEA binding on non-parties. If

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[270] See, for example, the *Wimbledon case*, where the PCIJ found that the international regime for the Kiel Canal (set out in the Versailles Peace Treaty) was binding also on Germany, even though Germany was not a party to the treaty (PCIJ Reports 1923, Series A, No. 1) and the *Dispute on the Regime of Demilitarization for the Aaland Islands*, where an *ad hoc* Committee of Jurists decided that the Paris peace settlement of 1856 setting out international obligations on demilitarisation was binding also on, and could be invoked by, Sweden and Finland, even though they were not a party to the settlement (see report of the International Committee of Jurists entrusted by the Council of the League of Nations with the task of giving an advisory opinion upon the legal aspects of the Aaland Islands Question, *League of Nations Official Journal*, Special Supplement No. 3, October 1920).

[271] It is reflected only in Art. 41, but then in the sense of *inter se* agreements not being allowed to deviate from multilateral treaties *that are binding on both parties*. Hence, the idea of certain multilateral treaties being more important than *inter se* treaties (notwithstanding the contractual freedom of states) was confirmed, but this only in respect of treaties binding on both parties.

[272] As Rosenne remarked: "It might be thought, and indeed not without reason, that … [Arts. 34-38] constitute an emphatic reassertion of the individual sovereignty of states vis-à-vis the law of treaties and negate any suggestion that the post-World War II codification of the law of treaties went any distance in acknowledging even the existence of community interest in the law", Rosenne, *Bilateralism …*, 204.

[273] For an overview and, in my view, correct conclusion on this matter, see Erik Franckx, *Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea,* 8 TULANE JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 49 (2000).

[274] Art. 8(4) of the 1995 Fish Stocks Agreement.

[275] Ibid., Art. 21.

[276] As codified in Art. 6.1 of UNCLOS. The *pacta tertiis* rule must apply also in respect of Art. 23.1 and 2 imposing an obligation on port states to take measures to promote the effectiveness of subregional, regional and global conservation and management measures.

[277] For examples of MEA provisions imposing obligations in respect of non-parties, see the WTO document entitled *Matrix on Trade Measures Pursuant to Selected MEAs*, WT/CTE/W/160/Rev.1, 14 June 2001, which has a separate column with "Provisions for non-parties", including: Art. XVIII of the International Plant

parties to the MEA restrict trade from non-parties and this trade restriction goes against other norms (e.g., WTO rules), the parties to the MEA cannot invoke the MEA as a justification for breach. Non-parties to the MEA cannot be held by the provisions of this MEA. Of course, parties could then still justify their action under exceptions in the WTO treaty itself (such as GATT Art. XX).

Arguing that "public interest norms" ought to bind also non-parties amounts to reverting to a legal-technical means to solve an essentially political question: how to get more states sign a treaty so as to avoid the free-riders problem? The political question ought to be resolved rather by political means, that is, through negotiation and the convincing of non-parties that the "public interest norm" is really also in their interest (this may involve bargaining and compensations elsewhere). It does not suffice for certain states to agree on something and to declare that something they agree on as being in the interest of all states so as to make it legally binding on these other states. Non-parties, especially developing countries, should be allowed to reap some benefits from their entry into an MEA as a result of political negotiations. These benefits can take the form, for example, of compensatory market access in exchange of commitments to environmental or labour standards. As Fidler noted in respect of the International Convention on Civil Aviation, mentioned elsewhere as being an example of a convention in "the public interest", binding also on non-parties: "The example of the International Convention on Civil Aviation was brought up, and it was noted that the states that really matter have adopted these rules, so everybody else has to fall into place. That is a matter of the exercise of power; it is not necessarily a matter of obeying law out of a sense of legal obligation. Weaker states really do not have any choice. That is a matter of power, not of law. You could also make the same claims in terms of the environment: this is really an agenda set by the Western developed countries, because it has become a value through the democratic process and has been placed on the international agenda".[278]

Certain norms do become binding on states independent of their direct consent. *Jus cogens* is one example. Decisions taken by organs of international organisations, not requiring the consent of all member states (e.g., by majority voting) is another. States must have agreed to set up the organisation and to grant it this decision-making power in the first place, but this can result in norms of international law to which they strongly oppose. Think, in this respect, of Security Council resolutions (as discussed in the *Lockerbie cases*[279]). A third vehicle to impose norms on states independent of their explicit consent is custom. As Charney noted, in accepting the existence of custom, the ICJ has shifted its approach from looking for affirmative and actual state practice in support of the alleged custom, to heavily relying on UN resolutions and norms enacted elsewhere confirming the alleged custom. In the *Continental Shelf cases*, for example, the ICJ was unable to find sufficient affirmative state practice to support the rule of equidistance. Whereas in the more recent *Nicaragua case*, the Court accepted the existence of certain customary norms on the use of force and humanitarian law, heavily relying on activities in international fora, and this *notwithstanding contrary state practice*.[280] This tendency towards more easily accepting the existence of custom, based mainly on treaties accepted by a large majority of states, may lend some support to the existence of "public interest

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Protection Convention, Art. X of CITES, Art. 4(8) of the Montreal Protocol, Art. 11 of the Basel Convention, Art. 24(1) of the Cartagena Protocol on Biosafety, Art. 10.9(a) of the Rotterdam Convention and Art. 3.2(b)(i) of the Stockholm Convention on Persistent Organic Pollutants.

[278] JOST DELBRUCK, NEW TRENDS IN INTERNATIONAL LAWMAKING – INTERNATIONAL 'LEGISLATION' IN THE PUBLIC INTEREST 118 (1997), hereafter "Delbrück, *New Trends ...*", comment by Fidler, 131. Charney noted the same in respect of the Antarctic Treaty and the question of whether it is binding also on non-parties as some "objective regime": "I do not think that the party status of the most important state actors in Antarctica or the states that surround Antarctica makes this system binding as general international law. Rather, I think it is the fact that this system has become accepted by the international community as a whole. There was, of course, resistance to the idea that this club would make Antarctic law. But it has become generally accepted internationally that this group of states really does create norms for Antarctica because of the acceptance by the general international community of the norms emanating from that group", 124.

[279] See section a above.

[280] Jonathan Charney, *International Lawmaking – Article 38 of the ICJ Statue Reconsidered*, in Delbrück, *New Trends ...*, 171-191, at 174-5.

norms", but this is only true in respect of the procedural creation of custom. It cannot operate as an independent reason to bind non-parties.

Finally, it should be noted that attempts to make so-called "public interest norms" binding also on non-parties may go further than simply breaching *pacta tertiis*. Much along the footsteps of *jus cogens*, it seems to imply also a certain higher hierarchical status for these norms v-à-v norms not in the public interest.[281] This risks creating a further erosion of the binding nature of these other norms, along the following lines: "these other norms are not of *jus cogens* nor in the public interest, so one can easily derogate from them, and since one can do this, they are not really binding". Although such reasoning is, of course, legally unsound, in practice it is one that is often heard..

e. A different application of norms when "vital interests" are at stake

Finally, a few words could be said about the fact that certain norms have been applied or enforced in a different manner because the case at hand involved "vital interests". Here, the norm does not, as such, defend "public interests" (the way so-called "public interest norms" allegedly do), rather it is applied as against the states bound by the norm in a way that is different based on the "vital interests" involved in a specific case. In the WTO context, for example, the Appellate Body in *EC – Asbestos* stressed that in an evaluation of the "necessity" requirement under GATT Art. XX

> " '[t]he more vital or important [the] common interests or values' pursued, the easier it would be to accept as 'necessary' measures designed to achieve those ends. In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risk posed by asbestos fibres. The value pursued is both vital and important in the highest degree".[282]

Against this background, it found that in *EC - Asbestos* the measure at issue was, indeed, "necessary" to protect human health. In contrast, in *Korea – Beef*, where the interest at stake was not as vital, i.e., to avoid that consumers confuse imported with domestic beef, the measure was *not* found to be "necessary" under GATT Art. XX(d). Under the SPS Agreement as well, the Appellate Body applied the requirement that there be a reasonable relationship between a risk assessment and the SPS measure in a way that is more lenient in case "the risk involved is life-threatening in character and is perceived to constitute a clear and imminent threat to public health or safety".[283] Here as well, the Appellate Body applied WTO rules more deferentially in case "vital interests" related to human health are it stake, as opposed to, for example, trade restrictions imposed for the protection of animal or plant health.[284] A similar approach, focused this time on the circumstances of the breach (not the gravity of the interests protected by the measure at issue) was taken recently by the ICJ in the *La Grand case*. There, the Court found that in case a state does not inform foreign detainees of their right to contact consular officers of their state of nationality, in breach of Art. 36 of the Vienna Convention on Consular Relations, "an apology would not suffice in cases where the individuals concerned have been subjected to prolonged detention or convicted or sentenced to severe penalties". In those cases, the

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[281] As Oxman noted (in Delbrück, *New Trends ...*, 21): « Those positing the idea of public interest norms presumably intend to distinguish them from other norms. But they presumably do not intend to suggest that other norms of international law are not in the public interest. Yet they cannot escape the possible consequences not only of being taken literally, but of suggesting a hierarchical relationship between some obligations and others".

[282] Appellate Body report on *EC – Asbestos*, para. 172, quoting from Appellate Body report on *Korea – Beef*, para. 162.

[283] Appellate Body report on *EC – Hormones*, para. 194.

[284] The Appellate Body was, indeed, far stricter in its reports on *Australia – Salmon* (involving animal health) and *Japan – Varietals* (on plant health) as it was in *EC – Hormones* (addressing human health).

defaulting state must "allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the Convention".[285]

In all of these cases involving "vital interests", the adjudicator has applied or enforced the norm differently and this even though the norm itself does not provide for such distinction. This form of giving more weight to certain interests is hence a largely judge-made process. Nonetheless, as justified as it may be, it as well could be said to be at variance with the alleged principle of "neutrality" of international law.

C. Judicial decisions and doctrine

Moving away from norms that are rightly or wrongly portrayed as "more important" than others, we next address two "sources of law" at the other side of the spectrum: judicial decisions and doctrine.

1. Not independent sources of international law, but highly influential

Judicial decisions and doctrine are *not* sources of international law in the strict sense of themselves creating new norms. As noted in Art. 38, paragraph 1(d) of the ICJ Statute, they are only "subsidiary means for the determination of rules of law". Moreover, Article 59 of the ICJ Statute (explicitly referred to in Article 38, paragraph 1(d)) unambiguously states that "[t]he decision of the Court has no binding force except between the parties and in respect of that particular case". The same applies in respect of all judicial decisions, including those of the WTO judiciary.[286] Schwarzenberger, for example, defined them as "law-determining agencies", as opposed to treaties, custom and general principles of law which are "law-creating processes".[287] The same reasoning must apply, *a fortiori*, to doctrinal writings. Doctrine does not constitute, in and of itself, new norms.

This is not to say, though, that judicial decisions and doctrine have only a minor role to play in international law.[288] Both have a definite impact on the wider process of law creation and determination. They exert an important influence on both states and international tribunals in the determination of the law, for example, in the establishment of customary law. For judicial decisions taken within the particular context of an international organisation, this is so especially in respect of law creation and determination *within* the international organisation. In many instances, however, the impact may spill over to other contexts as well. Focusing on the WTO, for example, panel and Appellate Body reports often refer to judgements of other international tribunals (especially the PCIJ and ICJ, but also the European Court of Justice). Conversely, other international tribunals have been faced with references to WTO panel and Appellate Body reports.[289]

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[285] *Germany v. United States of America*, Judgement of 27 June 2001, posted on the internet at "http://www.icj-cij.org/icjwww/idocket".

[286] See Chapter II, section C.4.

[287] GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, VOL. I, 26-27 (1957).

[288] See text at note 238 *supra* and Sir Gerald Fitzmaurice who thought that judicial decisions are, in some respects, formal sources of international law (Fitzmaurice, *Some Problems …*, 169).

[289] In the pleadings before the Arbitral Tribunal in the *Southern Bluefin Tuna case* (Australia and New Zealand v. Japan, Jurisdiction and Admissibility), constituted under Annex VIII of the UN Convention on the Law of the Sea, for example, Japan referred to the Appellate Body report on *EC – Bananas* in support of its arguments on *lex specialis* (Hearing of Sunday, 7 May 2000, statement by E. Lauterpacht). In reply, Australia and New Zealand submitted their views on the *EC – Bananas* report and added references to the Panel reports on *Turkey - Textile* and *Indonesia – Autos* (Hearing of Monday, 8 May 2000, statement by J. Crawford). Transcripts of these hearings can be found on the internet (www.worldbank.org/icsid/bluefintuna/main.htm).

2. Judicial decisions versus norms (including authoritative interpretations)

Since neither judicial decisions nor doctrine are, in and of themselves, norms of international law, they cannot be at play in a conflict of norms. To explain their relative importance, one can then only state the obvious, namely that in case a doctrinal writing contradicts a norm (be it a treaty norm or a custom or any other norm), the norm is more important. In fact, the norm is then the only element regulating the conduct of states.

More interesting is the case of judicial decisions. Unlike doctrine, they must be *presumed* to be an accurate statement of what the law is based on genuine sources of law, such as treaties or custom, as between two parties and as applied to a particular set of circumstances, at a particular point in time. Hence, at that point in time, and as between these states, there can, in theory, be no conflict between the judicial decision and the applicable norms of law *since the judicial decision is supposed to apply those norms* (not to contradict them). This presumption is confirmed by the fact that as between the parties in the particular dispute the judicial decision is legally binding or *res judicata*[290] (this, in turn, is a result of both disputing parties having conferred jurisdiction on the adjudicator to state what the law is). In the WTO as well, the principle of *res judicata* has been confirmed[291] (although, as seen below, complaints by *different* members can be brought against one and the same measure). Obviously, as between other states, in other circumstances or at a different point in time, the law may be different or have changed. Then, of course, the applicable norms are more important than the old judicial decision. There is then, once again, no conflict of norms since the judicial decision is not a norm nor an application of the allegedly contradictory norm. It is then simply a statement of what the law is in *another* factual circumstance.

Although limited *ratione personae*, *materiae* and *temporis*, a judicial decision is legally binding as reflecting the law applicable to a particular dispute. It is, in other words, *res judicata*. This binding nature of judicial decisions can only be undone by the consent of both parties involved[292], not, for example, by an unilateral act of the state against whom the decision was rendered. In addition, the

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[290] In favour of *res judicata* being a general principle of law: B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 336-364 (1963) and the ICJ Advisory Opinion on *Effect of Awards of Compensation Made by the UN Administrative Tribunal*, ICJ Reports 1954, 47, at 61; *contra*, at least in certain circumstances: Riphagen, in Cassesse and Weiler, *Change ...*, 35 and 37.

[291] As pointed out earlier, *supra* note 47 and section C.2 and 4, the Appellate Body in *Japan – Alcoholic Beverages* found that adopted panel reports "are not binding, *except with respect to resolving the particular dispute between the parties to that dispute*" (at 14, emphasis added, confirmed in the Appellate Body report on *US – FSC*, para. 108). The principle of *res judicata* was explicitly recognised also by the panel on *US – Shrimp* operating under DSU Art. 21.5 in order to decide whether implementation of an Appellate Body report was consistent with WTO rules. The panel found that "as long as the implementing measure before us is identical to the measure examined by the Appellate Body in relation to paragraph (g) [of GATT Art. XX], we should not reach a different conclusion from the Appellate Body" (at para. 5.39). In respect of *res judicata* in the WTO, it is noteworthy that in its report on *Canada – Aircraft*, the Appellate Body implied that even if in the case at hand it had not been convinced of the WTO inconsistency of a Canadian measure, Brazil could always bring a new case against that measure, based on facts that it may discover in the future: "we do not intend to suggest that Brazil is precluded from pursuing another dispute settlement complaint against Canada, under the provisions of the *SCM Agreement* and the DSU, concerning the consistency of certain of the EDC's financing measures with the provisions of the *SCM Agreement*. In that respect, we note that Brazil may request information from Canada, under Article 25.8 of the *SCM Agreement*". This approach seems to be in line with Art. 61 of the ICJ Statute on the revision of ICJ judgements in case of "discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence".

[292] For an interesting example in the WTO context, see the DSB decision in the *US – FSC* dispute to extend the deadline for withdrawal of the FSC subsidies from 1 October 2000 (as determined by the panel) to 1 November 2000. Both the US and the EC agreed to this extension but in effect it changed the judicial findings of the panel (see DSB decision in WTO doc. WT/DSB/M/90, acting on a US request in WT/DS108/11 of 2 October 2000).

organs of the international organisation that are bound by a judicial decision cannot change or overrule such judicial decision (even if the organ itself created the judicial body that made the decision).[293]

In the WTO context, the WTO Ministerial Conference or General Council can adopt authoritative interpretations of WTO agreements by a ¾ majority decision.[294] Such interpretations may contradict previous panel and/or Appellate Body interpretations in particular disputes. Art. 3.9 of the DSU explicitly provides that WTO dispute settlement is "without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement". But can such authoritative interpretation by an act of the WTO as an international organisation overrule an earlier WTO panel or Appellate Body decision?

It must be recalled, at this juncture, that a judicial decision is not a norm but an application of the law to a particular case. The authoritative interpretation, on the other hand, is an act of the WTO as an international organisation that, in effect, changes the law as opposed to what it was according to the judicial decision.[295] There is hence no conflict of norms, but a change in one and the same norm (the norm as interpreted by the judiciary as opposed to the norm interpreted by the WTO membership).[296]

If, in the authoritative interpretation, both disputing parties agree to change the law retroactively so as to apply it also to their dispute, the judicial decision, in so far as it relies on the old law, would loose its practical effect[297]: if the complainant had won the dispute on the basis of the old law, that party, having agreed to the new law, would no longer seek (nor, it would seem, be allowed to seek) the implementation of the judicial decision; if, on the other hand, the defendant had won the original dispute, the complainant would need to seek a new panel decision for it to see the new law applied to its case. However, the judicial decision would remain intact as a statement of the law understood *at a particular point in time*. And the authoritative interpretation as well does retain its character of norm. It is not an application of the law to a particular case so that it cannot be used as an independent basis to obtain implementation, the way DSB rulings and recommendations can be resorted to. If the new interpretation favours the complainant, the complainant will need to seek a new panel decision for it to see the new law applied to its particular case.

But what if the disputing parties disagree and the ¾ majority in favour of the contradictory interpretation is nonetheless obtained? It could be submitted that since one of the disputing parties does not agree to overrule the law as stated in the judicial decision, the law that is reflected in this decision cannot be changed retroactively, without the consent of that state. However, the WTO member concerned agreed *ex ante* to the WTO provision on authoritative interpretations as well as to the DSU provision stating that WTO dispute settlement is "without prejudice to the rights of Members to seek authoritative interpretation of [WTO] provisions". Thus, if, but only if, the authoritative

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[293] See, in this respect, the ICJ Advisory Opinions on *Effect of Awards of Compensation Made by the UN Administrative Tribunal* ICJ Reports 1954, 47, at 53 and on *Request for Revision of Judgement n. 273 of the UN Administrative Tribunal (Mortished)*, ICJ Reports 1982, 321.

[294] Pursuant to Article IX:2 of the Marrakesh Agreement.

[295] As the Appellate Body stated in footnote 127 of its report on *US – FSC* case: "The distinction between an authoritative interpretation and an interpretation made in dispute settlement proceedings is made clear in the *WTO Agreement*. Under the *WTO Agreement*, an authoritative interpretation by the Members of the WTO, under Article IX:2 of that Agreement, is to be distinguished from the rulings and recommendations of the DSB, made on the basis of panel and Appellate Body Reports. In terms of Article 3.2 of the DSU, the rulings and recommendations of the DSB serve only 'to clarify the existing provisions of those agreements' and 'cannot add to or diminish the rights and obligations provided in the covered agreements'".

[296] Recall, in this respect, the adage *ejus est interpretare legem cujus condere*, or as the PCIJ stated in its Advisory Opinion on the *Question of Jaworzina*: "it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it" (*Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina)*, PCIJ, Advisory Opinion, Ser. B, No. 8 (1923)).

[297] Although this may be problematic for the states involved v-à-v their nationals in terms of the right these nationals legitimately acquired under the law as stated by the original judicial decision.

interpretation validly obtained under the WTO Agreement were to state explicitly that it applies retroactively, including to the situation covered by the judicial decision, then this interpretation must prevail over the law as stated in the earlier judicial decision.[298] If the authoritative interpretation is silent on the matter of timing, it must, however, be presumed that it applies only prospectively. Here, an analogy with the principle of non-retroactivity of treaties[299] must be made and applied also to acts of international organisations such as WTO authoritative interpretations.

In sum, an authoritative interpretation pursuant to Art. IX.2 of the WTO Agreement may affect the law as interpreted by an earlier panel or Appellate Body ruling if, but only if, either (i) the disputing parties agree to this effect or (ii) the authoritative interpretation is explicitly stated to apply retroactively. However, even if the law as expressed in the judicial decision is so affected, this change is not automatically reflected in the judicial decision itself. For the new law to be enforced, the interested party will need to seek a new judicial decision, this time applying the law as interpreted authoritatively by the WTO membership.

3. Conflict between judicial decisions

Although judicial decisions (not being norms) cannot be part of a conflict of norms, it could occur that distinct judicial decisions as between the same parties on the same matter are in conflict. With the increasing number of international tribunals, there is, indeed, a risk that two judicial decisions contradict each other. One decision may find that no breach of international law occurred. Another may come to the opposite conclusion, as between the same parties on the same matter. Moreover, although judicial decisions do not themselves create new norms, they may, or may not, activate certain secondary rules of international law, such as an obligation to cease the breach or to pay reparation. If one decision activates such secondary obligations of international law and another does not (or does so differently), how should the defending state react?

No clear rules seem to exist in this respect, for one thing, because this situation of conflicting judicial decisions has not yet arisen and is, indeed, not likely to arise in the near future.

Firstly, the fact that different international tribunals exist does not necessarily mean that two tribunals will have jurisdiction to decide on the same claims as between the same parties. Although a dispute may be send to two tribunals, the claims before each tribunal may be very different.[300]

Secondly, although two tribunals may have to decide on the legality of one and the same measure (be it under the same or different claims), the law each tribunal is asked to enforce should be read together with all other rules of international law, both general international law and other treaties.[301] Hence, in most, if not all, cases where two tribunals have to decide one and the same claim, they will have to do so on the basis of the *same legal rules*. Consequently, conflict between judicial decisions should arise only as a result of different interpretations of the same law. As for explained below[302], claims under the WTO treaty, for example, cannot be enforced in isolation. A WTO panel must take account also of other rules of international law, such as a defence under an MEA or human rights treaty binding on both disputing parties. It is on the basis of this entire universe of legal norms applicable to the case at hand that the validity of a WTO claim must be assessed. In case another, non-WTO tribunal would

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[298] But this again does not mean that the authoritative interpretation can be resorted to by the complainant as an independent basis to obtain implementation. If the new interpretation favours the complainant, the complainant will need to seek a new panel decision for it to see the new law applied to its particular case.
[299] Set out in Art. 28 of the Vienna Convention.
[300] See, for example, the claims in the *Swordfish case* brought before a WTO panel as opposed to those brought before ITLOS (see *supra* note 28).
[301] On this, in particular the fact that non-WTO law should be capable of providing a defence before a WTO panel, see Chapter VIII, section D below.
[302] Ibid.

have to address the same claim, that other tribunal would need to go through the same exercise. In other words, the approach suggested below -- of allowing all relevant international law to be part of the applicable law before a WTO panel -- is not only theoretically underpinned. In practice, it will be the main instrument so as to avoid contradictions between judicial decisions reached in different WTO and non-WTO settings.

Conflict between judicial decisions should then arise only in case two tribunals interpret the exact same law in a different way. One way to avoid this conflict is for different tribunals to ask for each others' opinion (or the opinion of the political branch of the treaty regime in question or that of its secretariat). Thomas Schoenbaum refers to the possibility of asking an ICJ advisory opinion in case a WTO panel must decide a matter of non-WTO law, something that in his view "would be extremely cumbersome".[303] In making their assessment of non-WTO rules panels could, however, be assisted by other international tribunals or organisations through the operation of DSU Art. 13.1 allowing panels to "seek information and technical advice from any individual or body which it deems appropriate". The panel on *US –Copyright*, for example, requested information from WIPO before coming to a conclusion on claims under the TRIPS agreement which incorporates certain WIPO rules (*in casu*, the Bern Convention).[304] Moreover, in respect of IMF matters, GATT Art. XV:2 provides that "[i]n all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the [IMF]".[305] The Panel on *India – Quantitative Restrictions*, for example, asked for the opinion of the IMF in respect of certain balance of payments matters (with reference to DSU Art. 13, not GATT Art. XV:2) and based its final decision on that opinion.[306] The 1996 Agreement between the IMF and the WTO have amplified the WTO-IMF cooperation, including in respect of dispute settlement.[307]

After a detailed examination of the risk posed by multiple international tribunals, Charney concludes that "the coherence of international law does not appear to be significantly threatened by the increasing number of international tribunals".[308] He finds that "[o]n the basis of the available evidence, no substantial breakdown in the unity of central norms of general international law has developed".[309] For Charney, the most promising strategy for success would "rely on the ICJ itself to make optimal use of the historical, financial, intellectual, and reputational strengths it now holds, as well as efforts by all tribunals that address international legal matters to recognize their common enterprise and to engage in greater international dialogue".[310] Kinsbury, in a foreword to a series of papers on the same topic, concludes along the same lines: "If a hierarchical judicial system for

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[303] Thomas Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 ICLQ 647, at note 43.

[304] See Attachment 4 to the panel report on *US – Copyright*. Another example where "factual information" was request from WIPO can be found in the Panel report on *United States – Section 211 Omnibus Appropriations Act of 1998* (the so-called Havana Club case), paras. 8.11 ff.

[305] GATT Art. XV:2 continues: "In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund … and shall accept the determination of the Fund as to whether action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the [IMF], or with the terms of a special exchange agreement between the contracting party and the CONTRACTING PARTIES".

[306] Panel report on *India – Quantitative Restrictions*, 133 ff.

[307] Paragraph 6 of that agreement provides: "… The WTO shall invite the Fund to send a member of its staff as an observer to meetings of the WTO Dispute Settlement Body where matters of jurisdictional relevance to the Fund are to be considered. The WTO shall also invite the Fund to send a member of its staff to other meetings of the Dispute Settlement Body as well as of other WTO bodies for which attendance is not provided above (excluding the Committee on Budget, Finance and Administration, and dispute settlement panels), when the WTO, after consultation between the WTO Secretariat and the staff of the Fund, finds that such a presence would be of particular common interest to both organizations".

[308] Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECEUIL DES COURS 101-373, at 373 (1998).

[309] Ibid.

[310] Ibid.

international law is not to be established, two factors will work as counter-forces against those centrifugal forces. First, the ICJ must continue to maintain its intellectual leadership role in the field. If it does so, the other tribunals will be under pressure to abide by the ICJ's determinations on international law. Second, the other tribunals and the ICJ should be encouraged to increase the dialogue that already exists among them. The idea that all of these tribunals are engaged in a common endeavour would be emphasized. This might provide strong pressures against the centrifugal forces at work, while still permitting the independence of these specialized tribunals".[311]

Two tentative guidelines could nonetheless be suggested in order to resolve conflicts between judicial decisions as between the same parties on the same subject matter, if such conflicts ever arise. Firstly, because of principles related to *res judicata* or *l'autorité de chose jugée*, the decision of the court or tribunal deciding the matter *for the first time* should normally prevail (unless, perhaps, that decision trespassed the jurisdiction of the tribunal in question or includes manifest errors of law). Secondly, it would seem that a judgement by the ICJ, after all the only international tribunal with general jurisdiction and the principal judicial organ of the UN, carries more weight than decisions by other courts or tribunals. Pursuant to Art. 92 of the UN Charter, the ICJ Statute forms an integral part of the UN Charter. Art. 59 of the Statute states that decisions of the ICJ have binding force as between the parties and in respect of the particular case. Hence, the obligations derived from an ICJ judgement are legally binding and could be said to be "obligations of the Members of the United Nations under the present Charter" in the sense referred to by Art. 103 of the UN Charter.[312] Now, Art. 103 provides that in the event of conflict between such UN Charter obligations and "obligations under any other international agreement", say, WTO Appellate Body reports adopted pursuant to the WTO treaty, the UN Charter obligations prevail. Art. 103, further discussed below, could thus constitute a legal ground to give preference to an ICJ judgement in the event of conflict with another judicial decision.

In the WTO context, another problem of potentially inconsistent judicial decisions may arise, not as between two decisions in respect of the *same* parties, but as between two decisions on the same measure as a result of complaints brought by two *different* WTO members. This situation was addressed in the Panel Report on *India – Patent* (complaint by the EC). There, the panel allowed the EC to bring the same claims, against the same Indian measure, as those that were already decided by a previous panel at the request of the United States. The panel allowed for such "repeat claim" on the ground of Article 9 of the DSU[313], but noted India's concern "that an unmitigated right to bring successive complaints by different parties based on the same facts and legal claims would entail serious risks for the multilateral trade order because of the possibility of inconsistent rulings, as well as problems of waste of resources and unwarranted harassment".[314] The panel stated that "while we

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[311] Ben Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 NEW YORK JOURNAL OF INTERNATIONAL LAW AN POLITICS 679-708, at 707. On the same topic, see also the papers and discussions in IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION, 9 ASIL BULLETIN (1995). Other authors, in particular current or former judges of the ICJ, have expressed more pessimistic views in this respect. See, for example, G. Guillaume, *The Future of International Judicial Institutions*, 44 ICLQ 848 (1995); Robert Jennings, *The Proliferation of Adjudicatory Bodies: Dangers and Possible Answers*, in IMPLICATIONS OF THE PROLIFERATION OF INTERNATIONAL ADJUDICATORY BODIES FOR DISPUTE RESOLUTION, 9 ASIL BULLETIN 2 (1995) and, in particular, S. Oda, *The International Court of Justice from the Bench*, 244 RECEUIL DES COURS 9, at 139-155 (1993).

[312] In the *Lockerbie cases* (ICJ Reports 1992) the ICJ decided that UN Security Council resolutions give rise to UN Charter obligations in the sense of Art. 103. See Chapter VII, section A.1.b.i. There seems to be no reason why the decisions of other organs of the UN, *in casu* the ICJ, should be construed differently.

[313] Article 9 of the DSU provides as follows: "1. Where more than one Member requests the establishment of a panel related to the same matter, a single panel may be established to examine these complaints … A single panel should be established to examine such complaints whenever feasible … 3. If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels …".

[314] Panel report on *India – Patent* (EC complaint), para. 7.22.

recognize that these are serious concerns, this Panel is not an appropriate forum to address these issues".[315]

The urge to bring the same complaint as another WTO member did previously, is inspired mainly by reasons of securing the right to suspend concessions or other obligations as against the losing party. This is so because suspension in the WTO remains a bilateral exercise, to be engaged in only by those WTO members that won the dispute as complaining parties.[316] In practice, however, with the existence of the Appellate Body which is a standing body and operates on a collegial basis[317], any inconsistencies between panel reports on the same measure, but as a result of different complaints, are most likely to be wiped out on appeal. Nonetheless, the need for a WTO member to bring its own "repeat" complaint for it to be able to join in putting pressure on the defaulting member, highlights the bilateral, state-to-state nature of the WTO treaty and, in particular, its dispute settlement system. Thought ought to be given about making this system more collective, at least in respect of securing compliance with WTO rules in case the particular breach affects a number of WTO members and even if not all of these members have brought their own complaint.[318]

D. General principles of law

As pointed out recently by Degan: "general principles of law have become one of the most difficult doctrinal problems since they were promulgated in 1920[319] as a distinct source of international law".[320] Although Soviet doctrine refused to accept "general principles of law" as a distinct source of international law[321], in recent times at least one point of convergence seems to emerge, namely that general principles of law constitute a genuine source of positive international law. No agreement can be found, however, when it comes to defining the criteria to be met for something to be a "general principle of law recognized by civilised nations", nor on the type of norms that fall within this category. As noted by Sir Robert Jennings: "Article 38(c) of the Statute is enigmatic, and that is the last thing a source of law should be".[322]

1. Four categories of "general principles of law"

Broadly speaking, four types of "general principles of law" can be detected when reviewing judicial decisions and doctrine.[323] They are set out below with the knowledge that there are overlaps between

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[315] Ibid.
[316] DSU Article 22.2.
[317] DSU Article 17.1 and Working Procedures of the Appellate Body, Rule 4 (WTO doc. WT/AB/WP/3, dated 28 February 1997).
[318] See Pauwelyn, *Enforcement …*.
[319] Part of the list of sources in Article 38 of the PCIJ Statute.
[320] Degan, *Sources …*, 17.
[321] See *supra* note 224. This point of view was based mainly on the amendment consisting of the words "whose function it is to decide in accordance with international law such disputes as are submitted to it", which were inserted into the opening phrase of Article 38 when the ICJ Statute was adopted in 1945 (the phrase was not included in Article 38 of the Statute of the PCIJ). As a result, Soviet lawyers argued, Article 38 now requires that the principles in question are common to all national legal systems and applicable to international relations. As a result, they must enter international law either through treaty or custom (see G. Tunkin, *General Principles of Law in International Law*, in INTERNATIONALE FESTSCHRIFT FÜR ALFRED VERDROSS (MARCIC e.a.. ED.) 523-532, at 531 (1971).
[322] Robert Jennings, *What Is International Law and How Do We Tell It When We See It*, XXXVII ASDI 59-88, at 59 (1981). In the same sense: M. Virally, *Panorama du Droit International Contemporain*, 183 RECUEIL DES COURS 171 (1983).
[323] For an overview of PCIJ and ICJ judgements in the field of «general principles of law », see Degan, *Sources …*, 53-68. For an overview of doctrine, see B. Vitanyi, *Les Positions Doctrinales Concernant le Sens de la Notion de 'Principes Généraux de Droit Reconnus par les Nations Civilisées'*, 86 RGDIP 46-116 (1982).

them as well as disagreements as to whether some of these categories do set out general principles of law. As pointed out earlier, much depends on the normative concept of international law that one defends.

a. "Necessary" principles

Firstly, there are the so-called "meta-principles"[324] or "necessary principles", i.e., "rules of law that have an inherent and necessary validity, in whose absence no system of law at all can exist or be originated".[325] The principle of *pacta sunt servanda* is the most cited example.[326] Other examples found in doctrine include: the principle that everyone is born into a general legal order; the principle that no subject can be allowed to frustrate the law through an act of his own volition; the principle *nemo plus iuris transferre potest quam ipse habet*; and the principle of good faith.[327] Fitzmaurice considers, for example, that these "necessary" principles are part of natural law and can, in terms of Article 38, be classified under "general principles of law recognized by civilised nations".[328] Others are of the view that these principles are "elements of the general concept of law. They are 'necessary' for all law, and not the principles by which civilised nations distinguish their law from the law of other nations".[329] Following this approach, these "necessary principles" are not norms of international law but the very foundation of international law. They come before the law, not as part of the law.

b. Domestic law principles

Secondly, reference is made to legal principles derived from, or evidenced by, the consistent provisions of various municipal legal systems (principles *in foro domestico*) which can be validly transposed to international law.[330] The qualification "recognized by civilised nations" is, indeed, generally understood to mean, in modern times, recognition in the domestic law of a large cross-section of states, i.e., principles common to advanced legal systems of the word.[331] A major part of these domestic law principles relate to the conduct of judicial proceedings (such as principles on jurisdiction, burden of proof and prescription or the principles *nemo debet esse judex in propria sua causa*, *audiatur et altera pars* and *res judicata*). Other domestic law principles transposed to

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[324] M. Koskenniemi, *General Principles: Reflections on Constructionist Thinking in International Law*, 18 OIKEVSTIEDE-JURISPRUDENTIA 133 (1985).
[325] Fitzmaurice, *Some Problems …*, 164.
[326] Ibid.
[327] See, for example, Bos, *The Recognized …*, 38; H. Mosler, *General Principles of Law*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (ED. BERNHARDT), VOL. 7, 90-91 (1984), hereafter "Mosler, *General Principles …*".; and R. Monaco, *Sources of International Law*, ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (ED. BERNHARDT), VOL. 7, 424-434, at 426 (1984).
[328] Fitzmaurice, *Some Problems …*, 164 and *The Future of Public International Law and of the International Legal System in the Circumstances of Today*, INSTITUT DE DROIT INTERNATIONAL, SPECIAL REPORT, 130 (1973).
[329] Bos, *The Recognized …*, 38.
[330] As noted by McNair in the *South-West Africa case* of 1950 (ICJ Reports 1950, 148): "The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules". Similar words of caution were expressed by Verzijl who would admit reception of domestic law principles into international law only when authorised under a rule of treaty or customary law (J. VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE, VOL. I, 62-63 (1968).
[331] Cheng noted the following in this respect: "The qualification 'recognized by civilized nations' was intended to safeguard against subjectivity and possible arbitrariness on the part of the judge. It should be noticed, however, that the word *nation* was originally used in the sense of 'people' rather than 'State'. The qualifying epithet 'civilised' was, therefore, necessary in order to exclude from consideration systems of law of primitive communities which were not yet civilised. At a later stage, however, it would seem that the term was sometimes understood in the sense of States, in which case the word 'civilised' must be considered as merely redundant, since any State which is a member of the international society must be considered as civilised" (B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, 25 (1963), hereafter "Cheng, *General Principles …*". In the same sense: Degan, *Sources …*, 70.

international law are of a more substantive nature (such as the principle proscribing the abuse of rights or principles related to responsibility and contracts). To this, some have added also fundamental human rights recognised in every organised society.[332]

These principles *in foro domestico* seem to be the "general principles of law" that were mostly on the mind of the drafters of Article 38.1(c). The original draft of that provision, redacted by Baron Descamps (Belgium), was phrased as follows: "the rules of international law as recognised by the legal conscience of civilised nations".[333] Baron Descamps had in mind, more particularly, "the conception of justice and injustice as indelibly written on the hearts of civilised people".[334] The other main thinker behind Article 38.1(c), Lord Phillimore, insisted on re-drafting the provision in its current form so as to ensure the objective character of the rules contemplated. His re-draft imposed on the judges "a duty which would prevent them from relying too much on their own subjective opinion; it would be incumbent on them to consider whether the dictates of their conscience were in agreement with the conception of justice of civilised nations".[335]

The view of the drafters of Article 38.1(c) was, in other words, heavily entrenched in the normative concept of law that was dear to them, namely elements of natural law, civilisation and objective justice. Both drafters (Descamps and Phillimore) considered that the main function of Article 38.1(c) was to prevent the Court from committing a denial of justice in case no treaty or custom could be identified. It was, in other words, intended to be "a complement to the others"[336], a fall-back option to avoid a *non liquet*.[337] Following this line of thinking, the more international law develops and becomes "fuller" or complete, the smaller the role for domestic law principles in international law.[338]

Some authors have argued that Article 38.1(c) should be restricted to these general principles of *domestic* law which can be validly transposed to international law.[339] In the practice of the PCIJ and ICJ, however, one finds few explicit references to domestic law principles which were then transposed to international law.[340] As Degan observed: "It remains a mystery why the Court has so consistently abstained from directly referring to Article 38 (1c) of its Statute. It was perhaps in order to avoid by this references to analogy with, and comparative analysis of municipal law, on which many authors insist".[341]

c. Principles of international law

Thirdly, many authors and particularly international adjudicators have referred to legal principles of *international* law produced mainly through a process of induction from other positive rules of international law. These principles derive from the particular nature and structure of international relations. Examples are: the right of states to existence or preservation (including rights of self-defence and self-help), the right to independence or sovereignty and the equality of states. Some have

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[332] See *infra* note 342.
[333] PCIJ, Advisory Committee of Jurists, *Procès-Verbaux* of the Proceedings of the Committee, June 16-July 24 1920, with Annexes, 1920, 306.
[334] Ibid., p. 324.
[335] Ibid., p. 311.
[336] Ibid., p. 323.
[337] For a possible outcome consisting of *non liquet*, see, however, the class of "unresolvable conflicts" discussed in Chapter VII, section B.1 below.
[338] As noted by De Visscher: "Au fur et à mesure que se développe la coutume, les principes généraux perdent donc leur raison d'être. Leurs succès même les voue à la disparition » (C. De Visscher, *Cours Général de Droit International Public*, 136 RECUEIL DES COURS, 116 (1972)).
[339] R. JENNINGS and A. WATTS, OPPENHEIM'S INTERNATIONAL LAW, VOL. I, 29, hereafter "Jennings and Watts, *Oppenheim's …*".
[340] Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989 (Part Two)*, 1990 BYIL 1-133, at 110-127 (hereafter "Thirlway, *The Law …(Part Two)*").
[341] Degan, *Sources …*, 58.

placed the principle on respect for human rights in this category.[342] These principles are derived from more precise rules part of treaty or customary law, but often take on an importance of their own as broad ranging "principles" of international law.

Other authors see a more independent role for general principles of *international* law. Hulsroj, for example, submits: "Plainly read, the text [of Art. 38.1(c)] says that general norms adopted by the international law community are binding international law. And it does not matter whether the norm is derived from foro domestico or not. Where custom is practice related, 'general principles' instead presuppose common legal consciousness. If a norm can be shown to be part of the common legal consciousness it becomes a binding legal norm".[343]

d. Principles of legal logic

Fourthly, many authors refer to principles of legal logic, i.e., instruments in legal reasoning providing for logical consequences, as part of the category of "general principles of law". These principles form part of the technical skeleton of law. However, for those principles to be "general principles of law" part of positive international law they must be or derive from legally binding norms.[344]

Examples of such logical principles given by certain authors are: *lex specialis derogat legi generali*, *lex posterior derogat legi priori* and *expressio unius est exclusio alterius*.[345] Sometimes the so-called "equitable principles" invoked by the ICJ in its practice on maritime delimitations (to the extent it amounts only to equity *infra legem*) is mentioned under this heading.[346] In the *Continental Shelf (Tunesia/Libyan Arab Jamahiriya)* case, the ICJ confirmed that "the legal concept of equity is a general principle directly applicable as law".[347] One could, finally, include into this category the so-

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[342] Cassesse (in Cassesse and Weiler, *Change …*, 170) who takes Article 38.1(c) to mean "those fundamental principles of international law which govern international relations (substantially, the seven principles embodied in the 1970 Declaration on Friendly Relations, plus the principle on respect for human rights)".

[343] Peter Hulsroj, *Three Sources – No River, A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and 'General Principles of Law*', 54 ZEITSCHRIFT FUR OFFTENTLICHES RECHT 219-259, 245-6 (1999), hereafter, "Hulsroj, *Three Sources …*". In order to decide on what reflects "common legal consciousness" Hulsroj submits that "every actor on the international law scene is relevant -- and that the need for broad consensus means that it will be the attitude of a mix of categories of actors that will be formative of a 'general principle'". UN General Assembly resolutions are important in this respect but they are "not necessarily expressions of common legal consciousness". Hulsroj proposes to "free custom from the chastity belt traditionally imposed on it by the concept of opinio juris" (ibid., 230). In his view, "a general practice which has been followed without legal animus is creative of customary rules" (ibid., 240). *Opinio juris* is, in his opinion, "an expression of common legal consciousness and must as such be considered as falling within the ambit of … the general principles of law recognized by civilized nations" (ibid., 234).

[344] See, for example, Mosler, *General Principles …*, 93 who is of the view that these principles are not legally binding and thus not "general principles of law". Others mention the cited principles of legal logic prominently under Article 38.1(c). See, for example, Bos, *The Recognized …*, 38-39. The *lex specialis* principle, for example, was a principle mentioned explicitly in the *travaux préparatoires* of Article 38.1(c), *Procès Verbaux*, 314-315 (*per* Ricci-Busatti).

[345] On the role of *lex specialis* and *lex posterior* as logical consequences of the principle of contractual freedom of states, see below Chapter VII, section A.2 and 3.

[346] See Degan, *Sources …*, 89-99. Note, however, that a decision in application of equity is not the same thing as a decision *ex aequo et bono*, contemplated by Article 38.2 of the ICJ Statute which is possible only with the agreement of the parties. The former is basically "within the law", whereas the latter is "outside the law". Whereas application of equity *infra legem* (referring to the power of a court to select from one of several possible interpretations of the law so as to achieve the most equitable result) is generally accepted (see, for example, the *Frontier Dispute case*, ICJ Reports 1986, 567-8, para. 28), there seems to be far less support for the application of equity *praeter legem* (to fill a gap in the law) and even less so for equity *contra legem* (in derogation of the law) without special authorisation being given *ex ante* to the adjudicator. See Hugh Thirlway, *The Law and Procedure of the International Court of Justice 1960-1989 (Part One)*, BYIL 1989, 1-157, 49-62 (hereafter, "Thirlway, *The Law … (Part One)*") and R. Lapidoth, *Equity in International Law*, 1987 ASIL PROCEEDINGS 138.

[347] ICJ Reports 1982, 60, para. 71.

called canons of treaty interpretation, often considered to be logical devices to be weighed against each other rather than absolute legal rules.[348]

e. Some words of caution

It goes without saying that these four categories of "general principles of law" are not sealed-off compartments and often overlap. Some authors see no use in making these classifications[349], others consider (some of) these distinctions to be crucial.[350] It could be submitted, for example, that one should add to the category of general principles of *international* law, those general principles of law that are originally *not* specific to international relations (e.g., principles *in foro domestico*) but which have "graduated" to that level by means of their incorporation in treaty or customary law. Others, in contrast, have expressed the view that when a particular norm has become part of customary law or is embodied in a treaty, it is no longer and cannot be at the same time a general principle of law.[351]

At any rate, recalling the reluctance of adjudicators to delve into a detailed study of the major legal systems of the world in search of common *domestic* law principles, and knowing that, by now, many of these "general principles" of *domestic* law have been accepted as part of customary law or are embodied in treaties, it is readily understood why international adjudicators have preferred to talk of "general principles of international law", "generally recognized principles" or "fundamental rules of general international law" *without further specification*, instead of "general principles of law recognized by civilised nations". This may also explain why, as noted by Hugh Thirlway in his overview of ICJ cases up to 1990, "[n]o decision of the Court, or indeed of the Permanent Court, has yet been based explicitly upon a principle or rule of law drawn from the 'general principles of law recognized by civilised nations' referred to in Article 38, paragraph 1 (c), of the Statute".[352]

2. General principles of law as a "secondary" source but one with an important systemic role

a. The "secondary" role of general principles of law

Having made the above distinctions (acknowledging, though, that no sharp delineation is feasible), what can be said about the hierarchical status of general principles of law as against other norms of international law?

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[348] See, for example, O'CONNELL, INTERNATIONAL LAW, VOL. 1, 252-3.

[349] Cheng notes, for example, that "[i]t is of no avail to ask whether these principles are general principles of international law or of municipal law; for it is precisely of the nature of these principles that they belong to no particular system of law, but are common to them all" (Cheng, *General Principles …*, 390). He distinguishes four categories of general principles of law based rather on their content: the principle of self-preservation (including principles on expropriation, public safety and self-defence), the principle of good faith (including principles of the law on treaties), general principles of law in the concept of responsibility and general principles of law in judicial proceedings.

[350] See, for example, *Akehurst*, *Hierarchy …*, 278, note 8 ("The attempt by Cheng … to blur the distinction between the two meanings of general principles of law [general principles of international law and general principles borrowed from municipal law] is unsound").

[351] C. De Visscher, *Cours Général de Droit International Public*, 136 RECUEIL DES COURS, 116 (1972) («il faudrait exclure de la catégorie des principes généraux ceux d'entre eux qui se sont mués en coutume par l'effet d'une pratique subséquente, constante et générale assortie de l'*opinio juris* ») and Hulsroj, *Three Sources …*, 234 ("a source of law must be self-contained -- cannot in its norm-creative function rely on another source of law. If it does it has lost its raison d'être"). *Contra*: Degan, *Sources …*, 74, who considers that even if what we have referred to as a "necessary" principle (first category, including for example the principle *pacta sunt servanda*) "has undergone transformation into customary law, or if it is codified or confirmed by a treaty, it does not for this reason lose its character of a general principle of law".

[352] Thirlway, *The Law … (Part Two)*, 110-111.

Firstly, the so-called "necessary" principles (first category referred to above) could, from an institutional point of view, be said to be of higher value than all other norms of international law. Indeed, without these "necessary" principles there would be no such other norms at all. As noted by Cheng: "From the juridical point of view, the superior value of general principles of law over customs and treaties cannot be denied; for these principles furnish the juridical basis of treaties and customs and govern their interpretation and application".[353]

Secondly, however, from an operational point of view, the hierarchical order is reversed. Unless the general principle of law is one of *jus cogens*[354], when an international adjudicator is faced with a treaty or customary norm in derogation of a general principle of law, the treaty or customary norm prevails.[355] In that operational sense, general principles of law are, indeed, a secondary source of international law.[356] This operational order applies in respect of all four categories of general principles of law (including the "necessary" principles).[357] Support for the proposition that general principles of law have to give way to customary law can be found in the *Right of Passage Case*.[358]

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[353] Cheng, *General Principles …*, 393. In EC law, "general principles" possess this higher standing both from a theoretical and operational point of view. In the *Defrenne* case (ECJ, 8 April 1976, 43/75, *Rec.* 1976, 455, at 475), for example, , the ECJ responded to the argument that the notion of "principle" implies a vague normative value, in the following categorical way: "dans le langage du traité, cette expression est précisément utilisée pour marquer le caractère fondamental de certaines dispositions", so that "qu'en atténuant cette notion, au point de la réduire au rang d'une indication vague, on toucherait ainsi indirectement aux fondements mêmes de la Communauté et à la cohérence de ses relations extérieures » (quoted in Olivier Jacot-Guillarmod, *La Hiérarchie des Règles dans l'Ordre Constitutionnel de l'Union Européenne*, in DE LA CONSTITUTION, ETUDES EN L'HONNEUR DE J.-F. AUBERT (ED. PIERMARCO ZEN-RUFFINEN ET ANDREAS AUER), note 52.

[354] For views which consider that general principles of law may be of *jus cogens* character see: *Right of Passage Case*, *per* Judge *ad hoc* Fernandes dissenting, ICJ Reports 1960, 6, at 139-40 and *South West Africa Cases*, *per* Judge Tanaka dissenting, ICJ Reports 1966, 6, at 298. Brownlie, as well, refers to "a general principle part of the *jus cogens*" (Brownlie, *Principles …*, 4). See also *supra* note 249.

[355] However, in case Hulsroj's theory on "general principles of law" were to become accepted, general principles of law (based exclusively on "common legal consciousness" or *opinio juris*) are likely to become of the same operational value as treaty and, especially, customary rules (in Hulsroj's view, custom being exclusively practice based, unrelated to legal animus). See Hulsroj, *Three Sources …*, note 60.

[356] See further Chapter VII, section A.3.b.iii.

[357] In this sense: Cheng, *General Principles …*, 393 ("From the operative point of view, however, the hierarchical order is reversed. Rules of law though in derogation of general principles of law are binding"). See also Akehurst, *Hierarchy …*, 279 ("Case law and, with few exceptions, writers are unanimous that treaties and custom override general principles of law in the event of conflict"); Nguyen, *Droit …*, para. 60 (« Il est vrai, cependant, que certains sources, à défaut d'être secondaires, ont un caractère second : c'est le cas des principes généraux de droit. L'interprète n'y recourt qu'à défaut d'autre sources pertinentes. Le conflit potentiel est alors contourné ») and para. 220, at 340 (« La contradiction éventuelle entre une règle coutumière et un principe général de droit *stricto sensu* se résout nécessairement par la mise en œuvre de la règle coutumière); Mosler, *General Principles …*, 97 and Abi-Saab, *Les Sources …* , 33-34.

[358] There, the ICJ established the right of transit through Indian territory of private persons, civil officials and goods, on the basis of a local custom (ICJ Reports 1960, 40). Portugal also invoked general international custom, as well as general principles of law in support of its claims of a right of passage. The ICJ did not consider it necessary to examine whether these legal rules of general character led to the same result. It observed (at 44): "Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules". Nguyen, *Droit …*, para. 220, is, on the basis of this judgement, of the view that "[l]a contradiction éventuelle entre une règle coutumière et un principe général de droit *stricto sensu* se résout nécessairement par la mise en œuvre de la règle coutumière ». The view expressed by Degan in this respect seems more accurate : « … specific rights and obligations of parties were at stake, not the hierarchy of sources of international law as such … The Court simply established the existence of the Portuguese right on the basis of a local custom, presuming that no potentially existing general legal rule would be violated by this" (Degan, *Sources …*, 520).

The subsidiary nature of general principles of law is based on their broad character and main function of "filling gaps" left open by treaty and custom (not, as noted earlier, on their source or inherent legal quality or binding force which would, somehow, be of lesser value). General principles of law are denominated "principles" instead of "rules" with reason. Although they are legally binding just like other norms of international law, they are inherently broad and open-textured. They did not emerge, as treaties or custom normally do, in order to regulate a concrete situation at a given time.[359] As a result, they leave ample room for specification by other norms of international law. In that sense, general principles of law are *lex generalis*, treaties and custom being *lex specialis*.[360] Because of the vague nature of general principles of law, cases of genuine conflict between these principles and other norms of international law are rare.[361] Where they arise, treaty and custom must prevail as *lex specialis*.[362] From a practical perspective it is, however, quite unlikely that states decide one day that, for example, under a given treaty the principle of good faith, or before an international tribunal, the principal of due process, is not to be applied. As noted by Cheng: "the possibility of establishing rules in derogation of general principles of law must not be exaggerated. It may be compared to the theoretical omnipotence of the British Parliament to legislate except in order to make a woman a man, and a man a woman".[363] However, in case of genuine legal conflict the general principle must give way to the contradictory custom or treaty norm unless it is part of *jus cogens*.

The secondary nature of general principles of law derives also from their intended function, namely that of filling gaps left open by treaty and custom with the objective of avoiding a *non liquet*. As noted by Baron Descamps during the preparation of Article 38: "If two States concluded a treaty in which the solution of the dispute could be found, the Court must not apply the international custom and neglect the treaty. If a well known custom exists, there is no occasion to resort to a general principle of law".[364]

b. The potential importance of general principles of law

The role of filling gaps left by other norms confirms that general principles of law are a distinct source of international law.[365] In that capacity, the importance of Article 38.1(c) norms cannot be overestimated. They provide international law with "a most welcome possibility for growth".[366] They extend "the concept of the sources of international law beyond the limit of legal positivism according

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[359] However, although general principles of law do not normally emerge in order to regulate a concrete situation at a given time, they should, as "gap-fillers", nevertheless have a material content able to solve the substance of (part of) a case, albeit read together with treaty and/or customary norms that do exist but not exactly cover (part of) the case at hand. As Degan put it: "they still ought to have a certain content whose practical application leads to predictable results, although they did not emerge with a view of settling concrete legal situations" (Degan, *Sources …*, 136).

[360] See below Chapter VII, section A.3.g.ii (*lex specialis* as a supplement, not in conflict with, the *lex generalis*).

[361] See below Chapter V on conflict-avoidance techniques.

[362] See below Chapter VII, section A.3.b.iii.

[363] Cheng, *General Principles …*, 393.

[364] PCIJ, Advisory Committee of Jurists, *Procès-Verbaux* of the Proceedings of the Committee, June 16-July 24 1920, with Annexes, 1920, 337. This step-by-step "default" approach was very much in line with Article 7 of the unratified Twelfth Hague Convention Relative to the Creation of an International Prize Court of 1907: "If a question of law to be decided was covered by a convention in force between the belligerent captor and the Power which was itself, or whose subject was, a party to the proceedings, the Court has to apply the provisions of that Convention. In the absence of such provisions, the Court shall apply the rules of international law. If there are no rules generally recognized, the Court will decide according to the general principles of justice and equity".

[365] "Fall-back" on general international law, including general principles of law, is further discussed in Chapter IV, section C.2 below.

[366] Bos, *The Recognized …*, 42. But as Hulsroj remarked, the category of general principles of law "has been neglected as a creator of substantive international law despite the fact that its definition would make it perfectly suitable for this purpose" (Hulsroj, *Three Sources …*, 220).

to which, the States being bound only by their own will, international law is nothing but the law of the consent and auto-limitation of States".[367]

Whereas during the cold war, and until very recently, authors predicted "a decline of this source"[368], because of vast ideological differences and a growing reliance on individual state consent in international law, the post-war era may well reserve a brighter future for "general principles of law", in particular general principles of *international* law. This may be so, particularly, within international organisations (especially those with compulsory dispute settlement like the WTO). In that context, general principles of law may fulfil the important role of (1) go-between and converging factor between the law of the international organisation and the wider *corpus* of public international law[369] and (2) a welcome tool for the judicial function within the organisation allowing it to construe the law of the organisation in a dynamic fashion responsive to today's problems. If so, the statements by Brierly and Jenks would have something prophetic. The former opined in 1963 that Article 38.1(c) is "an authoritative recognition of a dynamic element in international law, and of the creative function of the courts which may administer it".[370] The latter stated one year earlier: "Neither agreement nor practice, even in the widest sense, can, however, provide sufficiently vigorous seeds of growth to enable the law to cope with new problems pressing for solution as the result of the activities of the international organisations. Legal principle therefore has an indispensable part to play in the development of the proper law of international organisations and its assimilation into the general body of international law".[371]

Finally, a new role for general principles of international law could be reserved.[372] Degan phrased it thus: "It is now possible only to imagine an inverse process: a principle of law developed in a number of general conventions could impose itself as a general principle of law within municipal legal orders of these States which are not their parties". Along these lines it could, for example, be argued that the "precautionary principle" is one developed and refined first on the *international* scene and now finds its way as a general principle of law in many *domestic* legal systems.

E. Custom and Treaties

1. Different types of treaties

Treaties can, according to Article 38 of the ICJ Statute, be "general or particular". The general character of a treaty can be linked to: (1) its wide *material* scope (such as the UN Charter or the General Agreement on Tariffs and Trade ("GATT") *versus* the more particular Cartagena Protocol on Biosafety or WTO agreement on agriculture); or (2) its broad *membership* (such as the ICJ Statute or

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[367] Dissenting Opinion, Judge Tanaka, *South West Africa Cases* (Second Phase), ICJ Reports 1966, 298. In the same sense: BRIERLY, THE LAW OF NATIONS 63 (1963): Article 38.1(c)'s "inclusion is important as a rejection of the positivist doctrine, according to which international law consists solely of rules to which states have given their consent". Taking this line of thought one step further, Professor Albert de Lapradelle, during the preparation of Article 38.1(c), expressed the view that "the tasks of the Court would be limited to registering the acts of the powerful" unless the Court were obliged to apply more than treaties and custom alone (PCIJ, Advisory Committee of Jurists, *Procès-Verbaux* of the Proceedings of the Committee, June 16-July 24 1920, with Annexes, 1920, 319-320).

[368] Cassesse and Weiler, *Change …*, 170 (*per* Riphagen, Abi-Saab, Cassesse, de Fiumel, Gaja). In the same sense: Czaplinski and Danilenko, *Conflict …*, 6: "[e]ven if the general principles [of law] could play a certain role in international law (mostly a moderate one), the notion is too indefinite and disputable for their inclusion in the elaboration of a theory for the purposes of this paper".

[369] See below Chapter IV, section C.2.

[370] BRIERLY, THE LAW OF NATIONS 63 (1963).

[371] WILFRED JENKS, THE PROPER LAW OF INTERNATIONAL ORGANISATIONS 259-260 (1962).

[372] For an increasing reliance on general principles of law, see also Hulsroj's theory summarised above in note 343.

the Marrakesh Agreement Establishing the WTO *versus* the more particular bilateral arbitration *compromis* or bilateral taxation agreement).

WTO treaties are "particular" as far as their *material coverage* is concerned. They all deal with a particular field of international relations, namely trade. In addition, some WTO treaties are more "particular" than others. For example, the Marrakesh Agreement itself is arguably the most general treaty, thereafter the three pillar agreements, GATT-GATS-TRIPS, which are, in turn, more general than the particular agreements on trade in goods, such as the Agreement on Agriculture or the SPS Agreement. Referring then to the "general" *versus* "particular" distinction in terms of *membership*, all WTO treaties (with the exception perhaps of the two plurilateral agreements that bind only less than half of the WTO membership) can be classified as "general". With some 140 signatories, WTO agreements can hardly be called "particular".

Many more classifications of treaties have been proposed, neither of which have been incorporated in Article 38 of the ICJ Statute or the Vienna Convention on the Law of Treaties. For present purposes, it may be useful to mention three more.

Firstly, there are the so-called law-making treaties (*traités-lois*) *versus* other treaties (*traités-contrats*). Law-making treaties set general norms for future conduct, comparable to national laws of general application (think, for example, of the UN Charter or the Marrakesh Agreement). *Traités-contrats* are more limited in nature in that the observance of the obligations set out in the treaty may dissolve the treaty (for example, a bilateral treaty between two countries to build a dam). To make another national law analogy, the former have features of public law. The latter are of a more private/contractual nature. It is the former type of treaties -- law-making treaties, especially those setting up a sub-system of international law (with some form of "law-maker" and enforcement mechanism) -- that are particularly prone to the creation of conflict of norms. It is, therefore, this type of treaty that will require particular scrutiny in this work.[373] Most WTO treaties (except for member-specific schedules of concessions) can be classified as "law-making treaties" (*traités-lois*). They set out general norms for future conduct, comparable to national laws of general application. Unlike the so-called *traités-contrats*, the observance of obligations set out in WTO treaties does not dissolve those treaties.

Secondly, reference could be made to framework treaties (*traités-cadres*) *versus* implementing treaties or treaties of a secondary nature. This distinction is relevant mainly *within* sub-systems of international law. It is prominent and highly developed in the law of the European Union. A framework treaty is then usually the treaty that establishes the sub-system (such as, the Treaty of Rome, now Amsterdam, the Marrakesh Agreement, UNCLOS or the European Energy Charter Treaty (ECT)). Most instruments constituting an international organisation are of this nature. Such treaties often enable the creation of other treaties or instruments of a secondary nature (such as regulations by the European Council, the WTO Protocol on Financial Services, the Convention for the Conservation of Southern Bluefin Tuna or the Transit Protocol in the ECT).[374] The framework treaty is mostly also of a higher hierarchical standing in the sense that in the event of conflict it will prevail over the secondary law created pursuant to it. It may, however, also be so that the implementing treaty, as the more specific law or *lex specialis*, prevails over the more general framework agreement.[375] In most instances their hierarchical relationship is explicitly regulated or can be derived from the intentions of the parties. Some WTO treaties could be labelled as framework treaties (*traités-cadres*), such as the Marrakesh Agreement itself or the three WTO pillars set out in the GATT, GATS and TRIPS. Other WTO treaties could then be classified as implementing treaties, such as the Understanding on Balance-

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[373] See, for example, Jenks, *Conflict …*, 401-452.

[374] For an interesting discussion on the relationship between "framework agreements" (*in casu*, UNCLOS) and "implementing agreements" (*in casu*, the CCSBT), see the *Southern Bluefin Tuna case* (jurisdiction and admissibility), arbitration award of 4 August 2000 rendered by the Arbitral Tribunal constituted under Annex VIII of UNCLOS, posted on the internet: www.worldbank.org/icsid/bluefintuna/main.htm. Hereafter referred to as the "*Bluefin Tuna case*".

[375] See Chapter VII, section A.3.

of-Payments Provisions of the GATT 1994 and the GATS Protocols on Basic Telecommunications Services and Financial Services. The internal hierarchy as between these different WTO instruments is discussed in Chapter VII, section A.d below.

Thirdly, the distinction between treaties containing "reciprocal" obligations *versus* those setting out "interdependent" or "integral" obligations may be recalled here. It was discussed earlier[376] and finds its origins in the reports on the law of treaties submitted by Fitzmaurice to the ILC.[377]

Importantly, however, as noted earlier, the Vienna Convention does *not* make general distinctions between different types of treaties. In principle, its provisions apply equally to all treaties.[378] We shall see below, though, that the particular features of a treaty may have an influence on how these treaties inter-relate with other treaties. In that sense, general classifications between different types of treaties, such as those outlined above, may become increasingly important, even if not explicitly mentioned in Article 38 of the ICJ Statute or the Vienna Convention.

Finally, it should be pointed out that treaties are not exclusively concluded between states (although only treaties between states are subject to the Vienna Convention). Treaties may also be concluded between a state or several states and an international organisation or between two or more international organisations. Treaties thus involving international organisations are subject to the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations

2. Different types of custom and custom versus *general principles of law*

Customary law is either general in that it binds *all* states (with the potential exception of persistent objectors) or special in that it binds only a limited number of states (also referred to as local or regional custom).[379] Customary law may also be general or special in terms of subject matter. Custom in the field of the law of the sea or international environmental law is then considered as "special".[380] Custom in the area of the law of treaties or state responsibility is then characterised as "general".[381]

While the distinction between custom and treaty is obvious, it may not always be easy to distinguish custom from general principles of law. According to some authors, a norm may be both part of general customary international law and a general principle of law.[382] Given the secondary nature of

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[376] See Chapter II, section E.

[377] See *supra* note 152.

[378] The notion of treaty as it is used in the Vienna Convention (Art.2.1(a)) is defined as: "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

[379] See, for example, the *Asylum case* (Columbia v. Peru), ICJ Reports 1950, 266, where the ICJ examined whether there was regional custom as between certain Latin-American states in respect of asylum, but finally answered the question in the negative. In the *Right of Passage case* (Portugal v. India), ICJ Reports 1960, 6, the court recognised the existence of a local custom, binding on the parties, allowing free passage for certain types of navigation between Daman and certain enclaves part of Portuguese territory in the Indian Peninsula. For an argument that there can not only be "particular custom" but also "particular general principles of law", see Hulsroj, *Three Sources …*, 250.

[380] See, for example, the Appellate Body report on *EC – Hormones* (complaint by the United States), para. 123, where, in respect of the so-called "precautionary principle", a distinction was made between "customary international *environmental* law" and "*general* customary international law".

[381] Recall, in this respect, that so-called "customary practices" developed within an international organisation or under a specific treaty, such as GATT 1947, do not normally constitute norms as such (hence "customary law"), but rather "subsequent practice" under a particular treaty. See Chapter II, section C.3 (on GATT/WTO "custom" and "subsequent practice").

[382] See Degan, *Sources …*, quoted *supra* in note 351 but *contra*: De Visscher, quoted in the same note.

general principles of law as opposed to custom and treaty, the party invoking the norm will then have an interest in defending the norm as part of customary law. In the alternative, it may be portrayed also as a general principle of law although in that case it risks being less persuasive.[383] The difference between "principle" and "rule" may also be recalled here: a rule is essentially practical, more clearly defined, whereas a principle, though legally binding, expresses a more general truth which is broadly defined. Mosler put it thus: "many general principles form part of customary law; however, the two concepts are not identical: Principles can be more general and less precisely determined than customary rules; in a given case the authority which has to apply them, in particular courts and arbitral tribunals, has a somewhat wider scope to determine their concrete form".[384] Or as Hulsroj put it more succinctly: "Custom does not elevate broad principles to law but makes patterns of specific behaviour law".[385] In addition, the conditions to be fulfilled for a norm to be a "general principle of law" and a customary rule are different. As Cheng noted: custom is "confined to what is a general practice among States accepted by them as law. General practice among nations, as well as the recognition of its legal character, is therefore required … In the definition of ["general principles of law recognized by civilised nations"] … there is also the element of recognition on the part of civilised peoples but the requirement of a general practice is absent. The object of recognition is, therefore, no longer the legal character of the rule implied in an international usage, but the existence of certain principles intrinsically legal in nature".[386] In Hulsroj's view "custom should be a predominantly state practice oriented source", whereas general principles of law "should be the source creating rules based on the common legal consciousness of states".[387]

3. ***Custom*** **versus** ***treaty***

a. No *a priori* hierarchy

Turning to the relationship between treaty and custom, it is generally accepted that no inherent hierarchy exists between them.[388] As was the case in respect of general principles of law as opposed to other norms of international law, it would be unsound to state that custom *always* has to give way to treaty. Given the absence of a centralised "legislator" in international relations and the absence of hierarchic sources of law that come with it in domestic law, treaty and custom are viewed as being of equal binding value. As noted earlier, the fact that there is no inherent hierarchy between treaty and custom is easily explained by voluntarists. Both types of norms rest on the consent of states (albeit tacit or implicit consent only in the case of custom). Hence, one form of consent can logically prevail over another. Recall also that the theory of *acte contraire* (by which a norm could only be modified by another norm originating in the same source) is not known in international law.[389] In sum, both treaty and custom have the same binding force.

This is also what the Institute of International Law found in its Resolution of 1 September 1995 on "Problems arising from a succession of codification conventions on a particular subject". In "Conclusion 11: Hierarchy of sources", it stated:

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[383] This is what the EC did in *EC – Hormones*, where it invoked the "precautionary principle" as one part of customary law or "at least" as being a general principle of law (Appellate Body report, para. 121). See also the pleadings by Japan in the *Bluefin Tuna case*, relying on general principles of law such as *lex specialis* and *lex posterior*, an approach that Australia and New Zealand attacked as required for want of better legal arguments in treaty or custom.
[384] Mosler, *General Principles …*, 91.
[385] Hulsroj, *Three Sources …*, 229.
[386] Cheng, *General Principles …*, 24.
[387] Hulsroj, *Three Sources …*, 220.
[388] See note 240.
[389] See *supra* note 245.

> "There is no *a priori* hierarchy between treaty and custom as sources of international law".[390]

b. In practice: treaty prevails over custom

i. The rule and main exception (jus cogens)

This being said (there is no *a priori* hierarchy between treaty and custom), in practice, most cases of apparent as well as genuine contradiction between treaty and custom must be decided in favour of the treaty norm.[391] The main exception to this rule is conflict between a treaty norm and a customary norm part of *jus cogens*. In that event, the custom not only prevails over, but actually terminates the treaty norm or renders it invalid.[392]

This is also what the Institute of International Law found in its 1995 Resolution referred to earlier.[393] Conclusion 11 of that Resolution (of which the first sentence is quoted above) continues as follows:

> "However, in the application of international law, relevant norms deriving from a treaty will prevail between the parties over norms deriving from customary law".[394]

Confirming the main exception stated above (custom part of *jus cogens*), Conclusion 4 of the Resolution includes a *caveat* in respect of *jus cogens*, stating: "These Conclusions are without prejudice to the application of Articles 53 and 64 of the Vienna Convention on the Law of Treaties of 1969".

ii. Treaty norms reflect explicit consent and are often lex specialis *vis-à-vis custom*

Treaty norms being written rules are easier to prove and identify. They are, in addition, an explicit expression of state intent at the highest level of government, mostly ratified also by parliament. Moreover, treaties (other than treaties codifying custom[395]) often constitute norms regulating a special field. They can, in that sense, be labelled as *lex specialis*.[396] Custom, on the other hand, lays down unwritten rules which are often vague and difficult to express in clear terms. They derive, moreover, from implicit consent only (or less than that). In addition, this "consent" being based on state practice and *opinio juris* must not necessarily be expressed by the highest levels of government (let alone parliament). Lower ranking officials (as well as judges, academics and international civil servants[397]) may also influence and shape custom.

Given the often vague wording of custom, cases of genuine conflict between treaty and custom are rather exceptional. In most cases the treaty will simply be more explicit than the custom and hence be found to be the applicable rule. As noted by Wolfke (after acknowledging that no inherent hierarchy between treaty and custom exists), "[f]or the judge, however, the difference in application of

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[390] 66 YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW, PART I, 245-248, at 248 (1995).
[391] Thirlway goes as far as saying that « it is universally accepted that … as between the parties to a treaty the rules of the treaty displace any rules of customary law on the same subject » (Thirlway, *The Law ... (Part One)*, 144). He thereby ignores, however, the possibility that new custom may alter the content of, even terminate, an earlier treaty, as well as the possibility that custom is part of *jus cogens* and thus prevails over all treaty norms.
[392] Pursuant to Articles 53 and 64 of the Vienna Convention.
[393] See text at note 390.
[394] 66 YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW, PART I, 245-248, at 248 (1995).
[395] Such as the Vienna Convention.
[396] See below Chapter VII, section A.3.b.
[397] Hulsroj remarked in this respect (*Three Sources ...*, 227): "International lawyers have surely felt very unconstrained in the area of custom and have superimposed their own political ideals. But these ideals did not always correspond to the political will -- and politicians saw, felt, that political decision were taken away from them. This is, to me, one of the reasons why there is, in general, a movement away from international law as a regulatory mechanism - and why only treaty law is effective".

conventional and customary rules is enormous. Suffice it to mention, for instance, the much greater precision and ease of determination of content and range of validity in the case of conventional rules and, in consequence, the much stronger, by comparison with other rules, persuasive impact for the Court and the parties".[398]

Even if there is a genuine conflict between treaty and custom, the treaty norm will prevail over the custom, both as the more explicit and (in most cases) the more special norm[399], unless the treaty can be said to be terminated or revised by subsequent custom, an event we discuss next.

iii. Treaty may modify custom and vice versa

In many cases of *alleged* conflict between treaty and custom, the question is not: which of two valid norms should prevail, but rather what is currently the norm, i.e., is the treaty still intact given the new custom or is the custom still the same given the new treaty? The issue there is not one of conflict between two pre-determined norms (such as between WTO provisions on countermeasures and customary international law on countermeasures), but one of determining a norm in evolution (such as the length of the territorial sea which, in the 20th century, moved from three, to twelve and then 200 miles from the shore by means of both conventions and custom[400]).

We shall not dwell on the impact of treaties in bringing about a *change* in customary law, nor on the impact of customary law in bringing about a *change* in, or even *termination* of, treaties. Both types of situations deal with the emergence of *new* norms, rather than *conflict* of *existing* norms.[401] Moreover, both types of situations have been thoroughly examined elsewhere.[402]

It suffices here to point out that the conclusion and operation of a contradictory treaty, in particular one that was adopted by many states, may gradually change customary law on the same subject matter but with a different content so as to conform to the new treaty. Villiger's conclusion on the issue of subsequent treaties changing pre-existing customary law is that "a convention cannot directly impair customary law on the same subject matter".[403] He admits, however, that "the more States parties adhere to the convention, the less States will engage in practice upon the customary rule which will eventually – and gradually – cease to attract the required widespread practice. As a result, the original customary rule may either be reduced to a special customary rule, or it may pass out of use – for instance, if it is modified by a new general customary rule which developed on the basis of a conventional rule".[404]

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[398] WOLFKE, CUSTOM IN PRESENT INTERNATIONAL LAW 93 (1964). See also SORENSON, LES SOURCES DU DROIT INTERNATIONAL 249 (1946) and Hulsroj, *Three Sources ...*, note 16 ("one must recognize that argumentation by one party demonstrating that the other party has explicitly consented to the norm stands a far better chance of success than justice based arguments … This is, however, not to be understood as though different classes of normativity exist").

[399] See further Chapter VII, section D.3.b. On whether custom contradicting an earlier treaty constitutes a genuine conflict of norms, see Chapter IV, section B.3.

[400] See Kontou, *Termination ...*, Chapter 3.

[401] On whether custom contradicting an earlier treaty constitutes a genuine conflict of norms, see Chapter IV, section B.3.

[402] See, in particular, Villiger, *Customary ...* (who examines both the former and the latter situation), and Kontou, *Termination ...* (who examines only the latter).

[403] Villiger, *Customary ...*, para. 244.

[404] Ibid., para. 245. It is important to point out, in this respect, that a customary rule "does not vanish only because it is under attack from a group of countries without enough strength to give birth to a different international law norm" (Hulsroj, *Three Sources ...*, 255). To this extent, custom does know a certain theory of *acte contraire*: it only ceases to exist if replaced by another rule or by *desuetude*. In contrast, the same does not apply for general principles of law where a "now consideration" is decisive. If *at the time of adjudication* not enough support can be pointed at in favour of the existence of a general principles of law, no such principle can be applied (ibid., 257).

At the same time, but much more controversial, it has been submitted that a pre-existing treaty can be terminated or revised by means of the establishment of new customary law.[405] Kontou, in her monograph on the matter and after careful examination of both judicial decisions and state practice, concludes as follows:

> "New customary law may be invoked as a ground for the termination or revision of a prior treaty if: (i) it is incompatible with the treaty provisions; (ii) it is different from the customary international law in force at the time of the conclusion of the treaty; and (iii) it is binding upon all parties to the treaty, unless (iv) the parties intended that the treaty should continue applying as special law".[406]

In respect of the fourth condition, Kontou adds that "[t]he intention of the parties to create a special regime may be expressly provided in the treaty or result from the interpretation of time clauses or other provisions".[407] She acknowledges, however, that "it can at least be said that tribunals are reluctant to accept that supervening custom automatically abrogates or modifies prior incompatible treaties, unless this is what the treaty partners intended. The parties' consent to be bound by the new customary law is not in this respect sufficient, because it does not prove their intent to terminate or revise a prior treaty".[408] Although she is not always clear on the matter, it seems, therefore, that, according to Kontou, for custom to revise treaty, more is needed than the existence of the custom *per se*. The party relying on the revision must prove in addition that the parties to the earlier treaty rule no longer want to apply that rule.[409]

Villiger is equally of the view that subsequent custom can revise or even terminate treaty rules. He seems to go one step further than Kontou, however, when submitting that "inherent in the formation of a new customary rule is the obligation that the incompatible conventional rule is no longer applied and, hence, ceases to exist. But then, if the conventional rule is not in force, there is no conflict, and the customary rule alone remains applicable".[410] For Villiger, the emergence of the custom *per se* is, therefore, enough for the contradictory rule to be revised (such revision is even a necessary consequence of the custom being created).

Villiger generally overlooks the not uncommon situation of prior treaty rules that continue to exist as *lex specialis*, notwithstanding the emergence of subsequent contradictory custom. That is, the potential for genuine conflict between a treaty rule and a subsequent custom whereby both rules validly exist, but where the custom must be dis-applied in favour of the treaty, the treaty being *lex specialis*. Villiger acknowledges, however, that "there is certainly room for a small conventional

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[405] That this may, in certain circumstances, occur is the conclusion reached in Kontou, *Termination …*. On the same line of thought, see also: Villiger, *Customary …*, paras. 302-352. See also Nguyen, *Droit …*, para. 201 ("Une coutume postérieure à un traité peut en modifier les dispositions; elle peut aussi avoir pour effet d'éteindre le traité"). *Contra*: The position of the United Kingdom, criticising Art. 68 para. (c) of the 1964 ILC Draft on the law of treaties ("treaties ought not to be modified without the consent of the parties"), 1966 YBILC II 345; less categorically: HUGH THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 133 and Akehurst, *Hierarchy …*, 276.

[406] Kontou, *Termination …*, 146. In support she refers, *inter alia*, to the *Spanish Fishermen's cases* of the European Court of Justice (for example, Case 812/79, A.-G. v. Burgoa, ECR (1980), at 2787), the *La Bretagne* Arbitration (90 RGDIP 1986, at 716), the *Fisheries Jurisdiction case* (United Kingdom v. Iceland), Jurisdiction of the Court (ICJ Reports 1973, 3) and Merits (ICJ Reports 1974, 3) and the *UK-France Continental Shelf Arbitration* (18 ILM 1979, at 397). In the latter case, for example, the Tribunal acknowledged "both the importance of the evolution of the law of the sea which is now in progress and the possibility that a development in customary law may, under certain conditions, evidence the assent of the States concerned to the modification, or even termination of previously existing treaty rights and obligations" (ibid., para. 47).

[407] Kontou, *Termination …*, 147.

[408] Kontou, *Termination …*, 145-146.

[409] In the same sense, Akehurst, *Hierarchy …*, 275-276 ("subsequent custom can terminate a treaty only when there is clear evidence that that is what the parties intend … In the absence of express statements concerning termination … evidence can only be provided by abundant and consistent practice").

[410] Villiger, *Customary …*, para. 324.

subsystem as a *lex prior specialis* alongside a general (incompatible) customary rule, if this is the intention of the parties".[411] It must, indeed, be possible that a new custom arises but that a prior conflicting treaty rule nevertheless continues to exist[412] (on this "contracting out" from custom by treaty, see more below, Chapter IV, section C and Chapter VII, section A.3.b.i).

Kontou, on the other hand, does not seem to take the absence of hierarchy between custom and treaty seriously. If it is, indeed, so that subsequent custom can overrule an earlier treaty as a later expression of state consent, then there must be a *presumption in favour of the later custom*. For the earlier treaty rule to apply nonetheless, it is then up to the party relying on the earlier treaty to prove that the parties to that treaty intended to *continue applying* the treaty rule as *lex specialis*. Contrary to what Kontou implies, with reference especially to case law (where the judge seems to have a bias in favour of the more explicit treaty rule), it should *not* be up to the party relying on the custom to show that the parties to the treaty intended to change or even terminate the treaty. This would amount to a form of *acte contraire* under which custom can only revise treaty if the parties to the treaty themselves first revise or terminate the treaty. In other words, when an international adjudicator is faced with a claim that new custom has terminated or revised an earlier treaty norm, once the new custom is validly established, *it is for the party opposing the claim to prove that the treaty norm was intended to continue applying as special law*. If it cannot meet this burden of proof, the later custom prevails.

Although important in theory (and for the recognition of custom as a source of equal status as treaty), in practice, it will often be relatively easy to prove that the prior treaty was intended to continue applying as *lex specialis*, either as between a limited number of states only (say, the EC treaty) or in a special field of application (say, trade under the WTO treaty). This will especially be so in case the original treaty contracted out of (an earlier version) of the customary rule and/or in case the treaty can be seen as a "continuing treaty" (a notion we explain below).[413] As Kontou specifies: "A prior treaty that was intended to be an exception from the general regulation of the subject-matter will, therefore, remain in force as originally drafted, notwithstanding any subsequent developments in custom".[414]

That modification of treaty norms by subsequent custom is a controversial matter is reflected in the negotiating history of the Vienna Convention. The 1964 ILC Draft on the law of treaties contained a provision on treaty modification "by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties" (Article 68, paragraph (c)).[415] This provision was subsequently deleted and as it was finally concluded, the Vienna Convention does not mention supervening custom as a ground of termination or revision of prior incompatible treaties.

More recently, it was confirmed that termination or revision of treaties by supervening custom remains a delicate question. The Institute of International Law in its final 1995 Resolution, referred to earlier, does *not* confirm the possibility of new custom modifying pre-existing treaty norms. However, in an earlier set of draft conclusions, dated December 1994, the second sentence of what is now Conclusion 11 (then Conclusion 12) read as follows: "However, as a matter of the application of international law, relevant norms deriving from a treaty binding upon the parties to the dispute will prevail over norms deriving from customary law, save where the norm deriving from a treaty contravenes a rule of

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[411] Ibid., para. 328.

[412] Or as Waldock noted in his observations on Art. 68(c) of the 1964 ILC Draft on the law of treaties (addressing the modification of a treaty by "the subsequent emergence of a new rule of customary law"): "The very object of a bilateral treaty or of a treaty between a small group of States is not infrequently to set up a special legal régime between the States concerned and sometimes a régime which derogates from the existing customary law. Accordingly, to say that the emergence of a new rule of customary law, binding on the parties as a general rule, is necessarily to modify the particular relations which they have set up between them may defeat their intention" (DIETRICH RAUSCHNING, THE VIENNA CONVENTION ON THE LAW OF TREATIES, TRAVAUX PRÉPARATOIRES 308 (1978), hereafter, "Rauschning, *Travaux …*").

[413] On this concept of "continuing treaties", see Chapter VII, section A.2.e.vi below.

[414] Kontou, *Termination …*, 24.

[415] YILC 1964-II, 198.

jus cogens, *or has been subsequently modified by a later norm of customary law* ".[416] A proposal (made by Rosalyn Higgins) to delete the last phrase in italics, confirming the possibility of subsequent custom modifying an earlier treaty norm, was originally rejected by 22 votes to 15, with 13 abstentions.[417] In a latter draft the phrase was nonetheless left out and a subsequent proposal to delete the entire second sentence of what is now Conclusion 11 was avoided only by 12 votes to 11, with 7 abstentions.

Finally, a distinction must be made between, on the one hand, treaty termination or revision as a result of new customary law and, on the other, *desuetude* or modification of treaties by subsequent practice (only the former can involve a conflict of norms, not the latter). It is, indeed, generally considered that a treaty falls into *desuetude* when its non-application by the parties over a period of time establishes their consent to let it lapse.[418] *Desuetude* can hence be described as treaty termination based on the parties' *implied consent*.[419] Also treaty modification by subsequent practice can be seen as a form of modification by *implied consent*.[420] Treaty modification by subsequent practice is not included in the Vienna Convention, but it is generally understood to be a rule of customary law.[421] Termination or revision of a treaty based on new custom, in contrast, is based not so much on implied consent to terminate or revise the treaty, but on the emergence of new customary law as such.

iv. In sum: cases of genuine conflict are limited to treaty norms "contracting out" of customary law and supervening custom terminating or revising treaty norms

Given the dynamic features of customary law (continuously dependent on both state practice and *opinio juris*) and the gradual nature of its emergence, cases of genuine conflict between, on the one hand, a treaty norm that is still in existence and intact and, on the other hand, a rule of customary law recognised as validly established notwithstanding the continuing existence of a contradictory treaty norm, are, indeed, of one type only. Namely, situations where a treaty norm aims at "contracting out" of a norm of customary law which is, in one way or the other, more general in nature than the treaty norm. This customary norm will mostly be one of general customary international law, both in terms of parties bound by it and subject-matter (such as custom on the law of treaties or state responsibility). But it may also be a norm of special customary international law, either in terms of parties bound by it (say, a bilateral treaty norm "contracting out" of a local or regional custom binding also on the parties

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[416] 66 YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW, PART I, 245-248, at 248 (1995).

[417] Ibid., PART II, 210 (1995). Higgins expressed the view that "this was a very complicated issue" and "considered it inappropriate for the Institute to deal with such an important issue as an ancillary point at the end of a Conclusion" (ibid., 207). Feliciano, in contrast, noted that "if the second sentence were to be retained as formulated by Mrs. Higgins, so as to exclude the modification of a treaty by subsequent customary international law, this itself could be seen as endorsing a hierarchy of sources" (ibid., 208). The controversial phrase originates in a comment made by Crawford, stating that an earlier draft of what is now Conclusion 11 (then Conclusion 12), not including any reference to custom modifying treaty, "ignores the possibility that a treaty norm will have been modified in subsequent practice by a later rule of customary international law" (ibid., PART I, 227 (1995)).

[418] For ICJ cases where a claim of *desuetude* was made, see the *Nuclear Tests case*, ICJ Reports 1973, 99, at 102 and the *Aegean Sea Continental Shelf case*, ICJ Reports 1978, 1, at 17 and 37. In neither of these two cases did the ICJ examine the claim.

[419] Kontou, *Termination …*, 25.

[420] For an example of treaty modification by subsequent practice, see the 1963 *United States v. France Air Transport Services Agreement* Arbitration, 38 ILR 1969, 182, at 249. For another prominent example, see the *Namibia Advisory Opinion*, ICJ Reports 1971, 22, where Art. 27, para. 3 of the UN Charter, which requires the "affirmative vote" of all permanent members of the Security Council, was, on the basis of subsequent practice, construed as meaning that the voluntary abstention of permanent members does not render invalid the resolution in question ("this procedure has been generally accepted by Members of the United Nations and evidences a general practice of that Organization").

[421] This rule was included in Art. 68 of the 1964 ILC Draft and Art. 38 of the 1966 ILC Draft (see DIETRICH RAUSCHNING, THE VIENNA CONVENTION ON THE LAW OF TREATIES, TRAVAUX PRÉPARATOIRES 304 and 309 (1978)). That it is part of customary law, see WOLFRAM KARL, VERTRAG UND SPÄTERE PRAXIS IM VÖLKERRECHT (1983).

to the treaty) or in terms of subject-matter (say, a treaty norm "contracting out" of a norm of customary international environmental law). We come back to treaty "contracting out" of general international law, including custom, in Chapter IV, section C.3.c (distinguishing "contracting out" from "accumulation" of norms) and Chapter VII, section A.3.b (*lex specialis*).

Conflict between treaty and custom is involved also in another, far more exceptional, circumstance, namely: supervening custom that terminates or revises an earlier treaty, referred to earlier. But on that occasion the treaty is not left intact (as is the case of treaty "contracting out" of custom) and one norm actually changes the other. We come back to supervening custom changing treaty norms in Chapter IV, section B.3 (definition of conflict) and Chapter VII, section A.3.b (*lex specialis*).

F. Unilateral Acts of States and Acts of International Organisations[422]

1. Unilateral acts of states creating legally binding obligations

Unilateral acts are only binding on the state making them if they evidence an intention to be bound. A distinction has been drawn between an intention to create a binding obligation and the expression of a mere political intention. The former is a legally binding unilateral act, the latter is not. Leading examples where it has been held that the unilateral acts concerned amount to an undertaking of a binding obligation are: the *Eastern Greenland* case (regarding the so-called Ihlen declaration[423]) and the *Nuclear Tests* cases (regarding the French statement of an ending of atmospheric testing[424]).

In the WTO context as well, a panel attributed "international legal significance"[425] to official, repeated and unconditional unilateral statements made by the United States in the proceedings before the panel. In doing so, the panel made reference to several PCIJ and ICJ cases, including the *Eastern Greenland* and *Nuclear Tests* cases.[426] Taken together with the US statement of administrative action that accompanied the US legislation at issue, the panel found that the United States was, on these grounds, under a duty, both under domestic and international law, to exercise the discretion given to it by the statutory language of the legislation in a way consistent with WTO obligations.[427] Given this legally binding undertaking, the panel concluded that the legislation at issue was *not* inconsistent with WTO rules.[428]

Turning to the hierarchical status of unilateral acts of states, their very nature confirms that they can only give rise to *additional obligations*. As Salmon noted: unilateral acts "sont l'expression de la volonté d'un seul État et doivent par conséquent être compatibles avec toutes autres règles du droit international. Ils ont par nature un caractère subsidiaire".[429] A unilateral act by a state aimed at *detracting* from *existing* obligations cannot as such constitute a new norm of international law which would somehow supersede an earlier obligation.[430] Hence, in case a unilateral act is contradictory with any other norm of international law, it cannot, in and of itself, become a legally binding right or

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[422] For a comprehensive overview of the role of unilateral acts of states and acts of international organisations as sources of international law, see Nguyen, *Droit …*, paras. 235-249.
[423] PCIJ Reports 1933, Series A/B, No. 53.
[424] ICJ Reports 1974, 253 (Australia v. France), 457 (New Zealand v. France).
[425] Panel Report on *US – Section 301*, para. 7.118.
[426] Ibid., footnote 692.
[427] Ibid., paras. 7.117-126.
[428] Ibid., para. 7.126.
[429] Salmon, *Antinomies …*, 286-7.
[430] However, it may well be that a unilateral act of a state, in conflict with customary law, is the beginning of, and even necessary condition for, changing that customary law. In this respect, see the statement by Weiler, in Cassesse and Weiler, *Change …*, 8.

undertaking, let alone prevail over that other norm. Equally, in case a new norm of international law emerges subsequently to the unilateral act and the new norm is binding also on the state which made the unilateral act but contradicts this act, then the new norm, as the latest expression of sovereign will and the only consensual norm at issue, prevails over the earlier unilateral act.[431]

2. Legally binding acts of international organisations

Acts of international organisations (that are not of a judicial nature) may either be legally binding or not (i.e., advisory only). Whatever their precise denomination, the former are often referred to as "decisions", the latter as "recommendations".[432] Without neglecting the importance of "recommendations" (e.g., recommendations of the UN General Assembly in the creation of customary law), we limited our examination in this study to norms of international law that are legally binding[433], *in casu*, legally binding "decisions" of international organisations.

A clear distinction must, moreover, be made between decisions taken by organs of the international organisation itself and agreements concluded by states under the auspices of the international organisation. The latter are created by means of acts of the member states (not the international organisation), the former by the organs of the organisation itself (even if these organs are composed of delegates of member states).

Two major types of legally binding "decisions" of international organisations can be detected. Firstly, decisions related to the *internal operation* of the organisation, such as nominations of agents or judges, creation of subsidiary bodies or financial decisions, but also decisions with a more general scope such as the adoption of rules of procedure for the conduct of meetings or judicial proceedings. Secondly, decisions which *directly create or affect rights or obligations* of member states of the international organisation, such as certain decisions adopted by the UN Security Council (e.g. pursuant to Chapter VII of the UN Charter[434]) or, in the WTO context, waivers granted by the Ministerial Conference to a certain WTO member[435], authoritative interpretations adopted by the Ministerial Conference or General Council[436] or decisions by the Dispute Settlement Body to establish a panel[437] or to authorise the suspension of concessions or other obligations.[438]

i. Internal validity and ranking of the decision

The legal status of binding "decisions" of international organisations is to be determined first and foremost with reference to the normative system of the organisation itself. As such, these decisions can only bind organs and/or states *within* the organisation, not states that are not a member or party to the organisation.[439] As against non-parties, decisions of international organisations can hence not be

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[431] Unless the unilateral act were to impose *stricter* obligations on the state in question than the new norm and the unilateral act were repeated or continued subsequently to the emergence of the new norm (or it can be shown that there was an intention that the unilateral act is to continue applying as the special and more burdensome law for the state in question). In those circumstances, it would seem that the unilateral act prevails over the other norm.

[432] See, for example, Nguyen, *Droit …*, paras. 242-249. However, in each case, the act (even if it is called a "decision") must be examined in its context in order to determine whether it is, indeed, legally binding (see, the *Namibia case*, ICJ Reports 1971, 41).

[433] See Chapter I, section B.

[434] Article 25 of the UN Charter provides that « [t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter ».

[435] By ¾ majority, pursuant to Article IX:3 of the Marrakesh Agreement.

[436] By ¾ majority, pursuant to Article IX:2 of the Marrakesh Agreement.

[437] By negative concensus (in other words, quasi-automatically) pursuant to DSU Article 6.1.

[438] By negative concensus (in other words, quasi-automatically) pursuant to DSU Article 22.6.

[439] These decisions may be instrumental in the creation of customary law binding also on states that are not a member of the organisation, but in and of themselves these decisions do not bind non-parties.

invoked, let alone be invoked as prevailing over other norms of international law such as treaties or customary law.

As between parties to the organisation, decisions taken by organs of the organisation must, first of all, be consistent with the treaty or other legal instrument establishing the organ. They must, in particular, be within the competence attributed to the organ. We come back to this below in Chapter VI, section B.3 (validity of acts of international organisations). In the UN context, for example, UN Security Council decisions must be consistent with the provisions of the UN Charter. In the WTO context as well, decisions by WTO organs must be consistent with the Marrakesh Agreement as well as any other WTO agreements granting them specific powers to act.

Once it is established that the decision of the international organisation is a valid one[440], within most (if not all) international organisations, the decision acquires a hierarchical status that corresponds to the organ that adopted the decision or the procedure followed in its elaboration. In the WTO, for example, the highest authority is the Ministerial Conference, after that comes the General Council which, in turn, is superior to the more specific Councils and Committees on, for example, Trade in Goods or Services or Agriculture.

ii. How does the decision relate to norms outside the international organisation?

Like all other norms of international law, decisions of international organisations must be consistent with *jus cogens*. If not, they are invalid or terminate. Such decisions, like treaty and custom, should, however, at least from an operational point of view, prevail over general principles of law[441] as well as unilateral acts of states. As noted earlier, the latter can only add to, not detract from, existing obligations.[442]

Two questions of hierarchy remain: what if a decision of an international organisation is in conflict with a treaty norm or custom that finds its source *outside* the organisation? For example, what if, in the WTO context, the DSB grants authorisation to a WTO member to suspend obligations under the TRIPS Agreement, but the resulting suspension is in conflict with that member's obligations under WIPO conventions? In these circumstances, the decision can best be compared to a treaty norm adopted under the auspices of the organisation in question. In other words, the rules to be applied when one treaty norm is in conflict with another, should apply also to conflicts between a decision of an international organisation and a treaty norm enacted outside that organisation. Hence, in the absence of an explicit conflict clause, the starting point should be that the later norm in time prevails. We come back to this type of conflict below, in Chapter VII, section A.2.d (treaty norms in conflict with later acts of international organisations).

The same can be said about conflicts between two decisions of different international organisations (i.e., two decisions that impose contradictory rights or obligations on states that are members to both organisations): the conflict ought to be treated like a conflict of treaty norms. In other words, if both parties concerned are bound by both of the decisions, the starting point must be that (absent an explicit conflict clause) the later decision in time, as the latest expression of state consent, prevails. If the two decisions are binding only on one of the two states, a conflict of the type AB/AC, discussed below in Chapter VI, section E.2, arises.

To resolve a conflict between a decision of the organisation and a norm of customary law, the same rules apply as in respect of conflicts between treaty norms and norms of customary law.[443] That is,

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[440] We briefly address the « legality » of acts of international organisations (as opposed to their validity) in Chapter VI, section C, 4.
[441] Unless, of course, the general principle of law is part of *jus cogens*. See further Chapter VI, section C, 4 on the "legality" of acts of international organisations.
[442] See section 1 above.
[443] See section E above.

there is no inherent hierarchy between the decision and the custom, but in practice, as between states bound by both, the decision prevails. Exceptions to this rule are: custom that is part of *jus cogens* or a decision that can be said to be modified or even terminated by subsequent custom (for this to happen, though, the decision must not be intended to continue applying as *lex specialis*).[444]

G. Reshaping the Landscape of Public International Law

In the previous sub-sections of this third chapter, the point was made that, in principle, no hierarchy exists as between the different sources of international law. Although, in operational terms, a certain hierarchy between the sources can be detected (treaties normally prevailing over custom which, in turn, prevails over general principles of law), this hierarchy cannot be generalised and is hence not solid enough for a theory on conflict of norms to be based upon. For purposes of understanding the existing hierarchies in international law, a more instructive manner of depicting the universe of that law may be to distinguish between "general international law" and "particular international law".

1. General International law

On the horizon of the international law universe there are a number of norms that bind *all* states. Although international law does *not* have a central *legislator* it *does*, indeed, include an element with features of international *legislation*, namely *general international law*. The rules of this general international law are, by their very nature, binding on *all* states. Each new state, as well as each new treaty, is automatically born into it.[445]

With reference to the sources of international law discussed earlier, this *corpus* of general international law consists of:

(1) General customary international law (in terms of membership)

Prominent examples are: rules on state responsibility, the law of treaties, inter-play of norms and settlement of disputes as well as more substantive norms on, for example, the use of force, genocide or human rights. This class of norms includes also special customary international law *in terms of subject matter*, such as customary international *environmental* law, as long as it is binding on all states (i.e., as long as it is general customary international law in terms of membership).[446]

(2) General principles of law

These principles are, by their very nature, binding on all states.[447]

(3) Jus cogens

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[444] See Section E.3.b.iii. But see the discussion below in Chapter VI, section C, 4 on the "legality" of acts of international organisations.

[445] This does not mean, of course, that states cannot "contract out" of general international law, see Chapter V, section C.c.

[446] We make abstraction here of the possibility for states to be "persistent objectors" to a rule of general customary law. Even if such rule would, as a result, not be binding on "persistent objectors", it is still one that is part of general international law *unless* persistently objected to. Such persistent objection is, in fact, not much different in character from the "contracting out" of general international law by treaty, discussed below, the major difference being that in case of persistent objectors the "contracting out" is based on unilateral state conduct.

[447] For a theory that also "particular" general principles exist, see Hulsroj, referred to *supra* note 379.

That is, in so far as they would not yet be covered under (1) or (2). Like general principles, norms of *jus cogens* are, by their very nature, binding on all states.

This general international law performs two crucially important roles within the system of international law.

Firstly, in so far as it includes all the rules of *jus cogens* it sets out the highest international law to which all other norms of international law must conform. Pursuant to the Vienna Convention, rules of *jus cogens* prevail over all, past and future, treaty norms.[448]

Secondly, in so far as it sets out what one could call "secondary rules" of international law or rules that impose rights and obligations on states only *indirectly through other (primary) rules of law*[449], general international law ensures the existence of international law as a legal system. These secondary rules include: rules on the law of treaties, state responsibility, inter-play of norms and settlement of disputes. Together they constitute international law's "tool-box" for the creation, operation, inter-play and enforcement of rules of international law. The fact that the content of this "tool-box" is generally speaking the same for all rules of international law is an important element of convergence in the decentralised system of international law. Importantly, however, and quite the opposite of *jus cogens*, these secondary rules of general international law (as well as all other general international law that is not *jus cogens*) are residual law only (or *droit supplétif*). That is, law on which one must "fall back" only in case a treaty is silent on the matter.[450] Treaties and other rules of particular international law can freely "contract out" of general international law (other than *jus cogens*).

Looked at from a certain angle, general international law does resemble domestic legislation. It is, indeed, the only international law that is binding on all states. In so far as, for example, Belgian law applies to all Belgians, general international law is the only international law that can be said to apply to all states. Some have even gone as far as saying that general international law is the only international "law" in the strict sense of the word "law".[451] All other international law (*in casu,* particular international law) would then be nothing else than "contracts" as between some states only (or, to complete the domestic law analogy, contracts binding on some Belgians only). To the extent general international law coincides with *jus cogens* one could even compare it to domestic constitutional law. However, contrary to much of domestic legislation (and all domestic constitutions), general international law other than *jus cogens* does *not* have an inherent legal value that is superior to other rules of law (in domestic law, sub-federal law, administrative regulations and contracts; in international law, treaties). On the contrary, general customary international law and general principles of law are, as we saw earlier, often characterised as being vague and imprecise, treaties being much more explicit and specific. As a result, in the event of conflict, particular international law will normally prevail over general international law.

In sum, general international law includes at the same time (1) the weakest form of international law in the sense of norms that are a "fall back" option only from which treaties can contract out as they wish; and (2) the strongest form of international law, namely rules of *jus cogens*.

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[448] See Arts. 53 and 64 of the Vienna Convention, discussed further in Chapter VI, section B.1.

[449] The distinction between primary and secondary rules was made prominently by H.L.A. HART in THE CONCEPT OF LAW 92 (1961): "secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied and the fact of their violation conclusively determined". The scope of the "secondary rules" referred to here (as well as by Hart) is much wider than the notion of "secondary rules" used by the ILC in its discussions on Draft Articles on State Responsibility (where it is limited to the definition and consequences of *breach* of "primary rules", excluding "secondary rules" such as those on the creation, application, revision or termination of "primary rules"). See, for example, James Crawford, *First Report on State Responsibility*, ILC, 50th session, A/CN.4/490, 4 (1998).

[450] This type of "fall-back" is further discussed in Chapter IV, section C.2.b.

[451] See Fitzmaurice, *Some Problems …*, 160.

Finally, two remarks related to the scope and nature of general international law must be made.

Firstly, there is a doctrinal discussion as to whether international law can be seen as a "complete" system of law. Some argue that it must be so regarded either because of the "residual negative principle" set forth in *Lotus*[452] (further discussed below) or on the ground that general principles of law automatically fill all gaps in case no other international law exists (in other words, international law, from its very beginnings as general international law before the conclusion of treaties, was already "complete").[453] The "completeness" of international law is, for these authors, the reason why an international adjudicator cannot pronounce a *non liquet*.[454] Other authors do not consider international law to be a "complete system" and regard it instead as a relatively primitive system of law which is, at times, incomplete or unclear. These authors do not shy away from a declaration of *non liquet*.[455] As we shall see below, *non liquet* may, indeed, be the only solution in certain exceptional cases of conflict of norms, where it is impossible for the adjudicator to find a decision in the law as to which of two contradictory norms must be applied. In yet other exceptional cases there may simply be no applicable law so that, in the words of Martti Koskenniemi, "[f]or the voice of justice to be heard, law must sometimes remain silent".[456] Daniel Bodansky refers to the example of "what was the international rule concerning the continental shelf as of January 1945?" and the issue of

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[452] *S.S. Lotus* (France v. Turkey), PCIJ, Series A, No. 10, 1927. That is, the principle that "everything which is not expressly prohibited is allowed". In support, see, for example, Julius Stone, Non Liquet *and the Function of Law in the International Community,* 35 BYIL 135 (1959) and the Dissenting Opinion of Judge Shahabuddeen (Part I, para. 6, 35 ILM 866 (1996)) as well as, apparently, the Individual Opinion of Judge Guillaume (para. 9, 35 ILM 1353 (1996)) in the 1996 ICJ Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*. *Contra*: Sir Gerald Fitzmaurice, *The Law and Procedure of the ICJ, 1951-54: General Principles and Sources of Law*, 30 BYIL 1 (1953), 8; Hulsroj, *Three Sources …*, 220 and the Declaration of President Bedjaoui (para. 16, 35 ILM 1347) in the 1996 ICJ Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*.

[453] See, for example, the Dissenting Opinion of Vice-President Schwebel (at p. 9) in the 1996 ICJ Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*.

[454] See Prosper Weil, *The Court Cannot Conclude Definitively …* Non Liquet *Revisited*, 36 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 109 (1997), hereafter "Weil, *Non Liquet …*"; Sir Hersh Lauterpacht, *Some Observations on the Prohibition of 'Non Liquet' and the Completeness of the Law*, SYMBOLAE VERZIJL 196 (1958), hereafter "Lauterpacht, *Some Observations …*"; Sir Gerald Fitzmaurice, *The Law and Procedure of the ICJ, 1951-54: General Principles and Sources of Law*, 30 BYIL 1 (1953); and Hersh Lauterpacht (as he then was), *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 BYIL 48, 78 (1949). For case law against *non liquet* (which is rare since courts do not normally acknowledge that the law has lacunae or is unclear, they simply fill the gap or provide their own interpretation), see the *Lighthouses between France and Greece* case, PCIJ, Series A/B, No. 62, 14, 20 and the *Employment of Women during the Night case*, Series A/B, No. 50, 377. In its 1996 Advisory Opinion on the legality of the threat or use of nuclear weapons, the ICJ found, according to many authors, a *non liquet* when stating that "in view of the current state of international law, and of the elements at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake" (*Legality of the Threat or Use of Nuclear Weapons,* ICJ Reports 1996, para. 105). But see the dissenting opinion of, for example, Rosalyn Higgins, ICJ Reports 1996, 583 (stating that this part of the ICJ *dispositif* is inconsistent with the prohibition of *non liquet*) and Sir Hersh Lauterpacht, *Some Observations …*, 213 and note 2 (concluding that the prohibition of *non liquet* applies to both contentious and advisory jurisdiction). Prosper Weil, on the other hand, makes a distinction between contentious procedures (where *non liquet* is prohibited) and advisory procedures (where a *non liquet* may be pronounced) ("In advisory proceedings, *non liquet* is an expression of the principles of self-interpretation and polynormativity that are characteristic of the international legal system", Weil, *Non Liquet …*, 119).

[455] See, for example, Hulsroj, *Three Sources …*, 220-228 and Fastenrath, *Lücken …*.

[456] Martti Koskenniemi, *The Silence of Law/The Voice of Justice*, in LAURENCE BOISSON DE CHAZOURNES AND PHILIPPE SANDS (eds.), INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, 488-510, at 489 [hereinafter "Koskenniemi, *Silence …*"]. Also in support of there being cases where a *non liquet* may be justified, see Daniel Bodansky, Non Liquet *and the Incompleteness of International Law*, in LAURENCE BOISSON DE CHAZOURNES AND PHILIPPE SANDS (eds.), INTERNATIONAL LAW, THE INTERNATIONAL COURT OF JUSTICE AND NUCLEAR WEAPONS, 153-170 [hereinafter "Bodansky, *Non Liquet …*"].

expropriation in the 1970s.[457] In both instances, there was, in his view, no norm one way or the other so that a *non liquet*, vindicating neither side's legal position, would have been justified at the time, thus leaving the issue to the normal process of international lawmaking.[458] In those exceptional cases where there is simply no applicable law (or too much applicable law in that there is an unresolvable conflict) the judge may either pronounce a *non liquet* or itself *create* the law. Much will depend on the *lacuna* in question (e.g., is it one of detail that can be easily filled by analogy or would filling the *lacuna* really amount to creating an entirely new norm?) as well as, prominently, the role generally attributed to the judge concerned, in particular the extent of its law-creating function[459] (to be weighed against the incentive that a *non liquet* may provide for *states* to fill the gap by normal lawmaking processes). Court activism may be more readily expected, for example, from the European Court of Justice than from the ICJ. The WTO judiciary could posit itself somewhere in between, although the diversity between WTO members as well as the prevailing "member-driven" character of the WTO as a legal system is likely to tip the balance *against* court activism on many an occasion.

Note that in WTO dispute settlement the matter of *non liquet* is somewhat simplified because of the substantive jurisdiction of panels and the Appellate Body. This jurisdiction is limited to deciding whether or not there is a violation under *specific treaty provisions*, namely those of WTO covered agreements.[460] In other words, in WTO dispute settlement (where only claims under WTO covered agreements can be brought), *a measure that is not prohibited by the WTO treaty is allowed*.[461] The WTO judiciary has no jurisdiction to examine claims under non-WTO rules: if something is not prohibited by the WTO treaty itself, it is allowed, or at least not "justiciable", *in the WTO*. In case a WTO panel finds that the WTO provision invoked by the complainant does not prohibit the defendant's measure or conduct, the defendant wins and the panel cannot, for example, find violations of non-WTO law. Since WTO prohibitions are necessarily set out in treaty provisions, the rules on treaty interpretation and the adage *jura novit curia* must normally be enough for the WTO judiciary to make up its mind as to whether a measure is prohibited under the WTO treaty. In the WTO context, the prohibition on *non liquet* is hence closely intertwined with the principle *jura novit curia*.

Secondly, there is also a discussion as to whether the "residual negative principle", i.e., the principle of "what is not prohibited is allowed", lays at the origin of international law. Proponents of this principle, allegedly recognised in the PCIJ *Lotus* case[462], claim that it is part of general international law and means that states, as sovereigns, have a complete freedom of action that is limited only by international law explicitly prohibiting them to engage in certain conduct. Strong arguments have

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[457] Bodansky, *Non Liquet …*, respectively at 157 and 158.

[458] Ibid. The possibility of there not being any applicable law for a particular matter was hinted at also in WTO law in the recent Appellate Body report on *US – Steel from Japan*, paras. 125-126. There, the Appellate Body found what it called a "lacuna" in the Anti-Dumping Agreement, more particularly Article 9.4 thereof, "because, while Article 9.4 *prohibits* the use of certain margins in the calculation of the ceiling for the 'all others' rate, it does not expressly address the issue of *how* that ceiling should be calculated in the event that *all* margins are to be *excluded* from the calculation, under the prohibitions" (para. 126, emphasis in the original). The Appellate Body refrained from dealing with this lacuna on the following grounds: "This appeal does not raise the issue of how that *lacuna* might be overcome on the basis of the present text of the *Anti-Dumping Agreement*. Accordingly, it is not necessary for us to address that question". In this instance, as the Appellate Body seemed to imply, a *non liquet* could well be avoided (i.e., the "*lacuna* might be overcome") by the adjudicator with reference to related provisions in the Anti-Dumping Agreement.

[459] Or as Martti Koskenniemi put it: "The question is not so much whether or not international law is a 'complete system', but whether we can trust the lawyers who manage it always to do the right thing" (Koskenniemi, *Silence …*, 507).

[460] DSU Art. 1.1. See below Chapter VIII.

[461] As Sir Gerald Fitzmaurice pointed out (although he opposes the view of international law being "complete", see *supra* note 452): "where the offence consists, and can only consist, in the violation of a specific prohibition, it must obviously be a sufficient defence to show that the act concerned did not involve such a violation, and was therefore 'not contrary to international law'" (Fitzmaurice, *Law and Procedure …*, 14).

[462] See *supra* note 452.

been put forward against this approach to international law.[463] Indeed, the right or freedom of one state, especially when exercised outside of its territorial jurisdiction, often implies a corresponding restriction of sovereignty of another state. The right or freedom of one state and the obligation or restriction of sovereignty of another state are, in that sense, but two sides of the same coin. Moreover, in international adjudication, if a state can place itself on the defendant side, the principle means that it will be up to the complainant to prove a rule of international law that *restricts the defendant's sovereignty*. If the complainant is not able to do so, the defendant wins. If, however, the roles are turned and the same state is put on the complainant side (for example, in a dispute over sovereignty over a certain piece of land), it will be *up to that state, as complainant, to prove that a rule of international law exists which restricts the (at origin) complete freedom of the opposing state*. For these reasons, it is difficult to accept the principle of "what is not prohibited is allowed" as one that is part of general international law. It may be relevant in limited contexts such as WTO dispute settlement where only claims under WTO covered agreements can be made so that what is not prohibited *by the WTO treaty* must, at least for purposes of WTO dispute settlement, be considered as allowed. The complete freedom of states can, however, no longer be seen as a valid starting point for all international law questions, especially now that modern international law is increasingly a law of co-operation with certain matters, such as the high seas and fundamental human rights being classified as "global commons".

2. Particular International Law

Whereas general international law is, by its very nature, binding on *all* states, particular international law is binding only on *some* states. With reference to the sources of international law discussed earlier, the diverse *corpus* of particular international law consists of:

(1) Treaties, be they bilateral or multilateral;
(2) Special customary international law (in terms of membership), that is, local or regional custom binding as between a number of states only;
(3) Unilateral acts of states creating additional obligations binding on those states only;
(4) Unilateral conduct of states that can be classified as persistent objectors to a norm of general customary international law;
(5) Acts of international organisations, binding on the member states of the organisation only.

As noted earlier, this particular international law can "contract out" of general international law other than rules of *jus cogens*. We further examine this "contracting out" of general international law, especially by treaties, in Chapter IV, section C.2.c ("fall-back" *versus* "contracting out" of general international law) and Chapter VI, section D.3 (*lex* specialis). However, particular international law can also confirm or add to rights and obligations set out in general international law. To that extent, particular international law simply confirms or complements general international law. Both can apply simultaneously and no situation of conflict arises. This is what we refer to below (Chapter IV) as accumulation of norms, as opposed to conflict of norms.

Norms of *particular* international law may "graduate" to norms of *general* international law. Most commonly, a treaty norm may, for example, transform into a norm of *general customary* international law. It is then not just binding on the parties to the treaty but becomes binding on *all* states. Art. 38 of the Vienna Convention provides, indeed, that "[n]othing in articles 34 to 37 [on treaties and third states, essentially setting out the *pacta tertiis* rule] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognized as such".

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[463] Especially by Sir Gerald Fitzmaurice, *The Law and Procedure of the ICJ, 1951-54: General Principles and Sources of Law*, 30 BYIL 1 (1953). See also Hulsroj, *Three Sources …*, 220-228. See also the authors referred to *supra* in note 456.

At the other side of the spectrum, nothing prevents states from concluding a treaty (particular international law) which simply confirms or "codifies" customary law (general international law). Importantly, however, in that circumstance (treaty codifying custom), the customary rules underlying the treaty *continue to exist and lead a separate life that is distinct from that of the treaty rules*, including as between parties to the codifying treaty. This approach was confirmed by both the ICJ and the Institute of International Law. In the *Nicaragua case (Jurisdiction and Admissibility)* the ICJ stated: "The fact that the above-mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.[464] This is also what the Institute of International Law found in its Resolution of 1 September 1995 on "Problems arising from a succession of codification conventions on a particular subject". In Conclusion 11 it is stated: "Treaty and custom form distinct, interrelated, sources of international law. A norm deriving from one of these two sources may have an impact upon the content and interpretation of norms deriving from the other source. In principle, however, each retains its separate existence as norm of treaty law or of customary law respectively". Hence, from this perspective, international law is a law of accumulation, not of exclusion.[465]

H. In Conclusion: Is there a hierarchy of sources?

Although Article 38 of the ICJ Statute does *not* set out an *a priori* hierarchy of sources, the successive listing in that provision of treaties, custom and general principles of law does reflect practical realities. To recall Baron Descamps' statement (the principal drafter of Article 38): "If two States concluded a treaty in which the solution of the dispute could be found, the Court must not apply the international custom and neglect the treaty. If a well known custom exists, there is no occasion to resort to a general principle of law".[466] Or as another main participant noted during the preparation of Article 38:

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[464] ICJ Reports 1984, 424, para. 73. See, in this respect, VILLIGER, M., op. cit., paras. 228-242 and HUGH THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION (1972).

[465] That this has not always been the prevailing view, witness Maarten Bos' statement (of 1977): "Treaty and custom are not only independent of each other, but mutually exclusive in this sense, that a rule valid between two States cannot be a treaty rule and a rule of customary law at the same time … First, if a treaty is a better 'source' of a rule than custom, as suggested above, it is not clear why the less perfect 'source' should survive. Second, if 'codification' of custom is necessarily 'development' … a customary rule becomes *ipso facto* abrogated by its codification" (Bos, *The Recognized …*, 74). Degan originally held a similar view on the evolution of international law as a law composed mainly of customary law that would "graduate" to the somehow higher treaty status (distinguishing between the alleged "perfect" (written) and "imperfect" (unwritten) sources) (DEGAN, L'INTERPRÉTATION DES ACCORDS EN DROIT INTERNATIONAL 3-15 (1963)). However, in his 1997 book on sources, Degan acknowledges that "[t]he developments in [the] last thirty-five years contradicted these expectations, first of all in respect of importance of customary law" (Degan, *Sources …*, 12 in note 20). Indeed, viewed from the general *versus* particular international law perspective, it remains so that it is for treaties (particular law) to "graduate" to custom (potentially even *jus cogens*) so as to become part of *general* international law binding on all states. It is not for general customary law (by nature, binding on all states) to be "perfected" into treaty form (in practice binding only on a certain number of states). This is one of the dilemmas of international law: either one tries to identify and live with relatively vague and imprecise custom binding on *all* states, or one attempts to codify and further develop this vague custom into written treaty form which, as a consequence, is likely to become binding only on a limited number of states. This dilemma between treaty and custom is reminiscent also of the divide between civil law and common law. For lawyers with a civil law background (such as Bos and Degan), statutes (hence, in international law, treaties) form the core of a legal system. For common lawyers, on the contrary, the common law (hence, in international law, custom) is more important. For Fitzmaurice (*Some Problems, …*, 157-160) and Parry (CLIVE PARRY, THE SOURCES AND EVIDENCES OF INTERNATIONAL LAW, 34 and 42-55), for example, treaties are only a source of *obligations*, not of *law*, which in time may become genuine international *law*, i.e., general customary international law.

[466] PCIJ, Advisory Committee of Jurists, *Procès-Verbaux* of the Proceedings of the Committee, June 16-July 24 1920, with Annexes, 1920, 337.

"the order mentioned simply represented the logical order in which these sources would occur to the mind of the judge".[467] It is, indeed, in this order that a judge would logically approach a legal question and in most cases, treaties will be applied rather than custom and custom rather than general principles of law. The main conclusions of Chapter III are, therefore, as follows:

- Although from a juridical point of view some "necessary" principles part of "general principles of law" could be said to be of higher standing than all other norms of international law (in that they form the very foundation of that law), from an operational point of view, in the rare event of conflict, general principles of law must give way to all other norms of international law (treaty, custom as well as unilateral acts of states and acts of international organisations). The only exception to be made should be general principles of law part of *jus cogens*.

- In the event of conflict between treaty and custom, treaty prevails, unless the customary norm is part of *jus cogens* or the treaty norm can be said to be modified or even terminated by supervening custom. The latter will occur if no intention on behalf of the parties to the treaty can be pointed at to the effect that the treaty should continue to apply as special law between them.

- Unilateral acts of states can only add obligations incumbent on the state conducting the act, they cannot detract from obligations.

- Finally, the validity of legally binding acts of international organisations (of a non-judicial nature) must be examined first within the legal system of the organisation itself. As against norms created outside the organisation, they operate in largely the same way as treaty norms do.

Having reached these conclusions, it may be questioned whether, from an operational point of view, it is worthwhile maintaining the somewhat theoretical contention that all norms of international law have the same inherent legal value. As pointed out, in practice, there are important differences between the sources of international law which do effect their hierarchical status. Firstly, there is the explicitness of norms and the state consent that created them. Treaty norms are normally more explicit than custom which is, in turn, more explicit than general principles of law. Secondly, there is the specificity of norms. Treaties, other than codifying treaties, are normally more specific than custom, which is, in turn, more specific than general principles of law. Thirdly, reference can be made to the different authors of norms. Treaties are negotiated and ratified at the highest level. Custom gradually develops and is influenced by all actors on the international scene, including lower state officials, international organisations and their civil servants as well as judges and academics. General principles of law, even though they must be "recognized by civilised nations", are heavily influenced by international tribunals and also academics.

Even if these distinguishing features do have great merits from an operational point of view, it remains the case that basing a theory of conflict of norms *with reference solely to the source of these norms* is unworkable. It would be poised with too many exceptions and uncertainties, essentially because hierarchies in international law (unlike domestic law) are not based on form but substance. This is why we reshaped the landscape of international law, setting it out as general international law *versus* particular international law. This starting point will prove more appropriate when it comes to finding solutions to conflict of norms.

[467] Ibid., *per* Lord Phillimore, 333.

I. Post-script: Where to classify rules on conflict of norms?

Having summed up the different sources of international law, where should one classify the rules on how to resolve conflict between norms of international law? As we shall see below[468], in some instances, treaty norms themselves will specify the relationship of a treaty with other norms of international law (Article 103 of the UN Charter is an example). In that event, the conflict rule is a treaty norm. In other cases, one may need to fall back to general treaty law, as codified in the Vienna Convention (in particular Article 30 thereof). Here again, at least for those states bound by the Vienna Convention, the conflict rule finds its source in a treaty.

However, in respect of conflict between treaty norms where not all parties are bound by the Vienna Convention, or in respect of conflicts between treaty norms and other sources of international law, or *as amongst* these other sources of international law, where can the rules on conflict be found? Arguably, some of them are part of customary law, such as Article 30 of the Vienna Convention. But it may be difficult to point at actual state practice in this respect as well as to find evidence of *opinio juris*. Many of the rules to solve these types of conflict, including those which we have set out so far, stem rather from legal logic, i.e., are the logical consequence to be drawn from, *inter alia*, the characteristics of the particular source in question and the requirements to be met for this source to give rise to norms of law. This is so, in particular, in respect of conflict involving either general principles of law or customary law. In other instances, the conflict rule is simply the result of applying the (latest) intent of the law-maker, for example, in cases where the *lex posterior* rule finds application or where a rule prevails as *lex specialis,* based on an intention of the law-maker that the special rule was meant to continue applying notwithstanding a contrary but more general rule. The conflict rule is then merely the consequence of the contractual freedom of states and the principle of state consent, itself considered as a major (and by some, the only) source of international law. In this sense, many conflict rules could be labelled general principles of law of the fourth type set out earlier (principles of legal logic). Others have argued that rules which govern the relationship between categories of international legal norms are "necessary" principles without which no legal system can exist (i.e., principles that fall within the first type of general principles of law referred to earlier).[469]

Whatever the exact nature and source of conflict rules (be they derived from an explicit conflict clause or the general principle of contractual freedom of states), they must derive from norms of international law that are legally binding when the conditions for their application are fulfilled. A solution to conflict of norms must be found in the law. It is not for an adjudicator to decide arbitrarily which of two conflicting norms ought to apply. This means that in exceptional cases, where no conflict rule is available or where none of the applicable conflict rules leads to a result, an adjudicator may have to pronounce a *non liquet*, based on the absence of conflict rules. We come back to this situation below.[470]

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[468] See Chapter VII, section A.1.
[469] See, in this respect, Thirlway, *The Law… (Part One)*, 143-147 and Bos, *The Recognized …*, 72-73.
[470] See Chapter VII, section B.1.

CHAPTER IV. ACCUMULATION AND CONFLICT OF NORMS

A. The function of norms

Most norms of international law have one of three functions[471]:

(i) They impose an obligation on states to do something (so-called "prescriptive norms", "must do" norms or norms imposing a "positive" obligation);
(ii) They impose an obligation on states *not* to do something (so-called "prohibitive norms", "must *not* do" norms or norms imposing a "negative" obligation); or
(iii) They grant a right to states to do something (so-called "permissive norms" or "may do" norms).

Norms of international law may also

(iv) empower an organ, institution or individual with legal capacity under international law[472]; or
(v) regulate *other* norms[473], that is, they may address the creation, application, inter-play[474], suspension, termination[475], breach or enforcement of other norms of international law (although many of these norms also impose, directly or indirectly, certain obligations on states or grant them rights and may hence fall also under norms of type (i), (ii) or (iii) above). Since these norms regulate other norms, they can be referred to as "secondary norms".[476]

On the basis of norms of type (i) and (ii), i.e., those that impose an obligation on states, other states (and/or, as the case may be, international bodies or individuals) derive rights. On the basis of norms of type (iii), that is, those granting a right to states, other states (and/or, as the case may be, international bodies or individuals) derive obligations.

The obligations thus imposed, or the rights thus conferred, upon a state by any of these types of norms may also be imposed or conferred upon other subjects of international law, in particular international institutions (including international adjudicators or international bodies not part of an international organisation[477]). As noted earlier, however, this work focuses on states.

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[471] See HANS KELSEN, THEORIE GENERALE DES NORMES, 1 : "Le mot 'norme' vient du latin *norma*, et a pris dans la langue allemande le caractère d'un mot d'emprunt par lequel on désigne – quoique non exclusivement, mais en premier lieu – un commandement, un ordre, une prescription. Commander n'est cependant l'unique fonction d'une norme ; habiliter, permettre, abroger sont aussi des fonctions de la norme ».

[472] Such as treaty provisions establishing an international organisation, committee or body and related provisions regulating their functions (e.g., Arts. I-IV of the Marrakesh Agreement and DSU Art. 2.1 providing that "[t]he Dispute Settlement Body is hereby established"). Also WTO committee decisions appointing a committee chairman fall under this type of norms.

[473] As most norms in the Vienna Convention and the ILC Draft Articles on State Responsibility do. Norms of type (v) may also include individual norms though, terminating, for example, one specific other norm or convention (see note 475).

[474] Such as the *General Interpretative Note to Annex 1A* or Art. 30 of the Vienna Convention.

[475] Such as the WTO General Council decisions to terminate the International Dairy Agreement and the International Bovine Meat Agreement.

[476] See *supra* text at note 449.

[477] Such as the Meeting of Contracting Parties under GATT 1947 (GATT did not constitute an international organisation) or most of the bodies under multilateral environmental agreements (see Robin Churchill and Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AJIL 623 (2001)).

A norm may be individual in that it applies in one pre-determined circumstance (such as the building of a dam or the cession of territory) or general in that it regulates conduct whenever it occurs (such as the MFN-obligation in the WTO treaty).

The obligation imposed by a norm may be unconditional in that it is automatically activated when certain factual circumstances are present or conditional in that it applies only in case a state exercises certain rights. For example, the obligation not to discriminate in GATT Art. III:4 is unconditional (it applies in respect of all internal measures referred to in that provision[478]). The obligation under GATT Art. XX(b) to ensure that the measure is "necessary" to protect health is conditional in that it applies only in case a WTO member decides to have resort to its right to impose certain trade restrictions for health protection purposes. The flip side of certain obligations being conditional upon the exercise of a right is that many permissive norms are also conditional, i.e., the explicit right granted by them can only be relied upon in case certain conditions are met. Most explicit WTO rights, for example (such as GATT Art. XX(b)), are conditional rights or exceptions to be invoked only in the event certain requirements are met. In that sense they impose, indirectly, certain obligations. Hence, norms such as GATT Art. XX(b) have a *permissive* component (they grant a right to restrict trade for health reasons, notwithstanding other GATT obligations) as well as a *prescriptive* component (if the right to restrict trade for health reasons is exercised, certain obligations of "necessity" and non-discrimination must be met). If this *prescriptive* component is not met, the conditional right or exception cannot be relied upon and one must fall-back on the initial negative obligation not to restrict trade (set out, for example, in GATT Arts. I, III or XI).

In the WTO context, examples of unconditional positive obligations are relatively rare. Many of the WTO's "prescriptive" or "must do" norms (of type (i) above) are included in the TRIPS Agreement, such as TRIPS Art. 12 prescribing a term of protection of copyrights of no less than 50 years. Most WTO provisions are, however, of the "prohibitive" or "negative" type ("must not do" norms of type (ii) above). This is the case, for example, of the GATT's most favoured nation and national treatment provisions which prohibit WTO members, *inter alia*, from discriminating, respectively, between like products of different WTO members and between imported products and like domestic products.

Finally, as point out already, certain WTO provisions grant rights to WTO members so as to allow them to do or obtain something (norms of type (iii) above). As noted, most of these rights are conditional rights. GATT Art. XX(b), for example, allows members to protect health under certain conditions (e.g., of "necessity"). Art. 27.3 of the Subsidies Agreement grants a right to developing countries to provide certain subsidies that are otherwise prohibited for a period of five years. DSU Art. 6.1, as well, gives a WTO member the right to the establishment of a panel unless the DSB decides by consensus not to establish the panel.

Importantly, when we refer here to norms granting a right to states (under type (iii) above) we do not include the, what one could call, "negative permission" sometimes referred to of "what is not prohibited is allowed". This "negative permission", discussed earlier[479], is allegedly set out in the PCIJ *Lotus* case. That this right is one of general international law has been criticised. What we do mean under norms granting a right to states are norms granting an explicit right to states or "positive permission". Not areas where conduct is not regulated (absence of norms) and where one could, according to some, fall back on the "what is not prohibited is allowed" principle.

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[478] The fact that GATT Art. III has a certain material scope of application also makes it "conditional" in a certain sense (i.e., it applies only to measures falling within its scope; not, for example, to measures unrelated to trade or falling within the scope of the exceptions to Art. III). However, the term conditional is used here in the sense of an obligation depending upon, and activated only, in case a state exercises a right. In that sense, GATT Art. III:4 is unconditional.

[479] See text at note 463.

B. How norms inter-act

Norms of international law may inter-act in two ways. They either

(i) accumulate; or
(ii) conflict.

If two norms do not conflict, they necessarily accumulate (and vice-versa). Two norms accumulate when they can be applied together and without contradiction in all circumstances. Two norms conflict when this is not the case (the definition of conflict is further defined below).

1. Accumulation

Focusing now on the norms of types (i), (ii) and (iii) set out above (imposing obligations on, or granting rights to, states), a norm may accumulate with other norms in two different ways. It may either

(i) add rights or obligations to already existing rights or obligations (without contradicting any of these rights or obligations) and hence form a complement to other norms ("complementary" relationship); or

(ii) explicitly confirm already existing rights or obligations, without either adding to or detracting from these rights or obligations.

Two norms accumulate in the first sense of being "complementary" when they deal with completely different subject matters (such as DSU Art. 4 on consultations and GATT Article I on most-favoured nation treatment), that is in the absence of overlap *ratione materiae*. Norms are also in a purely "complementary" relationship when they have no state-parties in common, say, between treaty X concluded by states A and B and treaty Y concluded by states C and D, that is, in the absence of overlap *ratione personae*.[480]

Norms may also complement each other even though they deal with the same subject matter and have one or more state-parties in common. This will be the case if one norm simply adds rights or obligations to those in the other norm without contradiction. This would occur, for example, when one norm regulates trade in goods and another trade in services, both dealing with trade, but one simply adding rights and obligations to the other, without detracting from them. Accumulation would arise also if one norm were to state, for example, that when navigating on the high seas, one may not dump oil and another norm adds to this that when navigating on the high seas one must also emit certain signals. The first norm (on trade in goods or oil dumping) does not detract from the second norm (on trade in services or the emission of signals), or vice versa. Implementing or relying on one norm cannot lead to breach of the other.[481] Hence, both norms accumulate and must be complied with at the same time. In that sense, international law is a law of accumulation.[482]

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[480] Norms that have a different scope of application *ratione temporis* could, in a certain way, also be seen as "complementary", although they do not complement each other as applied at one point in time, but complement each other rather in time. In that sense, they are not really complementary norms, but successive norms. On successive norms, see Chapter VII, section A.2.

[481] That this may not always be the case in respect of the GATT/GATS overlap, see below Chapter VII, section A.3.d.ii.

[482] However, as elaborated below, when two norms regulate the exact same action differently and one norm detracts from the other, conflict does arise in that the implementation of one norm constitutes breach of the other. This would be the case, for example, if one norm were to state that one may dump 100 litres of oil, the other positing a maximum of 1000 litres, or one norm prescribing conditions A, B and C for a certain trade restriction to be allowed, another norm prescribing only condition A.

Two norms may accumulate also by means of one norm simply "confirming" a pre-existing norm. DSU Article 3.2, for example, merely "confirms" pre-existing rules of general international law when stating that WTO covered agreements must be interpreted "in accordance with customary rules of interpretation of public international law". Other examples of mere confirmation are: GATT 1994 incorporating and hence confirming GATT 1947 and the TRIPS Agreement incorporating and hence confirming parts of certain WIPO conventions.

Note that also a norm that explicitly terminates[483] another norm, without replacing it by another (i.e., a norm of type (v) above), accumulates with the norm it is terminating. Both can, indeed, be applied at the same time in all circumstances. More particularly, application of the terminating norm will mean the end of the first norm so that both norms will never apply at the same time and hence cannot ever conflict.

Also one norm that sets out a general rule and another that explicitly provides for an exception to that rule, accumulate (such as GATT Arts. III and XX, the latter explicitly providing that "nothing in this Agreement shall be construed to prevent" Art. XX measures[484]). At first sight there is always an apparent conflict between a rule and an explicit exception to that rule. However, in case the exception explicitly provides that the rule does not apply in the exceptional circumstances, the apparent conflict disappears. Then, pursuant to the principle of "effective treaty interpretation"[485], the rule must simply be carved out to the extent required to give effect to the exception (the exception can then even be considered as a conditional right, de-linked from the general rule[486]). As a result, since both norms have a different scope of application, they can in all circumstances be applied side by side. In each and every circumstance only one of the two norms applies. Hence, they accumulate and no conflict arises.

The same does not apply, however, in case the alleged exception does *not* explicitly state that it is "notwithstanding" the general rule or where the general rule does *not* explicitly state that it applies "except for" situations dealt with under the exception. These situations do raise conflict and are further discussed below.[487] The general rule is then *not* carved out and continues to apply also in case the "exception" applies; there is then, in other words, conflict. As discussed below, one way to resolve such conflict is then to consider the "exception" as *lex specialis* that must prevail over the general rule or *lex generalis*.

Finally, also in case one norm regulates a matter differently than another norm (for example, by imposing different obligations for a safeguard measure to be taken), but one of the two norms explicitly refers to or incorporates the other norm, both norms accumulate. In that circumstance, given that the norms refer to, or incorporate each other, the different obligations must be applied cumulatively so that both norms accumulate. Only if the obligations under the two norms are mutually exclusive would a conflict arise in these circumstances. Such accumulation occurs, for example, in respect of safeguard measures allowed for under the Safeguards Agreement which, in its Arts. 1 and 11.1(a), explicitly refers back to the conditions for imposition of safeguards in GATT Art. XIX, including the requirement of "unforeseen developments".[488] The fact that this condition of

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[483] Termination of a norm may be referred to also as "abrogation". Abrogation then stands in contrast to derogation. The distinction is derived from Roman law, more particularly, CICERON, REPUBLIQUE, III, 22: "C'est un péché de modifier cette loi, il n'est pas non plus permis d'en supprimer (*derogare*) une quelconque partie, ni de l'abroger (*abrogare*) ».

[484] The same is true for SPS Arts. 3.1 and 3.3.

[485] See Chapter V, section B.3.

[486] See the Appellate Body report on *EC – Hormones*, in particular the findings on SPS Art. 3.3.

[487] See Chapter VI, section D.3 (*lex specialis*).

[488] Art. 1 provides : « This Agreement establishes rules for the application of safeguard measures which shall be understood to mean *those measures provided for in Article XIX of GATT 1994* » (emphasis added). Art. 11.1(a) states: "A Member shall not take or seek any emergency action on imports of particular products *as set forth in*

"unforeseen developments" was not explicitly copied in the Safeguards Agreement does not mean that it no longer applies. This was confirmed by the Appellate Body in *Korea – Safeguards*[489] and *Argentina – Safeguards*[490] (in both cases reversing the panel which had found that since the Safeguards Agreement itself does not refer to "unforeseen developments", this condition under GATT Art. XIX no longer applies). In these circumstances, given the explicit reference in Arts. 1 and 11.1(a) to GATT Art. XIX, the obligations in the Safeguards Agreement must be accumulated with those in GATT Art. XIX. Only if these obligations had been mutually exclusive would a conflict arise.[491]

2. Conflict

a. All conflicts, not just conflicts in the "strict" or "technical" sense

i. Conflict as defined in doctrinal writings

The definition of when two norms of international law are in "conflict" has, surprisingly, attracted little attention. Most authors writing on the topic of inter-play or hierarchy of norms do not even provide a definition.[492] In respect of these authors, one can only guess at what they consider to be norms in "conflict" by looking at the examples they cite. Doing so leads to a rather broad view on conflict.[493] Other authors do give a definition. Some give a very vague or general one. Others, in contrast, give a very strict or technical definition of "conflict".

Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement" (emphasis added).

[489] Appellate Body report on *Korea – Safeguards*, para. 81.

[490] Appellate Body report on *Argentina – Safeguards*, para. 84.

[491] Hence, the fact that WTO members must comply with the obligations under both the Safeguards Agreement and GATT Art. XIX does not, as the Appellate Body seemed to imply, so much derive from the fact that "a treaty interpreter must read all applicable provisions of a treaty [*in casu*, the WTO treaty, including both GATT 1994 and the Safeguards Agreement] in a way that gives meaning to *all* of them, harmoniously". Rather, it derives from the fact that the Safeguards Agreement explicitly incorporates also the additional obligation set out in GATT Art. XIX. In case such explicit incorporation had been absent, "effective treaty interpretation" would not have been able to resolve the matter. See Chapter V, section B.3. In that event, one would, indeed, need to have recognised the existence of a conflict between the different (though not mutually exclusive) obligations in the Safeguards Agreement and the GATT 1994, one agreement dealing with the exact same issue differently in such a way that one norm detracts from the other (under GATT the safeguard may be prohibited; while under the Safeguards Agreement it may be allowed). Such conflict would then need to be resolved by the conflict clause in the *General Interpretative Note to Annex 1A*, discussed below, that is, in favour of the obligations in the Safeguards Agreement.

[492] See, for example, Akehurst, *Hierarchy …*, Degan, *Sources …* and Quoc Dinh Nguyen, *Evolution de la Jurisprudence de la Cour Internationale de La Haye Relative au Problème de la Hiérarchie des Normes Conventionnelles*, in MELANGES OFFERTS A MARCEL WALINE, LE JUGE ET LE DROIT PUBLIC, Tome I, 215-233 (1974).

[493] Akehurst, for example, cites the inter-play between the customary law principle of liberty of State action (based on *Lotus*, but see above text at note 463) and the general principle of law imposing a duty to pay moratory interest on debt, as a question of hierarchy and hence, presumably, conflict of norms. This goes much further than the strict definition of Jenks and Karl as well as further than the wider definition suggested here (only an obligation as opposed to an explicit right, not the fall-back "negative permission" referred to by some of "what is not prohibited is allowed", can constitute conflict). Vierdag refers to a conflict between, on the one hand, Art. 19(2) of the UN Covenant on Civil and Political Rights of 1966 granting "to everyone *inter alia* the freedom to impart information of all kinds, regardless of frontiers, through any media of his choice" and, on the other hand, Art. 428 A of the International Radio Regulations of 1971, prescribing that "television broadcasting through a direct broadcasting satellite licensed by a State, which can also be received in the territory of neighbouring States, shall be subject to previous agreements of the licensing State with these neighbouring States" (Vierdag, *The Time of the 'Conclusion' of a Multilateral Treaty*, 60 BYIL 75, at 98 ff. (1989)). Here, we have a clear cut case of an explicit right (freedom under Art. 19(2)) conflicting with a positive obligation (requirement of prior consent under Art. 428 A). This is the conflict situation 3 we discuss below in section d.iii, a situation that would not be accepted as one of conflict by authors such as Jenks and Karl.

Jenks, it seems, was the first to adopt the strict or technical approach to conflict in international law. In 1953 he expressed the view that "[a] conflict *in the strict sense of direct incompatibility* arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties".[494] Karl as well (writing in 1981) remarked that "*[t]echnically speaking*, there is a conflict between treaties when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously".[495] Also Kelsen[496], Klein[497] and much later Wilting[498] adopted a similarly strict definition of "conflict", covering only mutually exclusive obligations.

Many other authors provide a broader definition of conflict. Rousseau (1932) refers generally to "la compatibilité des normes", "rapports juridiques … antinomiques" or one treaty "contredisant" another treaty.[499] Also Hersh Lauterpacht, writing in 1936, seems to hold a rather broad view, defining the word "inconsistency" as it was used in Art. 20 of the Covenant of the League of Nations as meaning "not only patent inconsistency appearing on the face of the treaty … but also what may be called potential or latent inconsistency … [such treaties] may become inconsistent and therefore abrogated, as soon as it becomes clear that their continued validity or operation is incompatible with the negative or positive obligations of the Covenant".[500] In 1952, Aufricht stated that "[a] conflict between an earlier and a later treaty arises if both deal with the same subject matter in a different manner". In 1965, Perelman (not limiting conflict to obligations) defined "antinomie" as "l'impossibilité d'appliquer simultanément, telles qu'elles sont énoncées, deux normes de droit positif qui sont assez précises pour être applicables en elles-mêmes et qui ne sont pas subordonnées l'une à l'autre par une disposition juridique impérative".[501] Importantly, also Sir Humphrey Waldock in the preparation of Art. 30 of the Vienna Convention held a broad view on conflict, noting that "[t]he idea conveyed by that term [conflict] was that of a comparison between two treaties which revealed that their clauses, or some of them, could not be reconciled with one another".[502] Capotorti focuses on "incompatibilité"

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[494] Jenks, *Conflict …*, 426 (emphasis added). Ibid. at 451: "A conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible".

[495] Wolfram Karl, *Conflicts Between Treaties*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (ED. BERNHARDT), 468-473, at 468 (1984), hereafter "Karl, *Conflicts …*".

[496] HANS KELSEN, THEORIE GENERALE DES NORMES, 161 : « Un conflit entre deux normes existe quand ce que l'une pose comme obligatoire est incompatible avec ce que l'autre pose comme obligatoire, et quand l'obéissance ou l'application de l'une des deux normes implique de façon *nécessaire* ou *possible* la violation de l'autre ». In HANS KELSEN, THEORIE PURE DU DROIT (TRANSLATION H. THEVENAZ) 144 (1988) (hereafter « Kelsen, *Théorie Pure …* »), a somewhat wider definition (not centred around the notion of obligation) was provided : « Quand on est en présence de deux normes simultanément valables, mais contradictoires, celui qui doit les appliquer (organe de l'Etat ou sujet de droit) ne peut se conformer à l'une sans violer l'autre ».

[497] Friedrich Klein, *Vertragskonkurrenz*, in WÖRTERBUCH DES VÖLKERRECHTS (ED. STRUPP, KARL AND SCHLOCHAUER), 555 (1962): "Das Rechtsproblem der Vertragskonkurrenz ist also dasjenige der Vereinbarkeit oder Unvereinbarkeit verschiedener Bestimmungen in Bezug auf denselben Sachverhalt in zwei oder mehreren völkerrechtlichen Verträgen. Praktisch bedeutsam sind nur diejenigen Vertragskonkurrenzen, in denen sich die Verttragsbestimmungen, insbesondere die Vertragsverpflichtungen, in zwei oder mehreren völkerrechtlichen Verträgen formal unauflösbar widersprechen (Kollosions- oder Konflikts-Vertragskonkurrenz)".

[498] Wilting makes a distinction between « Konkurrenzsituation », « Kollisionssituation » and « Konflikt ». A « Kollisionssituation » arises only when, as between two norms « die Rechtsfolgen nicht miteinander vereinbar sind, und zwar derart, dass eine gleichzeitige Anwendung der konkurrierenden Normen ausscheidet ». „Konflikt", in his view, arises only when two norms do, in actual fact, lead to mutual exclusiveness (WILHELM WILTING, VERTRAGSKONKURRENZ IM VÖLKERRECHT, 2-5, at 4 (1996)).

[499] Charles Rousseau, *De la Compatibilité des Normes Juridiques Contradictoires dans l'Ordre International*, 1932 RGDIP 133-192, 135. In the same sense, Salmon, *Antinomies …*, 285: "Par 'antinomies' nous entendons l'existence, dans un système déterminé, de règles de droit incompatibles; de telle sorte que l'interprète ne peut appliquer les deux règles en même temps, qu'il doit choisir ».

[500] Hersh Lauterpacht, *The Covenant as the "Higher Law"* 17 BYIL 54, 58 (1937).

[501] Chaim Perelman, *Les Antinomies en Droit*, *Essai de synthèse*, in LES ANTINOMIES EN DROIT (ED. CHAIM PERELMAN), 392-404, 399 (1965).

[502] YILC 1964, Vol. I, 125.

between norms, distinguishing between "conflit entre clauses obligatoires" and "divergences".[503] More recently, Czaplinski and Danilenko as well opted for a wider perspective on conflict.[504]

ii. The approach adopted in this study

In this work we shall approach the notion of "conflict" in the most open and non-dogmatic way. Like most authors, we use the term "conflict" of norms interchangeably with "inconsistent", "incompatible" or "contradictory" norms (as opposed to norms that complement or confirm each other). We do so even though some jurists have seen a difference between the notions of incompatibility (or inconsistency), on the one hand, and conflict, on the other.[505] We plan, moreover, to clearly distinguish between the *definition* of conflict and *how to solve* an alleged conflict. Our focus will be

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[503] Capotorti's starting point is « interférences » between norms. This notion includes, in his view, three possibilities: (1) "conflit entre clauses obligatoires" (i.e., « des engagements rigoureusement incompatibles, le respect de l'un comportant la violation de l'autre ») ; (2) « divergences » (« si celles-ci sont totales, on se trouve ramené au cas de l'incompatibilité et, si elles ne sont que partielles, elles laissent une marge plus ou moins grande de compatibilité »); and (3) norms that are « complémentaires » (« les cas où un accord a pour but d'en compléter un autre ou bien prévoit un comportement ou une situation entraînant l'application d'un autre accord ») (F. Capotorti, *Interférences dans l'ordre Juridique Interne entre la Convention et d'autres Accords Internationaux*, in LES DROITS DE L'HOMME EN DROIT INTERNE ET EN DROIT INTERNATIONAL, Actes du 2e Colloque International sur la Convention Européenne des Droits de l'Homme, 123-148, at 123-124 (1968), hereafter « Capotorti, *Interférences …* ».

[504] They state that "conflicts arise at the stage of application of the agreements when the later treaty in a particular situation violates the rights of any other party to the earlier treaty, or when the provision of the later treaty seriously infringes provisions of the earlier treaty which are indispensable for the effective implementation of the object or aim of that treaty" (Czaplinski and Danilenko, *Conflict …*, 13). See also Fastenrath, defining "Kollisionslücken" as situations where "zwei oder mehr Rechtssätze für einen Sachverhalt miteinander nicht vereinbare Rechtfolgen anordnen" (Fastenrath, *Lücken …*, 227). Or as Villiger noted in respect of treaty in conflict with a later custom: „the test will lie therein that the two rules cannot be applied simultaneously, and the gap cannot be bridged by a mode of interpretation or ascertainment which seeks to conform the customary to the conventional rule" (Villiger, *Customary …*, para. 322).

[505] In the preparation of Art. 30 of the Vienna Convention, for example, the earlier drafts referred to "conflict" (Waldock Report II, Art. 14, entitled "Conflict with a prior treaty"; and Waldock Report III, entitled "Priority of conflicting treaty provisions" in Rauschning, *Travaux …*, 228). As of the ILC Draft 1964, however, the word "conflict" was dropped and replaced by "incompatibility" (ibid., 229). This change was prompted by Roberto Ago. At the 742nd Meeting of the ILC (10 June 1964), Ago (as chairman) is reported to have said the following: "he doubted whether it was advisable to use the term 'conflict' [in Art. 65, now Art. 30]. In article 41 the Commission had referred to 'a further treaty relating to the same subject-matter'. Article 65 was concerned, *inter alia*, with the case in which all the parties to a treaty decided to conclude a new treaty to regulate the same matter in a different way. Whether the second treaty replaced the first entirely or only in part, it was not correct in that case to speak of a 'conflict' between the two treaties" (YILC 1964, Vol. I, 125). In response, Sir Humphrey Waldock (the special rapporteur who had selected the word "conflict") noted that "in his opinion, it was appropriate to use the term 'conflict', which was used in Article 103 of the Charter. The idea conveyed by that term was that of a comparison between two treaties which revealed that their clauses, or some of them, could not be reconciled with one another. The process of determining whether a conflict existed presupposed an element of interpretation. He did not believe that the fact that the parties to the two treaties might be the same made it inelegant to speak of a conflict; the point would be of interest only if the parties were in dispute as to the compatibility of the two treaties" (ibid., 125). Ago, however, "still believed that there could be no 'conflict' between two successive treaties concluded by the same parties. Either the second treaty prevailed entirely over the first, or the provisions of the first treaty which were not replaced by those of the second remained in force". Waldock (subsequently supported by Yasseen) replied, in turn, that "the problem with which article 65 attempted to deal was different. Even where the parties to the two treaties were the same, the case was not one of a desire to replace one treaty by another, but of a dispute in which one party claimed that the two treaties were incompatible" (ibid.). It was, finally, Amado who came up with a compromise. Amado, in support of Ago, pointed out that in his view "the word 'conflict' suggested contemporary things and was less appropriate when applied to successive ones". He then suggested to use the terms "compatible" and "incompatibility". "Incompatible" and "compatible" are also the terms that can now be found in, respectively, Arts. 30.2 and 30.3 of the Vienna Convention.

on the latter. Hence, we do not want to prejudice the question of *how to resolve* an alleged conflict by opting for one or the other technical *definition* of conflict.

This approach leads us to reject the narrow definition of conflict advocated, in particular, by Jenks (mutually exclusive obligations only). It may happen that in a certain treaty context "conflict" must be so defined (depending on the expressed intentions of the parties to the treaty), but to define it that strictly, generically and in isolation, is unwarranted. Indeed, by refusing to recognise certain situations as conflicts (such as a contradiction between a prohibition to do X and an explicit right that allows one to do X), Jenks' strict definition indirectly *resolves* a number of contradictions in favour of the strictest norm (*in casu,* in favour of the prohibition to do X, since not invoking the right to do X will avoid breaching the prohibition to do X). In those situations, the alleged conflict is then not solved by a rule on *how to solve* conflict but by the *very definition* of conflict. And this is exactly what we want to avoid. Although it may well be that the strictest norm prevails, this will not necessarily be so in all cases (the explicit right may, for example, be later in time or more specific). Carving out certain situations as not being conflicts "in the strict sense" or "technically speaking" (as Jenks and other authors do) is focusing on one type of conflict only, thereby ignoring the complexity of the potential forms of inter-play between norms. Doing so, one essentially solves part of the problem by ignoring it.

That "rights" under international norms are as important as "obligations" finds confirmation also in the drafting history of Art. 30 of the Vienna Convention. Art. 63.1 (now Art. 30.1) of the ILC Draft 1964 referred to obligations only ("the obligations of States parties to treaties the provisions of which are incompatible, shall be determined in accordance with the following paragraphs").[506] Following a comment by Israel ("reference should be made to the rights as well as the obligations of States"[507]), Art. 26.1 (now Art. 30.1) of the ILC Final Draft was changed into its current wording ("the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs").[508] Also Art. 30.4(b) makes explicit reference to obligations *and rights*.

Jenks himself acknowledged, for example, that "[a] difference which does not constitute a conflict [in the strict sense] may nevertheless defeat the object of one or both of the divergent instruments. Such a divergence may, for instance, prevent a party to both of the divergent instruments from taking advantage of certain provisions of one of them recourse to which would involve a violation of, or failure to comply with, certain requirements of the other. A divergence of this kind may in some cases, from a practical point of view, be as serious as a conflict". However, Jenks does *not* propose solutions for how to solve such "divergence". For Jenks, they are not conflicts "in the strict sense", hence they fall outside the (artificial and self-made) scope of "conflict of norms". This ostrich-technique of solving a problem by avoiding it is unacceptable.

iii. Why did some authors adopt a "strict" or "technical" definition of conflict?

But how then does one explain the strict approach to conflict, adhered to by a number of eminent authors?

Conflict is seen as an anomaly

Firstly, it seems that, for these authors, conflict of norms in a legal system implies an imperfection or shortcoming of that system. For these authors, conflict has, in other words, a negative ring to it and

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[506] Rauschning, *Travaux …*, 229.
[507] Ibid.
[508] Ibid., 231. Waldock, in his observations and proposals following governments' comments on the 1964 ILC Draft, noted the following in this respect: "In paragraph 1, the Government of Israel's suggestion that mention should be made of rights as well as of obligations appear to be well founded, even although the emphasis on the article may be primarily on obligations" (ibid., 230).

must be avoided. Hence, it should be defined strictly and cover situations only where the legal system does not offer clear solutions to the apparent contradiction.[509] But doing so, one confuses the *definition* of conflict with the tools available to *resolve* conflict.[510] One conflict may, indeed, be solved much easier than another (for example, when an explicit conflict clause has been inserted). And, in contrast, there may be conflicts where it is impossible for a judge to decide in favour of one or the other norm (that is, conflicts which constitute a *lacuna* in the law). But these are different *types* of conflict, not situations where there is no conflict as opposed to situations where there is conflict. The great majority of conflicts of norms has nothing abnormal or anomalous to it, that is, the legal system can cope with them. However, the fact that a conflict is readily solved does not mean that there is no conflict. In the event one treaty explicitly states that in case of conflict, another earlier treaty prevails, the solution to conflict is obvious: the earlier treaty prevails. But this easy *solution* to conflict, does not mean that there *is* no conflict. In such cases, determining conflict will, indeed, be crucial to decide exactly when and to what extent the earlier treaty prevails. The same applies in respect of the *lex posterior* rule in Art. 30.3 of the Vienna Convention: "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty". Here as well, the *solution* to any conflict or contradiction is clear: the later treaty prevails. But this does not do away with the problem of conflict, in particular, the problem of defining exactly when one provision is not "compatible" with another. The same can be said in respect of Arts. 53 and 64 of the Vienna Convention, giving an unambiguous preference to rules of *jus cogens* in the event a treaty "conflicts" (Art. 53) or "is in conflict with" (Art. 64) *jus cogens*.[511]

In all these cases (explicit conflict clause in favour of the earlier treaty, the *lex posterior* rule in Art. 30 and *jus cogens* under Arts. 53/64), to use Jenks' strict definition of "conflict" would lead to absurd situations. Under this definition, a prohibition to do X as opposed to an explicit right to do X would not constitute "conflict" (since there is a way to avoid breach under both norms by simply adhering to the prohibition and not invoking the right). Hence, under Art. 30, for example, an earlier treaty

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[509] Hans Kelsen, in his original writings, went even further and posited that a legal system *cannot* have conflict of norms. In his view, any legal system is founded on one "*Grundnorm*" which explains and justifies all other norms. For this "*Grundnorm*" to be the genuine foundation of the legal system, it cannot simultaneously accord validity to two norms which are contradictory without threatening the unity of the legal system (Kelsen, *Théorie Pure …*, 146). In Kelsen's view, « La science du droit … se trouve, à l'instar des sciences de la nature, dans l'obligation de présenter son objet comme une unité. Le critère négatif d'une telle unité est l'absence de contradiction et il vaut aussi dans le domaine des sciences normatives » (ibid., 145). As a result, « [l]orsque la science du droit se trouve en présence de normes contradictoires, elle s'efforce de résoudre la contradiction en montrant qu'elle est seulement apparente. Si elle n'y parvient pas, elle considère que les normes en question sont dépourvues de sens et que de ce fait elles n'appartiennent pas au domaine du droit » (ibid., 145). Kelsen subsequently changed his mind and acknowledged the existence of conflict of norms in a legal system. He did so because a conflict of norms is a conflict of will or intent, not a logical contradiction where only one of the propositions can be valid: "les normes sont créées par des actes de volonté et … expriment le sense de tels actes. Ce ne sont donc pas des actes de connaissance du genre de ceux auxquels la logique s'applique … quand la science du droit se trouve en présence de deux normes contradictoires, elle peut seulement formuler deux propositions constatant que chacune de ces normes est une norme valable, il n'y a pas de contradiction logique entre elles, car une contradiction [logique] ne peut apparaître que dans le cas où une proposition étant vraie, l'autre est nécessairement fausse » (ibid., 147). Indeed, a conflict of norms takes the form, for example, of state A being obliged to do X and –X at the same time (as a result of different expressions of intent in two different norms), but state A can, in principle, do either X or –X. In contrast, a logical contradiction takes the form of, for example, saying that one and the same cat is black and white. Here, only one of the two can be correct.

[510] As illustrated above, in note 505, Ago seems to make the same mistake. He refused to see a later treaty aimed at overruling an earlier one as two treaties "in conflict", on the ground that it should clearly be the later treaty that prevails. In that situation the solution to the conflict is, indeed, obvious (the later treaty prevails). And if the later treaty explicitly terminates the earlier one, there is, indeed, no conflict. But if the fact that the later treaty prevails is to be derived from the implicit intention to overrule the earlier treaty or the *lex posterior* rule in Art. 30, conflict must be acknowledged before one can solve it. The extent of the conflict will, indeed, determine the extent to which both the earlier and the later treaty apply.

[511] Note, indeed, that here the word "conflict" is used, in contrast to Art. 30 where the term "incompatible" was chosen (see note 505).

imposing the prohibition would in all instances prevail over a later treaty granting the explicit right (both treaties are not incompatible, hence there is no conflict and Art. 30 does not apply so that the earlier treaty continues to apply). But it may have been the very intention of the later treaty to detract from the earlier prohibition and to overrule that prohibition in certain circumstances by granting an explicit right.[512]

Equally, under Arts. 53 and 64, imagine a treaty between two states in which they grant each other the right to trade in slaves and impose certain regulations in respect of slave trade (without *obliging* each other to trade in slaves). Under Jenks' strict definition of conflict, there would not be a conflict between this treaty and the *jus cogens* prohibition to trade in slaves. The states party to the treaty are not *obliged* to engage in slave trade. Hence, there are no mutually exclusive obligations and not to exercise the rights under the treaty solves the apparent conflict. In other words, only if a treaty *obliges* the trade in slaves would there, according to Jenks, be a conflict and only then would the treaty be invalid under Arts. 53 and 64.

Conflict in domestic law

Secondly, the authors adhering to a "strict" or "technical" definition of conflict seem to be influenced also by domestic law, where for individuals subject to national legislation (i) a prohibition or prescription imposed by the state prevails over individual freedom and (ii) prohibitions prevail, at least according to some authors, over prescriptions. de Vattel embodies the clearest example of this transposition of domestic law principles into international law. He offered the following three conflict rules: "Dans tout les cas où ce qui est seulement permis se trouve incompatible avec ce qui est prescrit; ce dernier l'emporte … de même, la Loi, ou le Traité qui permet, doit céder à la Loi, ou au Traité qui défend … Toutes choses d'ailleurs égales, la Loi ou le Traité qui ordonne cède à la Loi, ou au Traité qui défend ».[513]

Note, first of all, that de Vattel recognised these situations (some involving only explicit rights or permission, not obligations) as conflict situations. Nonetheless, to transpose these solutions allegedly offered in domestic law to international law would be unsound. In many cases, the prohibition or prescription will prevail over the permission, but not necessarily so in all cases. Whereas, in domestic law, an individual cannot contract out of prohibitions or prescriptions by exercising its contractual freedom, in international law, states do have this power and can, with the consent of other states, detract from previous obligations by means of granting each other explicit rights. Equally, a positive obligation may prevail over a negative one, but this is not guaranteed. In international law, all of these situations must be recognised as conflicts. Their resolution will not so much depend on the prescriptive, prohibitive or permissive nature of the norm, but on other factors such as timing and material scope.[514]

In sum, it may be so that "mutually exclusive obligations" are a particularly grave situation of conflict (i.e., conflict in the "strict" or "technical" sense). But it is not the only one. To submit differently inevitably leads to pre-determined solutions to conflict before one has even identified the conflict. Having rejected Jenks' strict definition of conflict, we next attempt to provide a more accurate and neutral definition of conflict.

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[512] Under Jenks' strict definition, granting such explicit right could then only be effective if the later treaty setting out the right explicitly states that it terminates or derogates from the earlier treaty.

[513] DE VATTEL, LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE, BOOK II, CHAP. XVII, paras. 312-313 (1758), hereafter « de Vattel, *Droit des Gens …* ». See also GROTIUS, LE DROIT DE LA GUERRE ET DE LA PAIX (ED. D. ALLAND and S. GOYARD-FABRE), 413 : "Que ce qui permet cède à ce qui ordonne".

[514] De Vattel himself recognised as an exception to his earlier three principles the fact that "Si le conflit se trouve entre … deux Traités affirmatifs aussi conclus entre les mêmes … Etats ; le dernier en date l'emporte sur le plus ancien » (de Vattel, *Droit des Gens …* , para. 315).

b. An appropriate definition of conflict (normative conflict *versus* conflict in the applicable law)

Notwithstanding the varying definitions of conflict set out earlier (adopted by different authors), it is difficult to find reasons why a conflict or inconsistency of one norm *with another norm* ought to be defined differently than a conflict or inconsistency of one norm *with other types of state conduct* (e.g., wrongful conduct not in the form of another norm). Essentially, two norms are, therefore, in conflict if one constitutes, has led or may lead to, a breach of the other.[515] This may sound like a truism, but it moves the debate on "what is conflict" from the abstract relationship between two norms of international law, to the more concrete and common question of "when is there a breach of a given norm". Another advantage of approaching conflict in terms of breach is that conflict thereby becomes an "objective" question, based on the rights and obligations set out in the norms in question (to be determined by normal rules on, for example, treaty interpretation). Conflict does not turn then on a question of contradictory subjective "intentions" held by one or the other state.

Now, one norm of international law (as opposed to other state conduct) may breach another norm either

(i) *in and of itself*, by its mere conclusion or emergence.[516] Here, one norm constitutes an inherent breach of the other. We shall refer to this as "inherent conflicts"; or

(ii) by granting certain rights or imposing certain obligations which, *once exercised or complied with*, will constitute a breach of the other norm. Here, one norm has or may lead to a breach of the other.

The situation under (ii) is the more common one since norms of international law rarely prohibit the conclusion or emergence of other *norms*, they rather prohibit other *state conduct*. Under (ii), the question then becomes: if there are two norms, does the exercise of rights or compliance with obligations under one of these norms breach an obligation under the other norm?

In some cases, such breach will occur *necessarily*, whenever either of the two norms is complied with as required (as in cases of mutually exclusive obligations). We shall refer to this as "necessary conflicts". In other instances, there is a margin of discretion and only if a state actually decides to exercise a right will the breach materialise. We shall refer to this as "potential conflicts".

However, whatever the nature of the conflict (inherent, necessary or potential), it should be recognised that all of these instances do raise questions of conflict. No situation should be excluded *a priori* from the field of conflict of norms. If not, one risks solving a conflict by not realising that there is one.

Most conflicts that arise before an international tribunal result from the *exercise or implementation* of one norm which is, allegedly, in breach of another norm.[517] Such conflict results then from the application by one state (state A) of a norm (norm 2) which, according to another state (state B), breaches another norm (norm 1). To put it differently, state B will sue state A for breach of norm 1 whereas state A will invoke norm 2 in defence of the alleged breach. This raises the question of necessary or potential conflict of norms. Below, in order to resolve such conflicts, we refer to these conflicts as "conflicts in the applicable law".[518]

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[515] The word breach is used here interchangeably with "violation", "incompatibility" or "inconsistency".

[516] An example would be a multilateral treaty explicitly prohibiting the conclusion of certain *inter se* agreements. See Chapter VI, section C.1.

[517] As Sir Gerald Fitzmaurice noted: "The whole question of what inconsistency between two treaties means is a difficult one. Two treaties may be inconsistent in the sense that they set up mutually discordant systems, but so long as these do not have to be applied to or between the same parties, it may be quite possible to apply both … In short, there may be a conflict between the treaties concerned, without this necessarily resulting in any conflict of *obligation* for any of these parties" (YILC 1958 II, 20 ff., 44).

[518] See Chapter VI, section A.1.a.

An international tribunal may also be faced with inherent conflicts, that is, situations where one norm is alleged to constitute, in and of itself, breach of another norm. Below, we refer to this as "normative conflict". Normative conflict may arise in the abstract, without there being any other state conduct at issue[519], or in a dispute on the legality of certain state behaviour (in which case the defendant could claim, for example, that the norm which it has allegedly breached is an "illegal" one).[520]

Below, we shall use one further distinction, namely that between "apparent conflicts" and "genuine conflicts". An apparent conflict is then one which is either (i) not genuine in that it can, for example, be "interpreted away" or (ii) genuine, once all of the conflict-avoidance techniques set out in Chapter V have proven to be unsuccessful.

It should be stressed, finally, that the wider *definition* of conflict suggested here, does not, and should not, prejudice in any way how conflicts are *to be resolved*. In some cases it will, indeed, be the (stricter) obligation that prevails (the standard result under Jenks' and Karl's very *definition* of conflict) but as we shall see below this is not necessarily the case. In any event, if the (stricter) obligation does prevail this is not because of the definition of conflict but because of the will or intention of the parties, expressed either explicitly or implicitly, in conflict rules.

c. Pre-conditions for conflict to arise

Having defined conflict of norms as a situation where one norm constitutes, may lead or has led to, a breach of the other norm, we next set out certain pre-conditions that must be fulfilled for conflict to arise.

i. Overlap ratione materiae, personae and *temporis*

Firstly, it must be stressed that there can be no conflict if either the subject matter or the parties bound by the two norms are *completely* different. There must at least be some overlap in terms of subject matter and state-parties (at least one party must be bound by both rules). As Capotorti noted: "Pour qu'il y ait interférence entre deux accords, il faut qu'ils aient au moins un point de contact subjectif et un point de contact objectif; subjectif, en ce sens qu'un ou plusieurs États sont parties à ces deux accords; objectif, en ce sens qu'une même matière ou des matières connexes sont réglées, dans les deux accords, par une ou plusieurs dispositions ».[521]

To these requirements of overlap *ratione personae* and *ratione materiae*, one must add the need for overlap *ratione temporis*: only if two norms exist or inter-act at one point in time can there be conflict. Such inter-action may continue over a long period of time, when it leads only to one norm being dis-applied in favour of the other (as in conflicts in the applicable law, Chapter VI, section D below). The inter-action may also be short-lived in that it leads instantaneously to the invalidity or termination of one of the two norms (as in certain normative conflicts, discussed in Chapter VI, section B). However, when two norms apply at completely different points in time, there can be no conflict. In such cases, the question may arise as to which of several norms prevailing at *different* moments in time should apply to a particular case. This is the problem of the so-called "inter-temporal law". Although, in this situation, the two norms in question may be contradictory or deal with the same issue in different ways, they do not conflict since both norms have a different scope *ratione temporis*. Some elements of the inter-temporal law are further addressed below.[522]

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[519] As in ICJ advisory procedures or under Art. 66 of the Vienna Convention (conflict with *jus cogens*).
[520] See Chapter VI, section C.
[521] Capotorti, *Interférences* ... , 123.
[522] See Chapter V, section B.4.

ii. Conflict arises for one state in its relationship with another state

Secondly, one must approach conflict *from the perspective of a given state* (or, as the case may be, a given international body[523]). This state (or body) must necessarily be *bound by both rules*. If it is bound only by one of the two rules, there can be no conflict, at least not from the perspective of that particular state (*pacta tertiis*) or body.

In addition, one must assess conflict in terms of a legal relationship of a given state (or body) *with a given other state*. As further explained below, this second state must not necessarily be bound by both rules. It may be bound by only one of them or by both of them.[524]

d. Normative conflict and the four conflict situations in case of conflict in the applicable law

When faced with a normative conflict, that is, an allegation that one norm constitutes, in and of itself, breach of another norm, the definition of conflict and question as to whether there is, indeed, genuine conflict depends exclusively on the requirements set out in the first norm. The content of the primary obligation in the first norm determines whether there is breach. If so, there is normative conflict.

In respect of conflicts in the applicable law the situation is different and more complex. Here, we are faced with an allegation that there is conflict of norms because compliance or invocation of one norm has led, or would lead, to breach of the other norm. Focusing on the three main functions of norms in international law (prescriptive, prohibitive or permissive), a conflict in the applicable law *from the perspective of state A in its legal relationship with state B* may then take one of the following four forms:

[523] Such as a WTO panel or a WTO committee on which conflicting obligations may be imposed, such as the issuance of reports within different time limits.

[524] The second party in this conflict relationship, i.e., the party towards which an obligation under at least one of the two norms is owed, may also be an international body, such as a WTO panel or a WTO committee. States may, for example, have contradictory obligations, under different WTO rules, towards a WTO panel or committee to submit documents by a certain time.

CONFLICT SITUATION	NORM 1 (Obligation of State A v-à-v State B)	NORM 2 (Compliance with Obligation or Exercise of Explicit Right[525] by State A Constituting a Breach of Norm 1 v-à-v State B)
1	*Positive obligation*: in a given situation state A **"must do" X**	*Positive obligation*: in the same situation state A **"must do" Y** (Y being either different from or mutually exclusive with X)
2	*Positive obligation*: in a given situation state A **"must do" X**	*Negative obligation*: in the same situation state A **"must not do" X**
3	*Positive obligation*: in a given situation state A **"must do" X**	*Explicit right*: in the same situation state A **"may do" Y**
4	*Negative obligation*: in a given situation state A **"must not do" X**	*Explicit right*: in the same situation state A **"may do" X**

A permissive norm (allowing a state to do something) cannot be breached. Hence no conflict can arise in case norm 1 is a permissive norm granting an explicit right.

Conflict situations 1 and 2 constitute what we referred to earlier as "necessary conflicts", that is, whenever one norm is complied with as required, a breach or conflict with the other norm will necessarily arise.[526] Conflict situations 3 and 4 constitute what we denominated "potential conflicts". Here, a breach or conflict will emerge only in case the explicit right under norm 2 is actually exercised.

On that basis, all possible situations of conflict of norms can be illustrated as follows:

[525] It must be recalled that the right should be one that was granted *explicitly*. The residual right in general international law sometimes referred to of "what is not prohibited is allowed", based on the *Lotus case* (PCIJ, Ser. A, No. 10 (1927)) cannot be sufficient to overrule a conflicting obligation (see *supra* text at note 479).

[526] The exception to this are conflict situations 1 where the obligations are merely different, not mutually exclusive, as discussed below.

<table>
<tr><th colspan="2">CONFLICT OF NORMS</th></tr>
<tr><th>NORMATIVE CONFLICT</th><th>CONFLICT IN THE APPLICABLE LAW</th></tr>
<tr><td rowspan="2">Conflict depends solely on the conditions for breach of the particular norm in question</td><td>Necessary conflicts (conflict situations 1 and 2)[527]</td></tr>
<tr><td>Potential conflicts (conflict situations 3 and 4)</td></tr>
</table>

As noted earlier, an obligation (be it prescriptive or prohibitive) can be unconditional or conditional. State A can be obliged (not) to do X either (i) automatically, as soon as certain factual circumstances are present (i.e., unconditionally as under the GATT national treatment obligation) or (ii) only in case it exercises a certain right (e.g., on the condition that it decided to exercise the right to take health measures under GATT Art. XX(b); only then will the obligation of "necessity" in Art. XX(b) be activated). Once again, the flip side of certain obligations being conditional is that many permissive norms are conditional, i.e., the explicit right granted by them can only be relied upon in case certain obligations are met. Hence, a permissive norm may have a prescriptive component also. And a conflict may arise as between, for example, GATT Art. XI in combination with GATT Art. XX(b) (the latter prescribing the obligation of "necessity"; if this obligation is not met, the GATT Art. XI prohibition to restrict trade applies), on the one hand, and a norm in an MEA granting an explicit right to restrict trade *not* conditional on "necessity", on the other hand. A state bound by both norms may then apply a trade restriction prohibited by GATT (i.e., not meeting the "necessity" requirement in GATT Art. XX(b)), but explicitly allowed for under an MEA. This conflict, as between a negative obligation under GATT (the trade restriction may *not* be imposed) and a permissive norm under an MEA (the trade restriction may be imposed, notwithstanding the "necessity" requirement) then falls under conflict situation 4.[528]

Recall also that in case one norm simply abrogates another norm or one norm is an explicit carve out (or exception) of another norm, the two norms can be applied side by side.[529] In the first case, the abrogating norm simply terminates the other norm. In the second case, one norm has a different scope of application than the other. In these cases, no conflict arises. The same is true when one norm explicitly refers to or incorporates the conditions in another norm. Even though both norms set out different obligations, these obligations must then be applied cumulatively and both norms accumulate.[530]

Let us give some examples under each of the four conflict situations sketched above. Firstly, some drawn from the WTO context. Secondly, some hypothetical examples illustrating the situation in more practical terms.

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[527] Ibid.

[528] A similar situation arises in case one human rights convention would provide for broader exceptions to the respect for certain human rights (and is hence less favourable to the individual) there where another human rights convention allows for less exceptions (and is hence more favourable to the individual). In that event, the second convention sets out a negative obligation (not to interfere, for example, with the property rights of individuals in a certain way), the first convention an explicit right (i.e., an explicit exception to the protection of property rights allowing the state to intervene). One then has a conflict situation 4. See Capotorti, *Interférences* ... , 139.

[529] See text at notes 483 and 484.

[530] See the relationship between the Safeguards Agreement and GATT Art. XIX, discussed in text at note 488.

i. Conflict Situation 1: Conflicting Positive Obligations

Conflicting positive obligations may take the form of either

(i) two positive obligations that are merely different but which may both be complied with at the same time ("conflicting positive obligations that are merely different"); or
(ii) two positive obligations that are mutually exclusive, i.e., which cannot possibly be complied with at the same time ("conflicting positive obligations that are mutually exclusive").

Conflicting positive obligations that are merely different

A conflict between positive obligations that are simply different would arise when a WTO rule were to prescribe, for example, a minimum protection term of 50 years for copyrights, there where a rule enacted in the WIPO context were to prescribe a minimum of 40 years only. Compliance with the WIPO rule (norm 2) would constitute a breach of the WTO rule (norm 1). But in practice it is possible to comply with both norms, that is, by granting 50 years of protection (in that sense the conflict is a potential conflict only; not a necessary one[531]). The two obligations are hence different but not mutually exclusive. The same type of conflict would arise in case a WTO member must pursuant to a DSU rule submit a written brief in a legal procedure within 2 weeks, there where under a rule of the Subsidies Agreement it must submit such brief already within one week.[532] Compliance with the DSU rule (norm 2) would constitute a breach of the Subsidies rule (norm 1). But here again there is a way to comply with both norms, namely by submitting the brief within a week. Hence, the two obligations are different but not mutually exclusive.

Another example would be one norm prescribing that for a certain trade restriction to be validly imposed conditions A, B and C must be met, whereas another norm prescribes that for the same restriction to be imposed, in the same circumstances, it is sufficient that condition A be met. In that event, there would be an overlap with conflict situation 4 below, since under the first norm the measure could be prohibited (conditions B and/or C are not met), while under the second norm it is permitted (condition A is met).[533] There may be a case, for example, where the conditions for a trade restriction to be justified under GATT Art. XX are *not* met, whereas the same trade restriction is justified under the TBT Agreement (GATT Art. XX having a closed list of justifications, TBT Art. 2.2, referring to "a legitimate objective" more generally, without providing an exhaustive list).

Crucially, as pointed out before[534], in case one norm simply adds rights or obligations to another norm on the same subject matter, without detracting from them, i.e., without there being a possibility that the implementation or reliance on one norm breaches the other norm, both norms accumulate (and must be complied with at the same time) and no conflict arises. This would be the case, for example, if norm 1 imposes an obligation not to dump oil on the high seas, while another norm prescribes to emit certain signals on the high seas. Both obligations must then apply simultaneously.

A more concrete example of conflicting positive obligations that are merely different is one rule which prescribes that on Saturdays 8 a.m. I must jog 10 km in the park, whereas another rule prescribes that

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[531] See notes 526 and 527.
[532] An example in terms of conflicting prescriptive obligations resting on an international body would be a case where a WTO panel must issue its final report within 6 months under one rule, but within 3 months under another.
[533] Such conflict between two positive obligations would have arisen also in respect of safeguards had the Safeguards Agreement not explicitly referred back to the conditions under GATT Art. XIX. Without such cross-reference, a safeguard could then be legal under the Safeguards Agreement, but illegal under the GATT (since not meeting the "unforeseen developments" condition set out only in GATT). As noted above, such conflict would then have to be resolved by applying the *General Interpretative Note to Annex 1A*, giving preference to the Safeguards Agreement.
[534] See text at note 481.

on Saturdays I must jog 20 km in the park. Compliance with the first norm (jogging only 10 km) would mean violating the second (20 km). But once again it is possible to comply with both norms at the same time, namely by jogging 20 km. Nonetheless, conflict arises.[535]

When faced with conflicting positive obligations that are merely different, one could submit (and Jenks and Karl would certainly do so under their strict definition of conflict) that since both obligations can be complied with at the same time, there is no conflict. Under our examples, one should just protect copyright for 50 years, submit the brief within a week or jog 20 km in the park. But this type of reasoning shows exactly why a strict definition of conflict is not only about *defining* conflict but actually *resolves* conflict. The result of Jenks' and Karl's strict definition here is, indeed, *an absolute preference for the strictest obligation*. It may well be so that the strictest obligation is to prevail, but this decision cannot be made with reference to some technical definition of conflict. Take, for example, our jogging in the park hypothetical. It may well be so that the rule prescribing 20 km was agreed upon in 1995 and subsequently it was thought that 20 km was too much so that in a later rule, enacted in 2000, only 10 km were called for. Following Jenks' and Karl's definition of conflict, there would not be a conflict and the 20 km rule would simply prevail (both obligations can be complied with at the same time).[536] However, considering the contractual freedom of states, as confirmed in Art. 30.3 of the Vienna Convention, it must be possible for states to soften an obligation by means of a later norm in time.[537] Although, in our hypothetical, the two provisions are not "mutually exclusive", they are clearly "different" (20 as opposed to 10 km) and compliance with the later rule (10 km) means violating the earlier one (20 km). Both rules are hence "incompatible" and, pursuant to Art. 30.3, the later rule in time (10 km) must prevail (i.e., "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty").

Conflicting positive obligations that are <u>mutually exclusive</u>

A conflict between positive obligations that are mutually exclusive arises, for example, when one rule prescribes that on Saturdays 8 a.m. I must be jogging in the park, whereas another rule prescribes that at that very same time I must be working in the office. Here, complying with the former obligation necessarily means violating the latter, and vice versa. In other words, in this circumstance, the two norms are not only different, they are mutually exclusive. This is the type of conflict (a serious one, indeed) that even Jenks and Karl would recognise as "conflict". It is part of what we referred to above as "necessary conflicts". In the WTO context, it is very difficult, if not impossible, to point at examples of this type of conflict. WTO rules, in particular procedural or institutional WTO rules, may impose different positive obligations (e.g., in terms of recommendations to be made by a panel and time-limits to be respected[538]), but this author has not been able to find any situation where one WTO rule prescribes a certain conduct there where another WTO rule prescribes other conduct *that cannot be complied with at the same time*. In most, if not all, situations, one of the two forms of conduct will simply be more demanding than the other, and complying with the stricter norm will mean compliance also with the other, more lenient, norm.

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[535] In contrast, if one norm were to state that on Saturdays I must go shopping and another requires that I must also go jogging, no conflict arises. Both norms would then accumulate, in that the implementation or reliance on one norm cannot lead to breach of the other. Both norms address different actions. Thus, in these circumstances, I would be under an obligation to both shop and go jogging on Saturdays.

[536] Although, I am sure, they would invoke the *lex posterior* rule in favour of 10 km. But technically speaking they could not do so under their definition of conflict since *lex posterior*, as expressed in Arts. 30 and 59 of the Vienna Convention, requires an "incompatibility" before it can be said that the later rule "prevails" (unless, of course, the later rule explicitly states that it is intended to overrule the earlier one).

[537] And this without having to state explicitly in the later norm that the earlier norm is terminated. If this were done, no conflict would arise.

[538] Compare, for example, DSU Art. 19.1 to Art. 4.7 of the Subsidies Agreement.

ii. *Conflict Situation 2: Conflict Between a Positive and a Negative Obligation*

Examples of one norm *prescribing* certain conduct and another norm *prohibiting* the same conduct in the same circumstance are: a rule in an environmental convention prescribing trade restrictions in respect of certain products (say, allegedly endangered species), as opposed to a WTO rule (say, GATT Art. XI in combination with GATT Art. XX) prohibiting trade restrictions in the same circumstances. As amongst WTO rules it is difficult to find this type of conflict, especially in respect of substantive trade provisions. As noted earlier, WTO rules mostly *prohibit* the imposition of trade restrictions, they do not impose positive obligations on WTO members to *restrict* trade (not even under agreements such as the SPS Agreement). The WTO is about negative integration, not positive harmonisation. To give a more concrete example of conflict between a positive and a negative obligation: one rule prescribes that I go for a walk in the park on Saturdays, another rule prohibits me from walking in the park on Saturdays.

This type of conflict between positive and negative obligations also meets the strict definition of Jenks and Karl: compliance with one norm necessarily means violating the other. It is part also of what we referred to as "necessary conflicts".

iii. *Conflict Situation 3: Conflict Between a Positive Obligation and an Explicit Right*

The following are examples of conflict between a positive obligation and an explicit right. One rule in an environmental convention prescribes an import ban on certain products (say, endangered species), as opposed to another rule in the same or another environmental convention which states that certain imports of endangered species are allowed as long as they carry the necessary documents and have been inspected (i.e., a norm granting an explicit right to allow imports). One WTO rule may prescribe copyright protection of minimum 50 years, there where another WTO rule or a WIPO provision grants an explicit right not to protect certain copyrights. One rule may prescribe that I work in the office full time Mondays to Fridays, another rule may give me an explicit right to go for a walk in the park on Tuesdays and Thursdays. Under all these example, to exercise the explicit right granted in the second norm (allowing inspected imports, not protecting copyright and going for a walk in the park on Tuesdays and Thursdays) necessarily results in breaching the obligation imposed in the first norm (the obligation to ban imports, to protect copyrights for 50 years or to go to work every weekday). Recall that in these circumstances no conflict arises in case the second norm explicitly states that it derogates from or is an exception to, the first norm.[539]

Here again, Jenks and Karl would deny the existence of conflict, since in these situations, it is perfectly possible to comply with the positive obligation (to ban imports, to protect for 50 years or to work a full week) by simply not exercising the right granted in the other rule. In that sense, both norms are different, but not mutually exclusive. As a result, under Jenks' and Karl's definition these examples would *not* constitute conflict and the positive *obligation* would simply prevail over the explicit *right*.

However, as pointed out earlier, it may well be the case that the creators of the explicit right wanted this right to prevail over the positive obligation, for example, in case they concluded the norm granting the right *subsequently* to the norm prescribing the positive obligation or in case they wanted the explicit right to constitute an *exception* to the positive obligation. To preclude that the explicit right prevails over the positive obligation simply because of some technical *definition* of conflict is unacceptable. One must, first, accept the *existence* of a conflict and only then, second, look for the parties' intentions or more objective rules so as to *resolve* the conflict. If not, one risks to consistently elevate *obligations* in international law over and above *rights* in international law.

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[539] As noted earlier, if a norm is explicitly identified as an exception then the scope of application of the general rule is carved out and the two norms (the general rule and the exception), having a different scope of application, accumulate (they do not conflict).

This preference for obligations over and above rights, inherent in Jenks' and Karl's strict definition of conflict, is, indeed, reminiscent of one very traditional view of international law where the starting point is "complete freedom" for all states. Pursuant to this view, norms of international law simply impose "complementary obligations" carving out of this freedom. In modern times, however, states are also granted certain rights which detract from earlier agreed upon obligations (say, an explicit right to restrict trade in certain "non-green" products, there where a previous obligation imposed a general prohibition to impose trade restrictions).

Moreover, to consistently prefer obligations over and above explicit rights is at variance also with another principle of international law, of which the value has rightly been questioned[540], namely that of *in dubio mitius*. Pursuant to this principle, explicitly confirmed by the Appellate Body in *EC – Hormones*, "if the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon a party".[541] If in the *interpretation* of an obligation a somewhat deferential approach were required (something that is highly questionable[542]), then *a fortiori* an *explicit right* granted to a state in contradiction with another *obligation* should be taken seriously and not consistently have to give way to such obligation.

In the *Lockerbie* case the ICJ confirmed the fact that a positive obligation incompatible with an explicit right constitutes "conflict". In that case, Libya invoked an explicit right granted to it under the Montreal Convention to keep the two Libyan suspects of the Lockerbie bombing in Libya so as to try them there (Art. 7 of the Convention[543]). Nonetheless, the United States and Libya invoked a UN Security Council resolution imposing an obligation on Libya to surrender its two nationals to the United States and the United Kingdom. In that situation, the ICJ, in its 1992 order on provisional measures, found *prima facie* that, pursuant to Article 103, "the obligations of the Parties in that respect [contained in UN Security Council resolution 748] prevail over their obligations under any other international agreement, including the Montreal Convention".[544] For Art. 103 to be activated there must be conflict. Here, the ICJ did activate Art. 103 in the event of a positive obligation (to surrender the two suspects pursuant to the Security Council resolution) contradicting an explicit right (not to extradite the suspects on condition of trying them in Libya under the Montreal Convention). Hence, the ICJ as well regards this situation (conflict situation 3) as one of conflict.

iv. Conflict Situation 4: Conflict Between a Negative Obligation and an Explicit Right

The same applies in respect of conflict situation 4. The following are examples of one norm prohibiting a state to do something as opposed to another norm granting that state an explicit right to do exactly that. A WTO rule prohibits the imposition of certain trade restrictions (say, GATT Art. III, prohibiting the discrimination of domestic products over and above imports), there where another WTO rule grants an explicit right to impose these trade restrictions in certain circumstances (such as,

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[540] For criticism that this principle is of doubtful value in international law, see Hersh Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 1949 BYIL 48, 59-63; Hersh Lauterpacht, *Report to the Institute of International Law*, YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW 1950, I, 407-420 and MCNAIR, THE LAW OF TREATIES 765-766 (1961).

[541] Appellate Body report on *EC – Hormones*, footnote 154, quoting from Jennings and Watts, *Oppenheim's ...*, 1278.

[542] Normally, the rules set out in Arts. 31 and 32 of the Vienna Convention should suffice to determine the meaning of a treaty norm. To interpret obligations for one state restrictively could, indeed, amount to not giving the intended effect to the rights of another state.

[543] Art. 7 provides : « The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution ». In that sense, the Libyan right invoked under Art. 7 is (much like GATT Art. XX) a conditional one: it may refuse to extradite the suspects but then it must prosecute them (the way GATT Art. XX allows for trade restrictions if certain conditions, e.g., of necessity are met).

[544] *Lockerbie case* (provisional measures), ICJ Reports 1992, para. 42.

Art. 27.3 of the Subsidies Agreement granting a right to developing country members to provide subsidies contingent on the use of domestic products over and above imports until the year 2000). Or, a WTO rule that prohibits trade restrictions (say, GATT Arts. III or XI in combination with GATT Art. XX), as opposed to another rule in an environmental convention which grants an explicit right to impose trade restrictions on certain products (say, products harming the ozone-layer or endangered species coming from third-parties). Or, one rule prohibiting that I go to the park at all, as opposed to another rule explicitly allowing me to have a walk in the park on Tuesdays and Thursdays. Recall, once again, that in these circumstances no conflict arises in case the second norm explicitly states that it derogates from or is an exception to, the first norm.[545]

Here as well, to exercise the explicit right (to grant certain subsidies until the year 2000, to impose trade restrictions in respect of certain "non-green" products or to go for a walk in the park on Tuesdays) necessarily means breaching the other rule (prohibiting discrimination, the imposition of trade restrictions or walks in the park). For Jenks and Karl, however, these situations would not constitute conflict since complying with the negative obligation is possible by simply not exercising the right. But this strict *definition* of conflict, once again, *resolves* the conflict. And it does so automatically in favour of *obligations* over and above *rights*.

e. The definition of conflict in WTO jurisprudence

i. The notion of "conflict" as it is found in different WTO provisions

Given the multitude of WTO agreements and rules, certain WTO provisions regulate what to do in the event of conflict between different WTO provisions (discussed in Chapter VII, section A.1.d below). Two of these conflict clauses have attracted considerable attention and necessitated panels and the Appellate Body to define the notion of "conflict". The first of these clauses is set out in a *General Interpretative Note to Annex 1A* of the Marrakesh Agreement. It provides as follows:

> "In the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A to the [Marrakesh Agreement], the provision of the other agreement shall prevail to the extent of the conflict" (underlining added).

In other words, in the event of conflict between, for example, a GATT provision and a TBT, Subsidies or TRIMS provision, the TBT, Subsidies or TRIMS provision prevails over the GATT provision.[546]

The second conflict rule that has been clarified through case law is found in DSU Art. 1.2:

> "To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2 [to the DSU], the special or additional rules and procedures in Appendix 2 shall prevail" (underlining added).

DSU Art. 1.2 also provides for the parties to agree on the applicable dispute settlement rules, or the chairman of the DSB to determine such rules, "if there is a conflict between special or additional rules and procedures" of different covered agreements. The DSB chair must then be guided by "the principle that the special or additional rules and procedures should be used wherever possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid

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[545] As noted earlier, there may be an overlap between conflict situation 4 and conflict situation 1, discussed above, in particular in case two provisions set out different positive obligations for a certain state conduct to be justified.

[546] A similar conflict rule is provided for in Art. XVI:3 of the Marrakesh Agreement: "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict" (underlining added). This provision has, however, not yet been interpreted in case law. It is further discussed in Chapter VII, section A.1.d.i.

conflict".

Above we addressed the general international law definition of "conflict". A specific treaty such as the WTO may, of course, deviate from this definition. However, if no language to the contrary can be found, the general international law definition applies. Nowhere does the WTO treaty define the notion of "conflict" or "difference". Recalling also that, pursuant to Art. 31.4 of the Vienna Convention, "a special meaning shall be given to a term if it is established that the parties so intended", there is nothing in the WTO treaty itself to confirm that any such special meaning was given to the notions of "conflict" or "difference".

In *Indonesia – Autos*, Japan referred to the *travaux préparatoires* of the *General Interpretative Note* in support of a strict definition of conflict, along the lines of conflict covering only "mutually exclusive obligations". Japan pointed at an earlier version of the note, based on a Canadian proposal submitted on 14 October 1993 and entitled "Conflict of Substantive Provisions". This Canadian proposal read: "In the event of a conflict between a provision of the GATT (1993) and a provision of another agreement in Annex 1A, the provision of the other agreement shall take precedence to the extent of the inconsistency".[547] Subsequently, the delegation of Japan proposed to delete the term "inconsistency" and to replace it with the term "conflict", the way it now occurs in the *General Interpretative Note*. According to Japan, "[t]he delegations that addressed this amendment at the session generally concurred that it was intended to clarify the limited number of instances in which the Note would apply. Whereas 'inconsistency' was open to a broad interpretation, 'conflict' referred only to irreconcilable differences between an obligation under GATT 1994 and an obligation under another WTO agreement, such that the provisions of the two agreements were mutually exclusive and could not both be enforced at the same time".[548] The United States and the EC, also complainants in the *Indonesia – Autos* case, confirmed nor denied the Japanese interpretation of this change from "inconsistency" to "conflict". If the *travaux préparatoires* could be resorted to at all in order to give meaning to the word "conflict" (i.e., if it were considered that Art. 31 on treaty interpretation in the Vienna Convention leaves the meaning of "conflict" ambiguous or obscure), it is difficult to see how a redrafting from "inconsistency" to "conflict" would support Japan's position that "conflict" means "mutually exclusive obligations only". It seems rather that the change was necessary so as to streamline the *General Interpretative Note* itself: Canada's proposal first used "conflict" (i.e., "in the event of a conflict") but later on, in the same sentence, it referred to "inconsistency" (i.e., "to the extent of the inconsistency").

As we pointed out, when it comes to conflict of norms, "conflict" and "inconsistency" can be used interchangeably. Both can be reduced to one norm being, or leading to, "breach" of the other. Note, in this respect, that also GATT Art. XXIII.1(b) refers to the concept of "conflict" in the sense of breach ("whether or not it conflicts with the provisions of this Agreement"). There is no reason why "conflict" in the *General Interpretative Note* ought to be defined differently. Hence, it should include all four conflict situations set out earlier. Japan's argument that "conflict" must be construed narrowly is correct to the extent it means that there is a *presumption* against conflict and that all conflict-avoidance techniques set out below (Chapter V) must be resorted to before a genuine conflict arises. But it is incorrect to the extent it implies that conflict must be *defined* narrowly so as to include only "mutually exclusive obligations".

ii. The Panel on EC - Bananas

The first WTO panel confronted with the notion of "conflict", as it is used in the *General Interpretative Note*, defined it to include the following two situations: "(i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at

[547]Canadian Proposal "Conflict of Substantive Provisions" dated 14 October 1993 (Japan Exhibit 64 in the *Indonesia – Autos* case).
[548] Panel report on *Indonesia – Autos*, para. 5.240.

the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits".[549]

This definition of conflict covers the four conflict situations set out above, with the exception of certain conflicts under "conflict situation 1", namely conflicting positive obligations that are merely different, but not mutually exclusive (such as, an obligation in one rule to protect copyright for 50 years as opposed to 40 years in another rule). Importantly, however, (contrary to Jenks' and Karl's strict definition of conflict) the panel explicitly recognised conflict situations 3 and 4 (conflicts between an obligation and an explicit right) as "conflicts" under the *General Interpretative Note*. In a footnote the reason why was aptly explained with reference to an example:

> "For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ('ATC') authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994" (underlining added).[550]

The same reasoning seems to apply, however, in respect of conflicts between two positive obligations that are merely different but not mutually exclusive. Theoretically, one could then comply with both positive obligations at the same time by simply complying with the strictest of the two (e.g., copyright protection for 50 years). But doing so may well "run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994". To systematically prefer the strictest positive obligation, irrespective of whether it is set out in GATT 1994 or in one of the more special agreements on trade in goods, may, indeed, go against the drafters intention to let these special agreements prevail over the more general GATT 1994. In sum, there is no *a priori* reason not to regard all four conflict situations set out earlier as falling within the definition of "conflict" as it is used in the *General Interpretative Note*.

The panel explicitly refused to recognise as conflicts "situations where rules contained in one of the Agreements listed in Annex 1A provide for different or complementary obligations in addition to those contained in GATT 1994". But here the panel confused (i) the fact that different norms may, indeed, complement each other in case they deal with different subject matters or in the event implementation of, or reliance on, one norm cannot breach the other[551] or in case one norm explicitly refers to, or incorporates, the other norm[552] (in such cases one simply adds up the obligations), with (ii) the fact that two norms may also address the *exact same subject matter and circumstance* in a

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[549] Panel report on *EC* – Bananas, para. 7.159.
[550] Ibid., footnote 728.
[551] See text at note 481.
[552] As is the case for the relationship between the Safeguards Agreement and GATT Art. XIX, discussed in the text at note note 488.

different way (say, 50 *versus* 40 years of copyright protection) and this to such extent that complying with one norm (40 years protection) breaches the other norm (50 years protection). The former are situations of "accumulation" (complementary obligations). The latter is a situation of "conflict".

It may be the case that the special agreements in Annex 1A are more likely to impose the *stricter* obligations (the only hypothetical the panel itself referred to[553]) so that in any event, when one applies the conflict rule in the *General Interpretative Note*, the stricter obligations in the special agreements will prevail. But the panel overlooked the possibility that these special agreements may also set out *more lenient* obligations than GATT 1994 for exactly the same situation. For example, a trade restriction may *not* be justified under GATT Art. XX, but be valid under TBT Art. 2.2, the former referring to a closed list of policy exceptions, the latter accepting any "legitimate objective", without providing an exhaustive list of such objectives. In that event, the existence of a conflict should be recognised and it should be the more lenient obligation in the special agreement that prevails.

iii. The Panel on Indonesia – Autos

The second panel which addressed the notion of "conflict" (*Indonesia – Autos*) adopted a totally different position than the one espoused by the *Bananas* panel. Instead of broadening the notion of conflict as we suggested above, the panel restricted conflict to include only what Jenks and Karl consider as conflict "in the strict" or "technical" sense. In *Indonesia – Autos*, the complainants invoked a violation of, *inter alia*, GATT Art. III:2. In defence, Indonesia referred, *inter alia*, to its developing country rights under Art. 27.3 of the Subsidies Agreement (explicitly allowing it to maintain subsidies contingent on the use of domestic over imported goods until the year 2000). The panel found a violation under GATT Art. III:2. It concluded that "the obligations of the SCM Agreement and Article III:2 are not mutually exclusive. It is possible for Indonesia to respect its obligations under the SCM Agreement without violating Article III:2".[554] Consequently, the panel did not even examine whether the Subsidies Agreement would have provided Indonesia an *explicit right* to maintain certain of its measures. In other words, the panel did not consider a situation of an obligation contradicting an explicit right to be a conflict. In its view, the (strictest) obligation simply prevails. In the panel's opinion, "under public international law a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter".[555] Conflict situations 3 and 4 were hence excluded from the notion of conflict. In support, the panel referred to Jenks' and Karl's strict definition of conflict, the definition we criticised earlier.

This case shows that the very definition of conflict may, indeed, influence the outcome of a dispute. Had Indonesia's right to maintain certain of its measures under SCM Art. 27.3 been established, in my view, following the wider definition of conflict defended here, there would have been a "conflict", namely between a GATT obligation and an explicit SCM right. Pursuant to the *General Interpretative Note to Annex 1A* (giving preference to the Subsidies Agreement over GATT in the event of conflict), Indonesia's explicit SCM right would then have justified its violation of GATT Art. III:2, at least to the extent necessary to give effect to this explicit SCM right. In other words, had the correct definition of conflict been followed in *Indonesia – Autos*, Indonesia may have won part of the dispute.

iv. The Appellate Body on Guatemala - Cement

In *Guatemala – Cement*, the Appellate Body interpreted the conflict rule in DSU Art. 1.2, more particularly the term "different" used therein. Unfortunately, it did so in line with the panel on *Indonesia – Autos* and Jenks' and Karl's strict definition of conflict. The Appellate Body defined

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[553] The panel did *not* refer to the possibility that GATT 1994 may impose the stricter obligations as compared to the special Annex 1A agreement.
[554] Panel report on *Indonesia – Autos*, para. 14.99.
[555] Ibid., para. 14.49. In a footnote, the panel remarked that "the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations … which cannot be complied with simultaneously'", footnote 649.

conflict as: "a situation where adherence to the one provision will lead to a violation of the other provision".[556] The relevant finding deserves full quotation:

> "In our view, it is only where the provisions of the DSU and the specific or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them" (underlining added).[557]

In other words, much like Jenks and Karl, the Appellate Body seemed to recognise as "conflict" only part of conflict situation 1 (conflicting positive obligations that are mutually exclusive) and conflict situation 2 (conflict between a positive and a negative obligation). The Appellate Body seemingly refused to consider contradiction between an obligation and an explicit right (conflict situations 3 and 4) as "conflict". This strict definition was adopted even though DSU Art. 1.2 refers to a "difference" between provisions (it does not use the word "conflict"). The Appellate Body used the terms "difference", "conflict" and "inconsistency" interchangeably.

v. An Assessment of Guatemala Cement

Importantly, however, even though the Appellate Body opted for a strict definition of "conflict" in one sentence, in another sentence it equated "difference" or "conflict" with a situation where two provisions "*cannot* be read as *complementing* each other". Depending on how one interprets the word "complementing", it could be argued that in that other sentence a wider definition of conflict can be found. Also the words "*adherence* to the one provision" which must lead to "violation" of the other, can be interpreted differently than only referring to "mutually exclusive *obligations*". Can it not be said that complying with the explicit conditions set out under a *permissive* provision amounts to "adherence" to that provision (albeit in the exercise of an explicit right)? This "adherence to the one provision", i.e., exercise of an explicit right, may then violate a positive or negative *obligation* in the other provision. The relevant phrase does, indeed, refer to adherence to *provisions*, not adherence to *obligations*. If so, conflict situations 3 and 4 would nonetheless be covered as "conflict" (at least in so far as the exercise of the explicit right under norm 2 requires the "adherence" to certain obligations).

Further evidence that the Appellate Body may nonetheless recognise a contradiction between an obligation and an explicit right as constituting "conflict", can be found in subsequent case law on DSU Art. 1.2. In the *Brazil –Aircraft* case, for example, the Appellate Body stated that

> "Article 4.7 [of the Subsidies Agreement] contains several elements which are different from the provisions of Articles 19 and 21 of the DSU … For example, Article 19 of the DSU requires a panel to recommend that the Member concerned bring its measure 'into conformity' with the covered agreements. In contrast, Article 4.7 of the [Subsidies agreement] requires a panel to recommend that the subsidizing Member *withdraw* the subsidy. In addition, paragraph 1 of Article 21 of the DSU requires 'prompt compliance with recommendations or rulings', and paragraph 3 of that Article allows an implementing Member 'a reasonable period of time' to implement the recommendations or rulings of the DSB, where it is impracticable to

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[556] *Guatemala – Cement*, para. 65. In support of this definition: Elisabetta Montaguti and Maurits Lugard, *The GATT 1994 and Other Annex 1A Agreements: Four Different Relationships?*, 2000 JIEL 473-484, 476, hereafter "Montaguti and Lugard, *Relationships …*".

[557] *Guatemala – Cement*, para. 65. This finding was recently quoted with approval in the Appellate Body report on *US – Steel*, para. 51, addressing the potential of "conflict" between Article 17.6 of the Anti-Dumping Agreement and Art. 11 of the DSU. The Appellate Body added (ibid., para. 52): "Thus, we must consider the extent to which Article 17.6 of the *Anti-Dumping Agreement* can properly be read as 'complementing' the rules and procedures of the DSU or, conversely, the extent to which Article 17.6 'conflicts' with the DSU".

> comply immediately. In contrast, Article 4.7 of the [Subsidies agreement] requires a panel to recommend that a subsidy be withdrawn 'without delay'".[558]

Surely, all of these comparisons between the DSU and the Subsidies Agreement should, indeed, be recognised as "conflicting" obligations. They call for *different* implementation obligations to be imposed on the losing member, i.e., conflicting positive obligations that are different (part of conflict situation 1 above). But these "different" obligations are in no way mutually exclusive, as required under the strict definition of conflict adopted earlier by the Appellate Body in *Guatemala - Cement*. A panel could well recommend both (i) that the member bring the measure "into conformity" with the covered agreements, and (ii) withdraw the subsidy. Moreover, "prompt compliance", "within a reasonable period of time", on the one hand, and withdrawal "without delay", on the other, are not mutually exclusive obligations either. The losing member could well comply with both sets of obligations at the same time (the same way, under our hypothetical example, one could jog 20 km in case one is subject to conflicting obligations of 10 and 20 km of jogging).

The Appellate Body took the same approach in *US – FSC* when dealing with the relationship between GATT Art. XVI:4 and Arts. 3, 8, 9 and 10 of the Agreement on Agriculture. It noted, first of all, that

> "[i]t is clear from even a cursory examination of Article XVI:4 of the GATT 1994 that it differs very substantially from the subsidy provisions of the *SCM Agreement*, and, in particular from the export subsidy provisions of both the *SCM Agreement* and the *Agreement on Agriculture*" (underlining added).[559]

The Appellate Body found, in particular, that

> "Article XVI:4 of the GATT 1994 does not apply to 'primary products', which include agricultural products. Unquestionably, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the *Agreement on Agriculture* must clearly take precedence over the *exemption* of primary products from export subsidy disciplines in Article XVI:4 of the GATT 1994" (underlining added).[560]

Hence, the Appellate Body accepted that one provision setting out an exemption (permissive rule, GATT Art. XVI:4) as opposed to another imposing negative obligations (not to impose certain export subsidies, Agreement on Agriculture) do amount to "very substantial differences". Recalling its equation between "difference" and "conflict" [561], this must hence amount also to a "conflict". When the Appellate Body concluded that "unquestionably" and "clearly" the Agriculture provisions must prevail in this conflict, it did not refer to any conflict rule in support. It should have referred to the *General Interpretative Note*, confirming that in the event of conflict, the SCM and Agriculture provisions prevail over those of GATT 1994.

The fact that the Appellate Body did recognise the examples in *Brazil – Aircraft* and *US –FSC* as "differences", and hence "conflict", means that the door is left open for the Appellate Body to explicitly recognise a situation of one obligation contradicting an explicit right as "conflict". The last word on how the Appellate Body defines "conflict" has, therefore, not yet been said. The Appellate Body should recognise that conflict includes all four situations set out above.

vi. Specific reasons why a broader definition of conflict in the WTO is called for: taking WTO rights seriously

The reasons why in general international law as well as WTO law the broader definition of conflict

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[558] Appellate Body report on *Brazil - Aircraft*, para. 191, underlining added.
[559] Appellate Body report on *US – FSC*, para. 117.
[560] Ibid.
[561] Recall that in *Guatemala - Cement* it equated "difference" with "conflict", see text at note 556.

suggested here ought to be adopted were set out earlier. Some of them take on added significance in the WTO context. In particular, to stick to the strict definition of conflict (mutually exclusive obligations only) would mean that the WTO systematically elevates the *obligations* of WTO members over and above the *rights* of WTO members. However, as the Appellate Body stressed twice in respect of Art. 6 of the Textiles Agreement (but a statement that applies for the entire WTO treaty), Article 6 is "carefully negotiated language … which reflects an equally carefully drawn balance of *rights and obligations* of Members".[562]

The WTO can no longer be seen as the proverbial cyclist who needs to move on (i.e., *add* trade liberalising *obligations*, in particular tariff concessions) for it not to fall over. The WTO is an international treaty with *obligations* and equally important *rights*. It must take account of both interests *in favour of trade liberalisation* (leading to WTO obligations to liberalise trade) and legitimate interests *justifying trade restrictions* (leading to WTO rights to restrict trade). The obligations of WTO members to liberalise trade cannot systematically prevail over the rights of WTO members to restrict trade.

New WTO provisions (such as the TBT, SPS or Subsidies Agreements) cannot only add *obligations* to liberalise trade[563], they may also create new *rights* to restrict trade. The prevailing strict definition of conflict, on the contrary, creates the untenable situation that WTO obligations to liberalise trade can only be *accumulated* by other obligations to liberalise trade (much the way human rights agreements can, pursuant to standard human rights conflict clauses, only provide additional freedoms to individuals and not detract from freedoms granted earlier[564]). Under this strict definition, WTO prohibitions to restrict trade can only be *detracted from* or *overruled* by contradictory *obligations* to *restrict* trade (something that is hardly feasible in the WTO) or by provisions *explicitly stating* that the earlier prohibition no longer applies; not by WTO provisions granting an explicit *right* to restrict trade *tout court*.[565]

In this context, the statement by Montaguti and Lugard that "since the notion of *conflict* is being interpreted so narrowly, it allows each of the different legal terms set out in either the GATT 1994 or in the Annex 1A Agreement to have their full meaning"[566] is only partly correct. Yes, all WTO *obligations* are given their "full meaning" under the current (strict) definition of conflict. But what about explicit WTO *rights* (say, Indonesia's right to maintain certain measures under Art. 27.3 of the Subsidies Agreement)? Surely, these *rights* are *not* given their full meaning. They are in any event and always overruled by contradictory obligations, however general these obligations and specific these rights may be (there is no conflict anyhow).

In addition, in the particular context of DSU Art. 1.2 and, especially, the *General Interpretative Note*, a broader view on conflict is required to give *some* effect to these two conflict clauses. Although the insertion of a conflict clause does not necessarily imply the existence of conflict, one can presume that if states insert such clause, they must at least have considered that there was potential for conflict to arise. Under the strict definition of "mutually exclusive obligations only", this potential seems annihilated. Indeed, under this strict definition of conflict it is hard to see when these conflict clauses would be activated. A *right* to trade restriction under, say, TBT, would not "conflict" with an *obligation* to liberalise trade under GATT (or vice versa): the obligation simply prevails. Nor would an *obligation* under GATT to liberalise trade *less* than a liberalising obligation under, say, TBT (or

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[562] Appellate Body report on *US –Underwear*,15 (emphasis added) and explicitly confirmed in *US –Shirts and Blouses*, 16.

[563] The Appellate Body in *EC – Asbestos* (at para. 80) made this mistake very explicitly, stating, in my view, wrongly, that "the *TBT Agreement* imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under GATT 1994" (underlining added).

[564] See below Chapter VII.A.1.a.ii.

[565] See, for example, the sweeping statement by the panel on *Turkey –Textile*, para. 9.92: "As a general principle, WTO obligations are cumulative and Members must comply with all of them at all times unless there is a formal 'conflict' between them".

[566] Montaguti and Lugard, *Relationships …*, 476.

vice versa) "conflict" with each other: the stricter obligation simply prevails. There would only be a conflict if one provision imposes an *obligation to liberalise trade*, there where another *obligates members to restrict trade*. But does the WTO ever impose an *obligation* on its members to *restrict* trade? Not so, it would seem, in the area of trade in goods or services.[567] Hence, the fact that the *General Interpretative Note* must be given some meaning (pursuant to the principle of "effective treaty interpretation"), supports the wider definition of the term conflict set out in this work.

Also in respect of the non-trade related *procedural* or *institutional* provisions in either GATT, the DSU or the more special annex 1A agreements, it is difficult to find *mutually exclusive* obligations to be fulfilled at the same time, in the same circumstances. To give some meaning to DSU Art. 1.2 and the *General Interpretative Note*, conflict cannot, therefore, be limited to "mutually exclusive obligations".

f. Conclusion on the definition of conflict

In this section, we defined "conflict" of norms as a situation where one norm breaches, has led to or may lead to breach, of another norm. On that basis, we sub-divided conflict of norms into normative conflicts (one norm breaching, in and of itself, another norm) and conflicts in the applicable law (where the implementation or reliance on a norm leads to conflict with another norm). The wider approach to conflict adopted here led us to recognise four types of conflicts in the applicable law. In conflict situations 1 and 2 (also referred to as "necessary conflicts") an obligation under one norm leads to breach of an obligation under another norm. In conflict situations 3 and 4 the exercise of an explicit right under one norm breaches an obligation under another norm (also refered to as "potential conflicts" given that they arise only in case an explicit right is actually exercised). The Appellate Body in *Guatemala - Cement* has apparently opted for the so-called "strict" or "technical" definition of conflict defended by authors such as Jenks and Karl. This definition covers only "mutually exclusive obligations" or what we referred to as "necessary conflicts". However, in another panel report (*EC – Bananas*) and even other Appellate Body reports (*Brazil – Aircraft* and *US - FSC*) other situations were recognised also as constituting "conflict". It seems therefore that the door is still open for the Appellate Body to bring its definition of conflict in line with the approach suggested here.

Let it be clear once again that by recognising a situation as one of conflict, we do not want to prejudice in any way the *solution* to the particular inter-play of norms. The question of defining conflict must be distinguished from that of what the outcome may be of an inter-play between norms. The latter is what we examine next. It must, *a fortiori*, be separated from the question of how to resolve conflict (a question examined in Chapters VI and VII).

3. Post-script: Does the termination or revision of a treaty norm by subsequent custom constitute a conflict of norms?

One treaty norm may be terminated by another. But, as we saw earlier, a treaty norm can also be terminated or revised by a supervening rule of customary law.[568] In case the new custom does terminate or revise the treaty (in particular, in case the earlier treaty is not intended to continue applying as *lex specialis*), the earlier treaty norm ceases to exist, at least the way it was beforehand, and only the customary norm survives.

In practice, the issue is most likely to arise as follows. State B sues State A for breach of a treaty norm (norm 1). In defence, however, State A submits that this treaty norm has been terminated or revised by a later rule of customary law (norm 2). According to State A, under this customary law, its conduct is fully justified (i.e., the obligation under the custom is complied with or its conduct is an exercise of

[567] The TRIPS Agreement does impose certain obligations to restrict trade, i.e., in reaction to infringement of intellectual property rights (see TRIPS Art. 44).
[568] See Chapter III, section E.3.b.iii.

explicit rights granted under the custom). Since State A is relying on the customary norm, it will be for State A to prove that the customary norm exists. If State A can establish the existence of this customary norm, it will then be up to State B to show that the treaty was meant to continue applying as *lex specialis* (or to show that State B has persistently objected to this customary norm so that it cannot be held by it). If State B fails to do so, the customary norm may constitute a valid defence justifying State A's conduct.

But does this occurrence of later custom terminating or revising an earlier treaty constitute a genuine conflict of norms? The question seems of academic interest only. In practice, the party invoking the new custom will, indeed, have to prove, first, that the custom exists and, second, that it *is in conflict* with the earlier treaty norm. Only in case such conflict can be established (even if it is not necessarily a genuine conflict of norms meeting the condition of triple overlap discussed earlier), and only to the extent of that conflict[569], will the adjudicator be able to let the custom overrule the treaty. However, answering this academic question must reveal the process by which later custom can change an earlier treaty. This is why we shortly address it here.

a. The Villiger - Kontou debate (supervening custom terminating or revising an earlier treaty does involve a conflict of norms)

It could be argued that there is no conflict since the customary norm *itself* must include the *desuetude* of the earlier treaty norm or even an obligation to disregard the earlier norm. Hence, the situation is similar to a later treaty explicitly terminating, or derogating from, an earlier one: the two norms can be applied side by side; activation of the later norm means the end of the earlier one and this without prior conflict between the two norms (there is no overlap *ratione temporis*). This seems to be the position adopted by Villiger: "*modification* [by supervening custom] *necessarily implies desuetude of the original conventional rule*. In other words, inherent in the formation of a new customary rule is the obligation that the incompatible conventional rule is no longer applied and, hence, ceases to exist. But then, if the conventional rule is not in force, there is no conflict, and the customary rule alone remains applicable".[570]

On the other hand, if treaty termination or revision *by supervening custom* is to be regarded as a *distinct* legal process by which a treaty can be terminated or revised (e.g., distinct from desuetude or implied consent reflected in subsequent practice), then there must be cases where (1) *desuetude* of the treaty norm *cannot* be established but where nonetheless (2) the conflict with supervening custom *per se* causes the termination or revision of the treaty norm. In those cases, there is, first of all, a genuine conflict of norms (including a temporal overlap) and, secondly, only *because of that conflict* does the treaty change or terminate (not because of *desuetude* inherent in the custom). This is the position taken by Kontou: "There must be cases where a treaty is in conflict with supervening custom, but no evidence of the parties' specific intent to abrogate it can be found … cases of this kind are likely to arise because the generation of new customary law is not treaty-oriented. A State's consent to be bound by a new custom will not, therefore, always be accompanied by evidence of specific intent to abrogate any prior inconsistent treaty provisions … New customary law is created as a result of a

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[569] Indeed, whatever the answer to the theoretical question as to whether one has a conflict of norms here, from an operational point of view, it will always remain important to identify the exact extent of the incompatibility or conflict between the treaty and the later custom since the customary rule can only replace the earlier treaty norm *to the extent of* that conflict.

[570] Villiger, *Customary …*, para. 324, emphasis in original. In the same vein, see Kelsen: « Par la voie de la coutume, une norme valide peut … perdre son efficacité et donc sa validité par une observance et une inapplication durables, sans que par là même, une norme prescrivant un certain comportement soit créée coutumièrement. Mais la coutume peut également créer une norme qui prescrit l'abstention d'une action dont l'abstention est prescrite par une norme jusque-là valide, ou une norme qui prescrit une action dont l'abstention est prescrite par une norme jusque-là valide. Toutefois, dans ce cas, il n'y *a pas de conflit de normes* car la coutume qui crée la nouvelle norme implique l'inobservance et l'inapplication durables de la norme jusque-là valide, par lesquelles celle-ci perd son efficacité et donc sa validité (HANS KELSEN, THEORIE GENERALE DES NORMES, 143).

consensus to change the general rules governing relations between States. The review of existing treaty rights and obligations is not part of this process and the *opinio juris* required for the formation of new custom does not establish an intent to abrogate prior treaty provisions".[571]

Kontou's position – which implies that certain cases of termination or revision of treaty by supervening custom do constitute a genuine conflict of norms -- carries more weight. Villiger may be correct in pointing out that in some instances the later custom, in and of itself, includes *desuetude* of, or even an obligation to disregard, the earlier treaty norm. But this is not always so nor is it a requirement for supervening custom to change an earlier treaty. The treaty norm can also be changed by the *very incompatibility* with later custom. The question as to when this change occurs (i.e., when the later custom is established and hence, when the conflict arises and changes the treaty) will be a difficult one to answer. Moreover, only Kontou's approach allows for the emergence of a new *general* custom notwithstanding the continuing existence of *specific* incompatible treaty norms. And this must certainly be possible, i.e., it must be possible for states to develop a new general custom even if it deviates from a pre-existing norm in a specific field. As Kontou remarked: "supervening custom and a prior conflicting treaty can exist in parallel if the parties to the treaty wish to continue applying the conventional rule in their *inter se* relations".[572] Or as Waldock noted in his observations on Art. 68(c) of the 1964 ILC draft on the law of treaties (addressing the modification of a treaty by "the subsequent emergence of a new rule of customary law"): "The very object of a bilateral treaty or of a treaty between a small group of States is not infrequently to set up a special legal régime between the States concerned and sometimes a régime which derogates from the existing customary law. Accordingly, to say that the emergence of a new rule of customary law, binding on the parties as a general rule, is necessarily to modify the particular relations which they have set up between them may defeat their intention".[573]

b. An example: the SPS Agreement *versus* the precautionary principle

The following is a case at point. Art. 5.7 of the SPS agreement allows for the imposition of provisional trade restrictions in instances where there is not sufficient scientific evidence *as long as certain conditions are met*. Next to Art. 5.7, there is the so-called precautionary principle allowing for provisional health protection measures which is, in the view of some, part of customary international law. If it were, indeed, so that Art. 5.7 is *incompatible* with this precautionary principle[574] (something that is far from clear), nothing should prevent (or has prevented) this principle from becoming one of general customary international law. If it were established *by the WTO member invoking the precautionary principle* (i.e., the defendant, invoking the principle as a justification for breach of other SPS provisions), that this principle is, indeed, part of customary international law, a WTO panel ought to take cognisance of this new custom *even if it is incompatible with WTO rules*. Given the fact that supervening custom can revise a treaty (*in casu*, the SPS Agreement), it would then be up to the other WTO member (i.e., the complainant alleging breach of the SPS Agreement) to prove that the SPS Agreement (and Art. 5.7 in particular) continues applying as *lex specialis*, *notwithstanding the fact that this new custom has emerged*. If such proof of *lex specialis* can*not* be put forward, a WTO panel ought to acknowledge that the SPS Agreement has been revised by subsequent custom. It may then, depending on the factual circumstances, accept this principle as a valid justification for an alleged breach of the SPS Agreement.

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[571] Kontou, *Termination …*, 29-30 (providing a hypothetical example derived from the law of the sea).
[572] Kontou, *Termination …*, 30-31. Even Villiger acknowledges this possibility (Villiger, *Customary …*, para. 328).
[573] Rauschning, *Travaux …*, 308. WTO treaty rules as *lex specialis* v-à-v subsequent general custom would then not so much be special in the sense referred to by Waldock (i.e., binding on a limited number of states only), but rather special in terms of subject matter (trade relations).
[574] In that the precautionary principle allows for trade restrictions, there where the conditions under Art. 5.7 for the imposition of trade restrictions are not met.

Importantly, even if a later custom revises an earlier treaty, the customary norm does not become part and parcel of the treaty It leads a separate existence although it has become the applicable law for the matter at issue. This explains why, for example, a later custom revising the WTO treaty cannot form the basis of a claim for breach before a WTO panel. The new custom does not become part of WTO covered agreements. Since a WTO panel's substantive jurisdiction stretches only as far as claims under these agreements, a claim under the new custom would hence fall outside a WTO panel's substantive jurisdiction.[575]

C. The Outcome of inter-action between norms

In Chapters VI and VII below, we examine what the outcome of conflict between norms may be. In those Chapters, we set out, respectively, how normative conflict and conflict in the applicable law must be resolved. In this section, we focus on what happens in case two norms accumulate. Although accumulation is the opposite phenomenon of conflict, the topic of examination here, its consequences are of crucial importance. They support one of the main arguments made in this work, namely that WTO law and any other sub-system of international law, must be considered in the light of the wider *corpus* of public international law, both general international law and other sub-systems.

1. New law must be applied and interpreted in the context of pre-existing law

When two norms accumulate, both of them continue to exist and have their full intended effect. In any given situation both norms can be applied at the same time.

All norms are created in the background of already existing norms, in particular norms of general international law. To the extent that the new norm (say, a new treaty[576]) does not contradict or "contract out" of this general international law, general international law applies also to this new norm. To put it differently, for all issues not explicitly regulated by the new treaty (i.e., in provisions either adding, confirming or contracting out of rights or obligations), pre-existing norms of international law continue to apply and a "fall-back" to, especially, general international law is required. There is no need for an explicit *renvoi* in the new treaty for rules of general international law to apply to the new treaty. In addition, new law is not only created in the context of *general* international law, but in the context of *all* rules of international law, including other treaties. If the new law does not contradict pre-existing treaties, the latter continue to apply.[577]

The so-called fall-back by a treaty on other norms of international law may take two forms:

(i) **Interpretation** of the treaty norm with reference to other norms of international law (pursuant to Art. 31.3(c) of the Vienna Convention discussed below[578]). In other words, to the extent the terms in the treaty norm are ambiguous enough, general international law definitions as well as other rules should be injected in the treaty norm. As pointed out below[579], this "fall-back" through interpretation must, however, respect the inherent limits of treaty interpretation (in particular the fact that the other norms to be relied on reflect the "common intentions" of all parties to the treaty and that interpretations *contra legem* are prohibited).

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[575] See below Chapter VIII.

[576] We shall hereafter refer only to *treaties* contracting out of general international law. But recall that all particular international law (as set out in Chapter III, section G.2) may contract out of general international law and that the same rules apply for these other forms of particular international law.

[577] See below Chapter V, section B, on the presumption against conflict.

[578] See Chapter V, section B.4.

[579] See Chapter V, section B.1.

(ii) **Application** of the treaty in the context of other norms of international law for areas *not* covered by the treaty. In other words, for those areas in respect of which the treaty remains silent, other norms of international law (in particular, general international law) continue to apply to the treaty.

The first type of fall-back is based on the process of *interpretation* of the treaty norm in question. The second type of fall-back (application) on the very fact that the treaty is part of the wider context of international law. The second type of fall-back is not restricted by the limits of treaty interpretation (such as the prohibition to interpret *beyond* the clear meaning of the terms). It is not the result of interpreting a particular treaty term. It is the necessary consequence of that treaty being part of international law. We assess the first type of fall-back below in Chapter V, section B (interpretation of one norm in the light of the other norm as a conflict-avoidance tool). In this section, we focus on the second type of fall-back. We do so in the particular context of the WTO treaty and focus on fall-back on rules of *general international law* (section 2).

Any fall-back on pre-existing law is limited only by the extent to which the new law conflicts or "contracts out" of pre-existing law. To find out whether a new treaty "contracts out" of general international law, the same definition of conflict set out earlier applies. The question then is: does the mere conclusion of the treaty norm breach a norm of general international law or, more importantly, if a state complies with the obligation set out in the treaty norm or exercises an explicit right under this treaty norm, would it breach the allegedly conflicting norm of general international law (or vice-versa[580])? If so, the two norms are in conflict, i.e., the treaty norm "contracts out" of the general international law norm. Although such "contracting out" implies conflict of norms (not accumulation)[581], we examine the process of "contracting out" in this section on accumulation for it constitutes the mirror image of "fall-back", "fall-back" being a prime example of accumulation of norms. Indeed, the extent of this "contracting out" or conflict determines the extent to which the treaty norm does *not* fall-back on pre-existing law, i.e., the extent to which the treaty is *lex specialis* v-à-v general international law.[582] Section 3 addresses this "contracting out" in the particular context of the WTO treaty, focusing again on "contracting out" of rules of *general international law*.

2. "Fall-back" on general international law through application in case the treaty is silent

The second type of fall-back we referred to -- fall-back on other norms of international law for areas not covered by the treaty on the ground that the treaty is part of international law – finds confirmation in both judgements of the PCIJ/ICJ and reports of the WTO judiciary.

As one early source put it: "Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way".[583]

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[580] That is, if one were to exercise rights or comply with obligations under general international law, would one breach the treaty norm?

[581] Unless the new law explicitly states that it is an exception or derogates from general international law (something that rarely happens).

[582] In sum, when it comes to alleged conflicts between a treaty norm and general international law, the question is, indeed, not so much which rule should prevail (since, in principle, the treaty norm prevails, see Chapter III, section E and below Chapter VII, section A.3[582]). The question is rather: how far does the conflict reach? The extent of the conflict, i.e., the extent of the treaty norm being *lex specialis*, determines the contours of the fall-back to general international law rules *not* contracted out from by the treaty.

[583] *Georges Pinson* case, Franco-Mexican Commission (Verzijl, President), A.D. 1927-8, No. 292, para. 50. Or as McNair stated: "Treaties must be applied and interpreted against the background of the general principles of international law" (MCNAIR, THE LAW OF TREATIES 466 (1961)). See also Hersh Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 1949 BYIL 48, 76: "It is the treaty as a whole which is law. The treaty as a whole transcends any of its individual provisions or even the sum total of its provisions. For the treaty, once signed and ratified, is more than the expression of the intention of the

a. PCIJ/ICJ jurisprudence

Both the PCIJ and the ICJ confirmed that in the absence of "contracting out", i.e., in case the treaty remains silent on an issue, general international law rules continue to apply to that treaty. In the *Chorzow Factory case*, the PCIJ confirmed it in respect of the obligation to make reparation for a breach of international law:

> "Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself". It is, indeed, "a general conception of law, that any breach of an engagement involves an obligation to make reparation".[584]

The ICJ made similar statements in respect of rules on treaty termination for breach and exhaustion of local remedies.[585] In the 1971 *Advisory Opinion on South West Africa*, the ICJ confirmed the right of termination of a treaty for breach (*in casu*, the Mandate for South West Africa) and found that for this right *not* to be applicable to the Mandate

> "it would be necessary to show that the mandates system … excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties … The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law".[586]

This very point was confirmed also in the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*: "[t]he 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention".[587] In the *ELSI case* the acting Chamber of the ICJ had

> "no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty; or confirm that it shall apply. Yet the Chamber finds itself unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so".[588]

Also the Iran-US Claims Tribunal confirmed this approach.[589]

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parties. It is part of international law and must be interpreted against the general background of its rules and principles".

[584] *Chorzow Factory* (Merits), PCIJ, Ser. A, no. 17, 29 (1928). In the same sense *Oder Commission*, PCIJ, Ser. A, No. 23, 20 and *German Interests in Polish Upper Silesia* (Merits), PCIJ Ser. A, No. 7, 22 (1926).

[585] See also: *Interpretation of Peace Treaties*, Advisory Opinion, ICJ Reports 1950, 221 at 277 and the Dissenting Opinion of Basdevant, Winiarsky, McNair and Read, in the *Admissions case*, ICJ Reports 1948, 86.

[586] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, ICJ Reports 1971, 16, para. 96.

[587] ICJ Reports 1997, para. 100.

[588] *Elettronnica Sicula S.p.A (ELSI)* case, ICJ Reports 1989, 42, para. 50.

[589] *Amoco Int. Finance Corp. v. Iran* 15 Iran-US Cl. Trib. Rep. 189 (1987), para 112: "As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the law of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions".

In sum, when new law is created there is a presumption in favour of continuity or against conflict, in the sense that if a treaty does *not* contract out of a pre-existing rule, the pre-existing rule (being of the same inherent value as the new one[590]) continues to exist.[591] Only if it can be shown that the new treaty does, indeed, contradict a rule of general international law will the pre-existing rule be dis-applied in respect of the treaty in question. Or as Bruno Simma put it in the context of the EC treaties: "it cannot be denied that these treaties have been concluded as (and remain) treaties under international law. The exclusion of the legal systems created by them from the general law of treaties and State responsibility goes as far as the six original members intended to go".[592]

b. WTO jurisprudence

Also the WTO judiciary has "fallen back" on general international law[593] for matters on which the WTO treaty remained silent.[594] Even in the GATT days, panels applied Arts. 27 and 28 of the Vienna Convention (on internal law not being a justification for breach and the principle of non-retroactivity of treaties).[595]

In *US – Shirts and Blouses*, the Appellate Body applied rules on burden of proof pursuant to which "the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof" and "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".[596] It did so since these rules have, respectively, been "generally and consistently accepted and applied" by "various international tribunals, including the International Court of Justice" and are "generally-accepted canon[s] of evidence in civil law, common law and, in fact, most jurisdictions".[597] The DSU is silent on these issues of burden of proof. Hence, the Appellate Body applied general principles of international law.

Another example where the Appellate Body applied general international law is its case law on the principle of judicial economy. Nowhere in any WTO rule is this principle set out. Still, it plays an important role in the fulfilment of a panel's legal mandate. The principle was referred to in *US – Shirts and Blouses* as one providing that "a panel need only address those claims which must be addressed in order to resolve the matter at issue".[598]

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[590] Except for rules of *jus cogens*.

[591] Oppenheim's International Law refers to a "presumption that the parties intend something not inconsistent with generally recognised principles of international law, or with previous treaty obligations towards third states" (Jennings and Watts, *Oppenheim's …*, 1275, with references to ICJ decisions). In respect of the right to reparation, Crawford refers to "a presumption against the creation of wholly self-contained regimes in the field of reparation" (Crawford, Third Report, para. 147).

[592] Bruno Simma, *Self Contained Regimes*, 1985 NYIL 115, at 127, hereafter "Simma, *Self Contained …*".

[593] On the difficulty to distinguish between interpretation of WTO terms with reference to general international law and fall-back on general international law for matters on which the treaty is silent, see Chapter V, section B.5.b.

[594] That this was not always the case in the GATT days, witness the *Grey Portland Cement* Panel Report, GATT doc. ADP/82, para. 5.9. There, it was held that in the absence of an explicit provision confirming the rule of exhaustion of local remedies in GATT proceedings, this rule does not apply in GATT. Now, it may be so that on the basis of, for example, subsequent practice this rule was "contracted out". But to give the absence of explicit confirmation as the reason not to apply the rule is flawed. This rule, in so far as it is one of general international law, must apply also to GATT unless GATT contracted out of it.

[595] Respectively, Panel report on *Measures Affecting the Sale of Gold Coins* (South Africa v. Canada), not adopted, report circulated on 17 September 1985, L/5863, para. 53 and Panel report on *Countervailing Duties on the Importation of Non-Rubber Shoes*, 1989, para. 4.10.

[596] Appellate Body report on *US – Shirts and* Blouses, 14.

[597] Ibid.

[598] Ibid., 19. In the Appellate Body report on *Australia* – Salmon, para. 223, this principle was further refined as meaning, in the WTO context, that "[a] panel has to address those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members".

Similarly, in *EC – Bananas*, the Appellate Body, when examining whether the United States had a right to bring claims under GATT, found that in international law there is no "general rule that in all international litigation, a complaining party must have a 'legal interest' in order to bring a case".[599] But had there been such a rule in general international law[600], it seems that the Appellate Body would have applied that rule, as long as the DSU would not have contracted out of it. In the same case, it followed a similar *a contrario* reasoning when finding that there is nothing in the WTO treaty "nor in customary international law or the prevailing practice of international tribunals which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings".[601]

In *India – Patents*, as well, the Appellate Body referred to public international law when assessing the role of Indian municipal law and the extent to which the Panel had utilised it as a fact or had effectively interpreted it: "In public international law, an international tribunal may treat municipal law in several ways. Municipal law may serve as evidence of facts and may provide evidence of state practice. However, municipal law may also constitute evidence of compliance or non-compliance with international obligations".[602] Here again, the Appellate Body, in the absence of WTO rules on the issue, applied general principles of international law.

Following another *a contrario* reference to general international law (albeit an implicit one only), the Appellate Body in *US – Shrimp* decided that the panel had erred when it found that it *could not* accept *amicus curiae* briefs. The Appellate Body stated that "authority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel". Having identified the absence of a *prohibition* in the DSU on accepting information not requested by a panel, the Appellate Body then fell back to what is seemingly a general rule of international law for international tribunals, finding that a panel "has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a panel or not*".[603]

In *Canada – Aircraft*, as well, the Appellate Body referred to "general practice and usage of international tribunals" to find that panels examining claims of prohibited export subsidies have the "authority to draw adverse inferences from a Member's refusal to provide information". It did so even though this authority is nowhere specified in WTO rules. The Appellate Body found that this authority "seems to us an ordinary aspect of the task of all panels to determine the relevant facts of any dispute involving any covered agreement".[604]

Staying within the area of procedural rules, in *US – Anti-dumping Act of 1916* the Appellate Body also applied the, in its view, "widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it".[605] It did so when rejecting an EC argument that the United States raised a jurisdictional objection before the panel in an untimely manner. The Appellate Body agreed with the panel that "some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time".[606] Nowhere does the DSU grant this mandate of the so-called *compétence de la compétence* to WTO panels or the Appellate Body. Again, it is to be read into the DSU through application of general rules of international law.

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[599] Appellate Body report on *EC – Bananas*, para. 133.
[600] On this, see *supra* Chapter II, section E.4.d.iii.
[601] Appellate Body report on *EC – Bananas*, para. 10.
[602] Appellate Body report on *India –Patent*, para. 65.
[603] Appellate Body report on *US –Shrimp*, para. 107.
[604] Appellate Body report on *Canada –Aircraft*, para. 202.
[605] Appellate Body report on *US – Anti-Dumping Act of 1916*, footnote 30.
[606] Ibid., para. 54.

Moving then to more substantive rules of general international law, in *Brazil – Coconut* the Appellate Body applied the general principle of international law concerning the non-retroactivity of treaties (reflected in Article 28 of the Vienna Convention). It did so in its examination of the temporal application of the WTO Agreement to Brazilian countervailing duties taken during the period of co-existence of, on the one hand, the GATT 1947 and the Tokyo Round SCM Code with, on the other hand, the WTO Agreement.[607] The WTO Agreement was not explicit on this question of timing. Hence, the Appellate Body applied general principles of international law. The Appellate Body "endorsed this general principle of international law"[608] of non-retroactivity of treaties in two further cases: *EC – Bananas* (in respect of Articles II and XVII of GATS[609]) and *Canada – Term of Patent Protection* (in respect of Article 70 of the TRIPS Agreement).[610] In the latter case, it found that "[a] treaty applies to existing rights, even when those rights result from 'acts which occurred' before the treaty entered into force".[611] Finally, the arbitrators in *Brazil – Aircraft* applied general international law rules on termination of treaties (Articles 60 and 70 of the Vienna Convention) when examining the legal status of a bilateral agreement.[612] The same arbitrators referred to Article 27 of the Vienna Convention when stating that "[o]bligations under internal law are no justification for not performing international obligations".[613]

In terms of customary international law, this approach of falling back on general international law there where the WTO treaty does not contract out of it, was confirmed in a, for present purposes crucially important panel report (not appealed).[614] This is the very first report in which it is explained why the WTO judiciary can fall back on general international law and where some limits are set out on the extent to which this fall-back is allowed. The panel in question found as follows:

> "We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO".[615]

On these grounds, the panel applied "general rules of customary international law on good faith and error in treaty negotiations"[616], in particular Article 48 of the Vienna Convention.[617] The panel rightly rejected the *a contrario* argument that the reference in DSU Article 3.2 to *only* rules of treaty *interpretation* of customary international law means that all *other* international law is excluded.[618]

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[607] Appellate Body report on *Brazil –Coconut*, 15.
[608] The words used in *Canada – Term of Patent Protection*, footnote 49.
[609] Appellate Body report on *EC – Bananas*, para. 235.
[610] Appellate Body report on *Canada – Patent Protection Term*, paras. 71-74.
[611] Ibid., para. 70.
[612] *Brazil – Aircraft*, Arbitration under DSU Art. 22.6, paras. 3.6-3.10.
[613] Ibid., para. 3.65 and footnote 61.
[614] Further discussed below in Chapter VIII.
[615] *Korea –Government Procurement*, para. 7.96, underlining added.
[616] Ibid., para. 7.101.
[617] Ibid., paras. 7.123-126.
[618] Ibid., footnote 753: "We should also note that we can see no basis for an *a contrario* implication that rules of international law other than rules of interpretation do not apply. The language of 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilised in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law".

The panel limited its reference to *customary* international law. It should, instead, have referred to the broader class of *general* international law including both general *customary* international law and general *principles* of law.[619]

The approach of the Panel on *Korea – Government Procurement* finds reflection in a recent Appellate Body report where general international law rules on treaty interpretation were at issue. In its report on *US – Steel* the Appellate Body stated: "We observe that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* apply to *any* treaty, in *any* field of public international law, and not just to the WTO agreements. These rules of treaty interpretation impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned".[620] In a footnote, the Appellate Body then addressed the possibility for states to "contract out" of general international law:

> "It might be possible for the parties to a treaty expressly to agree that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* do not apply, either in whole or in part, to the interpretation of a particular treaty. Likewise, the parties to a particular treaty might agree upon rules of interpretation for that treaty which differ from those rules of interpretation in Articles 31 and 32 of the *Vienna Convention*. But this is not the case here".[621]

3. "Contracting out" of general international law

a. "Contracting out" is a question of degrees

i. The need to examine provision by provision

The question of contracting out or determining the extent to which a treaty is *lex specialis* vis-à-vis general international law (say, most parts of the Vienna Convention on the Law of Treaties and the ILC Draft on State Responsibility), is a question of degrees. It is not one of black and white, everything "in" or everything "out". As noted earlier[622], the WTO treaty is *not* a self-contained regime in the sense that it was created *outside* of the system of international law. Nor has the WTO treaty contracted out of *entire fields* of international law such as the law of treaties or state responsibility. All fields of general international law, to the extent relevant to the WTO treaty, continue to play a role. The extent of this role cannot be determined without looking at each and every WTO provision in detail. Only this type of detailed treaty interpretation can determine the extent to which the WTO treaty "contracted out". It is of no use to say: the WTO is *lex specialis* in terms of the law on treaties, state responsibility or the settlement of disputes. Of course it is. But the question is: *to what extent*? Nor is it really enlightening to say: WTO law is part of international law. Of course it is. But the question is: *to what extent* is this international law relevant in the WTO?

As Art. 56 of the ILC Draft 2000 (entitled "*lex specialis*") provides in respect of treaties contracting out of general international law on state responsibility:

> "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law".[623]

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[619] To be entirely correct, the panel should have specified also that only *general* customary international law applies as between all WTO members; not special or local customary law between certain WTO members only.
[620] Appellate Body report on *US – Steel*, para. 60.
[621] Ibid., footnote 40.
[622] See Chapter II, section B.
[623] See also Art. 5 of the Vienna Convention.

To discover the "extent" to which a treaty has contracted out of general international law, each and every treaty norm must be examined pursuant to normal rules of treaty interpretation and each time the extent of conflict and contracting out must be determined. For that reason, the statement made at the 6th Committee of the UN General Assembly that the ILC Draft Articles on State Responsibility "would not apply to self-contained regimes, such as those on the environment, human rights and international trade, which had been developed in recent years"[624] is too categorical, misleading and, as a matter of fact, erroneous. Of course these regimes offer some *lex specialis*, but this does not mean that therefore the entire Draft Articles no longer apply.

ii. Contracting out in one field, does not mean contracting out of everything

Similarly, the fact that there is some "contracting out" of general international law or some deviation by one treaty norm from another treaty norm (e.g., by means of *lex specialis*), does not mean that general international law or the other treaty norm have been dis-applied lock-stock-and-barrel. It is not so that a *lex specialis* totally eclipses or supplants the *lex generalis*.[625] As was noted in a recent Arbitration Award under UNCLOS:

> "it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. … there is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention" (underlining added).[626]

iii. Explicitly confirming one rule does not mean contracting out of all other rules

One other trap to be avoided (but one often fallen into by authors and WTO negotiators alike[627]) is to take the explicit confirmation of *some* preexisting rules of international law in, for example, the WTO treaty -- such as DSU Article 3.2 confirming customary international law rules on interpretation -- as proof that the treaty has contracted out of all *other* rules of international law (pursuant to the adage *expressio unius est exclusio alterius*). As noted earlier, rather than explicitly *confirm* (or make a *renvoi*) to preexisting rules of general international law for those rules to apply to it, the WTO treaty had to *exclude* those rules that were not to apply. As a result, any explicit confirmation of rules of general international law in the WTO treaty must be seen as made *ex abundante cautela*.[628] Hence,

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[624] Report of the ILC on the work of its 51st session (1999). Topical summary of the discussion held at the Sixth Committee of the General Assembly during its 54th session prepared by the Secretariat, A/CN.4/504, 9 para. 15).

[625] See below Chapter VII, section A.3.g.ii. This is nonetheless what Indonesia argued in the *Indonesia – Autos* case (at para. 5.129 ff.), submitting that the GATT and the Subsidies Agreement are mutually exclusive and that as soon as the Subsidies Agreement applies, the Subsidies Agreement being *lex specialis*, the GATT no longer applies. This is also what Japan argued unsuccessfully in the recent *Bluefin Tuna case*: "In accordance with generally accepted principles, the provisions of a *lex specialis* not only specify and implement the principles of an anterior framework agreement; they exhaust and supplant those principles as long as the implementing agreement remains in force" (Award, para. 38, point (c)).

[626] Ibid., para. 52. Hence, New Zealand and Australia successfully argued that: « The contention that the 1993 Convention [allegedly a *lex specialis*] 'covers' and thus eclipses the obligations in respect of … UNCLOS [allegedly the *lex generalis*] is wrong in fact, and the principle of 'coverage' is unknown to international law. The array of modern standards of international law has been achieved by a process of accretion and cumulation, not by erosion and reduction. Only where there is actual inconsistency between two treaties do questions of exclusion arise" (ibid., para. 41 point (g)).

[627] See, for example, Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARVARD INTERNATIONAL LAW JOURNAL 333, 342-3.

[628] This applies only in respect of *general* international law. Indeed, as far as the WTO treaty confirmed and incorporates pre-existing treaty rules, such as rules of certain WIPO conventions, WTO members not only confirmed their legal commitment to these rules (some WTO members agreeing to these rules for the first time),

even without DSU Art. 3.2, customary international law rules on treaty interpretation would have applied to the WTO treaty. As the Appellate Body noted in *US – Steel*: "the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* apply to *any* treaty, in *any* field of public international law".[629] For these rules not to apply to the WTO treaty, that treaty should have explicitly "contracted out" of them.[630]

iv. "Explicit" versus "implicit" contracting out

As noted before, "contracting out" by treaty of general international law must take place explicitly in the sense that silence means "contracting in".[631] However, this explicitness has graduations. Contracting out may occur by the very words of the treaty, read in isolation. It may occur also in a more implicit form, as a result of an interpretation of the treaty terms in their context and/or with reference to the object and purpose of the treaty or subsequent practice. The presumption against conflict, i.e., the presumption that what was not contracted out still applies, means that one has to be careful when accepting these more implicit forms of contracting out.[632] After all, however, the extent of the contracting out must be determined by the normal rules of treaty interpretation, in particular, by determining the ordinary meaning of the treaty terms, in good faith, in their context and with reference to the object and purpose of the treaty. These different elements must express sufficiently the intention of the parties as to whether or not they wanted to contract out.

Under Art. 56 of the ILC Draft 2000, for example, the question is: how can particular international law, especially treaty norms, "determine" special rules of international law? That is what we examine in the next sub-sections. That this question is a controversial one, especially in the WTO context, witness the statement by James Crawford that the DSU is, in terms of state responsibility, an example where it is "clear from the language of a treaty or other text that only the consequences specified flow"[633], as opposed to that by Petros Mavroidis stating that "[t]o the extent … that the WTO regime does not provide for specific remedies, the ILC codification is relevant".[634] The truth must lay somewhere in between.

b. "Explicit" contracting out

By explicit contracting out we mean here treaty provisions which either (1) explicitly state that they derogate from general international law (in that case, there is not even a conflict of norms[635]); or (2) in explicit terms cover a specific subject matter differently than a given norm of general international law (so much so that if the treaty norm is exercised, the general international law norm would be breached,

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they also extended this commitment by subjecting these rules to the automatic and compulsory dispute settlement system of the WTO. See *infra* Chapter VIII.

[629] Appellate Body report on *US – Steel*, para. 60. Discussed *supra* in text at note 620.

[630] This was explicitly acknowledged by the Appellate Body in its report on *US –Steel*, footnote 40, quoted *supra* in text at note 621.

[631] This is further discussed below in Chapter V, section B on the presumption against conflict.

[632] See Chapter V, section A below. As noted by Simma: "the burden of proving the 'self-contained' character of a subsystem lies with those who allege such a detachment of primary rules from the normal regime" (Simma, *Self Contained …*, 135). Later he states: "the exclusion or modification through a 'self-contained regime' of 'normal' secondary rules which leads to a 'softening' of the legal consequences of wrongful acts should not be easily be presumed" (ibid.). Here Simma seems to forget, however, that there is actually a presumption *against* contracting out (not the reverse). Moreover, whether the special treaty rules soften or strengthen the "normal" rules should not, in my view, influence the decision as to whether and to what extent there is contracting out. In both instances the normal rules of treaty interpretation must be applied.

[633] Crawford, Third Report, para. 420.

[634] Petros Mavroidis, *Remedies in the WTO Legal System: Between a Rock and a Hard Place*, 2000 EJIL 763, 765, hereafter "Mavroidis, *Remedies …*".

[635] As is the case of a norm explicitly providing for an exception to another norm, the derogating treaty norm then carves out the scope of application of the general international law norm as between the parties to the treaty. Hence, both norms (having a different scope of application) can then be applied side by side and no conflict arises.

or vice-versa). Examples of the former are rare. Examples of the latter are Art. IX:2 of the Marrakesh Agreement providing that authoritative interpretations can be adopted by ¾ majority instead of by agreement of all WTO members (contracting out of Vienna Convention Art. 31.3(a)) and Art. X of the Marrakesh Agreement providing for certain amendments by 2/3 majority instead of by agreement of all WTO members (contracting out of Vienna Convention Art. 40). Equally, in terms of state responsibility, DSU Arts. 22.6 and 23.2(c) explicitly contract out of general international law rules on countermeasures (reflected in Arts. 50-53 of the ILC Draft 2000) by requiring, for example, multilateral authorisation and monitoring of countermeasures.

As noted by Arranguo-Ruiz, special rapporteur to the ILC on state responsibility:

> "for a true derogation from the general rules to take effect, the parties to the instrument must expressly indicate that by entering the treaty-based regime they exclude the application of certain or of all the general rules of international law on the consequences of internationally wrongful acts, rather than confining themselves to dealing globally with the consequences of the violation of the regime".[636]

One author has taken this quote as meaning that only "explicit derogations", as we have construed them here (i.e., only contracting out by the very terms of a treaty read in isolation), can amount to contracting out, not "implicit derogations" based on treaty interpretation.[637] It seems, however, that Arranguio-Ruiz was contrasting "dealing globally with the consequences of the violation regime" to "expressly indicating" that certain rules are excluded. In other words, he was confirming the presumption in favour of general international law applying unless it is contracted out from in the treaty. He was not, the way I read it, limiting the form of this contracting out to explicit treaty terms taken in isolation only.

c. "Implicit" contracting out

A treaty norm may not contract out of general international law by means of its very terms. But it may still do so when these terms are interpreted in context and/or with reference to the object and purpose of the treaty. Elements extraneous to the treaty may also support contracting out, in particular subsequent treaty practice (pursuant to Art. 31.3(b) of the Vienna Convention or international institutional law[638]).

In the area of state responsibility, special rapporteur Riphagen recognised that

> "[a] rule of international law, whether customary, conventional or other origin, imposing an obligation on a State, may explicitly or implicitly determine also the legal consequences of the breach of such obligation".[639]

Riphagen referred to "the object and purpose of the subsystem" as an element to decide on whether there was implicit derogation.[640] In the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, as well, the ICJ checked indications of intentions of a not purely textual nature to decide on whether a treaty had "contracted out" of rules on treaty termination:

> "[t]he 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable

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[636] Underlining added.
[637] Garcia Rubio, *Unilateral Measures* …, 23.
[638] See *supra* Chapter II, section C.3 and below Chapter V.B.
[639] W. Riphagen, *Third Report on the Content, Forms and Degrees of International Responsibility*, YILC, 1982, V.II, Part One, para. 9, underlining added.
[640] Ibid., para. 75.

> régime of joint investment and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention".[641]

By "implicit" contracting out we do not mean, however, contracting out to be derived from elements other than those that can be referred to under the normal rules of treaty interpretation (such as *travaux préparatoires* there where treaty interpretation under the general rule of Art. 31 does not leave the meaning ambiguous or obscure or the subjective intention or legitimate expectation of only one or a few WTO members[642]). Such cannot amount to contracting out. As James Crawford noted, the question of the extent to which contracting out occurred "is always a question of interpretation in each case, which no provision such as article 37 [now article 56 on *lex specialis*] can prejudice".[643] This interpretation is bound by the customary rules of interpretation reflected in Arts. 31 and 32 of the Vienna Convention. If these rules lead to a conclusion that there is contracting out, there is contracting out. And in the end it does not make a difference whether the contracting out occurred explicitly or implicitly. If these rules do not lead to a finding of conflict or contracting out, the presumption in favour of general international law applying has not been rebutted.

d. The example of WTO remedies *versus* general international law remedies

Let us apply what was said above on "contracting out" to the question of the extent to which the WTO treaty contracted out of general international law rules on remedies (cessation, reparation and countermeasures[644]).

If the WTO treaty had only confirmed cessation as a remedy under the WTO treaty and added some special rules on how to obtain cessation, would this have meant that the other two remedies (reparation and countermeasures) are excluded as "contracted out"? No. In and of itself, a mere confirmation of one rule of general international law does not exclude other rules. As noted earlier, the presumption in favour of general international law applying stands in the way and trumps the adage *expressio unius est exclusio alterius*.

But what then in case the WTO treaty, as it does in the DSU, deals with remedies more extensively, i.e., does not confine itself to cessation and some modalities on how to obtain it? The DSU does, indeed, *oblige* panels and the Appellate Body, in case they have found a breach of WTO law, to recommend that "the Member concerned bring the measure into conformity with" the relevant WTO agreement (DSU Art. 19.1). In other words, the general international law remedy of cessation is explicitly confirmed in the WTO treaty. No other types of recommendations are explicitly called for.[645]

On top of that, however, DSU Art. 22 also provides for "compensation" and the "suspension of concessions or other obligations". Art. 22.1 provides: "Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the

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[641] ICJ Reports 1996, para. 100.

[642] The criterion of legitimate expectations of some WTO members only as a tool to interpret WTO rules in violation cases was twice rejected by the Appellate Body (*India – Patents*, para. 36 ff. and *EC – Computer Equipment*, para. 84). As noted below in Chapter V, section B, what counts is the "common intentions" of all WTO members.

[643] In the same sense, Simma: "the wording 'except where and to the extent …' [in what is now Art. 56 of the ILC Draft] allows for the question of conditions for a fall-back on the normal consequences of international wrongs to be answered in each individual case" (Simma, *Self Contained …*, 131).

[644] ILC Draft 2000, Arts. 28 ff.

[645] Other than those for specific WTO violations, such as prohibited subsidies where the recommendation must be that the member concerned "withdraw the subsidy" (SCM Art. 4.7) or for cases of non-violation, see DSU Art. 26. In addition, panels and the Appellate Body are granted the explicit authority to make "suggestions" as to how the member concerned could implement the recommendation of "bring the measure into conformity" (DSU Art. 19.2).

recommendations and rulings are not implemented within a reasonable period of time". Compensation is "voluntary" and must be "consistent with the covered agreements" (DSU Art. 22.1). Compensation, in the DSU sense, is, indeed, not the compensation known in general international law. It is not the granting of monetary compensation to make good past injury. Rather, it is the granting of additional trade concessions to make good the continuation of the breach (it is, in a way, a temporary re-negotiation of the WTO treaty).

Suspension of concessions, as well, has a different background and is of a different scope than countermeasures in general international law (although WTO suspension is, these days, generally referred to as "retaliation" or "countermeasures"). In the GATT/WTO, suspension has, indeed, its roots more in the law on treaties (more particularly, Art. 60 of the Vienna Convention allowing for suspension in case of material breach) than in the law on state responsibility (i.e., countermeasures).[646] The amount of suspension authorised under the DSU ("equivalent to the level of the nullification and impairment" of the inconsistent measure, DSU Art. 22.4) supports the view of WTO "countermeasures" merely being a tit-for-tat (one breach made good by another) and not an effective tool to induce compliance (as countermeasures are supposed to be under general international law).

In these circumstances, what about the general international law remedies of reparation and countermeasures? Has the DSU contracted out of them by providing "compensation" and "suspension" as it is set out in the DSU?

James Crawford answers this question in the affirmative. For him, the DSU is an example where it is "clear from the language of a treaty or other text that only the consequences specified flow".[647] Crawford refers to the DSU's focus "which is firmly on cessation rather than reparation". In contrast, Petros Mavroidis answers the question in the negative. In support, he refers to DSU Art. 19.1 which obliges panels to recommend that the member concerned "bring the measure into conformity" but leaves it open as to what this recommendation may require. Mavroidis points at the fact that Art. 19.1 "does not prejudge the form of remedies that the WTO adjudicating bodies can suggest" as ways in which conformity can be achieved so that "[t]o the extent … that the WTO regime does not provide for specific remedies, the ILC codification is relevant".[648] The truth must lay somewhere in between.

In support of Crawford, the DSU does provide *lex specialis* and at least some contracting out when it comes to, for example, countermeasures. The DSU "suspension of concessions" is now generally recognised as a form of countermeasures[649] and in terms of multilateral authorisation and monitoring, DSU Art. 22.6 contracts out of general international law. In support of Mavroidis, however, there remains room for input by general international law in the field of WTO remedies, either as a fall-back for particular issues not regulated in the DSU (the second type of fall-back we referred to earlier) or as a reference in the interpretation of the remedies that the DSU does explicitly provide for (the first type of fall-back discussed above).

As noted earlier, an examination of the extent to which contracting out occurred must be made separately for each particular rule, not for "the field of remedies" generally, as both Crawford and Mavroidis seem to do. Let us focus, first, on whether the obligation of reparation for past damage has been contracted out. We shall then examine the same question in respect of general international law on countermeasures

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[646] On the inter-play between suspension of treaty and countermeasures, see Linos-Alexander Sicilianos, *The Relationship between Reprisals and Denunciation or Suspension of a Treaty*, 4 EJIL (1993) 341-359.
[647] Crawford, Third Report, para. 420.
[648] Mavroidis, *Remedies …*, 765.
[649] See, for example, the Arbitrators' decision in *EC – Bananas* (US suspension request), at para. 6.3, addressing suspension of concessions under the DSU as "countermeasures to *induce compliance*" and this even if, in principle, treaty « suspension » is a remedy under the law of treaties rather than state responsibility (confirmed by the Arbitrators in *EC – Hormones*, US suspension request, para. 40 and *Brazil – Aircraft*, para. 3.44). On the evolution of GATT suspension as a tit-for-tat to being a sanction or countermeasure, see Steve Charnovitz, *Should the Teeth Be Pulled? A Preliminary Assessment of WTO Sanctions*, 2000, on file with the author.

i. Reparation for past damage in the WTO?

In support of the WTO treaty having contracted out of the general international law obligation of reparation for past damage, reference could be made to DSU Arts. 3.7 and 22.1. The latter was quoted earlier. The former states: "The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure" (underlining added). An interpretation of these provisions in favour of "contracting out" could refer also to what is allegedly a GATT "subsequent practice" of *not* awarding reparation for past damage (with the exception of six panel reports, only three of which were adopted, in the areas of dumping and subsidies).[650] This alleged "practice" was echoed also by some WTO members in recent DSB meetings.[651] DSU Art. 3.1 provides that "Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein". Art. XVI:2 of the Marrakesh Agreement, as well, provides: "Except as otherwise provided … the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947". Finally, Art. 31.3(b) of the Vienna Convention also directs that a treaty must be interpreted taking account of "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". An, in my view, less convincing argument in support of "contracting out" could, furthermore, be that the object and purpose of the GATT (as well as, for some[652], the WTO) was (and, for some, still is), to "maintain a general level of reciprocal and mutually advantageous concessions" (GATT Art. XXVIII:2), i.e., a certain general level of market access, not necessarily compliance with specific rules. To put it differently, the object and purpose of the GATT was to *allow for a certain level of trade*, not so much to have *trade policies in accordance with the rules per se*. A breach of the rules could, from this viewpoint, be made good by an additional concession elsewhere, or a reciprocal withdrawal of concessions by the victim state. There was no need, nor expectation, within this framework, to actually hold the violator state "responsible" for past damage. Although in today's context this argument is not convincing (given, especially, the clear DSU requirement of ultimate compliance with the rules) this traditionalist GATT view may play a role in the reconstruction of what WTO members had in mind when negotiating the WTO treaty.

The arguments above could lead to the interpretation that the DSU did contract out of the general international law obligation of reparation. However, if this were the case, this should not prevent panels from *interpreting* whatever *other remedies* the WTO does provide for in the light of general international law (pursuant to the first type of fall-back we referred to). For example, the remedy of "compensation" in DSU Art. 22 could be interpreted so as to cover also elements of past damage. If not, it could be argued, the "compensation" is not "satisfactory" in terms of DSU Art. 22.2. In addition, also WTO "suspension of concessions" could be interpreted so as to cover past damage, for example, by means of assessing the level of suspension allowed for as including not only prospective nullification (for as long as the breach continues) but also past nullification.

In contrast, strong arguments can be found also in support of the obligation of reparation *not* being contracted out in the WTO treaty. Firstly, DSU Arts. 3.7 and 22.1 may, indeed, limit the availability of "compensation" to situations of non-compliance with panel recommendations (hence excluding that compensation be awarded in the panel report itself). However, this "compensation" has, as noted earlier, little to do with the general international law remedy of reparation. DSU "compensation" is a treaty-based remedy. It is essentially a temporary re-negotiation of the treaty, requiring the consent of both parties, for as long as the breach continues. International law "reparation", in contrast, is an

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[650] Cases summed up in Pauwelyn, *Enforcement …*, note 21. See also Mavroidis, *Remedies …*, 774-777.
[651] See, for example, statements by Australia, the United States, the EC and Canada when the *Australia – Leather* Art. 21.5 panel report was adopted (WTO doc. WT/DSB/M/75, 5 ff).
[652] See Bello, *Less is More …*.

automatic consequence of state responsibility.[653] It requires neither re-negotiation of the treaty nor consent of the parties.

Secondly, the GATT "practice" of not awarding reparation for past damage may not amount to genuine "subsequent practice". There are not only notable exceptions to this practice (albeit in the areas of dumping and subsidies only[654]). What is more important, this "practice" is not one where GATT panels have consistently rejected requests for reparation. Rather, it is one where GATT contracting parties have simply not made such requests. Hence, when GATT panels did not award reparation for past damage they did so because of the *non ultra petita* rule, not on the ground of a legal finding that such reparation was not available. The same is true for WTO panels. Consequently, this alleged GATT/WTO practice, being one of silence rather than rejected requests, does arguably not qualify as a "principle for the management of disputes heretofore *applied*", nor as a "customary practice *followed*" by GATT parties or a "subsequent practice … which establishes the *agreement of the parties* regarding its interpretation" (respectively, in the sense of DSU Art. 3.1, Art. XVI:1 of the Marrakesh Agreement and Art. 31.3(b) of the Vienna Convention). As the Appellate Body pointed out: "Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a 'concordant, common and consistent' sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant".[655] In addition, as much as some WTO members have recently confirmed the absence of reparation for past damage, others have pleaded in favour of reparation.[656] Furthermore, there is one WTO panel report, albeit once again in the area of subsidies, that explicitly called for some form of reparation for past damage. It did so by finding that for a member to "withdraw" a one-time past subsidy (as required in Art. 4.7 of the Subsidies Agreement), the beneficiary of the subsidy must repay the entire sum of the subsidy to the government.[657] Finally, as already hinted at, the argument that the object and purpose of the WTO is a general balance of trade concessions safeguarded by treaty based remedies, not compliance with specific rules enforced by state responsibility, may have been true in the early GATT days. It is not today.

These arguments plead in favour of the fact that the WTO treaty has *not* contracted out of the general international law remedy of reparation. How then could this reparation be awarded?

Firstly, by a panel recommending that the violator make reparation in a separate "recommendation", on top of the recommendation to "bring the measure into conformity". DSU Art. 19.1 *obliges* panels to make the latter recommendation. Nothing in DSU Art. 19 prohibits them from making other recommendations. As further explained below[658], and recently confirmed by the ICJ in the *La Grand case*, the power of a tribunal to award remedies, including reparation, is part of the implied or incidental jurisdiction of panels, that is, a competence inherent in the exercise of the judicial function.[659] There is no need for WTO members to explicitly confer this power to WTO panels, i.e.,

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[653] See ILC Draft 2000, Art. 31 and, as to the automaticity of reparation, *Chorzow Factory* (Merits), PCIJ, Ser. A, no. 17, 29 (1928), quoted above.

[654] See *supra* note 650.

[655] Appellate Body report on *Japan – Alcohol Beverages*, 12-13.

[656] At a DSB meeting Equador, in the context of the *EC – Bananas* dispute, stated the following: "A careful reading of Article 3.2 of the DSU in conjunction with Article 31.3 of the [Vienna Convention] confirmed that the general principles of international law on state responsibilities were applicable in this case … Articles 19 and 22 of the DSU did not exclude the general principle of international law on reparation of injury caused by a violation of international law … it might be appropriate to initiate a new legal action in order to determine whether Ecuador had the right to compensation" (WT/DSB/M/89, para. 8).

[657] Panel report (pursuant to DSU Art. 21.5) on *Australia – Leather*, conclusion in para. 6.48.

[658] See Chapter VII, section B.

[659] Unless, of course, the treaty enforced has contracted out of reparation. The panels on *Guatemala – Cement I* (at para. 8.3)) and *US–* Steel (at para. 8.11), in my view, wrongly considered that for additional recommendations to be made by a panel, explicit DSU provisions to that effect should have been inserted. What

to make it explicit that they may "recommend" also reparation. Making an explicit recommendation that reparation must be made would be the most obvious and open track. An ordinary reading of the recommendation to "bring the measure into conformity" seems, indeed, to imply only cessation, either by removing the inconsistent measure altogether or by changing the measure so that it conforms to WTO rules.[660] In addition and distinct from this recommendation of cessation, a clear recommendation of reparation could then be made.

Secondly, and in the alternative, a panel could restrict itself to recommending that the measure be brought "into conformity" or, as it is required in the event of prohibited subsidies, to "withdraw the subsidy".[661] What is required to obtain this "conformity" could then be said to include reparation for past damage. A panel could make a "suggestion" in this direction pursuant to DSU Art. 19.2, i.e., suggest that, in its view, for the measure to be brought "into conformity" (or, for the subsidy to be "withdrawn") reparation is required. This is what the panel on *Australia – Leather* decided in respect of a past, one-time, non-recurring prohibited subsidy where "withdraw the subsidy" was read as requiring reimbursement of the entire subsidy, not just repayment of that part of the subsidy that continued to affect the competitiveness of its beneficiary in the future. There seem to be no reasons why the same could not be done in similar circumstances in respect of other WTO breaches (interpreting "bring into conformity" so as to include retrospective reparation also). This is what the panel on *Guatemala - Cement II* seemed to imply when stating that "repayment might be justifiable in circumstances such as these" in response to a Mexican request that the panel "suggest" that for "conformity" to occur Guatemala ought to refund the anti-dumping duties so far collected. The panel nonetheless refrained from making such suggestion.[662]

This second track of widely interpreting "bring the measure into conformity" is the one that will most likely be followed in the near future.[663] It is the one that rocks the boat the least, as opposed to a clear cut and separate recommendation to make reparation. It can be adapted also to the particular circumstances of each case, some breaches or circumstances requiring reparation, others not. The risk related to this approach is, however, that one creates a two class society of breaches, in particular completed breaches (such as the one in *Australia – Leather*) as opposed to continuing breaches (such as most WTO breaches, by legislative or administrative measures of a continuing nature). The ironic result could then well be that for WTO members to avoid paying reparation for past damage (as Australia was forced to do in the *Leather* case) they should simply *continue the breach* as a result of which cessation may still offer some remedy and reparation for past damage becomes less

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then about, for example, preliminary rulings by WTO panels on procedural objections? No DSU provision allows for such rulings. But this does not mean that panels have no power to make them. They have this power as part of their judicial function to settle a dispute.

[660] The Appellate Body implicitly limited the recommendation of "bring into conformity" to cessation only. In *US – Certain Products*, it reversed the panel's recommendation to "bring the measure into conformity" on the ground that the measure that was found to be WTO inconsistent was no longer in existence. Hence, since the breach had stopped, there was no use to recommend cessation. As the Appellate Body put it (at para. 81): "there is an obvious inconsistency between the finding of the Panel that 'the 3 March Measure is no longer in existence' and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations". In that case, although the measure was found to be WTO inconsistent, no recommendation was made (ibid., para. 129).

[661] Art. 4.7 of the Subsidies Agreement.

[662] The panel's conclusion in this respect is arguably a form of *non liquet*. The reason for refusing the suggestion was basically that Mexico's request "raises important systemic issues regarding the nature of the actions necessary to implement recommendations under Article 19.1 of the DSU, issues which have not been fully explored in this dispute" (Panel report on *Guatemala – Cement II*, at para. 9.7). The same excuse was made *verbatim* in *US – Steel* (at para. 8.13). Given the *jura novit curia* principle, it was for the panel to "fully explore" these "important systemic issues" and, if need be, to ask questions to the parties in this respect. The fact that the panel did not do so could be seen as a denial of justice or *non liquet*.

[663] But see the Appellate Body report on *US – Certain Products* where the Appellate Body found that making a recommendation to "bring the measure into conformity" in case the measure is no longer in existence is inappropriate. This seems to imply that, in the eyes of the Appellate Body, "bring into conformity" means cessation only. See *supra* note 660.

compelling.[664] This absurdity would plead in favour of awarding past reparation also for continuing breaches.

On balance, the arguments *against* contracting out of the obligation of reparation are destined to prevail. Nonetheless, for reparation to become a standard remedy in WTO law will take time.[665] This gradual shift will start with some awards of reparation in special circumstances (such as protracted non-compliance) and special fields (such as subsidies and dumping). WTO panels could also limit reparation for past damage to breaches that occur *subsequent* to the first finding that such reparation is, indeed, a remedy available in WTO law.[666] There are, however, no valid legal reasons to draw strict lines as between different types of violations (such as subsidies and dumping *versus* other fields of WTO law). WTO breaches, as well as the suspension of WTO obligations in response of breach, have a direct impact on individual operators. Whereas a balancing act of trade concessions without reparation for past damage may be acceptable to governments, legal rules affecting individuals call for greater predictability and stability. They must be respected as international obligations whose breach leads to state responsibility -- including some form of reparation for past damage --, not as some political compromise that can be withdrawn or exchanged for another.[667] However, as I noted elsewhere: "It would … be wrong to take these important steps precipitously and without extensive discussion; doing so could threaten the political support and legitimacy of the WTO, in general, and of its dispute settlement decisions, in particular[668] … Once WTO rules have been accepted as

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[664] On the other hand, for the WTO not to award any remedy for completed breaches (as was done in *US – Certain Products*), is equally absurd. It would make a mockery of the DSU: if the breach is repealed during panel proceedings, nothing in terms of remedies could then be obtained. On the contrary, members could start engaging in so-called "hit-and-run practices", enacting and repealing breaches at the appropriate time so as to avoid any responsibility. In those cases, the remedy of "assurances and guarantees of non-repetition" referred to in Art. 30(b) of the ILC Draft 2000 and recently confirmed by the ICJ in the *LaGrand case* (Judgement of 27 June 2001 on Jurisdiction and Admissibility, at paras. 46-48 and 117-127, posted on the ICJ webpage at "http:/www.icj-cij.org/icjwww/idocket"), could offer some redress. Once again, even if the DSU does not explicitly set out this remedy, it could be awarded by panels as part of their inherent judicial function, the way the ICJ awarded the remedy of non-repetition under the Vienna Convention on Consular Relations in the *LaGrand case*.

[665] Unless the WTO members were to explicitly inject it into the treaty by authoritative interpretation or amendment or, in contrast, were to explicitly exclude it from WTO law.

[666] Note, in this respect, the ICJ consideration in the *LaGrand* case that had Germany requested reparation for the US non-compliance with the Court's provisional measure, the Court would have taken account of the fact that when the US breach occurred "the question of the binding character of orders indicating provisional measures had been extensively discussed in the literature, but had not been settled by its jurisprudence". The Court noted that it "would have taken these factors into consideration had Germany's submission included a claim for indemnification" (at para. 116). This approach of not granting (full) reparation for breaches that occurred at a time when the law, as interpreted by the court, was not entirely "clear" was adopted more openly by the ECJ in the *Defrenne v. SABENA* case. There, the Court decided for the first time that Article 141 (ex 119) had direct effect in relation to direct and overt discrimination in violation of the principle of equal pay for equal work for men and women. The Court specified, however, that its judgment could not be relied on to support claims relating to pay periods prior to the date of the judgment except as regarded those workers who had already brought legal proceedings or made an equivalent claim (Case 43/75 [1976] ECR 455).

[667] This is not to imply that so-called collective compliance regimes, as used often under environmental conventions, de-linked from state responsibility, are less effective. On the contrary, for environmental norms, this type of collective "enforcement" is often more appropriate than bilateral dispute settlement based on state responsibility. See *supra* note 191 and Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B.INT'L ENVTL. L. 123.

[668] What, indeed, if a WTO member refuses to pay reparation? If reparation becomes generally available, the risk could arise, moreover, that WTO members want to scale down the substantive content of WTO rules and create less stringent new WTO rules. The fact that no reparation is available may have been one of the reasons why rather strict agreements such as the SPS agreement saw the light of day. Should it, one could submit, in the context of health and consumer information/protection issues not be possible for WTO members, in certain extreme circumstances, to "buy their way out" of certain SPS violations (by means of trade compensations or suspensions instead of compliance)? Or, on the contrary, should WTO members not have agreed to SPS rules in the first place if they wanted to reserve this right to "buy" violations?

international legal obligations that affect individuals and merit collective enforcement for the public good, however, and once this new perception has come to be accepted and entrenched, it will be increasingly difficult to justify both the absence of certain traditional remedies, including reparation, and the lack of a more effective system to induce compliance with WTO rules".[669]

ii. Countermeasures under general international law in the WTO?

Given the remedies explicitly provided for in the DSU, outlined above, has the WTO treaty contracted out of general international law on countermeasures? In the GATT days this question attracted a lot of scholarly attention.[670] In the GATT context, the question was essentially whether a GATT contracting party could resort to unilateral countermeasures in case another GATT contracting party blocked the establishment of a panel or the adoption of a panel report (both required a consensus of all GATT contracting parties). Many authors (as well as, prominently, the United States) submitted that such fall-back on general international law was justified in case the WTO enforcement mechanism was thus blocked. Other GATT contracting parties, in particular the EC, maintained that this fall-back was not allowed on the ground that the GATT had contracted out of this aspect of general international law.[671]

We shall not here enter into this historical debate. The one aspect that may be useful to clarify though is that the enforcement mechanism explicitly set out in GATT 1947 (Arts. XXII-XXIII) was largely, if not exclusively, a mechanism based *on the law of treaties*, namely: in the event of breach and in case the breach is not put to an end, the breach may be rectified by means of either (i) a re-negotiation of the treaty (trade compensation by the violator) or (ii) in cases where "the circumstances are serious enough to justify such action" (GATT Art. XXIII:2), a suspension of treaty obligations by the injured state v-à-v the violator. The latter, in particular, is a treaty-based remedy along the lines of Art. 60 of the Vienna Convention (suspension of treaty obligations in case of "material breach") and the *exceptio inadimpleti contractus*. Both the GATT suspension, as originally conceived, and a suspension under Art. 60 bring, at least in theory, an end to the matter.[672] The original GATT breach does then no longer constitute a breach, nor does the suspension in response to that breach. The relevant treaty obligations have, indeed, been suspended so that they can, *a fortiori*, no longer be breached (*inadimplenti non est adimplendum*). If, in these circumstances, a fall-back on general international law rules on countermeasures would, indeed, have been appropriate (a question we leave open here), this would not so much have been because a GATT panel or GATT suspension had been previously blocked by the violator state, but rather because the GATT had, arguably, not contracted out of the law on *state responsibility*, including the law on countermeasures (GATT having provided *lex specialis* only in terms of the *law of treaties*).[673] Countermeasures under the law of state responsibility are,

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[669] Pauwelyn, *Enforcement ...* , 347. At the same time, and as noted earlier, it could well be so that two types of WTO obligations become distinguishable, those that set out mere concessions that can be traded (e.g., under GATT Art. XXVIII or as part of a suspension of concessions) as opposed to those containing genuine legal obligations (whose breach is followed by state responsibility and which cannot be made subject to suspensions nor be exchanged). See *supra* text at note 125.

[670] For an excellent overview: Javier Fernandez Pons, *Self-Help and the World Trade Organization*, 55 in PAOLO MENGOZZI (ed.), INTERNATIONAL TRADE LAW ON THE 50TH ANNIVERSARY OF THE MULTILATERAL TRADING SYSTEM, at 67-74 (1999), hereafter "Pons, *Self-Help ...*". See also MICHAEL HAHN, DIE EINSEITIGE AUSSETZUNG VON GATT-VERPFLICHTUNGEN ALS REPRESSALIE (1995), hereafter "Hahn, *Einseitige ...*".

[671] See Kuijper, *Law of GATT ...*, 251.

[672] Although the obligations are only "suspended", no doubt out of a desire to leave open the possibility of a resumption of treaty relations notwithstanding the breach.

[673] Shabtai Rosenne, for example, makes a distinction between "the law of the instrument" (i.e., the treaty) and "the law of obligation" (i.e., the obligations derived from a treaty). He submits that the Vienna Convention focuses on "the instrument in which an international obligation is expressed and not the obligation itself" (SHABTAI ROSENNE, BREACH OF TREATY, 3-4 (1985)). The "law of obligations" is, then, what is currently examined by the ILC in the field of state responsibility. In this light, Art. 60 relates to the treaty as *instrument* and provides an opportunity to invoke suspension or termination in case the *instrument* has been, so to speak, endangered by a breach (only "material breaches" can lead to suspension or termination). When it comes to the consequences of breach for the treaty *obligations* (as opposed to the treaty as an instrument), the

indeed, of a different nature than suspension under Art. 60.[674] Countermeasures can be taken for any breach, not just material breaches). Moreover, countermeasures do not as such put an end to the breach (no treaty obligations are suspended). Rather, the original breach continues to exist and the countermeasure -- in principle illegal, but justified as a response to the original breach -- is there to induce compliance. It is not, as treaty suspension is, the end of the matter. Hence, if a fall-back would have been allowed for, it was, indeed, necessary for GATT contracting parties to first exhaust the treaty-based remedies provided for in GATT Arts. XXII-III, but once this was done, and to the extent still necessary[675], they could then arguably have invoked also rules on state responsibility, including countermeasures.[676] Not primarily because the GATT treaty-based remedies were ineffective, but because remedies under treaty law and remedies under state responsibility are different. The old GATT situation was, indeed, similar to what we see now under many environmental treaties. These treaties provide for special enforcement mechanisms (so-called collective compliance procedures) that have little to do with state responsibility. In these circumstances (and given the silence of these treaties on issues of state responsibility) it is, indeed, defensible to argue that a fall-back on general international law rules on state responsibility remains an option.[677] Again, not so much because of the ineffectiveness of the treaty-based mechanism, but because of the absence of contracting out of the law on state responsibility.

This situation has changed dramatically with the conclusion and subsequent interpretation of the WTO treaty, in particular the DSU. Suspension in the WTO is now generally equated with countermeasures.[678] In the Subsidies Agreement the word "countermeasures" is even used explicitly. WTO suspension is no longer seen as a suspension of treaty obligations (*à la* Art. 60 Vienna Convention) that re-balances the overall level of concessions and hence brings an end to the matter. The explicit "temporal" nature of trade compensation and suspension as a solution to a dispute (DSU Arts. 3.7 and 22.1), as well as the clear-cut obligation that the DSU imposes on violators to bring their measures *in compliance* with WTO rules (DSU Arts. 3.7, 19.1 and 22.1), have made it very difficult to

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law on state responsibility applies. Or as Bruna Simma noted: "Article 60 constitutes one of the provisions with regard to which … the limited scope of the Vienna Convention … will be felt both clearly and painfully. While Article 60 and its related provisions carefully and equitably regulate the application of the reactions to breach having their *sedes materiae* in the law of treaties, any examination of the breach situation limited to an analysis of the rules of the Vienna Convention will, due to the exclusion of similar reactions having their *sedes materiae* in the law of international responsibility provide the observer with an incomplete picture" (*Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law*, 20 OSTERREICHISCHE ZEITSCHRIFT FUR OFFENTLICHES RECHT 5, 83 (1970).

[674] See, Hahn, *Einseitige* ..., 396: "Distinguished commentators have advanced the view that Article 60 of the Vienna Convention sets up the exclusive standard for the suspension of treaties. However, an analysis of Article 60 of the Vienna Convention reveals that the traditional perception of the law of treaties and the law of state responsibility as parallel bodies of law is still valid. Thus, apart from special treaty regimes, it is the law of state responsibility which defines under what conditions a treaty may be suspended as reaction to an internationally wrongful act". In the same sense, see Crawford, Second Report, Add.2, paras. 314-329 (comparing and distinguishing the *exceptio inadimpleti contractus* from the regime of countermeasures and treaty suspension under Art. 60) and Third Report, para. 60 (making a categorical distinction between Art. 60 Vienna Convention and state responsibility). That the Vienna Convention leaves unaffected customary international law rules on state responsibility, see preamble 8 ("*Affirming* that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention") and Art. 73 of the Vienna Convention ("The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty … from the international responsibility of a State …"). The reverse applies for the ILC Draft. Art. 33 provides: "The applicable rules of international law shall continue to govern the legal consequences of an internationally wrongful act of a State not set out in the provisions of this Part".

[675] Although of a different nature, treaty suspension could well be enough to induce compliance so that no further countermeasures would be allowed.

[676] As Crawford noted in his Third Report (at para. 93): «Suspension of treaty relations is no substitute for an adequate regime of State responsibility ».

[677] See Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B.INT'L ENVTL. L. 123.

[678] In support, see Pons, *Self-Help* ..., 63 and the reference to a long series of authors in his note 17. See also *supra* note 649.

portray WTO suspension as anything else than countermeasures. That is, action taken, not as a tit-for-tat or to re-balance the situation, but *with the objective to induce compliance*.[679] Within this context, the provisions in the WTO treaty on suspension of treaty obligations have shifted into the area of state responsibility. Given their special nature -- e.g., the requirement to first have a multilateral decision in support of breach[680] and the condition of "equivalence" to nullification[681] -- they must be seen as a form of *lex specialis* in the area of countermeasures. Consequently, they contract out, at least to some extent, of general international law rules on countermeasures.[682]

The situation under the WTO treaty, providing *lex specialis* on countermeasures[683], is thus quite different from that under the GATT where, essentially, only treaty-based remedies were explicitly referred to. Moreover, since authorisation of WTO countermeasures can now only be blocked by a consensus of all WTO members (including the member seeking the countermeasures) and since DSU Art. 23 made it explicit that when a member seeks redress under WTO obligations, DSU procedures *must* be followed, the question of fall-back has, in practice, been narrowed down to this: can a WTO member take general international law countermeasures if WTO countermeasures turn out to be ineffective?

To answer this question in the affirmative, as some have done[684], is, to say the least, problematic. If it is, indeed, so that WTO suspension is a form of countermeasures, and hence the WTO treaty provides for a special regime on countermeasures, this special regime must be taken as the explicit choice of WTO members. They decided to contract out of general international law rules in this respect. For a WTO member to unilaterally "contract back in" on the ground that the special regime is not to its pleasing or ineffective cannot be accepted. Contracting out of general international law does not necessarily mean improving or making general international law *more* effective.[685] The way in which this contracting out goes -- more effective or less effective remedies --, is completely open and left to the contractual freedom of states, subject only to rules of *jus cogens*). If the parties to a treaty decide to contract out of something, one party to such treaty cannot unilaterally contract in again (*pacta tertiis*). If it is unhappy with the contracting out, it must convince the other parties to the treaty to change the treaty.[686] Or would it be possible for a state to fall-back on the general international law obligation of reparation, even if a treaty has contracted out of it, on the mere ground that that state considers that the treaty's enforcement mechanism, and its contracting out of reparation, is ineffective?[687]

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[679] See *supra* note 649.
[680] DSU Arts. 22.6 and 23.2(c).
[681] DSU Art. 22.4.
[682] Pursuant to Art. 56 ILC Draft 2000. *Contra*: Garcia Rubio, *Unilateral Measures …*, 29: "Nothing in article 23 of the DSU, according to which WTO Member States shall have recourse to the DSU and abide by its rules, amounts to an express derogation from the right to adopted countermeasures when a loosing party fails to implement a decision of the dispute settlement organs and the remedies provided for in the treaty have been exhausted without any positive result". If WTO suspension is, indeed, a countermeasure, it is difficult to see how the DSU does not provide *lex specialis* in the field of countermeasures. The DSU confirms that countermeasures can be taken but it makes this subject to a series of conditions, explicitly set out in the DSU.
[683] Even if the text of GATT Arts. XXII-III has not been changed and the DSU still talks about "suspension", the context in which these provisions now stand make it, as pointed out earlier, untenable to argue that WTO "suspension" provisions have nothing to do with (and hence provide no *lex specialis* for) state responsibility. Recall also that the Subsidies Agreement does mention the term "countermeasures" explicitly in its Art. 4.11.
[684] See *supra* note 682.
[685] If not, it would be impossible for States to agree on so-called "soft law", in the sense of law to be enforced only through consultations or reporting (that this should be possible, see Crawford, First Report, para. 27; implicitly *contra*, see Simma, *Self-Contained …* as discussed *supra* in note 632).
[686] Albeit a change *inter se*, discussed below in Chapter VI, section C.3.
[687] To fall-back on general international law countermeasures (fulfilling only the ILC draft's conditions of, e.g., proportionality) in the context of specific DSU provisions on suspension -- in particular, those *explicitly limiting* suspension to "equivalence" and those setting out the conditions for "cross-retaliation" in DSU Art. 22 – would, indeed, reduce these specific DSU provisions to a nullity.

Nonetheless, the fact that the WTO treaty did, therefore, contract out of some elements of general international law on countermeasures does not mean that this general law is irrelevant for the WTO treaty.

Firstly, the contracting out is only in respect of countermeasures taken in response to a breach *under WTO agreements*. The DSU does not say anything on countermeasures taken in response to *non-WTO breaches*. The non-WTO treaty that is breached may, of course, provide for *lex specialis*. But in case of breach of a *non-WTO norm* and in the event a countermeasure in the form of *suspension of WTO obligations* were taken in response to that breach *in full respect of the particular treaty in question and general international law*, such suspension of WTO obligations, valid under international law, ought to be recognised also as valid in the WTO, including before a WTO panel.[688] We come back to this in Chapter VIII below when we address the "applicable law" before WTO panels.

Secondly, the WTO treaty sets out *lex specialis* in respect of the timing, authorisation, nature and level of countermeasures that may be taken in order to induce compliance with WTO rules. But the terms used in this *lex specialis* are often open-textured enough so as to allow an interpretation with reference to general international law (the first type of fall back referred to earlier). The ICJ explicitly supported this method of interpreting the *lex specialis* in the light of more general law in its Advisory Opinion on *Threat or Use of Nuclear Weapons*.[689] All arbitrators that had to decide on countermeasures so far made reference to the ILC Draft Articles on countermeasures, e.g., in support of the fact that countermeasures have the objective of inducing compliance.[690] Such reference could reach further and include also a broader interpretation of the "equivalence" standard, i.e., one that is more in line with the "proportionality" standard in the ILC Draft. In addition, a further fall-back on general international law is required for matters such as the effect of countermeasures on third parties and individuals, that is, matters on which the WTO treaty itself remains silent. According to general international law, the rights of third parties may not be affected by countermeasures.[691] Hence, a suspension of, for example, transparency obligations under GATT Art. X as a form of WTO suspension should not normally be allowed. Such suspension v-à-v one state only would, indeed, seem quite difficult since non-publication is most likely to affects the rights of all WTO members, not just the member refusing to comply.[692] Moreover, a WTO suspension that were to go against fundamental human rights or certain provisions of humanitarian law should not be allowed either.[693] This does not mean, however, that every time individuals are affected by a WTO suspension such WTO suspension is to be regarded as inconsistent with international law.[694]

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[688] *Contra*: LAURENCE BOISSON DE CHAZOURNES, LES CONTRE-MESURES EN DROIT INTERNATIONAL ECONOMIQUE 184 (1992); Pons, *Self-Help* ..., 102; and Hahn, *Einseitige* ..., Teil 5, 284 ff.

[689] ICJ Reports 1996, para. 30. Discussed below in the text at note **1166**.

[690] See the Arbitrators' decision in *EC – Bananas* (US suspension request), at para. 6.3, addressing suspension of concessions under the DSU as "countermeasures to *induce compliance*", confirmed by the Arbitrators in *EC – Hormones*, US suspension request, para. 40 and *Brazil – Aircraft*, para. 3.44).

[691] ILC Art. 50, paragraph 2 („Countermeasures are limited to the suspension of performance of one or more international obligations of the State taking the measures towards the responsible State). Idem bananas

[692] That this is not *necessarily* so, i.e., the fact that WTO obligations are not "integral", in that their suspension does not necessarily affect the rights of all other WTO members, see above Chapter II, section E.

[693] ILC Art. 51: "Countermeasures shall not involve any derogation from: … (b) Obligations for the protection of fundamental human rights; (c) Obligations of a humanitarian character prohibiting any form of reprisals against persons protected thereby; (d) Other obligations under peremptory norms of general international law …". See also Art. 60.5 of the Vienna Convention: "Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties".

[694] Even if it affects property rights of individuals, it would go quite far to submit that this affects "fundamental human rights". Art. 60.5, for example, is explicitly limited to "provisions relating to the protection of the human *person*", not her property. In the end, any form of countermeasures, as well as WTO suspension, will, and is actually aimed at, affecting individuals in some form. How else would one "hurt" a state so as to induce it into compliance? Even to break-off diplomatic relations with a state as a form of retorsion (not even countermeasures) affects individuals (e.g., the diplomats involved and the person renting out the embassy, etc.).

The question as to whether or not one can fall-back back on general international law countermeasures, notwithstanding the suspension/countermeasures provided for in the WTO treaty itself, is, after all, most likely to be of little practical interest. Firstly, what can be obtained under general international law is not much more than what one now gets under the WTO treaty, especially if "equivalence" were to be interpreted more in line with general international law.[695] Also in terms of treaty-based remedies, the WTO offers remedies that are "as good" as those under general international law. Pursuant to Art. XV of the Marrakesh Agreement, a WTO member can withdraw from the WTO (e.g., in response to breach by others) on the mere condition of 6 months notice. If a WTO breach were, moreover, so fundamental as to effect all other WTO members or the very object and purpose of the WTO and/or were to continue for a very long time, suspension of an increasing number of obligations by an increasing number of WTO members -- under the banner of suspension "equivalent" to nullification -- should be allowed.[696] Secondly, the question of fall-back on general international law countermeasures is likely to remain of academic interest only because states mostly prefer to take countermeasures in the area of trade. This is so, in particular, in response to breaches that are themselves in the area of trade, but also in response to other types of breaches, e.g., under human rights or environmental treaties. If countermeasures are effective at all, to take them in the field of commerce is often considered to be the best way to "hurt" the opposing state (unless, of course, one starts to think of using force). Moreover, retort measures -- that is, measures that are, unlike countermeasures, not illegal, such as the refusal to sign or ratify certain treaties, or blocking development aid -- can now anyhow be taken. Unless such retort measures were explicitly linked to non-compliance with WTO rules[697], the target state of such “legal” measures has no redress against them.

So far the real problem has, indeed, been the timing and level of countermeasures *as they are explicitly provided for in the WTO treaty* (not countermeasures under general international law). And here WTO jurisprudence has made it clear that "the DSU imposes a general obligation of Members to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements **only** by recourse to the rules and procedures of the DSU, and not through unilateral action".[698] Hence, suspension by the United States before multilateral DSB authorisation had been obtained, was condemned[699] and even US legislation, on the basis of its text, leaving room for the USTR to impose countermeasures inconsistent with the DSU, was found to constitute a *prima facie* violation of the DSU.[700]

It can, in other words, no longer be contested that WTO members are (i) obliged to establish a WTO violation exclusively by going through DSU procedures, and (ii) can only impose WTO countermeasures after such procedures have been completed and DSB authorisation has been obtained. Moreover, the Appellate Body language, as well as the examination above, seem to leave little doubt either that WTO members, in their search for redress of WTO violations, cannot (iii) operate

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[695] This is acknowledged even by authors arguing in favour of such fall-back: Garcia Rubio, *Unilateral Measures…*, 35-36, Pons, *Self-Help …*, 88 (that Pons is, indeed, in favour of such fall-back in the event WTO countermeasures are ineffective, see his note 80).

[696] Subject though to the fact that each of these suspending members becomes a complaining party as well as to the control of arbitrators under DSU Art. 22.6.

[697] If explicitly linked to an alleged violation of WTO rules, even retort measures (i.e., measures that are legal) could be seen as a form of “seeking redress” of a violation of WTO rules in respect of which DSU Art. 23.1 explicitly provides that WTO members must have recourse to and abide by the DSU mechanism (instead of imposing retort measures on the basis of a unilateral determination that WTO rule have been violated). Once a member has obtained a DSU determination that WTO rules have, indeed, been violated, to then impose retort measures may, however, be justifiable.

[698] Appellate Body report on *US - Certain Products*, para. 111. Note that this language excludes all types of unilateral action, even countermeasures under non-WTO rules. See also the panel report on US - Section 301 (at para. 7.43) referring to DSU Art. 23.1 as an “exclusive dispute resolution clause”.

[699] Appellate Body report on *US - Certain Products*.

[700] Panel report on *US – Section 301*.

unilaterally, outside the DSU, by means of taking countermeasures *in non-WTO obligations*, either *before* or *after* DSU procedures have been completed.[701]

e. Conclusion on "contracting out"

The example of whether the WTO treaty "contracted out" of the general international law rules on reparation and countermeasures shows the difficulty of determining the extent to which particular law contracts out of general law. It is a matter of interpretation.[702] The presumption is that there no contracting out, but the normal rules of treaty interpretation, if and when they lead to the conclusion that the treaty did contract out, may rebut this presumption. If the presumption is thus rebutted for one aspect of general international law, other aspects may, however, continue to apply.

[701] Recall that the Appellate Body report on *US - Certain Products* (para. 111) excluded all types of unilateral action, including countermeasures under non-WTO rules. It is most probably in that context that Kuijper's statement, referred to *supra* text at note 72, must be understood ("[t]he intention to move further towards a self-contained system certainly underlies the WTO Agreement and its Dispute Settlement Understanding, but it remains to be seen how the WTO Members will make it function", Kuijper, *Law of GATT …*, 257). That is, in the sense that unilateral countermeasures, including countermeasures in non-WTO fields, are no longer tolerated as a means for seeking redress for breach of the WTO treaty.

[702] That this is not only a problem in respect of the WTO treaty, but in respect of all other treaties providing for some special form of enforcement mechanism, see Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B.INT'L ENVTL. L. 123.

CHAPTER V. CONFLICT-AVOIDANCE TECHNIQUES

A. Coordination *ex ante* (conflict prevention)

Conflict of norms may, first of all, be avoided at the negotiation stage of new norms, that is, *ex ante*. Conflict may then be prevented by one norm explicitly stating that it derogates from, or is an exception to another norm. One norm can also make an explicit reference to or incorporate the conditions of another norm. In those cases, the two norms simply accumulate[703] and conflict is prevented from arising *ex ante*. Conflict may further be avoided by drafting treaties more clearly (thereby avoiding especially inadvertent conflicts) or negotiating new treaties with other treaties in mind. As Jenks pointed out, when different treaties are negotiated by different people, negotiators are often tempted "to secure fuller satisfaction for their own views on debatable questions of detail at the price of conflict between different instruments and incoherence in the body of related instruments".[704] Here again, Jenk's call for negotiators to "form the habit of regarding proposed new instruments from the standpoint of their effect on the international statute book as a whole"[705] must be repeated.

Cooperation and information sharing as between international organisations may further assist in avoiding conflicts. Recall, in this respect, the role of the UN Economic and Social Council to "co-ordinate the activities of the specialised agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations" (Art. 63.2 of the UN Charter). The WTO, as well, has a range of cooperation agreements with other international organisations (such as the World Bank, the IMF, the International Plant Protection Agency, etc.).[706] These agreements were concluded on the basis of Art. V of the Marrakesh Agreement and with reference to, in particular, the *Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking*, part of the 1994 Final Act. This declaration recognises that

> "[t]he interlinkages between the different aspects of economic policy require that the international institutions with responsibilities in each of these areas follow consistent and mutually supportive policies. The [WTO] should therefore pursue and develop cooperation with the international organizations responsible for monetary and financial matters, while respecting the mandate … and the necessary autonomy in decision-making procedures of each institution … Ministers further invite the Director-General of the WTO to review with the Managing Director of the [IMF] and the President of the World Bank, the implications of the WTO's responsibility for its cooperation with the Bretton Woods institutions, as well as the forms such cooperation might take, with a view to achieving greater coherence in global economic policymaking".[707]

These are conflict prevention methods. However, *ex post facto*, that is, once the two norms have been created, what techniques may an international adjudicator resort to in order to avoid a finding of conflict? This is where the distinction referred to above between "apparent" and "genuine" conflicts

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[703] See Chapter IV, section B.1.
[704] Jenks, *Conflict …*, 452.
[705] Ibid.
[706] See Art. V of the Marrakesh Agreement and Art. XXVI of GATS for the legal basis allowing WTO organs to conclude such arrangements. For the Agreements with the IMF and the World Bank, as well as a report on their implementation, see report by the Director-General on Implementation of the Agreements between the WTO and the IMF and the World Bank, WT/GC/W/68, 13 November 1997 (for a text of the agreements, see WTO doc. WT/GC/W/43).
[707] WTO LEGAL TEXTS, 442-3, at 443 (para. 5).

comes into play.[708] If the conflict-avoidance technique works successfully, the alleged conflict will only be apparent. If it does not work, the conflict becomes a genuine one.

B. The presumption against conflict

1. The presumption and its consequences

The wide definition of conflict suggested in Chapter IV must be tempered by the generally accepted presumption against conflict.[709] Every new norm of international law is created within the context of pre-existing international law and the presumption is that this new norm, much like new legislation enacted by the same legislator, builds upon and further develops existing law.

This "presumption" has three major consequences:

(i) For a new norm to deviate from existing law explicit language must be found. It can, in other words, not be presumed that states "changed their minds". Evidence in support that this actually happened must be submitted in order to rebut the presumption of continuity, inherent in any legal system (this is what we discussed above when defining "contracting out" in Chapter IV, section C.3).

(ii) The state relying on a conflict of norms will have the burden of proving it.

(iii) When faced with two possible interpretations, one of which harmonises the meaning of the two norms in question, the meaning that allows for harmonisation of the two norms -- and hence avoids conflict -- ought to be preferred.[710] As the ICJ noted in the *Right of Passage* case: "[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it".[711]

The presumption of new law being consistent with pre-existing law, i.e., the presumption against conflict, is of the same nature as the presumption that any state conduct (not just the conclusion of new law) complies with the law.[712] In *EC – Hormones*, for example, the arbitrators made it clear that

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[708] See Chapter IV, section B.2. Karl, for example, refers to "prima facie" and "real" conflicts", pointing out that "[i]n a way, conflicts which can be solved by resorting to interpretation or legal principle are not real so much as only prima facie conflicts" (Karl, *Conflict …*, 468).

[709] See, for example, Jenks, *Conflict …*, 427 ("It seems reasonable to start from a general presumption against conflict"); and Akehurst, *Hierarchy, …*, 275 ("just as there is a presumption against the establishment of new customary rules which conflict with pre-existing customary rules, so there is a presumption against the replacement of customary rules by treaties and vice versa"). See also the Panel report on *Indonesia – Autos*, para. 14.28 (« in public international law there is a presumption against conflict ») and footnote 649.

[710] As noted by Sorenson (LES SOURCES DU DROIT INTERNATIONAL, 1946, 226-7): « Le texte est considéré comme partie du système global du droit international et l'interprétation se propose de la mettre en harmonie avec la réglementation générale de celui-ci. La présomption sur laquelle se base cette méthode d'interprétation est que les contractants, en rédigeant le traité, sont partis de certaines données qu'il n'était pas besoin de reproduire dans le texte, et auxquelles ils se sont référés tacitement ».

[711] *Right of Passage over Indian Territory* (Preliminary Objections), ICJ Reports 1957, 142.

[712] See JACQUES-MICHEL GROSSEN, LES PRESOMPTIONS EN DROIT INTERNATIONAL PUBLIC 60-63 (1954), hereafter « Grossen, *Présomptions …* » (referring to the « présomption de respect par les États, du droit en général, et du droit international en particulier », also expressed in the form of the latin adage *omnia rite praesumuntur esse acta*) ; 114-117 (« les parties sont présumées n'avoir pas voulu adopter des dispositions contraires aux traités conclu par elles avec des États Tiers ») ; and 115-117 (« les traités sont présumés ne pas déroger au droit coutumier »). Grossen, *Présomptions …* (114-117) thereby restricts the presumption against conflict of treaty norms to the AB/AC type of conflict we shall discuss below (Chapter VII, section B.2).

"WTO Members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member has acted *inconsistently* with WTO rules bears the burden of proving that inconsistency".[713] The same presumption of legality exists in respect of acts of international organisations. As the ICJ noted in the *Certain Expenses case*: "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organization".[714]

2. The limits of the presumption against conflict

At the same time, the effects of this presumption against conflict must not be exaggerated. Firstly, it does not say anything on how conflict should be defined. Whatever conflict means, there is an initial presumption against it. But this presumption should not form an excuse to *define* conflict narrowly, the way Jenks and Karl have done it, much the same way the presumption that state conduct is consistent with international law (until proof of the contrary) does not mean that breach of international law ought to be construed narrowly.

Secondly, in many cases, a new norm will be enacted with the very purpose of changing existing law. If this is the case, the presumption against conflict cannot stand in the way of this happening. The presumption against conflict is a presumption in favour of continuity, not a prohibition against change. It ought not lead to a restrictive interpretation of the new, allegedly conflicting, norm (the same way the presumption of consistency of state conduct should not lead to a restrictive interpretation of international law obligations).[715] To put it differently, the presumption against conflict -- in favour of stability -- must be balanced carefully with the need for change and evolution of the law. Or as the Institute of International Law put it in the limited context of the inter-temporal problem: "it is necessary to promote the development of the international legal system whilst preserving the principle of legal stability which is an essential part of any judicial system … any solution of an intertemporal problem in the international field must take account of the dual requirement of development and stability".[716]

Thirdly, the presumption against conflict requires that an effort be made to interpret the new norm in a harmonious manner with existing law. If the new norm, as well as the potentially conflicting norm already in existence, are ambiguous enough, such harmonious interpretation may well be possible. But if reconciliation between the two norms is not feasible, that is where the presumption ends. The presumption is one against the *existence* of conflict, it is not a presumption *in favour of the earlier rule* in the event there is a real conflict. To put it differently, the presumption against conflict may show that an *apparent* conflict is not real. It can, however, not *solve* a real conflict once such conflict has been established. It may be possible to interpret the terms of norm 1 in a way that avoids conflict with norm 2 (or vice-versa). But once norm 1 and norm 2 are found to be in conflict, an interpretation of either norm cannot solve the conflict. As Jenks put it, the presumption against conflict «will not suffice to reconcile clearly unreconcilable provisions … [it] may eliminate certain potential conflicts;

Nonetheless, the same presumption (if not, even a double one) ought to exist in respect of alleged conflict of the AB/AB type.

[713] Decision of the Arbitrator under DSU Art. 22 in *EC – Hormones* (US request for suspension), para. 9.

[714] ICJ Reports 1962, 168, continuing as follows: "If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'". See, in the same sense, *Lockerbie case* (order on provisional measures), ICJ Report 1992, para. 42 (presuming the validity of Security Council Resolution 748).

[715] As pointed out before, the principle *in dubio mitius* is of very questionable value. See *supra* notes **540** and **542**. *Contra* (confirming the principle): Appellate Body report on *EC – Hormones*, footnote 154.

[716] *1975 Resolution of the Institute of International Law*, 1975 YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW, 537, preambles 2 and 3.

it cannot eliminate the problem of conflict".[717] The conflict must then be resolved by a third norm (such as a conflict clause in either treaty or a rule of general international law, such as Art. 30 of the Vienna Convention).

Finally, with Grossen, one could question whether this so-called "presumption against conflict" is a genuine presumption.[718] The typical example of a presumption provided by Grossen is the English law rule that when one has no news from a person for more than 7 years, that person is presumed dead. In other words, on the basis of one fact (7 years no news), one presumes the existence of another fact (death).[719] Or as Art. 1349 of the French Civil Code states: "Les présomptions sont des conséquences que la loi ou le magistrat tire d'un fait connu à un fait inconnu".[720] As a result, genuine presumptions are of a positive nature. They do not constitute simple *evidence* (or "mode de preuve"), but amount to conclusive *proof* (or "dispense de preuve") unless the presumption can and has been rebutted. Establishing a presumption *positively* discharges one's burden of proof: for someone to prove under English law that a person is dead, it will suffice to prove that no news has been received from that person for more than 7 years. This proven fact (7 years no news) will then be positively accepted as sufficient proof of an unknown fact (namely, that the person is, indeed, dead).

The presumption against conflict, in contrast, is of a negative nature only. This is so because it amounts essentially to a restatement of the basic rule on burden of proof: it is for the party invoking something to prove it (*ei qui dicit incumbit probatio*). In other words, it is for the party relying on the conflict of norms to prove that there is such conflict. The starting point is: no conflict, and this will remain so up to the point that proof to the contrary can be provided. The consequence of this presumption against conflict is purely negative: if the party invoking conflict does not succeed in establishing its existence (including in situations of doubt), that party will loose. The presumption against conflict cannot produce the positive effects normally linked to a presumption. It will, for example, not be enough to rely on this presumption to counter a *prima facie* case raised by the opposing party that there *is* conflict.[721]

In sum, the presumption against conflict exists, but its importance ought not be overrated. In essence, it means that the starting point is: new law is consistent with existing law and it is for the party claiming the opposite to prove conflict. In that sense, the presumption against conflict goes, however, further than simply confirming a rule on burden of proof. It makes, indeed, clear *on which party* this burden must rest, namely on the party invoking conflict.[722]

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[717] Jenks, *Conflict ...*, 429.
[718] Grossen, *Présomptions ...*, 63 and 117. In the same sense : Salmon, *Antinomies ...*, 299.
[719] Grossen, *Présomptions ...*, 16.
[720] Ibid., 18.
[721] Grossen stated the following on the alleged presumption of consistency of state acts with international law: "il n'y avait pas véritablement déplacement du fardeau de la preuve. En fait le juge, en 'présumant' la licéité des actes étatiques, ne faisait que décider que la partie invoquant l'illicéité ne l'avait pas démontrée à suffisance. Cet aspect négatif de la règle ne se double d'aucun aspect positif susceptible d'en faire une présomption, c'est-à-dire que devant un commencement de preuve de l'illicéité, l'Etat poursuivi en responsabilité ne saurait se contenter d'invoquer à sa décharge la présomption de licéité des actes étatiques. Il faut donc conclure à l'inexistence d'une présomption de conformité des actes étatiques au droit international» (ibid., 63). In that sense, the presumption or *prima facie* case referred to in WTO jurisprudence under rules on burden of proof (i.e., the "commencement de preuve" established by the complainant) is a genuine presumption: if the opposing party does not submit anything in response, the complainant wins. See Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement, Who Bears the Burden*, 1998 JIEL 227.
[722] Without this rule on who bears the burden of proof, one could, indeed, imagine a situation where one party invokes the old law (claiming that it remains unaffected), whereas the other party relies on the new law (claiming that there is conflict and that the new law ought to prevail). In theory, each party must prove what it alleges (continuing existence of the old law *versus* prominence of the new law). The party relying on the conflict could then argue that the other party relying on the old law must prove its continuing existence (and that it is not up to it to prove conflict and prevalence of the new law). The presumption against conflict solves this impasse *in favour of the party relying on the old law*.

B. Treaty Interpretation as a conflict-avoidance tool

1. The inherent limits of treaty interpretation

Before examining the role of treaty interpretation as a conflict-avoidance technique -- that is, the extent to which interpreting one norm in the light of the other norm may dissolve an apparent conflict -- the inherent limitations of "interpretation" must be recalled.

Firstly, interpretation, at least in the relatively strict sense referred to in Arts. 31 and 32 of the Vienna Convention[723], is about giving meaning to the terms of a treaty. It is a matter of definition. In the WTO context, for example, for a WTO rule to be interpreted with reference to another, allegedly conflicting, rule, the WTO provision must, first of all, include terms that are broad and ambiguous enough so as to allow for input by other rules. In addition, the other rule must say something about what the WTO term should mean, i.e., there must be a hook-up with the WTO term for the other rule to impart meaning in the process of interpretation.[724] The other rule must, in other words, be relevant to the WTO rule. This was the case, for example, in *US – Shrimp* where the Appellate Body interpreted the WTO term "exhaustible natural resources" in GATT Article XX(g) with reference to, *inter alia*, UNCLOS, the Convention on Biological Diversity and CITES.[725]

Secondly, interpretation must be limited to giving meaning to rules of law. It cannot extend to creating new rules. *Within the process of treaty interpretation*, other rules cannot add meaning to WTO rules that goes either *beyond* or *against* the "clear meaning of the terms" of the WTO rule in question. Interpretations *contra legem* are prohibited. Interpretation thus allows, for example, to read the WTO term "exhaustible natural resources" as including *certain living species* with reference to international environmental law (such inclusion does not run counter to the "clear meaning of the terms"). Interpretation would, however, prohibit that this term be read so as to include also resources which are "clearly" *not* exhaustible (such as tomatoes) or resources that are "clearly" *not* natural (such as plastic). Even "evolutionary interpretation", further discussed below -- that is, interpretation of treaty terms in the light of supervening law --, is bound by this inherent limitation of treaty interpretation. New law may influence the meaning of pre-existing treaty terms. However, it cannot go either *beyond* or *against* the "clear meaning" of these terms. This was confirmed in the *Guinea-Bissau/Senegal Maritime Boundary Arbitration*.[726]

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[723] Not the wider sense it is sometimes given with reference to all possible actions that a judge can undertake. That Arts. 31 and 32 reflect general customary international law, see the ICJ *Case Concerning the Arbitral Award of 31 July 1989 (Guinea-Bissau v. Sénégal)*, ICJ Reports 1991; the *LaGrand* case, at para. 99; and Appellate Body reports on *US - Gasoline* and *Japan – Alcoholic Beverages*.

[724] As the ICJ stated in the *Fisheries Jurisdiction case* (Spain v. Canada) in respect of interpretation: «It is one thing to seek to determine whether a concept is known to a system of law, in this case international law … the question of the existence and content of the concept within the system is a matter of definition. It is quite another matter to seek to determine whether a specific act falling within the scope of a concept … violates the normative rules of that system: the question of the conformity of the act with the system is a question of legality » (ICJ Reports 1998, para. 68).

[725] Appellate Body report on *US – Shrimp*, paras. 128-132.

[726] Award of 31 July 1989, 83 ILR 1, at para. 85 (1990), where the tribunal did interpret notions such as continental shelf expressly mentioned in a 1960 bilateral agreement in the light of new law, existing in 1989, but made it clear, at the same time, that notions not mentioned in the 1960 treaty, such as "exclusive economic zone", could not, by means of treaty interpretation, be incorporated *ex post facto* into the treaty: "To interpret an agreement concluded in 1960 so as to cover also the delimitation of areas such as the 'exclusive economic zone' would involve a real modification of its text and, in accordance with a well-known dictum of the International Court of Justice, it is the duty of a court to interpret treaties, not to revise them".

Interpretation is sometimes seen as a solution under domestic law for conflict between national law and international law.[727] National law must then be interpreted so as to comply with international law. This may imply that certain rights granted under domestic law cannot be exercised (if not, international law would be breached).[728] In international law, interpretation as a conflict-avoidance technique cannot go that far since it would require a decision as to which of the two norms prevails, that is, something that can only be done once conflict is acknowledged. In domestic law this can be done because it is acknowledged *ex ante* that international law is the "higher law". In that sense, under domestic law to "interpret" the domestic law in line with international law is *a way of giving preference to international law*, not a technique to avoid conflict between domestic law and international law.

2. Interpretation « in the context » of all other treaty provisions

The terms of a treaty norm must, first of all, be interpreted "in their context" (Art. 31.1 of the Vienna Convention). This context includes, particularly, all the other provisions of the treaty in which the norm is set out. Given the fact that all WTO treaty provisions constitute one single treaty, any WTO rule must, therefore, be interpreted in the context of all other WTO rules. Hence, in the event of an alleged conflict *between two WTO rules*, only if an interpretation of these two rules in the light of each other cannot lead to a harmonious result can conflict arise. In other words, only if one of the two norms explicitly goes against the other norm is the presumption against conflict rebutted. To the extent either or both of these norms includes terms that are open-textured or ambiguous and an interpretation of these terms consistent with the meaning of the opposing norm is feasible, such interpretation, harmonising the two norms, must be preferred. In that sense, contextual interpretation is but a confirmation of the presumption against conflict.

3. The principle of effective treaty interpretation

The principle of effectiveness in treaty interpretation (*ut res magis valeat quam pereat*) may also be useful in solving apparent conflicts. However, its importance as a conflict-avoidance tool should, as is the case for the presumption against conflict, not be overestimated.

a. The tension between "effective" and "textual" treaty interpretation

The principle of effectiveness, in general, has certain limitations. It is not explicitly acknowledged in Arts. 31-32 of the Vienna Convention, but the Commentary to the final ILC draft deals with it *in extenso*. This commentary draws the attention to the usefulness of the principle in certain

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[727] See, in the United States, the Charming Betsy doctrine: "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains" (*Murray v. Schooner Charming Betsy*, 6 U.S. (2 Branch) 64, 118 (1804)) and "ambiguous statutory provisions … [should] be construed, where possible, to be consistent with international obligations of the United States (*Footwear Distributors and Retailers of America v. United States,* 852 F. Supp. 1078, 1088 (CIT), appeal dismissed, 43 F.3d 1486 (Table) (Fed. Cir. 19994), citing *DeBartolo Corp. v. Florida Gulf Coast Building and Trades* Council, 485 U.S. 568 (1988)). In the EC, EC legislation must comply with international law, the latter being the "higher law". See, for example, Case C-162/96 *A. Racke GmbH v. Hauptzollamt Mainz* [1998] ECR I-3655, paras. 45-46). If not, EC legislation can be annulled or set aside on condition that the international law is "directly effective" pursuant to EC standards. However, even if the international law is not "directly effective", it must still be construed, as far as possible, consistent with international law (see Case C-53/96 *Hermès International v. FHT Marketing Choice BV* [1998] ECR I-3603, para. 28). This may necessitate reading "explicit rights" out of EC law (i.e., solving conflict situations 3 and 4 in favour of international law). The same applies in respect of national law alleged to be illegal under EC law. on EC law being the supreme law, see *Costa v. ENEL*, Case 6/64 [1964] ECR 585. On the requirement to "interpret" national law consistently with EC law, even if that EC law has no "direct effect", see Case 14/83 [1984] ECR 1891, *Von Colson and Kamann v. Land Nordrhein-Westfalen*.

[728] This was found to be the case, for example, by the Panel on *US - Section 301*.

circumstances but rightly points out its limitations linked to the traditional "textual" approach to treaty interpretation. It deserves full quotation:

> "Nor did it [the ILC] consider that the principle expressed in the maxim *ut res magis valeat quam pereat* should not be included as one of the general rules [of treaty interpretation]. It recognized that in certain circumstances recourse to the principle may be appropriate and that it has sometimes been invoked by the [ICJ]. In the *Corfu Channel* case,[729] for example, in interpreting a Special Agreement the Court said:
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> > 'It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a Special Agreement should be devoid of purport or effect'.
>
> … The Commission, however, took the view that, in so far as the maxim *ut res magis valeat quam pereat* reflects a true general rule of interpretation, it is embodied in [what is now Art. 31, paragraph 1] which requires that a treaty shall be interpreted in *good faith* in accordance with the ordinary meaning to be given to its terms in the context of the treaty *and in the light of its object and purpose*. When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted. Properly limited and applied, the maxim does not call for an 'extensive' or 'liberal' interpretation in the sense of an interpretation going beyond what is expressed or necessarily to be implied in the terms of the treaty. Accordingly, it did not seem to the Commission that there was any need to include a separate provision on this point. Moreover to do so might encourage attempts to extend the meaning of treaties illegitimately on the basis of the so-called principle of 'effective interpretation'. The Court, which has by no means adopted a narrow view of the extent to which it is proper to imply terms in treaties, has nevertheless insisted that there are definite limits to the use which may be made of the principle *ut res magis valeat* for this purpose. In the *Interpretation of Peace Treaties* Advisory Opinion[730] it said:
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> > 'The principle of interpretation expressed in the maxim: *ut res magis valeat quam pereat*, often referred to as the rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which … would be contrary to their letter and spirit'.
>
> And it emphasized that to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty".[731]

The Appellate Body adopted the exact same approach. It confirmed that "an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"[732] At the other side of the spectrum, the Appellate Body stated also that the Vienna Convention "principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended".[733] Therefore, as much as words cannot be *interpreted "out of"* WTO provisions, new words, that are not there or were not intended, cannot either be *interpreted "into"* WTO provisions.

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[729] (Merits) ICJ Reports 1949, 4 at 24.
[730] ICJ Reports 1950, 229.
[731] Rauschning, *Travaux …*, 251, italics in original, underlining added.
[732] Appellate Body reports on *US – Gasoline*, 23, confirmed in, *inter alia*, *Japan – Alcoholic Beverages*, 12.
[733] Appellate Body report on *India –Patents*, para. 46.

b. The principle of effectiveness as a conflict-avoidance tool

How then could this principle of effectiveness solve apparent conflicts? Giving the intended effect to each of the, at first sight, contradictory norms may, indeed, solve an apparent conflict. This will be the case, for example, when one norm explicitly derogates from another or makes it otherwise clear that the scope of one norm must be restricted or carved out so as to give effect to another norm. As between two WTO treaty norms, it could, for example, be submitted that GATT Arts. III and XX constitute an apparent conflict, the former prohibiting certain trade restrictions which the latter explicitly allows for. However, this apparent conflict can be solved readily by "effective treaty interpretation" along the lines that for the GATT Art. XX right to have its desired effect, the scope of GATT Art. III prohibitions must be narrowed down or carved out. Art. XX provides, indeed, explicitly that "nothing in this Agreement shall be construed to prevent the adoption or enforcement" of the measures specified in Art. XX. Much the same happened in *EC - Hormones* where the Appellate Body reversed the panel's finding that Arts. 3.1 and 3.3 of the SPS Agreement are in a "general rule – exception" relationship. In that case, the Appellate Body stated that "Article 3.1 … simply excludes from its scope of application the kinds of situations covered by Article 3.3 … Article 3.3 recognizes the autonomous right of a Member to establish" its own level of protection.[734] Here as well, Art. 3.1 explicitly allows for Art. 3.3 to "deviate" from Art. 3.1. Art. 3.1 states that it applies "except as otherwise provided for in this Agreement, and in particular in paragraph 3". In both instances -- GATT Arts. III and XX as well as SPS Arts. 3.1 and 3.3[735] -- an apparent conflict is resolved by means of effective treaty interpretation, in particular by giving effect to wording making clear that one provision (GATT Art. III or SPS Art. 3.1) is derogated from by another.

It should, in this context, be pointed out that Arts. 31-32 of the Vienna Convention do not call for a restrictive interpretation of derogating norms or exceptions. Whereas under GATT 1947 panels stated that exceptions (in particular GATT Art. XX) are to be interpreted narrowly[736], the Appellate Body has rightly pointed out that "merely characterizing a treaty provision as an 'exception' does not by itself justify a 'stricter' or 'narrower' interpretation of that provision than would be warranted … by applying the normal rules of treaty interpretation".[737]

c. The limits of effectiveness

In other circumstances, however, a reading that harmonises both norms will not be possible. Not to acknowledge conflict in that event would go *against* the principle of effectiveness. To restrict the meaning of one norm with reference to the other would then, indeed, *not* give the required effect to the first norm. To put it differently, in the absence of explicit wording stating that one provision applies notwithstanding another, "effective treaty interpretation" can work both ways.

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[734] Appellate Body report on *EC – Hormones*, para. 104.

[735] This similarity is a strong argument in favour of revisiting also the "general rule – exception" relationship between GATT Arts. III and XX. As much as SPS Art. 3.3, GATT Art. XX should be seen as an autonomous right, carving out certain situations from the prohibition in GATT Art. III. Art. XX provides, indeed, that "nothing in this Agreement shall be construed to prevent the adoption or enforcement" of certain types of measures. Consequently, also under GATT Art. XX (as is the case under SPS Art. 3.3) the burden of proof should rest on the complainant.

[736] See, for example, the GATT Panel report on *US – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada* (BISD 38S/30, adopted on 11 July 1991, at para. 4.4): "an exception to basic principles of the General Agreement had to be interpreted narrowly". See also the GATT Panel report on *Canada – Import Restrictions on Ice Cream and Yoghurt* (BISD 36S/68, adopted on 4 December 1989, at para. 59), where the panel "noted, as had previous panels, that exceptions were to be narrowly interpreted".

[737] Appellate Body report on *EC – Hormones*, para. 104. The same should be said, however, in respect of the *in dubio mitius* principle (confirmed though in the same Appellate Body report at footnote 154). As pointed out earlier, *supra* notes **540**, **542** and 715, it seems erroneous to consistently interpret treaty provisions in favour of the party making obligations, the same way it is erroneous to always interpret an exception against the party invoking it. In both instances, the normal rules of treaty interpretation should apply.

Let us take the hypothetical example of a measure being GATT inconsistent (say, not conforming to GATT Art. XX) but TBT consistent (say, justified as pursuing "a legitimate objective", not mentioned in GATT Art. XX, but acceptable under TBT Art. 2.2,). It could then be argued that for the TBT *right* to be given effect, the GATT *prohibition* must be interpreted as carved out. But one could equally submit that for the GATT *obligation* to have its effect, the TBT *right* must be interpreted narrowly. Neither GATT Art. XX nor TBT Art. 2.2 explicitly derogates from one another. To put it differently, effective interpretation of a WTO prohibition may require neutralising a WTO right, the same way effective interpretation of a WTO right may require dis-activation of a WTO prohibition. In such instances, effective treaty interpretation alone cannot provide the solution. It must be accepted that in that event a genuine conflict has arisen[738] and the appropriate conflict rules must be applied (in this case, the *General Interpretative Note*).

In that sense, the principle of effectiveness puts a limitation on the presumption against conflict. If a harmonious reading of the two norms is not feasible within the realm of treaty interpretation, the presumption must be seen as rebutted and the existence of conflict acknowledged. Refusing to do so, would result in *not* giving the intended effect to the norms in question.

4. Interpretation with reference to norms outside the treaty

A treaty norm must also be interpreted in the light of certain other norms of international *not* set out in the treaty in question. There are four provisions in Arts. 31 and 32 of the Vienna Convention that may require a reference to rules of international law other than those set out in the treaty itself or in agreements or instruments signed in connexion with its conclusion:

- "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" (Article 31.3(a)) [739]
- "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" (Article 31.3(b))
- "any relevant rules of international law applicable in the relations between the parties" (Article 31.3(c))
- the non-exhaustive category of "supplementary means of interpretation" of Article 32, in particular other norms part of the "historical background" of the treaty being interpreted.

In the event of an alleged conflict between a WTO treaty rule and a non-WTO rule, the WTO rule must, therefore, be interpreted in the light of and, to the extent possible, consistently with the non-WTO rule *whenever this non-WTO rule falls under either of these four categories*. Equally, in the event the non-WTO rule is a treaty rule, this treaty rule must be interpreted in the light of and, to the extent possible, consistently with the WTO rule *whenever this WTO rule falls under either of these four categories*. In an alleged conflict of norms there are necessarily two norms and each of these two norms may need interpretation. If there is room for an interpretation under either of these norms that is consistent with the other norm, such interpretation must be preferred.

a. "Subsequent agreement" and "subsequent practice"

As far as the WTO treaty is concerned, the first two provisions -- subsequent agreement and subsequent practice -- are essentially limited to *agreements in the specific WTO context*. This is the case given the large membership of the WTO. Note, indeed, the strict requirement, also in respect of subsequent practice, that *agreement* between the parties on interpretation or application of WTO rules

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[738] More particularly, a conflict of type 4 set out earlier, namely a negative obligation *versus* an explicit right.

[739] Article IX of the WTO Agreement has contracted out of Article 31.3(a) on subsequent agreements "between the parties" regarding interpretation. It suffices, in the WTO, that ¾ of WTO members agree to an interpretation of the WTO treaty for that interpretation to be authoritative.

must be established.[740] Above, in Chapter II, section C.3, we discussed the importance of "subsequent practice" as a source of WTO law.

b. Historical background

In respect of the third provision – "supplementary means of interpretation" -- the Appellate Body in *EC – Poultry* made a reference to the bilateral Oilseeds Agreement between the EC and Brazil as "a part of the historical background of the concessions of the European Communities for frozen poultry meat".[741] This reference to "historical background" limits the relevance of non-WTO rules under Article 32 to those existing *at the time of conclusion* of the WTO treaty (15 April 1994). It should be pointed out, in this context, that the importance of "historical background" or *travaux préparatoires* as reference material to interpret a treaty has dwindled quite dramatically in the course of the 20th century. Under GATT 1947 this element was, for example, given a high degree of importance. In the WTO, in contrast, *travaux préparatoires* are generally not referred to, with the notable exception of interpretation of concessions set out in the country-specific schedules of WTO members.[742] In the recent *LaGrand* case, as well, the ICJ based its interpretation that provisional measures[743] are, indeed, legally binding exclusively on the elements referred to in Art. 31 of the Vienna Convention. The ICJ noted: "Given the conclusions reached by the Court above in interpreting the text of Article 41 of the Statute in the light of its object and purpose, it does not consider it necessary to resort to the preparatory work in order to determine the meaning of that Article".[744] It adopted the same approach when deciding that Art. 36, paragraph 1 of the 1963 Vienna Convention on Consular Relations creates rights not only for state parties but also for individuals. The Court noted: "The clarity of these provisions, viewed in their context, admits of no doubt. It follows, as has been held on a number of occasions, that the Court must apply these as they stand".[745]

c. Other "relevant rules of international law"

The fourth provision – other "relevant rules of international law" – is the most interesting one for present purposes. It provides for reference to rules that are *not* part of WTO covered agreements, *nor* part of the law created within the GATT/WTO context. The non-WTO rules referred to in Art. 31.3(c) may derive from any source of international law, e.g., treaty provisions, customary international law or general principles of law. Art. 31.3(c) refers to "relevant rules of international law" without restriction as to their source. In the *Golder case* decided by the ECHR it was held, for example, that the reference to "relevant rules of international law" in Art. 31.3(c) includes general principles of law.[746] According to Sinclair, this reference "may be taken to include not only the general rules of international law but also treaty obligations existing for the parties".[747]

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[740] However, the type of agreement required is not an explicit agreement by each and every one of the parties to the treaty. The commentary to Article 31.3(b) states as follows: "The text provisionally adopted in 1964 spoke of a practice which 'establishes the understanding of all the parties'. By omitting the word 'all' the Commission did not intend to change the rule. It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party must individually have engaged in the practice where it suffices that it should have accepted the practice" (Rauschning, *Travaux …*, 254).

[741] Appellate Body report on *EC - Poultry*, para. 83.

[742] See, for example, the Appellate Body reports on *EC – Computer Equipment* and *Canada – Dairy Products*.

[743] Under Art. 41 of the ICJ Statute.

[744] *LaGrand* case, para. 104. The Court added, nonetheless, that "the preparatory work of the Statute does not preclude the conclusion that orders under Article 41 have binding force" (ibid.).

[745] Ibid., para. 77. In his Separate Opinion, Vice-President Shi criticised the Court's refusal to examine also the *travaux préparatoires* of Art. 36. In his view, it is not possible to conclude from the negotiating history that Art. 36, paragraph 1 (b) was intended by the negotiators to create individual rights.

[746] *Golder case* (1975), 57 ILR 201, 217.

[747] SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2nd ED.) 119 (1984).

Importantly, however, not in every situation of alleged conflict must one norm be interpreted with reference to the other pursuant to Art. 31.3(c) There are limitations *ratione personae* as well as limitations *ratione temporis*. We examine them in turn.

5. Art. 31.3(c): The "other relevant rules" must reflect the "common intentions" of all parties to the treaty

a. Rules that are legally binding on all state parties to the treaty

Not in every alleged conflict of norms must one norm be interpreted in the light of the other. Of course, in the event of an alleged conflict between two bilateral treaty norms binding on both of the parties in question one norm must necessarily be interpreted with reference to the other. The same applies in respect of two norms derived from multilateral treaties with exactly the same parties. In these situations, both norms *express the same combination of state intentions* and one expression of intent must be assessed in the light of the other.[748] There can be no doubt either that in the event of an alleged conflict between a treaty norm and a norm of general international law, the treaty norm must be interpreted with reference to the norm of general international law.[749] Since general international law is, in principle, binding on all states, the latter must be a rule "of international law applicable in the relations between the parties".

But there are other types of conflict where the two norms are *not* an expression of the same configuration of state intent. In that event, one norm may not influence the meaning of the other unless it can be shown that the first norm is nonetheless a reflection of the "common understanding" or "common intentions" of the parties to the second norm. This is a direct result of the *pacta tertiis* principle. A state cannot be held by rules it did not agree to, nor can it, in principle, see its situation affected by rules it did not agree to *in the process of the interpretation of rules it did accept*.[750] Or as Waldock noted in his observations on the 1964 ILC Draft on the law of treaties, albeit in respect of "subsequent practice":

> "Under [what is now Art. 31.3(b)] it is only subsequent practice which clearly establishes the understanding of all the parties regarding the meaning of the treaty which is recognized as equivalent to an interpretative agreement and the reason is, of

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[748] The same applies where one treaty includes all the parties to the other plus certain additional states. In that event the multilateral treaty with the lowest number of states must be interpreted in the light of the broader multilateral treaty, including all states to the first one plus additional states. The opposite is not true (these additional states may not normally see their treaty being affected by another treaty they did not agree to).

[749] See *supra* note 746.

[750] Note in this respect that at the Vienna Conference the Federal Republic of Germany proposed the following amendment to what is now Art. 31.3(c): "any relevant international obligation of *one or more of the parties*" (Documents of the Conference, UN doc. A/CONF.39/C.1/L.214, 150, emphasis added). This was explained as follows: "Why should only rules of general international law applicable between the parties be taken into account? Would it not be sensible, and even necessary, to try to interpret treaties in such a manner that they did not conflict with prior treaties which the parties had concluded *with other States*?" (*per* Blomeyer-Bartenstein, Meetings of the Committee of the Whole, 172, para. 10, emphasis added). This amendment was rightly rejected. A party to a treaty should not normally see its treaty affected by another treaty to which it did not consent. As pointed out, exceptions may exist in case it can be shown that the relevant provisions of this other treaty do reflect also a common understanding of the parties to the treaty being interpreted. The other treaty may also be part of the negotiating history and by that means play a role. However, to posit as a general principle that any rule of international law must be taken into account as soon as it is binding on *one of the parties* to the treaty is unacceptable and was rightly rejected at the Vienna Conference. At the conference, Fleischhauer, another representative of the Federal Republic of Germany, pointed out that Art. 31.3(c) does not refer "only to the general rules of international law but also to treaty obligations existing for the various parties" (Plenary Meetings, 57, para. 64). Here again, this can only be so if these other treaty obligations reflect a common understanding of all the parties to the treaty being interpreted.

> course, that two parties or even a group of parties cannot, by their interpretation of the treaty, bind the other parties as to its correct interpretation".[751]

Art. 31.3(c) refers to rules "applicable in the relations *between the parties*". Article 2.1(g) of the Vienna Convention defines "party" as "a State which has consented to be bound by the treaty and for which the treaty is in force". Hence, Article 31.3(c) refers to parties *to the treaty*. Not parties *to a particular dispute under that treaty*. Indeed, how could, for example, a bilateral agreement between the disputing parties concluded *outside* the WTO context, play a role in the *interpretation* of WTO covered agreements, there were, pursuant to Arts. 31.3(a) and (b), agreements or practice *within* the WTO context can play this role only if accepted, either explicitly or implicitly, by *all* WTO members?[752] As the Appellate Body in *EC – Computer Equipment* put it:

> "The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined 'expectations' of *one* of the parties to a treaty".[753]

That elements to be referred to in treaty interpretation must express the "common intention" of all the parties to a treaty was recently confirmed also by the ICJ in the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.[754]

In contrast, the second panel on *US – Shrimp* seemed to go against this approach of looking for the "common intentions" of all WTO members. Instead, it focused, in my view, erroneously, on the question of whether *the two WTO members in dispute* (Malaysia and the United States) were bound by the non-WTO to be taken into account pursuant to Art. 31.3(c).[755]

b. Rules that are not legally binding on all state parties to the treaty but nonetheless express their "common intentions"

At the same time, Article 31.3(c) refers to "the parties", not to "*all* the parties".[756] As a result, and particularly in the light of the ILC commentary to Article 31.3(b)[757], the requirement is not that *all* the

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[751] Rauschning, *Travaux ...*, 307, emphasis added.

[752] For the particular situation of bilateral agreements part of the « historical background » of the WTO treaty, in particular member-specific concessions, see text at note 741 above.

[753] *EC – Computer Equipment*, para. 84 (italics in the original, underlining added). The criterion of legitimate expectations of some WTO members only as a tool to interpret WTO rules in violation cases was twice rejected by the Appellate Body (in *India – Patent*, para. 36 ff. and *EC – Computer Equipment*, para. 84). As noted, what counts is the "common intentions" of all WTO members.

[754] Jurisdiction and Admissibility, ICJ Reports 1995, 6, at 22: "whatever may have been the motives of each of the Parties, the Court can only confine itself to the actual terms of the Minutes as the expression of their common intention, and to the interpretation of them which it has already given" (emphasis added).

[755] Panel report on *US – Shrimp*, acting under DSU Art. 21.5, at para. 5.57: "Finally, we note that the Appellate Body, like the Original Panel, referred to a number of international agreements, many of which have been ratified or otherwise accepted *by the parties to this dispute*. Article 31.3(c) provides that, in interpreting a treaty, there shall be taken into account, together with the context, 'any relevant rule of international law applicable to the relations between the parties'. We note that, with the exception of the Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS), *Malaysia and the United States* have accepted or are committed to comply with all of the international instruments referred to by the Appellate Body" (emphasis added). The panel never examined whether these agreements can also be said to reflect the "common intentions" of WTO members other than Malaysia and the United States.

[756] Article 31.2(a), for example, uses the expression "*all* the parties" when it comes to agreements relating to the treaty made in connexion with the conclusion of the treaty.

[757] The commentary to Article 31.3(b) states as follows: "The text provisionally adopted in 1964 spoke of a practice which 'establishes the understanding of all the parties'. By omitting the word 'all' the Commission did not intend to change the rule. It considered that the phrase 'the understanding of the parties' necessarily means 'the parties as a whole'. It omitted the word 'all' merely to avoid any possible misconception that every party

parties to the WTO treaty have, one after the other, formally and explicitly agreed with the non-WTO rule, nor even that this rule is otherwise *legally binding* on *all* WTO members. The criterion is rather that the rule can be said to be at least *implicitly* accepted or tolerated by all WTO members, in the sense that the rule can reasonably be said to express the common intentions or understanding of all members as to what the particular WTO term means.

Recall, indeed, that the input of other rules of international law in the interpretation of a treaty norm is limited to giving meaning to explicit treaty terms. It is a question of definition and importing meaning, not one of incorporating legal rights or obligations set out in the foreign rule which are not included under the "clear meaning of the terms" of the treaty norm under interpretation. Indeed, when it comes to defining a term in the exercise of treaty interpretation, why should, for example, the Oxford English Dictionary play an uncontested role in giving meaning to the terms "exhaustible national resources" in GATT Art. XX(g) and, in contrast, a series of MEAs with large membership *a priori* be excluded even if these agreements are not binding on *all* WTO members? Like the Oxford English Dictionary, these other agreements may reflect the common understanding of all WTO members.

It should be stressed nonetheless that the determination of whether another norm does reflect the "common understanding" of all the parties to the treaty is to be established on an objective basis. As Bernhardt noted in the context of interpretation of human rights treaties:

> "What is decisive is not the personal convictions of the members of an international institution about the best solution to a given problem and the proper development of social conditions; rather the general development of law and society which permits and necessitates dynamic interpretation".[758]

In other cases, such as the interpretation of the concessions in member-specific schedules, the intention or practice of one WTO member or a bilateral agreement between two WTO members that originally negotiated the concession, may be of particular importance in ascertaining the *common* intentions of all WTO members.[759] Schedules of concessions are, indeed, not only adopted by the members that negotiated them, but are an integral part of the WTO treaty, thus reflecting the "common intentions" of all WTO members. Whether such unilateral practices or agreements as between some WTO members only can influence the meaning of WTO treaty terms set out in these concessions must depend on the concession in question and the extent to which a contrary understanding on behalf of other WTO members can be established. Such expression of intent by one WTO member or bilateral agreement can then be taken into account under Art. 31.3(c) (if it is, indeed, another "relevant rule" commensurate with common intentions) or Art. 32 (as part of the historical background to the WTO

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must individually have engaged in the practice where it suffices that it should have accepted the practice" (Rauschning, *Travaux …*, 254). As a result, if "parties" in Art. 31.3(b) means "all the parties" without requiring that all of them have explicitly agreed with (or actually conducted in) the practice, there is no reason to give a different meaning to "parties", as the term is used in Art. 31.3(c). In that context, as well, it should mean: rules accepted (or tolerated) by all the parties to the treaty, either explicitly or by some form of implied or tacit consent.

[758] Rudolf Bernhardt, *Thoughts on the Interpretation of Human-Rights Treaties* in PROTECTING HUMAN RIGHTS: THE EUROPEN DIMENSION, STUDIES IN HONOUR OF G. J. WIARDA (ED. F. MATSCHER AND H. PETZOLD), 65-71, 70 (1988). In some instances, however, such as in the ICJ Advisory Opinions on *Nuclear Tests* (ICJ Reports 1996), the Appellate Body report on *US - Shrimp* and the ICJ *Case Concerning the Gabcikovo-Nagymaros Project* (ICJ Reports 1997), it could be questioned whether the adjudicator is not merely paying lip service to the environmental community, in pursuit of broader legitimacy. In the end, interpretation cannot alter the treaty itself (in case of conflict, the treaty prevails) so that these environmental norms would be better referenced to as part of the applicable law (a matter discussed below in Chapter VIII), not as some political statements to be kept in the back of one's mind when interpreting another treaty.

[759] See the Appellate Body reports on *EC – Computer Equipment*, *EC – Poultry* and *Canada – Dairy Products*. See also *supra* note 752 and text at note 741 above.

treaty[760]). The Appellate Body dealt with this issue in *EC – Computer Equipment LAN*. It noted that "the fact that Members' Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members".[761] It found that normal rules of treaty interpretation must be applied to interpret schedules[762] and specified: "The security and predictability of tariff concessions would be seriously undermined if the concessions in Members' Schedules were to be interpreted on the basis of the subjective views of certain exporting Members alone". Nonetheless, the Appellate Body acknowledged that to establish the common intention of the parties to a treaty "the prior practice of only *one* of the parties may be relevant, but it is clearly of more limited value than the practice of all parties. In the specific case of the interpretation of a tariff concession in a Schedule, the classification practice of the importing Member, in fact, may be of great importance. However, the Panel was mistaken in finding that the classification practice of the United States [i.e., the exporting country] was *not* relevant".[763]

c. Examples of alleged conflicts of norms where one norm may not normally be interpreted with reference to the other

Two situations of conflict of norms spring to mind where normally one norm may *not* be interpreted with reference to the other on the ground that the latter is not binding on all state parties to the former.

i. Conflict of norms where only one of the states is bound by both norms (AB/AC conflicts)

Firstly, in the event of an alleged conflict between two norms both of which are only binding on one of the two parties (that is, conflicts of type AB/AC discussed below in Chapter VII, section B.2), the second norm (binding only on one of the parties) cannot normally be referred to in order to interpret the first norm. Imagine a treaty between A and B in which A grants certain exclusive rights to B. Thereafter, A concludes a new treaty granting the same "exclusive" rights to C. From the point of view of A, there may be a conflict (conflicting positive obligations that are mutually exclusive). But from the point of view of B and C, there is no conflict: they are bound only by one of the two treaties. Here, reference to the A-B treaty in the interpretation of the A-C treaty cannot normally be made. C is not a party to this A-B treaty and should hence not see its treaty with A influenced by this treaty it did not consent to.

Reference to the A-B treaty should then only be made if it can be proven that it is (i) part of the "historical background" of the A-C treaty or otherwise relevant as a "supplementary means of interpretation" pursuant to Article 32 of the Vienna Convention or (ii) reflecting the common understanding also of states A and C, pursuant to Art. 31.3(c). The fact that the "innocent party" (here, state C) was warned about the existence of the other norm (treaty A-B) or acknowledged its existence during the negotiation of the second norm (treaty A-C) may support making such reference.

ii. Conflict of norms binding on both states but where one norm has a wider membership than the other

Secondly, either of the two norms that are allegedly in conflict may derive from a multilateral treaty that is binding on both states in question, but includes also third states not bound by the other norm. In that event, the norm derived from the broader multilateral treaty may *not* normally be interpreted with

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[760] Note, of course, that elements that can be referred to under Art. 32 play a more limited role in that they can be resorted to only if Art. 31 leaves the meaning ambiguous or obscure or to *confirm* a meaning reached under Art. 31. In that sense, it has been argued that, for example, subsequent practice which does not fall within the narrow definition of Art. 31.3(b) (for example, because it is not consistent enough or not common to all the parties) can nonetheless be referred to under Art. 32 (TETSUO SATO, EVOLVING CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS 32 (1996, hereafter "Sato, *Evolving* ...").

[761] Appellate Body report on *EC – Computer Equipment*, para. 109.

[762] Ibid., para. 84.

[763] Ibid., para. 93.

reference to the norm derived from the more limited treaty and this even though both parties involved in the conflict are themselves bound by the two norms. If not, third states, bound only by the more universal treaty, could see their treaty rights or obligations affected by a treaty they did not agree to (against the *pacta tertiis* principle). Or as it is noted in *Oppenheim's International Law*:

> "An interpretation agreed between some only of the parties to a multilateral treaty may, however, not be conclusive, since the interests and intentions of the other parties may have to be taken into consideration".[764]

An example would be a norm in an MEA, not binding on all WTO members, which is allegedly in conflict with a WTO norm. In that event the WTO norm may not normally be interpreted with reference to the MEA norm. However, if all parties to the environmental norm are also WTO members, the environmental norm must be interpreted with reference to the WTO norm. The (unadopted) GATT panel on *US – Restrictions on Imports of Tuna*, for example, read Article 31 of the Vienna Convention (with a particular focus on Article 31.3(a)) as allowing reference *only* to non-WTO rules of international law that had been accepted by *all* GATT contracting parties. Since CITES was not so accepted, the panel refused to take it into account.[765] The principle is, indeed, correct. But as pointed out, there may be exceptions.

The MEA norm, though not legally binding on all WTO members, could still influence the meaning of the WTO norm if it can be shown that it is an expression of the "common intentions" or "understanding" of all WTO members. There may, indeed, be cases where a non-WTO rules is not *legally binding* on *all* WTO members, but still reflects the "common understanding" of all WTO members. In *US – Shrimp*, for example, the Appellate Body, in its interpretation of GATT Art. XX(g) (in particular the term "exhaustible natural sources"), referred to rules of international law that were not binding on all WTO members, not even on all parties to the dispute.[766] It did so nonetheless because the non-WTO rules, to the extent they were used by the Appellate Body in giving meaning to Art. XX(g), reflected "the contemporary concerns of the community of nations". Doing so, the Appellate Body skated on thin ice without much explanation. It did not even refer to Art. 31.3(c), nor did it explain why rules binding on only some WTO members (not even including all of the disputing parties) did nonetheless reflect "concerns" common to all WTO members which could, in turn, impart meaning on a WTO term.[767] However, given the reasons above the approach may defensible under

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[764] Jennings and Watts, *Oppenheim's …*, 1268.

[765] Panel on *US – Restrictions on Imports of Tuna*, DS 29/R, circulated on 10 June 1994, not adopted, .

[766] Appellate Body report on *US – Shrimp*, notes 110-113.

[767] Note in this respect the separate opinion of Judge Jiménez de Aréchaga in the *Continental Shelf (Tunsisia/Libya*) case: "even if a new accepted trend does not yet qualify as a rule of customary law, it may still have a bearing on the decision of the Court, not as part of the applicable law, but as an element in the existing rules or an indication of the direction in which such rules should be interpreted" (ICJ Reports 1982, 108 ff., para. 33). In this sense, both soft law and law not legally binding on the parties in question but nonetheless reflecting their common understanding or at least the common understanding of the world community, can constitute "an orientational aid to interpretation" or may lay down "the perimeters for future arguments as to the applicable law" (Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EJIL 305-340, at 314 (1993)). Fastenrath concludes as follows:

> "The more heterogeneous the world becomes, the more importance must be attached to the formulation of common goals and criteria for the balancing of interests and to the establishment of all-encompassing linguistic conventions. In the face of conflicting interests and divergent goals, stemming from different cultures, clarity in the formulation and comprehension of legal propositions can only be preserved in this manner, narrowing the room for possible interpretations and thus ensuring that the behaviour of all actors may remain predictable. Here, the much-maligned phenomenon of soft law performs an invaluable function. It enables world-wide agreement on the content of hard law, in that it limits the scope of acceptable subjective auto-determination. Thus, soft law constitutes a 'positivized' text, even though an extra-legal one in the eyes of legal positivism, which saves this very theory from extinction in a pluralist world" (ibid., 338-9).

Art.31.3(c), at least to the extent these non-WTO rules do, indeed, reflect a "common understanding" of all WTO members as to what the term "exhaustible natural resources" in Art. XX(g) means.[768]

6. Art. 31.3(c): "Contemporaneous" or "evolutionary" interpretation?

Art. 31.3(c) of the Vienna Convention refers to "relevant rules of international law" without restriction as to the timing of these other rules. At first sight, Article 31.3(c), in contrast to "supplementary means of interpretation", allows, therefore, for reference to both (1) rules of international law existing *at the time of conclusion* of the treaty norm being interpreted; and (2) rules of international law that emerged *subsequently* and exist *at the time of interpretation*.

a. The rule: contemporaneous interpretation

However, the text now in Article 31.3(c) originally read: "rules of international law in force *at the time of conclusion of the treaty*".[769] As it was then drafted, it thus allowed, like Article 32, reference only to rules of international law that existed *at the time the treaty was concluded*. This reflected the so-called "principle of contemporaneity". It is the first leg of the inter-temporal law according to which a juridical fact must be appreciated in the light of the law contemporary with it.[770] For example, when the ICJ interpreted the provisions of Article 20 of the treaties between the United States and Morocco of 1787 and 1836 (substantially identical in terms) in the *United States Nationals in Morocco* case, it stated that "it is necessary to take into account the meaning of the word 'dispute' at the times when the two treaties were concluded".[771]

This principle of contemporaneity is the rule.[772] In other words, the rule is that in interpreting terms in, for example, the WTO treaty, reference is to be had to their meaning in international law in April

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[768] As a result, legal norms, although not binding on all of the parties in dispute, may have an influence on the interpretation of other international law, especially if these norms reflect the common understanding of a large number of states in pursuit of global commons. These norms do not thereby become binding on non-parties (*pacta tertiis*) nor do they somehow become "higher law" that invalidates or prevails over other international law. But they do play a role in the discussion of "hierarchy of norms" in international law. As Bernhardt pointed out: "It is more that the higher law should be taken into account when interpreting other norms [rather than the higher norm invalidating normal norms]. To that extent, the common heritage of mankind has some value in itself. So, if we are discussing the hierarchy of norms, we should not in the first line see in which cases the inferior norm is invalidated, but we should see how much the basic principles of the international order are influencing the inferior norm" (Bernhard, discussion, in Delbrück, *New Trends …*, 126-127).

[769] Article 70.1(b) of the Waldock Report III, quoted in Rauschning, *Travaux …*, 238.

[770] This was first expressed by Judge Huber in the *Island of Palmas* arbitration (1928, Netherlands v. United States), 2 R. Int'l Arb. Awards 831, 845. Note, however, that strictly speaking the inter-temporal problem in international law "relates to the delimitation of the temporal sphere of application of norms" (Preamble 1 to the IIL Resolution of 1 September 1995 on "Problems arising from a succession of codification conventions on a particular subject", 66 YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW, PART I, 245-248 (1995), hereafter "*IIL Resolution 1995*"), i.e., the question of which norm to apply to a particular circumstance. Nonetheless, "a similar problem arises whenever a rule refers to a concept the scope or significance of which has changed in the course of time" (Preamble 4 to *IIL Resolution 1995*).

[771] ICJ Reports 1951, 189.

[772] That such contemporaneous interpretation remains, in principle, the rule, even today see *Guinea-Bissau/Senegal Maritime Boundary Arbitration* (Award of 31 July 1989, 83 ILR 1, at para. 85 (1990):

> "the 1960 Agreement must be interpreted in the light of the law in force at the date of its conclusion. It is a well established general principle that a legal event must be assessed in the light of the law in force at the time of its occurrence and the application of that aspect of intertemporal law to cases such as the present one is confirmed by case-law in the realm of the law of the sea".

1994, i.e., the time WTO agreements were concluded. This means that, in principle, through the process of *interpretation*, new (post-1994) non-WTO rules of international law cannot be referred to.[773]

On that basis, it would seem that the reference to the Berne, Paris and Rome Conventions in the TRIPS Agreement[774] is a reference to these agreements *as they stood in April* 1994, i.e., at the time of conclusion of the WTO treaty. The incorporation of these WIPO conventions into the WTO treaty would only be a dynamic one -- automatically incorporating also modifications brought to these conventions in WIPO -- in case there were a clear indication on behalf of the drafters of the TRIPS agreement to that effect.[775]

b. The exception: evolutionary interpretation

There is, however, scope for exception to this principle of contemporaneity. Indeed, already in the preparation of the Vienna Convention itself, it was realised that

> "the content of a word, e.g. 'bay' or 'territorial waters', may change with the evolution of the law if the parties used it in the treaty as a general concept and not as a word of fixed content".[776]

This reflects the so-called "evolutionary approach" to treaty interpretation. It is the second leg of the inter-temporal law. This interpretative rule has been confirmed in three subsequent ICJ judgements, interpreting, for example, the term "territorial status".[777] It was confirmed also by the Appellate Body in *US – Shrimp* where it was found that the term "exhaustible natural resources" in GATT Art. XX

See also the Individual Opinion of Judge Bedjaoui, in the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997 (in his view evolutionary interpretation is then the exception, if proof of intention to that effect can be pointed at).

[773] Of course, the opposite should then nonetheless occur: the post-1994 rule should be interpreted with reference to the 1994 WTO norm.

[774] Footnote 2 in the TRIPS Agreement.

[775] Palmeter and Mavroidis, *Sources …*, 410, hold the same view. See, in contrast, the final report of the Arbitration Panel Established Pursuant to Article 2008 of the North-American Free-Trade Agreement (NAFTA), in the matter of *Tariffs Applied by Canada to Certain U.-S.-Origin Agricultural Products*, 2 December 1996, where it was found that the use of the term "GATT" in the cross-reference provisions of the FTA and NAFTA had to be interpreted to mean GATT as it evolved into the WTO agreement".

[776] Observations and Proposals of the Special Rapporteur, quoted in Rauschning, *Travaux …*, 244.

[777] *Namibia (Legal Consequences) Advisory Opinion,* ICJ Reports 1971, 31:

> "the concepts embodied in Article 22 of the Covenant … were not static, but were by definition evolutionary … The parties to the Covenant must consequently be deemed to have accepted them as such"

See also the *Aegean Sea Continental Shelf Case,* ICJ Reports 1978, 3; the more recent *La Bretagne* Arbitration Decision (90 RGDIP 716, at para. 49 (1986), explicitly referring to Art. 31.3(c) and, on that basis, taking account of developments in the international law of the sea for purposes of interpreting a 1972 bilateral agreement); the *Guinea-Bissau/Senegal Maritime Boundary Arbitration* (Award of 31 July 1989, 83 ILR 1, at para. 85 (1990), interpreting the notions of territorial sea, contiguous zone and continental shelf, expressly mentioned in a 1960 bilateral agreement, as defined in 1989, i.e., with reference to UNCLOS III); and the ICJ *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, although in that case the evolutionary aspect was explicitly incorporated in the 1977 treaty (Arts. 15, 19 and 20 of that treaty obliged the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests (ibid., para. 106). On that basis, the ICJ noted that "the Treaty is not static, and is open to adapt to emerging norms of international law" (ibid., para. 112). It found also: "In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing – and thus necessarily evolving – obligation on the parties to maintain the quality of the water of the Danube and to protect nature" (ibid., para. 140). See, in this respect, the dissertation by S. ALY, L'INTERPRÉTATION

> "must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment [not as it was understood in 1947]".[778]

In doing so, the Appellate Body did not make any reference, however, either to the first leg of the inter-temporal law or to Article 31.3(c) of the Vienna Convention.

Hence, a WTO term, if intended by the drafters to be evolutionary in nature (not static), needs to be interpreted with reference to "relevant rules of international law applicable in the relations between the parties", not at the time of conclusion of the treaty, but at the time the treaty is being interpreted. Put differently, the ICJ referred to the need to interpret the treaty "within the framework of the entire legal system prevailing at the time of interpretation".[779]

To answer the question as to which interpretative method must be applied (contemporary or evolutionary approach), the intention of the parties to the treaty must be decisive.[780] The use of broad, unspecified terms -- such as "exhaustible natural resources", "public morals" or "essential security interests" in GATT Articles XX and XXI -- is an indication to the effect that evolutionary interpretation was intended.[781] It is, indeed, an indication that WTO Members *wanted* these terms to evolve with society and international law or, at least, *should have realised* that the vagueness of these terms would result in their meaning being open to discussion and variation depending on the context and times. As the commentary to Article 31.3(c) has put it: "the relevance of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties" and "would normally be indicated by interpretation of the term in good faith". In 1975 the Institute of International Law adopted a resolution in the same sense.[782]

In many regards, the evolutionary approach to treaty interpretation seems both logical and necessary. As Fastenrath remarked: "the adoption of a strictly static interpretation is consistent only with a view that identifies law with the will of a legislator as expressed in a specific law-creating process. Such a view entails insurmountable practical difficulties for neither could such a will ever be reliably ascertained nor could it have considered consciously all possible details and circumstances … If one takes modern philosophy of language into account, a dynamic understanding of legal rules becomes inevitable".[783] From this linguistic perspective, practice has, indeed, shown that the starting point for

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ÉVOLUTIVE EN DROIT INTERNATIONAL PUBLIC (1997), on file at the library of the *Institut des Hautes Etudes Internationales*, Geneva, Ref. HEIDS 576.

[778] Appellate Body report on *US – Shrimp*, paras. 128-132.

[779] *Namibia (Legal Consequences) Advisory Opinion,* ICJ Reports 1971, 31.

[780] See Rosalyn Higgins, *Some Observations on the Inter-Temporal Rule in International Law*, in JERZEY MAKARCYK (ED.), THEORY OF INTERNATIONAL LAW, ESSAYS IN HONOUR OF K. SKUBISZEWSKI 173 (1999).

[781] The same can be said of the terms used in Arts. 15, 19 and 20 of the 1977 treaty in the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997 (respectively, "ensure … that the quality of the water … is not impaired", "protection of nature" and "protection of fishing interests").

[782] *1975 Resolution of the Institute of International Law*, paragraph 4, first sentence: "Wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept concerned is to be interpreted as understood at the time when the provision was drawn up or as understood at the time of its application" (1975 YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW, 537, at 539). For Sorenson, the IIL rapporteur, the question of whether to take the meaning which the notion or the term had at the time when the norm was established is related to whether the norm concerned contains "un renvoi à contenu fixe ou un renvoi mobile" (Sorenson, *Le Problème dit du Droit Intertemporel dans l'Ordre International*, 55 YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW 1, 90 (1973)).

[783] Fastenrath, *Lücken …*, 295. He added one word of caution, though: "It has to be kept in mind, however, that the judicial understanding of a legal rule can never be totally disconnected from the states' understanding of the rule, since the activities of courts depend on the implementation of their decisions by the states concerned" (ibid.). See, more generally, MCDOUGAL, M., LASSWEL, H., and MILLER, J., THE INTERPRETATION OF

many WTO provisions is the time of application of the WTO treaty, not the time of its conclusion (April 1994): when construing the "ordinary meaning" of WTO terms, both panels and the Appellate Body consistently resort to the most recent version of, for example, the Oxford English Dictionary, not the version as it existed in 1994.

c. In the WTO context: evolutionary interpretation becomes the rule?

An additional argument in support of interpreting WTO treaty terms taking account of the evolution of international law as it presents itself at the time of interpretation, is the fact that an increasing number of WTO provisions are of a regulatory nature, setting out objective standards for future state conduct in a way that is not limited in time nor limited *ratione personae*.[784] Most WTO provisions can, moreover, be said to be of a "continuing nature" in the sense that WTO Members continuously renew their consent to them by means of implementing, applying, monitoring and reconfirming these provisions in the context of the WTO as an international organisation.[785] As noted by Simon in respect of treaties establishing international organisations:

> "l'accord de volontés qui a présidé à la conclusion de la convention ne s'est pas épuisé dans la rédaction d'un texte; l'application d'une telle convention suppose nécessairement le renouvellement permanent de l'adhésion des États membres au contenu de normes juridiques dont l'instrument signé ne constitue qu'une expression solennelle, mais, par essence, éphémère. Or la fonction de l'interprète est … de donner effet au consensus continu des parties plutôt qu'à des volontés cristallisées à la date de signature … ou, si l'on préfère, de reconnaître dans les traités constitutifs la présence d' 'effectivités en action ' qui imposent une interprétation 'évolutive' des intentions des fondateurs de l'organisation".[786]

Although the ICJ has confirmed that the normal rules on treaty interpretation apply also to constituent instruments of international organisations, the ICJ acknowledged that such instruments have certain special characteristics.[787] In particular when it comes to the powers attributed by such instruments to international organisations or their organs, a teleological and dynamic approach has been adopted under which the competence of international organisations has been interpreted broadly so as to

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INTERNATIONAL AGREEMENTS AND WORLD PUBLIC ORDER 99 (1967): "the principal aim of an interpreter should be to give effect to the continuing consensus of the parties – that is, their contemporary shared expectations concerning problems of the type being disputed".

[784] See Chapter II, section D.2.a.

[785] See below Chapter VII, section A.2.

[786] DENYS SIMON, L'INTERPRETATION JUDICIAIRE DES TRAITES D'ORGANISATIONS INTERNATIONALES 372-373 (1981). See also the Individual Opinion of judge Lauterpacht in *South West Africa* (Voting Procedure), ICJ Reports 1955, 67 at 106 and Jennings and Watts, *Oppenheim's …*, 1268: "There is however room for the view that a treaty of a 'constitutional' character should be subject to somewhat different rules of interpretation so as to allow for the intrinsically evolutionary nature of a constitution".

[787] Advisory Opinion on the *Question of Certain Expenses of the United Nations*, ICJ Reports 1962, 157: "On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics". This approach was further clarified in the Advisory Opinion on *Use of Nuclear Weapons* (at the request of the WHO): "constituent instruments of international organizations are also treaties of a particular type: their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties" (ICJ Reports 1996, 75, para. 19).

include also certain "implied powers" with reference to "institutional effectiveness" and "subsequent practice".[788]

A similar dynamic line could be taken when it comes to interpreting certain other provisions, not related to the attribution of powers.[789] As the ICJ pointed out, Article 31 of the Vienna Convention "makes it possible to give quite broad consideration to the particularities of the constitutional instruments of international organizations", for the terms of a treaty must be interpreted "in their context and in the light of its object and purpose".[790] Fitzmaurice extrapolated this so as to include multilateral conventions of the 'normative' type more generally. In his view, the teleological method "is a method of interpretation more especially connected with the general multilateral convention of the 'normative', and, particularly, of the sociological or humanitarian type. The characters or constitutive instruments of international organizations may also be placed in this category".[791]

The WTO treaty is one single undertaking and legally speaking it consists of one treaty only. Although the Marrakesh Agreement most closely resembles other "constituent instruments" of international organisations, a provision-by-provision approach is called for. Most provisions in the Marrakesh Agreement seem to require an evolutionary interpretation, but also other provisions in other WTO agreements may need this treatment. Unlike, for example, the UN Charter or the EC Treaty of Amsterdam, the Marrakesh Agreement does not set out the basic substantive trade provisions on which the WTO is founded (e.g., MFN and national treatment). To say that only provisions of the Marrakesh Agreement itself have a "constituent character" calling for evolutionary interpretation would hence be too formalistic.[792]

The WTO treaty, as it is set, monitored and evolves in an international organisation and given its enforcement through a compulsory dispute settlement system, constitutes a "legal regime" that leads a live that is largely independent and de-linked from the subjective and temporal intentions of its original drafters. In that sense, it is an objective, dynamic regime where "the whole is greater than the sum of the parts".[793] As it was noted by a 1986 arbitral tribunal in a dispute between Canada and France:

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[788] In the Advisory Opinion on *Reparations for Injuries*, the ICJ found: "It must be acknowledged that its Members [of the UN], by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged (ICJ Reports 1949, 179). The ICJ stated further that the "rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent document and developed in practice (ibid., 180). See also Advisory Opinion on the *Question of Certain Expenses of the United Nations*, ICJ Reports 1962, 168. On this issue, see Sato, *Evolving ...*, 33-37.

[789] See in this respect, Sato, *Evolving ...*, 259: "because constituent instruments are reasonably considered to contain many concepts and provisions of mobile reference, the provisions concerned will, unless the intentions of the parties are proved to be reference to a fixed content upon the examination, be regarded to be based upon a mobile reference and will be so interpreted. To this extent, the evolutionary nature of constituent instruments will be supported by the theory of inter-temporary law and their evolutionary and teleological interpretation will have a legitimacy".

[790] Advisory Opinion on *Use of Nuclear Weapons* (at the request of the WHO), ICJ Reports, para. 19, see also the Dissenting Opinion of judge Weeramantry, ibid., 148.

[791] SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE ICJ, Vol. I, 341 (1986).

[792] Also Sato, *Evolving ...*, 261, argues in favour of a « case-by-case examination of the specific nature of relevant provisions ». See, in this respect, Oscar Schachter, *The Relation of Law, Politics and Action in the United Nations*, 109 RECUEIL DES COURS 165, 188-96 (1963), who distinguishes between rules, principles, standards and doctrine or general theory, arguing that the criteria of interpretation for these four types of provisions are different, depending on their degree of generality.

[793] See Joseph Weiler, *Introduction : The Reformation of European Constitutionalism*, in JOSEPH WEILER, THE CONSTITUTION OF EUROPE 221, at 225 (1999). It is, indeed, remarkable that authors calling for "constitutionalisation" of the WTO keep referring to the April 1994 intentions or thinking of the original drafters of the WTO treaty and this in a rather backward-looking way. See, for example, Deborah Cass, *The Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, 12 EJIL 39-75 (2001), hereafter "Cass, *Constitutionalization ...*": "should

> "Dans les traités normatifs ou institutionnels conclus entre un nombre élevé d'États et pour une durée indéterminée, le but du traité se détache aisément des finalités poursuivies par chacun des contractants primitifs et acquiert une autonomie objective que l'interprète ne peut méconnaître ».[794]

Although the WTO treaty does not deal with "global commons" in the sense that the rights and obligations it sets out transcend the sum of individual state interests the way human rights treaties normally do, the following statement by the ECHR in the *Tyrer* case may nonetheless be relevant also for an interpretation of the WTO treaty:

> "The Court must also recall that the Convention is a living instrument which … must be interpreted in the light of present-day conditions … the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field".[795]

In that case, the ECHR was examining whether corporal punishment of juvenile delinquents constituted degrading punishment in breach of Art. 3 of the Convention. The same approach was followed in the *Marckx* case, where the situation of "illegitimate" children was compared to that of "legitimate" children:

> "It is true that, at the time when the Convention of 4 November 1950 was drafted, it was regarded as permissible and normal in many European countries to draw a distinction in this area between the 'illegitimate' and the 'legitimate' family. However, the Court recalls that this Convention must be interpreted in the light of present-day conditions … In the instant case, the Court cannot but be struck by the fact that the domestic law of the great majority of the member States of the council of Europe has evolved and is continuing to evolve, in company with the relevant international instruments, towards full recognition of the maxim '*mater semper certa est*'".[796]

Notions in the WTO treaty such as "public morals", "human health" and "essential security interests" must be interpreted in an equally dynamic way, not as they were understood in 1994, let alone 1947. They must be understood in an autonomous international sense and not be left to the full discretion of WTO members.[797] At the same time, WTO members must be given a certain margin of appreciation and a definition of these notions will need to be adapted to the particular circumstances of each WTO member. Given the quasi-universal nature of the WTO treaty as well as its essential character of "negative integration" (unlike the ECHR's drive of "positive integration" towards some common regional understanding of notions such as "degrading punishment"), this margin of appreciation must be wider in the WTO than it is, for example, in the ECHR or *a fortiori* the EC. The WTO is not about "positive integration", a political agenda towards federalism or the elaboration of common, harmonised non-trade standards. In that sense, it is not "constitutional", even if it forms an objective regime to be interpreted dynamically.

[developments in international health law] be relevant given their absence from the GATT 1994 preamble? How important to the *Turtles* opinion is the fact that an interrelationship between international trade and international environmental law was within the intention of the contracting parties?").

[794] Decision of 17 July 1986, 1986 RGDIP 713, at 734.

[795] Case A/26, 15.

[796] Case A/31, 19.

[797] See the Panel report on *US - Section 301* (at para. 7.20) when interpreting the term « determinations » in DSU Art. 23.2(a), noting that the same word does not necessarily have the same meaning the way it is used in Sections 304 and 306 of the US Trade Act of 1974 (see also, ibid., at para. 7.146). In the same sense, but in relation to GATT Art. XXI "essential security interests", see Schloemann and Ohlhoff, *Constitutionalization and Dispute Settlement in the WTO: National Security as an Issue of Competence*, 93 AJIL (1999) 242.

In sum, it should not be uncommon for WTO norms to be interpreted with reference to other non-WTO norms concluded *after* 1994 pursuant to the evolutionary approach allowed for in Art. 31.3(c)). In other words, in case of an alleged conflict between a WTO norm and another norm concluded subsequently to April 1994, in many instances also the WTO norm may need to be interpreted in the light of the later, allegedly conflicting, norm. Only if a harmonious interpretation of the two norms is then not feasible should conflict be established.

In that sense, it could be said that in the WTO evolutionary interpretation has become the rule, contemporaneous interpretation, the exception.

d. To interpret WTO rules in an evolutionary manner does not mean that WTO rules are "constitutional" in nature

Let it be clear: It is one thing to say, as we do here, that WTO rules are of a "continuing nature", set in the dynamic framework of an international organisation which will, in most cases, call for a continuous adaptation to evolution in society and international law. It is quite another to construe the WTO treaty as one of a "constitutional nature".

If "constitutional"[798] is used in the sense of the GATT/WTO having transformed from a mere agreement (GATT) into an international organisation or regime (WTO) with elements of international governance to be exercised through acts of organs of this organisation, including judicial acts, then the WTO has, indeed, "constitutional" features. If constitutional is used in the sense of checks and balances between, firstly, WTO members and the WTO as an organisation and, secondly, between different WTO organs (in particular, the WTO judiciary and other bodies), then the WTO does, indeed, raise "constitutional" questions. If the term "constitutional" is referred to in the sense of WTO norms being construed and further developed by the Appellate Body as an "international legal order for international trade"[799], more deeply embedded in national legal systems[800] and in need of deeper democratisation and legitimacy, a "constitutional" debate is, indeed, taking place in the WTO.

But the word "constitutional", after all exported from national to international law, has a ring to it also, if not mainly, of: (1) "higher law" in the sense of « legal entrenchment of some rules over others and the creation of a hierarchy of norms »[801]; (2) the pursuit of "higher values" or some "common project" that transcends individual state interests in need of supra-national governance; as well as (3) the existence of some isolated or self-sufficient legal regime, distinct and separate from other legal regimes, of a static or immutable nature from which deviations are not tolerated and which cannot easily be amended. These last three types of "constitutionalisation" are, in my view, not present in the WTO.

Firstly, WTO law cannot be viewed as law that is somehow inherently "higher" than other international law. On the contrary, the reciprocal nature of most WTO provisions puts them on a somewhat lower level than so-called interdependent or integral provisions.[802] Secondly, unlike the EC, the WTO does not have a common political project, nor is it in any direct way in pursuit of "global commons". As pointed out before, trade is not a value in and of itself. It is merely an

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[798] On the different meanings of constitutional in the WTO, see Cass, *Constitutionalization …*, especially at note 3.

[799] Benedek, *Rechtsordnung …*, 464: „The main role of the [GATT] is less that of trade liberalization, as commonly perceived, but rather that of providing a stable *international legal order* for international trade, which allows for legal security, dispute settlement and orderly change". Benedek refers in this respect to the "constitutional development of GATT".

[800] Including in the sense that WTO law affects individual operators and may be of the nature to grant rights to individuals, as advocated by E.-U. PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (1997) and *Constitutionalism and International Adjudication: How to Constitutionalize the UN Dispute Settlement System?*, 31 NEW YORK JOURNAL OF LAW AND POLICY 753 (1999).

[801] Cass, *Constitutionalization …*, note 3.

[802] See Chapter II, section E above.

instrument to better achieve other values such as higher living standards and social welfare.[803] Thirdly, the WTO legal system cannot be equated to a domestic legal system, the way one could equate EC law to an internal legal regime. The WTO is an integral part of international law. It must be read, interpreted and applied in the wider context of this international law, not just international law rules on treaty interpretation.[804] Moreover, the WTO treaty is not a constitution in the sense of a static legal instrument from which deviations are not tolerated and which is difficult to amend. The WTO does not set out an immutable legal framework to be respected as some "higher law" for international trade. As illustrated below, it provides "only" for a multilateral framework within which certain *inter se* agreements -- either further liberalising or *inter se* back-tracking on earlier concessions -- must be tolerated.[805] The conclusion of the WTO treaty did require a delicately balanced "package deal", but now that this multilateral framework is set (in particular the MFN clause it contains), bilateral or other *inter se* adjustments must not only be tolerated, they are needed to achieve further liberalisation and to take account of the economic, social and cultural diversity of the WTO membership.

7. WTO jurisprudence where WTO norms have been interpreted with reference to rules of general international law

Based on the theory explained above – i.e., the need to interpret treaty norms with reference also to other norms outside the treaty (in particular on the basis of Art. 31.3(c) -- panels and the Appellate Body have referred to a number of non-WTO rules in the interpretation of the WTO treaty. Earlier, we mentioned certain cases were non-WTO *treaties* were taken into account.[806] In this section we focus on the longer list of cases where the Appellate Body made reference to rules of *general international law*.[807] Above, we set out the limitations for such references to be made pursuant to Art. 31.3(c) of the Vienna Convention. It should be pointed out that in only one of these disputes reference was made to Art. 31.3(c).[808]

Referring to non-WTO rules in the interpretation of WTO provisions is something a WTO panel can, and should, do *at its own initiative*, as part of its own legal reasoning (*jura novit curia*).[809] It should, indeed, do so more often and foster a built-in reflex to look also outside the "four corners" of the WTO treaty for guidance on how to interpret WTO treaty terms. As pointed out before, one area where input from general international law would be particularly useful is that of remedies in the WTO.[810] In contrast, for a panel to refer to non-WTO rules as *facts*, e.g., to refer to an MEA regulating trade in genetically modified organisms as factual evidence that such organisms constitute a health risk, either of the parties must first raise these non-WTO rules. That party has then also the burden of proof in this respect

In *US - Shrimp* the Appellate Body referred to the principle of good faith and the doctrine of *abus de droit* as general principles of international law in the process of interpreting the chapeau of GATT Art.

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[803] See Chapter II, section E.4.b.

[804] See, however, Cass, *Constitutionalization ...*, at 44, making the, in my view, erroneous statements that: "the only customary rules of international law incorporated into WTO law are the Vienna Convention's rules of interpretation and do not include any substantive non-WTO international law" or (ibid., at 65) that: "international trade law is increasingly linked to the broader jurisdiction of international law, although only to the extent, it has been suggested, of its procedural rules".

[805] See below Chapter VI, section C.3.

[806] See *supra* notes 741, 755, 765 and 766.

[807] We do not generally refer in this section to references made by *panels* to rules of general international law, focusing instead on what the Appellate Body, as the highest judicial body in the WTO, has found.

[808] See *infra* note 812.

[809] This explains why the Appellate Body in *EC – Computer Equipment* (at paras. 89-90) chastised the panel for not having looked at certain non-WTO rules (legal instruments created in the context of the World Customs Organization), obviously related to the WTO rules under interpretation, even though the parties to the dispute had not invoke these non-WTO rules.

[810] See above Chapter IV, section C.3.d.

XX. The Appellate Body acknowledged that its "task here is to interpret the language of the chapeau [of GATT Art. XX)], seeking additional interpretative guidance, as appropriate, from the general principles of international law".[811] In doing so, the Appellate Body made reference for the very first (and until today, last) time to Article 31.3(c) of the Vienna Convention, albeit in a footnote only.[812]

In *EC – Computer Equipment*[813], the Appellate Body referred to "the fundamental rule of due process" in its interpretation of Article 6.2 of the DSU (specificity of panel requests).[814] In *EC – Hormones*[815], the Appellate Body made reference to "fundamental fairness, or what in many jurisdictions is known as due process of law or natural justice" in setting out the meaning of "an objective assessment" which panels have to conduct pursuant to Article 11 of the DSU. On that basis, the Appellate Body found that Article 11 sets out a standard prohibiting (only) "egregious error [by panels] that calls into question the good faith of a panel". In the same report, the Appellate Body again referred to "due process" in order to find that "an appellant requesting the Appellate Body to reverse a panel's procedural ruling on matters of procedure must demonstrate the prejudice generated by such legal ruling".[816]

In *US – FSC*, the Appellate Body confirmed that the principle of good faith is "at once a general principle of law and a principle of general international law".[817] Applying it in the area of procedural DSU rules, the Appellate Body added: "This pervasive principle requires both complaining and responding Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve disputes".[818] In *Brazil – Aircraft*, the arbitrators as well made reference to the principle of good faith (albeit in a different guise) when applying "a presumption of good faith to statements and evidence originating in subjects of international law".[819]

Also in WTO arbitrations on the question of retaliation, reference has been made to general international law in the field of countermeasures. This was done in order to answer the question of whether a proposal for "suspension of concessions or other obligations" under DSU Article 22.2 meets DSU requirements, in particular that of "equivalence" with the level of nullification and impairment caused by the WTO inconsistent measure still in place. In *EC – Bananas (US suspension request)*, the arbitrators invoked, for example, "the general international law principle of proportionality of countermeasures".[820] In *Brazil – Aircraft*, an arbitration on the "appropriateness" of "countermeasures" under the Subsidies Agreement, the arbitrators referred to the meaning and objective of "countermeasures" in general international law (in particular the work of the ILC in this field[821]), to give meaning to the term "countermeasures" as it is used in the Subsidies Agreement.[822]

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[811] Appellate Body report on *US – Shrimp*, para. 158.
[812] Ibid., footnote 157. In the same dispute, however, the implementation panel acting under DSU Art. 21.5 also referred to Art. 31.3(c). This reference is discussed above in the text at note 755.
[813] *EC – Computer Equipment*, para. 70.
[814] In *US – Underwear*, 15, the Appellate Body had already referred to "due process considerations" in support of its finding that the backdating of restraint measures would "diminish the utility and significance of prior consultations".
[815] Appellate Body report on *EC – Hormones*, para. 133.
[816] Ibid., footnote 138.
[817] Appellate Body report on *US – FSC*, para. 166.
[818] Ibid.
[819] *Brazil – Aircraft*, Arbitration Report under DSU Art. 22.6, paras. 2.10-11 and footnote 15.
[820] *EC – Bananas*, Arbitration Report under DSU Art. 22.6 (US suspension request), para. 6.16.
[821] The arbitrators considered the ILC Draft Articles on State Responsibility, setting out certain rules on countermeasures, to be "an indication of the agreed meaning of certain terms in general international law" and

In another dispute (*EC – Poultry*)[823], the Appellate Body referred to "customary usage in international trade" to conclude that the term "c.i.f. import price" in Article 5.1(b) of the Agreement on Agriculture refers simply to the c.i.f. price *without* customs duties and taxes. In doing so, the Appellate Body did not further elaborate on where this "customary usage in international trade" can be found, nor did it explain why such usage is to play a role in treaty interpretation pursuant to customary international law.

8. A word of caution on the role of interpretation with reference to other norms as a conflict-avoidance technique

a. Interpretation may solve apparent conflicts, it cannot solve genuine conflicts

Earlier we warned about the limitations of the "presumption against conflict" and the "principle of effectiveness".[824] The presumption does not influence the substantive definition of conflict, nor, *a fortiori*, how actual conflict ought to be resolved. Moreover, giving the "intended effect" to treaty provisions may work both ways and cannot solve genuine conflict. Interpretation of treaty terms *with reference to other norms of international law* plays an equally limited role in the solution of apparent conflicts.

Above, we set out some of the inherent limitations of interpretation: the need for open-textured terms and a hook-up between the two norms and no interpretations *contra legem*.[825] Interpretation of one norm with reference to the other, allegedly conflicting, norm -- if at all permissible under the limitations regarding membership and time set out earlier -- may lead to a harmonious reading of both norms, i.e., may lead to the conclusion that there is, after all, no conflict. However, if interpretation leads to the conclusion that one norm in and of itself, or as it is implemented or relied on by a state, *does* constitute a breach of another norm, that is where the role of interpretation of treaty terms as a conflict-avoidance technique stops. To put it differently, interpretation of the terms in question may resolve apparent conflicts, it cannot resolve genuine conflicts.

The above restrictions linked to the process of treaty interpretation make it clear that the role of non-WTO rules in the *interpretation* of WTO covered agreements must be rather limited (in particular because of the requirement that the non-WTO rules reflect the "common intentions" of all 140 WTO members). Hence, contrary to what certain authors seem to imply[826], treaty interpretation with

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this even though Canada objected to these rules being part of customary international law (*Brazil – Aircraft*, Arbitration Report under DSU Art. 22.6, footnote 48).

[822] Ibid., para. 3.44 and footnote 45.

[823] Appellate Body report on *EC – Poultry*, para. 146.

[824] See section A.2 and B.3.C above.

[825] See section B.1 above.

[826] See, for example, Joel Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARVARD INTERNATIONAL LAW JOURNAL 333, 343 (hereafter, "Trachtman, *Domain ...*"); Gabrielle Marceau, *A Call for Coherence in International Law – Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement*, 33 JWT 87 (hereafter "Marceau, *Coherence ...*") and Gabrielle Marceau, *Untitled*, *World Bank Seminar on International Trade Law, 24-25 October 2000* , 3, on file with the author (hereafter "Marceau, *World Bank ...*"); Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECEUIL DES COURS 101-373, at 219 (1998), hereafter "Charney, *Multiple Tribunals ...*" and Eric Canal-Forgues, *Sur l'Interprétation dans le Droit de l'OMC*, 2001 RGDIP 5, 11, hereafter "Canal-Forgues, *Interprétation ...*" (« Cette formulation générale [in Art. 31.3(c)] a pu être considérée comme la seule à pouvoir prendre en compte l'enlacement et l'interconnexion des branches du droit international tout en permettant de réconcilier les normes conventionnelles et coutumières issues de branches différentes »). Below, we shall see, however, that other norms of international law play a much more important role as fully-fledged parts of the *applicable law* before a WTO panel than they play as *reference material for the interpretation* of WTO rules, see Chapter VIII, section C.

reference to other rules of international law is *not* a panacea for all problems of inter-play between WTO and other rules of international law.

In contrast, it may be easier for WTO rules to impart meaning on non-WTO rules, given that the latter often have a more limited membership. Indeed, even if WTO rules may not be interpreted with reference to such non-WTO rules (because of questions of membership or timing), these non-WTO rules may, in turn, be subject to interpretation with reference to WTO rules. This reference may enable an interpretation of the non-WTO rule that is in line with the WTO treaty and thereby resolve an apparent conflict. But if such harmonious interpretation is not feasible, a genuine conflict arises and treaty interpretation in and of itself is incapable of resolving it.

b. Interpretation of the treaty with reference to other law *versus* application of the treaty in the context of other law

It is of crucial importance to distinguish the two types of "fall-back" on other rules of international law that we outlined earlier[827]: firstly, interpretation of specific treaty terms with reference to other law; secondly, application of the treaty in the context of other law, in particular in areas where the treaty remains silent. Many authors have ignored this distinction.[828]

Fall-back by means of *interpretation* with reference to other rules of international law is subject to many limitations: it is definitional in nature, it cannot go beyond the clear meaning of the terms and is, in principle, bound to contemporaneous norms expressing the "common intentions" of all parties to the treaty.

Fall-back because of a "gap" in the treaty, i.e., because of the presumption that international law continues to apply to the treaty unless there is contracting out, is much broader in scope. There, the influence of other norms is not linked nor limited to giving meaning to explicit terms in the treaty. The other norms, by their very nature (they fill a "gap") *add* to the treaty terms as a fully-fledged part of the applicable law in case of judicial disputes. They are not bound either by temporal limitations: the gap is filled by international law rules *as they stand at the time of application of the treaty*, not as they stood at the time of its conclusion. Moreover, as we shall see below[829], this second type of fall-back on international law is, unlike that of interpretation, not limited to rules of international law reflecting the "common intentions" of all parties to the treaty. It extends also to any rule of international law binding as between the *two disputing parties*. Since the WTO treaty was created and continues to exist in the context of international law, all rules of international law binding on the parties are potentially relevant in a decision on whether or not WTO law applies and has been breached.

Nonetheless, when it comes to rules of *general international law*, it may be difficult to distinguish between the first and the second type of fall-back. For example, if a panel makes reference to Art. 27 (internal law is not a justification for breach) or Art. 28 (non-retroactivity of treaties) of the Vienna Convention when deciding on whether a specific WTO rule has been breached, does it do so in the process of giving meaning to the terms of this WTO rule (first type of fall-back, interpretation) or in the process of applying general international law there where the treaty is silent (second type of fall-back, application)? It seems that the latter view is more appropriate: possible justifications for breach and the question of retroactive application of a rule is not so much *giving meaning to the specific terms* of the rule, rather it is part of the decision of *when and to what extent the rule applies* with reference to other rules.[830]

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[827] See above Chapter IV, section C.1.
[828] See, for example, Canal-Forgues, *Interprétation …*, 7 and 11. On the related distinction between jurisdiction, applicable law and interpretation, see below Chapter VIII, section C.
[829] See Chapter VIII, section C, on the applicable law before WTO panels.
[830] *Contra*: Canal-Forgues, *Interprétation …*, 7.

The distinction between interpreting the terms of a treaty with reference to other law and applying a treaty in the context of other law -- be it other law to fill gaps left open by the treaty or other law that may overrule the treaty -- was made clear by Sir Humprey Waldock's in his Third Report on the Law of Treaties. Art. 56 of his draft, on inter-temporal law, read as follows:

> "1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up.
>
> 2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied".[831]

The second paragraph was meant to apply, for instance, to cases of conflict between rules of international law, such as a treaty rule and a subsequent rule of *jus cogens*.[832] The article was subsequently left out, not because it was thought to reflect bad law, but because the ILC rightly pointed out that the second paragraph was not strictly speaking a question of intertemporal law.[833]

The same distinction was made by the International Law Institute in its 1975 Resolution on the Intertemporal Problem in Public International Law. Paragraph 4 of this Resolution provides in a first sentence:

> "Wherever a provision of a treaty refers to a legal or other concept without defining it, it is appropriate to have recourse to the usual methods of interpretation in order to determine whether the concept concerned is to be interpreted as understood at the time when the provision was drawn up or as understood at the time of its application".[834]

This first sentence addresses *interpretation*, in the sense of giving meaning to the *terms of a particular norm*. The second sentence of paragraph 4 continues as follows:

> "Any interpretation of a treaty must take into account all relevant rules of international law which apply between the parties at the time of application".[835]

At first sight, this seems to contradict the first part of the first sentence (interpretation of a concept "as understood at the time when the provision was drawn up"). However, it seems, rather, that the term "interpretation of a treaty", as it is used in this second sentence, does not address *interpretation* in the sense of *giving meaning to particular terms*, but rather the *application* of a treaty in the wider context of international law at the time the treaty is being applied.[836]

That a treaty must be applied in the context and together with other relevant law -- independent of the process of treaty interpretation -- was confirmed recently by the ICJ in the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*. There, the Court noted:

> "new [environmental] norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States

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[831] YILC, 1964-II, 8, emphasis added.
[832] Ibid., 9.
[833] It raised, instead, issues of modification of one rule by another. Intertemporal law, in contrast, specifies which of several rules prevailing *at different moments in time* should apply to a particular case (YILC, 1964-I, 33).
[834] *1975 Resolution of the Institute of International Law*, 1975 YEARBOOK OF THE INSTITUTE OF INTERNATIONAL LAW, 537.
[835] Ibid.
[836] The way also Waldock distinguished between interpretation and application, see text at note 831 above.

> contemplate new activities but also when continuing with activities begun in the past".[837]

In the *Lockerbie case* as well, the ICJ applied the 1971 Montreal Convention, but it did so taking account of other rules of international law applicable to the case at hand, *in casu*, UN Security Council Resolution 748, dated 31 March 1992. This resolution was not resorted to as an element to *interpret* the Montreal Convention. Rather, it was actually *applied* by the Court as a possible defence for an alleged breach under that Convention. The resolution was not only adopted *after* the Montreal Convention, it was actually taken three days after the close of the ICJ hearings on Libya's request for provisional measures.[838]

The distinction between *interpreting* a treaty in the light of new law and *applying* a treaty in the context of new law was made also in the *La Bretagne* arbitration. There, the tribunal held that the expression "fishery regulations" in Art. 6 of a 1972 bilateral agreement between France and Canada should be interpreted in accordance with its original and ordinary meaning, which related only to the capture of fish and not filleting. However, in view of the alleged developments in the law regarding the rights of the coastal state in its exclusive economic zone, the tribunal further examined whether an adjustment of the ordinary meaning of Art. 6 was required. But as the Tribunal noted, this was no longer a question of the interpretation of the 1972 Agreement, but a question of its "application over time", which could, *in casu*, result in supervening custom to prevail over an earlier treaty provision.[839]

In the previous Chapter[840] we discussed the *application of other law* (in particular, general international law) as a type of "fall-back" in case the treaty is silent on an issue (such as burden of proof or treaty termination). As noted there, this "fall-back" forms a situation of accumulation of norms, proving that new law is created in the context of pre-existing law. In the next two Chapters, where we address conflict resolution, the *application of other law* may be required, not as a "fall-back", but because the other law must, pursuant to conflict resolution rules, prevail over the treaty being interpreted. This proves that treaties are not only created in the background of pre-existing law, but continue to exist in the wider context of public international law. That also in the WTO context other, non-WTO law (including non-WTO treaties) may thus be applied by WTO panels, in particular as a defence against a claim of WTO breach, is what we examine in Chapter VIII.

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[837] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, para. 140. As Judge Weeramantry noted in the same dispute when faced, in 1996, with a 1977 bilateral treaty, on the one hand, and international environmental norms that had developed since, on the other:

> "This inter-temporal aspect of the present case is of importance to all treaties dealing with projects impacting on the environment. Unfortunately, the Vienna Convention offers very little guidance regarding this matter which is of such importance in the environmental field. The provision in Article 31, paragraph 3 (c) … scarcely covers this aspect with the degree of clarity requisite to so important a matter. Environmental concerns are live and continuing concerns whenever the project under which they arise may have been inaugurated. It matters little that an undertaking has been commenced under a treaty of 1950, if in fact that undertaking continues in operation in the year 2000. The relevant environmental standards that will be applicable will be those of the year 2000" (Separate Opinion, ICJ Reports 1997, 114).

As much as these new norms must be taken into account by the ICJ in a dispute on a 1977 bilateral investment treaty, also in WTO disputes, concerning the WTO treaty, these norms must be considered as part of the applicable law, see Chapter VII, section C above.

[838] *Lockerbie* case, ICJ Reports 1992, para. 42. Further discussed below in Chapter VII, section C.

[839] *La Bretagne*, Arbitration Decision 90 RGDIP 716, at para. 58 (1986).

[840] Chapter IV, section C.2.

CHAPTER VI. RESOLVING NORMATIVE CONFLICT

A. Preliminary classifications for conflict resolution

1. Solutions in the law of treaties, the law of state responsibility and international institutional law

The conflict-avoidance techniques set in the previous chapter may fail. An apparent conflict then becomes a genuine conflict. Once validly established as a genuine conflict, resolving a conflict of norms may involve different disciplines of public international law. The law of treaties, including the provisions of particular treaties, provide the bulk of all conflict rules. Nonetheless, state responsibility as well is highly relevant. When it comes to acts of international organisations, international institutional law must also be referred to.

a. Normative conflict *versus* conflict in the applicable law

As pointed out in Chapter IV, section B.2.b, a conflict of norms may take two forms:

(i) One of the two norms in conflict is alleged to constitute, in and of itself, breach of the other norm. This is what we called "normative conflict".[841] We examine the resolution of normative conflict in this Chapter (Chapter VI).

(ii) Compliance with, or the exercise of rights under, one of the two norms is alleged to constitute breach under the other norm. Here, state conduct, other than the conclusion of either norm, is claimed to give rise to state responsibility and the other norm is invoked in defence of such claim. This is what we referred to as "conflict in the applicable law".[842] We examine the resolution of conflict in the applicable law in the next Chapter (Chapter VII)

When faced with a normative conflict, one norm constitutes breach of the other. In other words, one norm is "illegal", i.e., constitutes wrongful conduct, under the other norm. Such normative conflict does not only give rise to state responsibility. In addition, rules on the law of treaties or of international institutional law may apply and result, for example, in the "invalidity" of the norm constituting breach. We come back to the distinction between "illegality" and "invalidity" below. A normative conflict will arise, for example, when a norm conflicts with another norm of *jus cogens* or when an *inter se* agreement is concluded by some parties to a multilateral treaty, in breach of an explicit prohibition to conclude such agreement. Note that under such normative conflicts, apart from state responsibility incurred for the very conclusion of one of the two norms, state responsibility may also be incurred because of specific state conduct performed under the "illegal" (or, as the case may be, "invalid") norm.

When faced with conflict in the applicable law, the question of "illegality" or "invalidity" of one of the two norms v-à-v the other norm does not arise. The question is rather: a state has acted in a certain way, two norms apply to the act in question, under one norm the act is "illegal", under the other it is not; which of the two norms must be applied? This situation will arise, for example, when a state was

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[841] This corresponds to what we called earlier inherent conflicts, that is, conflict of norms where one norm constitutes, in and of itself, breach of the other norm.

[842] This corresponds to what we called earlier necessary or potential conflicts, where the norm in and of itself is not in conflict with the other norm, but where the implementation of an obligation, or the exercise of a right under one of the norms necessarily or potentially constitutes breach of the other.

confronted with two norms and decided to comply with obligations or exercise rights under the norm *that should have given way*. As a result, the state in question, by its unilateral conduct, will have breached the prevailing norm so that its responsibility can be invoked. To put it differently, a WTO member may be challenged before a WTO panel for breach of rule A, invoke in its defence rule B, but fail to convince the panel that rule B prevails over rule A. On that ground, the panel may decide that the measure or conduct of the member in question does, indeed, violate its obligations under rule A (rule B forms no defence) so that state responsibility is incurred, not by the very conclusion of rule B, but by other state conduct in breach of rule A. As we shall see below, rule B may, in these cases, not constitute a valid defence, either because (i) it must give way to rule A (rule A being, for example, the *lex posterior* or the *lex specialis*); or (ii) it is not binding on the party claiming violation of rule A (pursuant to the *pacta tertiis* rule).

b. "Invalidity" distinguished from "illegality"

In normative conflicts and conflicts in the applicable law, rules on state responsibility may lead to one of the two norms, or other state conduct, respectively, being "illegal", i.e., constituting wrongful conduct under the other norm. In addition, but limited to normative conflicts, the law on treaties and international institutional law may result in the "invalidity" of one of the two norms because of conflict with the other norm. "Illegality" must hence be distinguished from "invalidity", first of all, on the basis of the rules leading to it (the law on state responsibility *versus* the law on treaties or international organisations).

Moreover, "invalidity" as a sanction is explained on the ground of lack of competence, contracting power or other anomalies related to the consent given to be bound *by the norm in question*, such as error, fraud, corruption or coercion. "Illegality", in contrast, is a somewhat lesser sanction in that, looked at in isolation, the norm was validly created. However, it is or becomes "illegal" because it constitutes conduct that is defined as wrongful under *another norm*.

In that sense, invalidity is normally a sanction that applies *ab initio* or *ex tunc* (except for supervening invalidity, as a result of, for example, supervening *jus cogens*).[843] Moreover, it cannot be rectified, except by concluding a new norm (this time not taken *ultra vires* or created without error, fraud, corruption or coercion). "Illegality", on the other hand, can be cured or rectified without changing the norm affected by it. It can, for example, be avoided by altering the norm with which it is in conflict.

Finally, and linked to the fact that invalidity, as opposed to illegality, cannot normally be cured, "invalidity" should be a matter to be discovered and decided upon by an international adjudicator *at its own initiative*.[844] "Illegality", in contrast, will normally be pronounced by an adjudicator only if so asked by one of the parties (here, the principle of *non ultra petita* applies).[845]

2. Formal hierarchies, value-based hierarchies, membership, time and subject matter

a. The absence of formal hierarchies in international law

As noted before, priority of norms in international law is not connected to the source of the norms in question, i.e., the way particular norms came about.[846] There is no inherent hierarchy of sources in

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[843] Nonetheless, pursuant to Art. 69 of the Vienna Convention, "acts performed in good faith before the invalidity was invoked are not rendered unlawful by reason of the invalidity of the treaty" (in situations other than fraud, corruption or coercion).

[844] See, in this respect, the statement by Judge Schücking in his Dissenting Opinion in the *Oscar Chinn* case: "It is an essential principle of any court, whether national or international, that the judges may only recognize legal rules which they hold to be valid" (PCIJ Reports, Series A/B, No. 63, 149 (1934)).

[845] For a potential exception, see *infra* note 952.

[846] See Chapter III.

international law. In addition, certain other formal elements do not play a role either. In terms of hierarchy, it does not matter where or in what context or international organisation a norm has been created (be it the WTO or WIPO or under an MEA). Moreover, a treaty originally concluded by a head of state does not carry more weight than one concluded by an ambassador.[847] Similarly, a norm (say, an act of an international organisation) validly adopted by majority voting must not give way to one adopted by unanimity. Nor must oral or implied consent give way to written or explicit consent (say, an oral statement publicly made which constitutes a binding unilateral act or consent implied from subsequent practice, as opposed to a written treaty provision). Nonetheless, as we noted earlier, in operational terms, especially when it comes to proving the existence of less "formal" norms or proving that they do conflict with more explicit norms, the latter (explicit consent) may carry more weight.[848]

b. Value-based hierarchies

In terms of value-based hierarchies, we pointed out earlier that certain norms, in particular norms of *jus cogens* but also other "more important" norms setting out, for example, integral obligations or obligations breach of which constitutes an international crime, "prevail" over other norms either in all situations (*jus cogens*) or in specific instances (such as suspension or termination, countermeasures or, more generally, the consequences attached to their breach).[849]

c. Membership to the norms in conflict

In terms of membership to the norms in question, their timing and subject matter, we pointed out before that a conflict of norms can arise only in case there is a triple overlap between two norms: overlap *ratione personae* (subjective overlap), overlap *ratione materiae* (objective overlap) and overlap *ratione temporis* (temporal overlap). One way to lay out rules on how to solve conflict would be to start from these different types of overlap.

In respect of the required overlap *ratione personae*, it must be recalled that a conflict of norms arises as between two states and that it is the specific legal relationship between these two states that must be examined (irrespective of the fact that other states may be bound also to the norms in question). In terms of conflict resolution, the fact that other parties are bound also by one or both of the conflicting norms plays a role only in respect of *inter se* agreements deviating from a prior multilateral agreement, discussed below in section C (Art. 41 of the Vienna Convention).

Ratione personae (i.e., in terms of membership to the norms), the two norms in conflict may be binding on

(1) both parties (AB/AB conflict); or
(2) only one of the two parties (AB/AC conflict).

Examples of conflicting norms binding on both parties (AB/AB conflicts) are: two WTO rules that are in conflict as between two WTO members (both WTO rules are binding on both of the parties); or a WTO rule in conflict with an MEA rule as between two states both of which are WTO member and party to the MEA.

A conflict of norms binding only on one of the two parties (AB/AC conflict) takes the following form. State A has concluded a norm with state B which is, from the point of view of state A, in conflict with another norm that state A concluded with state C. One may think here of the Nicaragua/Costa Rica Canas-Jerez treaty of 1858 (AB norm) in which Nicaragua committed itself not to grant concessions to

[847] See MCNAIR, THE LAW OF TREATIES, 64 (1961).
[848] But see the divergent weight that may be given to implicit and explicit consent, as discussed in Chapter III, section H.
[849] See Chapter III, section B.4.

other states in respect of a certain part of its territory, contradicted subsequently by the Nicaragua/United States Bryan-Chamorro treaty of 1914 (AC norm) in which Nicaragua granted such concessions to the United States.[850] Or, a WTO obligation resting on state A not to restrict trade v-à-v state B (AB norm), as opposed to a subsequent MEA obligation (or an obligation in terms of labour standards) resting on state A v-à-v state C to restrict trade in certain environmentally dangerous products (or products produced in disrespect of certain labour standards) *even if these products come from third parties* not bound by the MEA (or the labour standards agreement), *in casu*, state B (AC norm).

d. Timing of the norms in conflict and their subject matter

When it comes to the timing of the two norms, we shall see that this timing may, in certain circumstances, be crucial (Art. 30 of the Vienna Convention). Nonetheless, it would be wrong to posit timing as the all important factor in solving conflict of norms. After all, this timing factor is not a self-standing one. It derives from the contractual freedom of states (they can change their minds, so that in principle the latest expression of intention counts). But this contractual freedom is limited, for example, by *jus cogens*, the *pacta tertiis* principle and Art. 41. In addition, timing, after all an objective criterion from which to deduce the intention of the parties, may not always be clear.[851] In those circumstances, other criteria from which to derive the intention of the parties (such as the specificity of the norms) may be resorted to. This will bring us to the other important distinguishing feature between two norms: their subject matter, not in terms of the value they reflect, but in terms of their specificity.

3. Hierarchy among conflict rules

Below, we classify the different types of solutions to a conflict of norms according to their outcome: (1) one of the two norms disappears; (2) one of the two norms is "illegal"; (3) one of the two norms "prevails" (but is not "illegal"); (4) both norms are complete equals (and state responsibility provides the solution). The first two solutions raise normative conflict; the last two, conflict in the applicable law.

When faced with a particular conflict, this is also the hierarchical order one ought to follow. One should each time ask

(i) whether either of the two norms is "invalid" or "terminated" (section B below);

(ii) if not, whether one of them is "illegal" (section C below),

(iii) if this is not the case either, the question must be: which of the two norms "prevails", i.e., must be applied;

(iv) if these priority rules do not solve the conflict either, one must resort to the solutions offered under Chapter VII, section B: both norms are complete equals and state responsibility may offer the way out or the conflict constitutes a genuine *lacuna* in the law.

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[850] See Judgement of the Central American Court of Justice, reprinted in 11 AJIL 181-229 (1917), discussed below in section C.1.a and Chapter VII, section B.2.

[851] See above Chapter III, section B.2 and below Chapter VII, section A.2.

B. One of the two norms ceases to exist

A conflict of norms, when constituting normative conflict as defined above, may result in the end of one of the two norms. The question is then one of "survival" or which of the two norms remains. A norm may disappear as a result of conflict either through

(i) invalidity; or
(ii) termination.

If that is the case, the invalid or terminated norm can (no longer) be breached so that no state responsibility can be incurred under this norm. Of course, breach of the prevailing norm (e.g., by the very conclusion of the "invalid" norm or state conduct adopted pursuant to this norm) does result in state responsibility.

1. Invalidity of a norm because of conflict with jus cogens

In international law, invalidity of a norm because of conflict with another norm is limited to the extreme, namely to cases where a norm is in conflict with *jus cogens*. If that is the case, the conflicting norm is, or becomes, void so that only one of the two conflicting norms (the norm of *jus cogens*) continues to exist (Arts. 53 and 64 of the Vienna Convention).[852] For those states bound by the Vienna Convention, Art. 66 accords compulsory jurisdiction to the ICJ for disputes "concerning the application or the interpretation of articles 53 and 64" (unless the parties by common consent agree to submit the dispute to arbitration). Invalidity arises only in one other instance of normative conflict, namely a conflict between an act of an international organisation and its constituent instrument (discussed below in section 3).

a. Background to the limitation of "invalidity" to conflicts with *jus cogens*

That invalidity ought to occur only in case of conflict with *jus cogens*[853] has, however, not always been the prevailing view. Witness, for example, the preparatory works of the Vienna Convention and the quite dramatic shift in there from "invalidity", as a solution to conflict between treaties, to "priority" of one treaty provision over the other.[854] Sir Hersh Lauterpacht, the first rapporteur to the ILC, proposed as a general rule that a treaty should automatically be void "if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties".[855] Sir Gerald Fitzmaurice, on the other hand, the second rapporteur, proposed a draft based on the view that in general the question is one of reconciling conflicting legal provisions and that only in certain types of cases may the later treaty be invalid (in particular in the event of conflict with an earlier treaty of an "interdependent" or "integral" type).[856] The third, and most influential rapporteur, Sir Humphrey Waldock, sided with Fitzmaurice and took it even a step further. In his view, invalidity occurred only in the event of conflict with *jus cogens* (and in certain cases of inconsistency with the constituent

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[852] One could question then whether there is really a conflict of norms (given that the treaty norm is invalid). As Waldock noted: "where a treaty was invalid for conflict with a rule of *jus cogens*, it was not a treaty for legal purposes and no question of a conflict between two treaties arose" (YILC, Vol. 1, 742nd Meeting, 121, para. 23). He used this as a reason not to mention *jus cogens* in what is now Art. 30. However, from all other angles one must see Arts. 53 and 64 as raising a problem of "conflict" of norms. After all, these provisions include the very word "conflict" and the invalidity is a *consequence* of *conflict* (even if this consequence of conflict means that the conflict disappears; but is not the purpose of all conflict rules the disappearance of conflict?).

[853] Or in case of conflict between an act of an international organisation and its constituent instrument (discussed below in section 3).

[854] Summarised in Waldock's Second Report, Commentary to Art. 14, YILC 1964, Vol. II, 53-61.

[855] Ibid., 55, referring to Art. 16 of Lauterpacht's draft (A/CN.4/63 and 87). Lauterpacht did, however, add a series of exceptions to this general rule (a list which increased in his second report).

[856] Waldock's Second Report, Commentary to Art. 14, YILC 1964, Vol. II, 55-59.

instrument of international organisations, an exception he later dropped). Waldock, as well as the Vienna Convention as it was finally adopted, focuses not on "invalidity" but on "opposability" and "priority" of treaty norms combined with state responsibility (not nullity) in case of breach of one treaty by another.

Consequently, invalidity of a norm of international law is a rare sanction. It occurs only in the event of conflict with *jus cogens*. This conflict is seen as so serious that the conflicting norm should not only give way to the norm of *jus cogens*, but should actually be declared invalid or, in case of supervening *jus cogens*, become void and terminate. The invalidity of norms in conflict with *jus cogens* is explained, in theoretical terms, on the ground that states have no "legal capacity" to conclude norms against *jus cogens*. The very fact of states being part of the international community invalidates their consent to such norms.

Below, we discuss the possibility of declaring "invalid" acts of international organisations that are inconsistent with their constituent instruments (section B.3). We also explain that *inter se* modifications of a multilateral treaty that do not meet the conditions of Art. 41 are not "invalid" but "illegal" (section C.2). Finally, it shall become clear also that conflicts of the type AB/AC do not lead to the invalidity of the AC norm, but that both the AB and the AC norm are, in principle, equally valid.

b. Invalidity of the entire treaty or the conflicting provisions only?

In the event of a new treaty in conflict with existing *jus cogens* (Art. 53 of the Vienna Convention) the conflict is regarded so seriously that the offending provision is inseparable, i.e., the *whole treaty* is invalid, even if only one of its provisions is impugned. Article 44, paragraph 5, provides, indeed, explicitly that "[i]n cases falling under articles 51, 52 and 53, no separation of the provisions of the treaty is permitted". In contrast, in the event of conflict between an existing treaty and supervening *jus cogens*, the existing treaty becomes, pursuant to Art. 63, "void and terminates", but Art. 44 on "separability of treaty provisions" remains applicable.[857] Hence, it may well be the case that only one provision in the earlier treaty becomes invalid because of the conflict with supervening *jus cogens*, not the entire treaty.

The ILC, in its commentary to Art. 63 (then Art. 61), noted the following:

> "although the Commission did not think that the principle of separability is appropriate when a treaty is void *ab initio* under article 50 [now Art. 53] by reason of an existing rule of *jus cogens*, it felt that different considerations apply in the case of a treaty which was entirely valid when concluded but is now found with respect to some of its provisions to conflict with a newly established rule of *jus cogens*. If those provisions can properly be regarded as severable from the rest of the treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid".[858]

It is difficult to see what these different considerations may be. There seems to be no valid reason why a distinction ought to be made *in terms of separability of treaty provisions* between invalidity at the time of conclusion of a treaty and invalidity at a later stage. Of course, invalidity because of conflict with existing *jus cogens* results in invalidity *ab initio*, whereas invalidity because of supervening *jus cogens* operates only as of the establishment of the *jus cogens*.[859] But this distinction

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[857] And this even though Art. 63 provides that the "treaty … becomes void and terminates". *Contra*: Crawford, Second report, Annex 2, para. 306.

[858] Rauschning, *Travaux …*, 440.

[859] There is then no invalidity *ab initio*, the new *jus cogens* "does not annul the treaty, it forbids its further existence and performance" (Rauschning, *Travaux …*, 440). Note, in this respect, Art. 71 of the Vienna Convention. If a treaty is void because of a conflict with existing *jus cogens*, the parties must: "(a) eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and (b) bring their mutual relations into conformity with the peremptory norm of general international law". In contrast, if a treaty becomes void and terminates because of

relates to the timing of the invalidity, not to its material scope. In the latter sense, no distinction ought to be made. Either in both cases there is invalidity of the entire treaty or in both cases normal rules on separability apply. Given the exceptional nature of invalidity of a norm because of conflict with another norm, the continued application of separability rules in both instances seems more appropriate. The importance and superiority of *jus cogens* should not thereby be compromised. If it is, indeed, so that a non-respect for *jus cogens* underlies the entire treaty, the normal rules, in Art. 44, on separability would ensure the invalidity of the entire treaty.[860] As Capotorti remarked, after having rejected the distinction made in terms of separability between Art. 53 and Art. 64:

> "il conviendra plutôt de distinguer entre les dispositions étroitement liées à la clause incompatible et les dispositions indépendantes, et de voir si l'accord conserve encore son objet une fois que le contenu se réduit à ces dernières dispositions ».[861]

In case somehow the WTO treaty, with its myriad of agreements (but legally constituting one single treaty), were to include a provision in conflict with *jus cogens*, would it, indeed, not be going too far to say that because of this conflict with one WTO provision, the entire WTO treaty is invalid?

2. Termination of a treaty by conclusion of another incompatible treaty

A conflict between two norms may cause the "disappearance" of one of the two norms in another way than invalidity. The emergence of a new norm, in conflict with an earlier norm, may lead to the termination of the earlier norm. Pursuant to Art. 59 of the Vienna Convention, a later treaty may terminate an earlier one, either because "it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty" or because the provisions of the later treaty are

> "so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time".

The incompatibility or conflict required for the earlier treaty to be terminated must hence be of a rather serious nature, i.e., it must result in the impossibility to apply both *treaties* (not just two provisions of the two treaties) at the same time. Art. 59 is based on the Dissenting Opinion of Judge Anzilotti in the *Electricity Company of Sofia and Bulgaria* case where he introduced the distinction between explicit and tacit abrogation.[862]

In the *Free Zones of Upper Savoy and the District of Gex* case, the PCIJ refused to hold that the 1919 Treaty of Versailles had implicitly abrogated or was intended to lead to the abrogation of the provisions of the 1815 Treaties of Paris and other supplementary acts regarding the customs and economic regime of the free zones of Upper Savoy and the District of Gex.[863] The Court interpreted the later Treaty of Versailles as requiring that France and Switzerland agree between themselves on a modification of the existing 1815 regime. Pending the conclusion of such agreement "this regime

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supervening *jus cogens*, "the termination of the treaty: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination; provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not itself in conflict with the new peremptory norm of general international law".

[860] Art. 44, paragraph 3, allows for invalidity of only the impugned provision in case (1) that provision is separable from the others "with regard to their application"; (2) the impugned provision "was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole"; and (3) the "continued performance of the remainder of the treaty would not be unjust".

[861] Capotorti, *Interférences* ..., 131.

[862] PCIJ Reports, Ser. A/B, No. 77, 92 (1939).

[863] PCIJ Reports, Ser. A/B, No. 46 (1932).

must continue in force so long as it has not been modified by agreement between the parties".[864] In other words, in the view of the Court, the difference between the 1815 and the 1919 treaty was not such as to imply the termination of the earlier treaty.[865]

Art. 59, paragraph 2 adds that "[t]he earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties" (underlining added).

Importantly, as pointed out earlier, if one norm *explicitly* terminates or suspends another, no conflict of norms arises.[866] The operation of the second norm then simply means the end or suspension of the earlier norm and both norms can be applied side by side. Here, a situation of conflict arises only if the later treaty does not itself state that it terminates the earlier one and the termination must be implied instead from the degree of incompatibility between the two treaties. To put it differently, there is no conflict if norm 2 *itself* terminates norm 1. There is only a conflict in case norm 1 is terminated because of its very inconsistency with norm 2. That norm 1 is then terminated is not so much the result of norm 2 but of a third norm of international law (namely, Art. 59) resolving the inconsistency between the two norms by terminating the earlier one.

The *chapeau* of Art. 59.1 provides as follows: "A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject-matter". Hence, Art. 59 leads to the termination of the *entire* treaty, not just some of its *provisions*. This termination is a result of "incompatibility" between the two treaties, i.e., it occurs because there is a conflict between them. Given this "incompatibility" and recalling that for conflict to arise there must be overlap *ratione materiae*, it goes without saying that the two treaties must be "relating to the same subject-matter".[867]

Moreover, termination pursuant to Art. 59 requires that *all parties* to the first treaty are parties also to the second one. If some parties are missing, Arts. 30 and 41 apply. However, nothing precludes that the later treaty which terminates the earlier one has additional parties, not bound by the earlier treaty. In that event, Art. 59 must have its full effect as between the parties to both treaties.

In order to determine which of two treaties is the "later" one, the date of conclusion of the treaty (i.e., the date of its adoption) is decisive. However, as Vierdag remarked, Art. 59 does not apply in case either the earlier or the later treaty has not yet entered into force:

> "[Article 59] speaks of 'parties', which indicates that the treaty to be terminated or suspended is a treaty in force (Article 2(1)(g) [pursuant to which a 'party' is a State bound by a treaty and for which the treaty is in force]). Consequently, it seems that the later treaty can only effectively terminate it or suspend its operation if it is itself in force. In theory, if only the text of a treaty has been adopted, this text can be replaced through the adoption of another text by all the negotiating States. But this is not the situation envisaged by Article 59 according to its terms. So 'conclude' in Article 59 refers to the whole process of treaty-making, including the entry into force of the later treaty".[868]

The fact that Art. 59 leads to the termination of the *entire treaty* combined with the requirement that *all parties* to the earlier treaty also adopted the later one, means that Art. 59 will apply only in limited

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[864] Ibid., 80.
[865] But see the Dissenting Opinion of Judge Dreyfus, ibid., 110.
[866] See Chapter IV, section B.1.
[867] Art. 30 includes the same condition, see below Chapter VII, section A.2.
[868] Vierdag, *The Time of the 'Conclusion' of a Multilateral Treaty*, 60 BYIL 75, at 92 (1989), hereafter "Vierdag, *Conclusion ...*".

circumstances.[869] Nonetheless, before applying Arts. 30 and 41, resort must always be had first to Art. 59. Only if termination or suspension does not follow under Art. 59, may Arts. 30 and 41 be applied. As Vierdag noted, "in cases of termination or suspension Article 59 is *lex specialis*".[870] Art. 30.3 makes it explicit that it applies only in case "the earlier treaty is not terminated or suspended in operation under article 59".[871]

3. Acts of International Organisations that are Inconsistent with their Constituent Instruments

One other instance of "invalidity" of a norm because of conflict with another norm is the case where an act of an international organisation is inconsistent with its constituent instrument. Here as well, we are faced with what we called a normative conflict, not a conflict in the applicable law.

Member states may challenge the validity of an act of an international organisation or one organisation may challenge the validity of the act taken by another. In both instances their claim will be based on normative conflict between the act of the organisation and its constituent instrument. Also *within an international organisation* discussion may arise as to the validity of an act taken by one organ in the light of the competence of another organ. These different organs may then be distinct political organs or political *versus* judicial bodies. In case both organs have enacted conflicting norms, normative conflict may then arise.

In terms of conflicts within an organisation, in the EC, for example, the question often arises as to whether the competence of the European Commission, Parliament or Council has been respected.[872] In the UN the question has arisen as to whether the General Assembly or the Security Council is competent for a certain matter.[873] Prominently in the UN is also the question of attribution of powers as between the Security Council and the ICJ in respect of threats to the peace, breach of the peace and acts of aggression.[874] In the WTO as well questions have arisen as to the competence of panels to decide a dispute which has been examined or is still under examination by a particular WTO (political) committee.[875]

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[869] As Vierdag noted: "the requirement that all parties are involved probably results in a limited application of Article 59: the Article will function optimally with regard to treaties among States that form relatively small, coherent groups. For example, treaties concluded within an organization such as the European Communities require unanimity and enter into force for all members at the same time" (Vierdag, *Conclusion ...*, 91).

[870] Ibid., 91.

[871] Also the ILC Commentary is very clear in this respect: Article 30 "comes into play only *after it has been determined under [Article 59] that the parties did not intend to abrogate, or wholly to suspend the operation of, the earlier treaty*" (YILC, 1966, Vol. 2, 253, emphasis in original).

[872] In this respect, the ECJ has introduced the principle of *institutional balance*: "Observance of the institutional balance means that each of the institutions must exercise its powers with due regard for the powers of the other institutions. It also requires that it should be possible to penalize any breach of that rule which may occur … it is the Court's duty to ensure that the provisions of the Treaties concerning the institutional balance are fully applied and to see to it that the Parliament's prerogatives, like those of the other institutions, cannot be breached …" (Case C-70/88, *Parliament v. Council*, ECR 1990, 2073).

[873] Schermers refers to the 1950 Uniting for Peace Resolution 377(V) of the UN General Assembly as a "classical example of a decision of an organ which was considered to be *ultra vires* by a number of countries" on the ground that the resolution dealt with breaches of the peace or acts of aggression even though the primary responsibility for the maintenance of international peace and security rests on the Security Council pursuant to UN Charter Art. 24.1 (HENRY SCHERMERS AND NIELS BLOKKER, INTERNATIONAL INSTITUTIONAL LAW, UNITY WITHIN DIVERSITY, para. 208 (1995), hereafter Schermers and Blokker, *Institutional ...*".

[874] On this question see, for example, the *Lockerbie case*, ICJ Reports 1992.

[875] See, on this issue, Frieder Roessler, *The Institutional Balance between the Judicial and the Political Organs of the WTO*, Paper presented at the Center for Business and Government, HARVARD UNIVERSITY, June 2000, on file with the author.

In the WTO these institutional limitations are sometimes overlooked and the distinction between acts taken by WTO members *as states* (say, the conclusion of a new agreement) as opposed to acts taken by *WTO organs*, is not always respected.[876] WTO members can, of course, as the *Herren der Vertrag* always change WTO rules, including the institutional provisions. But when they act in the format of WTO organs, they must respect the existing rules. The WTO may be a member-driven organisation, but when members act within WTO organs, their decisions must respect WTO rules.

a. Invalidity because of lack of competence

i. International organisations have "attributed competence" only

Unlike states, international organisations as well as their organs have limited powers in the sense that they can exercise competence only if this competence has been attributed to them, e.g., by the states setting up the organisation or organ. As Schermers and Blokker phrased it: "while *states* are free to act as long as this is in accordance with international law …, *international organizations* are competent to act only as far as powers have been attributed to them by the member states. Basically, international organizations may not generate their own powers".[877] This represents the so-called doctrine of attributed competence (*compétence d'attribution*) or "principle of speciality" in terms of the competence of international organisations. As the ICJ put it in its Advisory Opinion on *Use of Nuclear Weapons* (at the request of the WHO):

> "international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them".[878]

In the WTO, Arts. II and III of the Marrakesh Agreement set out the "scope" and "functions" of the WTO as an international organisation and its organs. This is done very broadly, referring, for example, to the WTO providing "the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements" (Art. II.1) as well as providing "the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements" (Art. III.2).[879] As far as WTO *organs* are concerned, Art. IV of the Marrakesh Agreement sets out the competence of the Ministerial Conference, the General Council and other subsidiary bodies. Other WTO bodies are established by different agreements or even decisions of other WTO organs. Art. 2 of the DSU, for example, establishes the DSB which has "the authority to establish panels, adopt panel and Appellate Body reports, maintain the surveillance of implementation of rulings and recommendations, and authorize suspension of concessions …". Another example is the Understanding on the Balance-of-Payments Provisions of the GATT 1994 which establishes the Committee for Balance-of-Payments Restrictions.

In the UN, the limits of the organisation are determined, *inter alia*, by Art. 2.7 of the UN Charter (precluding that the UN intervenes "in matters which are essentially within the domestic jurisdiction"

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[876] See above Chapter II, section C.2 on acts of WTO organs as sources of WTO law.
[877] Schermers and Blokker, *Institutional …*, para. 209.
[878] Para. 25.
[879] As noted by Mark Koulen (*The Institutional Capacity of the WTO as a Forum Organization, A Research Proposal*, 23 March 2001, on file with the author, 3): "The terminology used in the WTO Agreement and the lack of detail of the description of the means by which the WTO is to achieve its objectives suggests that the WTO Agreement embodies a conception of the WTO as an arena for interaction between its Members, rather than as an actor charged with the performance of collective tasks. In this regard, it is appropriate to describe the WTO as a 'forum organization' in the sense in which the term was used by Robert Cox and Harold Jacobson" (referring to ROBERT COX AND HAROLD JACOBSON, THE ANATOMY OF INFLUENCE – DECISION MAKING IN INTERNATIONAL ORGANIZATION (1973)).

of states). The competence of UN organs, such as the General Assembly, the Security Council and the ICJ are also set out in the UN Charter.

ii. The theory of "implied powers"

Notwithstanding the fact that international organisations have "attributed competence" only, when it comes to interpreting the scope of this competence, a teleological and dynamic approach has been adopted pursuant to which the competence of international organisations has been interpreted broadly so as to include also certain "implied powers" with reference to "institutional effectiveness" and "subsequent practice".[880] In the Advisory Opinion on *Reparations for Injuries*, the ICJ found:

> "It must be acknowledged that its Members [of the UN], by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged".[881]

The ICJ stated further that the "rights and duties of an entity such as the Organization must depend upon its purposes and functions as specified or implied in its constituent document and developed in practice".[882] This approach was more recently confirmed in the ICJ Advisory Opinion on *Use of Nuclear Weapons*:

> "the necessities of international life may point to the need for organizations, in order to achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities. It is generally accepted that international organizations can exercise such powers, known as 'implied powers'".[883]

Thus, for an act of an international organisation to be invalid it will not suffice to point at the fact that no explicit competence has been conferred to the organisation. Implicit competence may be found so that the act is, nonetheless, valid.

b. Invalidity because of *ultra vires* exercise of competence

International organisations and their organs must, moreover, exercise their limited competence in line with any conditions that may have been imposed in the constituent instrument of the organisation or the decision setting up the organ. One could refer here to voting procedures (must the decision be taken by consensus, majority voting or is there a veto to be respected?), but also more substantive conditions such as the requirement that there be a request for consultations before the DSB can establish a panel (DSU Art. 6.2) and requirements in respect of terms of reference or multiple complaints (DSU Arts. 7 and 9). Also when the Ministerial Conference grants, for example, a waiver, it must respect the conditions set out in Art. IX:3 and 4, both in terms of voting requirements and substantive conditions such as the statement of "exceptional circumstances justifying the decision" and an annual review of waivers granted for more than one year.[884]

Also acts or decisions taken by WTO panels or the Appellate Body could be "invalid" on the ground that they are inconsistent with the DSU. If so, these judicial acts of WTO organs would be taken *ultra*

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[880] See *supra* text at note 789. Along these lines, Reuter has referred to the "functional" nature of the competence of international organisations (PAUL REUTER, INSTITUTIONS INTERNATIONALES 214-216 (1972)).

[881] ICJ Reports 1949, 179.

[882] Ibid., 180. See also the Advisory Opinion on the *Question of Certain Expenses of the United Nations*, ICJ Reports 1962, 168 and *Jurisdiction of the European Commission of the Danube*, Advisory Opinion, PCIJ, Ser. N, No. 14, 64. On this issue, see Sato, *Evolving …*, 33-37.

[883] ICJ Reports 1996, para. 25, 79.

[884] It must be acknowledged that here the line between "invalidity" because of *ultra vires* exercise of competence and "illegality" on the ground of breach of other law that applies to the organ in question, becomes thin. On the former issue of "illegality", see section C.4 below.

vires, that is, outside the limited competence granted to them. This may occur in particular if a panel or the Appellate Body were to adopt case-specific working procedures that are inconsistent with the DSU. Given that their competence derives from the DSU, both judicial organs must respect the DSU, they cannot deviate from it.[885]

In respect of the Appellate Body, Art. 16.1 of the Working Procedures for Appellate Review, explicitly confirms this: "In the interests of fairness and orderly procedure in the conduct of an appeal, where a procedural question arises that is not covered by these Rules, a division may adopt an appropriate procedure for the purposes of that appeal only, *provided that it is not inconsistent with the DSU, the other covered agreements and these Rules*".[886] In respect of panels, DSU Art. 12.1 provides: "Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute". The first paragraph of the standard working procedures in Appendix 3 states: "In its proceedings *the panel shall follow the relevant provisions of this Understanding*. In addition, the following working procedures shall apply".[887]

The same applies in respect of the general working procedures the Appellate Body was called to draw up in consultation with the Chairman of the DSB and the Director-General, pursuant to DSU Art. 12.9. These working procedures -- which are not case-specific but apply to all appeals -- are now set out in the Working Procedures for Appellate Review. They were, as called for by the DSU itself, drawn up by the Appellate Body itself, not the WTO membership. Hence, given the limited competence of the Appellate Body, these procedures could not possibly deviate from the DSU. If they did so, the procedural rule in question would be invalid. There is no need for an explicit DSU rule stating that WTO panels and the Appellate Body cannot adopt procedural rules inconsistent with the DSU. This rule automatically derives from the limited competence of WTO organs. The question as to whether WTO members may change the DSU, including by means of an *inter se* agreement applying to a particular case only, is an entirely different one. It is addressed below in section C.2 (Arts. 41/58 of the Vienna Convention).

In the UN context Art. 24.2 of the UN Charter makes it explicit that the Security Council "shall act in accordance with the Purposes and Principles of the United Nations".

c. Judicial review of the validity of acts taken by international organisations

It is one thing to note that acts of international organisations must respect the limits of the competence attributed to them. It is quite another, however, to obtain a decision which determines this invalidity. Acts of international organisations are often taken by decisions that do not require unanimity. As a result, one or more members in the minority may claim that a given act was taken in violation of the constituent instrument. Also in a particular dispute between two states, one of them may rely on an act of the organisation, there where the other contests its validity. Finally, as between two organisations or two organs within one organisation, one of them may contest the validity of the act taken by the other on the ground, for example, that the act falls within its competence. In this respect, Schermers and Blokker noted the following:

> "In the absence of agreement to the contrary, the international system has no tribunal competent to make a finding of nullity. It is the affected state itself which rejects the decision on the ground that it considers it null and void. Such a unilateral rejection of

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[885] Only the parties to the dispute are able to deviate from the DSU by means of concluding an *inter se* agreement. However, they can do so only if they do not thereby affect the rights of third parties, see the discussion on Arts. 41/58 below in section C.2.

[886] WTO doc. WT/AB/WP/3, dated 28 February 1997, emphasis added.

[887] Given that the obligation imposed on panels to follow DSU provisions is set out only in Appendix 3, subject to modification by the panel itself after consultation with the parties, does this mean that the panel can adopt working procedures that are inconsistent with the DSU? No. The competence of a WTO panel is limited by its constituent instrument, the DSU. A panel cannot act outside this limited competence. If it does so, its act is invalid.

> the validity of international decisions is, of course, antithetical to the implementation of the law of international organizations. To avoid leaving the decision on the validity of international acts to the states concerned, judicial organs may be established, especially in organizations empowered to take binding decisions".[888]

i. The presumption of validity of acts of international organisations

In respect of the conformity of acts with constituent instruments or other conditions linked to the exercise of power, the ICJ has stated the following:

> "when the Organization takes action which warrants the assertion that it was appropriate for the fulfilment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* the Organisation".[889]

In the same case, the ICJ remarked: "If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'".[890] In other words, even if the competence of international organisations is limited, their acts nonetheless benefit from a presumption of validity, similar to the presumption that state conduct is consistent with international law until proof of the contrary.

In the *Lockerbie cases* (provisional measures), the ICJ confirmed this presumption. It first recalled the obligation resting on the parties as UN members "to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter" and then considered that "prima facie this obligation extends to the decision contained in resolution 748 (1992)".[891]

ii. Jurisdiction to review the validity of acts of international organisations

The situation in the EC and the UN

A proper action for the annulment of decisions of international organisations is possible only in the EC. Such an action can be brought against binding acts of the Council and the Commission. Article 230 (ex 173) of the Amsterdam Treaty provides for an independent and direct cause of action to challenge the legality of these Community acts before the European Court of Justice.[892] Article 241 (ex 184) of the Treaty also provides for a plea of illegality against EC regulations when an action is otherwise competently before the Court.[893]

As far as the UN is concerned, the ICJ may be faced with questions of validity of UN decisions in advisory procedures at the request of an organisation of the UN family. The ruling it can then provide is, however, merely advisory and does not annul the decision. It will, however, deprive the decision of its political force so that for all practical purposes it amounts to annulment. There is, however, a second route pursuant to which the validity of UN decisions could be brought to the attention of the

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[888] Schermers and Blokker, *Institutional …*, para. 912, 576.
[889] Advisory Opinion on the *Question of Certain Expenses of the United Nations*, ICJ Reports 1962, 168.
[890] Ibid.
[891] ICJ Reports 1992, Order of 14 April 1992, para. 42.
[892] Note that the EC action for annulment covers both invalidity and illegality as we defined it above. Art. 230 does not make a distinction between the two in terms of grounds for annulment (although "lack of competence" undermines the validity of the act, whereas, for example, "infringement of any rule relating to its application" would results in illegality as we defined it above in section A.1.b). See below section C.4)
[893] In this respect, see Arnull, *Private Applicants and the Action for Annulment under Article 173 of the EC Treaty*, 1995, 32 CMLRev 7-49 and Craig, *Legality, Standing and Substantive Review in Community Law*, 1994, 14 OJLS 507-37.

ICJ, namely in contentious procedures where one of the parties relies on a UN decision and the other contests its validity.

In two instances, however, the ICJ seemed to imply that it does not have the power to "judicially review" UN decisions. In *Certain Expenses*, it remarked:

> "Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the [ICJ] were not accepted; … As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction".

More categorically, in the 1971 *Namibia case*, the Court stated:

> "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned".[894]

The question arose again in the *Lockerbie* cases where the United States and the United Kingdom invoked a UN Security Council resolution in defence against Libyan allegations of breach of the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation. In response, Libya claimed that this Security Council resolution was inconsistent with the UN Charter and could hence not be invoked as a norm that, pursuant to Art. 103 of the Charter, should prevail over the Montreal Convention. The ICJ, neither in its 1992 order on provisional measures nor in its 1998 judgement on jurisdiction and admissibility, took a position on this important matter of judicial review.[895] The ICJ confirmed that UN members are under an obligation to accept and apply the decisions of the Security Council pursuant to Article 25 of the UN Charter, but hesitated to confirm that it was empowered to review the conformity of these decisions with the UN Charter.[896] Some judges expressed clear opinions *against* the Court having the power to review Security Council resolutions, in particular those taken in the field of threat to the peace (Schwebel and Jennings). Others expressed opposing views (Rezek, Kooijmans).[897] However, even the judges expressing views against the ICJ's competence to review certain Security Council resolutions, did accept that the Security Council must comply with the UN Charter and that in case it fails to do so its acts will be invalid. As Jennings stated:

> "The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law … I therefore wholly agree with the Libyan argument that the Security Council decisions and actions should in no wise be regarded as enjoying some sort of 'immunity' from the jurisdiction of the principal organ of the United Nations".[898]

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[894] ICJ Reports, 1971, 45.

[895] See, in this respect, L.B. Sohn, *Enabling the United States to Contest "Illegal United Nations Acts"*, 69 AJIL 852-854 (1975) and Skubiszewski, *The International Court of Justice and the Security Council*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE 606 (1996).

[896] Order on Provisional measures, ICJ Reports 1992, 15 and 126.

[897] See the Opinions attached to the ICJ's judgement on jurisdiction and admissibility, ICJ Reports 1998.

[898] Dissenting Opinion Judge Jennings, ICJ Reports 1998. Jennings, subsequently stated, however, that when "the Security Council, exercising the discretionary competence given to it by Article 39 of the Charter, has decided that there exists a 'threat to the peace', it is not for the principal judicial organ of the United Nations to question that decision much less so to substitute a decision of its own, but to state the plain meaning and intention of Article 39, and to *protect* the Security Council's exercise of that body's power and duty conferred upon it by the law" (ibid.).

The situation in the WTO

Unlike the EC, and much like the situation in the UN, in the WTO the judicial branch does not have direct and substantive jurisdiction to consider claims of invalidity of decisions or acts taken by WTO bodies.[899] WTO panels can only consider claims made by a WTO member against another WTO member for breach of its obligations under WTO covered agreements. WTO members cannot start a procedure against WTO organs. Nor can WTO organs ask for advisory opinions or challenge each other's competence before a WTO panel. Nonetheless, the question of validity of acts taken by WTO organs could arise indirectly in a contentious case between two WTO members. Three situations could be thought of.

Firstly, a defendant could challenge the jurisdiction of the WTO panel and claim that although the DSB established the panel it did so in disregard of timing or consultation requirements. If a panel were, for example, established by the DSB without there having been any prior request for consultations by the complainant, should the panel not decline jurisdiction and thereby indirectly state that the DSB's decision to establish the panel was an invalid one, to be set aside? It would seem so. By deciding that it has no jurisdiction, the panel would then, of course, not annul the DSB decision, but for practical purposes that decision would loose its effect. As further explained below, the jurisdiction to examine whether one has jurisdiction (*compétence de la compétence*) is a power inherent in the judicial function. It is a power to be exercised also by WTO panels, *even at its own initiative*.[900]

An analogy can be found in the *Tadic* case. There, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia found that "the International Tribunal has the jurisdiction to examine the plea against its jurisdiction based on the invalidity of its establishment by the Security Council".[901] It did so even though the International Tribunal had not been granted any explicit authorisation to make such examination and after a finding by the Trial Chamber that the International Tribunal was *not* empowered to question the legality of the law which established it.[902] After a careful analysis of the powers granted to the Security Council under Chapter VII of the UN Charter, the Appeals Chamber concluded that the Security Council did have the power to set up the tribunal and that the tribunal had been created in conformity with the appropriate procedures of the UN Charter.[903]

Secondly, one could imagine also a situation where the WTO Committee on Balance-of-Payments (BOP) has taken a decision in respect of a WTO member's BOP restrictions, but nonetheless a claim is submitted by another WTO member for breach of WTO provisions on BOPs by that first member. The Appellate Body already decided that both the political and judicial track in respect of BOP measures do not exclude each other, so that a panel would have jurisdiction to the decide the matter.[904]

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[899] Judicial review of acts of the Appellate Body (in terms of, for example, working procedures that are invalid under the DSU, see text at notes 885 and 886) is even more difficult. For panel acts there is of course the possibility to appeal to the Appellate Body.

[900] That WTO panels have *la compétence de la compétence* was explicitly confirmed by the Appellate Body in *US – Anti-dumping Act of 1916*. There, the Appellate Body (at footnote 30) referred to the "widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it". See below Chapter VIII, section B.2.

[901] Appeals Chamber, Decision of 2 October 1995, IT-94-1-AR72, para. 22.

[902] Trial Chamber, Decision of 10 August 1995, IT-94-I-T, para. 8.

[903] Appeals Chamber, Decision of 2 October 1995, IT-94-1-AR72, paras. 26-48.

[904] Appellate Body report on *India – Quantitative Restrictions*, para. 88, referring to the second sentence of footnote 1 to the BOP Understanding ("The provisions of Articles XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked with respect to *any matters arising from the application of restrictive import measures* taken for balance-of-payments purposes", emphasis added): "In our opinion, this provision makes it clear that the dispute settlement procedures under Article XXIII, as elaborated and applied by the DSU, *are* available for disputes relating to *any* matters concerning balance-of-payments restrictions". For a critique on this finding, see Frieder Roessler, *The Institutional Balance between*

But would a panel be able to review the Committee's decision that, for example, the BOP measure is WTO consistent?

It would seem that in this case, the panel would not review the Committee's decision as such, but rather make its own finding on WTO consistency of the BOP measure in question, finding guidance in the Committee's decision. As the Appellate Body noted:

> "We are cognisant of the competence of the BOP Committee and the General Council with respect to balance-of-payments restrictions under Article XVIII:12 of the GATT 1994 and the *BOP Understanding*. However, we see no conflict between that competence and the competence of panels. Moreover, we are convinced that, in considering the justification of balance-of-payments restrictions, panels should take into account the deliberations and conclusions of the BOP Committee, as did the panel in *Korea – Beef*".[905]

In other words, the panel would re-do the exercise and take into account the Committee's evaluations. But nothing would prevent it from coming to a conclusion that is different from that reached by the Committee. Here as well, the Committee decision would not be annulled, nor even be declared illegal. However, the practical result of the panel concluding differently would be that the Committee decision looses its effect.

A similar situation has arisen in terms of the competence of WTO panels *versus* that of the WTO Committee reviewing regional trade agreements under GATT Art. XXIV. In *Turkey – Textile*, the Appellate Body implicitly held that panels have jurisdiction to examine the overall consistency of a regional integration agreement with relevant WTO rules, including GATT Art. XXIV:5, notwithstanding the competence in this field of the Committee on Regional Trade.[906] A comparable tension between the WTO judiciary and a WTO political organ arose also when the United States requested the establishment of a panel against the Philippines concerning trade-related investment measures applied by the Philippines in the automotive sector. The United States did so notwithstanding a pending request by the Philippines for an extension of the transition period under Art. 5.3 of the TRIMS Agreement, a request that was being discussed by the Council for Trade in Goods.[907]

Thirdly, one could imagine a claim under GATT Art. I (MFN) in defence of which a waiver under Art. IX of the Marrakesh Agreement is invoked. In turn, the complainant could argue, however, that the waiver was adopted inconsistently with the Marrakesh Agreement, e.g., that it does not state the "exceptional circumstances justifying the decision", has not been reviewed annually or was taken inconsistently with the voting procedures. Should a panel be allowed to review such objections against a waiver decision? It would seem so. The same applies in respect of any decision taken by a WTO organ invoked by either party but in respect of which the opposing party raises claims of inconsistency with WTO agreements. The WTO holds *its members* to WTO rules, hence also WTO *organs* should respect the rules that apply to them. In such cases, a panel could, once again, *not*

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the Judicial and the Political Organs of the WTO, Paper presented at the Center for Business and Government, HARVARD UNIVERSITY, June 2000, on file with the author.

[905] Appellate Body report on *India – Quantitative Restrictions*, para. 103.

[906] The Appellate Body found, first of all, that for GATT Art. XXIV to constitute a defence "the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV" (Appellate Body report on *Turkey – Textile*, para. 58). In addition, it noted the following: "The Panel maintained that 'it is arguable' that panels do not have jurisdiction to assess the overall compatibility of a customs union with the requirements of Article XXIV. We are not called upon in this appeal to address this issue, but we note in this respect our ruling in [*India – Quantitative* Restrictions, referred to *supra* in note 904] on the jurisdiction of panels to review the justification of balance-of-payments restrictions under Article XVIII:B of the GATT 1994" (Appellate Body report on *Turkey – Textile*, para. 60).

[907] See the discussions at the DSB meeting of November 2000.

decide that the WTO decision is invalid or annulled. It could only find inconsistencies and on that basis refuse to apply the decision. The practical consequence of this would be that the decision looses its effect.

Finally, the question could be raised as to whether *all* inconsistencies with WTO rules -- no matter how minor they are -- ought to lead to dis-application of the decision by the WTO organ. It could, indeed, be submitted that minor procedural mistakes should not lead to this result. Guidance could be found here in the grounds for annulment of decisions taken by EC institutions, set out in Art. 230 (ex 173) of the Treat of Amsterdam. These are: "lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers".[908] Moreover, situations could arise where the member invoking the invalidity of the WTO decision has prior to that voted in favour of the decision or not objected it to it, for example, at the DSB meeting when the decision was taken. Some negative inferences could be drawn from such conduct, in particular if the ground for invalidity invoked is a procedural one. In the *US - FSC case*, for example, the United States made a preliminary objection to the EC's claim under Art. 3 of the Subsidies Agreement on the ground that the EC's request for consultations at the origin of the panel did not include a "statement of available evidence", as required by Art. 4.2 of that agreement. The United States argued that because of this procedural deficiency, the panel should dismiss the claim. Both the panel and Appellate Body refused to do this (although they recognised that the procedural requirement in Art. 4.2 may well have been violated), *inter alia*, on the ground that the United States did not "object to the allegedly deficient request for consultations during those DSB meetings when the European Communities' request for establishment of a panel was on the agenda of the DSB and the Panel was established".[909] On that basis, the Appellate Body found that "the United States acted as if it had accepted the establishment of the Panel in this dispute, as well as the consultations preceding such establishment".[910] The Appellate Body derived this conclusion from the obligation to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute" (DSU Art. 3.10), noting that good faith "requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the Panel, so that corrections, if needed, can be made to resolve the disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes".[911]

One can derive some aversion from this statement to dismissing a case on the basis of procedural deficiencies. This reasoning seems well-founded also on principles of acquiescence, estoppel and *forum prorogatum*. Nonetheless, in cases of breach of essential procedural requirements or substantive WTO rules applying to WTO organs, panels ought to be willing, in certain circumstances, to dismiss a dispute (or to dis-apply a decision of a WTO organ), and this even if the member raising the objection does so for the first time before the panel. It could even be argued that, much like the matter of *compétence de la compétence*[912], such fundamental inconsistencies with WTO rules ought to be raised by the panel *at its own initiative* (without there being a need for either party to do so).

In the WTO, the need for judicial review of decisions by WTO organs is all the more present (more so, for example, than in the UN):

- Firstly, because most WTO organs, such as the DSB, only take legally binding decisions (UN General Assembly resolutions, in contrast, are only "recommended").

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[908] Note that the EC action for annulment covers both invalidity and illegality as we defined it above. Art. 230 does not make a distinction between the two in terms of grounds for annulment (although "lack of competence" undermines the validity of the act, whereas, for example, "infringement of any rule relating to its application" would result in illegality as we defined it above in section A.1.b).
[909] Appellate Body report on *US* – FSC, para. 163.
[910] Ibid., para. 165.
[911] Ibid., para. 166.
[912] See *supra* note 900.

- Secondly, because the WTO (unlike the UN Charter) has a compulsory dispute settlement mechanism.
- Thirdly, because the WTO treaty does not seem to reserve any area of competence under WTO covered agreements exclusively to the WTO's political branch (unlike, arguably, Art. 24.2 of the UN Charter reserving the "primary responsibility for the maintenance of international peace and security" to the UN Security Council).

C. One of the two norms is "illegal"

In the previous section, the conflict was resolved by bringing an end to one of the two norms (either through invalidity or termination). In Chapter VII, section A, both norms continue to exist but find application in different situations: one norm is more important or relevant than the other, either because the parties explicitly said so or because it is the latest one in time or the more specific one. Nonetheless, in that section the norm that must give way is not "illegal". In this section, we discuss the situation where one norm is "illegal" under the other norm. Here as well (like in the previous section, but unlike the next section) we are faced with "normative conflict". The later norm constitutes wrongful conduct under the earlier norm either because

(i) the later norm, in and if itself, is explicitly prohibited by the earlier norm; or

(ii) the later norm, in and if itself, is illegal pursuant to Arts. 41 or 58 of the Vienna Convention which prohibit certain *inter se* modifications and suspensions of an earlier multilateral agreement.

In those situations one of the two norms is clearly more important than the other, namely the earlier norm with reference to which the other norm is illegal. In both instances, the later norm may not only be a treaty norm. It can also be an act of an international organisation which is illegal under international law that applies to it, or is prohibited pursuant to principles equivalent to those set out in Arts. 41 and 58.

In the previous section, the question was mainly: which norm survives? In the next section it will be, which of the two norms applies? In this section, the essential question is: does one norm breach the other?

The solution to normative conflicts set out in this section is based largely on the law of state responsibility (including responsibility of international organisations), leading to the "illegality" of one of the norms. In terms of responsibility, if one norm does, indeed, constitute breach of the other, say, a regional arrangement in breach of GATT Art. XXIV, one of the secondary obligations resulting from this breach will be the obligation of ceasing the breach, i.e., of doing away with the illegal *inter se* agreement. In that sense, the ultimate solution to the conflict is not that different from conflicts discussed in the previous section: it resides in the end of one of the two norms. In the previous section this end was achieved by means of invalidity or termination. In this section it will be induced by state responsibility and the secondary obligation of cessation. For acts of international organisations that are "illegal" under the law applicable to them (to be distinguished from the situation where they are "invalid", e.g., because of lack of competence), the responsibility of the particular organ may be invoked and that organ as well will have to cease the illegal act. In practice, if an adjudicator has jurisdiction to determine the illegality, the illegal norm will be set aside and as a result loose its practical effect.

Although in practical terms, the distinction between "invalidity" (under the previous section) and "illegality" (under this section) may sometimes be minimal, as pointed out before, a major difference between "invalidity" and "illegality" is, however, that normally invalidity is something to be examined

ex officio by an adjudicator, whereas illegality will, in principle, only be looked at if claimed by one of the parties to the dispute.[913]

1. The Conclusion of a norm is explicitly prohibited by another norm

An allegation that the very conclusion of a norm constitutes breach of another norm implies that the other norm is earlier in time. Normative conflicts of this type may take two forms:

(i) Not all of the parties to the later, "illegal" norm are parties to the earlier norm. A conflict of the type AB/AC then arises, where from the perspective of A the very conclusion of the AC norm constitutes breach of the earlier AB norm.

(ii) The later, "illegal" norm constitutes an *inter se* modification or suspension of an earlier multilateral treaty, explicitly prohibited by that treaty.

a. One state concluding a norm with another state in breach of a pre-existing norm with a third state

Examples of a later AC norm constituting breach of an earlier AB norm can be found in the following case law. In the PCIJ Advisory Opinion on *Customs Régime Between Germany and Austria*, the Permanent Court found that a 1931 Protocol concluded between Austria and Germany setting up a customs union between the two countries was incompatible with an earlier 1922 Protocol concluded between Austria, France, Great Britain, Italy and Czechoslovakia, and subsequently acceded to by Belgium and Spain in which Austria made a commitment not to violate her economic independence by granting to any state a special régime or exclusive advantages calculated to threaten this independence.[914] In other words, from the perspective of Austria, the later 1931 norm between Austria and Germany (AC norm) was found to constitute, in and of itself, breach of an earlier 1922 norm binding on Austria and other states, but not on Germany (AB norm). Consequently, Austria had to bring an end to this incompatible treaty so as to bring its conduct in line with the 1931 Protocol. Nonetheless, Germany, not being bound by the 1931 Protocol, could not be held by this incompatibility based on the 1931 Protocol. Depending on the circumstances, it could then claim compensation from Austria for bringing an end to their customs union.[915]

Another example where a later norm was found to constitute breach of an earlier norm, not binding on the other party to the later norm, can be found in the *Costa Rica v. Nicaragua case*.[916] There, the Central American Court of Justice declared that Nicaragua had violated its obligations towards Costa Rica, set out in the 1858 Canas-Jerez treaty, not to grant concessions to any other state, by concluding the 1914 Bryan-Chamorro Treaty in which Nicaragua did grant such concessions also to the United States. [917] In other words, from the perspective of Nicaragua, the later 1914 norm between Nicaragua and the United States (AC norm) was found to constitute, in and of itself, breach of an earlier 1858

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[913] For other consequences related to the distinction, see section A.1.b.

[914] PCIJ, Series A/B, No. 41, 5 September 1931.

[915] See below Chapter VII, section B.2. Note that the finding of illegality of the 1931 Protocol between Germany and Austria under the multilateral 1922 Protocol has nothing to do with *lex specialis* or the 1922 Protocol prevailing as an "objective régime". The finding is based on state responsibility, not on the law of treaties or priority rules to be resorted to in a conflict in the applicable law. Czaplinski and Danilenko missed this point arguing that this case rejects the *lex specialis* principle, giving preference to the more general 1922 Protocol on the basis of its substantive content as a peace treaty (Czaplinski and Danilenko, *Conflict …*, 20).

[916] Judgement of the Central American Court of Justice, reprinted in 11 AJIL 181-229 (1917).

[917] More particularly, the Central American Court of Justice held that Nicaragua was internationally responsible to Costa Rica for entering into a treaty with a third state, without first complying with the consultation requirements of an earlier treaty between Nicaragua and Costa Rica.

norm binding on Nicaragua and Costa Rica, but not on the United States (AB norm).[918] Consequently, Nicaragua had to bring an end to this incompatible treaty so as to bring its conduct in line with the 1858 treaty. Nonetheless, the United States, not being bound by the 1858 treaty, could not be held by this incompatibility based on the 1858 treaty. Depending on the circumstances, it could then claim compensation from Nicaragua for not granting the concessions to it.[919]

It must be stressed that the later norm is, in these circumstances, not "invalid", but only "illegal".[920] Moreover, it is illegal only from the perspective of the state bound by both norms (in our example, A), not from the perspective of the party bound only by the later norm (in our example, C). We come back to this below in Chapter VII, section B.2. The extent to which C can then invoke the responsibility of A for bringing an end to, or not implementing the AC norm, is also discussed there.

b. A later *inter se* modification or suspension that is explicitly prohibited by an earlier multilateral treaty

Arts. 41 and 58 of the Vienna Convention confirm the illegality of *inter se* modifications or suspensions explicitly prohibited by an earlier multilateral treaty. Under Art. 41, one of the conditions for "[t]wo or more of the parties to a multilateral treaty [to] conclude an agreement to modify the treaty as between themselves alone" is that "the modification in question is *not prohibited by the treaty*" (emphasis added). Under Art. 58, one of the conditions for "[t]wo or more parties to a multilateral treaty [to] conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone" is that "the suspension in question is *not prohibited by the treaty*" (emphasis added).

Instances where *inter se* modifications or suspensions are prohibited can be found, for example, in UNCLOS and the GATT. Art. 20.1 of the Covenant of the League of Nations provided another example: "The members of the League … solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof".[921]

Art. 311.3 of UNCLOS provides as follows :

> « Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention".

This provision largely confirms the conditions set in Arts. 41 and 58 for *inter se* modifications or suspensions to be legal under the general law of treaties. Art. 311.5 adds that Art. 311 "does not affect international agreements expressly permitted or preserved by other articles of this Convention". Art. 311.6 provides for an additional instance where subsequent agreements are prohibited:

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[918] In the same sense, see the *El Salvador v. Nicaragua* case where the Central American Court found that the Bryan-Chamorro Treaty also violated rights of El Salvador set out in a 1907 treaty concluded between Central-American states (reprinted in 11 AJIL 674-730 (1917)).

[919] See below Chapter VII, section B.2.

[920] In the *Costa Rica v. Nicaragua* case, the Court did not go as far as saying that the Bryan-Chamorro treaty is invalid, albeit mainly on the ground that the United States was not a party to the dispute. See below Chapter VII, section B.2.

[921] For other examples, see Article 8 of the North Atlantic Treaty (UNTS, Vol. 34, p. 243), Article 7 of the Warsaw Treaty of 1955 (UNTS, Vol. 219, p. 3) and the respective clauses of the Geneva Red Cross Conventions of 1949.

> "States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof".

In sum, when a state party to UNCLOS were to conclude any of these agreements prohibited under Art. 311 of UNCLOS, such agreement would, from its viewpoint, constitute a breach of its earlier UNCLOS obligations. For that state, the later norm would then be "illegal" under the earlier norm.[922]

GATT as well prohibits the conclusion of certain *inter se* agreements, namely regional trade arrangements in which trade concessions are granted only to regional partners and not to other WTO members, in violation of GATT Art. I (MFN), and that do not meet the conditions set out in GATT Art. XXIV (e.g., that the arrangement covers "substantially all the trade" between the regional partners).[923] It does so, arguably, in less explicit terms in that it prohibits rather the state conduct resulting from such *inter se* agreements (i.e., the fact that trade concessions are not given to other WTO members), not the *inter se* agreement as such. Nonetheless, in *Turkey – Textile* the Appellate Body implied that panels have jurisdiction to review the overall compatibility of regional arrangements with GATT Art. XXIV in order to assess whether a particular state measure is justified under WTO rules. A panel could, hence, find that a regional arrangement does not meet GATT Art. XXIV and although it could not declare that arrangement "illegal", for all practical purposes the arrangement would need to be changed so as to conform to Art. XXIV. If not, the regional partners could not longer implement it, at least not in line with their WTO obligations.

2. Inter se *agreements prohibited under Art. 41 or Art. 58 of the Vienna Convention on the ground that they affect third party rights or the object and purpose of the treaty*

We noted earlier that a conflict of norms arises and must be examined as between two states. We added that normally the fact that other states are also bound by either of the two norms does *not* play a role. The exception to this rule is the theory set out in Arts. 41 and 58. These provisions provide living testimony that it is no longer correct to state that "every multilateral treaty can simply be divided up into a number of bilateral legal relationships leaving no remainder".[924] The very idea behind Arts. 41 and 58 is that an earlier multilateral treaty limits the contractual freedom of states to subsequently change their bilateral relationships *inter se*. In that sense, the bilateral relationship between two states is not an isolated matter, it is influenced also by the relationship these two states have with third states under a multilateral treaty.

In respect of *inter se* agreements to modify a multilateral agreement, Art. 41.1 of the Vienna Convention provides as follows:

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[922] Note that in addition to prohibiting *inter se* agreements deviating from Art. 136, Art. 311.6 prohibits even amendments to Art. 136 by all States Parties. In other words, even if all parties to UNCLOS were to conclude an amendment to Art. 136, Art. 311.6 would prohibit such amendment. Such prohibition would make the amendment "illegal" (Art. 40 of the Vienna Convention gives effect to any special provisions set out in treaties in terms of their amendment). However, unless Art. 136 (and thus Art. 311.6) were to be part of *jus cogens* (something that is not unthinkable), the contractual freedom of state parties to UNCLOS should allow them to amend Art. 311.6 itself, e.g., by concluding a deviation from Art. 136 and explicitly stating that this deviation is not subject to Art. 311.6. Moreover, Art. 311.6 also prohibits that UNCLOS parties conclude treaties with third states, not party to UNCLOS, in deviation of Art. 136. Any such deviation would be illegal looked at from the angle of the UNCLOS party. However, as against the third party, Arts. 136 and 311.6 are *res inter alios acta* (unless they were to be part of *jus cogens*). Pursuant to the *pacta tertiis* principle, one would then be faced with a conflict of the type AB/AC: A, the UNCLOS party, would have (i) obligations v-à-v other UNCLOS parties (B) under Arts. 136 and 311.6; and (ii) at the same time, be bound by conflicting obligations v-à-v the third party to UNCLOS (C).

[923] GATS Art. V provides for a similar provision.

[924] Comment by the Netherlands in the preparation of the Vienna Convention, in Rauschning, *Travaux* ... 230.

"Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

(a) the possibility of such modification is provided for by the treaty; or

(b) the modification in question is *not prohibited by the treaty* and:

(i) *does not affect* the enjoyment by the *other parties* of their rights under the treaty or the performance of their obligations;
(ii) does not relate to a provision, derogation from which is incompatible with the *effective execution of the object and purpose of the treaty* as a whole" (emphasis added).

Art. 41.2 provides that, unless the possibility of the *inter se* modification is provided for by the treaty itself and this without further notification, "the parties shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides".

Art. 58 is an almost exact copy of Art. 41, but it applies, not to *inter se* modifications, but *inter se* suspensions of an earlier multilateral treaty.[925] Note, however, that Art. 41.1(b)(ii) refers to incompatibility with "*the effective execution of* the object and purpose of the treaty *as a whole*"[926], there where Art. 58.1(b)(ii) refers to incompatibility with "the object and purpose of the treaty" *tout court*. Although there is this difference in wording, it is difficult to see what consequences it may have or even why different rules ought to apply in this respect as between *inter se* modification and *inter se* suspension.

Whereas it can safely be said that Arts. 41.1 and 58.1 constitute general customary international law (it has, for example, been copied in Art. 311 of UNCLOS, quoted earlier), it is doubtful whether the more procedural obligation in Arts. 41.2 and 58.2 to notify other parties meet that standard.[927]

Inter se agreements under Arts. 41 and 58 can take the form of

(i) a bilateral or multilateral treaty where all parties are bound also by the original multilateral treaty (ABCD / AB or ABCD / ABC conflicts); or

(ii) a multilateral treaty which includes also parties not bound by the original multilateral treaty (ABCD / ABEF conflict).

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[925] Art. 58.1 of the Vienna Convention provides as follows: "Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of the provisions of the treaty, temporarily and as between themselves alone, if: (a) the possibility of such a suspension is provided for by the treaty; or (b) the suspension in question is *not prohibited by the treaty* and: (i) *does not affect* the enjoyment by the *other parties* of their rights under the treaty or the performance of their obligations; (ii) is not incompatible with *the object and purpose of the treaty*" (emphasis added). Art. 58.2 provides that, unless the possibility of the *inter se* suspension is provided for by the treaty itself and this without further notification, "the parties in question shall notify the other parties of their intention to conclude the agreement and of those provisions of the treaty the operation of which they intend to suspend".

[926] Emphasis added.

[927] See, however, for a similar provision : Art. 311.4 of UNCLOS.

a. The three grounds of illegality set out in Arts. 41 and 58 (an application of the notion of "integral obligations")

i. The three grounds

Arts. 41 and 58 thus prohibit *inter se* agreements in three instances:

(i) in case the multilateral treaty itself prohibits the *inter se* agreement in question (the instance discussed in section C.1 above);

(ii) if the agreement affects the rights or obligations of third parties; or

(iii) if the agreement is incompatible with the (effective execution of the) object and purpose of the treaty (as a whole).

The first ground of illegality under Arts. 41 and 58 results from the specific multilateral treaty in question and was discussed earlier. As Waldock pointed out, this first ground is different from the other two (relating to third parties and object and purpose) in that "it leaves no room for the subjective questions of interpretation which may arise under the other two conditions".[928]

The second and third conditions are self-standing grounds of illegality and cannot be overestimated. They relate to the notion of integral obligations, discussed at length in Chapter II. We reduced this essentially "value-based" and subjective matter of "integral obligations" to one of checking whether their breach necessarily constitutes breach v-à-v *all* parties to the multilateral treaty. If this is so, these obligations take up a higher legal status in that they cannot be deviated from *inter se*. On that ground, Arts. 41 and 58 prohibit the conclusion of *inter se* agreements which affect either: (i) rights or obligations of third parties (parties to the multilateral treaty but not parties to the *inter se* agreement); or (ii) the very object and purpose of the treaty as a whole. In other words, the *inter se* agreement, though not necessarily prohibited by the earlier treaty itself, is then prohibited because it undermines the "integral nature" of the multilateral treaty.

It may, at first sight, be difficult and amount to a rather subjective exercise to decide whether an *inter se* agreement is incompatible with the "object and purpose" of a multilateral treaty. If it is prohibited by the treaty itself, with reference*, inter alia*, to the "object and purpose" of the treaty (a reference required by rules on treaty interpretation[929]), then no problem of subjectively assessing whether the agreement goes against the "object and purpose" in the sense of the "spirit" of the treaty arises. Indeed, an *inter se* agreement incompatible with the very object and purpose of the treaty is most likely to be prohibited also by the treaty itself. As the ILC Commentary pointed out: "an *inter se* agreement incompatible with the object and purpose of the treaty may be said to be impliedly prohibited by the treaty". The ILC suggested even that incompatibility with object and purpose would be a particularly grave breach of the treaty itself when it wanted to keep the two grounds of illegality separate because "it is always possible that the parties might explicitly forbid any *inter se* modifications, thus excluding even minor modifications not caught by the second condition [on object and purpose]".[930]

Nonetheless, there may be instances also where the *inter se* agreement is not as such prohibited by the treaty, but nonetheless goes against the "object and purpose" of the treaty. However, in my view, those cases would then fall also under the second ground of illegality under Arts. 41/58 (i.e., illegality based on *pacta tertiis*). Indeed, "object and purpose" has to do also with the notion of integral treaties,

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[928] Rauschning, *Travaux* ..., 302.
[929] Art. 31 of the Vienna Convention.
[930] Rauschning, *Travaux* ..., 303.

discussed above.[931] Recall, for example, that the *Genocide Convention case* which introduced the idea of integral obligations, did not refer to the term "integral" as such, but to the "objects" of the treaty. In respect of *inter se* modifications incompatible with the object and purpose of the treaty, the ILC commentary to Art. 41 notes that "[h]istory furnishes a number of instances of *inter se* agreements which substantially changed the régime of the treaty and which overrode the objections of interested States". The one example provided is that of "an *inter se* agreement modifying substantive provisions of a disarmament or neutralization treaty".[932] Such *inter se* agreements are incompatible with the "object and purpose" of the treaty, but not so because of some subjective evaluation of the "spirit" of the treaty, but as a result of the fact that they necessarily violate also the rights of third parties, that is, because the obligations under the multilateral treaty deviated from are of an integral nature (as we defined them in Chapter II).

Hence, it can safely be said that the ground of illegality based on incompatibility with the object and purpose of the treaty overlaps either with a prohibition in the treaty itself or the ground of illegality based on the effect on third parties rights.

ii. Some examples

We noted earlier, that the notion of integral obligations, and hence Arts. 41 and 58, finds its roots, *inter alia*, in the *Genocide Convention case*, where the ICJ addressed the legality of reservations.[933] More focused on the legality of *inter se* agreements deviating from an integral multilateral treaty are the Opinion of Judge Anzilotti in the *Customs Régime Between Germany and Austria* case and the Dissenting Opinions of Judges Van Eysinga and Schücking in the *Oscar Chinn* case.[934] Judge Anzilotti questioned whether the parties to the 1922 Geneva Protocol

> "were in a position to modify *inter se* the provisions of Article 88 [of the Treaty of Saint-Germain], which provisions … form an essential part of the peace settlement and were adopted not in the interests of any given State, but in the higher interest of the European political system and with a view to the maintenance of peace".[935]

In contrast to the majority of the PCIJ, Judges Van Eysinga and Schücking expressed the view that the 1919 Convention of St. Germain relating to the Congo Basin was void[936] between its signatories on the ground that it modified the earlier General Act of Berlin of 1885 without the assent of all the signatories thereto. Judge Van Eysinga expressed it thus:

> "the Berlin Act presents a case in which a large number of States, which were territorially or otherwise interested in a vast region, endowed it [the Congo Basin] with a highly internationalized statute, or rather a constitution established by treaty, by means of which the interests of peace, those of 'all nations' as well as those of natives, appeared to be most satisfactory guaranteed … [It] does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations … This régime, which forms an indivisible whole, may be modified, but for this agreement of all contracting Powers is required".[937]

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[931] Recall, indeed, that the *Genocide Convention case* which introduced the idea of integral obligations, did not refer to the term "integral" as such, but to the "objects" of the treaty (see Chapter II, section E.3.a).
[932] Rauschning, *Travaux …*, 303.
[933] See Chapter II, section E.3.a above.
[934] For other cases where a treaty was characterised as transcending the interests of the parties directly concerned (or as constituting a so-called objective regime), see *supra* note **270**.
[935] PCIJ, Series A/B, No. 41, 64 (1931).
[936] As noted before, in section B.1, declaring the 1919 Convention "void" or "invalid" because it breaches another treaty, not of *jus cogens*, would (under current international law) go too far. It may be illegal, but it is not invalid.
[937] PCIJ, Series A/B, No. 63, 132-134 (1934).

In Van Eysinga's view, the later *inter se* Convention of St. Germain was, therefore, illegal (even void[938]) because it deviated from an integral treaty (second/third ground of illegality in Art. 41/58). In addition, in his opinion, Art. 36 of the Berlin Act explicitly "precludes any modification by some only of the contracting parties"[939] (first ground of illegality in Art. 41/58). The majority of the Court decided not to examine whether the *inter se* agreement was invalid on the ground that "the validity of this Act has not so far, to the knowledge of the Court, been challenged by any government".[940] Judges Van Eysinga and Schücking, in contrast, were of the view that the invalidity at hand was one to be examined *ex officio*.[941]

In terms of an *inter se* agreement affecting the rights of third parties (second ground of illegality), one may think also of an *inter se* agreement as between two parties to an MEA in which the prior MEA obligation of 30% reduction in emission of a certain substance is brought down *inter se* to only 20%. Such *inter se* agreement necessarily affects third parties that are parties to the MEA. Moreover, it would seem to affect also the object and purpose of the MEA (third ground of illegality). Hence, on two grounds, the *inter se* agreement is illegal under Art. 41. In both instances, this is so because the MEA obligation is one of an integral nature. The *inter se* agreement would, in other words, be illegal even if the multilateral treaty itself does not explicitly say so. The illegality results then from Art. 41, more particularly, from the integral nature of the obligation deviated from *inter se*.

The same reasoning would apply in respect of an *inter se* agreement that detracts from substantive human rights or a so-called objective regime setting up, for example, an international regime for a certain territory (e.g., the Antarctic Treaty). Such *inter se* agreement would necessarily affect also the rights of parties to the human rights treaty or objective regime that are not parties to the *inter se* agreement (as well as arguably undermine the object and purpose of the former treaties). This is the case because human rights obligations or obligations under such objective regime are of an integral nature. Hence, the *inter se* agreements concerned are illegal under Art. 41. As the ILC Commentary noted:

> "Some obligations contained in treaties are in the nature of things intended to apply generally to all the parties all the time. An obvious example is the Nuclear Test-Ban Treaty, and a subsequent agreement entered into by any individual party contracting out of its obligations under that Treaty would manifestly be incompatible with the Treaty. Other obligations may be of a purely reciprocal kind, so that a bilateral treaty modifying the application of the convention *inter se* the contracting States is compatible with its provisions".[942]

b. The consequence of an *inter se* agreement being prohibited under Arts. 41 or 58: illegality, not invalidity

In case either of the three conditions in Art. 41 or Art. 58 is met, it will be the *lex prior* (multilateral treaty) which prevails, not the *lex posterior* (*inter se* agreement). What is more, the *lex posterior* will then be illegal on the basis of the *lex prior*, i.e., it constitutes wrongful conduct under the earlier norm, either directly (explicit prohibition, first ground of illegality) or indirectly (through the operation of Arts. 41 and 58, second and third ground of illegality).[943] Unlike, for example, Art. 30, Arts. 41 and

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[938] But see *supra* note 936.
[939] PCIJ, Series A/B, No. 63, 133 (1934).
[940] Ibid., 80.
[941] Ibid., respectively at 135 and 149.
[942] Rauschning, *Travaux ...*, 234.
[943] It is interesting to note that at the Vienna Conference France proposed an amendment to what is now Art. 30.4(a). France wanted to add an explicit reference to what it called restricted multilateral treaties, a notion that comes close to that of "integral treaties". France defined a "restricted multilateral treaty" as "a treaty which is intended to be binding only on the States referred to in the treaty and whose entry into force in its entirety with respect to all the negotiating States is an essential condition of the consent of each of them to be bound by it"

58 not only set out a "priority rule". It is not so that the multilateral treaty simply "prevails over" the *inter se* agreement. Arts. 41 and 58 go further and actually declare the *inter se* agreement illegal or impermissible. As the ILC Commentary notes, under Art. 41 "the main issue is the conditions under which *inter se* agreements may be regarded as permissible".[944]

On the other hand, although Arts. 41 and 58 go further than, for example, the priority rule in Art. 30, they do not go as far as, for example, Arts. 53 and 64 on *jus cogens*. Arts. 41 and 58 may lead to the illegality of an *inter se* agreement, they do not result in the invalidity of such agreements.[945]

This was made clear in the *travaux préparatoires* to Art. 41. Originally, as outlined before[946], ILC drafts on the law of treaties (mainly Lauterpacht's report) provided for the "invalidity" of later treaties (including *inter se* agreements) which are incompatible with an earlier treaty. This was founded on the argument that parties to the earlier treaty had limited their capacity to conclude later inconsistent treaties. This theory was rejected, first by Fitzmaurice, then more categorically by Waldock. The latter noted that the ILC

> "felt bound to conclude that, as the law stands today, by entering into the earlier treaty the parties do not render themselves legally incompetent to enter into another inconsistent treaty and that the later treaty is valid and effective as between the States parties to it".[947]

Karl as well notes that "Art. 41, which refers to these cases [of *inter se* agreements expressly or impliedly prohibited], governs only the question of their legality. The later treaty may therefore be illegal and cannot be invoked against States standing aloof, but it is not invalid".[948]

Rosenne, in the context of Art. 311.4 of UNCLOS referred to earlier (basically a copy of Arts. 41 and 58), would nonetheless take it a step further and declare *inter se* agreements not meeting the standard of Art. 311.4 "invalid". He puts it thus:

> "the conclusion seems inescapable that if the law of the treaty-instrument contained in the 1969 Convention does not lead directly to the invalidity of the later treaty or impair the capacity of the States to conclude it (since article 6, on capacity, does not mention any limitation on the capacity of every State to conclude treaties) at the same

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(Documents of the Conference, 112, French proposal in UN doc. A/CONF.39/C.1/L.24). France would have rephrased Art. 30.4(a) as follows: "As between States parties to both treaties the same rule applies as in paragraph 3 [the later treaty prevails], *however, when the earlier treaty is a restricted multilateral treaty and the later treaty is concluded between certain of the parties only, the provisions of the earlier treaty shall prevail*" (Documents of the Conference, 148, French proposal in UN doc. A/CONF.39/C.1/L.44). France stated that the earlier treaty should thus prevail "in the interests of the integrity of the treaty; that integrity was essential to the very existence of that type of treaty" (*per* de Bresson, Meetings of the Committee of the Whole, 166, para. 24). The proposal was not accepted. However, it is submitted here that Art. 41 has exactly the same effect and goes even further in that the later *inter se* agreement deviating from an integral obligation must not only give way to the earlier treaty, it also becomes illegal.

[944] Rauschning, *Travaux ...*, 303, underlining added. Or as it is noted in Nguyen, *Droit ...*, para. 173, at 270: "Dans les situations où les conditions posées par l'article 41 de la Convention de 1969 ne sont pas respectées, le traité restreint postérieur au traité général n'est pas licite. Il faut donc affirmer la primauté du traité antérieur et écarter l'application du traité postérieur. La solution est nettement affirmée en jurisprudence ».

[945] On the distinction between illegality and invalidity, see above section A.1.b.

[946] *Supra* section B.1.a.

[947] Rauschning, *Travaux ...*, 303.

[948] Rauschning, *Travaux ...*, 471, emphasis added. See also Waldock, 742nd Meeting of the ILC, YILC, 1974, Vol. I, 121, para. 25: "an undertaking not to contract out was implied in every treaty containing 'integral' or 'interdependent' obligations, but the consequences of the breach of any such undertaking, whether express or implied, was to raise an issue of priority rather than validity, except in cases of *jus cogens*" (emphasis added).

> time it does not exclude the possibility that another branch of law, whether the law of treaty-obligations or the law of State responsibility, could lead to that result in appropriate circumstances, especially if appropriate procedural provisions for determining the issue of breach exist in a form binding the parties concerned. Article 311 of the [UNCLOS] … may be one of those …".[949]

c. The illegality operates v-à-v third parties, but also as between the parties to the *inter se* agreement

However, the fact that the later *inter se* agreement not meeting one of the conditions in Art. 41 or 58 cannot be seen as "void" or "invalid" as between its parties, does not do away with its "illegal" nature.

As against third parties, all *inter se* agreements are, first of all, not opposable. This is so because of the *pacta tertiis* principle. A third party cannot see its rights or obligations affected by an *inter se* agreement to which it did not consent. In addition, in respect of third parties that are a party to the multilateral agreement, the *inter se* agreement is not only non-opposable, it also constitutes, in and of itself, breach of their rights under the multilateral agreement and this on the ground that the *inter se* agreement is either (i) explicitly prohibited by that treaty or (ii) violates third party rights under that treaty (as a result of which the second or third condition of Arts. 41 or 58 were triggered). Hence, as against third parties bound by the multilateral treaty, the *inter se* agreement is both non-opposable and illegal.

But Arts. 41 and 58 affect more than the legal relationship between parties to the *inter se* agreement, on the one hand, and non-parties to that agreement, on the other hand. Indeed, these provisions mean also that an *inter se* agreement not permitted under Art. 41 or Art. 58 (and hence "illegal") may not be invokeable either *as between parties* to the *inter se* agreement.

The ILC as well as Art. 30.5 made it very explicit that in the event of conflict of norms rules on state responsibility continue to apply. Now, if it is so that the *inter se* agreement is illegal, the responsibility of all of the parties to the *inter se* agreement is engaged and the agreement, constituting a breach under international law, must cease.[950] Hence, to allow one of the parties to enforce the *inter se* agreement as against another party to it, would not only be giving effect to an illegal instrument from the point of view of both parties (something that could, in the circumstances, be enough for an adjudicator not to enforce the agreement), it would constitute, moreover, confirmation of breach v-à-v third parties, given that implementation of the *inter se* agreement necessarily breaches the rights of third parties.

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[949] SHABTAI ROSENNE, BREACH OF TREATY, 89 (1985). On his distinction between the law of the instrument and the law of the obligation see *supra* note **673**. In support of a rather technical/procedural reasoning leading to acceptance of "invalidity" of *inter se* agreements inconsistent with Art. 311.4 of UNCLOS, Rosenne refers in particular to Art. 319.2(c) of UNCLOS imposing an obligation on the UN Secretary-General to "notify States Parties of agreements in accordance with article 311, paragraph 4". He also finds support in Arts. 76 and 77 of the Vienna Convention on the depository functions of the UN Secretary-General. On these grounds, he believes that "it may be suggested that the action of the Secretary-General under the two sets of provisions, looked at in the light of the total structure of the final provisions (Part XVII) of the Convention, may be such as could set in motion a process by which breach of article 311 could be established and the later treaty found to be void because of a specific provision to that effect in the Convention" (ibid., 92). If it comes to the establishment of breach of Art. 311.4 (i.e., of illegality under Art. 41), Rosenne's procedural approach is helpful. However, the consequence of invalidity once breach is established (instead of illegality) is not sufficiently explained, nor would it, as noted earlier (see text at note 913), in many cases seem to make much of a difference if the treaty were invalid, as opposed to only illegal (except for conflicts of the AB/AC type, discussed in Chapter VII, section B.2). Also in the latter instance the *inter se* agreement would most likely loose its practical effect.

[950] This clearly distinguishes the situation from conflicts of type AB/AC discussed below (Chapter VII, section B.2) where responsibility is incurred only by state A, not by states B or C.

Thus, although the *inter se* agreement is not invalid or void under the law of treaties, as a result of its illegality grounded in Art. 41 or Art. 58 and the law of state responsibility, the *inter se* agreement must be ended and cannot, therefore, be enforced *not even as between the parties to it*.[951]

This explains why Arts. 41 and 58 provide for an exception to the contractual freedom of states. For an international tribunal to enforce the *inter se* agreement at the demand of either party would necessarily affect third parties. Thus, even if it is one of the parties to the *inter se* agreement that contests its legality under Art. 41 or Art. 58, that party should be allowed to do so and be successful if either of the three conditions for illegality are met. A different question is whether an adjudicator should, at its own initiative, examine the legality of the *inter se* agreement even if the parties in dispute do not make any claims in this respect. As pointed out earlier, whereas invalidity should be examined *ex officio*, illegality is normally subject to the *non ultra petita* rule.[952] In practice, however, one would expect that the illegality will be raised either (i) by the party to the *inter se* agreement in whose favour the illegality would work, or (ii) by the third parties affected by the *inter se* agreement. In that sense, the question of legality v-à-v parties to the *inter se* agreement may, after all, be a largely theoretical problem since it is most likely that *third states* will challenge the agreement, not states that agreed to it in the first place.

Especially if the multilateral agreement is administered and monitored in the context of an international organisation and/or can be enforced under a system of compulsory third party adjudication (as under the WTO treaty and, to a great extent, UNCLOS), the illegality of *inter se* agreements inconsistent with Art. 41 or Art. 58 *even as between parties to it*, ought to be accepted. The fact that a state party could hence rely on the illegality of such *inter se* agreement, even if it originally agreed to it, does not mean that that state is no longer responsible for breach v-à-v third parties. Given that it was part of the *inter se* agreement, it should in principle bear collective responsibility together with the other parties. As against another state party, it could, of course, not claim damages. Since it is itself, together with other states, responsible for the conclusion of the *inter se* agreement, it should then only be able to obtain cessation.

In these circumstances, the difference between "invalidity" of the *inter se* agreement and "illegality" of such agreement may be minor.[953] For all practical purposes the illegal *inter se* agreement will loose its effect. The *inter se* agreement would only continue to be relevant in case it is binding also on states which are not at the same time parties to the multilateral treaty.

3. The legality of inter se *agreements deviating from the WTO treaty*

The legal relationship as between WTO members under the WTO treaty cannot only be affected by amendments, interpretations or other decisions taken pursuant to the Marrakesh Agreement. Vienna Convention rules on application of successive treaties (in particular Art. 30.4(a)) and *inter se* agreements to modify a multilateral treaty (Art. 41) apply also to the WTO treaty. The WTO treaty did not "contract out" of these rules. As a result, they apply also to the WTO treaty.[954] Hence, the

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[951] We examine the peculiar situation of a party to the multilateral treaty concluding an agreement with another party, not party to that treaty, in breach of the treaty (that is, conflicts of type AB/AC) below in Chapter VII, section B.2.

[952] In case the parties to the *inter se* agreement do not contest the legality of their agreement and implement it, it will then be up to the third parties to challenge the legality of the agreement. If the parties to the *inter se* agreement by mutual consent ask the adjudicator to enforce that agreement (i.e., none of the parties contests its legality), the question may, indeed, arise as to whether the adjudicator should examine the legality of the *inter se* agreement at its own initiative. Since illegality in these circumstances is not only a matter as between the parties to the *inter se* agreement, but one affecting the rights of third states, there are strong reasons, in particular in the context of WTO law that is administered in the framework of an international organisation, in favour of the adjudicator assessing the issue *ex officio*.

[953] But see section A.1.b above.

[954] See Chapter IV, section C.

trade relationship between WTO members may be affected also by bilateral agreements as well as multilateral agreements to which not all WTO members are a party and which do not constitute WTO norms.[955] If this were not the case, the legal relationships set out in the WTO treaty would be written in stone, to be altered only by consensus. Such would make change virtually impossible and impair the flexibility needed to keep abreast of changing international conditions and the diversity as between WTO members. If the WTO treaty could only be affected by WTO norms, it would become the alpha and omega of all trade relations as between all WTO members. No room would be made, for example, for more detailed or special rules, either in terms of subject matter (say, rules in the World Customs Organisation) or membership (say, the EC or NAFTA treaties). It is one of the main purposes of this thesis to reject this isolationist view of WTO law. Below, we explain why these non-WTO norms must be part of the applicable law also before a WTO panel.[956]

For WTO purposes, a distinction should be made between two types of *inter se* agreements:

(1) those <u>further liberalising trade</u> as between some WTO members only for which the WTO treaty has explicit rules; and

(2) those <u>restricting trade</u> in contrast to trade flows called for under the WTO treaty (again, as between some WTO members only), on which the WTO treaty is silent.

An example of the former is a free trade arrangement. An example of the latter is an agreement between some WTO members only, say in an MEA, not to invoke GATT Arts. III and XI vis-à-vis certain trade restrictions they both consider to be justified (even though they are, in principle, contrary to GATT rules, including, for example, GATT Art. XX).[957] This second category of *inter se* agreements could also include *inter se* agreements concluded regarding a particular WTO dispute in which two WTO members agree not to invoke certain procedural rights granted to them in the DSU (say, the right to appeal pursuant to DSU Arts. 16.4 and 17[958]) or an *inter se* agreement as between some members broadening the scope for "compulsory licensing" in respect of essential drugs (in deviation of TRIPS Art. 31).

a. *Inter se* agreements further liberalising trade

The first type of *inter se* agreements -- <u>further liberalisation</u> as between some WTO members only -- is explicitly dealt with in the WTO treaty itself. It prohibits such agreements unless they

(1) extend the increased liberalisation to *all* WTO members (in accordance with WTO rules on most-favoured nation treatment); <u>or</u>

(2) conform with the conditions in GATT Art. XXIV (GATS Article V) in respect of regional arrangements.

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[955] As noted by Hersh Lauterpacht as early as 1935: "It is clearly impossible to accept the view that the provisions of a multilateral treaty can never be modified and its obligations limited by particular agreements unless with the consent of all other contracting parties" (in *The Chinn case*, 16 BYIL 162-6, at 166 (1935)).

[956] See Chapter VIII, section C.

[957] Another example is an *inter se* agreement between some WTO members only in which they agree that as between themselves an import ban on hormone-treated beef should be imposed (notwithstanding the Appellate Body report on *EC – Hormones,* declaring such ban as inconsistent with the SPS Agreement).

[958] In the *Australia – Leather* case, for example, Australia and the United States reached a bilateral agreement concerning the procedures to be applicable for proceedings pursuant to Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement. Paragraph 4 of that bilateral agreement stated: "Both Australia and the United States will unconditionally accept the review panel report [pursuant to Art; 21.5] and there will be no appeal of that report" (agreement reproduced in WTO doc. WT/DS126/8). For another bilateral agreement on how to proceed under DSU Arts. 21.5 and 22.6, see the US-EC agreement in the *US – FSC* dispute, reproduced in WTO doc. WT/DS108/12.

Being "prohibited by the treaty" in the sense of Art. 41.1(b) of the Vienna Convention, they are not permitted to modify WTO rules as between the WTO members that concluded the *inter se* agreement. *A fortiori*, such *inter se* agreements cannot affect the WTO rights and obligations of WTO members which are *not* a party to the *inter se* agreement.

Apart from a regional arrangement not meeting the conditions in GATT Art. XXIV, one could imagine other "illegal" *inter se* agreements aimed at further liberalisation *inter se*. An *inter se* agreement could, for example, further liberalise trade as between its parties only in the sense of narrowly defining "injury" in the area of anti-dumping (hence *inter se* limiting the scope for trade restricting anti-dumping duties). Not to grant this trade advantage on an MFN basis to all WTO members is prohibited by the WTO treaty, hence illegal also under Art. 41.

b. Other inter se agreements deviating from or suspending WTO rules

In contrast, in respect of the second type of *inter se* agreements -- restricting trade as between some WTO members only under an MEA, altering DSU procedural rights *inter se* or broadening the scope of TRIPS exceptions *inter se* -- the WTO treaty itself does not provide for *lex specialis*. Indeed, nothing in the WTO treaty prevents a limited number of WTO members from agreeing in an MEA not to invoke, for example, GATT Arts. III or XI in respect of certain trade restrictions they both consider to be justified (but in respect of which they know or fear that, for example, GATT Art. XX is not met). The same can be said about a bilateral agreement as between two disputing WTO members setting out, for example, that contrary to DSU rules for the particular dispute in question no appeal shall be possible.[959] As between the parties to the *inter se* agreement, the implementation of the agreement could then raise a conflict with WTO rules: on the basis of the *inter se* agreement one state would, for example, be allowed to restrict trade from the other even if GATT Art. XX exceptions are not met. But this "conflict" does not mean that the WTO treaty prohibits the conclusion of the *inter se* agreement in and of itself. On the contrary, the later *inter se* agreement will normally prevail in this conflict which is then no longer a normative conflict, but a conflict in the applicable law.[960] WTO members have the contractual freedom to change their *inter se* relationships as long as (i) the WTO treaty does not explicitly prohibit the *inter se* agreement and (ii) they respect the rights of third parties. Indeed, since such *inter se* agreements are "not prohibited by the [WTO] treaty", only the two conditions in Art. 41.1(b) of the Vienna Convention apply:

(1) the *inter se* agreement may not "affect the enjoyment by the other parties [i.e., the other WTO members that are not parties to the *inter se* agreement] of their rights under the [WTO] treaty or the performance of their obligations"; and

(2) the *inter se* agreement may not relate to a WTO provision "derogation from which is incompatible with the effective execution of the object and purpose of the [WTO] treaty as a whole".

In respect of the first condition, although an *inter se* derogation from WTO rules -- say, an *inter se* agreement to expand TRIPS exceptions or to expand GATT Art. XX justifications for trade restrictions under an MEA -- may well have an effect also on *trade flows* or *trade opportunities* with certain third parties, the WTO *rights and obligations* of these third parties remain unaffected by the *inter se* agreement.[961] The same applies in respect of an *inter se* agreement in which the DSU right to appeal in a given dispute has been waived (the rights of third parties are not affected by such waiver).

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[959] See *supra* note 958.

[960] Discussed below in Chapter VII, section A.2.

[961] Indeed, if such *inter se* trade restricting agreement does have an affect on trade flows with third parties, this is likely to be one to the benefit of these third parties: the trade that is restricted *inter se* is likely to lead to increased imports from third parties. See, in contrast, *inter se* agreements allowed under GATT Art. XXIV, where the affect on trade flows from third parties is more likely to be negative: the increased trade as between the parties to the *inter se* agreement is, indeed, likely to diminish imports from third states.

In all of these cases this is so because, as we discussed earlier, trade obligations under the WTO treaty are reciprocal in nature, not integral.[962] The expansion of TRIPS or GATT exceptions can, for example, only be invoked by and against parties to the *inter se* agreement, not vis-à-vis third parties. Such expansion, although deviating from WTO rules as between the parties to the *inter se* agreement, does not affect the rights of third states. In particular, the MFN rights of third parties are not breached by such *inter se* agreement. To the contrary, the parties to the *inter se* agreement are those that will see their trade restricted. Third parties will continue to see trade flow and, as a result, *benefit rather than be discriminated against*. If an *inter se* agreement were, nonetheless, to breach the rights of third parties, then it would go Art. 41.1(b) and hence be illegal.[963]

In respect of the second condition, it is difficult to predict exactly which WTO rights are so important that "giving them away" *inter se* (without affecting third parties) would nonetheless threaten the effective execution of the object and purpose of the WTO treaty *as a whole* (if any such rights exist at all). Indeed, since substantive trade rights and obligations under the WTO can be reduced to reciprocal rights and obligations as between two WTO members, it is difficult to see how *inter se* modifications that are not prohibited by the WTO treaty itself (nor affect rights or obligations of third parties) could, nevertheless, prejudice "the effective execution of the object and purpose of the treaty as a whole". As explained earlier, if an *inter se* agreement is not prohibited by the treaty itself, nor affecting the rights or obligations of third parties, it should not be found to be incompatible either with the object and purpose of the treaty.[964] In that sense, the ground of incompatibility with object and purpose of the treaty overlaps completely with the two other grounds of illegality set out in Art. 41 and 58.

If, but only if, *inter se* agreements to the WTO treaty meet the conditions set out above, they will "legally" change the relationship between the WTO members party to the agreement.[965] Once again, the *inter se* agreement cannot, however, alter the rights and obligations of third parties.

If an *inter se* agreement thus changes the relationship between certain WTO members, the conflict of norms is not resolved by one norm being "illegal" under the other. Nonetheless, a conflict in the applicable law may then arise. That is, as between the WTO members party also to the *inter se* agreement, one may invoke the WTO rule, the other the *inter se* agreement deviating from that rule. In that event, Art. 30.4(a) of the Vienna Convention applies and the law to be applied by the adjudicator is that set out in the *inter se* agreement, being the *lex posterior*. We come back to Art. 30 below in Chapter VII, section A.2.

If *inter se* agreements do not meet the conditions in Art. 41 or 58, they are illegal and the normative conflict between them and the WTO treaty must be decided in favour of the WTO treaty. The WTO treaty then not only prevails, it leads to the illegality of the *inter se* agreement to the extent of the conflict.

c. *Inter se* modifications in the form of another multilateral treaty concluded in an entirely different context

For Art. 41 to apply, it is not required that the *inter se* modification is concluded in the same functional or organisational context as that of the original multilateral treaty. As noted before, a conflict under Art. 41 may take the form also of an ABCD norm deviated from *inter se* by A and B in an ABEF norm. Nor does Art. 41 require that the parties to the *inter se* agreement explicitly acknowledge that their agreement is aimed at modifying another multilateral treaty. Art. 41 applies

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[962] See Chapter II, section E.
[963] If the rights of a third party are nevertheless affected, this third party can bring a claim to a WTO panel which should enforce its WTO rights over and above the *inter se* agreement to which the WTO member in question is not a party. See *infra* Chapter VIII.
[964] See *supra* text at note 932.
[965] The effect of such changes in WTO dispute settlement is discussed *infra* in Chapter VII, section D.

when "two or more of the parties to a multilateral treaty … conclude an agreement to modify the treaty as between themselves alone". Hence, two multilateral treaty norms stemming from entirely different contexts could also fall under the scope of Art. 41.

Indeed, WTO rules, on the one hand, and rules under MEAs or human rights treaties, on the other, could, in the event of conflict and depending on their membership, also be seen as a situation of *inter se* agreements deviating from an earlier multilateral treaty. Depending on which of the two can be defined as the multilateral treaty earlier in time, the other could then be characterised as a subsequent *inter se* deviation of the ABCD – ABEF type (in that event EF are kept out of the operation of Art. 41; Art. 41 would then only affect the relationships between ABCD).

i. WTO rules constituting an inter se *modification of an earlier human rights treaty or MEA of an integral nature: the WTO rule is illegal to the extent of the conflict*

We pointed out earlier that many MEA and human rights obligations are of an integral type, whereas trade obligations under the WTO are reciprocal in nature.[966] Hence, in case the WTO rule can be defined as the later in time (ABEF norm), it could be seen as an *inter se* agreement modifying integral human rights or MEA obligations (ABCD norm). If this is the case -- i.e., if the WTO rule deviates from human rights or MEA obligations as between WTO members only -- then WTO rules would not only affect WTO members but also third party rights (i.e., right of non-WTO members, party to the human rights treaty or MEA, *in casu* C and D) or even be incompatible with "the effective execution of the object and purpose of the [human rights or MEA] treaty as a whole". Consequently, as between parties to the MEA or human rights treaty (ABCD norm) the particular WTO provision (ABEF norm), to the extent of the conflict, would then be illegal under Art. 41. In other words, the conflict should then be decided in favour of the earlier MEA or human rights provision, the later WTO rule being non-opposable to A, B, C and D to the extent of the conflict. This would be the result of Art. 41. The fact that the WTO rule is the *lex posterior* under Art. 30.4(a) does not alter this solution. As noted below, Art. 30.5 explicitly makes the operation of Art. 30.4 subject to Art. 41.

ii. WTO rules subsequently modified inter se *by a human rights treaty or an MEA: WTO rules must give way as* lex prior

In contrast, if the human rights treaty or MEA would be the later in time (ABEF norm), it must be recalled that *inter se* agreements modifying reciprocal obligations such as the WTO treaty are more easily accepted under Art. 41. The human rights treaty or MEA (ABEF norm) could then be defined as an *inter se* agreement deviating from WTO rules (ABCD norm) as between the parties to the human rights treaty or MEA. Given the reciprocal nature of WTO obligations, this *inter se* agreement is unlikely to be illegal under Art. 41 (unless it affects the rights of third parties). Hence, in the event of conflict, the later human rights treaty or MEA would *not* be prohibited as an illegal *inter se* deviation. It should then prevail as the *lex posterior* pursuant to Art. 30.4 (of course, only as between the parties to both norms). The earlier WTO rule is then, however, not illegal. It is simply the *lex prior* having to give way *inter se* to the later human rights treaty or MEA.

iii. In summary, when integral obligations are involved, conflicting WTO rules must always give way (irrespective of timing)

In sum, *irrespective of the actual timing of the two norms, in the event of conflict between a WTO rule of the reciprocal type and a human rights or MEA obligation of an integral nature, the human rights or MEA obligation must, either pursuant to Art. 41 or pursuant to Art. 30.4(a), prevail in the relationship between two parties that are bound by both norms* (*in casu*, states A and B).[967]

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[966] See Chapter II, section E.

[967] Below, in Chapter VII, section A.2, we point at certain difficulties in respect of determining the date of a treaty. The conclusions reached here are subject to these considerations.

Take the example of conflict between a WTO obligation *not to restrict trade* in product X (assuming that GATT Art. XX does not allow for trade restrictions on product X) and an MEA obligation, of the integral type, *to restrict trade* in product X because product X is defined as a harmful substance. As between states that are bound by both rules, the MEA rule must prevail, irrespective of whether it comes earlier or later in time. If it comes later in time, it prevails as the *lex posterior* under Art. 30.4(a). If it is the earlier in time, it cannot, as an integral obligation, be deviated from *inter se*, by the later WTO rule.

Another example would be conflict between a human rights obligation to respect certain property rights and an explicit WTO right to infringe such human rights (say, certain property rights when it comes to taking countermeasures in the field of intellectual property or foreign services already established in the country taken the countermeasures). Here again, as between states that are bound by both rules, the human rights rule must prevail, irrespective of whether it comes earlier or later in time. If it comes later in time, it prevails as the *lex posterior* under Art. 30.4(a). If it is the earlier in time (most likely, in case the WTO right derives from a DSB authorisation to impose sanctions), it cannot, as an integral obligation, be deviated from *inter se*, by the later WTO rule. Once again, all of this applies only in case both norms are binding on both of the parties.

4. Acts of international organisations that are "illegal"

The responsibility of international organisations is a topic that so far attracted little attention. Earlier, we set out the possibility that acts of international organisations be "invalid" because of a lack of competence or other breach of their constituent instruments. This invalidity derived from international institutional law. In addition, acts of international organisations may also be inconsistent with norms of international law other than those set out in their constituent instruments, i.e., norms that do not directly relate to their competence.

Acts of international organisations are, indeed, not taken in a legal vacuum nor within the context only of their constituent instruments. They are, like new treaties, part of the *corpus* of international law. There is no inherent hierarchy of sources in international law. As a result, an act of an international organisation, if validly taken, has the same hierarchical status as a treaty norm. However, such act must then abide also by the same rules on legality that apply to treaty norms.

Hence, there can be little doubt that also acts of international organisations must respect norms of *jus cogens*. If not, the consequences specified above in section B.1 must apply (by analogy to Arts. 53 and 64 of the Vienna Convention).

Moreover, international organisations and their organs, as subjects of international law, must also respect general principles of law and relevant rules of general customary international law, unless they decide to contract out of these rules and are competent to do so under their attributed powers. Schermers notes, for example, that

> "[it] can be safely submitted that international organizations are bound by international customary law, either on the ground that all subjects of international law are so bound, or on the ground that the member States were bound by international customary law when they created the organization and thus may be presumed to have created the organization as being so bound, or on the ground that the rules of international customary law are at the same time general principles of law to which international organizations are bound".[968]

[968] Schermers, *The Legal Basis of International Organization Action*, in A HANDBOOK ON INTERNATIONAL ORGANIZATIONS (ED. RENE-JEAN DUPUY), 401-411, at 402 (1998).

Furthermore, it has been submitted that "an international organization is bound to all international treaties to which all its member States were parties when the organization was established" (pursuant to the adage *nemo plus juris transferre potest quam ipse habet*) and that "[w]hen only some of the member States were bound by particular treaties when the organization was established one should still uphold the presumption that the organization must respect the treaty obligation of those States. In order to be allowed to ignore the obligation of some of its members the organization must bring convincing arguments".[969]

Hence, depending on the law that is found to apply to them, acts of international organisations, when in conflict with another norm, may be found to be "illegal" under that other norm.

Also Arts. 41 and 58 would seem to apply by analogy to acts of international organisations. In other words, in case these acts constitute, in effect, an *inter se* deviation or suspension of an earlier multilateral treaty (say, a treaty to which not all members of the international organisation are a party) which is either (i) explicitly prohibited by that treaty or (ii) constitutes a breach of third parties (not members of the organisation), such *inter se* deviation or suspension should be regarded as "illegal" (not on the basis of Art. 41 or 58, but on the basis of international institutional law).

Take the example of a decision by a WTO organ, say, a DSB authorisation to suspend certain WTO obligations as between two WTO members. Such suspension, if implemented, may be inconsistent with the obligations as between these two members under a human rights treaty. The DSB authorisation could then, in effect, constitute an *inter* se suspension or modification of that human rights treaty. However, since human rights obligations are of an integral nature, such *inter se* suspension or modification could then be illegal on the ground that it affects also the rights of other parties to the human rights treaty. As a result, the DSB decision, to the extent it deviates from the human rights obligation in a way that is inconsistent with the conditions set out in Arts. 41 or 58, would then be illegal and should not be implemented.[970]

In contrast, if the DSB decision were to allow for an *inter se* suspension or modification of obligations that are *not* of an integral nature, say, obligations under a WIPO convention whose breach remains bilateral and does not affect third parties, the DSB decision would then constitute a legal *inter se* suspension or modification (not falling under any of the grounds of illegality set out in Art. 41 or 58). The DSB decision should then, as the later in time, prevail over the inconsistent WIPO treaty rule, of course, as between the parties to the DSB suspension only.[971]

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[969] Ibid., 403.

[970] On the limits of suspending human rights as a form of countermeasure, see also text above at note **693**.

[971] See *supra* text at note **442** and Chapter VII, section A.2.d (treaty norms in conflict with later acts of international organisations).

CHAPTER VII. RESOLVING CONFLICT IN THE APPLICABLE LAW

A. One of the two norms "prevails"

In the previous Chapter, normative conflict was resolved rather categorically by effectively bringing an end to one of the two norms, either through invalidity or termination (section B) or through illegality (section C). In most conflicts, however, that is, when faced with what we called conflicts in the applicable law, both norms will continue to exist and international law will only offer what one could call "priority rules". In that event, both norms survive the conflict and are considered as "legal". The conflict is then resolved in favour of one of the two rules because that rule has been, or can be, labelled as the more "prominent" or "relevant" one, or because it expresses the latest intention of the parties. The result of these "priority rules" is that only one of the two rules applies to the situation. The initial question is hence not, as under the previous Chapter, which of the two norms *survives*, but which of the two norms *applies*.

In terms of state responsibility under a conflict in the applicable law, obviously, only the rule that must finally be applied can be breached and result in responsibility. The discarded rule does not apply and can hence not be breached. However, although this rule is dis-applied in the particular case, it is not declared invalid nor is it in any way seen as an "illegal rule". It is simply a rule that must give way to another one in the circumstances. In other circumstances, the discarded rule may continue to apply.

The priority rules to resolve a conflict in the applicable law are determined by three basic principles:

(i) The Contractual freedom of states;[972]
(ii) *Pacta sunt servanda*[973];
(iii) *Pacta tertiis nec nocent nec prosunt*[974].

In most instances, the contractual freedom of states will be decisive. In other words, the latest expression of the states' intentions will count and prevail. This latest expression of intention may, for example, be found in explicit conflict clauses set out in a treaty provision or be activated as a result of the *lex posterior* principle.

Nonetheless, the *pacta tertiis* rule is as important. States may, by mutual consent, change their minds. But they may not do so in a way that affects the rights or obligations of other states. If they so affect third parties, the resulting norm will be non-opposable to third parties. Hence, the contractual freedom of states, as well as the *pacta sunt servanda* rule, are limited by the *pacta tertiis* principle.

1. Explicit conflict clauses

When states negotiate treaty norms they may not only express their intention as to what the content of the treaty norms should be, but also create rules as to what should happen in case of conflict with other norms. There are three types of explicit, treaty-based conflict clauses:

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[972] For an exception see Arts. 41 and 58 of the Vienna Convention.
[973] In respect of treaty norms: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" (Art. 26 Vienna Convention).
[974] In respect of treaty norms : "A treaty does not create either obligations or rights for a third State without its consent" (Art. 34 Vienna Convention).

(i) those relating to the past (i.e., relationship with pre-existing norms);

(ii) those relating to the future (i.e., relationship with norms that may be created subsequently); and

(iii) those regulating internal conflict of norms (i.e., conflict of norms within the same treaty).

We deal with these three types of clauses in turn and shall complete this section with a few words on the role of implicit references in treaties on what to do in the event of conflict.

The expression of state intent in conflict clauses must be accepted as valid and decisive by an international adjudicator unless

(i) it conflicts with *jus cogens* (say, a treaty on slave trading explicitly stating that it prevails over norms prohibiting the trade in slaves); or
(ii) it goes against Art. 41 of the Vienna Convention (say, a plurilateral WTO agreement on the reduction of tariffs in information technology products explicitly stating that the advantages accorded in it apply only *inter se* and that, in this respect, the *inter se* agreement prevails over MFN obligations in the WTO treaty); or
(iii) a later expression of state intent deviates from the conflict clause (say, if states X, Y and Z agree in treaty A that this treaty A prevails over another treaty B, nothing prevents X, Y and Z to subsequently change their minds and to agree in treaty C that it should, nonetheless, be treaty B that prevails over treaty A).

In cases under (ii), the conflict clause cannot be applied because of the *pacta tertiis* principle, under (iii) it cannot be invoked because of the contractual freedom of states.

These limitations on the effect of explicit conflict clauses are a reminder also of the hierarchy of conflict rules set out earlier. When faced with a conflict of norms, one must first examine whether there is normative conflict as a result of which either of the two norms ceases to exist or is illegal. Only if that is not the case, must resort be had to the rules set out in this Chapter.

a. Conflict clauses as to the past (pre-existing treaties)

i. The new treaty states that it prevails over pre-existing ones

An example of a treaty providing that it is to prevail over pre-existing norms is Art. 311.1 of UNCLOS:

> "This Convention shall prevail, as between States Parties, over the Geneva Convention on the Law of the Sea of 29 April 1958".

Another example is Art. 103 of NAFTA:

> "1. The Parties affirm their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and other agreements to which such Parties are party.
> 2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement".[975]

[975] See, in this respect, the final report of the Arbitration Panel Established Pursuant to Article 2008 of the North-American Free-Trade Agreement (NAFTA), in the matter of *Tariffs Applied by Canada to Certain U.-S.-Origin Agricultural Products*, 2 December 1996, where it was found that the use of the term "GATT" in the cross-

As the ILC Commentary to Art. 30 noted: "This form of clause presents no difficulty when all the parties to the earlier treaty are also parties to the treaty which seeks to override it. As is pointed out in the commentary to article 56 [now 59], the parties to the earlier treaty are always competent to abrogate it, whether in whole or in part, by concluding another treaty with that object. That being so, when they conclude a second treaty incompatible with the first, they are to be presumed to have intended to terminate the first treaty or to modify it to the extent of the incompatibility, unless there is evidence of a contrary intention. Accordingly, in these cases the inclusion of a clause in the second treaty expressly proclaiming its priority over the first does no more than confirm the absence of any contrary intention".[976]

To put it differently, a clause stating that in the event of conflict the new treaty prevails over an earlier treaty *as between the parties to the new treaty* is simply confirming the contractual freedom of states, as it is expressed in Art. 59 and Art. 30.3 of the Vienna Convention. However, whereas such conflict clause confirms the obvious as between the parties to the new treaty, it cannot impose the new treaty on third parties. As the ILC Commentary continues: "When, on the other hand, the parties to a treaty containing a clause purporting to override an earlier treaty do not include all the parties to the earlier one, the rule *pacta tertiis non nocent* automatically restricts the legal effect of the clause. The later treaty, clause or no clause, cannot deprive a State which is not a party thereto of its rights under the earlier treaty".[977]

This would be the case, for example, in the event, referred to earlier, a plurilateral WTO agreement on the reduction of tariffs in information technology products were to state that the advantages accorded in it apply only *inter se* and that, in this respect, the *inter se* agreement prevails over MFN obligations in the WTO treaty. Such *inter se* agreement cannot detract from the MFN rights of third parties under the WTO treaty. Equally, because of the *pacta tertiis* principle, Art. 311.1 of UNCLOS cannot lead to UNCLOS prevailing over the 1958 Convention on the Law of the Sea for states party *only to the 1958 Convention*. Art. 311.1 makes this explicit by stating that the conflict clause applies only "as between States Parties" to UNCLOS.

ii. The new treaty states that it is subject to pre-existing ones

A new treaty may also state that in the event of conflict with a pre-existing treaty, the earlier treaty prevails. This type of clause is mostly expressed, not in terms of "conflict" and "one treaty prevailing over the other", but in terms of the later treaty not derogating from, not being incompatible with, not affecting or being subject to, the earlier treaty.

In so far as the clause relates to treaties with third states, it only confirms the obvious. Because of the *pacta tertiis* principle, the new treaty is simply not capable of derogating from the rights or obligations of third states under pre-existing treaties. Such pre-existing treaties may be treaties either (i) between *one or some* of the state parties to the new treaty and third states, or (ii) between *all* of the state parties to the new treaty and third states.[978]

However, in so far as the clause gives priority to earlier treaties as between the parties to the new one, the clause deviates from the *lex posterior* principle set out in Arts. 59 and 30.3. This is why Art. 30.2 was needed, explicitly allowing for such conflict clause in favour of pre-existing treaties:

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reference provisions of the FTA and NAFTA had to be interpreted to mean GATT as it evolved into the WTO agreement.

[976] Rauschning, *Travaux* ..., 233, underlining added.

[977] Ibid., underlining added.

[978] An example of the latter would be a clause in a plurilateral WTO agreement stating that the plurilateral agreement does not derogate from rights and obligations of other WTO members under the WTO treaty.

> "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier … treaty, the provisions of that other treaty prevail".

Many examples of conflict clauses giving priority to earlier norms can be referred to. Art. 22.1 of the UN Convention on Biological Diversity provides, for example:

> "The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights or obligations would cause serious damage or threat to biological diversity".[979]

Art. 4 of the European Energy Charter Treaty, as amended, provides: "Nothing in this Treaty shall derogate as between particular Contracting Parties which are members of the WTO, from the provisions of the WTO Agreement as they are applied between those Contracting Parties".[980] Art. 40 of the North American Agreement on Environmental Cooperation states: "Nothing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international environmental agreements, including conservation agreements, to which such Parties are party". Art. 104 of NAFTA provides:

> "1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in: a) [CITES], b) [the Montreal Protocol on Substances that Deplete the Ozone Layer], c) [the Basel Convention], or d) the agreements set out in Annex 104.1, such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement".[981]

Also Art. 60 of the European Convention on Human Rights gives priority to prior treaties, but only to the extent that they add human rights or fundamental freedoms in favour of the individual: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any of the High Contracting Party or under any other agreement to which it is a Party".[982]

Finally, the preamble to the Cartagena Biosafety Protocol provides:

> "this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements".

This clause would make the Protocol subject to pre-existing agreements. Nonetheless, it is followed by an

> "[u]nderstanding that the above recital is not intended to subordinate this Protocol to other international agreements".

These two preambular paragraphs seem to neutralise each other. In the end, it is difficult to speak of any remaining conflict clause.

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[979] Done at Nairobi, 22 June 1992.
[980] Done at Lisbon, 17 December 1994, amended in 1998.
[981] Note that Art. 104 of NAFTA refers only to inconsistency with MEA trade *obligations*, not explicit rights granted therein that would allow parties to restrict trade. Nonetheless, it could be argued that to every "explicit right" to restrict trade corresponds a "trade obligation" to respect this right.
[982] See Evert Alkema, *The Enigmatic No-Pretext Clause: Article 60 of the European Convention on Human Rights*, in KLABBERS, J., and LEFEBER, R., ESSAYS IN THE LAW OF TREATIES 41-56 (1998).

b. Conflict clauses as to the future (subsequent treaties)

i. The treaty states that it will prevail over subsequent ones

The limited effect of clauses claiming priority over future treaties

In so far as a clause claims priority over future treaties that would affect third party rights (say, *inter se* agreements inconsistent with Art. 41/58), it only confirms general rules (*pacta tertiis*). However, in the few cases where a clause claiming priority over future treaties is found, it is perceived as wider in scope in that it covers any future treaty, not just future treaties affecting third parties. To that extent, the clause contradicts the contractual freedom of states pursuant to which a later treaty normally prevails over an earlier one, at least as between the parties to both treaties (Art. 30.3). Unlike the situation where a later treaty states that it is subject to an earlier one (in deviation from Art. 30.3, but allowed for in Art. 30.2), a conflict clause proclaiming its priority over future treaties *cannot* limit the contractual freedom of states. States can always change their minds in the future, by mutual consent (subject only to *jus cogens* and Arts. 41/58). Art. 30.2 does *not* sanction conflict clauses stating that the treaty prevails over future treaties. Art. 30.2 only excludes from the application of Arts. 30.3 and 4 those cases where the treaty says that it is subject to other treaties. As the ILC Commentary to Art. 30 noted:

> "Article 103 [of the UN Charter] apart, clauses in treaties which purport to give priority over another treaty, whether earlier or later in date, do not by themselves appear to alter the operation of the general rules of priority set out in paragraphs 3 and 4 of the article".[983]

Hence, conflict clauses may well provide that the treaty prevails over future treaties, but nothing prevents the parties to the first treaty to change their minds and to decide in the later treaty that, notwithstanding the earlier conflict clause, the later treaty must prevail. Crucially, even if this later treaty does not include an explicit conflict clause that dis-activates the first conflict clause, in the event of conflict between the two treaties, the later treaty, as between the parties to it, would still prevail pursuant to Art. 30.3. Pursuant to Art. 30.4(a), this later treaty would then so prevail *even if it were concluded only as between some of the parties to the first treaty* (of course, as long as the conditions in Art. 41/58 are met).

Take the example of an ABCD treaty X stating that it prevails over all future treaties as between ABCD. According to one author, DSU Arts. 3.2 and 19.2 constitute such a conflict clause as between WTO members v-à-v post-1994 non-WTO treaties.[984] A later treaty Y is subsequently concluded as between ABCD and conflicts with the earlier treaty X. Treaty Y will then, notwithstanding the conflict clause in treaty X, prevail *unless treaty Y explicitly states that it is subject to treaty X* (only in that case does Art. 30.2 apply and dis-activate the *lex posterior* principle). Treaty Y will so prevail even if it does not explicitly reverse the conflict clause in treaty X. The mere incompatibility with the earlier treaty X activates Art. 30.3 and calls for preference to the later treaty Y. Even if A and B subsequent to treaty X between ABCD conclude an *inter se* agreement deviating from treaty X, this *inter se* agreement shall, as between A and B, prevail, once again, notwithstanding the conflict clause in treaty X.[985] The same reasoning should apply also in respect of DSU Arts. 3.2 and 19.2 in case they were to constitute a general conflict clause in favour of the WTO treaty (*quod non*[986]). They would be subject to any subsequent change of mind, both as between all WTO members and as between some WTO members only in *inter se* agreements. Hence, their effect would be extremely limited in terms of ensuring the priority of the WTO treaty.

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[983] Rauschning, *Travaux …*, 233
[984] Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 2001 JWT (forthcoming).
[985] Of course, as long as the *inter se* agreement between A and B is legal under Art. 41/58.
[986] See section A.1.c.vi below.

In sum, as Karl rightly remarked:

> "Clauses which claim priority over future treaty engagements are futile: They cannot be invoked against third States; they do not render later conflicting treaties void; and they can always be overcome by the common will of the parties".[987]

The exceptional case of Art. 103 of the UN Charter

The most prominent example of a conflict clause claiming priority over future treaties is Article 103 of the UN Charter. This clause represents a special case and is, indeed, far from "futile".[988] This provision states:

> "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligation under any other international agreement, their obligations under the present Charter shall prevail".

The term "any other international agreement" covers both past and future agreements. Hence, a conflict between a UN Charter obligation and a future agreement must be decided in favour of the UN Charter obligation. Art. 30.1 makes an explicit exception for Art. 103 of the UN Charter, thereby making Art. 103 a special case among the conflict rules claiming priority towards the future:

> "Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs" (underlining added).

Four remarks are warranted which put the importance of Art. 103 in perspective.

Firstly, even if Art. 103 represents a special case, it must be recalled that the contractual freedom of UN members does not prevent them from amending Art. 103, unless Art. 103 were to be seen as *jus cogens*. Thus, also Art. 103 is limited and subject to the contractual freedom of UN members. UN charter obligations prevail over other agreements, not because they represent an inherently "higher law", but because UN members have agreed to this priority rule in the UN Charter itself.

Secondly, although there has been a lot of discussion on this matter[989], Art. 103 is not binding on states that are not UN members[990], except for that part of UN Charter obligations that are part of *jus cogens*.[991] Non-UN members (such as Switzerland) have not even signed up to UN Charter

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[987] Karl, *Conflicts …*, 471.

[988] Ibid. Note, in this respect, also Art. 20.1 of the 1919 Covenant of the League of Nations: "The Members of the League … solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof".

[989] For an overview, see Czaplinski and Danilenko, *Conflicts …*, 15.

[990] In support see, for example, Degan, *Sources …*, 428 and P. Cahier, *Le Problème des Effets des Traités à l'Egard des Etats Tiers*, 143 RECUIL DES COURS 718 (1974). *Contra* : K. Dahl, *The Application of Successive Treaties Dealing with the Same Subject-Matter*, 17 Indian Yearbook for World Affairs 305 (1974). Some authors referred to the *travaux préparatoires* of the UN Charter which allegedly indicate that Art. 103 was intended to be applicable in relation to non-UN members (see, for example, Jenks, *Conflict …*, 438). However, this intention would not as such seem enough to trump the *pacta tertiis* rule. It is not enough for A and B to agree in an AB treaty that the treaty must apply also to C for that to be the case. The situation may be different in respect of the UN Charter in so far as it is part of *jus cogens*. But then the priority of UN Charter obligations does not result from the UN Charter as such but from their *jus cogens* character.

[991] UN Charter obligations part of *jus cogens* then prevail over all other obligations, even those of non-UN members, but this is the result of their *jus cogens* character, not of Art. 103.

obligations, how could these obligations then prevail over their other obligations?[992] Even if certain provisions of the UN Charter can be said to be part of customary law binding also on non-UN members, as we saw earlier, custom does not have a legal status that is higher than other obligations. Hence, only if Art. 103 could itself be seen as custom would non-UN members be bound under customary law to give preference to UN Charter obligations *as expressed in custom* over and above their other obligations.[993] However, the higher standing of UN Charter obligations would then not derive from Art. 103 but from customary law.

Thirdly, Art. 103 is phrased in terms of a priority rule. In the event of conflict, UN Charter obligations "prevail" over other obligations. The norms setting out these other obligations do not, because of Art. 103 as such, become "invalid".[994] Art. 103 does not speak of invalidity, nor do Vienna Convention rules on invalidity of treaties mention Art. 103 as a ground of invalidity. Invalidity because of conflict with UN Charter obligations may occur. But then it would be the result of these Charter obligations being part of *jus* cogens (not of Art. 103 as such). [995]

Fourthly, the obligations that prevail under Art. 103 are not just any UN obligations. Only obligations *under the UN Charter* are cloaked with this higher legal standing. Not, for example, obligations under any agreement or act concluded *in the context of a UN body* (which would then prevail, for example, over WTO rules, the WTO not being a UN body).

Within these limitations in mind, though, it must be stressed that Art. 103 does, indeed, go a step further than other conflict clauses claiming priority over future treaties. The breath of Art. 103 should not be under-estimated either. In this respect, four remarks are called for.

Firstly, whereas other conflict clauses claiming priority for the future will be overruled by any subsequent contradictory treaty as between the parties to this later treaty (unless this later treaty explicitly states that it is subject to the earlier treaty)[996], an agreement concluded by some or even all UN members, *without amending Art. 103*, would not prevail over the UN Charter. This is the case because Art. 30.1 explicitly dis-applies the *lex posterior* rule (in Arts. 30.3 and 4) in respect of Art. 103 (not so in respect of other conflict clauses claiming priority over future treaties).[997]

Secondly, the *Lockerbie* cases confirmed that also Security Council resolutions (not just UN Charter provisions themselves) prevail over all other (past and future) international agreements, *in casu* the 1971 Montreal Convention. In its Order on provisional measures, the ICJ found as follows:

> "Whereas both Libya and the United States, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court … considers that prima facie this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect

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[992] At the Vienna Conference on the law of treaties, Switzerland opposed the formula of Art. 30.1, referring to Art. 103 of the UN Charter, on the ground that Switzerland being a non-UN member could not recognize the priority of UN Charter obligations (Vienna Conference, *Official Records*, 1st Session, 31st Meeting, 165 (1986)).
[993] This would mean, for practical purposes, that UN Charter obligations part of customary law are of a *jus cogens* character, i.e., prevail over future law and cannot be derogated from by future law, unless that future law is itself *jus cogens*.
[994] In support: Czaplinski and Danilenko, *Conflicts …*, 16. *Contra*: Karl, *Conflict …*, 470.
[995] Arts. 53 and 64 of the Vienna Convention would then apply (see Chapter VI, section B.1).
[996] See text at note 983 above.
[997] The ILC in its Commentary to Art. 30.1 explained this reference to Art. 103 as follows: "the position of the Charter of the United Nations in modern international law is of such importance, and the States Members of the United Nations constitute so large a part of the international community, that it appeared to the Commission to be essential to give Article 103 of the Charter special attention and a special place in the present article" (Rauschning, *Travaux …*, 232).

> prevail over their obligations under any other international agreement, including the Montreal Convention".[998]

Or as Sir Hardie (United Kingdom) noted at the public sitting of the ICJ: "both the sense and the literal terms of Article 103 apply its effect to binding decisions of the Security Council as well as to the provisions of the Charter itself. The syllogism is simple: Member States are under a legal obligation to 'accept and carry out' the binding decisions of the Council; that obligation is an 'obligation under the Charter'; therefore that obligation prevails over 'Member States obligations under any other international agreement'".[999]

Thirdly, Art. 103 only gives priority to UN Charter obligations in the event of conflict with "obligations under any other international agreement". Should this mean that later acts of international organisations (other than those giving rise to *UN Charter* obligations) can deviate from Charter obligations? Not so, it would seem, since "obligations under any other international agreement" could be interpreted broadly so as to include also obligations arising under an act of an international organisation, in particular one like the WTO not part of the UN family (say, a DSB decision to suspend concessions). Such obligations can, indeed, be said to arise, albeit indirectly only, from an "international agreement", i.e., the agreement in which the states in question granted the authority to the international organisation to take the act. More problematic though is whether UN Charter obligations prevails also over *customary* international law. Not so, it would seem, on the basis of Art. 103 which refers only to ""obligations under any other international agreement".[1000]

Fourthly, Art. 103 only addresses "obligations" under both the UN Charter and other agreements. It does not explicitly refer to rights.[1001] As noted earlier, however, conflict can arise also as between an obligation and an explicit right.[1002] Hence, Art. 103 would have been better drafted if it had referred also to rights. The drafting of Art. 103 caused discussion also in the *Lockerbie* cases. Libya suggested that Art. 103, which speaks of obligations, may not extend as well to rights under another treaty or under general international law.[1003] In other words, in the eyes of Libya, the UN Charter prevails over other *obligations*, not over other *explicit rights*. In response, the United Kingdom (Mr. Crook) stated thus:

> "The obligation to comply with Security Council decisions applies fully both to decisions affecting the *rights* and those affecting the *obligations* of States. The relevant provisions of the Charter are phrased broadly and are intended to be broad in effect. They must be in order to assure the effectiveness of the régime of Chapter VII and in interpreting this aspect of the Charter this Court has not recognized any distinction between 'rights' and 'obligations' … Moreover, this suggested limitation creates serious difficulties. Suppose a bilateral treaty gives the nationals of each party the right to invest in the territory of the other. Surely the Charter gives the Security Council the power in a Chapter VII situation to require that one party prohibit investments by its nationals in the territory of the other, notwithstanding these treaty provisions".[1004]

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[998] ICJ Reports 1992, para. 42.

[999] UK statement (Sir Hardie) at the public sitting of the ICJ on Tuesday, 14 October 1997, 10 am, referring to the UK submission, at para. 5.39, posted on the internet at http://www.icj-cij.org/icjwww/idocket.

[1000] Once again, UN Charter obligations may then still prevail over custom but then because of their *jus cogens* character, not because of Art. 103.

[1001] See, in contrast, Art. 30.1 of the Vienna Convention which was, following a proposal by Israel extended so as to cover both obligations *and rights*. See *supra* text at note **508**.

[1002] See Chapter IV, section B.2.

[1003] UK statement (Mr. Crook) at the public sitting of the ICJ on Wednesday 15 October 1997, 10 a.m., para. 3.35, posted on the internet at "http://www.icj-cij.org/icjwww/idocket".

[1004] Ibid. Note that the United Kingdom never argued that a UN Charter obligation *versus* an explicit (investment) right does *not* constitute conflict on the ground, for example, that the right could simply not be exercised so as to comply with the obligation. The United Kingdom implicitly recognised that there was conflict, explaining why Art. 103 should apply as well to this type of conflict, even though strictly speaking it

The example referred to by Mr. Crook is a clear case of conflict between an *obligation* and an *explicit right* from the point of view of the state victim of the boycott, namely: a UN Security Council obligation to respect the boycott imposed on it by other states *versus* a bilateral treaty granting it an explicit right to invest in another state. Nonetheless, when viewed from the standpoint of *two parties*, one can always point at *two obligations*, even if the conflict, in the eyes of the party facing it, is one of an obligation *versus* an explicit right. The explicit right corresponds then to an obligation on the other party to respect that right. Thus, looked at from this angle, there will always be opposing *obligations* involved. Art. 103 itself seems to allow for an examination of conflict looked at from this angle of *several parties* (not only from the viewpoint of one UN member, facing conflict, i.e., the way we have addressed conflict above). Art. 103 refers, indeed, to "conflict between the obligations of the *members* of the United Nations under the present Charter and *their* obligations under any other international agreement" (emphasis added). Thus, as the UK argued, the priority given to the UN Charter should apply in respect of both obligations and *explicit rights*. Moreover, the priority UN Charter provisions benefit from should, in turn, cover UN Charter obligations as well as UN Charter *explicit rights*, at least in so far as these explicit rights correspond to obligations on behalf of other UN members.

ii. The treaty states that it will be subject to subsequent ones

For a treaty to provide that it must give way to subsequent treaties as between its parties amounts to confirming the obvious. By mutual consent, states can change their mind and as between parties to two treaties, the latest one prevails (Art. 30.3). Still, it may be useful for a treaty to clarify that it may be supplemented by other more specific treaties, in particular if these other treaties are *inter se* agreements. Arts. 41 and 30.4(b) allow for such *inter se* agreements to change the legal relationship between its parties if certain conditions are met and this even without any specific reference in the treaty to *inter se* agreements. But it does not harm to confirm or specify this possibility in the treaty itself as well as the conditions that *inter se* agreements must meet. A good example is Art. 311.3 of UNCLOS:

> "Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention".

Another example of a conflict clause giving priority to future treaties is Art. 73:2 of the 1963 Vienna Convention on Consular Relations which recognises the right to *supplement* its provisions by bilateral agreements.[1005] One could refer also to Art. 60 of the European Convention on Human Rights which makes it explicit that it must not be "construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured … under any other agreement to which it is a Party", including future agreements. Much like Art. 60, Art. 19.8 of the Statute of the ILO and Art. 20 of the Berne Convention for the Protection of Literary and Artistic Works allow for future treaties to prevail but only in case they are more favourable to the rightholders (respectively, workers and

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could be said not to apply on the ground that Art. 103 does not refer to "rights". Libya's argument implied, *a fortiori*, that an explicit right may constitute a conflict with an obligation and that it should not always be the obligation that prevails: In Libya's opinion, its explicit right in the Montreal Convention should even prevail over UN Charter obligations. The United States as well recognised the existence of conflict between a Montreal Convention right and a UN Security Council obligation. As Prof. Schachter noted: "it is more precisely and correctly a collision between rights that the State may have under treaties and the obligations imposed by the mandatory measures of the Council" (Public sitting held on Wednesday 15 October 1997, at 10 am, para. 4.4, referring to a statement by Judge Shahabuddeen).

[1005] This is the example referred to in the ILC Commentary to Art. 30.2 (Rauschning, *Travaux* ..., 232).

copyright owners). Finally, Art. 52 of the UN Charter as well allows for the conclusion of future regional arrangements.[1006]

Although such conflict clauses confirm general rules (in particular, the *lex posterior* principle, but also the principle of *lex specialis*), Art. 30.2 nonetheless explicitly confirms their validity:

> "When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, a … later treaty, the provisions of that other treaty prevail".

c. Conflict clauses in the WTO treaty on the relationship between WTO law and other norms of international law

The WTO treaty itself contains very little in terms of how it relates to other rules of international law. This is surprising, given the vast potential for conflict.[1007] It is probably explained because of (i) a lack of preoccupation with (and, for many, expertise in) public international law on behalf of the negotiators of the WTO treaty (recall that trade negotiators are often employed by a ministry of trade or the economy, de-linked from that of foreign affairs); and (ii) political dead-lock for those rules of international law WTO negotiators did have in mind (in particular, MEAs). Unlike, for example, UNCLOS, the WTO treaty does *not* include a general conflict clause setting out its relationship with pre-existing international law. The WTO treaty does not explicitly provide that it is to prevail over pre-existing law, nor does it state that it is without derogation from pre-existing law.[1008] The WTO treaty does not include a general conflict clause in respect of future treaties either.

WTO members could, of course, always clarify or change the relationship between WTO rules and other rules of international law. This could be done, for example, by providing authoritative interpretations of WTO rules, by granting certain waivers or by amending WTO rules (respectively, under Arts. IX:2, IX:3 or X of the Marrakesh Agreement). WTO organs, such as the Ministerial Council or General Council, on the advice of, for example, the Committee on Trade and Development, could also adopt certain guidelines. Several WTO rules explicitly allow for WTO organs to define more clearly the relationship between the WTO and other international organisations. Art. V.1 of the Marrakesh Agreement on "Relations with Other Organizations" provides:

> "The General Council shall make appropriate arrangements for effective cooperation with other intergovernmental organizations that have responsibilities related to those of the WTO".

GATS Art. XXVI on "Relationship with Other International Organizations" provides, in turn:

> "The General Council shall make appropriate arrangements for consultations and cooperation with the United Nations and its specialized agencies as well as with other intergovernmental organizations concerned with services".[1009]

[1006] Art. 52 provides: "Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations".

[1007] See Chapter I.D above.

[1008] Note, in contrast, the very elaborate Article 311 of UNCLOS on "Relation to Other Conventions and International Agreements". See, in this respect, Emmanuel Roucounas, *Engagements Parallèles et Contradictoires*, 1987-VI RECUEIL DES COURS 222.

[1009] From the other side of the spectrum, recall the powers of the UN Economic and Social Council to "co-ordinate the activities of the specialised agencies through consultation with and recommendations to such agencies and through recommendations to the General Assembly and to the Members of the United Nations" (Art. 63.2 of the UN Charter, see Chapter V, section A above). Note, however, that the WTO is not part of the UN family.

Recall also the *Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking*, part of the 1994 Final Act, discussed earlier.[1010]

Hence, further conflict rules may derive from WTO members as states (taking the form of treaty language) or from WTO organs acting as international organisations. In the former case, the conflict rule is likely to become a full part of WTO covered agreements. In the latter case, it would not, although it would clearly be part of WTO law in the wider sense as well as part of the applicable law before a WTO panel.[1011]

As the WTO treaty stands today, there are, however, relatively limited exceptions where the WTO treaty does provide some rules on how to resolve conflict between the WTO treaty and certain other norms of international law.

i. GATT 1947 and related instruments

With reference to paragraph 1 of GATT 1994 – which sums up the legal instruments that are to be part of GATT 1994 -- it can be presumed that all pre-1994 GATT related instruments that were *not* incorporated into the WTO treaty (in particular, into GATT 1994) have been terminated or at least superseded by the WTO treaty.

In *EC – Poultry*, the Appellate Body found that the so-called Oilseeds Agreement concluded bilaterally between the EC and Brazil in the framework of GATT Article XXVIII re-negotiations (as part of the resolution of a previous 1990 oilseeds dispute) was *not* a "covered agreement" subject to the DSU, nor part of the multilateral obligations accepted by Brazil and the EC pursuant to the WTO Agreement. As a result, the Appellate Body concluded that "it is Schedule LXXX [the relevant 1995 EC schedule of concessions attached to the WTO Agreement into which only parts of the Oilseeds Agreement had been incorporated], rather than the Oilseeds Agreement, which forms the legal basis for this dispute".[1012] The Appellate Body added that, in its view, "it is not necessary to have recourse to either Article 59.1 [termination of a treaty by conclusion of a later treaty] or Article 30.3 [application of successive treaties] of the *Vienna Convention*, because the text of the *WTO Agreement* and the legal arrangements governing the transition from the GATT 1947 to the WTO resolve the issue of the relationship between Schedule LXXX and the Oilseeds Agreement in this case".[1013]

ii. The WIPO conventions incorporated into the TRIPS Agreement

Art. 2.2 of the TRIPS Agreement provides that

> « [n]othing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits".

The Arbitrators in *EC – Bananas*, assessing the request by Ecuador to suspend obligations v-à-v the EC under the TRIPS Agreement, noted the following in respect of Art. 2.2:

[1010] See Chapter V, section A above.

[1011] Here again, we have a compelling example of why the applicable law before a WTO panel cannot be limited to WTO covered agreements (an argument we develop below in Chapter VII, section C). If this were so, a WTO panel would not be able to take account of conflict rules provided for by WTO organs *outside WTO covered agreements*, such as those set out by the WTO Ministerial Conference in a waiver or other *sui generis* decisions. Such approach would be unacceptable. The Appellate Body itself has realised this when reverting to the *Declaration on the Relationship of the WTO with the IMF*, a Ministerial Declaration not part of WTO covered agreements, in *Argentina – Footwear*. The same was done in *EC – Bananas* where a waiver was taken into account as a defence.

[1012] Appellate Body report on *EC – Poultry*, para. 81.

[1013] Ibid., para. 81.

> "This provision can be understood to refer to the obligations that the contracting parties of the Paris, Berne and Rome Conventions and the IPIC Treaty, who are also WTO Members, have between themselves under these four treaties. This would mean that, by virtue of the conclusion of the WTO Agreement, e.g. Berne Union members cannot derogate from existing obligations between each other under the Berne Convention. For example, the fact that Article 9.1 of the TRIPS Agreement incorporates into that Agreement Articles 1-21 of the Berne Convention with the exception of Article 6*bis* does not mean that Berne Union members would henceforth be exonerated from this obligation to guarantee moral rights under the Berne Convention".[1014]

It must be stressed, however, that the priority rule in Art. 2.2 only extends to Parts I to IV of the TRIPS Agreements. Any rights or obligations that WTO members may obtain under Parts V to VII do not necessarily have to give way to WIPO conventions, at least not pursuant to Art. 2.2.[1015] Importantly, Part V sets out the dispute settlement provisions that apply to the TRIPS Agreement. Hence, any obligations or suspensions of rights that a WTO member sees imposed on it as a result of WTO dispute settlement, including as a result of DSB authorisations to suspend TRIPS obligations because of non-compliance with dispute settlement recommendations under GATT or GATS, may prevail over WIPO conventions. Indeed, as between state parties to the relevant WIPO convention that are also WTO members, the DSB authorisation, constituting an act of a WTO organ, should then normally prevail over the earlier WIPO convention as the *lex posterior*.[1016] TRIPS Art. 2.2 does not prevent this from happening. Recall that there is no inherent hierarchy between the sources of international law, *in casu*, between a treaty norm and an act of an international organisation. As a result, the latest expression of state intent, *in casu*, the DSB authorisation, must prevail. For treaty norms this is confirmed in Art. 30. For acts of international organisations, it must be seen as part of customary international law.

That Art. 2.2 does not prevent the suspension of TRIPS obligations, even if such suspension constitutes a suspension of WIPO obligations also, was confirmed by the same Arbitrators in *EC – Bananas*:

> "nothing in Article 64 or other Articles of the TRIPS Agreement provides specifically that Article 22 of the DSU does not apply to the TRIPS Agreement … Provided that Ecuador's request for the suspension of certain TRIPS obligations is consistent with all the requirements of Article 22 of the DSU, including paragraphs 3 and 4 thereof, neither Article 2.2 read in context with Article 64 of the TRIPS Agreement, nor any other provision of the WTO agreements indicate that an authorization by the DSB of that request would in theory be prohibited under WTO law".[1017]

iii. Consultation and dispute settlement provisions in the area of health

Art. 11.3 of the SPS Agreement provides that

> « [n]othing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute

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[1014] Report of the Arbitrators under DSU Art. 22.6 (Ecuador's request for suspension), para. 149. See also Art. 20 of the Bern Convention, referred to above in section A.1.b.ii.
[1015] Ibid., para. 150.
[1016] See the discussion above in Chapter VI, section C.4 and Chapter III, section F.2.ii and below in section 2.d.
[1017] Ibid., paras. 150-151. The Arbitrators claimed not to have jurisdiction "to pass judgment on whether Ecuador, by suspending, once authorized by the DSB, certain TRIPS obligations, would act inconsistently with its international obligations arising from treaties other than the agreements covered by the WTO (e.g. the Paris, Berne and Rome Conventions which Ecuador has ratified)" (ibid., para. 152). See below Chapter VIII, section B.

> settlement mechanisms of other international organizations or established under any international agreement ».

One author submitted that this SPS provision should extend to other rules of international law *not related to consultations and dispute settlement*.[1018] However, although the word "including" is used, it seems to refer to a non-exhaustive list of *consultation and dispute settlement* provisions in other international agreements ("including the right to resort to the good offices or dispute settlement mechanisms"), not to any other type of provisions. This is confirmed by the context of Art. 11.2. Art. 11 is entitled "Consultations and Dispute Settlement". It would hence be surprising to find that WTO members had subjected the SPS agreement to all other international agreements in this article dealing only with consultations and dispute settlement.

iv. IMF rules

In respect of the relationship between the WTO treaty and IMF rules, the *Declaration on the Relationship of the WTO with the IMF*[1019] states, in essence, that GATT 1994 and other Annex 1A agreements prevail over IMF rules unless otherwise provided for in these agreements:

> "unless otherwise provided for in the Final Act, the relationship of the WTO with the International Monetary Fund, with regard to the areas covered by the Multilateral Trade Agreements in Annex 1A of the WTO Agreement, will be based on the provisions that have governed the relationship of the CONTRACTING PARTIES to the GATT 1947 with the International Monetary Fund".

In *Argentina – Footwear*, the Appellate Body examined whether a 3 per cent statistical tax found by the panel to be in violation of GATT Article VIII could be excused by means of an allegedly conflicting obligation imposed on Argentina in a Memorandum of Understanding between Argentina and the IMF. In this IMF Memorandum it was set out that the fiscal measures to be adopted by Argentina include "increases in import duties, including a temporary 3 per cent surcharge on imports". Referring to the *Declaration on the Relationship of the WTO with the IMF*, the Appellate Body found, however, that since no IMF-related exceptions under GATT Article VIII are to be found in GATT itself, independent IMF rules, such as the IMF Memorandum, cannot justify Argentina's violation of GATT Article VIII.[1020]

Mention should be made also of the 1996 Agreement between the IMF and the WTO as well as the *Declaration on the Contribution of the WTO to Achieving Greater Coherence in Global Economic Policymaking*. Both were discussed earlier.[1021] However, none of these instruments set out explicit conflict clauses.

v. UN Charter obligations for the maintenance of international peace and security

GATT Art. XXI(c) (entitled "Security Exceptions") sets out an explicit conflict clause giving preference to certain obligations of WTO members under the UN Charter over and above the WTO treaty. It provides as follows:

> "Nothing in this Agreement shall be construed … to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security".

[1018] MARC IYNEDJIAN, L'ACCORD DE L'ORGANISATION MONDIALE DU COMMERCE SUR L'APPLICATION DES MESURES SANITAIRES ET PHYTOSANITAIRES, UNE ANALYSE JURIDIQUE, Thèse de doctorat, University of Lausanne, 351-352 (2000).
[1019] *WTO Legal Texts*, 447.
[1020] Appellate Body report on *Argentina – Footwear*, paras. 69-74.
[1021] See Chapter V, section A.

GATS Art. XIV*bis*(c) sets out the exact same conflict clause in respect of GATS. These GATT/GATS clauses are a limited mirror image of Art. 103 of the UN Charter. They are limited, indeed, to UN Charter obligations "for the maintenance of international peace and security". In practice, they make clear that whenever UN members are under an obligation to impose economic sanctions on another state (pursuant to a UN Security Council resolution), their WTO trade obligations v-à-v that state should not prevent them from doing so.

GATT Art. XXI(c) and GATS Art. XIV*bis*(c), as important as they are in terms of linking WTO law to UN law, only confirm a pre-existing conflict rule that already applied to WTO members that are also UN members. Indeed, even without these WTO clauses, WTO members should have given preference to their UN Charter obligations over and above those in the WTO treaty and this on the basis of Art. 103 of the UN Charter. GATT Art. XXI(c) and GATS Art. XIV*bis*(c) merely confirm part of this rule. In this respect as well, it is crucial that also before a WTO panel all relevant international law, including UN Charter law, must apply (even if the jurisdiction of WTO panels is limited to claims under WTO covered agreements).[1022]

vi. Multilateral Environmental Agreements

As far as the relationship between the WTO treaty and MEAs is concerned, reference can be made to the *Declaration on Trade and Environment*, part of the 1994 Final Act.[1023] However, rather than setting out conflict rules itself, the merit of this declaration is that it establishes the WTO Committee on Trade and Environment (CTE). One of the major tasks of this Committee is to examine the relationship between the WTO treaty and MEAs. This mandate has, so far, not resulted in any explicit conflict rules. Importantly, the CTE did, however, endorse "multilateral solutions based on international cooperation and consensus as the best and most effective way for governments to tackle environmental problems of a transboundary or global nature" and expressed a preference for trade disputes that arise in connection with a multilateral environmental agreement to be resolved through the mechanisms established by that agreement.[1024]

vii. DSU Arts. 3.2 and 19.2 do <u>not</u> constitute a conflict clause

It has been submitted that DSU Art. 3.2, as confirmed in DSU Art. 19.2, is another, more general, conflict clause addressing the relationship between WTO law and other norms of international law.[1025] The last sentence of Art. 3.2 provides:

> "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

Article 19.2 states:

> "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements".

[1022] See Chapter VIII.
[1023] *WTO Legal Texts*, 469.
[1024] WTO doc. WT/CTE/1, para. 171 (1996). For an interesting, though inconclusive, evaluation of the relationship between the WTO treaty and earlier MEAs, see Housman and Goldberg, *Legal Principles in Resolving Conflicts Between Multilateral Agreements and the GATT/WTO*, in THE USE OF TRADE MEASURES IN SELECT MULTILATERAL ENVIRONMENTAL AGREEMENTS (ED. HOUSMAN et. Al.), 297 (1995).
[1025] See Lorand Bartels, *Applicable Law in WTO Dispute Settlement Proceedings*, 2001 JWT (forthcoming), hereafter "Bartels, *Applicable Law ...*".

Should these provisions be read as saying that WTO panels, the Appellate Body as well as the DSB cannot ever add to or diminish anything from the rights and obligations explicitly set out in WTO covered agreements? In other words, should these provisions be interpreted to mean that no other law, be it pre- or post-1994, can ever influence WTO covered agreements and that, in the event of conflict between WTO covered agreements and another rule of international law, the WTO rule must *always* prevail?

In my view, they cannot. DSU Arts. 3.2 and 19.2 do not address the *jurisdiction* of panels nor the *applicable law* before them. Nor do they proclaim that WTO covered agreement must necessarily and always prevail over all past and future law. They deal rather with the inherent limits of a WTO panel as a judicial organ in *interpreting* WTO covered agreements.[1026] In the exercise of this judicial function of interpretation, WTO panels may clarify and interpret what WTO covered agreements mean, but they may not "add to or diminish the rights and obligations provided in the covered agreements". The immediate context of this passage in Art. 3.2 confirms our reading. The sentence follows directly the instruction for panels to clarify WTO covered agreements « in accordance with customary rules of interpretation of public international law ». This is a clear indication that also the last sentence of Art. 3.2 deals with the interpretative function of panels, not with the applicable law before a panel, nor with conflict of norms.

To put it differently, as judicial organs WTO panels may not create new rights and obligations, they must apply those that WTO members agreed to. This limitation on the interpretative function of WTO panels was made *ex abundante cautela*. Even without it, it would have applied to WTO panels as an inherent limitation of the judicial function prescribed in general international law. As the ICJ noted in the *Interpretation of Peace Treaties* Advisory Opinion: "to adopt an interpretation which ran counter to the clear meaning of the terms would not be to interpret but to revise the treaty".[1027]

As for DSU Arts. 3.2 and 19.2 being a conflict clause automatically deciding all conflicts of norms in favour of WTO rules, there is a major difference between stating what the *judiciary* can do with the law and stating what the *legislature* (i.e., WTO *members*) have done, or can do with, the law. DSU Arts. 3.2 and 19.2 direct that the WTO *judiciary*, like any other judiciary, cannot "change" the WTO treaty at the time they are asked to apply that treaty. A conflict clause, in contrast, would

(1) tell us that WTO *members*, when negotiating the treaty, did not want *any other* existing rules of international law to prevail over the WTO treaty, as well as
(2) direct WTO *members* that in their future dealings they *cannot* change or overrule the rights and obligations set out in the WTO treaty (accept pursuant to the amendment and other provisions in the treaty itself).

To interpret DSU Arts. 3.2 and 19.1 in this way would be erroneous. To make an analogy with the ICJ, the fact that the ICJ Statute prescribed in 1945 that the Court must "decide in accordance with international law" -- a phrase interpreted in the *South West Africa cases* to mean that the ICJ's "duty is to apply the law as it finds it, not to make it"[1028] – can hardly be interpreted to mean that the law the ICJ may look at is limited to that of 1945 nor can it mean that international law as it existed in 1945 must always and necessarily prevail over all subsequent rules of international law.

The drafters of the WTO treaty *could have* inserted a conflict clause stating that the WTO treaty is to prevail over *all past and future* international law, similar to the one in Article 103 of the UN Charter.[1029] Although such would have been with limited effect only[1030], the contractual freedom of

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[1026] On the crucial distinction between jurisdiction, applicable law and interpretation, see below Chapter VIII, section C. See also above Chapter V, section C.5.b.
[1027] ICJ Reports 1950, 229. On the inherent limits of treaty interpretation see above Chapter V, section C.1.
[1028] ICJ Reports 1966, 48.
[1029] See also, but in a much more limited way, Article 311.6 of UNCLOS. NAFTA, as well, includes explicit conflict clauses in its Arts. 103 and 104.

WTO members would have allowed them to do so (within the limits of *jus cogens* and the principle of *pacta tertiis*). But had drafters wanted the WTO treaty to play this role of a second UN Charter, prevailing over all other law, would they not have explicitly said so? Would they, for example, not have put a non-derogation clause in the WTO Agreement itself, instead of twice inserting a sentence at the end of a provision on the function of WTO panels in the, after all, technical DSU?

Finally, even if DSU Arts. 3.2 and 19.2 were to amount to a conflict clause claiming priority for the WTO treaty over all other norms of international law (*quod non*), when it comes to future treaties in conflict with the WTO treaty, this conflict clause would have little effect. As noted earlier[1031], the contractual freedom of WTO members allows them to deviate from the WTO treaty, *including the alleged conflict clause*. All WTO members could conclude a new treaty and even without explicitly amending DSU Arts. 3.2 and 19.2 such new treaty would then, as the later in time, prevail over the old WTO treaty, notwithstanding the conflict clause. This would occur pursuant to Art. 30.3 of the Vienna Convention, unless the later treaty is explicitly made subject to the earlier WTO treaty (so that Art. 30.2 applies). As pointed out before, Art. 30 gives effect to only one conflict clause claiming priority over future treaties and this is Art. 103 of the UN Charter. For all other conflict clauses of the same time, the *lex posterior* principle is *not* disactivated. Also a limited number of WTO members could then conclude an *inter se* agreement that meets the conditions of Art. 41/58 of the Vienna Convention. If they do and thereby derogate from certain WTO rules, as between themselves the later *inter se* agreement prevails pursuant to Art. 30.3(a) and this notwithstanding the alleged conflict clause in DSU Arts. 3.2 and 19.2 (in that event Art. 30.2 does not apply, nor does the exception provided for in Art. 30.1 for Art. 103 of the UN Charter).

In sum, even if DSU Arts. 3.2 and 19.2 were to constitute a conflict clause calling for automatic preference to be given to WTO rules over other rules (*quod non*), this conflict clause would have no effect in respect of post-1994 treaty norms as between the WTO members party to these norms. As conflict clauses related to future norms, DSU Arts. 3.2 and 19.2 would then be subject to any subsequent change of mind, both as between all WTO members and as between some WTO members only in *inter se* agreements. To that extent, DSU Arts. 3.2 and 19.2 would be an example of "futile" conflict clauses referred to by Karl.[1032]

d. Conflict clauses resolving conflict within a treaty: the example of the WTO treaty

In respect of conflict between two rules part of WTO covered agreements, the WTO treaty includes a series of provisions on which rule should prevail.[1033] Obviously, in the event no such explicit conflict rules can be found for intra-WTO conflicts in the WTO treaty itself, the conflict rules part of general international law, discussed in this work, must be reverted to.

i. The Marrakesh Agreement prevails over all other multilateral trade agreements

In the event of conflict between a rule in the Marrakesh Agreement and another rule in any of the multilateral trade agreements (such as the GATT, GATS, TRIPS, or DSU), the rule of the Marrakesh Agreement must prevail. Art. XVI.3 of the Marrakesh Agreement provides:

> "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict".

[1030] See above section 1.b.i.
[1031] Ibid.
[1032] See *supra* note 987.
[1033] On intra-WTO conflict more generally, Montaguti and Lugard, *Relationships …*.

ii. GATT 1994 prevails over all other Annex 1A agreements on trade in goods

In the event of conflict between a provision of the GATT 1994 and a provision of another agreement on trade in goods part of Annex 1A to the WTO Agreement, the provision of the other Annex 1A agreement prevails. The *General Interpretative Note to Annex 1A* provides:

> "In the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A [to the Marrakesh Agreement] … the provision of the other agreement shall prevail to the extent of the conflict"

iii. Schedules of concessions must give way to WTO treaty provisions as such

Art. II:7 of GATT provides that "[t]he Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement". Also member-specific commitments under the Agreement on Agriculture are an integral part of the GATT. Art. 3.1 of the Agreement on Agriculture provides: "The domestic support and export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994". Finally, specific commitments under the GATS set out in the GATS schedule of WTO members are an integral part also of the GATS pursuant to GATS Art. XX.3. On that basis, the Appellate Body found in *EC – Computer Equipment* that

> "the concessions provided in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*".[1034]

However, even though the norms set out in WTO members' schedules are treaty language and an integral part of the WTO treaty, they do have an inherently lower legal standing than the provisions in the WTO treaty *strictu senso*, i.e., those binding equally on all WTO members. Already in respect of concessions contained in the schedules annexed to GATT 1947, the panel on *US – Sugar Headnote* found that

> "Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement".[1035]

This approach was confirmed in respect of market access concessions and commitments for agricultural products contained in the schedules annexed to the GATT 1994 by the Appellate Body in *EC – Bananas*[1036]:

> "The ordinary meaning of the term 'concessions' suggests that a Member may yield rights and grant benefits, but it cannot diminish its obligations".[1037]

As the Appellate Body pointed out, this interpretation is supported by paragraph 3 of the *Marrakesh Protocol*, itself an integral part of GATT 1994[1038], which provides:

[1034] Appellate Body report on *EC – Computer Equipment*, para. 84.
[1035] GATT Panel report on *United States – Restrictions on Importation of Sugar*, adopted on 22 June 1989, BISD 36S/331, at para. 5.2.
[1036] In that case, the EC had argued that even if its tariff quota share allocation as a result of the Framework Agreement on Bananas (concluded by the EC with Columbia, Costa Rica, Venezuela and Nicaragua) were inconsistent with GATT Art. XIII, the fact that the this quota allocation is included in the EC's schedule on agricultural products, an integral part of the WTO treaty, constitutes a valid defence against breach of GATT Art. XIII. In the EC's view, the schedule should then, as the more specific commitment, prevail over GATT Art. XIII (Appellate Body report on *EC – Bananas*, paras. 19-21).
[1037] Ibid., para. 154.
[1038] Pursuant to paragraph 1(d) of GATT 1994.

> "The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be *without prejudice to the rights and obligations of members under Agreements in Annex 1A of the WTO Agreement*".[1039]

The Appellate Body found that nothing in the Agreement on Agriculture allow market access concessions on agricultural products to deviate from GATT provisions, *in casu*, GATT Art. XIII.[1040] It confirmed that a schedule must be consistent with the GATT itself in *EC – Poultry*, finding that « the concessions contained in Schedule LXXX pertaining to the tariff-rate quota for frozen poultry must be consistent with Articles I and XIII of the GATT 1994 ».[1041]

In sum, in the event of conflict between a GATT schedule, on the one hand, and the provisions of GATT 1994, on the other, the provisions of GATT 1994 prevail. Pursuant to paragraph 3 of the *Marrakesh Protocol*, the same applies in respect of conflict between a GATT schedule, on the one hand, and any treaty provision in Annex 1A to the WTO treaty, that is, any treaty provision on trade in goods binding on all WTO members (such as the Agreement on Agriculture or the SPS Agreement), on the other hand. This results from paragraph 3 of the *Marrakesh Protocol* and is supported by the ordinary meaning given to the words "concessions" or "commitments" in GATT Art. II and Arts. 3 and 4 of the Agreement on Agriculture.

The *Marrakesh Protocol* does not apply, however, in respect of conflicts between GATS schedules and provisions of the GATS as such. Here, the remaining reason to give preference to the provisions in the GATS itself, over and above GATS schedules, is the ordinary meaning to be given to the terms "concessions" and "specific commitments" in Parts III and IV of GATS. Even though no conflict clause similar to that in the *Marrakesh Protocol* is provided for, it would seem inconsistent to let GATS schedules prevail over GATS, there where GATT schedules must give way to GATT. Note, indeed, that in the *US – Sugar Headnote* case no conflict clause similar to paragraph 3 of the *Marrakesh Protocol* was available either, but that this panel, on the basis of the ordinary meaning of the word "concessions" in GATT Art. II, still came to the conclusion that GATT schedules must give way to provisions in GATT 1947 itself. On that basis, the priority of treaty provisions over schedules (including GATS schedules) could be said to be part of the "customary practices followed by CONTRACTING PARTIES to the GATT 1947" by which the WTO must be guided (pursuant to Art. XVI.1 of the Marrakesh Agreement). It must be acknowledged, however, that in the absence of this practice and the words "concessions" or "commitments" and, for GATT schedules, the *Marrakesh Protocol*, strong arguments would have been available to let WTO schedules prevail as *lex specialis* over other treaty provisions[1042]: Schedules are an integral part of the WTO treaty, accepted as such *by all WTO members*, and address certain trade matters more specifically than other treaty provisions, both in terms of subject matter (e.g., tariff concessions for a particular product) and membership (that is, obligations applying to one WTO member only).[1043]

The "lower" legal standing of WTO schedules supports our contention above of a "two-class society" of WTO rules, those set out in the treaty as such as opposed to those in member-specific schedules.[1044] It must be stressed, however, that even if WTO members may not detract from WTO treaty provisions

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[1039] Ibid., emphasis added. The Marrakesh Protocol to the GATT 1994 is reprinted in *WTO Legal Texts*, 37.
[1040] Ibid., paras. 155-158. The Appellate Body thereby overruled the EC argument (at paras. 19-21) that concessions on agricultural products are part of the Agreement on Agriculture and should hence pursuant to Art. 21 of that Agreement (discussed in section iv below) prevail over GATT provisions. In support of the Appellate Body finding, it must be pointed out that Art. 3.1 incorporates agriculture schedules *into GATT 1994*, not into the Agreement on Agriculture as such (which pursuant to Art. 21 prevails over GATT 1994).
[1041] Appellate Body report on *EC – Poultry*, para. 99.
[1042] See the EC argument paraphrased above in note 1036. On *lex specialis*, see below section 3.
[1043] In respect of post-1994 commitments in WTO schedules this *lex specialis* argument would find support also in the *lex posterior* principle.
[1044] See text at note **124** above.

as such *in their schedules* (even if these schedules are agreed upon by all WTO members), nothing prevents them from concluding subsequent agreements, including *inter se* agreements, with exactly that effect *outside WTO schedules*.[1045]

iv. The Agreement on Agriculture prevails over GATT 1994 and all other Annex 1A agreements

In the event of conflict between the Agreement on Agriculture, on the one hand, and GATT 1994 or any other Annex 1A agreement, on the other, the agreement on agriculture prevails. Art. 21 of the Agreement on Agriculture states:

> "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement".

v. Special or additional rules and procedures on dispute settlement prevail over the DSU

The special or additional rules and procedures on dispute settlement set out in Appendix 2 to the DSU prevail over the rules and procedures in the DSU, to the extent of the difference. Art. 1.2 of the DSU states:

> "The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Annex 2 shall prevail".

Art. 1.2 also provides for a special procedure in case of "disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review": "where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the [DSB] …, in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member". In making such decision, "the Chairman shall be guided by the principle that special or additional rules and procedures should be used where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict".

Note, that in the first part of Art. 1.2 there is talk of "difference" (between DSU rules and special or additional rules), whereas in the second part reference is made to "conflict" (between special or additional rules under different agreements). However, recalling the definition of conflict set out above, both notions ("difference" and "conflict") should, in this context, be given the same meaning.

vi. If the SPS Agreement applies, the TBT Agreement cannot apply

Although not strictly speaking a conflict clause but a rule defining the respective scope of application of two agreements, in case a measure falls under the SPS Agreement, the TBT Agreement does not apply. Art. 1.5 of the TBT Agreement provides:

[1045] In that sense, the *form* of the agreement is important. If it takes the form of provisions part of a schedule, WTO treaty provisions as such cannot be detracted from. If it takes the form of an agreement not incorporated in a schedule (say, an MEA or a bilateral trade-related agreement), WTO provisions may be detracted from, that is, of course, as between the parties to the agreement only and in so far as the conditions in Art. 41/58 of the Vienna Convention are met.

> "The provisions of this Agreement do not apply to sanitary and phytosanitary measures as defined in Annex A of the Agreement on the Application of Sanitary and Phytosanitary Measures".

To put it differently, for those measures that, absent TBT Art. 1.5, would have fallen under both the SPS and the TBT agreements, the SPS Agreement "prevails" (pursuant to Art. 1.5 it is actually the only applicable agreement in the first place). Art. 1.4 of the SPS Agreement, *ex abundante cautela*, states:

> "Nothing in this Agreement shall affect the rights of Members under the Agreement on Technical Barriers to Trade with respect to measures not within the scope of this Agreement".

Obviously, an agreement (*in casu*, the SPS Agreement) cannot affect measures not falling under its scope of application. Note, however, the exclusive reference in SPS Art. 1.4 to "rights" of WTO members under the TBT Agreement, seemingly implying that the SPS Agreement imposes more obligations than the TBT Agreement does (the TBT Agreement thus retaining more "rights" to restrict trade).[1046] Nonetheless, it goes without saying that the SPS Agreement cannot affect either the *obligations* under the TBT Agreement with respect to measures that do not even fall within the scope of the SPS Agreement.

vii. The DSU "prevails over" panel and Appellate Body working procedures as well as the Rules of Conduct

Although not related to conflict clauses as such, it may be recalled here that the working procedures of both panels and the Appellate Body must be consistent with the DSU itself. WTO members may deviate from the DSU, including by means of *inter se* agreements that apply to one dispute only (as long as the conditions in Art. 41/58 of the Vienna Convention are met[1047]). Nonetheless, procedural decisions taken by WTO panels and the Appellate Body, being organs with a limited competence, are invalid if they are inconsistent with their constituent instrument, i.e., the DSU. This was discussed above.[1048]

The same applies in respect of the Rules of Conduct for the DSU.[1049] These rules were adopted by the WTO's Dispute Settlement Body in 1996.[1050] Rule II explicitly provides: "These Rules shall in no way modify the rights and obligations of Members under the DSU nor the rules and procedures therein". In this sense, the DSU "prevails" over the Rules of Conduct.

viii. No conflict clauses for the relationship GATT-GATS-TRIPS

Surprisingly enough, the WTO treaty does not include conflict rules to resolve contradictions between provisions in GATT, GATS or TRIPS. The GATT-GATS overlap is discussed below.[1051]

[1046] See, in this respect, the Appellate Body report on *EC - Asbestos*, para. 80, construing the TBT Agreement as an agreement with only "additional obligations" as compared to GATT 1947. For a critique, see *supra* text at note **134**.
[1047] See Chapter VI, section C.3.b.
[1048] See Chapter VI, section B.3.b.
[1049] Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC/1, adopted by the DSB on 11 December 1996.
[1050] Given that the DSB, being itself established by the DSU, adopted these rules, they could not have detracted from the DSU in the first place because of the DSB's limited competence. See Chapter VI, section B.3.b.
[1051] See section 3.d.ii.

e. The drafting of conflict clauses

Conflict clauses may be straightforward in that they provide for which norm to prevail in the event of conflict. If so, an adjudicator must decide only whether there is conflict and, if so, the extent of the conflict. Once conflict is found, it knows exactly which norm must prevail.

Recall, however, that the very strict definition of conflict defended by some authors should not be accepted.[1052] Hence, adopting a proper definition of conflict is important also in the operation of conflict rules. If one were to reject, for example, the fact that an obligation may conflict also with an explicit right, the obligation would always prevail, not as a result of the conflict clause but as a result of a strict definition of conflict. Because of the importance of both rights and obligations under other treaties, conflict clauses ought to be drafted also with reference to "provisions" or "rights and obligations" under other treaties, which are, for example, "not affected by" the new treaty. To refer only to "obligations" under other treaties would give a wrong signal as to the definition of conflict and could, indeed, be interpreted strictly so that the explicit conflict clause applies only to a certain type of conflict, namely those affecting obligations under other treaties, not those affecting rights. Art. 104 of NAFTA and Art. 103 of the UN Charter, for example, refer to *obligations*, not to "rights and obligations" or "provisions".[1053] In contrast, following a proposal by Israel, Art. 30.1 of the Vienna Convention refers to both obligations *and rights*.[1054]

There may also be clauses under which the adjudicator is required to decide more than the question of whether there is conflict. Under Art. 22.1 of the UN Convention on Biological Diversity, for example, the adjudicator must give way to rights and obligations under other treaties only if "the exercise of those rights and obligations would not cause a serious damage or threat to biological diversity". Art. 104 of NAFTA gives prominence to certain MEAs but it does so "provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement".

Finally, it should be recalled that a treaty explicitly abrogating another one[1055], or a treaty provision explicitly deviating from another one (in the form of "general rule – exception"), does not involve conflict of norms nor, *a fortiori*, the operation of conflict clauses.[1056] In the event of one treaty explicitly abrogating another one, the two norms are never in operation at the same time so that there is no conflict. In case of one treaty norm explicitly carving out of the scope of application of another norm (say, GATT Art. XX carving out of all other GATT norms), the scope of application of the two norms (mostly in a "general rule – exception" relationship) are simply different and do not overlap. Hence, there is no conflict and the fact that the exceptional norm states that it deviates from the general rule cannot be seen as a conflict clause.

This point was illustrated by Japan at the Vienna Conference in respect of treaty clauses stating that the new treaty "is not to be considered as incompatible with" other treaties (a phrase occurring in Art. 30.2). Japan submitted an amendment to delete from what is now Art. 30.2 the phrase "or that it is not to be considered as incompatible with".[1057] The delegate of Japan explained its proposal as follows:

[1052] See Chapter IV, section B.

[1053] See the discussion above in note 981 (Art. 104 of NAFTA) and the text at note 1003 (Art. 103 of the UN Charter).

[1054] See above text at note **508**.

[1055] See, in this respect, Art. 20 of the 1919 Covenant of the League of Nations: "1. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof … 2. In case any Member of the League shall, before becoming a Member if the League, have undertaken any obligations inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations".

[1056] See above Chapter IV, section B.1.

[1057] Amendment submitted at the Vienna Conference on the law of treaties in doc. A/CONF.39/C.1/L.207.

"the case of a treaty that was not to be considered as inconsistent with an earlier treaty was different from the case of a treaty being subject to another. In the former case, the question of one treaty prevailing over the other should not arise".[1058] A clause stating that the new treaty ought not be considered as incompatible with, or must not be interpreted as incompatible with, another treaty would then, indeed, much like GATT Art. XX, carve out of the normal scope of application of the new treaty those situations covered by the other treaty so that, in the end, there would be no two norms applying to the same situation.

A conflict clause stating that a norm ought not be interpreted or considered in conflict with another norm is, in terms of result, little different from one stating that in the event of conflict the other norm prevails: in both cases, the other norm must be applied. However, in terms of legal technique there is a major difference. In the first instance, the very existence of conflict is precluded. In the second instance, conflict is allowed for but solved in a certain way. In the first case, the adjudicator is precluded to adopt an interpretation that conflicts with another norm. In the second case, it must follow normal rules on treaty interpretation, may find a conflict and must then give preference to the other norm.[1059] To avoid all confusion, and recalling that "interpretation" covers only the definition of terms in a treaty provision (unless, of course, the parties to a treaty say differently), states should, however, be advised to use genuine conflict clauses in the treaties they negotiate, in the style of "in the event of conflict between the provisions of [or rights or obligations under] treaty A and treaty B, those in treaty A shall prevail".

f. Implicit references to what to do in the event of conflict

In the absence of explicit conflict clauses, other more implicit expressions of intent on what to do in case of conflict may still be found. These implicit indications as to the intentions of the parties will play a role, firstly, in the interpretation of the norms in question *so as to avoid conflict*. Here, elements such as the preamble to the treaties in question (part of the context in which interpretation must take place)) and, in case of ambiguity, its *travaux préparatoires* may be important. However, these implicit elements may be influential also in the event of genuine conflict, i.e., where interpretation was unable to come to a harmonious reading. This will be the case, in particular, in the absence of a clear cut solution to the conflict, say, in the event of conflicts where no explicit conflict clause is available and the *lex posterior* principle is difficult to apply (e.g., in cases of "continuing" treaties[1060]). In that event, the search for "current state consent" may be determined by other methods such as the *lex specialis* principle or other indications as to what the states in question would have done had they been faced with the conflict.

As explained below, both the *lex posterior* and the *lex specialis* principle are, in effect, but two elements or methods of one and the same legal question, namely: following the principle of contractual freedom of states what coincides with current state consent?[1061] Under this legal test other implicit expressions of intent may be important also. If they cannot provide a predictable solution either -- that is, a solution where the judge is applying the law, not making it -- a situation of conflict of norms constituting a *lacuna* may arise (discussed in section B.1).

In terms of alleged conflict between the WTO treaty and MEAs, for example, the preamble to GATT 1994 provides guidance, both for interpretative purposes and in terms of what WTO members had in mind when concluding the WTO treaty. It explicitly calls for

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[1058] Meetings of the Committee of the Whole, 164, para. 7 (*per* Mr. Fujisaki).

[1059] Hence, this author would disagree with, for example, Salmon who would allow an adjudicator to review whether there is, indeed, a conflict between the two norms in case the conflict clause states only that a treaty must not be "interpreted" as affecting pre-existing norms: "Il apparaît cependant que si ces clauses ne sont que pures précautions verbales et s'il existe une réelle incompatibilité entre les dispositions conventionelles nouvelles et les dispositions conventionelles anciennes, ces clauses n'auront pas pour effet de supprimer le problème sur le plan du droit" (Salmon, *Antinomies …*, 295).

[1060] Discussed below in section 2.e.

[1061] See section 3.a.

> "the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".

One could refer also to the *travaux préparatoires* of certain MEAs, where GATT officials had expressed the opinion that the draft MEAs were in conformity with GATT rules.[1062] As a result, it seems, the drafters of the MEAs did not include a conflict clause. But this could be interpreted both ways: (i) the drafters wanted to make sure that the GATT was left unaffected, GATT officials confirmed that this was so, as a result, there was no need to include a savings clause for the GATT; or, in contrast, (ii) the drafters wanted to make sure that the new MEA would be effective and not be nullified by the earlier GATT: they heard a GATT opinion that this was so; as a result, they did not have to confirm that the later MEA prevails over the earlier GATT in the event of conflict. However, given the presumption that the later treaty in time prevails, it would seem that in the absence of a conflict clause, the intention was to let Art. 30 and the *lex posterior* principle (to the extent it can be applied[1063]) play its role. Hence, the most logical conclusion to be derived from the absence of a conflict clause in these MEAs is that, in case there were a conflict, these MEAs must prevail over earlier treaties (but see the concept of "continuing" treaties below[1064]).

2. Lex posterior

a. Preliminaries

Art. 30 of the Vienna Convention provides for the following conflict rules in respect of "Application of successive treaties relating to the same subject-matter":

> "1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier treaty or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, *the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty*.
>
> 4. When the parties to the later treaty do not include all the parties to the earlier one:
> (a) as between States Parties to both treaties the same rule applies as in paragraph 3;
>
> (b) as between a State Party to both treaties and a State Party to only one of the treaties, *the treaty to which both States are parties governs* their mutual rights and obligations.
>
> 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of

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[1062] For references, see Housman and Goldberg, *Legal Principles in Resolving Conflicts Between Multilateral Agreements and the GATT/WTO*, in THE USE OF TRADE MEASURES IN SELECT MULTILATERAL ENVIRONMENTAL AGREEMENTS (ED. HOUSMAN et. Al.), 303 (1995).
[1063] See Section 2.e.
[1064] Ibid.

> responsibility which may arise for a State from the conclusion or application of treaty, the provisions of which are incompatible with its obligations towards another State under another treaty" (emphasis added).

Arts. 30.3 and 30.4(a) are a confirmation in the law of treaties of the adage *lex posterior derogat legi priori* or the contractual freedom of states according to which their latest expression of intent prevails. Art. 30.4(b) confirms the *pacta tertiis* rule pursuant to which states can only be held by treaty norms they agreed to.

Art. 30 applies only in respect of conflict between two *treaties*. Resort may be had to Art. 30 only in case Art. 59 -- on "Termination or suspension of the operation of a treaty implied by conclusion of a later treaty" -- has *not* led to the termination or suspension of the earlier treaty. Art. 30.3 explicitly refers to Art. 59. More generally, as pointed out before, the conflict rules provided in Art. 30 are subject to those set out in earlier sections. To that extent, Art. 30 is of a residual nature only, subject to explicit conflict clauses in either treaty, *jus cogens*, termination or suspension pursuant to Arts. 59 or 60 as well as (crucially) illegality under Art. 41/58. Art. 30 makes explicit *caveats* for Arts. 41 and 60 as well as Art. 103 of the UN Charter. The ILC Commentary on Art. 30 further clarified that the ILC wanted to "avoid the risk of paragraph 4(c) [now Art. 30.4(b)] being interpreted as sanctioning the conclusion of a treaty incompatible with obligations undertaken towards another State under another treaty".[1065] This reservation is important both for Arts. 41/58 illegality (v-à-v third parties not bound by an *inter se* agreement) and the conflicts of the AB / AC type discussed below (section B.2). Art. 30.5 specifies further that Art. 30.4 is "without prejudice … to any question of responsibility which may arise for a State from the conclusion or application of treaty, the provisions of which are incompatible with its obligations towards another State under another treaty". Note also that special rules applicable in the context of an international organisation may apply. These rules prevail over Art. 30.4(b) pursuant to Art. 5 of the Vienna Convention.

As a last preliminary remark, it should be recalled that Art. 30 provides for *priority* rules as between specific *provisions* of successive treaties. It does not *invalidate* or *terminate* norms, nor does it give priority to (let alone, does it invalidate or terminate) *entire treaties*. Consequently, if under Art. 30 the later treaty provision ceases to exist, the earlier provision with which it was in conflict will be re-activated. In contrast, if, under Art. 59, the later treaty is ended, the earlier treaty which was terminated by the later one, does not revive.

b. All the parties to the earlier treaty are parties also to the later one: the later treaty prevails

Art. 30.3 deals with conflicts where "<u>all the parties</u> to the earlier treaty are parties also to the later treaty", but where the later treaty was not terminated or suspended pursuant to Art. 59. Two conflict situations are covered by Art.30.3:

(i) conflicts where the parties to the two treaties are <u>exactly the same</u> (conflicts of type AB / AB or ABC / ABC);

(ii) conflicts where the second treaty is binding on all parties to the first treaty, <u>plus a number of additional states</u>[1066] (conflict of type AB / ABC or ABC / ABCD).

The solution offered in Art. 30.3 is straightforward:

[1065] Rauschning, *Travaux …*, 232. See also, ibid., 235.

[1066] The ILC Commentary states explicitly that Art. 30.3 applies "for cases where all the parties to a treaty *(whether without or with additional States)* conclude a later treaty relating to the same subject matter", Rauschning, *Travaux …*, 234 (ILC Commentary to Art. 30, para. (9), emphasis added).

> "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty".

To put it differently, *to the extent of the conflict, the later treaty prevails*. As the ILC noted in its Commentary, this is "no more than an application of the general principle that a later expression of intention is to be presumed to prevail over an earlier one".[1067] In other words, the *lex posterior* rule in Art. 30.3 is nothing more than a logical consequence of states being their own law-makers, possessing the contractual freedom to "change their minds": a later expression of consent prevails over an earlier one. This principle not only applies in respect of successive treaty norms (as Art. 30 does). It applies also in respect of all norms of international law, in particular custom and acts of international organisations.[1068]

Obviously, in the second type of conflict covered by Art. 30.3 -- conflicts of type AB / ABC -- this solution applies only to the relationship between parties bound by both treaties, i.e., as between A and B. As far as the relationship with parties bound only by the later treaty is concerned (*in casu* C), the *pacta tertiis* rule expressed in Art. 34 applies: "a treaty [*in casu*, the earlier treaty AB] does not create either obligations or rights for a third State [*in casu*, C] without its consent". Note, indeed, that in respect of these third parties to the earlier treaty, Art. 34 applies, not Art. 30.4. Art. 30.4 applies only "when the parties to the later treaty do not include <u>all</u> the parties to the earlier one". This is not the case here under either of the conflict situations covered (AB / AB; ABC / ABC; AB / ABC; ABC / ABCD).

c. *Not* all the parties to the earlier treaty are parties also to the later one

In contrast to Art. 30.3, Art. 30.4 covers conflicts where "the parties to the later treaty do <u>not</u> include all the parties to the earlier one". Three types of conflict fall under Art. 30.4:

(i) a later *inter se* agreement deviating from an earlier multilateral treaty (conflicts of type ABCD / AB); this is the first type of *inter se* agreement referred to under Art. 41[1069];
(ii) a later *inter se* agreement concluded *with a number of third parties* deviating from an earlier multilateral treaty (conflicts of type ABCD – ABEF); this is the second type of *inter se* agreement referred to under Art. 41[1070];
(iii) a later agreement concluded by *only one of the parties to the earlier treaty* which conflicts with the obligations of that party under the earlier treaty (conflicts of type AB – AC or ABC – AD).

In respect of the first two conflict situations set out above (ABCD / AB and ABCD – ABEF), resort must be had first to Art. 41.[1071] As noted before, the conflict rules in Art. 41 prevail over those in Art. 30.4 (Art. 30.5 makes this explicit). Hence, only in the event the later *inter se* agreement is permissible under Art. 41 -- i.e., only if it is a "legal" agreement -- should Art. 30.4 be applied.[1072] If

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[1067] Rauschning, *Travaux ...*, 234, para. (10).
[1068] See above Chapter III, section B.2.
[1069] See text at note 927 above.
[1070] Ibid.
[1071] See above Chapter VI, section C.2.
[1072] It is interesting to note that at the Vienna Conference France proposed an amendment to what is now Art. 30.4(a). France wanted to add an explicit reference to what it called "<u>restricted multilateral treaties</u>", a notion that comes close to that of "integral treaties". France defined a "restricted multilateral treaty" as "a treaty which is intended to be binding only on the States referred to in the treaty and whose entry into force in its entirety with respect to all the negotiating States is an essential condition of the consent of each of them to be bound by it" (Documents of the Conference, 112, French proposal in UN doc. A/CONF.39/C.1/L.24). France would have rephrased Art. 30.4(a) as follows: "As between States parties to both treaties the same rule applies as in paragraph 3 [the later treaty prevails], *however, when the earlier treaty is a restricted multilateral treaty and the later treaty is concluded between certain of the parties only, the provisions of the earlier treaty shall prevail*" (Documents of the Conference, 148, French proposal in UN doc. A/CONF.39/C.1/L.44, text of amendment in

the *inter se* agreement is illegal, it cannot be opposed as against third parties, nor, as we saw earlier, should it be opposable v-à-v states bound by the *inter se* agreement. As between parties to both the earlier and later agreement, Art. 41 thus provides for an exception to the principle of contractual freedom. If the later *inter se* agreement is not permissible under Art. 41, it cannot prevail as the latest expression of state intent *even as between the parties to both treaties*.

The solutions offered by Art. 30.4 are, once again, straightforward:

(1) As between parties bound by both the earlier and the later treaty, *the later treaty prevails to the extent of the conflict*.

Art. 30.4(a) states that in this situation the rules in Art. 30.3 apply. Hence "the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty". Or, to put it differently, the later treaty prevails to the extent of the conflict. Much like Art. 30.3, this first solution set out in Art. 30.4(a) is "no more than an application of the general principle that a later expression of intention is to be presumed to prevail over an earlier one".[1073] It finds application only under the first and second conflict situation set out above, that is, those of the ABCD – AB and ABCD – ABEF type. Only in these instances is there a double overlap *ratione personae*, i.e., there, both A and B are bound by the two treaties. In the third conflict situation (of the AB – AC type), only one of the parties is bound by both rules so that Art. 30.4(a) does not find application.

(2) As between a party to both treaties and a party to one of the treaties only (be it the earlier or the later one), "the treaty to which both States are parties [respectively, the earlier and the later one] governs their mutual rights and obligations" (Art. 30.4(b)).[1074]

In the first conflict situation (of the type ABCD – AB), this means that A's and B's relationship with C and are governed only by the earlier ABCD treaty. In the second conflict situation (of the type ABCD – ABEF), it means that (i) A's and B's relationship with C and D are governed only by the earlier ABCD treaty; and (ii) A's and B's relationship with E and F are governed only by the later ABEF treaty. In the third conflict situation (of the type AB – AC), the solution offered in Art. 30.4(b) means that (i) A's relationship with B is governed only by the AB treaty; and (ii) A's relationship with C is governed only by the AC treaty.

Art. 30.4(b) is, in other words, a simple confirmation of the *pacta tertiis* rule in Art. 34. Indeed, as far as the first and second conflict situations are concerned, *Art. 30.4(b) does not provide a solution to*

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italics). France stated that the earlier treaty should thus prevail "in the interests of the integrity of the treaty; that integrity was essential to the very existence of that type of treaty" (*per* de Bresson, Meetings of the Committee of the Whole, 166, para. 24). The proposal was not accepted. However, it is submitted here that Art. 41 has exactly the same effect and goes even further in that the later *inter se* agreement deviating from an integral obligation must not only give way to the earlier treaty, it also becomes illegal.

[1073] Rauschning, *Travaux …*, 234, para. (10).

[1074] Note that, as for all Vienna Convention provisions, special rules applicable in the context of an international organisation may apply. These rules prevail over Art. 30.4(b) pursuant to Art. 5 of the Vienna Convention. At the Vienna Conference, reference was made in particular to the practice within the Bureaux for the Protection of Intellectual Property (BIRPI, now WIPO). It was pointed out that in the BIRPI one often had to do with so-called chain-treaties, that is, treaties that had been revised on several occasions. Technically, each original convention and its revising acts were separate and successive treaties. Some states were bound only by an earlier version, others acceded later and did so only in respect of the latest version. Hence, Art. 30.4(b) would, in these circumstances, lead to there not being any treaty relation between parties only to the earlier version and parties that acceded only to the latest version. To solve this problem, it was understood within the BIRPI that the acceding state, by acceding to the latest version, had tacitly accepted also all of the previous versions (Meetings of the Committee of the Whole, 165, paras. 17-19, statement by Mr. Woodley).

conflict since the legal relationships it addresses are free of conflict: in the first situation, AB *versus* C and D; in the second, AB *versus* C and D and AB *versus* E and F).[1075]

Nonetheless, Art. 30.4(b) is crucial as a conflict rule in the third type of conflict (of the type AB-AC). This conflict is one on behalf of A which has obligations towards B (under an AB norm) that are contradictory with its obligations towards C (under an AC norm). Here, Art. 30.4(b), *instead of giving priority to either of the two norms, simply confirms the validity of both of them*. Recall, however, that in earlier ILC reports (especially that by Lauterpacht), a later treaty (AC) in conflict with an earlier one (AB) was said to be invalid.[1076] Art. 30.4(b) does away with this theory. It confirms the validity of both treaties but limits this validity as between the parties to those treaties. However, the fact that both treaties are hence valid, does not mean that they are necessarily legal under Art. 41/58. Here again, the conflict rules in Art. 41/58 prevail over those in Art. 30.4(b) as well as those we set out below in section B ("both norms are equals").

d. The situation of treaty norms in conflict with later acts of international organisations

Art. 30 applies only in respect of successive *treaty norms*. However, as we noted above, Art. 30 is essentially but the logical consequence of a broader principle, namely that "a later expression of intention is to be presumed to prevail over an earlier one".[1077] This general principle applies also in respect of a treaty norm in conflict with supervening custom. It should apply, moreover, in respect of a treaty norm in conflict with a later act of an international organisation. A good example is the potential conflict between, on the one hand, WIPO conventions (setting out positive obligations to protect intellectual property rights) and, on the other hand, a subsequent DSB authorisation to suspend concessions under the TRIPS Agreement (granting explicit rights not to protect certain intellectual property rights). In that event, which of the two norms should prevail, the earlier WIPO treaty norm or the later act of the DSB, being an organ of an international organisation other than WIPO? As the *lex posterior*, the DSB authorisation ought to prevail. We noted earlier that no *a priori* hierarchy exists as between the sources of international law, including as between treaties and acts of international organisations.[1078] We pointed out also that the fact that norms have been created in different contexts (WIPO or the WTO) does not normally say anything on their hierarchical relationship.[1079] Hence, as the latest expression of state intent, the later DSB authorisation must prevail. That is, of course, only as between states that are both WTO members and bound by the relevant WIPO convention, and only to the extent that the DSB authorisation is legal under both WTO rules (in particular the DSU) and other applicable international law norms (e.g., Art. 51.1(b) of the ILC draft 2000, precluding countermeasures under obligations for the protection of fundamental human rights).[1080] We noted earlier that the conflict clause in TRIPS Art. 2.2 does not affect this solution.[1081] If the suspension of TRIPS obligations meets these conditions of legality under WTO and other international law norms, the DSB decision authorising this suspension must prevail over the WIPO convention to the extent of the conflict. Of course, the relevant WIPO rule is not thereby rendered illegal. As soon as the DSB authorisation expires, the WIPO rule will be re-activated.

[1075] As Vierdag noted : «Paradoxically, [Art. 30.4(b)], which can be regarded as crucial in terms of the subject-matter of Article 30, does not deal with 'application of successive treaties' at all. This provision concerns only one treaty, namely the treaty to which both States are parties, only one of these States being party to two 'successive' treaties" (Vierdag, *Conclusion …*, 96).

[1076] See above Chapter VI, section B.1 and Chapter II, section E.3.b.

[1077] ILC Commentary on Art. 30, in Rauschning, *Travaux …*, 234, para. (10). See above Chapter III, section B.2.

[1078] See above Chapter III, section B.1 and section F.2.

[1079] See Chapter VI, section A.2 above.

[1080] See Chapter III, section B.4.b.

[1081] See section A.1.c.ii above.

e. The treaties must be "successive"

i. Treaties as instruments with a time-label

As Rosenne pointed out, the focus of the Vienna Convention is treaties as an *instrument*, not *obligations* deriving from treaties. It is "the instrument in which an international obligation is expressed not the obligation itself".[1082] The Vienna Convention addresses, indeed, issues such as the conclusion and validity *of treaties*, the application and interpretation *of treaties* and the modification, amendment and termination *of treaties*. Art. 30 as well, deals with the application of "successive treaties" and "an earlier treaty" as opposed to "a later treaty". This seems to imply that the timing of treaties under Art. 30 is a question of putting a date on the treaty *as an abstract instrument*, not a question of defining when the treaty imposes a particular obligation as between two given states.

This approach of putting a time-label on treaties as instruments makes sense in case one is faced with a treaty that is clearly concluded in order to amend an earlier one and where the parties to both treaties are exactly the same. One may think here of a 1990 bilateral investment treaty between A and B which is subsequently amended by a later 2000 treaty as between A and B; or a 1994 WTO agreement which is subsequently amended by a later 2000 treaty as between all WTO members, pursuant to Art. X of the Marrakesh Agreement.

In those instances, the domestic law analogy with "legislative intent" and "the legislator" being able to change earlier legislation by later legislation, may make sense. In those cases, one is, indeed, faced with one homogenous bloc of states, acting, arguably, as some kind of legislator in a particular field (albeit legislation applicable only as between the parties to the treaty).

ii. The fiction of "legislative intent" unfolded

However, the fiction of later "legislative intent" overruling another, earlier one, looses its attraction as soon as the "same context – same parties" constellation changes. Indeed, even in respect of two AB treaties, it becomes hard to refer to one and the same "legislature" in case the earlier bilateral treaty was concluded in the context of an MEA and the later one in the context of, for example, the WTO. A state's consent must be seen as one and indivisible, irrespective of who negotiated the treaty, but the reality remains that in the context of an MEA a very different set of people and values are at work than those active in, for example, the WTO context. Hence, the position of one state in one context may, indeed, be diametrically opposed to that same state's position in another context.[1083]

But it is not only the difference in context that may make the analogy with "legislative intent" unworkable. In many instances -- and especially in respect of the great regulatory treaties of modern times, such as certain MEAs, UNCLOS and the WTO -- the two treaties will have a different membership. The two treaties are then clearly the result of a *different* "legislature", i.e., a different composition of states. They will hence be the reflection of a different balance of interests and one state may well have been able to push through its interests more under one treaty than under another. This difference will be accentuated in case a norm in one treaty context is adopted by unanimity and a norm in another treaty context is adopted by majority voting, even as between states that are parties to both treaties. In that case, it may well be that one of the parties accepted the first norm but explicitly voted against adoption of the second norm. Such objection cannot mean that the state in question is

[1082] SHABTAI ROSENNE, BREACH OF TREATY, 3-4 (1985). On that basis, Rosenne distinguishes "the law of the instrument" from "the law of the obligation".

[1083] The example of the position of some developing countries in respect of genetically modified organisms (GMOs) is telling. In the WTO, they are very much opposed to trade restrictions in respect of GMOs (thus safeguarding trade rights in a WTO trade context). In contrast, during the negotiations of the Cartagena Biosafety Protocol they pleaded very much in favour of granting as much leeway as possible to states wanting to protect themselves against GMO imports (thus safeguarding environmental protection rights in the biosafety, environmental context).

not bound by the second norm since it agreed to the majority voting procedure in the first place. But it would make the comparison with one and the same "legislator" simply changing its mind over time more difficult.

The above considerations highlight the diversity as between different treaties and the difficulty of making a domestic law analogy based on changing "legislative intent". Nonetheless, these difficulties must, as a general rule, be accepted as a reality of international law. Adopting a *lex posterior* rule in this context may, indeed, provide a strong incentive for states to streamline their positions across international organisations and irrespective of the membership to particular treaties. States must realise that, in principle, whatever they consent to now prevails over what they agreed on earlier, irrespective of the context in which the obligations were entered into.

Hence, the *lex posterior* rule may be an important instrument that creates some order in the chaos of international law. However, given its shaky foundation of changing "legislative intent"", it cannot be seen as an absolute rule the way it is regarded, for example, in domestic law for inter-acting statutes. Exceptions to it must be allowed for in case the analogy with "latest legislative intent" looses touch with reality.

The ambiguity inherent in any conflict rule of international law based purely on timing was aptly worded by Jenks as follows:

> "Nor, unhappily, is it always reasonable, in view of the complexity of governmental organization in the modern State and the wide variations in the procedures whereby international obligations are now contracted, to assume, when conflicting networks of obligations have developed simultaneously or almost simultaneously, that the parties concerned knew, or must be deemed to have known, when undertaking an obligation of a specialized character, of the existence of a prior obligation of a similar character which may be inconsistent with it. In these circumstances one of the essential elements in the *lex prior* principle, the principle of good faith, [and, one may add, in the *lex posterior* principle, the principle of subsequent legislative intent] ceases to be at issue. The principle may still be a reasonable and convenient one in so far as some rule for resolving the conflict is necessary; and priority of obligation, when it can be determined, is an intelligible criterion which tends to discourage the irresponsible conclusion of new law-making instruments with insufficient regard for their effect on other instruments, but it loses the absolute quality attributed to it when it is thought of as a necessary consequence of the principle of good faith [subsequent legislative intent] and it has to be weighed against, and reconciled with, other principles which may be relevant".[1084]

iii. The difficulty of putting a time-label on a treaty as "instrument"

The *lex posterior* rule in Art. 30 may not only be put in doubt because of the shaky analogy it makes with changing "legislative intent". From a more practical point of view, it will in many cases also be difficult to "put a time-label" on a treaty.

To begin with, it is generally accepted that the timing of a treaty is determined by the date of its conclusion or adoption. In case of the WTO treaty, for example, this is 15 April 1994. It is *not* the date of entry into force that determines the timing of a treaty under Art. 30. This was made explicit by the Expert Consultant at the Vienna Conference:

[1084] Jenks, *Conflict …*, 444-445.

> "for purposes of determining which of two treaties was the later one, the relevant date should be that of the adoption of the treaty and not that of its entry into force. His own understanding of the intentions of the [ILC] confirmed that assumption".[1085]

The fact that the date of conclusion is decisive was explained with reference to the concept of "legislative intent" elaborated earlier: "when the second treaty was adopted, there was a new legislative intention; that intention, as expressed in the later instrument, should therefore be taken as intended to prevail over the intention expressed in the earlier instrument. That being so, it was inevitable that the date of the adoption should be the relevant one".[1086] That the date of conclusion counts to define a "later treaty" under Art. 30 finds support also in Art. 59 where reference is made to "conclusion of a later treaty" and "conclude a later treaty".[1087]

Hence, it is not the difficulty of deciding between the date of conclusion, opening for signature, ratification or entry into force that makes it difficult to put a time-label on treaties. What counts is the date of conclusion, *irrespective of the fact that the treaty may have been ratified by, or entered into force for, different parties at different times*. Utilising the date of conclusion does, indeed, make logical sense when faced with a conflict between two treaties *to which no parties acceded subsequently*. For example, as between a 1990 bilateral investment treaty between A and B and a subsequent 2000 bilateral investment treaty between A and B.

The situation is more complicated in the event of treaties to which additional states have acceded. This is the case in respect of all regulatory treaties with a universal calling (such as the WTO treaty, UNCLOS, most MEAs and most human rights treaties) as well as many regional arrangements (such as the EC, ECHR or NAFTA). The underlying objective of these treaties is that an increasing number of states accede to it (with or without regional restrictions). When faced with such "expanding" treaties, it becomes often untenable to stick to the date of original conclusion of the treaty. This problem was already pointed out by Sir Ian Sinclair at the Vienna Conference itself:

> "supposing a multilateral convention was opened for signature in 1960, State A ratified it in 1961, and the convention entered into force in 1962. Then State A and State B concluded a bilateral treaty on the same subject in 1963 which entered into force in 1964, after which State B acceded to the multilateral convention in 1965. Which of the treaties was the earlier and which was the later? In State A's view, the multilateral convention was the earlier [1960] but in State B's view it was the later [1965]".[1088]

The fact that the parties to a treaty did not "conclude" the treaty at the same point in time makes it impossible to put a single time-label on the treaty in question. It necessitates a shift away from the treaty as *abstract instrument* to an assessment of the treaty as source of rights and obligations *resting on particular states*.[1089] This fact is, moreover, a death blow to the fiction of each treaty being

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[1085] *Official Records of the Vienna Conference*, Vol. 2, 253, para. 39. The Expert Consultant was confirming an earlier statement to that effect by Sir Ian Sinclair, the UK representative who had expressed a similar view: "the decisive date should be that of the adoption of the treaty; it is based on paragraph 1 of Article 56 [now Art. 59], which referred to the conclusion of a later treaty" (ibid., Vol. 2, 222). Before the vote on what is now Art. 30 was taken, the Ceylonese delegation once again confirmed this approach as follows: "the crucial date … should be the date when the text of the new treaty had been finally and formally established" (ibid., vol. 2, 56, para. 50).

[1086] Ibid., Vol. 2, 253, para. 39.

[1087] See note 1085. Consequently, one of the problems put forward by Sir Ian Sinclair at the Vienna Conference can be easily resolved. The problem was the following: "Supposing that Convention A was signed in 1964 and came into force in 1966, whereas Convention B was signed and entered into force in 1965, which of them would be earlier?" (*Official Records of the Vienna Conference*, Vol. 1, 165). The answer must be: Convention A since A was concluded in 1964 and B only later in 1965.

[1088] Ibid., Vol. 1, 165.

[1089] In this respect, Vierdag refers to « the distinction between abstract norms and concrete rights and obligations … 'Abstract norms' refers here to treaty rules as such, irrespective of the legal position of signatories or States

concluded by one and the same "legislative intent", expressed at one point in time. This fiction must, in turn, be brought back to a genuine principle of international law, namely the contractual freedom of states. We next examine Art. 30 from this perspective of treaty provisions binding *on particular states* and contractual freedom *as between the two states in question*.

iv. Treaties as a source of rights and obligations as between particular parties

Although the crucial date under Art. 30 is the date of conclusion of the treaty, Art. 30 can be activated only as between two parties for which the treaty has entered into force. If not, there could not be conflict. This obvious importance of entry into force was highlighted by the Expert Consultant as follows:

> "Another question, however, arose: that of the date at which the rules contained in article 26 [now 30] would have effect for each individual party. In that connexion, the date of entry into force of a treaty for a particular party was relevant for purposes of determining the moment at which that party would be bound by the obligations arising under article 26 [now 30]. The provisions of that article referred to 'States parties'; they therefore applied only when States had become parties to the two treaties".[1090]

However, once the treaty has entered into force for the two states in question, i.e., once a conflict may arise, in order to put a time-label on the treaty it is not the date of entry into force that counts -- that date that may well be different for the parties involved -- but the date of conclusion of the treaty.

But this leaves us with the situation referred to by Sinclair -- that is, the situation that prompted us to examine Art. 30 in terms of *rights and obligations resting on particular states* -- namely: treaty 1 to which state A is an *original member* and state B *acceded* at a later point in time, in conflict with a bilateral treaty 2 that was concluded by A and B *in between these two points of time*. One may think here of a conflict between a WTO rule and a provision in a bilateral treaty concluded in 2000 as between two parties, one of which is an *original* WTO member (1994), the other being a state that *acceded* to the WTO only in 2001. For the original (WTO) member (state A) treaty 1 (the WTO treaty) is "concluded" at the time of the treaty's original conclusion (15 April 1994). Hence, for A treaty 1 is the "earlier treaty". In contrast, for the acceding member (state B), treaty 1 (the WTO treaty) is "concluded" at the time its accession was adopted (*in casu*, 2001).[1091] Hence, for B the same treaty 1 is the "later treaty". The same situation would arise in case A and B are original WTO members, A concludes and becomes bound by a WTO amendment in 2000, there where B only does so in 2002 and in 2001 A and B conclude a treaty in conflict with the WTO amendment. For A, the 2001 treaty is the later in time; for B the WTO amendment is the later in time. In those cases, as Vierdag pointed out,

> "[p]aradoxically, as a result of the *lex posterior* rule laid down in paragraph 3 of Article 30, a treaty [or amendment] to which a State was quick to become a party will be set aside by an incompatible treaty to which it became a party at a later date, perhaps

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bound by the rules. 'Concrete rights and obligations' refers to the specific position of a particular State with respect to one or more treaties" (Vierdag, *Conclusion ...*, 94).

[1090] *Official Records of the Vienna Conference*, Vol. 2, 253, para. 40. This is not entirely correct since Art. 30.4(b) covers situations also where a party is bound only by one of the two treaties. See also SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES (2nd ED.) 98 (1984).

[1091] In the WTO, for example, this would be the date at which the Ministerial Conference approves "the agreement on the terms of accession" pursuant to Art. XII:2 of the Marrakesh Agreement. Note that such approval can be adopted by two-thirds majority of WTO members. Hence, here as well, the situation may arise that a WTO member does not agree to another state's accession but nonetheless that state can accede. As a result, earlier treaties as between these two parties would, without the consent of the original WTO member, be overruled by the later WTO agreement. Art. XIII of the Marrakesh Agreement allows, however, for existing WTO members to decide not to apply the WTO treaty in its relationship with an acceding state. Moreover, the WTO practice is to approve accession only by concensus.

> reluctantly. For States that were slow in adhering to a treaty [or amendment] the effect of paragraph 3 will be that this treaty will supersede an incompatible treaty they were quick to enter into at an earlier date".[1092]

At this juncture, two approaches are possible. Firstly, in application of Art. 30 one could search for the time of "convergence of state consent" in respect of the particular treaty provision. Secondly, one could dis-apply Art. 30 all together on the ground that the two treaties are not "successive". We next deal with these two alternatives in turn.

v. Look for the "time of convergence of state consent" in respect of the treaty provision concerned

Cases where for one party the treaty is "earlier in time", for the other it is "later in time"

Firstly, one could submit that in circumstances where for one state the treaty is "earlier" and for the other the treaty is "later", one ought to focus, not so much on the timing of the treaty as abstract instrument, but *on the date at which the consent of the two states in question converged*. Hence, instead of focusing on the date of "legislative intent" underlying the treaty as abstract instrument, one would then focus on the date when the expression of contractual freedom of the particular states in question met. Under this first approach, the hypothetical conflict outlined above between the WTO treaty and a bilateral treaty concluded *subsequently* in 2000 but *before* the second state acceded to the WTO in 2001, would then be resolved in favour of the WTO rule *since the consent of both parties to the WTO treaty arose subsequently to that underlying the bilateral agreement* (i.e., 2001, date of accession of the second state to the WTO, as opposed to 2000, date of conclusion of the bilateral treaty). In other words, when faced with two parties for which a treaty has a different date, the latest date should then be adopted as the date reflecting the time at which both parties' consent around the treaty emerged.

In the context of a multilateral treaty in conflict with a bilateral treaty this approach may work. But if one applies it also to a similar type of conflict between *two multilateral* treaties, the solution may be problematic for it becomes difficult to talk of an earlier *versus* a later convergence of state consent. Take the example of the WTO treaty (1994) in conflict with the Cartagena Biosafety Protocol (1999). States A and B are original WTO members which adopted the Protocol in 1999. State C acceded to the WTO in 2000 after it had adopted the Protocol in 1999. State D acceded to the WTO in 2001 and subsequently adopted the Protocol. In that situation our first approach offers the following outcome:

- as between states A and B, the Protocol prevails as the later treaty;
- as between states A and B, on the one hand, and state C, on the other, the WTO prevails as the later treaty;
- as between states A, B, C, on the one hand, and state D, on the other, the Protocol prevails as later treaty.

This differential approach would thus mean that for some states, WTO rules prevail, for others the Protocol. Depending on the circumstances -- i.e., is the Protocol obligation one of an integral nature? – the WTO rule may be "illegal" pursuant to Art. 41 as an *inter se* deviation from an integral obligation.[1093] But if no integral obligations are involved, can this "balkanisation" of multilateral treaties be tolerated?

As between states that both participated in the conclusion of the two treaties (*in casu*, states A and B), to say that the "later treaty" prevails as between them -- *even if for other states this treaty may not be*

[1092] Vierdag, *Conclusion …*, 101. He adds that in those cases « [t]he dates of adoption (or opening for signature) or entry into force of a treaty are of limited relevance in this connection, and the relevance of Article 30 is limited accordingly".

[1093] See above Chapter VI, section C.2.

the later one – seems to make sense. However, as soon as one of the treaties is the "later" in time for one party and the "earlier" in time for another party, the solution offered becomes shaky. Indeed, in terms of state practice, would states A and B (original parties to both the WTO and the Protocol) realise that when they let C accede to the WTO in 2000 *in their relationship with C, WTO rules prevail*; but when they subsequently let D accede to the WTO in 2001 *in their relationship with D, the Protocol prevails*?

Conflict involving treaties that are re-concluded, amended or regularly revised

The problem of whether the *lex posterior* rule in Art. 30 still reflects "the later expression of state consent to prevail over earlier expressions" arises not only in case the treaty has a different date for the two parties involved. It may emerge also in the event of amendments to either treaty where the treaty as amended is "concluded" once again *in its entirety*. The conclusion of the WTO treaty offers a good example. The GATT 1947 was concluded in 1947 and continued to exist up to 1995. In 1994, however, the GATT 1947 was incorporated into the WTO Agreement (as part of GATT 1994) under whose umbrella also a number of new treaties were put. As a result, when the WTO Agreement was concluded in 15 April 1994, also the provisions of GATT 1947 *as incorporated into the WTO Agreement*, were "re-concluded". The Appellate Body confirmed in, for example, *Argentina – Footwear* that all provisions of the WTO Agreement "entered into force … at the same time".[1094] However, as against treaties concluded between 1947 and 1994, did this re-conclusion of GATT result in a complete *tabula rasa* in the sense that whereas before 1994, these other treaties prevailed, as of 1994, it was again the GATT that must prevail as the "later treaty"?[1095]

Vierdag refers to another example of conflict involving "amended treaties", namely alleged conflict between the Covenant on Civil and Political Rights (1966) and certain ITU Radio Regulations (1982): "the Radio Regulations are subject to regular revisions, and they are adopted and become binding again on member States in the revised form. The regular conclusion of revised Regulations means that in the end the Regulations will always become the later treaty *vis-à-vis* every other treaty that is not likewise regularly revised, such as the Covenant on Civil and Political Rights".[1096]

In other words, treaties subject to regular revision, that is, in particular technical treaties, would then, through Art. 30, always prevail over treaties not subject to revision (i.e., treaties of a more immutable or regulatory type such as GATT articles). It is highly questionable whether this result is still in line with the "latest expression of state consent".

Conflict between treaties with universal calling and regional treaties

Another case where the principle of *lex posterior* may lead to an absurd outcome is that of conflict between a regional treaty (say, the ECHR or EC treaties) and a subsequent multilateral treaty with universal calling (say, a UN treaty on human rights or the WTO treaty) binding on all regional partners. Even if for the two parties involved (say, two member states of the EC), the respective dates of the two treaties are the same (1991 for the Maastricht treaty and 1994 for the WTO treaty), should *the later multilateral treaty prevail over the earlier regional one* (pursuant to Art. 30.3 providing that "[w]hen all the parties to the earlier [EC] treaty are parties also to the later [WTO] treaty … the earlier

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[1094] Appellate Body report on *Argentina* – Footwear, para. 81: "the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time".

[1095] In contrast, if one were to take the singular act of conclusion of a multilateral treaty seriously, it could well be argued that GATT 1947 (as incorporated without any change in GATT 1994) remains, pursuant to Article II:4 of the WTO Agreement, a "legally distinct" instrument concluded not in 1994, but in 1947. Hence, in terms of timing, *GATT remains the earlier treaty* vis-à-vis, for example, pre-1994 environmental treaties. At the same time, new WTO agreements (such as, the 1994 SPS agreement) would then, however, be *later in time*. Thus having to make a distinction between GATT and SPS rules shows the absurdity of the "guillotine" rule of time of conclusion in respect of "continuing treaties" (a notion discussed below in section vi).

[1096] Vierdag, *Conclusion …*, 101.

[EC] treaty applies only to the extent that its provisions are compatible with those of the later [WTO] treaty")? In the case of conflict between human rights treaties, explicit conflict clauses in either treaty may resolve the conflict. However, no such clauses can be found for conflict between an EC treaty and the WTO treaty. Nor could one invoke, in that instance, the fact that the EC treaty is of an objective or integral nature under Art. 41 so that no deviations from it are allowed. Art. 41 only applies only in the event of *inter se* modifications to the integral (EC) treaty, *not in case all EC member states have signed up to the later WTO treaty*.

More absurd still, did WTO rules, as between EC member states, prevail over the 1991 Maastricht Treaty simply because they were concluded later in time and was this situation reversed again in 1997 with the conclusion of the Amsterdam Treaty, once again, simply because that treaty succeeded WTO rules *ratione temporis*?

Under the examples cited above – of conflict between multilateral treaties where a treaty has different dates for each of the parties, has been re-concluded or revised or comes subsequently to a regional treaty – it can be questioned whether Art. 30 still finds application. To use the words of Jenks, could it, in these circumstances, not be said that "[w]hen matters reach this degree of intricacy the *lex prior* [and *lex posterior*] principle ceases to have any rational bearing on the real questions at issue"?[1097] Or in the words of Vierdag: "Article 30 rests on an assumption that will often appear not to be correct, as it fails to take account of the complication in time of multilateral treaty-making through complex procedures".[1098]

vi. Dis-apply Art. 30 – the notion of "continuing" or "living" treaties

This brings us to a second approach. One could submit, indeed, that in situations where for one state a conflicting treaty is the earlier one, whereas for the other state it is the later one, it is impossible to define the treaty as either "earlier" or "later" in time as required in Art. 30 (for A it is "earlier" and for B it is "later"). Consequently, the conflict in question is not one of "successive treaties". Hence, Art. 30 does not apply and one must have resort to other conflict rules (in particular, *lex specialis* developed below in section 3).

A strong argument in support of this second approach applies when faced with a multilateral treaty of what I term a "continuing" or "living" nature. Such multilateral treaty norms are part of a regulatory framework or legal system that was created at one point in time but continues to exist and evolve over a mostly indefinite period. Most rules of modern multilateral conventions are of this nature, including EC treaties, WTO rules, UNCLOS and many environmental conventions and human rights treaties. They are rules part of a framework or system which is continuously confirmed, implemented, adapted and expanded, for example, by means of judicial decisions, interpretations, new norms or the accession of new state parties (for which not only the consent of the new party is required, but also the reciprocal acceptance of all, or a majority of, existing parties). Such treaty norms were not only consented to when they originally emerged, but continue to be confirmed, either directly or indirectly, throughout their existence, in particular when monitored and evolving within the context of an international organisation (such as the WTO).[1099] It would be inconsistent with the genuine will of

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[1097] Jenks, *Conflict …*, 444.

[1098] Vierdag, *Conclusion …*, 98. He explains elsewhere : « there is an inadequacy and inconsistency in Article 30 with regard to the time of treaties and the time of rights and obligations : the occurrence of treaties (legal rules) in time does not necessarily correspond at all with the actual acquisition of rights and the incidence of obligations under treaties in force by particular States parties to them. It is one thing to adopt the text of a multilateral treaty, and to adopt the text of another treaty at a later moment of time; it is another thing to identify at a given moment the concrete rights and obligations of two or more States under two or more treaties in force" (ibid., 97).

[1099] See, for example, DENYS SIMON, L'INTERPRETATION JUDICIAIRE DES TRAITES D'ORGANISATIONS INTERNATIONALES 372 (1981) : « "l'accord de volontés qui a présidé à la conclusion de la convention ne s'est pas épuisé dans la rédaction d'un texte; l'application d'une telle convention suppose nécessairement le renouvellement permanent de l'adhésion des Etats membres au contenu de normes juridiques

states to "freeze" this type of rules into the mould of time at which they were originally created and to label them as an expression of state consent limited to, say, 15 April 1994. This type of treaty norms derive from what I term "continuing" or "living" treaties, not reflections of a "one-shot-end-all" expression of state consent.[1100] As a result, when such treaty norm conflicts with another treaty norm, in particular another continuing treaty norm, the "guillotine" approach of time of conclusion (the later in time prevailing) may not make sense and lead to arbitrary solutions.

This theory of "continuing" or "living" treaties is a logical consequence also of the obligation to interpret certain treaties in an "evolutive" manner (discussed above in Chapter V, section B.4.b). Evolutive interpretation and the impossibility of putting a singly time-label on the treaty in question go hand in hand. Thus, in respect of the WTO treaty, the Appellate Body's evolutive approach to treaty interpretation must be matched with an acknowledgement that the WTO treaty is a "continuing" or "living" treaty in respect of which the *lex posterior* principle in Art. 30 cannot always be applied.

It should normally be sufficient that <u>one</u> of the two treaty norms in conflict is of a "continuing" or "living" nature for Art. 30 to be dis-applied (i.e., for the treaty norms not to be "successive"). This would be the case, for example, when two original WTO members conclude a bilateral treaty, addressing certain trade issues, in 2000. In case of conflict between the two treaties[1101], it would then, indeed, be difficult to say that the two treaties are "successive" in time, since WTO rules existed *before* the bilateral treaty was concluded and continue to be confirmed *after* that. The conflict should then be better solved by, for example, the *lex specialis* principle, according to which the bilateral treaty would most likely prevail either because of its more specific subject-matter or its more specific membership, or both.

Nonetheless, even "continuing" or "living" treaties do have a starting point, even if this starting point is not the beginning and the end of state consent to the treaty. As a result, there may be treaties that were concluded *before* <u>the starting point</u> of a continuing treaty. Consequently, there may still be conflicts involving a continuing treaty where the two treaties are "successive" and the continuing treaty prevails as *later in time* under Art. 30. For example, the starting point of GATT is 1947. That of new WTO agreements, 1994. Thus, in case of a conflict between a GATT 1947/WTO norm and another norm (*not* of a continuing nature) which clearly pre-dates the GATT 1947/WTO norm (say, a bilateral agreement concluded in, respectively, 1930 or 1980), Art. 30 should still find application given that the two treaties are then, indeed, "successive" in time.[1102] Indeed, although the consent to the GATT 1947/WTO norm was given in 1947/1994 *and continues to be confirmed thereafter*, it remains the case that the (non-continuing) consent given to the other norm *pre-dates* the consent to the GATT 1947/WTO norm.

However, in the event of conflict between <u>two</u> norms of the "continuing" or "living" type, it seems difficult to apply Art. 30 at all, except in case one norm is an explicit amendment of the other in the sense of Art. 40 of the Vienna Convention.[1103] Even if the starting point of one of the two treaties may

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dont l'instrument signé ne constitue qu'une expression solennelle, mais, par essence, éphémère ». See also *supra* text at note 786.

[1100] Such « continuing treaties » are, indeed, « continuing acts », as referred to in Art. 14.2 of the ILC Draft 2000. On this notion, see Joost Pauwelyn, *The Concept of a 'Continuing Violation' of an International Obligation: Selected Problems*, 1995 BYIL 415. In support, see also the references in note 786.

[1101] Of course, a conflict not involving prohibited action under WTO rules, if not the bilateral treaty is "illegal" under both WTO rules and Art. 41 of the Vienna Convention.

[1102] This should be the case also in the hypothetical case outlined above, i.e., of an original WTO member A which concludes a bilateral agreement with B, *before* B's accession to the WTO. In that event the parties' consent around the WTO treaty emerged only at the date of adoption of B's accession so that, even if the parties' consent to the WTO treaty continues to be confirmed thereafter, the bilateral treaty (of a non-continuing nature) clearly predates the WTO treaty. As a result, Art. 30 must be applied and the WTO treaty prevails as *lex posterior*.

[1103] Art. 30 should continue to apply in case of amendments to a continuing treaty norm. There as well, there can be no doubt that the two norms are « successive » : the amendment comes later in time than the provision of the

then pre-date that of the other, given that the norms are in conflict, at the time of the conflict both exist and continue to be confirmed *at the same time*. Hence, the two treaties cannot be defined as "successive" in time. They are rather "parallel" in time. Thus, Art. 30 cannot be applied and, most probably, the *lex specialis* principle will resolve the conflict.

In sum, when a conflict involves a norm of a "continuing" or "living" nature, Art. 30 on "successive treaties" should *not* apply (instead, the principle of *lex specialis* must be resorted to) unless

(i) the contradictory norm is one of a non-continuing nature *pre-dating* the starting point of the "continuing" norm (in which case the "continuing" norm prevails as *lex posterior*); or

(ii) the contradictory norm constitutes an *amendment* to the "continuing" norm (in the sense of Art. 40 of the Vienna Convention, in which case the amendment prevails as *lex posterior*).

vii. Conclusion on the timing of treaties

The above examination shows, firstly, that the analogy with "latest legislative intent" underlying the *lex posterior* rule in Art. 30 may not always be convincing, in particular if the two norms stem from a different context or were created by a different set of states. Nonetheless, as a starting point, the *lex posterior* principle must be accepted in international law as the "best available solution" that may well create order in the chaos of inter-play between norms. The principle is confirmed in the Vienna Convention and is based on an objective criterion (time). Its outcome should, in most cases, be predictable. However, already at this stage it was noted that, given the sometimes shaky analogy with "latest legislative intent", *lex posterior* in international law cannot be the absolute legal principle which it is in domestic law.

Secondly, we have seen also that the dating of treaties may not always be easy. If the treaty has the same date for all of its parties, all the time (*in casu*, the date of its original conclusion), no problem arises and time may, indeed, be the decisive element in deciding conflict. However, as soon as the date of a treaty (or particular treaty provisions, for example, "as amended") is different depending on the particular party to the treaty (as a result, for example, of subsequent accessions or amendments), putting a single time-label on the treaty becomes impossible. In those cases, time may still play a convincing role *as between two parties for which the treaty was "concluded" at the same time* (say, two original parties to the treaty or two parties that acceded to it at the same time) and this irrespective of the fact that for other parties to the treaty the treaty has a different date. Even *as between two parties for which the treaty has a different date*, in some cases, it may still be convincing to utilise the latest date as the decisive one, i.e., as the date at which both parties' consent converged around the treaty. This may be the case, for example, in the event of conflict between a multilateral treaty (for which the date is different depending on the parties) in conflict with a bilateral treaty concluded as between the two parties in question.

However, whenever one of the treaties is a multilateral treaty that can be said to be of a "continuing" or "living" nature" -- in that it is continuously re-confirmed through institutional mechanisms -- putting a definite time label on the treaties involved may loose all connection with the search of "latest expression of state consent". Hence, in many cases involving such "continuing" or "living" treaties, the conflicting treaty norms will not be "successive" in time so that Art. 30 cannot be applied. Especially in the event of conflict where both norms are of this "continuing" nature, the norms cannot be seen as "successive". They are rather "parallel" in time.

In sum, in quite a number of cases the application of Art. 30 is put into serious doubt. In these "hard cases", the *lex posterior* principle seems de-linked from its underlying *rationale*, i.e., the search for the

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continuing treaty which is then no longer confirmed as of the date of the amendment. Hence the amendment must prevail as the later in time under Art. 30.

latest "legislative intent" or "latest expression of state consent". In those instances, strong arguments exist not to apply Art. 30 or, at least, to let other conflict rules (in particular, the *lex specialis* rule) play a role also. The conflict rules in Art. 30 should hence not only be subject to those set out in Arts. 53 and 64 (*jus cogens*), Art. 59 (termination and suspension) and Art. 41/58 (integral obligations). In certain circumstances, room ought to be made in addition to give priority to the principle *lex specialis derogat legi generali*. We discuss elements of this principle in the next sub-section (to what extent does Art. 30 itself include a *lex specialis* principle?) and devote section 3 below entirely to the notion of *lex specialis*.

f. The treaties must be "relating to the same subject-matter"

The conflict rules in Art. 30 apply only in the event successive treaties relate to "the same subject-matter". This is made clear in the title of Art. 30 as well as in Art. 30.1.

i. If there is conflict, the two treaties necessarily relate to "the same subject matter"

At the Vienna Conference, Sir Ian Sinclair expressed doubts about the meaning of the phrase "the same subject-matter":

> "Did the United Nations Covenants on Human Rights relate to the same subject-matter as the European Convention on Human Rights or the ILO and UNESCO Conventions on certain specific aspects of human rights?".[1104]

According to Sinclair, the phrase "should be construed strictly".[1105] The Expert Consultant agreed, saying "that those words should not be held to cover cases where a general treaty impinged indirectly on the content of a particular provision of an earlier treaty; in such cases the question involved such principles as *generalia specialibus no derogant*".[1106]

As noted before[1107], and further elaborated in section 3, there should be room to apply the *lex specialis* principle over and above the *lex posterior* rule in Art. 30. However, to base this priority rule on the requirement in Art. 30 that the two treaties must relate to "the same-subject matter" is not convincing. To let *lex specialis* prevail over *lex posterior*, one better refers to the absence of "successive treaties" with reference, in particular, to the notion of "continuing treaties".

Indeed, if there is a genuine conflict between two treaty norms, the two treaty norms must necessarily deal with the same subject-matter. If not, there would be no conflict in the first place since no overlap *ratione materiae* (one of the three overlaps required[1108]). As Vierdag pointed out:

> "The requirement that the instruments must relate to the same subject-matter seems to raise extremely difficult problems in theory, but may turn out not to be so very difficult in practice. If an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can be safely assumed that the test of sameness is satisfied".[1109]

Does this mean that the words "relating to the same subject-matter" have no meaning (against the principle of effective treaty interpretation)? No. The words relate to the existence of a conflict or

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[1104] Meetings of the Committee of the Whole, 165, para. 13.
[1105] *Offical Records of the Vienna Conference*, Vol. 2, 222.
[1106] Ibid., 253.
[1107] See section e.vii above.
[1108] See Chapter IV, section B.2.c.
[1109] Vierdag, *Conclusion …*, 100. Or as it is noted in *Oppenheim's*: "Article 30 of the Vienna Convention deals with successive treaties relating to 'the same subject-matter': it is not clear what limitation this involves, since in a sense if a course of conduct is such as to attract the application of two different treaties they can be said to related to the same subject matter" (Jennings and Watts, *Oppenheim's …*, 1212, note 2).

incompatibility. They limit the scope of application of Art. 30 to situations of conflict, thereby referring explicitly to one of the three overlaps required for there to be conflict (overlap *ratione personae*, *ratione temporis* and *ratione materiae*). In the two sentences where the phrase "relating to the same subject-matter" is used, it constitutes the only reference to there being a conflict or incompatibility as between the two successive treaties: In the title, "Application of successive treaties relating to the same subject-matter", in Art. 30.1, "the rights and obligations of States Parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs". In subsequent provisions, the phrase is no longer used. Instead, reference is made to "incompatible" (Arts. 30.2 and 5) and "compatible" (Art. 30.3). Hence, the words "relating to the same subject-matter" are important in that they require the existence of a conflict. That is their ordinary meaning. They do not say anything in respect of the *lex specialis* principle, nor, *a fortiori*, can they be read as implying an absolute preference for the *lex specialis* principle over and above the *lex posterior* rule.

Nonetheless, the statements by Sinclair and the Special Rapporteur on the existence of a *lex specialis* principle (made, without objection, at the Vienna Conference itself) remain important elements in support of *lex specialis* being either an element to be looked at in determining the "current expression of state consent" or a principle of customary international law in its own right.

ii. "Same subject matter" and the WTO panel on Indonesia - Autos

Another example of unjustified reliance on the phrase "relating to the same subject-matter" can be found in the WTO panel on *Indonesia – Autos*. This panel did not invoke "same subject-matter" as a ground for applying the *lex specialis* principle, nor did it actually refer to Art. 30. It made reference to "same subject-matter" in support of a strict definition of conflict.[1110] The alleged conflict at issue was one between the Subsidies Agreement and the TRIMs Agreement (the latter confirming GATT Art. III in respect of certain investment measures). We noted earlier that the panel, in our view incorrectly, only accepted situations of "mutually exclusive obligations" as situations constituting conflict.[1111] To make its definition of conflict even stricter, the two provisions alleged to be in conflict ought, according to the panel, also "cover the same type of subject matter".

Instead of looking at the particular provisions at issue and examining whether, *as invoked in the particular circumstances*, they would have lead to conflicting results -- i.e., under GATT Art. III / TRIMs, the measure is a domestic content requirement in breach of national treatment, whereas under the Subsidies Agreement it constitutes a subsidy which developing countries may grant up to the year 2000 -- the panel examined "same type of subject matter" *in the abstract*. On that ground, it refused to consider the situation as one of conflict:

> "With respect to the nature of obligations, we consider that, with regard to local content requirements, the SCM Agreement and the TRIMs Agreement are concerned with <u>different types of obligations and cover different subject matters</u>. In the case of the SCM Agreement, what is prohibited is the grant of a subsidy contingent on use of domestic goods, not the requirement to use domestic goods as such. In the case of the TRIMs Agreement, what is prohibited are TRIMs in the form of local content requirements, not the grant of an advantage, such as a subsidy".[1112]

But, of course, if *the grant* of a subsidy contingent on a domestic content requirement were <u>allowed</u> under the Subsidies Agreement, would then not also, *a fortiori*, the *domestic content requirement* which is implied in this subsidy be allowed? As a result, would there then not be a conflict between the Subsidies Agreement, <u>explicitly allowing</u> the grant of the subsidy, and the TRIMs Agreement which <u>prohibits</u> the domestic content requirement? Obviously, norms that are in conflict are

[1110] Discussed in Chapter IV, section B.2.d.iii.
[1111] Ibid.
[1112] Panel report on *Indonesia* – Autos, para. 14.50, underlining added.

"different" (if not, there would be no conflict) and may approach a subject-matter from a different angle (subsidy contingent on a requirement *versus* the requirement as such). But this "difference" between provisions does not mean that there can be no conflict. On the contrary, it is this very difference that leads to the conflict.[1113]

In sum, "same subject-matter" cannot be used as an abstract criterion on which to base either a *lex specialis* principle in Art. 30 or a general decision as to whether there is conflict between two treaties. The requirement of "same subject-matter" relates solely to whether there is a genuine conflict (i.e., a material overlap) *as between two specific treaty provisions in the particular circumstances of each case*.

3. Lex specialis

The principle of *lex specialis* is often referred to by authors, litigators and international tribunals alike. Nonetheless, many have expressed doubts as to the status of this principle under international law. Is it, for example, part of customary law? Any useful discussion of the principle of *lex specialis* must acknowledge, up front, that the principle is referred to in different contexts and may have a different meaning depending on this context. What is of interest to this study is, of course, the principle *lex specialis derogat legi generali*. That is, the principle of *lex specialis* as a rule to resolve a genuine conflict between two norms. Pursuant to this principle, in the event of conflict, the more special norm prevails over the more general norm.[1114]

It may not always be easy to determine whether a reference to *lex specialis* is meant to be one to *lex specialis* as a conflict rule. For example, in the *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, the ICJ confirmed the notion of *lex specialis* as follows:

> "it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship

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[1113] Hence, the three requirements summed up by the *Indonesia – Autos* panel for there to be conflict in footnote 649 of the report are all three mistaken or at least erroneously interpreted . The panel stated: "In international law for a conflict to exist between two treaties, three conditions have to be satisfied. First, the treaties concerned must have the same parties". This is incorrect since it overlooks conflicts of type AB/AC discussed below in section B. The panel continued: "Second, the treaties must cover the same substantive subject matter". Again, the way the panel interpreted this requirement, that is, *in the abstract*, not as a requirement of material overlap depending on the circumstances, was flawed (see this section ii). The panel then stated: "Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations". We discarded this strict definition of conflict in Chapter IV, section B above.

[1114] For an example where an author did not fully realize the extent of the *lex specialis* principle as a conflict rule, see Vierdag, *Conclusion …*, 100 : « It is not proper to apply a principle such as *generalia specialibus non derogant* if the *generalia* in one instrument are so phrased as to rule out any *specialia* in another instrument ». In other words, Vierdag would exclude the application of the *lex specialis* principle in case there is a clear conflict between the two norms. But the principle is exactly there to solve a situation where one rule conflicts, i.e., « rules out » another norm. Vierdag's statement goes against recognising *lex specialis* as a genuine conflict norm . In his view, as soon as the *lex generalis* « rules out », i.e., conflicts with, the *lex specialis*, giving preference to the *lex specialis* would « not be proper ». The example Vierdag refers to, namely of a conflict between the 1966 Covenant and 1982 ITU Radio Regulations (quoted above in the text at note 1096) is, indeed, easily resolved once one accepts *lex specialis* as a genuine conflict rule. In my view, the 1966 Covenant is a « continuing » treaty so that it is not in a « successive » relationship with the « later » 1982 Radio Regulations (the 1966 Covenant continues to be confirmed also after 1982). Hence, Art. 30 should not apply. Since, according to Vierdag, all parties to the Covenant are also parties to the Radio Regulations, Art. 41 (prohibiting *inter se* modifications to the Covenant which must be seen as an integral treaty) does not apply either. Since the Covenant provision at issue is not of *jus cogens*, all the parties to the Covenant can, by common consent, validly deviate from it. Hence, the *lex specialis* principle must provide the solution and it is clear that the Radio Regulations are more specific in subject matter than the Covenant provision (radio broadcasting *versus* freedom to impart information of all kinds).

> is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*" (underlining added).[1115]

It is unclear from this statement whether the ICJ considered the 1977 Treaty as a *lex specialis* simply in terms of more specific law supplementing other law or whether the ICJ intended to go further implying also that "above all" means that in the event of conflict, the 1977 Treaty must prevail.

In sub-sections (a) to (e) below we examine *lex specialis* as a rule to resolve conflict in the applicable law. In sub-section (f) we then touch upon some other meanings of the *lex specialis* principle.

It must be recalled, once again, that the conflict rules supplied below are subject to those set out in earlier sections of this Chapter and Chapter VI, in particular *jus cogens*, Art. 41/58 of the Vienna Convention and explicit conflict clauses. The relationship between the *lex posterior* and the *lex specialis* principle is further discussed below.

An interesting example of inter-play between (i) the rules on validity of acts of international organisations (*in casu*, UN Security Council resolutions); (ii) an explicit conflict clause (*in casu*, Art. 103 of the UN Charter); (iii) the *lex posterior* principle; and (iv) the *lex specialis* rule, can be found in the *Lockerbie cases*. There, a conflict arose as between the rights of Libya under the 1971 Montreal Convention (i.e., Libya's right to keep and try the two suspects in Libya), on the one hand, and the obligations of Libya under a UN Security Council resolution (i.e., Libya's obligation to surrender the two suspects to the UK and the US), on the other. Libya, claiming that its Montreal Convention *right* ought to prevail, (i) relied on the invalidity of the Security Council resolution claiming that it was taken in disregard of the UN Charter, (ii) submitted that because this resolution is invalid, Art. 103 does not find application[1116]; and (iii) argued that the 1971 Montreal Convention as both *lex specialis* and *lex posterior* ought to prevail over the UN Charter system.[1117] In defence, the UK and the US relied on the explicit conflict clause in Art. 103. In their view, any rights that Libya may have had under the Montreal Convention are now superseded by Libya's UN Charter obligations under the Security Council resolution. In its judgement on provisional measures, the ICJ seemed to support the UK and US positions, finding (i) that the obligation resting on all UN members to accept and carry out the decisions of the UN Security Council in accordance with Article 25 of the Charter extends *prima facie* to the decision contained in resolution 748 (1992); and (ii) that "in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention".[1118]

a. Why should *lex specialis* prevail and when is a norm more special than another?

An early reference to *lex specialis* as a conflict rule can be found in the writings of Grotius:

[1115] ICJ Reports 1997, para. 132.

[1116] See Libya's Oral Statement, *per* Prof. Suy, Public Sitting held on Wednesday 22 October 1997 (posted on the internet at http://www.icj-cij.org/icjwww/idocket): "La primauté établie par cet article 103 *présuppose* une obligation établie conformément à la Charter. Il présuppose donc, dans la présente espèce, une décision du Conseil de sécurité respectant les limites que la Charte lui impose ».

[1117] See Libya's Oral Statement, *per* Prof. David, Public Sitting held on Friday 17 October 1997 (posted on the internet at http://www.icj-cij.org/icjwww/idocket): "très naturellement le système de la convention de Montréal apparaît, par rapport au système de la Charter des Nations Unies, à la fois comme une *lex posterior* et comme une *lex specialis* ; c'est pour cela aussi que dans les domaines qui relèvent de cette convention, celle-ci doit à priori l'emporter sur les systèmes prévus par la Charter, sauf application de l'article 103 … » (at para. 4.20).

[1118] ICJ Reports 1992, para. 42.

> "Parmi les conventions … que l'on préfère ce qui est le plus particulier, et ce qui approche le plus de la chose ! Car ce qui est spécial est ordinairement plus efficace que ce qui est général ».[1119]

In the same sense, de Vattel : « De deux Loix, ou de deux Conventions, toutes choses d'ailleurs égales, on doit préférer celle qui est la moins générale, & qui approche le plus de l'affaire dont il s'agit . Parce que ce qui est spécial souffre moins d'exceptions que ce qui est général ; il est ordonné plus précisément, & il paraît qu'on l'a voulu plus fortement ».[1120]

Pufendorf gave the following example in support: « Une loi défend de paraître en public avec des armes, pendant les jours de fête, une autre Loi ordonne, de sortir en armes pour se rendre à son poste, dès qu'on entendra sonner le tocsin. On sonne le tocsin un jour de fête. Il faut obéir à la dernière Loi, qui forme une exception à la première ».[1121]

Based, *inter alia*, on the rather prosaic references to *lex specialis* in the writings of Grotius, de Vattel and Pufendorf, the following two reasons for letting a more specific norm prevail over a more general one can be given:

(i) it is the more effective or precise norm, allowing for less exceptions (the *lex specialis*, if it prevails, is, indeed, already an exception to the *lex generalis*); and

(ii) because of this, the *lex specialis* reflects most closely, precisely and/or strongly the consent of the states in question.

Consequently, much like *lex posterior* -- which is based on the view that the "latest expression of state consent" ought to prevail -- the principle of *lex specialis* is but a consequence of the contractual freedom of states, grounded in the idea that the "most closest, precise or strongest expression of state consent" ought to prevail. Both Arts. 30 and the *lex specialis* principle thus attempt to answer one and the same question, namely: which of the two norms in conflict is the "current expression of state consent"? Since both *lex posterior* and *lex specialis* derive from the principle of contractual freedom of states, both principles are "subjective" conflict rules in the sense that it is the intention of the parties that counts, not some formal criterion such as source.

Looked at from this angle, it would be unwise to portray the *lex posterior* and *lex specialis* principles as absolute and self-standing legal norms. They are rather practical methods in the search of "current expression of state consent". They deduce logical consequences from the fact that a norm is later in time or more specific so as to determine the "current expression of state consent".[1122] In sum, they are more factual/subjective elements in the assessment of contractual freedom and state consent than absolute legal norms in their own right. Thus, if we conclude below that Art. 30 may not apply to certain conflicts and the *lex specialis* principle ought to be resorted to instead, this shift from Art. 30 to *lex specialis* is a shift in the methods used to assess one and the same question, namely what is the "current expression of state consent". It is not a shift in the underlying legal norm applied to resolve conflict. This norm remains the principle of contractual freedom of states.

Nonetheless, in terms of detecting a *lex posterior* and *lex specialis*, a major difference does persist. In the former case, the decisive element is time. In the later, it is speciality. Now, time is generally seen as a criterion to be applied more easily than speciality and, in that sense, considered to be more

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[1119] GROTIUS, LE DROIT DE LA GUERRE ET DE LA PAIX (ED. D. ALLAND and S. GOYARD-FABRE), 413.
[1120] de Vattel, *Droit des Gens …* , 511.
[1121] PUFENDORF, DROIT DE LA NATION ET DES GENS, LIV. V. CHAP. XII-XXIII (quoted in de Vattel, *Droit des Gens …*, 511).
[1122] In that sense they are rather "principles of legal logic", as we defined them above in Chapter III, section D.1.d.

explicit or objective than the sometimes implicit and subjective determination of what is more special. This appearance may, however, be misleading. Firstly, as we saw above[1123], determining the relevant date of a treaty is often *not* as straightforward as noting that, for example, the WTO treaty was concluded on 15 April 1994. Secondly, a decision on what norm is more special or specific may be easier than first thought. A norm may be *lex specialis* on one of two grounds:

(i) subject matter; or
(ii) membership.

Recall, in this respect, Art. 38, paragraph 1(a), of the ICJ Statute which refers also to "international conventions, whether general or particular", discussed above in Chapter III, section E.1.

i. Subject matter

Although necessarily dealing with the "same subject-matter" -- if not there would be no conflict[1124] -- one norm may be *lex specialis* because it addresses the particular subject matter more directly or precisely. In that sense, the material scope of one norm can be more precise or limited than another. On that basis, a WTO rule dealing with countermeasures for breach of WTO obligations is *lex specialis* as opposed to general international law dealing with countermeasures generally, for any breach of international law. Equally, an obligation to do something in events A to Z, is *less specific* than an obligation not to do this something in events A and B. Or also, a WTO obligation *not* to restrict trade, irrespective of the product involved must be seen as *less specific* than an obligation (or explicit right) to restrict trade in products A and B (which are, for example, labelled as harmful). In that sense, the WTO's SPS agreement, dealing generally with all sanitary and phytosanitary measures, *irrespective of the product or health concern*, must be seen as less specific than, for example, the Cartagena Protocol on Biosafety which addresses certain specific products, such as "living modified organisms" and deals with a specific health concern, namely risks related to certain genetically modified organisms. NAFTA confirms the specificity of MEA trade provisions as compared to WTO/NAFTA rules when, in its Art. 104, it addresses "inconsistency between this Agreement and the specific trade obligations set out in", *inter alia*, CITES, the Montreal Protocol and the Basel Convention.

ii. Membership

A norm may also be *lex specialis* with reference to its membership. By this we do not mean that a treaty with less parties generally prevails over a treaty with more parties or that an *inter se* agreement always prevails over an earlier multilateral agreement.[1125] Rather, some treaty norms must be seen as *lex specialis* because they deal with the same subject matter as the opposing *lex generalis* does but in a way that goes further, *either in terms of detail or in terms of the objectives pursued under both treaties*.

As an example one could refer here to the WTO treaty (a treaty with universal calling) as opposed to EC treaties (of a regional nature). Both address trade matters and aim at trade liberalisation. However, the EC treaty does so in more detail and in a way that goes further in terms of trade liberalisation. On that basis, and depending on the particular provisions at issue, it should, therefore, be seen as *lex specialis* as between EC members.[1126] Hence, it should, for example, not be possible for an EC member in its relationship to other EC members to rely on an explicit WTO right (to restrict trade) that contradicts an EC treaty obligation (to free trade), even if the EC treaty is the earlier in time. The same applies in respect of regional human rights conventions (such as the ECHR) as

[1123] See section 2.e.
[1124] See Chapter IV, section B.2.c and section 2.f above.
[1125] See Art. 41/58 of the Vienna Convention (Chapter VI, section C.2) for proof to the contrary.
[1126] That is, of course, to the extent EC rules are not explicitly prohibited by WTO rules (such as GATT Art. XXIV) in which case it must be clear, at least under international law, that WTO rules "prevail" over EC rules.

opposed to universal human rights conventions (such as those concluded in the UN). In many respects, the regional human rights treaty will deal with the protection of human rights in more detail and go further in the shared aim of human rights protection. To that extent, these regional conventions ought to be seen as *lex specialis*.[1127] Another example can be found in the preference given by the ICJ to special customary international law binding as between some states only over and above general customary international law which is, in principle, binding on all states.[1128]

Now that we have provided some clarifications as to how a *lex specialis* can be identified, in the four sub-sections below, we examine to what extent the *lex specialis* principle applies, as a conflict rule, under current international law. We begin with the instance where it applies beyond doubt, namely: treaty provisions contracting out of general international law (section b). We next examine cases where it has been accepted, but where the decision in favour of the *lex specialis* was made partly (if not largely) because it was at the same time the *lex posterior* (section c). We then assess the "hard cases" of conflict between provisions in the same treaty (should either of them prevail as *lex specialis*?) and conflict involving a *lex specialis* which is at the same time the *lex prior* (sections d and e).

b. Particular international law prevails over general international law

As hinted in Chapter III, section G, in the event of conflict between, on the one hand, <u>particular</u> international law (say, a specific treaty norm or special customary international law) and, on the other hand, <u>general</u> international law (general customary international law or general principles of law), particular international law prevails (subject, of course, to *jus cogens*).

i. Treaties contracting out of general international law

As we explained earlier, it is perfectly possible for a treaty norm to "contract out" of general international law.[1129] In that event, the conflict between the treaty norm and the norm of general international law must be decided in favour of the treaty norm. It is then the treaty norm which prevails, although the norm of general international law continues to exist.[1130] This solution is based on the principle of *lex specialis*. As the Iran-US Claims Tribunal found:

> "As a *lex specialis* in the relations between the two countries, the Treaty supersedes the *lex generalis*, namely customary international law. This does not mean, however, that the latter is irrelevant in the instant Case. On the contrary, the rules of customary law may be useful in order to fill in possible lacunae of the law of the Treaty, to ascertain the meaning of undefined terms in its text or, more generally, to aid interpretation and implementation of its provisions".[1131]

This approach is explicitly confirmed in both the law of treaties and the ILC Draft 2000 on state responsibility. Art. 5 of the Vienna Convention states that it is

> "without prejudice to any relevant rules of [international] organisations".

Moreover, on several occasions, Vienna Convention provisions are explicitly made subject to *lex specialis* that may be set out in particular treaties, using phrases such as "unless the treaty so (or otherwise) provides" or "unless it is prohibited by the treaty" (e.g., in Arts. 19(a), 20.1, 28, 29, 30.2, 40.1, etc.). Art. 56 of the ILC Draft 2000, entitled "*Lex specialis*", states the following:

[1127] This is the example Sinclair referred to at the Vienna Conference. Note also that regional conventions themselves may include explicit conflict clauses to this effect.
[1128] *Right of Passage case* (Portugal v. India), ICJ Reports 1960, 6.
[1129] See Chapter III, section E.3 and Chapter IV, section C.3 above.
[1130] But see above text at note **404**.
[1131] *Amoco Int. Finance Corp. v. Iran*, 15 IRAN-US CL. TRIB. REP. 189, para. 112 (1987).

> "These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or its legal consequences are determined by special rules of international law".

In these instances, the treaty norm is mostly also the *lex posterior.* Even if, for example, the Vienna Convention was concluded only in 1969, it largely codified customary law pre-dating 1969. As a result, there is a double reason to let the treaty norm prevail: *lex posterior* and *lex specialis*.

ii. Supervening custom in conflict with an earlier treaty: lex specialis prevails over lex posterior

Nonetheless, as explained earlier[1132], in cases where it is established that the custom is supervening (something that may be difficult to prove), the custom must, in principle, prevail over the earlier treaty norm as *lex posterior unless it can be shown that the treaty norm continues applying as lex specialis*. Hence, in respect of conflict between treaty and supervening custom one first applies the *lex posterior* rule, which is then subject, however, to the principle of *lex specialis*. In other words, if it can be shown that the treaty norm is still existing particular international law, the new general international custom must give way.

An example can be found in the *INA Corp. v. Iran* case, decided by the Iran-US Claims Tribunal, where INA Corp. had filed a compensation claim for the expropriation of certain shareholdings. It invoked a 1955 Treaty of Amity concluded between the United States and Iran imposing a compensation standard of prompt, adequate and effective compensation. Iran claimed, however, that this treaty had been superseded by developments in general international law which, in its view, imposed less stringent compensation requirements. The Tribunal held that both norms prescribe the same standard and that in any case, in the circumstances, the treaty had priority over the custom:

> "for the purpose of this case we are in the presence of a *lex specialis*, in the form of the Treaty of Amity, which in principle prevails over general rules".[1133]

Another example is the WTO treaty contracting out of certain general customary international law rules on countermeasures.[1134] In this respect, WTO rules prevail over general custom. If, over time, this general custom changes, however, the general custom as amended becomes the *lex posterior* prevailing over the WTO treaty. This will be so unless it can be shown that the specific WTO treaty rules on countermeasures continue applying as *lex specialis*. It may also occur that the WTO treaty specifically addresses an issue (say, national treatment) which is, at the time of conclusion of the WTO treaty, not regulated in general custom. There is then no conflict. However, if such general custom were, nonetheless, to develop subsequently and it conflicts with the earlier WTO rules, this general custom should, in principle, prevail over the earlier WTO treaty as *lex posterior*. But this again is subject to rebuttal in case it can be proven that the specific WTO rules on national treatment continue applying as *lex specialis*.

These two situations of supervening custom in conflict with pre-existing treaty norms – i.e., treaty "contracting out" of custom which then changes or treaty regulating a matter dealt with in custom only subsequent to the treaty -- must be distinguished from cases where the treaty is silent on a matter (say, on burden of proof), there is general custom at the time the treaty is concluded, but this custom changes subsequently. In that case, *there is no conflict* since the treaty is silent on the matter and the general custom *as it evolves over time* continues to apply to the treaty (up to the point that the treaty itself were to derogate from it).

[1132] See Chapter III, section E.3.
[1133] Award of 12 August 1985, 8 IRAN-US CL. TRIB. REP. 373, at 379. This was confirmed in *Phillips v. NIOC and Iran*, Case No. 39, Chamber Two, Award no. 425-39-2, 29 June 1989, para. 107.
[1134] See above Chapter IV, section C.3.c.iv.

iii. Treaties and custom as lex specialis prevailing over general principles of law

Earlier, it was explained also that general principles of law, from an operational perspective, are a "secondary source" only.[1135] As noted there, this is based partly on the principle of *lex specialis*. In particular *treaty norms* are most likely to be more specific than general principles of law. The same applies, but to a lesser extent, in respect of custom *versus* general principles of law. In those cases, the general principle of law is most likely to be *lex prior* also. Hence, it will have to give way to, for example, a conflicting treaty norm both on the ground of *lex specialis* and *lex posterior*. It is most unlikely that a conflict would arise as between an existing treaty norm and a later general principle of law: either the treaty norm will have been terminated or fallen into *desuetude* or the general principle will not have developed in the light of a conflicting treaty. Moreover, given the very function of general principles of law (fall-back in case there is no treaty or custom), any conflict between an existing treaty and a general principle of law should, indeed, be decided in favour of the treaty.

iv. Special customary law prevailing as lex specialis over general customary law

Finally, based also on the principle of *lex specialis*, we saw earlier that special customary international law (either in terms of subject matter or membership) prevails over general customary international law. This was confirmed in the *Rights of Passage* case. There, the Court established the right of transit through Indian territory of private persons, civil officials and goods, on the basis of "a constant and uniform practice", which "was accepted as law by the Parties".[1136] Portugal had also invoked general international custom as well as general principles of law in support of its claim of a right of passage. The Court did not consider it necessary to examine whether these more general rules lead to the same result as that set out in the special custom. It simply observed:

> "Where therefore the Court finds a practice clearly established between two States which was accepted by the Parties as governing the relations between them, the Court must attribute decisive effect to that practice for the purpose of determining their specific rights and obligations. Such a particular practice must prevail over any general rules".[1137]

It should be noted, however, that special custom can only prevail over general custom in case the general custom is not part of *jus cogens*. In addition, strong arguments exist in support of making an analogy with Art. 41/58 of the Vienna Convention.[1138] Special custom (much like an *inter se* agreement deviating from an earlier multilateral treaty) should then be allowed to prevail over general custom only in case it does not contract out of an integral obligation, i.e., in case the special custom does not affect third party rights under the general custom.

c. Cases where the *lex specialis* prevailed but where it was at the same time *lex posterior*

In the previous sub-section, we addressed conflict between particular and general international law, the latter being either general customary international law or general principles of law. In what follows we shall focus mainly on conflict as between *two treaty norms*. Has the principle of *lex specialis* been applied so as to let a special treaty norm prevail over a conflicting, general treaty norm? In most cases where *lex specialis* was referred to as a rule to resolve conflict, the *lex specialis* was, at the same time, the *lex posterior*. Hence, on the ground of that case law it is difficult to conclude that the *lex specialis* principle prevails over the *lex posterior* rule. It is nonetheless useful to refer to some of these cases.

In the *Mavrommatis Palestine Concessions* (Jurisdiction) case, the PCIJ examined the relationship between Great Britain's 1922 Mandate over Palestine and a subsequent 1923 Protocol. The Court held

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[1135] See Chapter III, section D.2.
[1136] ICJ Reports, 1960, 40.
[1137] Ibid., 44.
[1138] See Chapter VI, section C.2.

that if there were a conflict between these two agreements (something that turned out not to be the case), the Protocol, being the special and more recent agreement, would prevail over the Mandate:

> "It is certain that Protocol XII is an international instrument, quite distinct from and independent of the Mandate for Palestine. It deals specifically and in explicit terms with concessions such as those of M. Mavrommatis, whereas Article 11 of the Mandate deals with them only implicitly. Furthermore it is more recent in date than the Mandate. *All the conditions therefore are fulfilled which might make the clauses of the Protocol overrule those of the Mandate … in cases of doubt, the Protocol, being a special and more recent agreement, should prevail*" (emphasis added).[1139]

In the *Polish Postal Service in Dantzig* case, the parties invoked the 1919 Treaty of Versailles and two bilateral treaties concluded between Poland and Dantzig, one in 1920, the other in 1921. The PCIJ confirmed the *lex specialis* principle stating that the more specific bilateral treaty prevails over the more general Treaty of Versailles pursuant to which the bilateral treaty was concluded.[1140] In *Jurisdiction of the European Commission of the Danube*, the PCIJ was faced with two legal instruments regulating the régime of the Danube, one general instrument, the 1919 Treaty of Versailles, another more specific one, the 1923 Statute of the Danube. The Court applied the more specific treaty, which was at the same time the *lex posterior*.[1141]

d. Lex specialis as amongst provisions of the same treaty (or same date)

The widely acclaimed *lex specialis* principle is only really put to the test in case it is not at the same time the *lex posterior*. This may be the case, firstly, if both conflicting norms are set out in the same treaty (or, in the rather exceptional case of two norms deriving from different instruments concluded *at the same point in time*). This is what we examine in this sub-section. In the next sub-section we examine a second set of "hard cases", namely where the *lex specialis* is also the *lex prior*. Importantly, whereas in this second type of cases, the *lex specialis* principle enters into conflict with Art. 30's *lex posterior* rule, in the first type of cases we discuss here (norms with the same date) there is no such conflict since Art. 30 only applies in case of "successive treaties".

As far as conflict between treaty norms with the same date is concerned, *Case A/2* of the Iran – United States Claims Tribunal confirmed the *lex specialis* principle. There, the Tribunal examined the relationship between a 1981 Declaration referred to as "the General Declaration" and another 1981 Declaration, of the same date, referred to as "the Claims Settlement Declaration". The Tribunal found as follows:

> "if there were any inconsistency, it is a well recognised and universal principle of interpretation that a special provision overrides a general provision … Moreover, the terms of the Claims Settlement Declaration are so detailed and so clear that they must necessarily prevail over the purported intentions of the parties, whatever they could have been".[1142]

That the *lex specialis* principle applies as between two instruments of the same date was also confirmed, albeit implicitly, by the ICJ in the *Ambatielos case* (Preliminary Objection) where the Court addressed the relationship between a 1926 treaty and an accompanying declaration of the same date. The Court held that the declaration forms an integral part of the treaty so that it had jurisdiction to decide any dispute as to the interpretation or application of the declaration pursuant to Art. 29 of the

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[1139] PCIJ, Ser. A, No. 2, at 30, 31 (1924).
[1140] PCIJ, Ser. B, No. 11 (1925).
[1141] PCIJ, Ser. B, No. 14, 24 (1927).
[1142] *Iran-United States, Case A/2*, 101, at 104. Note, however, that *lex specialis* as referred to here by the Tribunal is not a rule of *interpretation*, but a rule on *how to resolve conflict* in case treaty interpretation does not do away with an apparent conflict.

treaty. More particularly, it found that on that basis it had jurisdiction to decide whether there is a difference between the parties within the meaning of the declaration that must be referred to a Commission of Arbitration. If so, the Commission of Arbitration would decide on the merits of the difference. The Court then noted, and this is where the *lex specialis* principle comes into play:

> "It may be contended that because a special provision overrides a general provision, the Declaration should override Article 29 of the Treaty … and, as it lays down a special arbitral procedure, it excludes the jurisdiction of the Court under Article 29. While it is true that the Declaration excludes the Court from functioning as the Commission of Arbitration, it is equally true that it lies with the Court to decide precisely whether there should be a reference to a Commission of Arbitration" (underlining added).[1143]

Conflict between WTO treaty rules offers another example. The WTO treaty, including its more or less 60 different agreements, understandings and other legal instruments, was concluded as a "single package" at one point in time.[1144] Even GATT 1947 was re-concluded as part of GATT 1994, in turn, an integral component of the Marrakesh Agreement. We saw earlier that a number of explicit conflict clauses are provided for in the WTO treaty itself, resolving conflict, for example, as between the Marrakesh Agreement and other multilateral WTO agreements.[1145] For those internal WTO conflicts not resolved by explicit conflict clauses, resort must be had to the *lex specialis* principle.

i. Lex specialis and the General Interpretative Note to Annex 1A

One of the explicit conflict clauses in the WTO treaty -- the *General Interpretative Note to Annex 1A* -- can, indeed, be seen as a confirmation of the *lex specialis* principle. This note prescribes that

> "[i]n the event of conflict between a provision of the [GATT] and a provision of another agreement in Annex 1A [e.g., the TBT or SPS Agreement or the Agriculture or Subsidy Agreement] … the provision of the other agreement shall prevail to the extent of the conflict".

The note thereby gives a preference to *the more specific agreement*: GATT can be said to deal with trade in goods generally; the agreements in Annex 1A ("Multilateral Agreements on Trade in Goods") can be considered as dealing with particular issues or sectors of trade in goods (such as sanitary measures or textiles).

Note, however, that the *General Interpretative Note* gives preference to other Annex 1A agreements *as agreements*, i.e., irrespective of whether the particular provision in those agreements is actually more specific that the conflicting GATT provision. It is, indeed, not precluded that a conflict may arise as between an Annex 1A provision that is *less specific* than the contradictory GATT provision. However, even in that case the Annex 1A provision must prevail. Consequently, the *General Interpretative Note to Annex 1A* does to a large extent confirm the *lex specialis* principle, but in certain circumstances it may contradict this principle.

Moreover, it should be recalled that the *General Interpretative Note* must not always result in giving preference to the most stringent obligation in terms of trade liberalisation.[1146] Other Annex 1A agreements, such as the TBT Agreement, may largely be more specific and add additional obligations on WTO members. But this is not *necessarily* so. They may also detract from GATT obligations in that they can provide for explicit rights to restrict trade, there where GATT would have prohibited such restrictions. As noted before, the WTO is not the proverbial cyclist who needs to move on (i.e., further liberalise) for it to survive. New WTO rules, such as the other Annex 1A agreements, may not

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[1143] ICJ Reports, 1952, 28 at 44.
[1144] See *supra* text at note 1094.
[1145] See section 1.d above.
[1146] See Chapter IV, section B.2.d above.

only further liberalise trade, they can also allow for certain new instances where trade restrictions are tolerated. This is why the following statement by the Appellate Body in *EC – Asbestos* is far too categorical:

> "the *TBT Agreement* imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994".

It may be the case that the TBT Agreement only adds obligations to those in GATT, but this is not necessarily so. Nothing precludes that the TBT Agreement detracts from previous GATT obligations. For example, GATT Art. XX provides for an exhaustive list of justifications, there where TBT Art. 2.2 refers to any "legitimate objective". In that event as well, the TBT explicit rights to restrict trade must, pursuant to the conflict clause in the *General Interpretative Note to Annex 1A*, prevail over GATT obligations to liberalise trade.

ii. The GATT-GATS overlap: no explicit conflict clause, but lex specialis may resolve conflicts

WTO treaty provisions have the same date and many internal conflicts are resolved by explicit conflict clauses. But what happens in case there is a conflict between two WTO rules and no such treaty based conflict clause can be found? This may be the case in respect of a GATT rule in conflict with a GATS provision or a GATT/TRIPS or GATS/TRIPS conflict. *In respect of none of these conflicts does the WTO treaty provide for explicit conflict clauses.*[1147] Hence, the conflict rules in general international law must be applied and resort may be had, in particular, to the *lex specialis* principle.

Let us take the GATT/GATS conflict as an example. It is the only conflict as between the three WTO pillars (GATT/GATS/TRIPS) that has received attention in WTO jurisprudence.[1148]

GATT and GATS are not mutually exclusive

GATT does not define its material scope of application. To find out whether a GATT provision, such as GATT Art. III on national treatment, applies one must focus on the language of that particular provision. Although GATT is generally recognised to apply to trade *in goods* and is listed in Annex 1A entitled "Multilateral Agreements on Trade *in Goods*", nowhere is the scope of GATT explicitly limited to trade in goods. On the contrary, many GATT provisions seem to have a rather broader scope. GATT Art. III:4, for example, explicitly provides that it applies to

> "all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use [of products]".

Hence, Art. III, with its broad "affecting" requirement and reference to "offering for sale", "transportation" and "distribution", does seem to cover also elements of services trade, in particular in the sectors of wholesale, transportation and distribution services *as long as the services measure has an effect on goods*.

The material scope of GATS, in contrast, is generally defined up front in GATS Art. I. GATS "applies to measures … affecting trade in services" (GATS Art. I:1). Pursuant to GATS Art. XXVIII(c), such measures "include measures in respect of (i) the purchase, payment or use of a service; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member". GATS Art. I:2 defines "trade in services" as the supply of a service in one of four modes

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[1147] See section A.1.d.viii above.

[1148] On the GATT/GATS overlap see John Gaffney, *The GATT and the GATS: Should they be mutually Exclusive Agreements?*, 1999 LEIDEN JOURNAL OF INTERNATIONAL LAW 135-153 and, more generally, Werner Zdouc, *The Triangle of GATT/GATS and TRIPS*, World Trade Forum Vol. 3, 2000 (forthcoming).

(cross-border supply, consumption abroad, commercial presence and movement of natural persons). Hence, although GATS (unlike GATT) does define its general scope of application, it did so in a very broad manner, using, in particular, a rather vague "effects" criterion ("measures … affecting trade in services"), very much like, for example, GATT Art. III.

There is, of course, nothing wrong with broadly defining the scope of an agreement. It means only that many measures may fall under it. But if two equally broadly defined agreements deal with subject matters as closely related as measures "affecting trade in goods" and measures "affecting trade in services", the potential for overlap is vast. Indeed, whenever a measure restricts the supply of, for example, foreign distribution services, the measure will most likely "affect" also the trade in the foreign goods normally supplied by these foreign distributors. Or, conversely, whenever a measure restricts the importation of particular goods, such restriction is very likely to lead also to less demand, and hence a restriction, in the foreign services that may be needed to distribute and wholesale these imported goods. Where there is potential for overlap, there is, of course, potential for conflict, especially if the two regimes set out a number of substantially different obligations as GATT and GATS do[1149] (unlike, for example, the goods *versus* services regime under the EC treaty).

When they overlap, GATT and GATS rules may simply accumulate (i.e., either confirm or complement each other), but they may also conflict. GATT and GATS may, first of all, set out mutually exclusive obligations (conflict situations 1 or 2 referred to in Chapter IV). But they may also (and more likely even) raise conflicts of the obligation *versus* explicit right type (conflict situations 3 and 4):

(1) a GATT norm may prohibit something which a GATS norm explicitly allows for (say, a GATT Art. III prohibition to discriminate periodicals on the ground that they include certain advertising *versus* no national treatment commitments in the advertising sector under GATS Art. XVI[1150]);
(2) a GATT norm may explicitly allow for something which a GATS norm prohibits (say, an anti-dumping duty on steel justified under the Anti-Dumping Agreement *versus* the MFN obligation in GATS Art. II in respect of the distribution and wholesale of steel, not providing for exceptions in case of dumping[1151]).

If any of these four conflict situations arise, in favour of which norm must they be decided?

WTO jurisprudence has, first of all, acknowledged the potential for overlap between GATT and GATS, thereby rejection the argument that GATT and GATS are mutually exclusive. In *EC – Bananas* the Appellate Body found as follows:

> "Given the respective scope of application of the two agreements [GATT and GATS], they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when

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[1149] In particular, the national treatment obligation in GATT Art. III applies across the board, there where national treatment under GATS Art. XVI applies only in services sectors where explicit commitments by the member in question were made.

[1150] This was the situation in *Canada – Periodicals*, where the United States had invoked violations of GATT and Canada argued, in defence, that GATT did not apply since the measure was a GATS measure. The Panel and Appellate Body rejected Canada's argument on the rather narrow ground that the measure did fall under GATT, leaving it open as to whether it fell also under GATS. Instead, the panel should have examined whether both agreements applied, and if so, it should have determined whether a conflict between the two arose in the particular case. If there was such conflict, it should then have decided which provision must prevail. This would have been most likely the GATT prohibition as *lex specialis*. See below text at note 1159.

[1151] The anti-dumping duty on steel from one particular company or country could then be argued to violate the MFN rights of that country in particular services sectors. Indeed, if it can no longer export its steel because of the higher duties, that country's distributors as service suppliers may also be affected and thus be discriminated as against other foreign distributors whose steel is not subject to anti-dumping duties.

> they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT 1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis".

This conclusion that there are measures: (i) falling only under GATT; (ii) falling only under GATS; and (iii) falling under both GATT and GATS, was unavoidable given the broadly defined scope of application of both GATT and GATS, referred to earlier. One could even go as far as saying that it will be difficult to find a measure that falls *only* under GATT or *only* under GATS (that is, measures of type (i) or (ii)), since, as noted above, all goods measures are likely to have some effect also on services and vice-versa. In any event, it would have been legally unsound to "interpret" the respective scopes of application of GATT and GATS in such a way as to *exclude* overlaps. If the measure at issue, on the basis of the "clear meaning" of the two agreements does, indeed, fall within the scope of both agreements, "interpretation" cannot change this without effectively changing the content of the agreements.[1152] In these circumstances, to narrowly "interpret" the scope of application of one agreement so as to conclude that only the other applies would, indeed, go against the principle of "effective treaty interpretation". We are faced here with a situation, referred to earlier[1153], where "effective treaty interpretation" works both ways. To find that only GATT applies -- because, for example, the measure is "essentially" a goods measure -- would disregard the *effect utile* of GATS. To say that only GATS applies -- because, for example, the measure is "predominantly" a services measure -- would disregard the *effet utile* of GATT.

GATT and GATS may accumulate

As noted before, in the event of overlap between GATS and GATT, the provisions may, firstly, be cumulative in nature (accumulation, discusses in Chapter IV, section B.1). This will be the case, for example, when a GATT obligation is simply *confirmed* from another (services) angle by a similar GATS obligation in respect of the same measure. In case a breach is then found under these two obligations, bringing the measure in conformity with GATT will most likely imply also conformity with GATS. In other words, in case of GATT/GATS obligations which essentially confirm each other (albeit from a different perspective), there may be no much use to find the additional GATS or GATT breach. The panel or Appellate Body could then even not examine the second agreement on the grounds of judicial economy.[1154] This was arguably the case in the *EC – Bananas* dispute where the Appellate Body found that the EC import licensing regime for bananas violated MFN and national treatment under both GATT and GATS. This would arguably have been the case also had the Appellate Body confirmed the panel's finding in *Canada –Autopact* that Canada's import duty exemption for certain motor vehicles violated MFN under both GATT and GATS.[1155]

[1152] See Chapter V, section C.1

[1153] See Chapter V, section C.3.c.

[1154] To find an additional breach under the other agreement may, indeed, not further "solve the dispute" since it would, in terms of the implementation required, not have added value (see the criterion for exercise of judicial economy in the Appellate Body report on *Australia – Salmon*).

[1155] The Appellate Body reversed the panel's finding of violation under GATS on the ground that the panel had not sufficiently explained why GATS applied in the first place (Appellate Body report on *Canada – Autopact*,

However, GATT and GATS may also accumulate in that the obligation under one agreement *adds to or complements* the obligation under the other (without contradiction). In that case, a panel *must* examine both agreements. To bring the measure into compliance with, for example, GATT will then normally not mean compliance also with GATS.

GATT and GATS may conflict

Instead of accumulating -- either in the sense of confirming or complementing each other -- a GATT/GATS overlap may also constitute conflict, as noted before, especially of the type obligation *versus* explicit right (conflict situations 3 and 4 in Chapter IV). One and the same measure may fall under both GATT and GATS, but the solution offered by each agreement may be different. As noted by the Appellate Body in *Canada – Autopact*:

> "In cases where the same measure can be scrutinized under *both* the GATT 1994 and the GATS … the focus of the inquiry, and the specific aspects of the measure to be scrutinized, under each agreement, will be different because the subjects of the two agreements are different".[1156]

Nonetheless both agreements apply to one and the same measure and may lead to a contradictory result. If so, they deal with the "same subject-matter" but differently.

In case of a GATT/GATS conflict, as noted before, "interpretation" cannot resolve the conflict.[1157] To resolve genuine conflict one must choose sides based on conflict rules, not interpretation. In GATT/GATS conflicts as well one must, firstly, acknowledge the existence of a conflict and then apply general international law rules on how to resolve conflict.

In *Canada – Periodicals*, for example, the potential for conflict was not even acknowledged. Canada's defence that under GATS it did not have obligations (amounting, allegedly, to an explicit right to impose the measure at issue) was examined only in terms of an argument to interpret GATT in such a way that it would not apply in the first place. Of course, the measure *did* fall within the scope of GATT. But it arguably fell also within the scope of GATS. And if that were the case, there may have been a conflict and the GATS rule may have prevailed so that the GATT provision did, upon closer examination, *not* apply. If so, this would have been the result *not* of the *wording* of GATT Art. III but of *the conflict with GATS*. This aspect was not examined by the Appellate Body. Instead, it presumed that once a measure falls within the scope of GATT, GATT must necessarily apply irrespective of there being a conflicting GATS provision. Hence, in the view of the Appellate Body, *any GATT/GATS conflict of the type GATT prohibition/GATS explicit right must be decided in favour of GATT*. It noted, indeed, that

> "[t]he entry into force of the GATS … does not diminish the scope of application of the GATT 1994".

But it gave this general preference to GATT without any textual reference, nor reference to any conflict rule. In the absence of an explicit conflict clause in favour of GATT and given that GATT and GATS are part of the same treaty (so that their date is the same), such *a priori* preference for GATT is not justified. It flows from a general misunderstanding that new WTO rules can only further liberalise trade. As noted before, the WTO is not the proverbial cyclist who needs to move on (i.e.,

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para. 167: "The Panel did not show that the measure at issue affects wholesale trade services of motor vehicles, as services, or wholseale trade service suppliers of motor vehicles, *in their capacity as service suppliers*", emphasis in original).

[1156] Appellate Body report on *Canada* – Autopact, para. 160. See also, but less categorically, its report on EC – *Bananas*, para. 221: "the specific aspects of [the] measure examined under each agreement could be different".

[1157] See Chapter V, section C.

further liberalise) for it to survive. The WTO is a set of international law norms which may, like any other norms, be adapted or supplemented *either way*: towards further liberalisation or taking a step backwards, allowing for certain additional instances where trade restrictions may be imposed. Unlike the EC, the WTO's objective is not a "single world market".

Lex specialis may resolve the conflict

Given that the conflict rules set out in previous sections and Chapter VI do not resolve GATT/GATS conflicts -- there is, for example, no conflict clause and both GATT and GATS have the same date – in order to resolve GATT/GATS conflicts resort must be had to the *lex specialis* principle. The decisive question should then be: Which of the two legal provisions covers the factual circumstances more closely and precisely? The detail in the respective GATT/GATS provision will count, but also the focus of the measure in question: is it "essentially" or "predominantly" a measure regulating goods or services (e.g., in terms of its structure and scope or economic effect)?

Under the examples of potential conflicts given above[1158], such examination should lead to the conclusion that (i) in the example of *Canada – Periodicals*, the GATT provision was the more specific one[1159]; and (ii) in the example of anti-dumping duties allowed under GATT but prohibited under GATS, it is the anti-dumping agreement that deals most specifically with the measure at issue.

e. Does the *lex specialis* principle prevail over the *lex posterior* principle?

If the *lex specialis* norm is the later in time, should it still prevail? In other words, must the *lex posterior* principle give way to that of *lex specialis*? Some authors answer this question in the affirmative based solely on the adage *generalia specialibus non derogant*.[1160] They do not refer to case law nor, more importantly, do they explain on what legal basis Art. 30 of the Vienna Convention can be set aside.

Earlier, we set out the difficulties that may arise in applying the *lex posterior* rule in Art. 30[1161], especially when it comes to multilateral treaties to which states may accede, which may be amended or regularly "re-concluded". In that respect, we noted also that it is difficult to identify many of today's regulatory treaties with one particular moment in time. These treaties ought to be seen rather as "continuing treaties", to which the state parties regularly and on a continuous basis reaffirm their consent. In those "hard cases" it would no longer be consonant with the intent of the parties in question to define either treaty as earlier or later. Looked at from the angle of the underlying *rationale* of Art. 30 (that is, preference must be given to the latest expression of state consent), Art. 30 should then be dis-applied.

But apart from the fact that Art. 30's objective would no longer be met, how can one legally justify this setting aside of Art. 30? There are three ways. Firstly, as hinted at earlier, in those "hard cases" one could conclude that there are no "successive treaties" and hence decide that Art. 30 does *not* apply in the first place. One could then simply apply the *lex specialis* principle, even if from certain points of view the *lex specialis* is the earlier norm. There would then be no conflict between the *lex posterior* and the *lex specialis* rule since the former does not apply. The *lex specialis* principle would then offer

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[1158] See text at note 1150 above.

[1159] See, for example, the Appellate Body report on *Canada – Periodicals* (at 17), explaining why the measure at issue (a provision in the Canadian Excise Tax Act) is a "goods measure": "First of all, the measure is an excise tax imposed on split-run editions of periodicals. We note that the title to Part V.1 of the Excise Tax Act reads, 'TAX ON SPLIT-RUN PERIODICALS', not 'tax on advertising' … Secondly, a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product – the periodical itself".

[1160] See, for example, Hans Aufricht, *Supersession of Treaties in International Law*, 1952 CORNELL LAW QUARTERLY 655, 698: "if the scope of the later treaty provisions is broader than that of the earlier ones the maxim *lex posterior generalis non derogate priori specialis* applies".

[1161] See section 2.e.

the solution, either as self-standing principle of customary law or as a particularly useful method to detect the "current expression of state consent".

Secondly, one could, in these circumstances where a *lex posterior* is hard to define in terms of "latest expression of state consent" and where one of the two norms is clearly a more special one, refer to the residual nature of Art. 30 in that it does not apply where a clear intent to the contrary can be found. The residual nature of Art. 30 is confirmed in Art. 30.2 and the ILC Commentary, although the focus is on *explicit* conflict clauses.[1162] On that ground, one could argue that the precise and strong consent to the more special treaty amounts to an *implicit* conflict rule in the treaty itself to the effect that this more specific norm prevails over future, more general norms. The more specific norm would then prevail as a result of the implicit reconstruction of state intent, not as the result of a self-standing *lex specialis* rule.

Thirdly, it could be submitted that the adage *generalia specialibus non derogant* is part of customary international law. Note that this would go a step further than claiming that customary law prescribes that a special law prevails over a more general one. It would go as far as saying that, pursuant to customary law, a special law prevails over a more general one *even if the more general one is later in time*.[1163] Preamble 8 to the Vienna Convention includes a safeguards clause in which it is affirmed 'that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". But is the question of successive treaties not regulated in Art. 30 *without* mentioning the *lex specialis* principle so that if a norm is, indeed, later in time it prevails *even if the other norm is more special*? Or could it be said that the *lex specialis* principle continued to exist as custom[1164] alongside the *lex posterior* rule and that, in the event of conflict between the two, the Vienna Convention does not "govern the question" so that resort must be had to another custom -- namely, *generalia specialibus non derogant* -- to resolve that conflict?

The first of these three grounds to let the *lex specialis* prevail – i.e., Art. 30 does not apply in the first place -- is the most convincing one. It is also the one that would protect legal security and predictability the most. In other words, an established *lex specialis* ought to prevail over another norm, alleged to be *lex posterior*, only in case it is impossible or would be absurd to put one single or definite time label on either of the two norms. That is, in the event the two treaties in question, as between the states concerned, cannot be seen as "successive".

The second ground opens the door for subjective reasoning based on a tentative and static "reconstruction of state intent" at the time of conclusion of a treaty. The third ground -- *generalia specialibus non derogant* -- is difficult to establish since if support can be found in state practice that a special law prevails over a more general one, it is hard to find instances where states acknowledged that a treaty which is clearly later in time must give way to an earlier one on the ground that the earlier treaty is more special.[1165] Moreover, under this third ground the *lex specialis* would *always* prevail over the other norm, even if it is perfectly possible (and would make logical sense) to determine their respective dates of conclusion. This would grant the *lex specialis* principle an absolute higher legal standing than the *lex posterior* rule and this *even though only the latter was codified in the Vienna Convention*. The absence of the *lex specialis* principle in the Vienna Convention should not preclude that the *lex specialis* rule be referred to (i) in support of a norm that should already prevail under Art. 30 or (ii) in case it is impossible or would be absurd to see the two treaty norms as "successive". However, the absence of the *lex specialis* principle in the Vienna Convention makes it very difficult, if not impossible, to justify the position that a *lex specialis* must always prevail over another norm validly identified under Art. 30 as the *lex posterior*.

[1162] See section 2.a above.
[1163] See *supra* note 1160.
[1164] Support for the fact that the *lex specialis* principle continued to exist also in respect of treaty norms can be found in the statements made by Sinclair and the Expert Consultant at the Vienna Conference, referred to earlier in section 2.f.i.
[1165] That is, of course, instances where no explicit conflict clause is available in support.

To put it differently, the *lex posterior* rule in Art. 30 is and should remain the rule of first resort. It is for the party claiming that although it could be said that one of the norms is, from certain viewpoints, later in time, to prove that this norm should nonetheless give way, essentially because Art. 30 does not apply. To give wider credence to the *lex specialis* principle (without further codification) would threaten legal security and predictability in the field of conflict of norms.

This being said, our examination above does attribute great importance to the *lex specialis* rule in case "continuing treaties" are involved. In many of those cases Art. 30 cannot be applied since there are no "successive treaties" and the conflict must be decided in favour of the more specific norm. This seems to be what the ICJ did in one of the few cases where an allegedly "later norm" (environmental conventions) had to give way to a seemingly "earlier", more specific norm (law on the use of force). Given the "continuing" nature of the norms involved, it would have been difficult to put a single time label on either of these norms and to define one of them as the "later in time". In respect of environmental norms that would allegedly be violated by the use of nuclear weapons, the Court did

> "not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives".[1166]

Here, we have an example of *lex specialis* (law on self-defence and armed conflict) contradicting another, more general norm (environmental norms). In this instance, there is, indeed, a conflict since nowhere does the environmental norm itself provide for an exception in armed conflict. Given the special character of the law on self-defence and armed conflict, it is this *lex specialis* that prevails. Nonetheless, this *lex specialis* (necessity and proportionality of use of force) must be *interpreted* with reference to the *lex generalis* (environmental norms).[1167] The ICJ did not explicitly acknowledge conflict but did apply only the law on self-defence and armed conflict.

f. Conclusion on the principle of *lex specialis* as conflict rule

In sum, the principle that the more specific norm prevails over the more general one must be accepted as a solution to conflict where none of the other conflict rules set out earlier applies and in case

(i) the *lex specialis* is contracting out of general international law (hence Art. 30 on conflict between treaty norms does not apply);
(ii) the *lex specialis* is, at the same time, the *lex posterior* (hence, in the event of conflict between treaties, the principle confirms the result reached under Art. 30);
(iii) both treaty norms in question have the same date, e.g. because they are set out in one and the same treaty (hence Art. 30 on successive treaties does not apply); or
(iv) one or both of the treaty norms in conflict derive from a "continuing" or "living" treaty so that the two treaties cannot be said to be "successive" in time (hence Art. 30 on successive treaties does not apply).

However, in the event Art. 30 on "successive treaties" does apply, the fact that the earlier norm is *lex specialis* should not prevent that the later *lex generalis* prevails.[1168]

[1166] Advisory Opinion on *Threat or Use of Nuclear Weapons*, ICJ Reports 1996, para. 30.
[1167] Ibid.: « Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality ».
[1168] This is the conclusion reached also in Nguyen, *Droit …*, para. 173, at 270: "Si par contre le traité restreint est antérieur, et dans le silence du traité postérieur, le principe *lex posterior* l'emporte sur le principe *in toto jure …* [that is, *lex specialis*] (superiorité du traité postérieur), conformément à la volonté implicite des États ».

Thus, the *lex specialis* principle as conflict rule is both limited and broad. It is limited in the sense that it cannot, in my view, overrule the *lex posterior* principle in Art. 30. It is broad to the extent that it will, nonetheless, be the decisive criterion in many cases (especially there where Art. 30 does not apply, e.g., in cases involving "continuing" or "living" treaties).

It should, in this respect, be recalled, however, that both the *lex posterior* and *lex specialis* principle are but *different methods* in search for an answer to *one and the same legal question*: what is the "current expression of state consent"? Hence, these principles are not absolute legal norms and will often be complementary. But if they may lead to conflicting results, the solution set out above ought to apply.

Consequently, in terms of conflicting treaty norms, states should realise that the first conflict rule to be resorted to remains Art. 30. Hence, if they conclude a first bilateral treaty in 1990 and a second one in 2000, the latest one will prevail, irrespective of the fact that the earlier treaty is more specific. However, when they conclude a multilateral treaty, states ought to realise that Art. 30 may not find application (in particular when that treaty is one of a "continuing" or "living" nature conflicting with another multilateral treaty of the same type). In those cases, the more specific law must prevail.

g. *Lex specialis* in other forms than a rule to resolve conflict

Above, we examined the content and consequences of the *lex specialis* principle as a rule to resolve conflict in the applicable law. Nonetheless, *lex specialis* is often referred to also in different contexts, not involving conflict.

In those other cases, *lex specialis* is invoked as the more specific norm which supplements the more general one without contradiction. The *lex specialis* and the *lex generalis* then simply accumulate. This is often the case, for example, in respect of treaty or custom supplementing general principles of law (discussed in Chapter III, section D.2.a).[1169] Earlier we referred also to more specific treaties supplementing so-called *traités-cadres*, without conflict between the two.[1170]

A *lex specialis* supplementing a *lex generalis* must always be interpreted in the light of the *lex generalis*.[1171] This interpretation may result in an apparent conflict being "interpreted way" (discussed in Chapter V). For example, in its Advisory Opinion on *Threat or Use of Nuclear Weapons*, the ICJ, invoking elements of *lex specialis*, found that "the most directly relevant applicable law … is that relating to the use of force enshrined in the United Nations Charter and the law applicable in armed conflict which regulates the conduct of hostilities, together with any specific treaties on nuclear weapons the Court might determine to be relevant".[1172] The Court considered that the right not arbitrarily to be deprived of one's life -- guaranteed in Art. 6 of the International Covenant on Civil and Political Rights -- applies also in hostilities. It noted, nonetheless, that

> "[t]he test of what is an arbitrary deprivation of life … then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict".

This is an instance where *lex specialis* is used to *interpret* the terms of another, more general norm (*in casu*, the words "arbitrarily deprived").[1173] It does not conflict with nor, *a fortiori*, overrule the other norm. Thus, in this case both the *lex specialis* and the *lex generalis* could be applied side by side, the *lex specialis* playing the greater role of the two.

[1169] See text at note **396** above.
[1170] See Chapter III, section E.1.
[1171] This is the case even if the *lex specialis* contracts out of the *lex generalis*. See text at notes **690** and 1166 above.
[1172] ICJ Reports 1996, para. 34.
[1173] Pursuant to Art. 31.3(c) of the Vienna Convention, discussed earlier, although the ICJ did not explicitly refer to this provision.

In sub-sections (i) and (ii) below we focus on two specific arguments based on *lex specialis* (other than *lex specialis* as a conflict rule). Firstly, *lex specialis* as an argument for an adjudicator to examine a more specific norm before it examines a more general norm. Secondly, *lex specialis* as an argument for an adjudicator to examine and apply only the more specific norm.[1174] The first argument is correct, the second one is difficult to sustain.

Lex specialis has been referred to also as a rule of treaty interpretation, although there it largely coincides with the principle of effectiveness (sub-section (iii)). Finally, *lex specialis* elements are at play in the principle of speciality that applies to the powers of international organisations (sub-section (iv)).

i. Lex specialis as a reason to first examine the more specific norm

In the WTO context, *lex specialis* has been referred to on several occasions as a reason to *first examine* the most specific WTO agreement. Under this approach, a WTO panel should normally start its examination by assessing those claims under the WTO agreement or provision that is established as *lex specialis*. As the Appellate Body noted in *EC – Bananas*, after finding that both the GATT and the Licensing Agreement applied to the measure at issue:

> "the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures".[1175]

In *EC – Hormones* as well, where claims of violation under both GATT and the SPS Agreement were made, Canada argued that "the SPS Agreement is the *lex specialis* for a review of sanitary measures and should, therefore, be addressed first".[1176] The panel followed this suggestion by first examining the complainants' SPS claims, *inter alia*, on the ground that "[t]he SPS Agreement specifically addresses the type of measure in dispute".[1177] In *Argentina – Footwear* as well, the Appellate Body when faced with Arts. II:1(a) and II:1(b) of GATT noted:

> "Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with paragraph (a) … Because the language of Article II:1(b), first sentence, is more specific and germane to the case at hand, our interpretative analysis begins with, and focuses on, that provision".[1178]

In *US – Shrimp*, the Appellate Body stressed that under GATT Art. XX a panel must first examine "the specific exemptions provided for in Article XX" and only thereafter assess whether also the standards in the chapeau of Art. XX are met, standards that are "necessarily broad in scope and reach".[1179]

[1174] In both instances, it is implied that the *lex specialis* supplements but does not contradict the *lex generalis*.

[1175] Appellate Body report on *EC – Bananas*, para. 204. For an example where the Appellate Body itself failed to first examine the most specific agreement (*in casu*, the TBT Agreement), without apparent justification (other than a statement that it felt insecure about making findings under the TBT Agreement for the very first time), see *EC – Asbestos*. There, the fact that the Appellate Body refused to examine Canada's TBT claims, basically on the ground of the law not being clear, arguably amounted to a denial of justice (against the principle *jura novit curia*). The incompleteness of the factual record was not explicitly invoked by the Appellate Body nor would it have been a good excuse since both the GATT and TBT claims required very similar factual findings.

[1176] Panel report on *EC – Hormones* (Canadian complaint), para. 8.37.

[1177] Ibid., para. 8.45.

[1178] Appellate Body report on *Argentina – Footwear*, para. 45.

[1179] Appellate Body report on *US – Shrimp*, para. 120. See, in contrast, and against its normal line of reasoning to first examine the *lex specialis*, the Appellate Body finding in *EC – Hormones*, at para. 250: "We are, of course, surprised by the fact that the Panel did not begin its analysis of this whole case by focusing on Article 2 that is captioned 'Basic Rights and Obligations', an approach that appears logically attractive".

ii. Lex specialis as a reason to only examine the more specific norm

However, in a situation where *lex specialis* supplements the *lex generalis* (without conflict) to say that the *lex specialis* must be examined first, does not amount to saying that the *lex generalis* no longer applies. Both norms apply and it makes logical sense to first examine the *lex specialis*. But nothing precludes that the *lex generalis* is still relevant and adds certain rights or obligations. Obviously, in case there is conflict between the two, the fact that a norm is *lex specialis* is not a guarantee that it will prevail. As pointed out earlier, the *lex specialis* may, for example, be the earlier in time that must, pursuant to Art. 30, give way to a later *lex generalis*.

The erroneous position that *lex specialis* necessarily disapplies and eclipses the *lex generalis* has nonetheless been adopted by a number of states in recent disputes. In the WTO context, for example, Indonesia (in *Indonesia – Autos*[1180]) submitted that the GATT and the Subsidies Agreement are mutually exclusive and that as soon as the Subsidies Agreement applies, the Subsidies Agreement being *lex specialis*, the GATT (as *lex generalis*) no longer applies. The argument was rejected by the panel. Indeed, assuming that agreements like the TBT or Subsidies Agreement are *lex specialis* as opposed to the GATT, this does not mean that a given measure, once found to be subject to the TBT or Subsidies Agreement, no longer falls under the GATT. To the contrary, both agreements continue to apply and in the event of conflict, this conflict must be solved by the conflict rules set out above (such as the *General Interpretative Note to Annex 1A*).

In *Argentina – Safeguards*, the Appellate Body explicitly confirmed that a *lex specialis* does not vacate or subsume a *lex generalis*. The case involved the relationship between GATT Art. XIX and the more specific Safeguards Agreement. The Appellate Body found as follows:

> "We see nothing … that suggests an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the GATT 1994 within the *Agreement of Safeguards* and thus to render those requirements no longer applicable".[1181]

A similar submission as that made by Indonesia in *Indonesia – Autos* was made by Japan in the *Southern Bluefin Tuna case.*[1182] There, Japan argued as follows: "In accordance with generally accepted principles, the provisions of a *lex specialis* not only specify and implement the principles of an anterior framework agreement; they exhaust and supplant those principles as long as the implementing agreement remains in force".[1183] In response, New Zealand and Australia argued the following: « The contention that the 1993 Convention [allegedly a *lex specialis*] 'covers' and thus eclipses the obligations in respect of … UNCLOS [allegedly the *lex generalis*] is wrong in fact, and the principle of 'coverage' is unknown to international law. The array of modern standards of international law has been achieved by a process of accretion and cumulation, not by erosion and reduction. Only where there is actual inconsistency between two treaties do questions of exclusion arise".[1184] The Arbitrators sided with New Zealand and Australia, rejecting the Japanese argument that *lex specialis* eclipses *lex generalis* on the following grounds:

> "it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. … there is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process

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[1180] Panel report on *Indonesia – Autos,* para. 5.129 ff.
[1181] Appellate Body report on *Argentina – Safeguards*, para. 83. Recall that in this situation the Safeguards Agreement explicitly refers back to GATT Art. XIX, so that there is no conflict between the two (see Chapter IV, section B.1).
[1182] *Australia and New Zealand v. Japan*, Award of 4 August 2000, posted at www.worldbank.org/icsid.
[1183] Ibid., para. 38, point (c).
[1184] Ibid., para. 41 point (g).

> of accretion and cumulation; in the practice of States, the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention".[1185]

In line with this approach, Germany (in the *La Grand* case before the ICJ) challenged one and the same US conduct under three distinct legal obligations (paragraphs 1(a), (b) and (c) of the 1963 Vienna Convention on Consular relations). It submitted, in particular, that it is "commonplace that one and the same conduct may result in several violations of distinct obligations".[1186] In the end, the ICJ did find a violation under all three legal grounds forwarded by Germany.[1187]

This generally confirmed refusal to regard *lex specialis* as "eclipsing" *lex generalis* is an element in support also of the thesis defended across this work, namely that WTO law must be applied in the context of public international law more generally. WTO law does not "eclipse" that other law.[1188]

iii. Lex specialis as a rule of treaty interpretation

Lex specialis considerations may play a role also when interpreting different treaty provisions. Nonetheless, when limiting treaty interpretation to its true sense, that is, giving meaning to terms in a treaty pursuant to Arts. 31 and 32 of the Vienna Convention, *lex specialis* offers little help. At best, it coincides with the principle of effectiveness. For example, if one treaty norm states that it is an exception to another norm, i.e., that it is a specific carve out from this other norm, this first treaty norm or *lex specialis* must be given effect and "prevail" over the general rule (the way GATT Art. XX "prevails" over GATT Art. III in respect of measures "necessary to protect human health").[1189] In that case, as we saw earlier[1190], there is, however, no conflict of norms, since one norm explicitly delimits the scope of application of the other and in one given circumstance only one of two norms finds application (either the general rule or the exception, if the conditions for the latter are met). Based on the presumption against conflict and applying the conflict-avoidance techniques set out earlier, *lex specialis* may also be resorted to so as to give full effect to more special treaty provisions, notwithstanding other, more general ones.[1191] Nonetheless, in the event a genuine conflict arises between these two norms, the conflict rules set out earlier must apply and *lex specialis* as a rule of treaty interpretation cannot resolve the conflict. As pointed out above, the principle of effectiveness can then work both ways.[1192] To give too much effect to the *lex specialis* risks reducing the *lex generalis* to a nullity. In contrast, to focus too much on the *lex generalis* risks not giving the intended

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[1185] Ibid., para. 52.
[1186] Para. 70.
[1187] Para. 73.
[1188] See Chapter II, section A above.
[1189] In the same sense, see the PCIJ *Case Concerning the Payment of Various Serbian Loans Issued in France*, PCIJ, Series A., Nos. 20/21, 1929, 30: "The coupons in each of these issues either provide for payment in gold … or carry the words '…% *Gold loan*' … It is argued that there is ambiguity because in other parts of the bonds, respectively, and in the documents preceding the several issues, mention is made of francs without specification of gold. As to this, it is sufficient to say that the mention of francs generally cannot be considered as detracting from the force of the specific provision for gold francs. The special words, according to elementary principles of interpretation, control the general expressions. The bond must be taken as a whole, and it cannot be so taken if the stipulation as to gold francs is disregarded".
[1190] See Chapter IV, section B.1.
[1191] In this sense, see MAXWELL, THE INTERPRETATION OF STATUTES 183 (1946): "where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation … that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so". Nonetheless, if a genuine conflict arises, the later more general act will *not* be "capable of reasonable and sensible application without extending them to subjects specially dealt with" in the earlier act. At that point, conflict rules must be applied, not rules of interpretation.
[1192] See Chapter V, section C.3.c.

effect to the *lex specialis*. The PCIJ case on *Upper Silesia Minorities* illustrates that in some cases of treaty interpretation the focus must be on the *lex generalis*, rather than the *lex specialis*.[1193]

Note, in this respect, the Canadian proposal to add to what is now DSU Art. 3.2 certain examples of what are referred to there as "rules of interpretation of customary international law".[1194] Canada proposed to cite as examples not only Arts. 31-33 of the Vienna Convention, but also "the principle of *lex specialis*". It did so in a more general proposal on "Conflict of Substantive Provisions". None of the examples referred to by Canada were in the end incorporated in what is now DSU Art. 3.2. Nonetheless, to the extent Canada wanted to explicitly include the *lex specialis* principle into the WTO treaty as a rule to *resolve conflict of norms*, it should have done so not in a provision on treaty *interpretation*. As noted before (Chapter V), treaty interpretation may solve an apparent conflict, it cannot solve a genuine one. Hence, *lex specialis* is a rule to resolve conflict once it has arisen, much more than a tool to assist in interpreting the terms of treaty provisions.

iv The principle of "speciality" governing international organisations

We referred earlier to the so-called "principle of speciality" governing the competence of international organisations. As the ICJ put it in its Advisory Opinion on *Use of Nuclear Weapons* (at the request of the WHO):

> "international organizations are subjects of international law which do not, unlike States, possess a general competence. International organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them".[1195]

This principle of "limited" or "special" competence of international organisations must be played out against the theory of "implied powers" to be attributed to these organisations so as to enable them to effectively achieve their objectives.[1196] In the *Use of Nuclear Weapons* case, this inter-play led the Court to reject the WHO's request for an advisory opinion on the legality of the use of nuclear weapons for lack of jurisdiction under Art. 96.2 of the UN Charter. Pursuant to this provision, specialised UN agencies are only allowed to request an advisory opinion "on legal questions arising *within the scope of their activities*". The Court concluded that "none of [the WHO's] functions has a sufficient connection with the question before it for that question to be capable of being considered as arising 'within the scope of [the] activities' of the WHO".[1197] In the opinion of the ICJ:

> "to ascribe to the WHO the competence to address the legality of the use of nuclear weapons – even in view of their health and environmental effects – would be tantamount to disregarding the principle of speciality; for such competence could not be deemed a necessary implication of the Constitution of the Organization in the light of the purposes assigned to it by its member States".[1198]

[1193] There, the Court found that a general clause whose overriding character is beyond dispute cannot validly be modified by a *lex specialis*: "The Court in this respect recalls the fact that the provisions of Division I [of the third Part of the Geneva Convention] are provisions the terms of which were settled beforehand by the Conference of Ambassadors. They had to be accepted such as they were and subject to no modifications … These provisions constitute a separate category among the provisions relating to the protection of minorities, *and subsequent provisions entered into between the contracting parties* [*in casu*, the more specific Division II of the third Part of the Geneva Convention] *cannot modify them or be construed as being contradictory and thus diminishing the extent of the protection provided*" (PCIJ, Ser. A, No. 15 at 30, 31 (1928).

[1194] Canadian Proposal entitled « Conflict of Substantive Provisions », dated 14 October 1993, on file with the author.

[1195] ICJ Reports 1996, para. 25.

[1196] See above Chapter VI, section B.3.

[1197] ICJ Reports 1996, para. 22.

[1198] ICJ Reports 1996, para. 25.

Could this principle of "speciality" be used as an argument to let, for example, a UNEP rule prevail over a WTO rule in case of a conflict of norms involving environmental issues *on the ground that the competence of UNEP covers environment, that of the WTO, trade*? To answer this question, a distinction must be made between (i) norms created by the state parties to either of these conventions *as states*; and (ii) norms created by the WTO or UNEP *as international organisations*. The principle of "speciality" applies only in respect of the latter norms. Only these norms are acts taken by the WTO or UNEP as an international organisation for which it must have the necessary competence. Norms created by the states themselves, irrespective of the context in which these norms emerged (be it under the auspices of the WTO or UNEP), are not restricted by the principle of "speciality". The competence of *states* to conclude norms is a general one.

Acts of the international organisation

Thus, only if the WTO norm in conflict with a UNEP norm were to be an act of the WTO as international organisation (or any of its organs) would the principle of "speciality" apply. However, given the broadly defined functions of the WTO (e.g., "the forum for negotiations among its Members concerning their multilateral trade relations in matters dealt with under the agreements"[1199]), it may be difficult to convince a judge that the WTO does *not* have competence to address certain environmental matters. Such argument may be successful, nonetheless, if the WTO *as organisation* (say, the SPS or TBT Committees) were to start adopting decisions, not so much related to trade in allegedly harmful products, but addressing the very substantive environmental question of whether or not a particular product is harmful, or decisions in which specific maximum residue levels are specified or commitments are made to reduce emissions in certain harmful substances. These types of WTO decisions may then be "invalid" for lack of competence on behalf of the WTO as an international organisation. And this even if these decisions were later confirmed by the General Council or the Ministerial Conference, since these organs *remain WTO organs*.

The allocation of competence within the UN system was illustrated by the Court in the *Use of Nuclear Weapons* case as follows:

> "the Charter of the United Nations laid the basis of a 'system' designed to organize international co-operation in a coherent fashion by bringing the United Nations, invested with powers of general scope, into relationship with various autonomous and complementary organizations, invested with sectorial powers. The exercise of these powers by the organizations belonging to the 'United Nations system' is co-ordinated, notably, by the relationship agreements concluded between the United Nations and each of the specialized agencies".[1200]

On that basis, the Court noted that the powers of specialised agencies must be interpreted taking account of "the logic of the overall system contemplated by the Charter". It even seemed to go as far as saying that the competence of the UN and those of particular specialised agencies are mutually exclusive when noting that WHO responsibilities

> "are necessarily restricted to the sphere of public 'health' and cannot encroach on the responsibilities of other parts of the United Nations system. And there is no doubt that questions concerning the use of force, the regulation of armaments and disarmament are within the competence of the United Nations and lie outside that of specialized agencies".

In his Dissenting Opinion Judge Weeramantry warned about the dangers of such approach:

[1199] Art. III.2 of the Marrakesh Agreement.
[1200] ICJ Reports 1996, para. 25.

> "The Court is of course anxious to ensure that there should not be an unnecessary confusion or overlapping of functions between the different organs and agencies of the United Nations. However, the principle of speciality does not mean that there can be no overlap. It is in the nature of a complex organization like the United Nations that there will be, owing to the multiplicity and complexity of its functions, some areas of overlap between the legitimate spheres of authority of its constituent entities".[1201]

Referring to the example of overlap between the ICJ itself and the Security Council, Weeramantry referred instead to the "principle of complementarity". He rightly concluded as follows:

> "The family of United Nations organizations was not set up in a fretwork pattern of neatly dovetailing components, each with a precisely carved outline of its own. These organizations deal with human activities and human interrelationships and it is of their very nature that they should have overlapping areas of concern. Their broad contours are of course defined, but different aspects of the self-same question may well fall within the ambit of two or more organizations".[1202]

It must, in this context, be recalled that the WTO is not a specialised UN agency. Nonetheless, the principle of "speciality" also applies to it, although not, perhaps, to the extent that account must be had of "the logic of the overall [UN] system contemplated by the Charter". Thus, whereas it may be so that no overlaps of competence are tolerated *within* the UN system (something which is, for the reasons set out by Weeramantry, highly questionable), overlaps could be acceptable as between a UN organisation (say, UNCTAD) and the WTO.

Acts of states

The situation is entirely different for WTO/UNEP norms created *by states themselves*. Here, no principle of "speciality" applies in terms of competence. Thus, the fact that states adopt an agreement on substantive environmental matters (say, an agreement on GMOs) *in the context of the WTO* (but not acting in the form of a WTO organ), cannot be objected to on the ground of "speciality" of the WTO *as an international organisation*. Such WTO norms are then of inherently equal value as UNEP norms, be the latter enacted by states as states in the context of UNEP or by UNEP organs pursuant to UNEP powers. However, even though "speciality" in terms of WTO competence could then not be used as an argument to let UNEP rules prevail, UNEP rules may still cover the subject matter at issue more directly and precisely and on that ground prevail as the *lex specialis*.[1203] But then the UNEP norm prevails, not on the ground of *lack of WTO competence*, but on the ground of a *substantive conflict rule* given preference to the more specific norm.

B. Both norms are "equals"

There are, finally, cases where the conflict rules set out above do not provide a solution. A particular type of conflict for which international law generally does not provide a solution are those of the AB/AC type (that is, state A promising one thing to B, but another contradictory thing to C). This is essentially so because of the *pacta tertiis* principle. These conflicts are discussed in sub-section 2. In addition, there may, in exceptional cases, be conflicts of the more traditional AB/AB type (that is, where the norms in conflict are binding on both parties) where none of the conflict rules in the previous sections lead to a clear result. These are discussed next.

[1201] Ibid., 150.
[1202] Ibid., 151.
[1203] See section 3.e above.

1. Conflict of norms binding on both parties that cannot be resolved: conflict in the applicable law constituting a lacuna

Can there be conflicts of the traditional AB/AB type where none of the conflict rules above offer a solution? That is, conflicts between treaty norms where Art. 41/58 is irrelevant, no explicit conflict clauses are set out, the *lex posterior* principle does not apply and where the *lex specialis* principle does not make it possible either to detect the "more specific norm"? In very exceptional cases, this possibility must be acknowledged. An international adjudicator is assumed to know the law (*jura novit curia*) and if two conflicting norms apply to the same situation, its function will be to apply conflict rules so as to enable it to apply only one of the two norms. But if the law itself fails to offer the solution as to which of the two norms applies, it should not, normally, be for the judge itself to make that decision. In effect, and although there would then be a problem of "too much law" (two norms apply and one cannot decide which one ought to prevail), one is faced then with a *lacuna* in the law: international law offers no solution as to which norm must prevail, as a result, one may have to declare a *non liquet*.[1204] This possibility is envisaged, for example, by Fastenrath who refers to "Kollisionslücken"[1205] and Salmon talking of "lacune de règle de solution d'antinomie".[1206]

There may be contexts where the judge will take up a more pro-active role and decide for itself which rule ought to prevail (as, for example, in the EC). But this should not be the general rule under public international law where it is generally acknowledged that the judge applies the law (and may thereby further develop the law), but does not create new law. If the judge decides nonetheless to create its own conflict rule, he is, moreover, unlikely to do so openly. He would then rather cover this solution under the all-embracing approach of, for example, "teleological interpretation".

This exceptional situation is most likely to arise as between two contradictory provisions in the same treaty. A potential example can be found in DSU Art. 21.5 *versus* DSU Art. 22.6. Art. 21.5 provides, without time limitation, that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures". Art. 22.6, in contrast, and without cross-reference to the Art. 21.5 panel procedure, states that "the DSB, upon request, shall grant authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time unless the DSB decides by concensus to reject the request". In *US – Certain Products*, the Appellate Body seemed to realise the unavoidable contradiction between these two provisions, noting the following:

> "… we are cognizant of the important systematic issue of the relationship between Articles 21.5 and 22 of the DSU. As the United States correctly points out in its appellee's submission, the terms of Articles 21.5 and 22 are not a 'model of clarity' and the relationship between these two provisions of the DSU has been the subject of intensive and extensive discussion among Members of the WTO. We note that, on 10 October 2000, eleven Members of the WTO presented a proposal in the General Council to amend, *inter alia*, Articles 21 and 22 of the DSU. In so noting, we observe that it is certainly not the task of either panels or the Appellate Body to amend the DSU or to adopt interpretations within the meaning of Article IX:2 of the *WTO Agreement.* Only WTO Members have the authority to amend the DSU or to adopt such interpretations. Pursuant to Article 3.2 of the DSU, the task of panels and the Appellate Body in the dispute settlement system of the WTO is 'to preserve the rights and obligations of Members under the covered agreements, and to *clarify existing provisions* of those agreements in accordance with customary rules of interpretation of public international law.' (emphasis added) Determining what the rules and procedures

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[1204] On the issue of *non liquet*, see note **454** above.
[1205] Fasthenrath, *Lücken …*, 227.
[1206] Salmon, *Antinomies …*, 449.

> of the DSU ought to be is not our responsibility nor the responsibility of panels; it is clearly the responsibility solely of the Members of the WTO".[1207]

In not less than three bananas-related disputes, the WTO judiciary has managed to avoid solving the Art. 21.5- Art. 22 dilemma (*EC – Bananas*, US request for suspension; *US – Section 301*; *US – Certain Products*). This sent a clear signal to the WTO membership that it was for them to resolve the conflict. The rather passive role taken by the WTO judiciary seems justified, in particular in the context of its rather strict "interpretative mandate" under DSU Art. 3.2 ("not add or diminish from" WTO covered agreements). As noted before, in other contexts where the judiciary is granted a more creative role (as in the EC), the judge may have reacted differently and resolved the question itself.

There is, finally, one important benefit linked to declaring a *non liquet* in case of "non-resolvable" conflict. States should then realize that it will not suffice to let potential conflicts linger without political solution. Leaving the inter-action between treaty provisions ambiguous would hence imply a serious risk: if the conflict turns out to be an "un-resolvable" one, the international judge will simply apply none of the two rules, thereby nullifying the effect of both treaties or both treaty provisions. For states in the position of defendant this may be the ideal solution. But in a context of compulsory dispute settlement, as the WTO, one day a state is defendant, another day it is complainant. Hence, the risk of not seeing any law applied should constitute a serious incentive for states to provide more explicit solutions to potential conflicts, in the form, for example, of more clearly phrased provisions or explicit treaty-based conflict clauses.

The occurrence of "un-resolvable" conflicts of the traditional AB/AB type is not limited to two provisions in the same treaty. Two norms deriving from different treaties may raise the same problem, especially if either of the two are of a "continuing" nature and the *lex posterior* principle cannot be applied. If it is, in these circumstances, not possible either to determine which of the two is *lex specialis*, one may then be faced with a *lacuna* and be forced to declare a *non liquet*.[1208]

It is not inconceivable that such *lacuna* arises in the event of a conflict between a WTO rule and a rule under another multilateral agreement, say an MEA. If the MEA were to set out general trade clauses (not limited to specific, harmful products), or the WTO rule were to include product specific environmental exceptions (in open conflict with MEA rules), a conflict between these two "continuing" norms may not be resolvable under the *lex specialis* principle. One may then again be forced to declare a *non liquet*. The likelihood of the WTO and MEAs regulating matters at this same level of specificity is small (after all, WTO is about trade; MEAs about environment). But the possibility of such openly conflicting norms arising ought not be precluded. Recall, in this respect, the often diametrically opposed positions adopted by states in different contexts (say, the WTO as opposed to the Biodiversity context[1209]). If the same states were, indeed, to conclude in one context (say, the WTO) that GMOs are *not* harmful (e.g., in a new WTO agreement on GMOs) and, at the same time, adopt the position that GMOs *are* harmful in another context (say, under the Cartagena Biosafety Protocol), the conflict would be one of two equally specific provisions. Such conflict, essentially the result of the schizophrenic behaviour of *states*, ought not be resolved by an international *adjudicator*. It would be for the states themselves to bring their act together and solve the conflict at a law-making level. If not, some states (especially the most powerful ones) could well

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[1207] Appellate Body report on *US –Certain Products*, paras. 91-92.

[1208] Imagine, for example, that five WTO members conclude an agreement that is almost an exact copy of GATT but in it they bring minor changes to certain provisions in such a way that it cannot be said that their *inter se* agreement is "more specific" than GATT, either in terms of subject matter or membership (the *inter se* agreement does not, for example, go further in terms of trade liberalisation). If the *inter se* agreement is not one prohibited under the WTO, nor one prohibited under Art. 41 (it does not affect third parties), Art. 30's *lex posterior* principle would not provide a solution either (the WTO treaty is of a "continuing nature", and so is, arguably, also the *inter se* agreement). Since the *inter se* agreement cannot be seen either as *lex specialis*, a judge faced with conflicting provisions under both agreements would then most likely have to declare a *non liquet*.

[1209] See note 1083 above.

regard the potential for judges to decide difficult political questions as an incentive to leave these questions open, in the hope that they could then convince the judge, at the time of a dispute, of their position.[1210]

2. Conflict of norms where only one party is bound by both rules: conflicts of the AB/AC type

As pointed out earlier, a conflict of norms may arise from the point of view of state A in case A first promises one thing to state B in one norm (AB) and thereafter promises another, contradictory thing to state C in another norm (AC).

In the past, especially in the days of Grotius and de Vattel, but actually up to the end of the second world war (i.e., up to the boom in so-called law-making treaties), AB/AC conflicts were of the greatest concern in international law, in particular, in the field of the law of war and neutrality (e.g., state A promising intervention to state B, but neutrality to state C for exactly the same situation). As of 1947, however, the risk and importance of AB/AB conflicts rose dramatically, not because of an increase in bilateral treaties reviewing earlier ones, but as a result of a growing number of multilateral treaties being concluded in different contexts by the same states.

a. Normative conflict of the AB/AC type *versus* conflict in the applicable law of the AB/AC type

We saw above that the very conclusion by A of the later norm AC may constitute breach of the earlier norm AB (Chapter VI, section C.1). Such event raises a normative conflict (not a conflict in the applicable law). Recall, in this respect, the *Customs Regime Between Germany and Austria* case and the *Costa Rica v. Nicaragua* case involving the Bryan-Chamorro treaty. If the later norm AC does, in and of itself, constitute breach of the earlier norm AB, then state B can challenge the legality of norm AC and obtain a ruling as against state A that this norm is illegal. From the point of view of state C, however, the AC norm is not illegal (C is not bound by the earlier norm AB) and C may then claim compensation from A for not implementing the AC norm.

In contrast, the conclusion of norm AB being the earlier in time cannot constitute breach of the later norm AC even if the two are in a normative conflict. At the time of conclusion of norm AB, norm AC was not yet in existence).

A conflict of the AB/AC type may also give rise to conflict in the applicable law. This will be the case in the event norm AC does not, in and of itself, constitute breach of the earlier norm AB (hence there is no normative conflict), but compliance with either norm would constitute breach of the other. That is, in one set of circumstances state A is bound to do one thing under norm AB, but another, contradictory thing under norm AC. If A complies with the first norm v-à-v B it will necessarily breach the second norm v-à-v C. If A complies with the second norm v-à-v C it will necessarily breach the first norm v-à-v B.

This is the situation we shall further examine in this sub-section. It may arise at two points in time:

(i) <u>after</u> A has selected to comply with either norm (say, A decided to implement norm AC and B subsequently challenges this implementation as a breach of the AB norm); or

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[1210] Recall, in this respect, to the two irreconcilable conflict clauses in the preamble to the Cartagena Biosafety Protocol (quoted above in section A.1.a.ii). It provides an example of a treaty in respect of which the parties could not agree on whether the new norms ought to prevail over, or be subject to, WTO rules. Each side obtained its preambular paragraph but the result seems to be that they neutralise each other. In the end, an adjudicator would not have any guidance based on this preambular language. Nonetheless, in this case, it would seem that the *lex specialis* principle should work in favour of the Protocol (it being more specific in terms of subject matter than, for example, the SPS Agreement). See section 3.a above.

(ii) as a more abstract question before A decides to comply with either norm (say, A, B and C ask an adjudicator to determine which norm A should comply with).

b. Conflict in the applicable law of the AB/AC type arises only in the event of mutually exclusive obligations imposed on A

From the above description, it is apparent that in respect of conflicts in the applicable law of the type AB/AC, conflict situations 3 and 4 outlined in Chapter IV (those involving explicit rights), do not find application. Indeed, where A has an explicit right to do X under the AB norm, but an obligation to do –X under the AC norm, *there is no conflict*. In that instance, the explicit right (v-à-v B) must always give way to the obligation (v-à-v C). Here, the right was granted by B. The obligation imposed by C. It is, therefore, impossible that the right (in AB) overrules the obligation (in AC) since the right and obligation have been granted/imposed by different parties (B and C respectively). An AB right cannot replace an AC obligation. For C, the AB norm is *res inter alios acta*.

The same applies in case the later AC norm grants an explicit right to do something that is prohibited in the earlier AB norm. There is then no conflict and A is fully capable of complying with both norms, namely by not exercising its explicit rights in a way that would breach its obligations under the other norm. In sum, conflict in the applicable law of the AB/AC type arises only in case of mutually exclusive obligations imposed on A under the two norms in question.[1211]

c. Conflict resolutions in the law of treaties

i. The evolution from "invalidity" of the later AC norm to no solution at all in the law of treaties

In doctrine a tendency has long prevailed in support of declaring the later AC norm invalid (on the ground that the AB norm detracted from A's very "legal capacity" to conclude the AC norm) or, at least, to let, in these circumstances, the earlier AB norm prevail over the later, conflicting AC norm (*lex prior* principle or *prior in tempore potior in jus*). Witness, for example, the draft convention on the law of treaties of the Harvard Research in International Law:

> "If a State assumes by a Treaty with another State an obligation which is in conflict with an obligation which it has assumed by an earlier treaty with a third State, the obligation assumed by the earlier treaty takes priority over the obligation assumed by the later treaty".[1212]

Lauterpacht, in Art. 16 of each of his *Reports on the Law of Treaties* prepared for the ILC went even a step further and started from the principle that a treaty is void if its performance involves a breach of a treaty obligation previously undertaken by one or more of the parties, subject to the right of an innocent party (*in casu*, state C) to damages for resulting loss.[1213] We discussed earlier how this principle of invalidity of one of the two conflicting norms evolved to rules on priority of application (with reports by Fitzmaurice and Waldock).[1214] For AB/AC conflicts, this culminated even in a

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[1211] Conflict situation 1, in so far as it relates to conflicting positive obligations that are merely different but not mutually exclusive does not give rise to conflict either in an AB/AC constellation. A can then avoid breaching its obligations towards both B and C by simply complying with the strictest norm.

[1212] Reprinted in 29 AJIL 1024 (1935), supplement.

[1213] UN Documents, A/CN.4/63 of 24 March 1953, 198-208 and A/CN.4/87. This invalidity was conditional on whether the departure from the terms of the prior treaty was such as to interfere seriously with the interests of the other parties to that treaty, or seriously impair the original purpose of the treaty. In his second report this was slightly revised to refer specifically to a bilateral or a multilateral treaty or any provision thereof, while the last phrase of the condition was reworded to read "to impair an essential aspect of [the prior treaty's] original purpose". See also Hersh Lauterpacht, *The Covenant as the 'Higher Law'*, 17 BYIL 54 (1936) and *Contracts to Break a Contract*, in INTERNATIONAL LAW, THE COLLECTED PAPERS OF HERSH LAUTERPACHT (ED. BY E. LAUTERPACHT) 341, at 374-5 (1978).

[1214] See Chapter VI, section B.1.a.

complete absence of priority rules and an exclusive reliance on state responsibility in the Vienna Convention.[1215]

We saw earlier that in the *Costa Rica v. Nicaragua* case, the later Bryan-Chamorro treaty was not invalidated for cause of breach with the earlier Canas-Jerez treaty.[1216] In a more recent dispute, the *Case Concerning East Timor* (Portugal v. Australia), the ICJ was even more reticent to declare a treaty in violation of an earlier one invalid. In that case, it was argued that Australia's entry into a treaty with Indonesia which conflicted, *inter alia*, with the rights of Portugal under the UN Charter gave rise to the international responsibility of Australia. Unlike Costa Rica in the Bryan-Chamorro dispute, Portugal expressly did not seek a determination that the treaty which Australia had concluded with Indonesia was void. Rather, it restricted itself to a claim of responsibility. Here, the ICJ declined to decide the case at all, on the ground that it could not do so without first pronouncing on the illegality of the conduct of Indonesia, a state not party to the proceeding. In these circumstances, the ICJ concluded, it was not competent to determine Portugal's claim of responsibility against Australia.[1217]

ii. The resolution provided for in the Vienna Convention

In order to resolve AB/AC conflicts under present international law, the three principles set out earlier (contractual freedom of states, *pacta sunt servanda* and *pacta tertiis*) must be resorted to.

Pursuant to the *pacta sunt servanda* principle, **A** is bound by the first norm v-à-v B, but at the same time A is bound also by the second, contradictory norm v-à-v state C.[1218]

Moreover, pursuant to the *pacta tertiis* principle, **C** cannot be held by the earlier AB norm. It can neither see its AC rights detracted from because of conflict with this AB norm to which it did not consent. The same applies for state **B** in respect of the AC norm to which state B did not consent.

Finally, the contractual freedom of state A allowed it to conclude the contradictory AC norm (assuming that the AB norm is not of *jus cogens*). International law does *not* invalidate the AC norm because it conflicts with the earlier AB norm. From the viewpoint of A, the AC norm can be illegal if it constitutes, in and of itself, breach of the earlier AB norm, but it cannot be invalid.

Crucially, in case the AC norm does *not*, in and of itself, constitute breach of the AB norm, international law does not offer a priority rule obliging A to comply with the AB norm over and above the AC norm or vice versa. Both norms are then valid and legal and can be invoked by A's contractual partners. This is the solution explicitly provided by Art. 30.4(b) of the Vienna Convention:

> "When the parties to the later treaty [AC norm] do not include all the parties to the earlier one [AB norm] … as between a State Party to both treaties [A] and a State Party

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[1215] Already in 1953, Jenks cautioned against an application of the *lex prior* rule in international law: "while the *lex prior* principle is an important one in the law of contract, there is no corresponding principle in the law of statutory interpretation, where, on the contrary, the *lex posterior* principle represents the general rule. This suggests considerable caution in applying the principle to law-making treaties" (Jenks, *Conflict …*, 444).

[1216] See Chapter VI, section C.1.a.

[1217] Note that in the *Costa Rica v. Nicaragua* case, the Central American Court did declare the responsibility of Nicaragua (notwithstanding the absence of the United States) but that in that case it could do so without having to decide first on the legality of US conduct (whereas in the *East-Timor* case both Australia and Indonesia were bound by the UN Charter, under which Portugal invoked the breach; in the *Costa Rica v. Nicaragua* case, the treaty invoked by Costa Rica (Canas-Jerez treaty) was binding only on Nicaragua, not the United States).

[1218] Or as Crawford noted: "if any of the parties to two inconsistent treaties is different, both treaties are considered to remain in force, with the consequence that State A (a party to both) may have one set of obligations to one group of States and another set of obligations to another … The Vienna Convention … does not contemplate that a treaty will be void for inconsistency with another treaty" (Crawford, Second Report, para. 9, (c) and (d)).

> to only one of the treaties [B and C], the treaty to which both States are parties governs their mutual rights and obligations".

In other words, in case of conflict in the applicable law of the AB/AC type, A is bound towards B by the AB norm as much as it is bound towards C by the contradictory AC norm.

Hence, if an adjudicator were faced *ex ante* by a request of, for example A, B and C to decide which norm A must comply with, the adjudicator would not be able to decide either way.[1219] It is then up to A to make a political choice as to whether it will comply with the AB norm or with the AC norm. The law of treaties does not direct A either way. Or as Karl put it :

> « With the law stepping back, a principle of political decision takes its place whereby it is left to the party to the conflicting obligations to decide which treaty it prefers to fulfil ».[1220]

It is interesting to note that an earlier version of what is now Art. 30.4(b) made a reservation for conflicts of the AB/AC type. It provided for a priority rule in favour of the *earlier treaty* for cases where C "was aware of the existence of the earlier treaty [AB norm] and that it was still in force with respect to the first State [A]".[1221] This proviso was later dropped.

d. Conflict resolution in the law of state responsibility

In sum, the law of treaties does not provide a solution for AB/AC conflicts in the sense that it does not direct state A to give preference to one of the two norms. However, this lack of conflict rules in the law of treaties has left untouched normal international law rules on state responsibility.[1222] This is, again, what Art. 30.5 of the Vienna Convention provides:

> "Paragraph 4 is without prejudice to … any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty".

As Crawford noted, the Vienna Convention "seeks to resolve the difficulties of conflicting treaty obligations by expressly reserving [the rules of state responsibility] … Thus it is no excuse under international law for non-compliance with a subsisting treaty obligation to State A that the State was simultaneously complying with a treaty obligation to State B".[1223] This means also, as another author put it, that the conflict is not actually resolved:

> "Il ne s'agit donc plus de résoudre un conflit de normes (problème objectif de compatibilité), mais de sanctionner (subjectivement) un comportement internationalement illicite ».[1224]

Above, we already examined the instance of the later AC norm constituting, in and of itself, breach of the earlier AB norm.[1225] To use the words of Art. 30.5, this relates to the "question of responsibility which may arise for a State [A] from the conclusion … of a treaty [*in casu*, the AC norm], the provisions of which are incompatible with its obligations towards another State [B] under another

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[1219] Unless, of course, the AC norm constitutes, in and of itself, breach of the earlier AB norm.
[1220] Karl, *Conflict …*, 470-471. That this solution is "sans doute guère satisfaisante", see Nguyen, *Droit …*, para. 175, at 274.
[1221] Waldock Report III, Art. 65.4(c). Discussed, *inter alia*, at the 742nd Meeting of the ILC, YILC, 1964, Vol. I, 119, at 120 (where it is stated in para. 11 that the proviso had been suggested by McNair with reference to the principle of good faith).
[1222] See Crawford's Second Report, para. 9.
[1223] Crawford, Second Report, para. 9, (c) and (d).
[1224] Nguyen, *Droit …*, para. 175, at 274.
[1225] See Chapter VI, section C.1.a.

treaty [*in casu*, the AB norm]". In case of such normative conflict, the law of state responsibility directs state A to stop the breach, i.e., to cease the existence of the AC norm. This, in turn, will activate state A's responsibility v-à-v state C.

In case of conflict in the applicable law of the type AB/AC (that is, two norms imposing mutually exclusive obligations, the matter at issue here), as soon as state A executes either of the two norms it will engage its state responsibility. To use the words of Art. 30.5, this raises the "question of responsibility which may arise for a State [A] from the application … of a treaty [*in casu*, either the AB or the AC norm], the provisions of which are incompatible with its obligations towards another State [respectively, C or B] under another treaty [respectively, the AC or the AB norm]". If A complies with norm AB, it will engage its responsibility v-à-v state C. If it complies with norm AC, it will engage its responsibility v-à-v state B. Since not to execute either of the two norms is, in the event of mutually exclusive obligations, not an option that would avoid breach, for state A to sit still and not to execute either of the two norms would mean that it breaches both of them. In that event, state A would engage its responsibility v-à-v both state B and state C. In sum, under the law of treaties state A is free to comply with either norm. Nonetheless, doing so will necessarily activate state A's responsibility under the other norm. It is then the application of either norm (not the conclusion of the second norm as such) that may lead to adjudication. If so, the adjudicator will have to find breach of the opposing norm that A did not implement and grant damages to the state wanting to rely on that opposing norm. Or as Jiménez de Aréchaga phrased it at an ILC meeting:

> "According to the principle of nullity, a treaty which conflicted with a prior treaty was void. According to the principle of State responsibility, it was valid, but the State which had assumed conflicting obligations was free to choose which of the treaties it would fulfil; so far as the unfulfilled treaty was concerned, it was required to pay an indemnity. The State which had assumed conflicting obligations thus 'bought' its choice".[1226]

The problem then is, of course, that although A can pay compensation to its contracting partner towards whom it did not comply, it cannot cease the breach towards that state without in turn breaching the other norm. As we discuss below, this is why the only long term solution to a conflict of the type AB/AC is to re-negotiate either norm so as to cease the conflict.

In addition, in case of breach of either norm by state A, and in the event such breach constitutes a "material breach", the state subject to the breach may then be allowed to invoke the termination or suspension of the treaty breached by state A pursuant to Art. 60 of the Vienna Convention. Art. 30.5 explicitly reserves the operation of Art. 60. In most cases, however, the subject of the breach will be interested more in performance of the treaty rather than its suspension or termination. The latter may well benefit more state A who would then be freed of its contradictory obligations.

e. Can state C be held responsible for breach by state A of the AB norm?

However, does this almost exclusive reliance on state responsibility in the Vienna Convention for AB/AC conflicts mean that states B and C are put in exactly the same position? Not necessarily so. Conclusion or implementation of the AC norm, in conflict with the AB norm, may not only engage the responsibility of state A. It could be argued that state C, by concluding the AC norm, aided or assisted state A in the commission of the breach of norm AB. In other words, in the event state A decides to comply with the later AC norm, state B could invoke, not only the responsibility of state A, but also that of state C. Or, looked at from a different angle, state A could, in its defence, refer to the

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[1226] YILC, 1964, Vol. I, 123, 742nd Meeting, para. 44. Degan (*Sources …*, 435) criticised the Art. 30 solution to conflicts of the AB/AC type as follows: "The solution from paragraph 5 of Article 30 seems to be insufficient, especially because it considers both incompatible treaties as equal. It does not protect the rights of the injured party from the earlier treaty", in casu state B. Nonetheless, as explained below, in some cases B should be able to claim compensation from both A and C.

responsibility of state C, e.g., in order to reduce the amount of damages to be paid by state A to state B.

i. The ILC Draft 1996 on State Responsibility

Art. 27 of the ILC Draft 1996, entitled "Aid or assistance by a State to another State for the commission of an internationally wrongful act", addresses the issue of aid or assistance in breach as follows:

> « Aid or assistance by a State to another State, if it is established that it is rendered for the commission of an internationally wrongful act carried out by the latter, itself constitutes an internationally wrongful act, even if, taken alone, such aid or assistance would not constitute the breach of an international obligation ».

As James Crawford remarked, "article 27 posits a rather extensive principle of responsibility of one State for the acts of another".[1227] Three requirements for Art. 27 to be activated should be pointed at.

Firstly, for present purposes, the exact degree of "aid or assistance" required, i.e., the question of whether there is actual or material assistance or only advice, encouragement or incitement, is not that important. For state C to actually conclude a treaty with state A which breaches another international obligation of state A (under norm AB), or will necessarily lead to such breach if complied with, undoubtedly amounts to actual and material aid and assistance. It could even be said that state C thereby even "becomes a co-perpetrator of an internationally wrongful act".[1228] Without state C, the treaty and hence the breach would not have materialised.

Secondly, the "mental element" required for there to be liability of state C, i.e., the fact that the assistance must be given "with the *intent* to facilitate the commission"[1229] of the breach, does, in the circumstances, not raise serious difficulties either. As Crawford noted, "[i]gnorance of international law is not generally an excuse for wrongful conduct by States". Thus, state C, when concluding the conflicting norm AC must normally have been aware that this new norm would breach or lead to breach of other obligations of state A. By actually concluding the new norm, state C must, moreover, have intended to facilitate the occurrence of this breach.

A potential third requirement is more problematic in the circumstances, that is, the question as to whether or not the assisting state, *in casu* state C, must also be bound by the obligation that state A breaches by concluding the norm AC. Art. 27 of the ILC Draft 1996 did not seem to impose this requirement. Nonetheless, most of the examples given in the Commentary to Art. 27 involve assistance by one state in the use of armed force by another, e.g., through allowing overflight or landing rights in the course of a military operation by another state which is said to constitute aggression or intervention. Indeed, all of the examples given involve breaches of obligations arising under rules by which the assisting state was itself bound.

ii. The Reports of James Crawford and the ILC Draft 2000

The fact that the text of Art. 27 of the 1996 ILC Draft could, nonetheless, be read as including also breaches of rules *not* binding on the assisting state was criticised by Crawford, who rightly remarked the following:

> "Take the case of a bilateral treaty between State [A] and State [B] under which the two States agree not to export certain materials or technology to, or not to trade with, State [C] … State [C], the target State, is of course not bound by the treaty. Why should it be

[1227] Crawford, Second Report, Add. 1, para. 167.
[1228] ILC Commentary to Art. 27, para. (2).
[1229] Ibid., para. (16), emphasis in original.

> legally responsible if, knowing of the treaty, it assists State [A] in breaching? Article 27 could thereby become a vehicle by which the effect of well-published bilateral obligations was extended to the rest of the world".[1230]

In support of his position, Crawford, in Addendum 3 to his Second Report, provided a comparative analysis of the concept of "interference with contractual rights" in domestic law.[1231] He concludes that while English, US, French and German law recognise that knowingly and intentionally inducing a breach of contract -- even if the inducing party is not bound by the contract -- is a civil wrong, they approach the matter in different ways. These differences are accentuated if one brings into account a wider range of comparisons, such as, for example, Islamic or Russian law. Under Islamic law, for example, no such liability seems to be recognised. He concludes that the statement of a general principle that any knowing interference with the performance of any contract constitutes a delict or tort is an oversimplification of a more complex situation.[1232]

In his remarks under Art. 27, Crawford then continues as follows: "even if the support to be drawn from the domestic analogies such as inducing breach of contract were less equivocal than it is, there are difficulties in applying such a general principle to international relations. Treaties reflect the particular policies of the States entering into them, and international law has a strict doctrine of privity in relation to treaties. Moreover, treaties have proliferated, and many obligations to provide finance, materials or technology are incorporated in treaties. National legal systems have more rigorous controls on the legality of contracts than international law currently has for treaties, and there are ways under national law by which third parties can challenge the legality of contracts adversely affecting them which do not yet exist for treaties".

On that basis, Crawford proposed to replace Art. 27 by the following (now Art. 16):

> "A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) <u>The act would be internationally wrongful if committed by that State</u>".

Hence, under the third point discussed earlier, it is now made clear that the assisting state (*in casu*, state C) can only be held liable for assisting state A in its breach of norm AB, if state C itself is bound by the obligation set out in norm AB.

iii. Some examples: WTO obligations (AB norm) versus MEA obligations imposed in respect of non-parties (AC norm)

Where does this leave us under the example of the 1914 Bryan-Chamorro treaty concluded by Nicaragua and the United States in breach of Nicaragua's obligations v-à-v Costa Rica under the 1858 Canas-Jerez treaty (the *Costa Rica v. Nicaragua* case)? Under Art. 16, with its requirement that the

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[1230] Second Report, Add. 1, para. 184. The denomination of states in the example has been adapted to conform to the hypotheticals used here.

[1231] UN document, A/CN.4/498/Add. 3.

[1232] French law is the most open in principle to such liability (but subject to limitations in practice such as a strict burden of proof); German law least so, since it requires something over and above knowing assistance or inducement, amounting to improper conduct. English and United States law take an intermediate position; there is liability in principle for deliberate and knowing inducement, but this is subject to the defence of justification and the proof of actual damage arising from the breach. Whether there is sufficient justification depends on a number of factors but, in English law, for example, to justify an inducement, it is not enough to show that one was acting in good faith in the pursuit of a legitimate interest, there has to be something in the nature of a moral duty, or a distinct legal right to act.

assisting state must be bound also by the norm breached, the United States could not be held responsible for its assistance provided to Nicaragua in the form of concluding the Bryan-Chamorro treaty. The United States was, indeed, not itself bound by the Canas-Jerez treaty.

But what in respect of other examples? Take a WTO rule between state A and state B, obliging state A not to restrict trade from state B in conflict with a subsequent MEA rule concluded by state A with state C under which state A is obliged to restrict trade of certain products *even if these products come from non-parties*, including state B (not bound by the MEA). Many MEAs include such obligations in respect of non-parties.[1233]

Under the law of treaties, the AB/AC conflict would not result in the invalidity of the later MEA norm, nor does the law of treaties provide for a priority rule. The obligation of state A v-à-v state B not to restrict trade is of equal standing as the obligation of state A v-à-v state C to restrict trade. But what about state responsibility? If state A executes the WTO norm (norm AB), it breaches the MEA norm and engages its responsibility v-à-v state C in the MEA. If state A executes the MEA norm (norm AC), it breaches the WTO norm and engages its responsibility v-à-v state B in the WTO.

However, in the second instance (compliance with the MEA, breach of the WTO), would state B (or, for that matter state A) be able to invoke also the responsibility of state C and this *on the ground that state C assisted state A in committing the breach*, i.e., in concluding the MEA? If state C is, like states A and B, a WTO member the answer should be yes (at least under the current draft Art. 16). In that event, state C has, indeed, assisted in the commission of wrongful conduct by state A v-à-v state B and this wrongful conduct, in case it had been committed by state C, would also have constituted a breach of the WTO obligations of state C. If, on the other hand, state C is only a party to the MEA and not a WTO member, it cannot be held responsible pursuant to Art. 16 for assistance to breach since state C would not itself be bound by the WTO norm breached by state A.

Importantly, although the legal value of the WTO and the MEA norm are then equal from the point of view of A, the compulsory dispute settlement system available for breach of WTO norms may provide an incentive for state A to comply with the WTO norm, rather than the MEA norm.

On the other hand, the fact that all MEA parties that are also WTO members could be held "co-responsible" for the breach of WTO norms by any of these MEA parties[1234], could provide a strong enough safety-net for WTO members who see their trade restricted by the implementation of MEA norms they did not consent to in the first place. Such WTO members may then see their trade restricted, but they would be allowed to claim compensation for such restrictions in breach of WTO rules from all WTO members that are party also to the MEA.

f. The only long term solution: re-negotiate either norm so as to cease the conflict

In the end, the optimal (and actually, only genuine) resolution of AB/AC conflicts ought to be found in a re-negotiation of either of the two norms. Such re-negotiation could take the form of

(i) the termination of either norm by common consent and compensation (say, the termination of norm AC by agreement between A and C, with C being compensated); or
(ii) making the two norms binding on all three parties involved, e.g., by means of the accession of B to the AC norm (*in casu*, the MEA) with B being compensated for it in the

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[1233] For an overview, see *Matrix on Trade Measures Pursuant to Selected MEAs*, WTO doc. WT/CTE/W/160/Rev.1, dated 14 June 2001. See, *inter alia*, Art. X of CITES, Art. 4.8 of the Montreal Protocol, Art. 11 of the Basel Convention, Art. 24.1 of the Cartagena Protocol on Biosafety, Arts. 8.4, 17 and 33 of the UN Fish Stocks Agreement, Art. 10.9(a) of the Rotterdam Convention and Art. 3.2(b)(i) of the Stockholm Convention.

[1234] A breach necessitated by the MEA v-à-v states not parties to the MEA but member of the WTO.

context of the AB norm (say, by means of the original MEA parties granting increased market access to B in the WTO).

Invoking the responsibility of C for the breach by A of the earlier AB norm may offer some pressure to either change the AC norm or to offer compensation to B on condition that B joins the AC norm.

If neither of the two norms is changed, there is an impasse. As noted earlier, the responsibility of A is necessarily incurred, whatever A does. Moreover, restitution under the violated norm is materially impossible. It requires the co-operation of the state not party to the norm breached. In addition, cessation of the norm breached is not an option either since it would necessarily lead to a violation of the other norm. To put it differently, without re-negotiating either norm, state A would be in a continuing situation of breach, for which it would need to pay compensation, without being able to stop the breach. If it were to do so, it would engage in another breach.

The fact that re-negotiation of either norm will be required in the long term leads to another consideration. Measures taken by WTO members under the AC norm (be it an MEA or a labour standards agreement), to which B is not bound, should not be too easily accepted under WTO exceptions (say, GATT Art. XX). Often it is mistakenly thought that not to offer such exception under explicit WTO rules, necessarily condemns the measure in question. As explained below, the defendant should be allowed also to invoke defences or exceptions under non-WTO rules. If both parties are bound by these rules, defendants should be able to justify breach of WTO rules, depending on the applicable conflict rules. If the complainant is *not* bound by these non-WTO rules, such rules should not be invokeable[1235] and cannot justify an established breach of WTO law. However, to find on that basis that the measure is WTO inconsistent is not necessarily the end of the matter. B should not be held bound by rules it did not agree to, but once the WTO inconsistency established, states A and C would do well in re-negotiating their WTO relationship with B so as to induce B to sign up to the MEA or labour standards agreement.[1236] In short, WTO dispute settlement should not be used as a fall-back in case B refuses to sign an MEA so as to get B bound by that MEA anyhow. B should be offered equal opportunities to negotiate its entry (and related benefits) to the MEA.

C. Conclusion on Conflict Resolution

The starting point for resolving conflict of norms must be the "holy trinity" of (i) contractual freedom of states; (ii) *pacta sunt servanda*; and (iii) *pacta tertiis*. States are, indeed, free to change their legal relationship with other states (contractual freedom), as long as these other states consent. When they do not consent, these other states cannot be bound (*pacta tertiis*) and any earlier treaty must be complied with (*pacta sunt servanda*), if not state responsibility will be incurred. Conflict of norms in international law is governed essentially by priority rules and state responsibility, not by rules invalidating either of the two conflicting norms.

When concluding new norms, or assessing the hierarchy as between existing norms, states ought to be aware of the following seven steps:

- Firstly, norms cannot deviate from *jus cogens* (Arts. 53 and 64 Vienna Convention). Any new norm in conflict with *jus cogens* will be void. The same happens to existing norms contradicting supervening *jus cogens*. The one other instance of "invalidity" occurs when acts of an international organisation were taken *ultra vires*, i.e., outside the limited competence of the organ in question. If so, these acts are invalid.

[1235] Except perhaps for purposes of interpretation of WTO rules if these non-WTO rules reflect a "common understanding" of all WTO members. See above Chapter V, section C.4.a.

[1236] In this direction, see Kyle Bagwell, Petros Mavroidis and Robert Staiger, *It's a Question of Market Access*, 2001 AJIL (forthcoming).

- Secondly, one norm may constitute in and of itself breach of another, earlier norm. In that event, the later norm is "illegal". Also an *inter se* agreement deviating from a pre-existing multilateral treaty may be "illegal". This will be so, of course, if the multilateral treaty explicitly says so, but also in the event the multilateral obligation derogated from *inter se* is of an "integral nature". *Inter se* deviations from "integral obligations" are not permitted (Art. 41/58 Vienna Convention), essentially because they necessarily affect also third states (against the *pacta tertiis* principle). The very idea of concluding "integral obligations" is that they continue to apply to all parties to the multilateral treaty, all the time (until amended by, in most cases, consensus). Many environmental and human rights obligations are of an "integral nature". Hence, when concluding, for example, new trade agreements states ought to be aware of the limits imposed by Art. 41/58. Nonetheless, when all parties to the "integral obligation" agree to change it, Art. 30.3 (*lex posterior*) applies. Then, the only limit is *jus cogens*. Similar limits of "illegality" must apply in respect of acts of international organisations that constitute a breach of the law that applies to them (to be distinguished from acts that are "invalid" on the ground that they were taken *ultra vires*).

- Thirdly, treaty norms cannot affect the rights and obligations of third parties and this even if these third party rights and obligations do not derive from "integral treaties". An *inter se* agreement deviating from a "reciprocal obligation" set out in a multilateral treaty will also be illegal to the extent it breaches the rights of third parties (Art. 41/58 Vienna Convention). Moreover, a later agreement as between A and C cannot alter the rights and obligations of B under an earlier AB agreement (*pacta tertiis*).

- Fourthly, account must be had to explicit conflict clauses in existing treaties (especially Art. 103 of the UN Charter). Also, when creating new treaties conflict clauses may be inserted so as to safeguard pre-existing treaties, to make sure that the new treaty prevails over earlier ones, or to regulate the relationship between the new treaty and future treaties, in particular *inter se* deviations from the new treaty. Apart from Art. 103, conflict clauses claiming priority over future treaties are, however, subject to the contractual freedom of states, both as expressed in a new treaty as between all parties to the earlier one and in *inter se* agreements. Such conflict clauses are, in other words, without much practical effect.

  Moreover, conflict clauses cannot alter the operation of the first three steps set out above: (i) a slave trade agreement even if it includes a conflict clause stating that it prevails over the prohibition on slave trade, remains void; (ii) a conflict clause in an "illegal" *inter se* agreement stating that it prevails over the earlier multilateral treaty does not dis-activate Art. 41 nor the *pacta tertiis* principle; (iii) the same applies in respect of an AC treaty explicitly stating that it prevails over an earlier AB treaty (*pacta tertiis*) or in respect of an act of an international organisation in which it is explicitly set out that the act prevails over any limitations as to the competence of the organ taking the act (such competence could be extended only by changing the constituent instrument of the organ).

- Fifthly, in case the previous four steps do not solve the conflict, one must fall back on the contractual freedom of states and look for the "current expression of state intent". In many cases, this search will be determined under Art. 30's *lex posterior* rule, applicable to "successive treaties". The latest expression of state intent is presumed to coincide with the current expression of state intent. Even if an earlier treaty is *lex specialis* v-à-v this latest expression, this latest expression should still prevail. Art. 30 does not provide for an exception in this regard. Nonetheless, there may be cases where different treaties cannot be seen as "successive treaties", either because they were concluded at the same time or because they have a different time for different parties or are of a "continuing" or "living" nature so that they must be seen as "parallel" rather than "successive". In those cases where it is difficult to apply Art. 30, resort must be had to step six.

- Sixthly, in case the search for the "current expression of state intent" cannot be resolved by the *lex posterior* principle, other indications as to state consent must be looked at. Here, the *lex specialis* principle plays a pivotal role. The more precise and specific expression of state consent is then considered as coinciding with the strongest and current expression of state intent (overruling a more general norm, even if this norm is, from certain points of view, later in time). *Lex specialis* cannot, however, overrule a *lex posterior* in case Art. 30 finds application. It can only prevail in cases where treaties cannot be said to be "successive" (e.g., conflicts involving "continuing treaties"). Other indications as to state intent may also play a role, in particular implicit statements in, for example, the preamble or *travaux préparatoires* as to what the drafters had in mind in terms of the inter-play between the treaties in question.

- Seventhly, once the earlier six steps exhausted, there may be exceptional cases where an adjudicator would no longer be applying the law, but creating it. That is, situations where none of the first five steps above offer a solution and where under the sixth step (*lex specialis*) the search for "current expression of state consent" cannot be conclusively determined either. In that event, the adjudicator is faced with a *lacuna* in the field of conflict rules. He must then declare a *non liquet*.

- Eighthly, under all seven steps above questions of state responsibility may arise. One norm may, in and of itself, constitute breach of the other and thereby become "illegal" under the law of state responsibility (see step two). But the "illegality" may also be limited to the application or implementation of either norm. State responsibility is of great importance especially in conflicts of the type AB/AC. It is, in that event, the only solution to conflict given that the *pacta tertiis* principle precludes an adjudicator from letting one rule prevail over the other.

In sum, when concluding new treaties states ought to keep in mind the limits under steps 1 (*jus cogens*), 2 (illegalities) and 3 (*pacta tertiis*). If at all possible, they should include explicit conflict clauses in their new treaties (step 4). Doing so cannot neutralise the limits in steps 1-3, but it will avoid the inherent uncertainties present in steps 5-7. If, for whatever reason, an explicit conflict clause is not set out, states must remember that the rule of first resort is and remains the *lex posterior* principle. Their latest expression of consent will prevail (step 5). Nonetheless, states must be aware of the fact that the *lex posterior* rule has its limits in that it applies only to "successive treaties". If, *but only if*, the treaties are, for whatever reason, not "successive" (but, for example, "parallel"), the search for "current expression of state consent" must be widened so as to include also the *lex specialis* principle and any other implicit statements of preference for either norm (step 6). If these additional elements leave the question of "current state consent" indecisive, the conflict of norms cannot be resolved. States must be cognisant of this risk of *non liquet*. This risk ought to be an incentive for states to provide for explicit conflict clauses under step 4.

CHAPTER VIII. CONFLICT OF NORMS IN WTO DISPUTE SETTLEMENT[1237]

A. The judicial settlement of disputes

1. In public international law

International law lacks not only a central "legislator" and an inherent hierarchy of its rules (other than *jus cogens*)[1238], but also a unified international "judiciary" to which all pertinent disputes could be referred.[1239] The jurisdiction of an international court or tribunal cannot be presumed. It must be granted by the consent of states in *explicit* terms.[1240] *Peaceful* settlement is the only available means to settle disputes.[1241] However, general international law does not *obligate* states to actually settle disputes or, *a fortiori*, to submit all disputes to one given court. States are free to choose the court or tribunal they want.[1242] The jurisdiction of an international adjudicator depends on the consent of the parties. States may decide to authorise an *ad hoc* arbitrator to settle their dispute. In that case they will often specify, by consent, both the subject matter in dispute and the applicable law. States may also decide to create a standing judicial body (such as the ICJ, the ITLOS or the WTO Appellate Body) and grant their consent *ex ante* for this body to hear not so much *a given* dispute but a certain *type* of dispute (for example, disputes on certain subjects or claims under a given convention). When doing so, states are required to specify, in advance, certain general procedural rules to be followed by the parties and the court in question. These general procedural rules or statutes may include a provision on the "applicable law".[1243] Whereas the consent to jurisdiction and the definition of the applicable law in *ad hoc* arbitration are mostly clear and precise, the reference *ex ante* to a standing judicial body often results in jurisdictional objections by the defending state and makes discussions on applicable law more frequent.

Consequently, despite the lack of a general hierarchy of rules of international law the need for explicit consent for legal claims to be brought before an international court or tribunal means that, in a sense, a "two-class society" does exist, namely, between rules of international law that can be judicially enforced before a court with compulsory jurisdiction and those that cannot.[1244]

2. In the WTO

At first glance, one may doubt whether the DSU actually provides for the *judicial* settlement of disputes. First, contrary to the Appellate Body, WTO panels are not standing bodies but *ad hoc* tribunals created pursuant to predetermined procedures in the DSU. Panels must be established *ad hoc*

[1237] This Chapter is based largely on Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* 2001 AJIL (forthcoming).
[1238] See Chapter III.
[1239] See Chapter I, section 1.d. There is, of course, the ICJ, the "principal judicial organ of the United Nations" (UN Charter, Art. 92). But this court only has compulsory jurisdiction as between some states and in respect of certain subject matters (as, for example, defined under the optional clause system of Art. 36.3 of the Statute of the ICJ).
[1240] For exceptions, see section B.2 below on implied jurisdiction.
[1241] UN Charter, Article 2.3.
[1242] UN Charter, Art. 33.1.
[1243] See Art. 38 of the Statute of the ICJ and Art. 291 of UNCLOS.
[1244] The fact that a rule cannot be judicially enforced does not mean, though, that it will not be complied with. Compliance mechanisms other than judicial settlement of disputes may, in certain cases, be as effective or even more effective than third party adjudication. See *supra* note **191**.

for each case by the WTO dispute settlement body (DSB).[1245] They cannot be established by the mere will of the disputing parties. Still, their establishment by the DSB is quasi-automatic pursuant to the negative consensus rule in DSU Art. 6.1. In terms of their *mode of establishment*, panels could thus be qualified as a mixture between arbitration and judicial dispute settlement. Yet, when it comes to their actual function and way of handling disputes, the DSU leaves no doubt that panels are judicial in nature. Second, the legal findings and conclusions of both panels and the Appellate Body culminate only in "recommendations" to the defending party. These recommendations must still be adopted by the DSB to obtain their legally binding force as between the parties to the dispute. Once again this adoption occurs by negative consensus, i.e., quasi-automatically (DSU Arts. 16.4 and 17.14). This procedure could, at most, mean that the WTO judiciary includes the DSB. In practice, however, both panels and the Appellate Body are established, operate and make their legal conclusions in an entirely independent and law-based fashion. They are judicial tribunals in the international law sense.

WTO members granted *compulsory* jurisdiction to this WTO "judiciary" *ex ante* and on a claim-specific basis (claims under WTO covered agreements only). It was *not* granted general jurisdiction to adjudicate *all trade disputes* between WTO members (i.e., on a subject matter basis). Importantly, it is generally accepted that no counter-claims (not even counter-claims under WTO covered agreements) can be made. If a defendant wishes, in turn, to lodge a complaint about the acts of the plaintiff it must start a new procedure.[1246] As pointed out before, the importance of the WTO judiciary's holding compulsory jurisdiction for all WTO claims cannot be overestimated. It is a crucial element in the increasing risk of conflicts between WTO law and other international law arising (see Chapter I, section D.1.d).

B. The jurisdiction of WTO panels

1. The substantive jurisdiction of WTO panels

a. Standard WTO panels

The jurisdiction of WTO panels is limited to certain claims only, namely *claims under WTO covered agreements*. DSU Art. 1.1 provides that the DSU applies to

> "disputes brought pursuant to the consultation and dispute settlement provisions of the *agreements listed in Appendix 1 to the [DSU]*" (emphasis added).

These consultation and dispute settlement provisions allow for so-called violation complaints (claims of violation of WTO rules), non-violation and situation complaints[1247] (hereinafter referred to jointly as claims under WTO covered agreements or WTO claims). *Ratione temporis*, the jurisdiction of WTO panels is limited to requests for consultations (which may, eventually end up in a panel), made on or after 1 January 1995 (the date of entry into force of the WTO Agreement). What counts is the date of the request, not the date of enactment of the allegedly WTO inconsistent measure (this measure may be pre- or post-1995). The fact that the jurisdiction of WTO panels is limited to claims under WTO covered agreements only is confirmed in DSU Article 3.2 stating that the DSU mechanism "serves to preserve the rights and obligations of Members under the *covered agreements*". The standard terms of reference of WTO panels are

> "[t]o examine, in the light of the relevant provisions in (name of the *covered agreement(s)* cited by the parties to the dispute), the matter referred to the DSB … and

[1245] That is, a political WTO body in which all WTO members, without exception, have a seat.
[1246] DSU Art. 3.10.
[1247] See, for example, GATT Art. XXIII.1(a), (b) and (c).

> to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in *that/those agreement(s)*" (DSU Article 7.1, emphasis added).

Finally, DSU Article 11 instructs panels to "make an objective assessment of … the applicability of and conformity with the *relevant covered agreements*, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the *covered agreements*" (emphasis added).

Consequently, no claims of violation of rules of international law *other* than those set out in WTO covered agreements can be brought to a WTO panel. Similarly, a WTO panel does not have jurisdiction to consider claims under *WTO rules other than those included in WTO covered agreements* (such as the ministerial decisions and declarations that are part of the Final Act, but not of the WTO Agreement; or rules set out in a mutually acceptable solution agreed upon in the context of a WTO dispute). Nor does it have jurisdiction to rule on claims of violation of *non-WTO* rules, such as environmental or human rights conventions or rules of general international law (including rules of customary law and/or *jus cogens*). A WTO panel could only decide these other claims if the parties to the dispute in question were to grant it this jurisdiction *ad hoc* and by mutual consent, for example, by means of explicitly agreeing on special terms of reference pursuant to DSU Art. 7.3 or by referring the dispute, including these other claims, to arbitration under DSU Art. 25.[1248]

Although a WTO panel has jurisdiction only over WTO claims, it should be recalled that some WTO rules explicitly confirm and incorporate pre-existing *non-WTO* treaty rules. These non-WTO rules have thereby become WTO rules which can be judicially enforced before a panel.[1249] Other WTO rules do not *incorporate* non-WTO rules but make an explicit reference to them. Also these non-WTO rules can thereby become part of a WTO claim (although they have not as such been incorporated and can therefore not be judicially enforced independently of other WTO rules). An example of "incorporation" is the TRIPS Agreement which incorporates, *inter alia*, provisions of the Berne, Paris and Rome Conventions part of WIPO.[1250] Examples of "explicit reference" are the SPS, TBT and Subsidies agreements where reference is made, for example, to international standards adopted in the WHO/FAO Codex Alimentarius Commission (SPS Agreement), the IARC[1251] (TBT Agreement) or to the OECD Arrangement on Guidelines for Officially Supported Export Credits (Subsidies Agreement[1252]). In the TRIPS Agreement, the incorporated rules are legally binding as such in the WTO and can be judicially enforced before a WTO panel.[1253] In the other WTO agreements, the non-WTO rules serve only as a benchmark or basis for the assessment of a distinct WTO-specific obligation. For example, the international standards referred to in the SPS agreement are not incorporated as binding in the WTO (hence no independent claim of breach of, for example, Codex standards can be brought to a WTO panel). However, when WTO members base their sanitary measures on such standards, they will be presumed to be in conformity also with the SPS agreement.[1254]

[1248] DSU Art. 25 is not limited to claims under WTO covered agreements. The only requirement is that the disputes « concern issues that are clearly defined by the parties » (DSU Art. 25.1).
[1249] See *supra* note **628**.
[1250] For panel reports where the relationship between the TRIPS Agreement and the incorporated WIPO conventions is discussed (including the particular extent of this incorporation), see the Panel report on *US – Copyright* and the Panel report on *US – Section 211 Omnibus Appropriations Act of 1998*.
[1251] International Agency for Research on Cancer, referred to, for example, in the panel report on *EC –Asbestos*, at para. 8.186. Whereas the SPS Agreement refers to three specific "sister institutions" (Codex Alimentarius Commission, International Office of Epizootics and International Plant Protection Convention, see SPS Article 3.1 and Annex A, paragraph 3), the TBT Agreement refers to international standards developed by any "[b]ody or system whose membership is open to the relevant bodies of at least all Members" (TBT Article 2.4 and Annex 1, paragraph 4).
[1252] Annex I, item (k) of the Subsidies Agreement.
[1253] See, for example, in respect of the Berne Convention, the panel report on *US –Copyright Act*.
[1254] SPS Articles 3.1 and 3.2.

b. Implementation panels under DSU Art. 21.5 and arbitrators on retaliation under DSU Art. 22.6

In the DSU, WTO members agreed also to confer compulsory jurisdiction to WTO panels/arbitrators in respect of two particular types of disputes:

(i) disputes constituting "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" adopted by the DSB as a result of standard panel and Appellate Body procedures (so-called "implementation panels" set up under Art. 21.5 of the DSU); and

(ii) in the event of non-compliance and the submission of a proposal to retaliate, objections to the level of suspension proposed, or claims of violation of the principles and procedures set forth in DSU Art. 22.3 on the sectors and agreements under which retaliation and cross-retaliation may take place (referred to here as "arbitrators on retaliation", pursuant to DSU Art. 22.6).

The jurisdiction of implementation panels has been broadly defined. Such panels may examine (i) whether there exist "measures taken to comply"; and (ii) whether such measures are consistent with any provision in WTO covered agreements. The Appellate Body stressed that these panels are "not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings".[1255]

The jurisdiction of arbitrators on retaliation is much more limited. It covers only (i) the level of retaliation, i.e., is it equivalent to the level of nullification or impairment? (as called for in DSU Art. 22.4; and (ii) whether the principles and procedures in DSU Art. 22.3 have been met. DSU Art. 22.7 adds to this (iii) the question of whether the proposed suspension is allowed under the covered agreement (in line with DSU Art. 22.5). Art. 22.7 makes it explicit that these arbitrators "shall not examine the nature of the concessions or other obligations to be suspended". Nonetheless, the arbitrators in *EC – Bananas*, albeit in exceptional circumstances, also considered the consistency under WTO covered agreements of EC measures taken to comply (something that should normally be done under Art. 21.5).[1256]

Importantly, arbitrators under DSU Art. 22.6 do not have jurisdiction to decide, for example, whether the proposed suspension is in line also with other rules of international law, say, the ILC Draft 2000 prohibition to take countermeasures in the form of suspending obligations for the protection of fundamental human rights or WIPO conventions in case the proposed suspension is one under the TRIPS Agreement.[1257] The Arbitrators in *EC – Bananas* (suspension request by Ecuador) confirmed not to have jurisdiction "to pass judgment on whether Ecuador, by suspending, once authorized by the DSB, certain TRIPS obligations, would act inconsistently with its international obligations arising from treaties other than the agreements covered by the WTO (e.g. the Paris, Berne and Rome Conventions which Ecuador has ratified)".[1258]

Nonetheless, the fact that a WTO panel does not have *jurisdiction* to rule on the conformity with these other norms does not mean that these other norms do not apply to the suspension finally imposed. A

[1255] Appellate Body report on *Canada –Aircraft*, Recourse by Brazil to Article 21.5 of the DSU, para. 40. See also the implementation panel report on *Australia – Salmon*, paras. 7.10-7.22.

[1256] Arbitrators report on *EC – Bananas* (US request for retaliation), para. 4.2. This approach was approved by the panel on *US - Certain Products*, paras. 6.121-126. However, on appeal the Appellate Body found that the panel had no mandate to make these findings in respect of DSU Art. 22.6 and declared that these findings "have no legal affect" (para. 90).

[1257] We discussed how to resolve conflict between a DSB decision and, for example, WIPO conventions, above in Chapter VI, section C.4.

[1258] Arbitrators report on *EC – Bananas* (Ecuador request for retaliation), para. 152.

WTO arbitrator may well decide that under the DSU, the proposed suspension is authorised, but this does not mean that it is consistent also under other rules of international law. Hence, although authorised by the WTO, a suspension may still be inconsistent with international law (in case the suspension would, for example, derogate from fundamental human rights). Yet, this inconsistency cannot be challenged before a WTO arbitrator, unless the parties involved were to grant it the additional jurisdiction required.

To further legitimise the enforcement mechanism of the WTO, thought should be given to expand the jurisdiction of arbitrators under DSU Art. 22.6 so as to include also claims of violation of general international law restrictions that apply to countermeasures, that is, those set out in the ILC Draft 2000.

2. The implied or incidental jurisdiction of WTO panels

The substantive jurisdiction of any international court or tribunal must be granted *explicitly* by consent of the parties involved. Nevertheless, once an international court or tribunal has been seized of a specific matter, it also has certain implied jurisdictional powers which derive directly from its very nature of a judicial body. This, what has been called, incidental or implied jurisdiction is an inherent part also of the mandate of WTO panels (WTO panels being international bodies of a judicial nature). Elements of this incidental jurisdiction are: (1) the jurisdiction « to interpret the submissions of the parties » in order to « isolate the real issue in the case and to identify the object of the claim »[1259]; (2) the jurisdiction to determine whether one has substantive jurisdiction to decide a matter (the principle of *la compétence de la compétence*); (3) the jurisdiction to decide whether one should *refrain* from exercising substantive jurisdiction that has been validly established[1260]; and (4) the jurisdiction to decide all matters linked to the *exercise* of substantive jurisdiction and inherent in the judicial function[1261] such as claims under rules on burden of proof, due process or any other general international law rules on the judicial settlement of disputes or state responsibility including the implied jurisdiction to order remedies, i.e. to order cessation of the breach[1262], assurances of non-repetition[1263] and reparation for breach.[1264] As the ICJ held recently in the *LaGrand* case:

> "Where jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation".[1265]

The jurisdiction to indicate provisional measures, explicitly provided for in respect of some courts and tribunals[1266], is not generally recognized as part of their implied jurisdiction.[1267]

That WTO panels have *la compétence de la compétence* was explicitly confirmed by the Appellate Body in *US – Anti-dumping Act of 1916*. There, the Appellate Body referred to the "widely accepted rule that an international tribunal is entitled to consider the issue of its own jurisdiction on its own initiative, and to satisfy itself that it has jurisdiction in any case that comes before it".[1268] As noted by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadic*

[1259] *Nuclear Test cases*, ICJ Reports 1974, 262, para. 29 and 466, para. 30.
[1260] In support: the WTO jurisprudence outlined in Chapter IV, section C.2.
[1261] See the very broad statements on the ICJ's implied jurisdiction in the *Northern Cameroons case (Judgment)*, ICJ Reports 1963, 29 and the *Nuclear test cases*, ICJ Reports 1974, 259-260, para. 23 and 463, para. 23.
[1262] As confirmed in the Rainbow Warrior Arbitration Award (30 April 1990), UNRIAA, Vol. XX, 217 at 270, para. 114.
[1263] See the *LaGrand* case recently decided by the ICJ, at para. 48.
[1264] See *Chorzow Factory case*, PCIJ, Series A, No. 9, 22..
[1265] ICJ *LaGrand* case, at para. 48.
[1266] See Art. 41 of the ICJ Statute and Art. 290 of UNCLOS.
[1267] In this sense: Hugh Thirlway, *The Law and Procedure of the ICJ 1960-1989*, 69 BYIL 1, 19 (1998).
[1268] *US – Anti-Dumping Act of 1916*, , note 30.

case (which decided, contrary to the Trial Chamber, that it did have the jurisdiction to review the validity of its establishment by the Security Council), this implied jurisdiction

> "is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive document of … tribunals", "[t]o assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council 'intended' to entrust it with, is to envisage the International Tribunal exclusively as a 'subsidiary organ' of the Security council".[1269]

Also the implied jurisdiction to decide whether one should refrain from exercising substantive jurisdiction finds reflection in WTO jurisprudence where the so-called principle of judicial economy plays a prominent role. The principle was referred to in *US – Shirts and Blouses* as one providing that "a panel need only address those claims which must be addressed in order to resolve the matter at issue".[1270]

It should be stressed that the question of jurisdiction is one to be examined by the court or tribunal *proprio motu*.[1271] In *US – Anti-dumping Act of 1916* the Appellate Body rightly rejected an EC argument that the United States had raised a jurisdictional objection before the panel in an untimely manner noting that an international tribunal "is entitled to consider the issue of its own jurisdiction on its own initiative".[1272]

3. What about WTO claims in the context of a wider dispute mainly about non-WTO matters?

The issue may arise as to whether a WTO panel has jurisdiction to hear WTO claims even though the underlying or predominant element of disagreement derives rather from other rules of international law, which cannot be judicially enforced in the WTO (such as, the law of the sea, territorial delimitation or human rights law). This issue of jurisdiction must be distinguished from the issue of what the role of non-WTO rules is before a WTO panel once such panel has decided that it will hear a case (discussed below in section C).[1273]

One should, first, recall that a WTO panel has the implied jurisdiction to decide whether, and to what extent, it has substantive jurisdiction in respect of a given dispute. What is more, it must exercise this jurisdiction at its own initiative. Second, no burden of proof is involved in establishing jurisdiction. As noted by the ICJ in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras*), "[t]he existence of jurisdiction of the Court in a given case is … not a question of fact, but a question of law".[1274] In respect of questions of law the principle *jura novit curia* applies. The judge knows the law. It is not for either party to establish it. What remains important though is the question of whether in case of doubt the Court should decide that it has jurisdiction or rather decline jurisdiction. On this issue, the ICJ noted that it will "only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot itself create a doubt calculated to

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[1269] Decision of 2 October 1995, IT-94-1-AR72, paras. 18 and 15. Note that Prof. Abi-Saab, now a member of the WTO Appellate Body, was a judge on this Appeals Chamber.
[1270] *US –Shirts and Blouses*, 19.
[1271] Case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras*), ICJ Reports 1988, 76, para. 16. There, the ICJ opened a phase of the proceedings devoted to jurisdiction and admissibility on its own initiative.
[1272] *US – Anti-Dumping Act of 1916*, note 30. The Appellate Body agreed with the panel that "some issues of jurisdiction may be of such a nature that they have to be addressed by the Panel at any time" (ibid., para. 54).
[1273] The matter here must also be distinguished from that of two agreements dealing with dispute settlement in respect of one given dispute but where only one of the two agreements provides for compulsory jurisdiction. In this respect, see the *Bluefin Tuna* case and Bernard Oxman, *Complementary Agreements and Compulsory Jurisdiction* 95 AJIL 276-312 (2001).
[1274] ICJ Reports 1988, 76, para. 16.

upset its jurisdiction".[1275] Under WTO jurisprudence, this level or degree of proof required may be slightly lower, namely creating a *presumption* (in favour of the panel having jurisdiction) not sufficiently rebutted by the defendant.[1276]

a. Two possible solutions

With these considerations in mind, one can imagine two possible solutions to the problem of panel jurisdiction over predominantly non-WTO disputes. First, it could be submitted that as soon as a WTO member brings a claim pursuant to the consultation and dispute settlement provisions of WTO covered agreements (i.e., a WTO claim), a WTO panel has jurisdiction to hear and decide the claim notwithstanding the fact that the wider dispute underlying the claim also or even predominantly involves other rules of international law. In most (if not all) cases, this will be the preferred solution. The WTO does not provide for compulsory dispute settlement only in the event a WTO member *wants* to bring a WTO claim to the WTO. DSU Art. 23.1 prescribes that

> "[w]hen Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objectives of the covered agreements, *they shall have recourse to*, and abide by, the [DSU]".

A WTO panel has interpreted this provision as being an "exclusive dispute resolution clause".[1277] DSU Art. 11 further supports the competence of panels to examine WTO claims, even if non-WTO rules are of crucial and even higher importance in the context of the wider dispute. This provision directs panels to "make such *other findings* as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".[1278] The standard terms of reference of WTO panels provide to similar effect.[1279] Support for such "salami-slicing" of disputes[1280] can be found also in the *Nicaragua case* where the ICJ declared that it did have jurisdiction over certain claims under *customary international law* brought by Nicaragua against the United States. The Court did so even though the United States had not accepted ICJ jurisdiction in respect of "disputes arising under a multilateral treaty, unless … all parties to the treaty affected by the decision are also parties to the case before the Court" and even though the multilateral treaty rules largely overlapped with the customary law invoked by Nicaragua.[1281] Moreover, in the *Hostages case* the ICJ found that

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[1275] Case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras*), ICJ reports, 1988, 76, para. 16, quoting and confirming *Chorzow Factory (Jurisdiction*), PCIJ, Series A, No. 9, 32.

[1276] See Joost Pauwelyn, *Evidence, Proof and Persuasion in WTO Dispute Settlement, Who Bears the Burden*, 1998 JIEL 227.

[1277] *US – Section 301*, para. 7.43. But see, however, the limited exception provided for in SPS Art. 11.3, discussed in Chapter VII, section A.1.c.

[1278] Thomas Schoenbaum, *WTO Dispute Settlement: Praise and Suggestions for Reform*, 47 ICLQ 647, 653 (hereafter "Schoenbaum, *Praise …*") refers to DSU Art. 11 as an "implied powers" clause which "should be interpreted broadly so that the panels and Appellate Body can decide all aspects of a dispute".

[1279] DSU Art. 7.1 directs panels « to make *such findings* as will assist the DSB in making the recommendations or in giving the rulings provided for in [the relevant covered agreement(s)] ».

[1280] A term used by Alan Boyle, *Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction*, 46 ICLQ 37, 41 (1997).

[1281] Jurisdiction and Admissibility, ICJ Reports 1984, para. 73 and Merits, ICJ Reports 1986, para. 175. For forceful critique, see the dissenting opinions by Schwebel (ICJ Reports 1984, 613 and 616, noting, for example, that "Nicaragua's claims are so integrally and essentially bound up with the treaty provisions on which they rely that, if those provisions cannot be pleaded, there is no case which the Court can consider" and calling the "salami-slicing" approach in this instance "an unreal, artificial, highly constricted – and yet unduly unconstrained – process"), Oda (ICJ Reports 1986, 217) and Jennings (ICJ Reports 1986, 530). Oda had, indeed, a strong point when saying that "the Court should have proved, not that it can apply customary and general international law independently, but that the dispute referred to it in the Applicant's claims had *not* arisen under these multilateral treaties". The Court in that case did, indeed, confuse to some extent the issue of applicable law (custom *versus* treaty) with that of jurisdiction (over certain *disputes*).

> "no provision of the Statute or Rules contemplates that the Court should decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important".[1282]

In Chapter III, section C above, we discussed the possibility for WTO panels to seek assistance from other tribunals or organisations through the operation of DSU Art. 13.1 allowing panels to "seek information and technical advice from any individual or body which it deems appropriate".[1283] Exercising this power in cases involving non-WTO matters may be particularly helpful.

As a second way of dealing with predominantly non-WTO disputes, one could argue that in certain extreme cases the dispute no longer genuinely concerns WTO claims (even though such claims could technically be made) but rather other rules of international law to which the WTO claims are inextricably linked and independent of which these WTO claims could not be decided.[1284] In such extreme cases it could then be submitted that the history, prior procedures and substantive content of the dispute indicate that the real issue of the case (i.e., the genuine object of the claim) is related to non-WTO claims as to which a WTO panel does *not* have jurisdiction. On these grounds, the WTO panel could either decide that it does *not* have substantive jurisdiction over the dispute or find that it *does* have jurisdiction but that it does not consider it appropriate to exercise this jurisdiction.[1285] In this respect, one should recall that WTO panels, like any international court or tribunal, have the implied jurisdiction « to interpret the submissions of the parties » in order to « isolate the real issue in the case and to identify the object of the claim ».[1286] As was confirmed in WTO jurisprudence on the principle of judicial economy, WTO panels also have the implied jurisdiction to decide whether or not to exercise substantive jurisdiction even if, in theory, this jurisdiction was conferred upon them.

In the *Fisheries Jurisdiction case* (Spain v. Canada), for example, the ICJ "re-defined" Spain's complaint relating to Canada's "lack of entitlement to exercise jurisdiction on the high seas" into a dispute "arising out of or concerning conservation and management measures" for which Canada had made a reservation. On that basis, the Court found that it did *not* have jurisdiction to hear the case.[1287]

Support for this second solution or "incorporation" (*auxiliarum principali sequitur*) approach[1288] can be found in the recent Arbitration Award on *Southern Bluefin Tuna.* There, the tribunal found that the dispute

> "while centered in the 1993 [trilateral Convention for the Conservation of Southern Bluefin Tuna], also arises under [UNCLOS]".

It continued, nonetheless, by saying that

[1282] *United States Diplomatic and Consular Staff in Tehran*, ICJ Reports 1980, 19, para. 36.
[1283] For an example, see the panel report on *US – Copyright Act* which requested information from WIPO. See also the discussion above in Chapter III, section C.
[1284] See the dissenting opinion of Schwebel, *supra* note 1281. Recall also that a WTO panel cannot hear counter-claims, a restriction that may limit a panel's ability to actually resolve a dispute (see the *Chile – Swordfish* dispute, *supra* note **28**, where in the WTO only the EC complained, but where in ITLOS both parties submitted claims).
[1285] See William Davey, *Has the WTO Dispute Settlement System Exceeded its Authority?* 4 JIEL 95 (2001) on what he termed « issue avoidance techniques » such as standing, mootness, ripeness, political appropriateness and judicial economy. Note that although the WTO dispute settlement body must first « establish » a panel, it will be difficult for this body not to establish a panel, even if there are potential problems related to jurisdiction or exercising jurisdiction, given that it makes its decision by negative consensus, i.e., the panel will be established unless all WTO members, including the complainant, agree not to establish it. This quasi-automatic DSB decision establishing a panel should not bar panels from properly examining their jurisdiction.
[1286] *Supra* note 1259.
[1287] ICJ Reports 1998, 437.
[1288] The Appellate Body used this approach, not to decide on jurisdiction but on which WTO rules to apply, in *EC – Asbestos*, para. 62.

> "[t]o find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the [1993 Convention] would be artificial".[1289]

Since the tribunal later declared not to have jurisdiction over the 1993 Convention part of the dispute, it automatically declined jurisdiction also over the UNCLOS part (notwithstanding the compulsory jurisdiction in Part XV of UNCLOS) on the ground of its "single dispute" theory.

Although for present purposes the sticking point is a related *subject matter* or *claim* for which WTO panels have no jurisdiction, it is instructive to recall that the ICJ has found that it cannot decide a case in the event that doing so would necessarily imply making a ruling in respect of *states* for which it has no jurisdiction.[1290]

In any event, for a WTO panel to dismiss a case because it has no substantive jurisdiction, or because it does not consider it appropriate to exercise this jurisdiction, is not the same as proclaiming a *non liquet*. In a *non liquet* a panel would find that it *has* substantive jurisdiction and that it *is* appropriate to exercise this jurisdiction, but nevertheless conclude that it cannot come to a substantive legal conclusion *on the ground that there is no law to be applied or that the applicable law is unclear*.[1291] In the context of WTO dispute settlement, being a claim-specific mechanism, *non liquet* (often portrayed as prohibited under general international law[1292]), is generally precluded. Either a WTO claim is valid (and the complainant wins) or a WTO claim is unfounded (and the complainant looses). A panel should *not* be allowed to conclude that the WTO rules invoked are unclear (*jura novit curia*) and on that basis proclaim a *non liquet* (except in the extreme circumstances referred to in Chapter VII, section B.1 above).

b. The problem of non-violation complaints with reference to a violation of non-WTO rules

The necessity for a WTO panel to actually decide on whether *non-WTO* rules have been *violated* could arise particularly in a so-called non-violation case. It may arise also when the defendant relies on a WTO decision, not part of WTO covered agreements (say, a waiver or DSB decision) or an act of another international organisation (say, the UN Security Council) in defence of an alleged breach under WTO covered agreements. In reply, the complainant may then challenge the legality of this WTO decision or other act under the constituent instrument of the decision-maker in question.

In non-violation cases a WTO panel could, indeed, be called upon to refer to non-WTO rules (such as international competition law or international labour or environmental law) in its assessment of whether certain governmental measures, though not in violation of WTO rules, have affected the "legitimate expectations" that could have been derived from a trade concession. A complainant could invoke these non-WTO rules along the following lines: "when we obtained your trade concession (duty free access for our computers), we did so with the expectation that you would continue to respect international labour standards (in particular, not to employ children under the age of 10); now you have violated these non-WTO rules (children under the age of 10 assemble computers in your country); this violation of labour standards does not violate WTO rules as such, but it nullifies the trade value of your concession, a nullification that we could not have foreseen (you are now able to produce much cheaper computers than before and out-compete our computers which are produced

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[1289] *Bluefin Tuna* case, paras. 52 and 54. But see the forceful separate opinion by Sir Kenneth Keith.

[1290] *Monetary Gold case*, ICJ Reports 1954, 32 (« Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania »). More recently confirmed in the *East Timor case*, ICJ Reports 1995, 102, para. 28. See also panel report on *Turkey –Textile*, paras. 9.4-13.

[1291] See *supra* note **454** and Chapter VII, section B.1.

[1292] See *supra* note **454**. For an exception see Chapter VII, section B.1.

with full respect of international labour standards); so in the WTO we should be compensated for this nullification under the heading of non-violation".

Such non-violation claim may require that WTO panels decide on whether non-WTO rules have been violated (in our example, a decision as to whether employing children under the age of 10 violates international labour standards binding as between the disputing parties). The Appellate Body has, however, recently confirmed that the non-violation remedy "should be approached with caution and should remain an exceptional remedy".[1293] This trend goes against endorsing the wide interpretation paraphrased above.

C. The Applicable law before a GATT/WTO panel

1. The applicable law before GATT 1947 panels

The law referred to by GATT 1947 panels was very much limited to the "four corners of GATT". No distinction was made between (i) the jurisdiction of GATT panels; (ii) the law GATT panels could refer to when interpreting GATT treaty terms; and (iii) the law they could apply when deciding on the validity of GATT claims. GATT Art. XXIII conferred jurisdiction on panels only in respect of claims under the GATT, not claims under any other norm of international law. Moreover, as we noted earlier, the (unadopted) GATT panel on *US – Restrictions on Imports of Tuna* correctly pointed out that, in principle, treaty interpretation allows for reference *only* to non-GATT rules of international law that had been accepted by *all* GATT contracting parties.[1294] Since CITES was not so accepted, the panel refused to take it into account. However, these restrictions imposed in respect of treaty interpretation and, in particular, the limited jurisdiction of GATT panels, was erroneously extended so as to portray GATT dispute settlement as an activity exclusively limited to the "four corners of GATT", outside of the realm of international law.

In the 1984 panel report on *Canada – Administration of the Foreign Investment Review Act*, the United States challenged the GATT consistency of Canadian investment legislation. At the Council meeting, a number of contracting parties had expressed "doubts whether the dispute … was one for which the GATT had competence since it involved investment legislation, a subject not covered by the GATT".[1295] In response, the United States stressed that it was only challenging "the two specific trade-related issues mentioned in the terms of reference" of the panel. Canada as well was of the view that "the terms of reference ensured that the examination would touch only on trade matters within the purview of GATT". On the basis of this discussion, the Council decided that

> "it be presumed that the Panel would be limited in its activities and findings to within the four corners of GATT".[1296]

To the extent this decision relates only to panel jurisdiction, it is obviously correct: the parties conferred jurisdiction on the panel only in respect of GATT claims, not claims under, for example, bilateral investment agreements. Nonetheless, the broad scope of the statement surely gave the wrong impression that GATT panels, when interpreting GATT treaty terms and examining the validity of GATT claims, are not allowed to refer to, or apply, any other rules of international law.

The same impression was created by the 1984 panel on *United States – Imports of Sugar from Nicaragua*. There, the United States stated that "it was neither invoking any exceptions under the

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[1293] Appellate Body report on *EC – Asbestos*, para. 186.
[1294] See *supra* note 765.
[1295] Report of the panel, adopted on 7 February 1984, L/5504, BISD30S/140, at p. 141, para. 1.4.
[1296] Ibid., confirmed by the panel in para. 5.1, at p. 157.

provisions of the General Agreement nor intending to defend its actions in GATT terms".[1297] The United States stressed that its reduction in Nicaragua's sugar imports "was not taken for trade policy reasons" and "was fully justified in the context in which it was taken". It concluded that "attempting to discuss this issue in purely trade terms within the GATT, divorced from the broader context of the dispute, would be disingenuous" and that it "did not believe that the review and resolution of that broader dispute was within the ambit of the GATT". In response, the panel stated that the US measures "were but one aspect of a more general problem" and that, pursuant to its terms of reference, it would examine those measures "solely in the light of the relevant GATT provisions, concerning itself only with the trade issue under dispute".[1298]

Here again, the panel's statement was correct in so far as it related to panel jurisdiction. The panel took the right decision also to examine GATT claims, even if they were set in a broader dispute, the way the ICJ did in the *Teheran Hostages* and *Nicaragua* cases.[1299] But, here again, it erroneously limited its examination in terms of treaty interpretation and validity of GATT claims to GATT provisions only. Non-GATT rules could have been referred to in the interpretation of GATT treaty terms. More importantly, the United States should have been allowed also to invoke non-GATT norms, such as those on self-defence or countermeasures, in defence of its action and of any violation of GATT rules (as to whether such defence would have been valid and have prevailed over GATT under the applicable conflict rules is another question).

A similarly restrictive approach was taken by the 1988 panel on *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, where the panel noted the following at the very end of its report: "Canada referred in its submission to international agreements on fisheries and the Convention on the Law of the Sea. The Panel considered that its mandate was limited to the examination of Canada's measures in the light of the relevant provisions of the General Agreement. This report therefore has no bearing on questions of fisheries jurisdiction".[1300]

A number of other GATT panels adopted the same approach, recognising and exercising their jurisdiction to adjudicate on GATT claims, even if the dispute was set in a broader context, not limited to trade matters.[1301]

Javier Pons would continue to apply GATT/WTO rules within the "four corners" of the WTO treaty. He notes that

> "beyond a panel's particular findings, other rules of international law such as the general international rules on countermeasures could justify certain behaviour in contrast to the special GATT/WTO rules. In such a case, the value of a panel/Appellate Body report would be characterized by its relativity, since the 'losing' party could continue to invoke other international law rules, in relation to which it had not operated a third party adjudication, so as to legitimate its conduct".[1302]

But this is exactly the "ostrich" approach that must be avoided. If not, WTO judicial decisions would not only become "relative", also the unity of international law as such would be at risk. This is why a

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[1297] Panel report adopted on 13 March 1984, BISD31S/67, L/5607, at p. 72.
[1298] Ibid., p. 73, para. 4.1.
[1299] See section B.3.a.
[1300] Panel report, adopted on 22 March 1988, BISD35S/98, L/6268, at p. 115, para. 5.3. See also the panel report on *United States – Taxes on Petroleum and Certain Imported Substances*, adopted on 17 June 1987, BISD34S/136, at p. 162, para. 5.2.6 where the panel noted that its terms of reference did not allow it to examine the consistency of the US Superfund Act with the polluter-pays principle. That this is so should not have prevented the panel from taking account of this principle, for example, in the interpretation of GATT treaty terms to the extent this principle was part of customary international law.
[1301] See, in particular, the 1984 panel on *United States – Imports of Sugar from Nicaragua* and the 1988 panel on *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, both discussed below.
[1302] Pons, *Self-Help …*, 102.

treaty must always be applied, and treaty claims be examined, in the context of *other* applicable law. In WTO dispute settlement as well, such other law must be capable of justifying a breach of WTO rules. There is no need for the WTO treaty to explicitly incorporate such non-WTO justifications, nor for the defendant to go to another tribunal to see this non-WTO law applied. This is what we explain in the next sub-sections.

2. The applicable law before WTO panels: the framework delimited

Once it has been determined that a WTO panel has jurisdiction to hear a case, the question of what law to be applied in order to resolve the WTO claims put before it may arise. The applicable law before a WTO panel is delimited by four factors:

1) *The claims that can be brought to a WTO panel*. Based on the limited *substantive jurisdiction* of WTO panels, only legal claims under WTO covered agreements can be examined. Only claims set out with sufficient clarity by the complaining party in the panel request upon which the dispute settlement body has established the panel fall within a panel's mandate[1303] (no counter-claims within the same procedure are allowed).[1304] As pointed out earlier, in order to complete such examination of WTO claims, a panel may also be required, and is allowed, to make other findings either pursuant to its *implied jurisdiction*[1305] or in order to come to a legal conclusion under the WTO claims themselves[1306];
2) *The defences invoked by the defending party*. Except for matters or defences that a WTO panel must examine *ex officio* (such as its own jurisdiction), a WTO panel must limit its examination to defences invoked by the defending party (*non ultra petita*).
3) *The scope of the relevant rules ratione materiae, ratione personae and ratione temporis*. Within the framework of the claims and defences thus before the panel, a WTO panel can only apply those rules which apply to the facts and circumstances of the case before it.
4) *Conflict rules in the WTO treaty, general international law and other non-WTO treaties*.[1307] In the event two or more rules apply to the facts and circumstances of the case and these rules are contradictory (pursuant to the definition of conflict described in Chapter IV), a WTO panel must apply the relevant conflict rules.

3. "Jurisdiction" distinguished from "applicable law"

Crucially, and this is one of the main points of this thesis, the fact that the substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements does not mean that the applicable law available to a WTO panel is necessarily limited to WTO covered agreements. Much has been said above about the creation and continuing existence of the WTO treaty in the wider context of general international law and other non-WTO treaties, be they pre- or post-1994. This context and background (essentially, that WTO rules belong to international law) does not suddenly evaporate when WTO claims are transferred to a WTO panel.

As submitted earlier, it could be argued that there is a "two-class society" between those rules of international law that can be judicially enforced and those that cannot. In that sense, rules of international law may, indeed, operate at two levels. The first and most general level being that of the entire *corpus* of public international law where all rules of international law freely inter-act. The

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[1303] DSU Arts. 6.2 and 7.1.
[1304] DSU Art. 3.10.
[1305] See section B.2 above.
[1306] Of course, in so far as this necessity to decide on non-WTO matters has not lead the panel to find that it has no substantive jurisdiction in the first place or that it does not consider it appropriate to exercise such jurisdiction. See *supra* section B.3.
[1307] See Chapters VI and VII.

second and more specific level being that of a court of international law with jurisdiction to enforce only a limited number of rules. Rules in WTO covered agreements operate at both the first and the second level. However, these two levels do not exist in "splendid isolation". There is an obvious link between them. In particular, if in the first, more general level of the entire *corpus* of international law, WTO rules are somehow changed, albeit as between certain WTO member only, such change must necessarily be felt also and penetrate the second, more concrete level of WTO dispute settlement. The exact consequences of such change are discussed below in section D. As much as the WTO treaty was not created nor exists in a legal vacuum, so does the WTO dispute settlement system which was set up by that treaty. That system, providing for the judicial settlement of disputes under certain rules of international law, is merely a tool or instrument to enforce WTO covered agreements *as they were created and necessarily continue to exist in the wider corpus of international law*. It is not a system frozen into April 1994 law, nor is it one that is limited to the four corners of WTO covered agreements (even if it is limited to enforcing claims under these agreements). No treaty can be created outside the system of international law, nor can a court or tribunal enforcing claims under a treaty.

The *Lockerbie* cases perfectly illustrate this point. There, the ICJ had jurisdiction only to consider Libyan claims under the Montreal Convention. However, this did not stop it from also examining other international law, in particular UN Security Council Resolution 748 invoked in defence by the United Kingdom and the United States, as part of the applicable law.[1308]

The same approach was taken by the ICJ in its Advisory Opinion on *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt*:

> "a rule of international law, whether customary or conventional, does not operate in a vacuum; it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part. Accordingly, if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law in which it falls for consideration. Otherwise its reply to the question may be incomplete and, in consequence, ineffectual and even misleading as to the pertinent legal rules actually governing the matter under consideration".[1309]

Or as it was noted in the *Kronprins Gustaf Adolf* arbitration award, in response to a US argument that the arbitrator's jurisdiction is limited to a consideration of whether two specific treaties have been violated so that the arbitrator cannot base its decisions on other rules of international law :

> "The decision to be given is undoubtedly to be governed by the treaties, and the Arbitrator is not asked to look for other rules in the field of international law. On the other hand, it is clear that the treaties themselves are part of the international law as accepted by both contracting powers and it may be safely assumed that, when the said treaties were concluded, both parties considered them as being agreed upon as special provisions to be enforced between them in what may be called the atmosphere and spirit of international law as recognized by both of them".[1310]

[1308] Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Accident at Lockerbie (Libyan Arab Jamahiriya v. U.S. and U.K.), Provisional Measures, 1992 ICJ Reports 1992, at para. 42.

[1309] ICJ Reports 1980, 73, at 76.

[1310] *Arbitration of a Difference Concerning the Swedish Motor Ships Kronprins Gustaf Adolf and Pacific*, 18 July 1932, AJIL 835, at 839-840 (1935).

4. Relevant DSU provisions and WTO jurisprudence

The DSU limits the *jurisdiction* of WTO panels and the Appellate Body. It does not limit the potentially *applicable law* before them. The DSU, unlike UNCLOS or the Statute of the ICJ[1311], does not include an explicit provision on "applicable law". The repeated references to "providing security and predictability to the multilateral trading system", preserving "the rights and obligations of Members under the covered agreements" (DSU Art. 3.2), "benefits accruing to it directly or indirectly under the covered agreements", "proper balance between the rights and obligations of Members" (DSU Art. 3.3) and the panel function of assessing the "applicability of and conformity with the relevant covered agreements" (DSU Art. 11), relate to the *jurisdiction* or *substantive mandate* of WTO panels to judicially enforce only WTO covered agreements. Not to the *law* that may be applied in doing so.

Equally, as pointed out in Chapter VII, section A.1.c.vii, the direction in DSU Arts. 3.2 and 19.2 that panels cannot "add to or diminish the rights and obligations provided in the covered agreements" relates to a panel's *interpretative* function, not to the law that they can *apply*. Nor do these provisions set out a general *conflict clause* in favour of WTO rules. It must be recalled also that confirming some rules of public international law (such as DSU Art. 3.2 does in respect of rules on treaty interpretation), does not amount to excluding all others.[1312]

More directed at applicable law are DSU Arts. 7.1 and 7.2. Art. 7.1, setting out the standard terms of reference of panels, directs panels to examine the matter referred to them "in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute)". Art. 7.2 obliges panels to "address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute". Panels have hence *an obligation* to address and, as the case may be, apply those rules referred to be the parties that are part of WTO covered agreements. However, and this again is crucial, *nothing in the DSU or any other WTO rule precludes panels to address and, as the case may be, apply <u>other</u> rules of international law in order to decide the WTO claims before them*.[1313] As was outlined earlier in respect of the WTO treaty, there is no need for the DSU, a judicial system aimed at enforcing certain rules of international law, to explicitly refer to or confirm all *other* potentially relevant rules of international law, be they pre- or post-1994. Such reference or confirmation occurred automatically by the simple fact that the DSU was created and continues to exist in the wider context of international law. These other rules of international law apply, indeed, automatically *unless* the DSU or any other WTO rule has contracted out of them.

As noted by the panel on *Korea – Government Procurement* in respect of rules of customary international law which it referred to in its examination of the non-violation complaint before it (in a footnote!):

[1311] Respectively, Art. 291 and Art. 38.

[1312] See *supra* text at note **627**.

[1313] In support: Palmeter and Mavroidis, *Sources …*, 399 and Bartels, *Applicable Law …. Contra:* Trachtman, *Domain …*, 342 (stating that the explicit language in the DSU "would be absurd if rights and obligations arising from other international law could be applied by the DSB" and that "[w]ith so much specific reference to the covered agreements as the law applicable in WTO dispute resolution, it would be odd if the members intended non-WTO law to be applicable"; less categorically: Marceau, *Coherence …* 110 (concluding that "[i]t seems, therefore, that under the DSU not all sources of law may be applied or enforced by WTO adjudicating bodies") and Marceau, *World Bank …*, 3 ("Under the DSU only provisions of the 'covered agreements' can be the 'applicable law' applied and enforced by panels and the Appellate Body"); Charney, *Multiple Tribunals …*, 219 ("sources of general international law outside of the agreements appear to arise only in the context of treaty interpretation rules"); Pons, *Self-Help …*, 102 and Canal-Forgues, *Interprétation …*, 11-12.

> "We do not see any basis for arguing that the terms of reference [in DSU Art. 7.1] are meant to exclude reference to the broader rules of customary international law in interpreting a claim properly before the Panel".[1314]

Unlike UNCLOS Art. 291 or Art. 38 of the ICJ Statute, the DSU does not *explicitly confirm* its creation and existence in international law. However, there was *no need* for the DSU to do so: it cannot but be created and exist in international law.[1315]

Implicit confirmation that WTO panels, when examining WTO claims, may be required to refer to and apply other rules of international law can be found in DSU Arts. 3.2, 7.1 and 11. As noted earlier, the reference in Art. 3.2 to "customary rules of interpretation of public international law" implies an obligation for panels to *interpret* WTO rules taking account of "any relevant rules of international law applicable in the relations between the parties".[1316] Art. 7.1 instructs panels to make "*such findings* as will assist the DSB in making the recommendations or in giving the rulings provided for in [the relevant WTO covered agreements]". Art. 11 directs panels to "make an *objective assessment* of … the *applicability* of … the relevant covered agreements" and to "make such *other findings* as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements". The obligation in Art. 11 to objectively assess the applicability of WTO rules may -- depending on the claims, defences and facts of the matter before it -- require a panel to refer to and apply *other rules* of international law.[1317] These other rules may show that the relevant WTO rules *do not apply* (for example, because they must give way to these other rules pursuant to the conflict rules set out above) and have, therefore, *not* been violated. Not to look at these other rules would preclude an "objective assessment of … the applicability of … the relevant covered agreements".

The reference in Art. 11 to making all "other findings" (or, in the words of DSU Art. 7.1, all "such findings") as will assist the DSB in resolving the WTO claims before it, further acknowledges that WTO panels may need to resort to and apply rules of international law *beyond* the four corners of WTO covered agreements.

Hence, to deduce from the *explicit* reference in DSU Arts. 7.1 and 7.2 (quoted above) to *some law* (i.e., WTO covered agreements), that *all other law* is thereby *implicitly excluded* is erroneous. Indeed, in practice, the terms of reference of WTO panels do not read as requiring an examination "in the light of the relevant provisions in (name of the covered agreement(s) cited *by the parties to the dispute*)" (DSU Art. 7.1), but rather, an examination

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[1314] Panel on *Korea – Government Procurement*, para. 7.101, note 755. One could compare this to a situation where the ICJ, say, pursuant to the optional clause system, has jurisdiction only over a limited set of claims (as occurred in the *Nicaragua case* where it had jurisdiction only over certain claims under customary law and a bilateral treaty, see *supra* note 1281). The fact of not having jurisdiction over claims under *other* rules of law (*in casu*, multilateral treaties), does not prevent the ICJ from referring to and, as the case may be, applying these *other* rules in deciding on the claims which *are* within its jurisdiction (as Judge Singh noted in respect of the claims under the bilateral treaty: "under the Treaty basis the Court would be free to apply for purposes of interpretation and application of the Treaty the whole sphere of international law, as defined in Article 38" (ICJ Reports 1984, Separate Opinion, 448).

[1315] As noted by the First Committee in the *travaux préparatoires* of Art. 38 of the ICJ Statute in respect of the addition in Art. 38 of the obligation for the Court to decide "in accordance with international law": "[t]he lacuna in the old Statute with reference to this point did not prevent the [PCIJ] from regarding itself as an organ of international law; but the addition will accentuate that character of the new Court" (13 UNCIO 164, 284, 392 (Committee IV/1).

[1316] Pursuant to Art. 31.3(c) of the Vienna Convention. See *supra* section III.F.2.c.

[1317] The Appellate Body in *US – Steel* (at para. 54) made it explicit that "Article 11 of the DSU imposes upon panels a comprehensive obligation which embraces all aspects of a panel's examination of the 'matter', both factual and legal. Thus, panels make an 'objective assessment of the facts', of the 'applicability' of the covered agreements, and of the 'conformity' of the measure at stake with those covered agreements".

> "in the light of the relevant provisions of the covered agreements cited by [the complainant] in [document DS/…]", i.e., the panel request submitted *by the complainant*.

Does this exclusive reference to the provisions invoked *by the complainant* imply that no other law (*not even the defences invoked by the defending party*) can be looked at? Surely not. The same reasoning applies in respect of the explicit references in the DSU to WTO covered agreements as law to be looked at. These references cannot be read as excluding all other law. Or does the law explicitly referred to in Art. 38 of the ICJ Statute preclude the ICJ from looking and applying other rules of international law? It does not. The ICJ, as WTO panels, being a court under international law, has, and regularly does, refer to law not explicitly mentioned in Art. 38, in particular unilateral acts of states and acts of international organisations.[1318]

WTO jurisprudence also confirms that the DSU, or any other WTO rule, should *not* be interpreted as limiting the applicable law before a WTO panel to WTO covered agreements. In practice, panels and the Appellate Body alike have frequently referred to and applied other rules of international law in their examination of WTO claims. They did so not only in the process of *interpreting* WTO covered agreements (discussed in Chapter V, section B.4.c). In addition, and more importantly, WTO panels and the Appellate Body have applied other rules of international law *independently* of giving meaning to specific words in a given WTO provision. This case law was summarised above in Chapter IV, section C.2.b. In their examination of WTO claims, they have applied (1) rules of *general* international law, in particular rules on (i) judicial dispute settlement (such as standing[1319], representation by private counsel[1320], *la compétence de la compétence*[1321], burden of proof[1322], the treatment of municipal law[1323], the authority to accept *amicus curiae* briefs[1324] and to draw adverse inferences[1325] and judicial economy[1326]); (ii) the law of treaties (such as the principle of non-retroactivity of treaties[1327] and error in treaty formation[1328]); and (iii) state responsibility (such as rules on countermeasures[1329] and attribution[1330]), referring each time to the work of the ILC on the subject. Moreover, WTO panels and the Appellate Body alike have applied (2) WTO rules not part of WTO covered agreements (such as the *Declaration on the Relationship of the WTO and the IMF*[1331] and acts of WTO organs such as waivers[1332]) as well as (3) non-WTO rules which are not part of general international law (such as the Lomé Convention[1333] or unilateral acts of WTO members[1334]).

[1318] See Nguyen, *Droit …*, 356-381. In the *Continental Shelf case* (Tunisia v. Libya), the ICJ confirmed that disputing parties could, by agreement, add to the applicable law as prescribed in Art. 38 (*in casu*, "new accepted trends" in the law of the sea), but that they cannot detract from it ("the Court is, of course, bound to have regard to all the legal sources specified in Article 38"), ICJ Reports 1982, 37, 38.
[1319] Appellate Body report on *EC – Bananas*, para. 133.
[1320] Ibid., para. 10.
[1321] See *supra* note 1268, note 30.
[1322] Appellate Body report on *US – Shirts and Blouses*, 14.
[1323] Appellate Body report on *India – Patent*, para. 65.
[1324] Appellate Body report on *US – Shrimp*, para. 107.
[1325] Appellate Body report on *Canada –Aircraft*, para. 202.
[1326] See *supra* note 1270.
[1327] Appellate Body report on *Brazil –Coconut*, 15. Confirmed in: Appellate Body report on *EC – Bananas*, para. 235 and *Canada – Patent Protection Term*, paras. 71-74.
[1328] Panel Report on *Korea – Government Procurement*, paras. 7.123-126.
[1329] Arbitration report (US request for suspension) on *EC – Bananas*, para. 6.16 and Arbitration report on *Brazil –Aircraft*, para. 3.44 and notes 45 and 48.
[1330] Panel report on *Canada – Dairy Products*, para. 7.77 and note 427 (in support of provincial milk marketing boards being an "agency" of Canada). See also Panel report on *Turkey – Textile*, para. 9.33.
[1331] Appellate Body report on *Argentina – Footwear*. See Chapter VII, section A.
[1332] See Appellate Body report on *EC – Bananas*, para. 164.
[1333] See Appellate Body report on *EC – Bananas*, para. 167.
[1334] See Panel report on *US – Section 301*, para. 7.114.

In the absence of an inherent hierarchy of rules of international law (other than *jus cogens*), there is no reason to apply *general* international law, but not to apply, for example, non-WTO *treaties* (always to the extent, of course, that both disputing parties are legally bound by them and in so far as this is done in the examination of *WTO claims*).[1335] Finally, confirmation that the WTO judiciary does not apply only WTO covered agreements can also be found in its repeated reference to GATT/WTO jurisprudence and publicists. These sources do not, in and of themselves, constitute rules of international law. However, as noted in Art. 38.1(d) of the ICJ Statute (where they are mentioned as two of the five legal sources that the Court must "apply"), they are "subsidiary means for the determination of rules of law".

Clearly, if WTO panels and the Appellate Body were not allowed to refer to or apply any source of law other than WTO covered agreements, all of the WTO cases referenced above would be legally incorrect.

D. Practical consequences of the approach suggested

1. "At worst": the WTO rule is not enforced; a WTO panel has no jurisdiction to enforce the non-WTO rule

The jurisdiction of WTO panels is limited. The applicable law before them is not. What is the practical result of WTO defending parties being allowed to invoke other rules of international law, be they part of general international law or non-WTO treaties?

First, it should be stressed that a defending party can only invoke those rules to which both itself and the complaining party are bound.[1336] The complaining party cannot see its WTO rights diminished on the basis of a rule of international law by which it is not bound. Second, as we have repeated more than once, other rules of international law, including post-1994 treaties, cannot form the legal basis of a WTO complaint. Only claims under WTO covered agreements can be brought.

Within these limits, however, the practical consequences of a defending party being able to invoke, for example, a rule of customary law or an environmental or human rights convention or bilateral treaty to which both disputing parties are bound *in defence against a WTO claim*, must be determined by the relevant conflict rules referred to earlier.[1337] These rules may be spelled out in the WTO treaty itself, the treaty from which the contradictory rule derives or general international law. If the relevant conflict rule indicates that the WTO rule in question *prevails* over the conflicting norm of international law, the WTO rule must be applied (and the complainant wins). If, in contrast, the relevant conflict rule demonstrates that the other rule of international law overrides or even invalidates the WTO rule, the WTO rule then *cannot be applied* (and the defendant wins). Crucially, this will be the case irrespective of whether the WTO treaty itself includes an exception or justification for the measure at hand.[1338] The latter case does not result in requiring the WTO panel *to judicially enforce the other rule of international law* (say, the contradictory environmental norm). A WTO panel can only enforce

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[1335] For a possible exception in respect of treaty interpretation, see Chapter V, section B.4.a.

[1336] Ibid.

[1337] *Supra* Chapters VI and VII.

[1338] A defence under a NAFTA provision could, for example, be submitted by Canada against a US complaint before the WTO. If under the applicable conflict rules, the NAFTA provision prevails over the WTO provision allegedly breached, as between NAFTA members, the NAFTA provision should then constitute a valid defence. This may be the case, for example, based on Art. 103.2 of NAFTA which gives preference to NAFTA over the WTO treaty in the event, and to the extent, of inconsistency, except as otherwise provided in NAFTA. See Chapter VII, section A above.

claims under WTO covered agreements. To be able to enforce these other rules, a WTO panel would need expanded jurisdiction.

Recalling the two levels at which WTO covered agreements operate (the general level of the entire *corpus* of international law and the more concrete level of WTO dispute settlement), *what has been taken away or overruled at the first level*, *can no longer be enforced either in the second level* (i.e., if a WTO rule no longer exists or has been overruled under international law, it can no longer be enforced either in WTO dispute settlement). What WTO members *themselves* have been taken out of WTO covered agreements at the first level (albeit *inter se* only) cannot be put back *by a WTO panel* in the second level. For a panel to do so anyway would amount to (using the words of DSU Arts. 3.2 and 19.2) "adding" to obligations of the defendant that pursuant to other rules of international law and the way these inter-act with WTO rules, no longer exist. If a panel follows the approach suggested here and dis-applies the WTO rule in these circumstances, the panel would not be "diminishing" the rights of the complainant. Rather, the complaining WTO member itself would have done so by agreeing to the conflicting non-WTO rule in the first place. Thus the WTO panel would not create law but merely give effect to law created elsewhere *by the WTO member itself*. On the other hand, for *claims* under these non-WTO rules to filter through to the second level of WTO dispute resolution, an express intention to expand the jurisdiction of WTO panels would be required.

2. Is the uniformity of WTO law at risk?

Critics may submit that the WTO treaty explicitly provides how it can be amended[1339] so that it can essentially be affected only by the consent of all WTO members. Following this line of thinking, one could argue that for a WTO panel to take cognisance of non-WTO rules as part of a defence, especially rules binding on only the disputing parties, contravenes WTO amendment procedures and threatens the uniformity of WTO law. This reasoning implies, however, that the WTO treaty is an island created and existing outside the sphere of international law. One of the main objectives of this study was to show that it is not. Thus, the WTO treaty can be affected by explicit amendment, but also by the conclusion of other treaties or the existence or emergence of other rules of international law pursuant to, for example, the rules in the Vienna Convention on, *inter alia*, the application of successive treaties (Art. 30), *inter se* modifications (Art. 41) and treaty interpretation (Art. 31.3(c)).[1340] The WTO treaty did not contract out of these general international law rules on the inter-play of norms, let alone out of the system of international law. Hence, these rules must apply also to the WTO treaty. The WTO treaty changed the 1994 landscape of international law, but post-1994 treaties can also change this landscape, including the legal relationships between WTO members in the WTO.
International law does not comprehend inherent hierarchies of norms, nor does it require an *acte contraire* for a norm to be affected by another one. Moreover, if WTO members could affect the WTO treaty only through a formal amendment (i.e., if the WTO were in essence a separate legal system as domestic or, to some extent, EC law is), it would basically mean that whatever WTO members do in their relationship to other WTO members in the area of trade is regulated exclusively and eternally by the 1994 provisions of the WTO treaty *unless a consensus of WTO members decides otherwise*. Ironically, this immobility in the WTO would then only increase together with the membership of the WTO. Indeed, the more WTO members there are, the more difficult it becomes to

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[1339] The general rule is that amendments should be taken by consensus (Article X:1). However, if consensus is not reached, most amendments can be taken by a two thirds majority of WTO members (others only upon acceptance by all WTO members) (Article X:3-5).

[1340] In addition, besides other treaties, also subsequent practice and custom can affect the WTO treaty (irrespective of amendment provisions). See, in this respect, WOLFRAM KARL, VERTRAG UND SPÄTERE PRAXIS IM VÖLKERRECHT 387-389 (1983) and Kontou, *Termination…*. Indeed, if such *implicit* forms of consent as subsequent practice and custom can alter or revise a treaty notwithstanding amendment provisions in the treaty itself or the Vienna Convention, then *a fortiori* formal *inter se* agreements to which certain WTO members *explicitly* agreed (such as a post-1994 environmental convention) must be able to affect WTO rules as between the parties to these agreements.

muster a consensus for formally amending WTO rules.[1341] The WTO would become more then a collection of rules "written in stone", it would also be transformed into a "safe haven" for WTO members wanting to backtrack on obligations entered into elsewhere.

The effect of the approach suggested here, that WTO rules would apply differently to different WTO members depending on whether or not they have accepted other non-WTO rules, may complicate the matrix of rights and obligations between WTO members. But this is an unavoidable consequence of not having a centralised legislator in international law.[1342] In addition, from a practical point of view, should we expect -- in our complex world with 140 WTO members of widely diverging interests -- each and every WTO member to bear the same obligations v-à-v each and every other WTO member? Surely not. Still, this consequence would ensue if formal amendments were required as a prerequisite to affecting the WTO treaty.[1343] The WTO seeks to promote non-discrimination and *trade* liberalisation *in the context of regulatory diversity*. Unlike the EC, for example, it does not generally extend its reach to harmonisation in *non-trade* matters in pursuit of some sort of "federation of nation states".

Finally, giving effect to non-WTO rules as suggested here must be distinguished from *interpreting* the WTO treaty differently depending on the disputing WTO members involved. In my view, the latter is not allowed and would definitely threaten the uniformity of WTO law. On that basis, the triple distinction between jurisdiction, applicable law and interpretation -- a distinction that runs through this work -- can be depicted as follows when it comes to WTO panels:

[1341] This point was made by Marceau, *Coherence* ..., 124.
[1342] Even today, each WTO member has quite unique obligations depending, *inter alia*, on the provisions in its schedules of concessions.
[1343] See Petros Mavroidis, *Trade and Environment after the* Shrimps-Turtles *Litigation*, 2000 JWT 73, 77.

WTO LAW AND OTHER INTERNATIONAL LAW
BEFORE THE WTO JUDICIARY

	WTO Covered Agreements (including amendments)	**Other WTO Law** (e.g., agreements or declarations not part of covered agreements and acts of WTO organs)	**General International Law and Norms Binding on All WTO Members or Reflecting their "Common Intentions"**	**Norms Binding on both Disputing Parties** (not all WTO Members, nor reflecting their "common intentions")	**Norms Binding on only one of the Disputing Parties**
JURISDICTION	**Yes**	No	No	No	No
APPLICABLE LAW	**Yes**	**Yes**	**Yes**	**Yes**	No
REFERENCE MATERIAL FOR THE INTERPRETATION OF WTO COVERED AGREEMENTS	**Yes**	**Yes**	**Yes**	No	No
VALID DEFENCE AGAINST A WTO CLAIM?	**Yes**	**Yes**	**Yes**	**Yes**	No
POSITIVELY ENFORCED IF IT PREVAILS AS THE APPLICABLE LAW?	**Yes**	No	No	No	No

Not to make the above distinctions has led to confusion. The limited jurisdiction of panels has lead to unjustified restrictions on the distinct matter of applicable law before a panel.[1344] In turn, the realisation by some that a panel should be allowed to consider more than WTO covered agreements (a matter of applicable law) has led certain commentators to wrongly accept even those non-WTO rules that do not reflect the "common intentions" of all WTO members as reference material in interpreting WTO treaty terms.[1345] Moreover, those authors rightly accepting that potentially all international law may be applicable law before a panel have erroneously restricted the impact of these non-WTO rules (in the sense that, in their view, WTO rules always prevail) with reference to restrictions on treaty interpretation (e.g. DSU Arts. 3.2 and 19.2).[1346] Equally important is the distinction between amending the WTO treaty and accepting *inter se* modifications to it. The strict requirements imposed to amend the WTO treaty have been wrongly invoked as a reason to preclude that *inter se* agreements may modify WTO rules as between some WTO members only.

[1344] See, in particular the case law on applicable law before GATT panels in section C.1.
[1345] Marceau, *Coherence …*
[1346] Bartels, *Applicable Law …*

We next have a closer look at certain WTO disputes in the light of the theory set out in this thesis.

E. A closer look at certain past disputes in the light of the theory presented here

1. EC - Poultry

WTO panels have sometimes been asked to *judicially enforce* pre-1994 GATT instruments that were *not* included in WTO covered agreements. The answer to such requests was obvious: only those GATT rules that were incorporated into WTO covered agreements (including member-specific schedules of concessions) can be the subject of claims before a panel. The substantive jurisdiction of WTO panels is limited to claims under WTO covered agreements. In *EC – Poultry*, the Appellate Body found that the so-called Oilseeds Agreement concluded bilaterally between the EC and Brazil in the framework of GATT Article XXVIII re-negotiations (as part of the resolution of a previous 1990 oilseeds dispute) was *not* a "covered agreement" subject to the DSU, nor part of the multilateral obligations accepted by Brazil and the EC pursuant to the WTO Agreement. As a result, the Appellate Body concluded that "it is Schedule LXXX [the relevant 1995 EC schedule of concessions attached to the WTO Agreement into which only parts of the Oilseeds Agreement had been incorporated], rather than the Oilseeds Agreement, which forms the legal basis for this dispute".[1347] The Appellate Body added that, in its view, "it is not necessary to have recourse to either Article 59.1 [termination of a treaty by conclusion of a later treaty] or Article 30.3 [application of successive treaties] of the *Vienna Convention*, because the text of the *WTO Agreement* and the legal arrangements governing the transition from the GATT 1947 to the WTO resolve the issue of the relationship between Schedule LXXX and the Oilseeds Agreement in this case".[1348] The arbitrators in *EC – Hormones* were faced with a similar problem. The United States claimed autonomous beef quota rights on the basis of bilateral US-EC agreements, not incorporated in WTO covered agreements. The arbitrators repeated what was said in *EC – Poultry*, namely that the bilateral agreements do not set out "rights under any of the WTO agreements covered by the DSU" and that "[t]he rights thus alleged are derived from bilateral agreements that cannot be properly enforced on their own in WTO dispute settlement".[1349]

But had, in these two disputes, the relationship between the bilateral agreement and the relevant GATT rules *not* been addressed in the WTO treaty and if, pursuant to conflict rules of international law, the bilateral agreement would *prevail* over the GATT rule, under the theory presented here, such bilateral agreement could operate as a valid *defence* (dis-applying the relevant WTO rule); in any event not as a valid *claim*.

2. Argentina - Footwear

In *Argentina – Footwear*, the Appellate Body examined whether a 3 per cent statistical tax found by the panel to be in violation of GATT Article VIII could be excused by means of an allegedly conflicting obligation imposed on Argentina in a Memorandum of Understanding between Argentina and the IMF. In this IMF Memorandum it was set out that the fiscal measures to be adopted by Argentina include "increases in import duties, including a temporary 3 per cent surcharge on imports". The Appellate Body found that on the basis of the record before the panel, it did "not appear possible to determine the precise legal nature of this Memorandum".[1350] The Appellate Body found also that

[1347] Appellate Body report on *EC – Poultry*, para. 81.
[1348] Ibid., para. 81.
[1349] Arbitration report (US request for suspension) on *EC – Hormones,* para. 50. In support, the arbitrators explicitly referred to the *lex posterior* rule in Art. 30 of the Vienna Convention (ibid., para. 51).
[1350] Appellate Body report on *Argentina – Footwear*, para. 69.

"Argentina did not show an irreconcilable conflict between the provisions of its 'Memorandum of Understanding' with the IMF and the provisions of Article VIII of the GATT 1994".[1351] The Appellate Body continued that even if there were a conflict "nothing in the *Agreement Between the IMF and the WTO*, the *Declaration on the Relationship of the WTO with the IMF* or the *Declaration on Coherence* … justifies a conclusion that a Member's commitments to the IMF shall prevail over its obligations under Article VIII of the GATT 1994".[1352] The Appellate Body found that only the *Declaration on the Relationship of the WTO with the IMF* -- a Ministerial Decision part of the WTO Final Act, but *not* part of WTO covered agreements -- says something about the legal relationship between the WTO and the IMF. This declaration states, in essence, that the relationship between WTO and IMF rules in the area of trade in goods shall continue to be governed by GATT 1947 provisions, i.e., that only the exceptions provided for in these GATT provisions for IMF-related measures can be used as an excuse for GATT violations.[1353] On the basis of this conflict rule, the Appellate Body found that since no IMF-related exceptions under GATT Article VIII are to be found in GATT itself, independent IMF rules, such as the IMF Memorandum, cannot justify Argentina's violation of GATT Article VIII.[1354]

If the Appellate Body had thought that the IMF Memorandum could not possibly cure the violation of GATT Article VIII simply because this Memorandum is *not* part of WTO covered agreements, it could have said so. But it did not. Rather, it made an assessment of whether the IMF Memorandum is *in conflict* with GATT rules and examined which of the two rules should prevail in case such conflict were to arise. The conclusion reached is fully justified and supports the thesis presented in this paper. The Appellate Body did, indeed, not limit its examination to WTO covered agreements. It went beyond those agreements and took account also of (i) IMF rules; and (ii) the *Declaration on the Relationship of the WTO with the IMF*, a legal instrument *not* part of WTO covered agreements. This declaration provides for an explicit conflict clause in favour of GATT rules. But had the allegedly conflicting rule not been an IMF rule, but one drawn from, for example, an environmental convention binding on both parties, how would the Appellate Body have reacted? Under the theory suggested here, it should then, as it did in *Argentina – Footwear*, not limit itself to the "four corners" of WTO covered agreements. It would need to apply the environmental rule as a possible defence and in the event of conflict between it and WTO rules (say, GATT Arts. III and XX) apply the relevant conflict rules of general international law (in the absence of any treaty-based conflict rules). In the event the applicable conflict rule determines that the environmental rule prevails, the Appellate Body would then be obliged *not* to apply the contradictory WTO rule and the complainant looses. It would, however, not have jurisdiction to hear claims of violation of the environmental rule.

3. EC - Hormones

In *EC – Hormones*, the Appellate Body was faced with an EC claim that the so-called "precautionary principle" constitutes customary international law, or at least a general principle of law. The Appellate Body found that it was "unnecessary, and probably imprudent, for [it] in this appeal to take a position on this important, but abstract, question".[1355] It noted though that "the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation".[1356] It further remarked that "the principle has not been written into the *SPS Agreement* as a ground for justifying SPS measures that are otherwise inconsistent with the obligations of Members set out in particular provisions of that Agreement". The Appellate Body recognized, however, that the principle "finds reflection" in several SPS provisions. Noting that "the precautionary principle does not, by itself, and without a clear textual directive to that effect, relieve a panel from the duty of applying the

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[1351] Ibid.
[1352] Ibid., para. 70.
[1353] See Chapter VII, section A.
[1354] Appellate Body report on *Argentina – Footwear*, paras. 69-74.
[1355] Appellate Body report on *EC – Hormones*, para. 123.
[1356] Ibid.

normal … principles of treaty interpretation", the Appellate Body finally agreed with the Panel that "the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the *SPS Agreement*".[1357]

This outcome is, in my view, fully justified. But not so the legal reasoning. As noted earlier, there was *no need* for the SPS Agreement to explicitly refer to the precautionary principle for this principle to be a possible defence in WTO dispute settlement. In my view, the Appellate Body was obliged to make a ruling on whether this principle is, indeed, part of customary law binding on the disputing parties.[1358] If this had been the case, the Appellate Body should have acknowledged that a rule of customary law, if later in time and in conflict with an earlier (SPS) treaty rule, must prevail over that treaty rule (no inherent hierarchy exists between treaty and custom)[1359], *unless* there was an intention to continue applying the (SPS) treaty rule as *lex specialis*. In the circumstances, it was, however, difficult to establish that (i) the "precautionary principle" *is* a rule of customary international law; (ii) that it emerged *subsequent to* the WTO treaty; (iii) that it was, indeed, in conflict with SPS rules (the EC had, for example, *not* invoked SPS Art. 5.7 which explicitly provides for a form of precautionary approach); and (iv) that WTO members did *not* want the SPS Agreement to continue applying as *lex specialis* (in particular, given the "continuing" nature of the WTO treaty[1360]). Hence, the Appellate Body was correct in concluding that "the precautionary principle does not override the provisions of Articles 5.1 and 5.2 of the *SPS Agreement*". But it did so too categorically and without deciding certain crucial questions it should have answered before coming to that conclusion.

4. Korea – Government Procurement

As noted earlier, this panel rightly found that "[c]ustomary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO" and this to the extent "the WTO treaty agreements do not 'contract out' from it".[1361] The panel applied, more particularly, rules on error in treaty formation under a US claim of non-violation (GATT Article XXIII:1(b) as referred to in the Government Procurement Agreement (GPA)). The panel saw similarities between the non-violation provision in the WTO and the rules on error in treaty formation in international law: both are based on the principle of good faith. The panel noted that the traditional interpretation of the non-violation provision is aimed at "protecting the reasonable expectations of competitive opportunities through negotiated concessions".[1362] Hence, it is about good faith *implementation* of what is set out in the WTO treaty. Error in treaty formation, the panel continued, does not address what is set out in the treaty. Rather, it attacks the very validity of the treaty on the ground of error in its negotiation. Thus, the panel found, error in treaty formation is about good faith *negotiation* of the WTO treaty. On the basis of these two legal principles (non-violation and error in treaty formation) the panel found, in my view correctly, that "[p]arties have an obligation to negotiate in good faith just as they must implement the treaty in good faith".[1363] So far so good.

But then the panel, instead of applying these two principles independently to the case at hand, *injected the error in treaty formation principle into the non-violation rule*. It did so on the ground that "[t]o do otherwise potentially would leave a gap in the applicability of the law generally to WTO disputes".

[1357] Ibid., para. 125. It is unclear whether the EC referred to the "precautionary principle" either (1) as an element to be looked at in the *interpretation* of Art. 5 of the SPS Agreement; or (2) as a non-WTO rule of international law in defence of a violation of Art. 5. Although the former seems more accurate (the EC was claiming that *because* its measures were precautionary in nature they satisfied the requirements of Art. 5), the latter hypothesis is more interesting and is the one we further examine in this paper.

[1358] Or at least to *assume* that it was customary law and on that basis further examine whether it could possibly overrule SPS treaty rules.

[1359] See Chapter III, section E above.

[1360] See Chapter VII, section A.2.e.

[1361] Panel report on *Korea – Government Procurement*, para. 7.96.

[1362] Ibid., para. 7.98.

[1363] Ibid., para. 7.100.

More precisely, the panel stated: "If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of GPA commitments … then nothing could be done about them within the framework of the WTO dispute settlement mechanism".[1364]

The panel was right to somehow rephrase the US claims. As noted earlier, WTO panels hold an implied jurisdiction « to interpret the submissions of the parties » in order to « isolate the real issue in the case and to identify the object of the claim ».[1365] Although, in that case, the panel went perhaps *beyond* this mandate by actually deciding a claim that was never put to it by the United States (the United States itself never claimed error, definitely not in its request for a panel, and only vaguely so in its submissions). As far as the specifics of non-violation are concerned, non-violation is about upsetting the competitive opportunities that can be expected *from a concession* against the legitimate expectations that a member can reasonably hold *on the basis of this concession* (even if the upsetting is not as such illegal). However, *in the absence of a concession* (as was the case here, as acknowledged by the panel), there can be no question of upsetting anything. The fact that non-violation, as it is generally understood, does *not* provide relief for error in treaty formation (and in the absence thereof "nothing could be done about [it]" in WTO dispute settlement) is *not* good enough a reason to suddenly expand non-violation so as to include error (especially so if this is done without regard to the actual words of GATT Art. XXIII:1(b)[1366]).

Since error in treaty formation does not, therefore, seem to be a claim for which WTO panels have been granted jurisdiction, the panel should not have decided upon it (even if the United States had actually made the claim).[1367] That being said, error in treaty formation as a ground of invalidity could well be invoked *as a defence* before a WTO panel (this rule being one of customary international law from which the WTO treaty did not contract out). Moreover, a complaint based on error could be brought also under Art. 66 of the Vienna Convention, at least to the extent both parties were bound by that Convention.

[1364] Ibid., para. 7.101.

[1365] See *supra* note 1259.

[1366] This provision requires, for example, that Korea impairs benefits or impedes the attainment of objectives by means of the "application" of a "measure", something error in treaty formation does not involve.

[1367] The only way it could be said to be within a WTO panel's jurisdiction is to argue that it amounts to Korea impeding the attainment of an objective under the GPA (i.e., the objective of having a valid agreement in the first place) "as the result of the existence of any other situation" (namely, the situation of error on behalf of the United States) in the sense of GATT Art. XXIII.1(c) pursuant to a so-called situation complaint.

CHAPTER IX. CONCLUSIONS

Two themes have been developed in this work. Firstly, a centralising or uniting theme, in defence of construing and applying all international law, including the WTO treaty, in the context of other norms of international law, be they customary law or other conventions. Secondly, a theme calling for the recognition of the diversity between states and the contractual freedom of states to change their minds and to decide for themselves to which treaty or norm they want to give preference. This second theme is not a centralising or uniting one, but a centrifugal one allowing for regional and state-to-state differences in legal relationships. The tension between these two themes explains why this thesis, though focusing on conflict and conflict resolution, devoted large parts also to the process of accumulation of norms.

The inter-play of norms in international law is no longer of academic interest only. In today's interdependent world, where states must cooperate in pursuit of common objectives and do so under the auspices of an ever increasing number of distinct international organisations, the potential for conflict between norms is very real, indeed. In the absence of a centralised international law-maker, the multitude of law-makers and other actors, be they domestic or international, at work on the international scene fuel the risk of conflict of norms arising. (Chapter I)

Unlike domestic legal systems, in international law hierarchy of norms is not determined by the particular source of the norms in question. All international law, in one way or the other, derives from the same source, that is, state consent. Hence, there is no inherent hierarchy as between the different sources of international law traditionally referred to (treaties, custom, general principles of law and unilateral acts of states or international organisations). In principle, they all have the same binding force. Even the higher standing of *jus cogens* is unrelated to its source. Only judicial decisions and doctrine, not in and of themselves creating new norms, are secondary in nature. In operational terms, however, it can safely be said that general principles of law will have to give way to treaties and custom. In most cases, treaties will also prevail over custom, although it must be recognised that custom -- being of the same legal standing as treaties – is capable of revising or even terminating pre-existing treaties. (Chapter III)

Given that the criterion of source cannot constitute a solid foundation for a theory on conflict of norms, one must turn to an examination of the inter-play of norms, regardless of their source. Norms can either accumulate or conflict. As part of the centralising or uniting theme of this thesis, we stressed that all new law must be seen in the context of pre-existing law. This pre-existing law, be it general international law or other treaties, will apply to any new treaty unless the new treaty "contracts out" of it. There is, in other words, a presumption of continuity and against conflict. The fall-back on other international law norms may take the form of interpreting the new treaty in the light of other norms. However, this interpretative process is limited to giving meaning to the terms in the treaty. It cannot extend to revising the treaty. It is limited also by the *pacta tertiis* principle and considerations of time. Contemporaneous interpretation is, in the principle, the rule. More importantly, the fall-back on other norms must take the form also of applying other norms, in particular general international law, for matters on which the new treaty remains silent. In addition, the new treaty must be considered also in the context of other norms even if the two sets of norms may conflict. Such conflict will, however, emerge only as a genuine one in case the presumption against conflict has been rebutted, in particular, in case an interpretation of the two norms in the light of each other – if such is called for under the rules of treaty interpretation -- does not lead to a harmonious reading.

This brings us to the second theme of this work, namely the centrifugal or dividing one. Although there is a presumption against conflict, this is no reason to define conflict strictly. Conflict must be equated with breach. Hence, there is conflict of norms in case one norm breaches, has led or may lead to breach of another norm. Crucially, contradiction as between an obligation and an explicit right

must also be recognised as a situation of conflict (except for conflicts of the AB/AC type). (Chapters IV and V)

Once a conflict of norms does arise, a distinction must be made between normative conflict (that is, situations where one norm, in and of itself, breaches the other) and conflict in the applicable law (that is, where the implementation or reliance on one norm has led or may lead to breach of the other norm). Normative conflict may be resolved in one of two ways: either one of the two norms ceases to exist or one of the two norms is illegal. A norm will cease to exist if it is in conflict with *jus cogens*, if it is implicitly terminated by another one or if it takes the form of an act of an international organisation taken *ultra vires*. A norm is illegal in case it constitutes, in and of itself, a breach under another norm or if it takes the form of an *inter se* agreement deviating from an earlier multilateral treaty obligation of the "integral type" (that is, an obligation breach of which necessarily affects not just the parties to the *inter se* agreement but also all other parties to the multilateral treaty). (Chapter VI)

Conflict in the applicable law can be resolved in one of four major ways. Firstly, by giving effect to an explicit conflict clause, such as Art. 103 of the UN Charter. Secondly, in the absence of such clause, by giving priority to the *lex posterior*. In some cases, especially those involving "continuing" or "living" treaties, it will be difficult to determine which treaty is "later in time". The conflicting treaties are then "parallel" rather than "successive" so that *lex posterior* cannot apply. Thirdly, in the absence of a conflict clause and in case the *lex posterior* principle cannot be applied (e.g., because the treaties cannot be said to be "successive" in time), resort must be had to the *lex specialis* principle. This principle cannot apply over and above the *lex posterior* rule, but will be crucial in a number of cases where norms have the same date or can be said to be "parallel" in time rather than "successive". This is the case for a great number of regulatory treaties of modern times. Fourthly, a particular type of conflict, that where a state has conflicting obligations v-à-v two different states (conflict of type AB/AC) has not been resolved in the law of treaties (both norms are "equals"). For those conflicts a solution must be found rather in state responsibility under the norm that is finally not complied with. In cases where none of the above conflict rules resolves the conflict, an adjudicator must acknowledge a *lacuna* and may be forced to pronounce a *non liquet*. (Chapter VII)

The conflict rules thus provided by international law – based essentially on three principles: contractual freedom of states, *pacta sunt servanda* and *pacta tertiis* -- surprisingly perhaps, offer a coherent theory on conflict of norms. The fact that *lacunae* may arise is not so much an anomaly but should provide an incentive to states to incorporate explicit conflict clauses in the treaties they negotiate or at least to prevent conflict by increased cooperation as between different law-making agencies. Hence, this thesis felt no need to elaborate a "new theory" on conflict of norms. The solutions provided derive from already existing principles. The only remaining uncertainty resides in conflicts of the type AB/AC where both norms are equals and only state responsibility offers a way out. Still, a further development in the rules on shared responsibility for assistance or aid in breach by another state as well as the acknowledgement that such conflicts will, in the end, only be resolved by a re-negotiation of either norm, does not make this conflict of norms a pressing topic for new law-making either.

Applying these conclusions to the example of the WTO treaty (Chapters II and VIII), the centralising or uniting theme of this thesis advocates an examination of WTO law in the wider context of other norms of international law. WTO law is but a branch of public international law. This other law must apply also to the WTO treaty unless that treaty has "contracted out" of it. Also before a WTO panel, the applicable law must include all relevant norms of international law, even if the jurisdiction of panels is limited to claims under WTO covered agreements only. Such examination of WTO law in the wider context of international law may not only lead to fall-back on, especially, general international law rules for matters not regulated in the WTO treaty itself. In addition, WTO law must be interpreted taking account of other norms of international law, as long as these other norms represent the "common intentions" of all WTO members. The normal restrictions of treaty interpretation apply, although "evolutionary interpretation" can safely be said to be the rule rather than

the exception given the "continuing" or "living" nature of the WTO treaty. Finally, other international law may also conflict with WTO law and even amongst WTO provisions conflicts may arise.

Crucially, the current definition of conflict in WTO jurisprudence must be broadened so as to include, in addition, obligations contradicting explicit rights. The presumption against conflict applies also to the WTO treaty and only in case "contracting out" or conflict can be proven and treaty interpretation cannot harmonise the two norms in question, will a genuine conflict arise.

This brings us to the dividing or centrifugal theme of the thesis, as it applies to the WTO example. In the event of conflict involving WTO provisions, WTO provisions may not always prevail, including before a WTO panel. The trade obligations in the WTO treaty are of the "reciprocal type". They are not of an "integral nature". Hence, WTO provisions can be deviated from as between a limited number of WTO members only, as long as this deviation does not breach third party rights. Affecting the economic interests of other WTO members does not amount to breaching their WTO rights. Recognising that WTO obligations are of a reciprocal nature allows for the taking into account of the diversity of needs and interests of different WTO members. It shows that in most cases of conflict between, for example, human rights and environmental conventions (generally setting out obligations of an "integral type"), on the one hand, and WTO obligations (of the "reciprocal" type), on the other, WTO provisions will have to give way. This will be so either on the basis of the rules resolving normative conflict (in particular, the fact that *inter se* deviations from integral obligations are "illegal") or the rules resolving conflict in the applicable law. In respect of the latter, in particular the *lex specialis* principle must be resorted to. Given the "continuing" nature of the WTO treaty it will often be difficult to frame the conflict in terms of one of "successive treaties" so that the *lex posterior* rule finds no application. Here again, the WTO treaty being a framework agreement in respect of most trade matters will often have to give way to, for example, MEAs or other conventions imposing obligations or granting explicit rights in terms of trade restrictions applied to *particular products* or for *particular reasons*.

However, the fact that non-WTO norms may, therefore, prevail over the WTO treaty, even as before a WTO panel, does not mean that WTO panels must judicially enforce compliance with these non-WTO rules. Non-WTO rules may be part of the applicable law before a WTO panel and hence offer, in particular, a valid defence against claims of WTO breach. However, they cannot form the basis of legal claims, the jurisdiction of WTO panels being limited to claims under WTO covered agreements only.

Finally, intra-WTO conflict can often be resolved by the explicit conflict clauses provided for in the WTO treaty itself. In the absence of such clauses (as is the case for GATT/GATS/TRIPS conflicts), the normal conflict rules set out earlier must apply. Given that all WTO provisions are part of one and the same treaty, the *lex posterior* principle will not be of help. *Lex specialis*, in contrast, may resolve a great number of conflicts, say, as between GATT and GATS.

The WTO must be construed and applied in the context of all other international law. This other law may fill gaps or provide interpretative material. But it may also overrule WTO norms. WTO law must thus be united with other public international law. But other, in particular, other *more specific* law must be recognised as capable of overruling WTO law so as to take account of the diversity between WTO members.

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