ICTSD Programme on Dispute Settlement



Conflicting Rules and Clashing Courts

The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO

By **Pieter Jan Kuijper**
University of Amsterdam

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Published by

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Acknowledgments

ICTSD wishes to express its gratitude to Joost Pauwelyn, David Vivas-Eugui and Alan Yanovich for their valuable and insightful comments.

ICTSD welcomes feedback and comments on this document. These can be forwarded directly to Marie Wilke at mwilke@ictsd.ch

Citation: Pieter Jan Kuijper (2010), *Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO*, Issue Paper No. 10, ICTSD's Programme on Dispute Settlement and Legal Aspects of International Trade, (International Centre for Trade and Sustainable Development, Geneva, 2010)

ISSN 1994-6856

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LIST OF ABBREVIATIONS AND ACRONYMS

ACWL	Advisory Center on WTO Law
AB	Appellate Body
ABS	Access and benefit sharing
BIT	Bilateral Investment Treaty
CAFTA	Central American Free Trade Agreement
CBD	Convention on Biological Diversity
CFC	Chlorofluorocarbon
CITES	Convention on International Trade in Endangered Species
CU	Custom Union
COP	Conference of the Parties
DSU	Dispute Settlement Understanding
ECtHR	European Court of Human Rights
EFTA	European Free Trade Association
EU	The European Union
EC	European Communities
EPA	Economic Partnership Agreement
FAO	Food and Agriculture Organization
FTA	Free Trade Agreement
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GSP	Generalized System of Preferences
HFCS	High fructose corn syrup
ICSID	International Centre for the Settlement of Investment Disputes
ICJ	International Court of Justice
ILC	International Labour Convention
ILO	International Labour Organization
ITLOS	International Tribunal for the Law of the Sea
MEA	Multilateral Environmental Agreements
NAFTA	North American Free Trade Agreement
PCB	Polychlorinated biphenyl
PIC	Rotterdam Convention on Prior Informed Consent
POP	Stockholm Convention on Persistent Organic Pollutants
PPMs	Process and Production Methods
RTA	Regional Trade Agreements
SPS	Agreement on Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TDM	Temporary Defense Mechanism
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

FOREWORD

Inherent structural changes resulting from the expansion and diversification of international law have fundamentally transformed what is conceived of as the 'international trading regime'.

A large number of increasingly specialised, complex international organizations addressing more and more areas of global governance beyond trade have emerged. Even though these fora address issues other than trade, they introduce a new level of competition since cases may not always fall clearly within one of the regimes. At the same time, the vast increase in bilateral and regional agreements providing for trade regulation has generated numerous new fora for dispute settlement. These seem to coexist with the World Trade Organization's (WTO) dispute settlement system, yet the legal interrelation of the different jurisdictions, that is their legal mandates, is unclear. The potential for conflicting rules and clashing courts has thus increased immensely during the last decade.

Many of these bilateral, regional and multilateral agreements address issues of conflicts of laws and jurisdictions only in a limited way. However, international agreements, first and foremost the Vienna Convention on the Law of Treaties (VCLT) provide for certain 'conflict rules'. In the past, several of these provisions have been applied by the WTO Panels and the Appellate Body as well as other dispute settlement fora. Yet, jurisprudence has shown that these provisions tend to be limited in their ability to comprehensively address potential conflicts.

Cases such as the *Mexico-Soft Drinks* case at the WTO have illustrated the problems that arise in cases of conflict of jurisdiction, meaning when a claimant may have recourse to several fora: the situation facilitates forum shopping, legal uncertainty increases, a threat of incoherent jurisprudence arises, and eventually conflicting decisions may be pronounced.

As illustrated by the longstanding discussions on possible conflicts between the CBD and the WTO TRIPS Agreement, differing objectives and purposes may also lead to conflicting interpretations and conclusions that may, in the absence of clear conflict rules, prejudice a certain objective. Other agreements may again require a certain expertise that may not be provided for by a dispute settlement mechanism established under another agreement. Thus the concern has been articulated that the WTO's dispute settlement understanding (DSU) may not be sufficiently equipped to decide on certain trade questions that relate for example to environmental protection or climate change.

Likewise, these challenges fundamentally affect developing countries and their capacity to resort to dispute settlement. The increased complexity makes it harder to navigate through the system and to judge on the legal and economic feasibility of claims. Consequentially, extensive legal capacity is required to ensure an economically efficient and legally successful use of the system. Likewise, the fragmentation and its affects threaten the effectiveness, credibility and thus stability of the multilateral trading system.

At the same time, the "fragmentation" of international law provides for great opportunities. The sophistication of different regimes and the development of new fora can bring up mechanisms that are better equipped to address conflicts arising under the increasingly complex agreements.

All these topics, fora and concerns have been on the Centre's core agenda since its establishment in 1996. The relation of issues such as environmental protection, climate change, trade

supported development strategies, regional economic integration and the multilateral trading system is more obvious and important than ever before. With the increase in formal and informal linkages there is also greater need for providing sound and comprehensive analysis on the challenges arising from the observed development.

As a contribution to this debate and an introduction of the topic to the greater trade law community, the International Centre for Trade and Sustainable Development (ICTSD) commissioned the present study under its Programme on Dispute Settlement and Legal Aspects of International Trade. It provides a comprehensive overview on existing and potential conflicts of laws and jurisdictions in the international trading system; discusses the legalistic interrelation of relevant agreements and dispute settlement systems; assesses challenges arising thereof; examines existing conflict laws included in agreements, and finally develops potential solutions.

By suggesting various policy options for negotiators, lawyers, international tribunals and other key policy makers, ICTSD aims at paving the way for exploring and applying novel approaches so to ensure that the opportunities provided by the fragmentation of international trade law work for the better for all different actors and fora involved. At the same time the study can be deployed as a reference booklet as it includes definitions and examples of the most relevant conflict clauses and rules on treaty interpretation.

We hope that you will find this input a useful contribution to approach conflicting rules and clashing courts in practice.

Ricardo Meléndez-Ortiz
Chief Executive, ICTSD

EXECUTIVE SUMMARY

International law is like the expanding universe. After World War II there was a first "big bang" which created the United Nations (UN) and most of its specialized agencies, including the Bretton Woods Organizations and the General Agreement on Tariffs and Trade (GATT). The 1980's and 1990's brought a second "big bang", during which the GATT was transformed into the World Trade Organization (WTO), which was a galaxy of international agreements unto itself. This period also saw the formation of other such galaxies (or regimes, as they have sometimes been called by lawyers), in particular in the areas of international criminal law and, more relevant to this paper, in the field of environmental law, where many so-called Multilateral Environmental Agreements (MEAs) were created within a time span of barely ten years.

Within the new WTO, the seeming impossibility to make progress through negotiations at the galactic level pushed internal tensions up to the point where a supernova developed that projected great numbers of Regional Trade Agreements (RTAs) outwards.

All these legal galaxies and their fragments are criss-cross racing outwards, losing their cohesion more and more, and yet collisions cannot always be avoided. This is what international lawyers call fragmentation.

This paper is concerned primarily with the collisions - which are of two kinds. They are (1) the collisions between the substantive rules of the different galaxies/regimes (conflicts of norms) and (2), if these regimes are equipped with courts and tribunals, the collisions between the courts and tribunals of different regimes (conflicts of jurisdiction). A conflict of norms occurs, for example, when the GATT states that quantitative import restrictions on goods are prohibited, while the so-called Basel Convention gives governments the possibility to stop imports of certain industrial waste, even if it is sold for treatment abroad. A conflict of jurisdiction occurs, for example, when the WTO Appellate Body has decided that certain trade remedies, such as particular anti-dumping measures, were imposed in conformity with the WTO Anti-Dumping Agreement, whereas an Investment Arbitration Tribunal has ruled that the same measures seriously affect the value of investments of foreign investors and are contrary to the "fair and equitable treatment" standard protected by a Bilateral Investment Treaty. The two kinds of conflict obviously can reinforce each other.

These collisions are of great importance. Though discussed for many years already by academic lawyers and WTO litigators, they are habitually neglected by trade negotiators. This is dangerous. Why?

First of all, in respect of clashes of jurisdictions, the law of the strongest dispute settlement system prevails. Strength is measured in such cases primarily in terms of whether the system is compulsory and cannot be escaped from, as it is the case of the WTO system. Strength is thus a question of attraction. Imagine that an RTA contains norms that are largely parallel to WTO rules, but that it has more advanced and detailed rules on the treatment of tradeable waste within national jurisdictions of the members on the basis of what is called the proximity principle in international environmental law. Suppose that the RTA has a dispute settlement system that is not fully compulsory, but all RTA members are also WTO Members. Inevitably, cases on tradeable waste will end up in the compulsory WTO dispute settlement system that will deal with such cases under the exceptions of Article XX GATT. As a consequence, the detailed rules on tradeable waste laid down in the RTA will seldom be used and will atrophy.

It is obvious that this will lead to the following problems:

- The substantive law of the dispute settlement with the strongest attraction (the WTO) nearly always prevails.
- In the long run this can pose a threat to the legitimacy of the WTO dispute settlement system.
- It can lead to RTAs and MEAs functioning below their intended level.
- This may constitute a danger to sustainable development.
- Thus in the end both the WTO and the other treaty systems suffer.

This is why the questions related to conflicts of norms and clashes of jurisdictions between the WTO and related treaty systems deserve all our attention.

The paper will first analyze conflicts of norms in general and will then zoom in on the WTO on the one hand and environmental agreements and Free Trade Agreements on the other. To this end, the paper will discuss general international legal rules that serve to accommodate or regulate conflicts between treaties. It will also explain the rules that are available in the WTO agreement itself and which may help solve conflicts of norms. After a brief discussion of the areas of Human Rights, International Labour Law and Investment Law in their relation with the WTO, the rest of this chapter will concentrate on the areas that are most likely to experience great problems due to clashes of norms with the WTO, namely MEAs and FTAs. A brief evaluation will arrive at the conclusion that the international agreements in question and general international law provide sufficient elements to solve real conflicts of norms. The main question is whether the international courts and tribunals, or any other dispute settlement systems involved in such conflicts, will have the requisite knowledge and "savoir faire" to apply the techniques in question – which brings the issue of conflicts of jurisdiction into play.

When the discussion switches to this subject, a brief description of the WTO's jurisdictional clauses will come first, followed by an analysis of selected jurisdictional clauses of other international organizations or multilateral treaties. The logical sequel is the discussion of a number of actual cases of jurisdictional overlap and the serious consequences flowing from them. The evaluation at the end of this section shows that conflicts of jurisdictions tend to intensify conflicts of norms and on the whole have negative effects, leading to lawyers' festivals. This is normally not in the interest of the parties and certainly not if one of the parties is a developing country.

A final section will present the conclusions and the recommendations of the paper. The recommendations will in part be addressed to states, in part to the relevant international organizations, as well as to the courts and tribunals that are forced to deal with conflicts of norms and conflicts of interest.

A comprehensive index will provide further guidance by directing the reader to the most important concepts and ideas mentioned in the paper. This should allow one to use the paper as a reference handbook.

1. INTRODUCTION

This paper seeks to address two important questions: the conflicts of norms between the World Trade Organization (WTO) and other international agreements and the conflicts of jurisdiction between the WTO dispute settlement system and the dispute settlement systems of international organizations and agreements. The first kind of conflicts concern clashes between the substantive norms of the WTO on the one hand and the norms of other international agreements on the other. The second kind of conflicts concern clashes between international courts and tribunals, which fight over what areas they may rule in and which rules they have final authority to apply to conflicts that are substantively the same.

This sounds very negative, but there are also positive aspects to the proliferation of international rules. Large areas of international life that were literally "lawless" are now covered by a dense web of rules. This is true of two domains that will retain all our attention in this paper: trade and international environmental governance. In roughly the same period (1985-2000) both areas have seen an enormous expansion in the rule system: the creation of the WTO and the development of one Multilateral Environmental Agreement after another.

As to the expansion of international jurisdictions, the same is true in principle. If international courts and tribunals and other dispute settlement systems contribute to the actual application of and respect for the rules laid down in all those new legal instruments, that is no doubt all for the better. In this way the increased legal capacity, both as to the coverage of the norms and their enforcement, has overall positive effects.

However, **if** the proliferation of rules in different international agreements leads to clashes between those rules and **if** no clear rules are given by international law in general, and in particular by the international agreements in question, to solve those conflicts, this may erode the authority of the law and its effectiveness. **If**, moreover, the newly created international courts and tribunals are also involved in clashes over their competence and scope of their jurisdiction, the authority and the effectiveness of the law and of the courts themselves will doubly suffer. These are three big "ifs" and it is by no means sure that they are all fulfilled. If they are, however, all the great strides forward in international trade and environmental law that have been made over the last quarter century risk being undermined.

It is because of these serious risks that the twin problems of conflicts of rules and conflicts of jurisdiction need urgent attention in particular from negotiators. This paper will seek to analyze both types of conflicts in some detail and to propose some concrete recommendations at the end.

2. HISTORICAL BACKGROUND

The questions relating to conflicts of norms and conflicts of jurisdiction, which are being discussed in this report, are rooted in the problem of fragmentation of international law.

Box 1: What is Fragmentation?

> The International Law Commission has described fragmentation as follows:
>
> The fragmentation of the international social world has attained legal significance especially as it has been accompanied by the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice. What once appeared to be governed by "general international law" has become the field of operation for such specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" and even such exotic and highly specialized knowledge areas as "investment law" or "international refugee law" etc. – each possessing their own principles and institutions. The problem, as lawyers have seen it, is that such specialized law-making and institution-building tends to take place with the relative ignorance of legislative and institutional activities in the adjoining fields and of the general principles and practices of international law. The result is conflicts between rules or rule-systems, deviating institutional practices and, possibly, the loss of an overall perspective of the law.[1]

Fragmentation has been seen on the one hand as a deplorable development, signifying the loss of unity and coherence in international law caused by a decrease of awareness of the central tenets of international law in the peripheral areas of specialized international law, such as investment arbitration or climate change. On the other hand, many simply regard it as an inevitable consequence of the expansion, differentiation and consequentially increased specialization in the field of international law. They see such growth and specialization as a natural phenomenon in the so-called hard sciences, as well as in the scholarship in the humanities and the social sciences, including legal scholarship. The adherents to this view were more ready to point to the advantages of such increased coverage of and increased differentiation into specialized fields of international law. At the same time, they usually admitted that some basic tenets of general international law should be respected, if only to enable two fields of specialized international law to live in (relative) harmony with one another.

It is perhaps ironic to note that the situation of the old General Agreement on Tariffs and Trade (GATT) was quite in line with the first vision of fragmentation, even before that notion was ever used in international law. GATT kept quite apart from the normal notions of treaty law and treaty interpretation and did not want to know of them. It preferred to use certain notions that were felt to be more suitable to economic life. Concepts such as nullification and impairment only very gradually moved, through a phase of being an irrebuttable presumption of breach, in the direction of the normal legal concept of breach of treaty obligations. Non-violation, and nullification and impairment were a sort of hybrid between breach of good faith execution of an international agreement and normal breach of treaty. Though formally retained, both concepts had less and less of a function in a WTO which was more a normal legislative treaty than the sum of mutual concessions. Also treaty interpretation under GATT dispute settlement was much closer to the method of interpretation followed by national (in

particular anglo-American) judges, with great emphasis on researching the historical record in order to find the intent of Congress or of Parliament (in this case of the Conferences of London and Havana) than to the recognized rules of treaty interpretation as applied by international courts and tribunals, which normally give only a secondary role to the historical record.[2]

It was only in the last phases of the GATT, when dispute settlement already began to evolve in the directions indicated by the ongoing negotiations on the Dispute Settlement Understanding (DSU), that GATT panels began to conform more to the classical international law approach. The first references to the classical rules of treaty interpretation from the Vienna Convention on the Law of Treaties of 1969 began to appear.[3] Nullification and impairment gradually became a quaint way of referring to breach of obligations instead of a unique notion of its own.[4] One can say that with the entry into force of the Marrakesh Agreement on January 1, 1995 the WTO then became rather an example of the second vision of fragmentation. That is to say, it became a specialized field of international law, but one that was attached to certain central tenets of general international law, in particular in the field of the law of treaties and treaty interpretation. In the treaty text this was affirmed *inter alia* by the reference to the customary rules of interpretation of public international law in Article 3(2) of the DSU as the standard for clarifying the provisions of the covered agreements.

Needless to say, there remained a vocal minority of Members – and still remains today – that continued to argue for splendid isolation from general international law, and even more so from other specialized areas of international law. This minority invoked other phrases from the same paragraph of Article 3, most notably the one that says that "recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". In their view, any reference to other international agreements to aid in the interpretation of the WTO agreements implied either an addition to or a diminution of the rights and obligations laid down in the covered agreements.

However, the early and well-known pronouncement from the Appellate Body that the reference in Article 3(2) DSU to the customary rules of interpretation of public international law reflected "a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law"[5] provided guidance to the majority of Members. They realized that their governments were bound not just by the WTO agreements alone, but by many other so-called "law-making" agreements relating *inter alia* to intellectual property, to health and safety standards, to the environment, to economic development, to investment, to the law of the sea, to the law of treaties and other basic norms of international law. All these agreements were bound to colour the way in which Members regarded their WTO rights and obligations as well as their rights and obligations under these other agreements. Not to speak of the many agreements creating customs unions (CUs) or free-trade areas that blossomed in the period immediately after the entry into force of the WTO and that were basically supposed to have a hierarchical relationship to GATT[6] and the General Agreement on Trade in Services (GATS),[7] but were also bound to have an influence on the legal context in which the WTO grew up.

So far, we have been speaking implicitly of the co-existence between the substantive rules of a treaty. However, when mentioning CUs and Free Trade Agreements (FTAs) and of the hierarchical relationship between the GATT and GATS and such agreements, we have entered the domain of the special kind of norms that are the rules by which the substantive norms are maintained. In particular some CUs and FTAs have dispute settlement systems that are equally or even more sophisticated in their structure and techniques of enforcement than

the WTO dispute settlement itself. Even some of the other specialized regimes have dispute settlement systems that can be quite strong.[8]

It is here that we encounter the difference between the conflicts of law and the conflicts of jurisdiction. **Conflicts of law**, or conflicts of norms, are about clashes or overlap between the substantive rules laid down in the WTO Agreements on the one hand, and other agreements in force between WTO Members that may be relevant to their interpretation, on the other hand. Sometimes international agreements contain rules for solving such conflicts or overlap between substantive treaty norms. **Conflicts of jurisdiction**, however, are conflicts or overlap between rules about dispute settlement within the framework of two different international agreements. If treaties or international organizations are outfitted with such systems of dispute settlement they normally also contain so-called **jurisdictional clauses.** These determine the scope of jurisdiction of the judicial or quasi-judicial bodies charged with settling disputes about the primary rules of the treaty or organization. Sometimes they also contain claims of exclusivity of jurisdiction. The strength and scope of these jurisdictional provisions in each international agreement or international organization will have great influence over the relationship between the (quasi-)judicial bodies and the question of which of them "goes first".

In the following sections, this report will first discuss questions related to conflicts of norms between treaties and international organizations. Subsequently, the problems related to multiple jurisdictions and the possible conflicts between them will be analyzed. Finally, some conclusions will be drawn on the basis of the material presented. In doing so, special attention will be paid to the position of developing countries and the lessons they may learn from the analysis.

3. CONFLICTS OF NORMS[9]

3.1 Introduction

Given the enormous expansion of international law over the last three to four decades, total coherence between the various bodies of international law can no longer be expected. States and other international actors are simply no longer capable of maintaining a "total view" of their international rights and obligations and hence are bound, from time to time, to take on obligations or acquire rights that conflict with their other rights and obligations. This is also inherent in the way governments are structured. The well-known phenomenon that the Minister for the Environment has a different view from the Minister of Agriculture on intensive cattle or dairy farming or the use of pesticides is often replicated at the international level. The UN Environment Programme (UNEP) may thus adopt different rules on these subjects than the UN Food and Agriculture Organization (FAO). Conflicts between rules from different treaties, therefore, should not surprise us.

In a broader context we speak about conflicts between norms or rules. These conflicts can exist to various degrees. As a consequence, **varying definitions of "conflict of norms"** exist in international law. Such definitions range from those covering a situation wherein a state is faced with two clearly incompatible binding obligations,[10] to broad definitions of conflict where "two rules or principles suggest different ways of dealing with a problem".[11]

For the present purposes, a broad definition appears preferable. Admittedly, as long as the obligations imposed by various sources of law related to the same subject matter are not clearly incompatible, state responsibility does not need to be incurred. A state faced with two obligations that are not fully mutually exclusive, for instance an obligation under one regime to do A and a right in another regime to abstain from A, can undertake action compatible with both (abide by the obligation, declining to make use of its right incompatible with the obligation). In such a situation, some consider it misleading to talk about a conflict. Others, however, have pointed out that a state that has acquired a right or a permission in one treaty and is confronted with a contrary obligation, or even an outright prohibition in another, will find itself in a clear conflict of norms, albeit not a conflict of obligations.[12] Moreover, adopting the narrow definition offered above would impose considerable restraints on the scope of this study and would also not do justice to the reality of dispute settlement. In real life dispute settlement, the situation described above may not be decided in a single case, but in two separate cases or in cases pronounced by different tribunals so as to accentuate the "clash" between norms. In the same way an identical norm in two different treaties may be interpreted differently by different competent tribunals. Consequently, it would inhibit the validity of the conclusions of this study on the effects of diversification and expansion on international law to opt for the narrow definition of treaty conflict. Finally, a choice in favour of the strict definition would limit the utility of the study insofar as it will attempt to indicate how states (including developing countries) may best manoeuvre in an international legal system increasingly characterized by conflicting interests, incompatible rights and obligations, and conflicting jurisdictions.

Accordingly, the present study covers not only situations where a state, Member of the WTO, is faced with mutually exclusive obligations, but also those where it has the choice of abiding by a binding obligation under the WTO (e.g. to guarantee free access to its markets based on the principle of non-discrimination) or resorting to an implicit or explicit right under another legal regime (e.g. the right to take trade sanctions under a Multilateral Environmental Agreement, such as the Convention on International Trade in Endangered Species, CITES), inconsistently with this obligation. It will even touch upon situations in which a state has assumed two identical or near-identical obligations, but in different contexts, such as the prohibition of quantitative

restrictions (and all measures having equivalent effect) that can be found, for instance, in the WTO, in the Treaty on the Functioning of the European Union (TFEU) and in FTAs concluded by the European Union (EU) and may be – and have been – differently interpreted in these different contexts, for instance with respect to the exhaustion of intellectual property rights.[13]

3.2. Conflicts of Norms Under International Law: General Principles

3.2.1 The Law of Treaties as a means to solve conflicts

In comparison with domestic legal systems where the issue of conflicts of laws is generally well regulated, international law is often criticized for lacking an unambiguous solution for situations where legal rules come into conflict with one another. Admittedly, with the exceptions of *jus cogens*[14] and Article 103 of the UN Charter,[15] international law does not recognize a general hierarchy of norms, similar to domestic legal systems, based on the source of obligations.[16] However, international law does not leave lawyers entirely empty handed to deal with conflicts of norms. The Vienna Convention on the Law of Treaties (VCLT) – the relevant provisions of which constitute customary international law - and customary international law do contain conflict rules.

Box 2: The Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties 1969, or VCLT for short, is a result of the codification work of the UN International Law Commission (ILC). As the name already indicates it was negotiated and adopted at a diplomatic conference in Vienna in 1969 after preparatory work by the ILC. It entered into force on 27 January 1980 and presently has close to a hundred state parties. It covers all of the law of treaties between states. It lays out its own rules that to a very large extent have been recognized as customary international law by the International Court of Justice and other international courts and tribunals. For the purposes of this paper about conflicts between different rules of international law, the most important parts of the Vienna Convention are the rules of interpretation (Articles 31-33), which have become customary international law. Hence the reference to the customary rules of international law on the interpretation of treaties in Article 3(2) of the Dispute Settlement Understanding of the WTO Agreements is considered to be a reference to these provisions of the VCLT. Also important are the rules about the relationship between successive treaties relating to the same subject matter (Article 30).

Considering our choice in favour of the broad definition of a "conflict", it is perhaps even more important to consider rules of treaty interpretation than conflict rules *stricto sensu*. At the outset it should be pointed out that rules of treaty interpretation are only useful in and prescribed by law for resolving situations in which provisions of two treaties are not in an unambiguous conflict.[17] In such cases, perhaps the most important rule of interpretation is that international law has a strong **presumption against conflict**.[18] This means that as long as the provisions of two treaties are not in crystal clear conflict, their rules should be interpreted — within the bounds permitted by their ordinary meaning, the context and other relevant factors and rules (Article 31(1)-(3) VCLT) — so as to reconcile their apparent conflict or at least to minimize the potential for conflicts. The International Law Commission's Study Group on the Fragmentation of International Law has referred to this "presumption" as the **principle of harmonization** (of interpretations).[19]

Box 3: The Rules of Treaty Interpretation

The rules of treaty interpretation are laid down in Articles 31-33 of the Vienna Convention. Article 31 lays down the primary rules of interpretation. There are four elements clearly present in paragraph 1 of that article, namely (1) good faith (also mentioned in Article 26 in respect of the observance of treaties); (2) the ordinary meaning of the words of the treaty; (3) placed in their context; and (4) read in the light of the object and purpose of the treaty. All elements need to be combined in a single approach. The first element is seen to be the basis for the harmonization principle. If the emphasis in an interpretation falls on the ordinary meaning of the text, one speaks of a *textual or litteral* interpretation; if the emphasis is more on the context, it is called a *contextual or systematic* interpretation; finally, if the accent falls primarily on the object and purpose of the treaty, it is called a teleological interpretation. Only if these principles of treaty interpretation yield no result, i.e. the result remains ambiguous, obscure, contradictory, unreasonable or absurd, can recourse be had to the historical sources of treaty negotiation, as mentioned in Article 32. This remains strictly a secondary method of treaty interpretation, as historical sources are often untrustworthy or selectively used by parties to the dispute. Article 31, paragraphs 1 and 2, indicate what can be considered part of the context and what other elements can be considered together with the context, while Article 33 contains special rules for the interpretation of treaties for which the different language versions are equally authentic.

At the roots of this presumption is the **principle of good faith** or **pacta sunt servanda** (Article 26 VCLT), which implies that the parties cannot have intended to deviate from their existing obligations when concluding a new treaty. The principle is also confirmed in Article 31(1) of the VCLT on the interpretation of treaties. Hence, unless an intention to the contrary is clear, it should be presumed that the new obligation was meant to be consistent with the previously assumed ones, irrespective of the source of such obligations.

A closely related principle recently mentioned in international agreements with a controversial relationship with the WTO Agreements is that of **mutual supportiveness** between specific treaties. This principle seems to go a step further than the principle of harmonization. The principle of mutual supportiveness has been advanced in the Cartagena Biosafety Protocol to the Biodiversity Convention,[20] the Rotterdam Convention on Prior Informed Consent (PIC),[21] the Stockholm Convention on Persistent Organic Pollutants (POPs)[22] and the UNESCO Convention on Cultural Diversity.[23] It is also mentioned in the Doha Declaration.[24] Relatively little thinking and writing has as yet been done on this potentially very important concept. Given its explicit wording, it is difficult to accept that it would be no more than just another manifestation of the presumption against conflict under international law.[25] In particular Article 20(1) of the UNESCO Convention on Cultural Diversity seems to have been drafted so as to consider the principle of harmonization and the principle of mutual supportiveness as two different expressions of the underlying principle of good faith application and interpretation of treaties.[26] We will return to the principle of mutual supportiveness at a later stage.[27]

Another related rule is one according to which, when interpreting a treaty, account must be taken *inter alia* of "any relevant rules of international law applicable in the relations between the parties" (Article 31(3)(c) VCLT), in other words not only the rules of the treaty under which the conflict arose. This includes all sources of international law listed in Article 38(1)(b) of the Statute of the International Court of Justice, i.e. international conventions, customary international law and general principles of law recognized by nations. This provision is commonly seen as requiring the interpreter to take into account not only the rules that existed at the time of the conclusion

of the treaty but also contemporary law in force between the parties.[28] This is basically a concrete expression of the harmonization rule, since good faith and fairness require that states regard their own treaty rights and obligations, as well as the treaty rights and obligations of other states, as an integrated whole.

3.2.2 The notion of special and self-contained regimes and *lex specialis*.

On the other hand, the diversification of international law has led to the emergence of a number of **special (or "self-contained") regimes**.[29] A common regime of this kind consists of rules and principles laid down in an international agreement or a group of agreements, regulating a specific subject matter such as trade law, environmental law, law of the sea, human rights law, or international criminal law. Of particular importance is the fact that these regimes often set up their own institutions with their own control mechanisms to ensure the observance of the rules of the regime. They often include a court and administer their own remedies for the breach of the rules. Sometimes these regimes even claim, if not actual primacy over, at least a certain impermeability to, other rules of international law. This is particularly true for the general rules on the consequences of wrongful acts under international law, such as countermeasures normally being available to the injured party.[30] The provisions establishing such regimes should be interpreted as much as possible in the light of the object and purpose of the regime, thus giving a distinctive teleological flavour to the functioning of such regimes.[31]

We previously saw[32] that the GATT already in its early days developed very distinctive traits that set it apart from general international law, using the notion of "nullification and impairment" instead of breach of treaty, using its own method of (mainly historical) interpretation. The WTO can also be seen at least as a moderate example of such a self-contained system. It has developed a very distinctive system of dispute settlement with exclusive power over the interpretation and enforcement of the WTO Agreements.[33] It has its own system of remedies, carefully circumscribed[34] and subject to the approval of the organs of the organization,[35] and their application is subject to judicial oversight.[36] It can already be said that many of the problems discussed below arise in the context of the relations between the WTO and other such special regimes, for instance international environmental law.

The justification behind the claims of primacy by such regimes relates to the maxim of **lex specialis derogat legi generali**. Under this principle — not yet codified in the VCLT[37] but increasingly accepted as a tool of interpretation and conflict resolution in international law[38] — a more specific norm prevails between the parties over general ones regarding the same subject matter. Whereas the more general rules also remain in force between the parties to the special law, their significance is restricted to being interpretative tools (e.g. context) and to filling potential gaps. An important exception, based on the fundamental notion that treaties cannot create obligations for states not party to the treaty,[39] is that rights belonging to third parties under the general law should not be violated through the application of *lex specialis*.

3.2.3 Later treaties between the same parties and on the same subject matter

A related conflict rule of international law regulates the relationship between successive treaties among the same parties. Under the principle of **lex posterior derogat legi priori**, codified in Article 30 VCLT and constituting customary international law, the later treaty binding the same parties prevails in case of inconsistency. This rule applies to parties to two successive treaties even if not all parties to the first treaty have become parties to the later one. In such cases, however, the earlier treaty prevails in relation to states not parties to the later treaty. The 'same parties' condition thus restricts the applicability of the principle.

In practice, disputes concerning conflict of norms often involve claims of *lex specialis* by one party against invocations of the primacy of *lex posterior*. Perhaps the most serious gap regarding the conflict of norms in international law is the lack of a clear hierarchy between these two principles. Where their parallel application would lead to inconsistent results, the question of primacy is to be settled taking into account the context and the specifics of the individual norms in question.[40] Many would consider that the *lex posterior* principle should be applied only between treaty rules with the same level of detail, thus opting for a certain priority for the *lex specialis* rule.

These general principles of treaty interpretation and conflict resolution can be set aside by mutual agreement of the parties. In fact, international agreements often contain provisions meant to regulate the hierarchy between the treaty in question and other obligations and rights of the parties, either in favour of the treaty at hand, or in favour of existing or future obligations. With regard to the *lex posterior* principle, this rule is explicitly laid down in Article 30(2) VCLT stating that "when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail". When such clauses are inserted in the operative text of the treaty, they have binding force between parties. On the other hand, it is not uncommon to include such provisions in the preamble of international agreements. In such cases, the status of such clauses is better perceived as a means of interpretation that can be resorted to, if interpretation on the basis of the operative text of the treaty does not yield conclusive results, and as evidence of the historical intentions of the parties".[41]

Such conflict clauses are becoming more and more common and are gaining increasing significance in the law of treaties due to the proliferation of international agreements that regulate the same or overlapping areas of international law. It should, however, be noted that it is not uncommon that two treaties invoked by parties to a dispute in support of their position both contain such clauses, each claiming primacy for the treaty in question. In such cases, the situation can be treated as equal to a conflict between two treaties without such clauses.[42]

In addition, whereas Article 41 VCLT explicitly permits two or more states to conclude a new agreement that derogates from their prior multilateral treaty obligations, this freedom is subject to certain conditions. Modification of the obligations must be provided for in the multilateral treaty concerned, or (a) the derogation from the original obligations must not affect the rights of the other parties to the multilateral treaty and (b) it must not relate to a provision whose modification would hinder the fulfilment of the object and purpose of the treaty. A clause included in an *inter se* agreement[43] not respecting these conditions while claiming primacy for the instant treaty would thus seem to be ineffective. However, once a later *inter se* agreement does respect these conditions, which will normally be the case if it does not pretend to regulate the relations with states not parties to it, there is no reason to assume that provisions deviating, for instance, from the WTO Agreements would not be fully valid under international law.[44]

3.3. Relevant WTO Provisions

3.3.1 Basic substantive rules of the WTO

In order to provide for a better understanding of how and why WTO obligations (may) come into conflict with provisions of, e.g. regional free trade agreements or international agreements dealing with other fields of international law, it appears necessary to set out some core rules of the WTO system. In addition, it should be pointed out that the WTO system itself contains a number of rules that make it possible to avoid, reconcile or adjust conflicts with other rules of international law. These will be briefly set out below as well, but will not be analyzed or quoted in detail. It is assumed that the reader has a broad familiarity with them.

Box 4: Basic Rules of the WTO

The WTO was set up with the aim of liberalizing trade between its members "by entering into reciprocal and mutually advantageous arrangements directed to the substantial *reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce"*.[45] Its principles relate to the fulfillment of this aim.

GATT thus contains non-discrimination provisions in Articles I and III; and equivalent provisions exist in Articles II and XVI of GATS. Article I of GATT ("general most-favoured-nation treatment") requires contracting parties not to discriminate among like foreign products originating from or destined for other contracting parties based on their origin. This equal treatment must be unconditional and must be applied very broadly to imported goods (e.g. also to the administration of quantitative restrictions, insofar as these are lawful) and to goods after they have been imported.

Article III of GATT ("national treatment") in turn requires parties to treat foreign (imported) products not less favourably than domestic "like" products in respect of any "internal taxes and other internal charges", and as to "laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions".[46] This provision is often considered to prevent discrimination based on "production process methods", although this view has become controversial.[47] While this provision is generally applicable to the "behind-the-border-treatment" of all goods, in the domain of services it is restricted to those services sectors for which Members have made commitments.

Article XI, in turn, prohibits quantitative restrictions such as quotas, import and export licenses, etc.[48] This provision and the so-called tariffication measures in the framework of the Agreement on Agriculture demonstrate that the WTO-system strives to make trade barriers quantifiable, and thus negotiable in a downward direction.

3.3.2 Exceptions, waivers, interpretations

The obligations imposed on parties under the WTO's general principles are subject to certain exceptions and limitations explicitly stated in WTO law. These exceptions and limitations essentially have two goals; they either are acceptable, as long as they are deemed to improve the chances for free trade, or they really give priority to non-trade values over free trade, but only on the condition that free trade is maintained to the greatest extent possible and abuse of the exception is retrained to the utmost.

First of all, **Article XXIV GATT** provides the Members the possibility to conclude two special types of *inter se* agreements, namely Free Trade Agreements (FTAs) and Customs Unions (CUs) agreements. They basically allow groups of WTO Members to go further among themselves on the road towards trade liberalization, unhindered by the most-favoured-nation clause. They are, however, subject to specific conditions laid down in some detail for these two categories of agreements. The conditions seek to guarantee that the general cause of trade liberalization among all Members does not suffer from such agreements *inter se*. This does not mean that any other type of *inter se* agreements would be prohibited by implication. It merely means that the limited category of *inter se* agreements called FTAs or CUs are subject to the special conditions of Article XXIV GATT. Any other *inter se* agreements fall under the general rule of the law of treaties laid down in Article 41 of the VCLT, already discussed above.

In addition, and of great interest from the perspective of potential conflicts arising out of the diversification of international law, **Article XX GATT** establishes certain general exceptions to the obligations placed upon Members, including (but not limited to) the non-discrimination and the elimination of quantitative restrictions.[49] The exceptions are subject to the conditions laid down in the *chapeau* of the article, "that such measures are not applied in a manner which would constitute a means of *arbitrary or unjustifiable discrimination* between countries where the same conditions prevail, or a *disguised restriction* on international trade".[50] Contracting parties are free to adopt and enforce measures that fulfill these conditions and are, *inter alia*:

"(a) necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health; [...]

(d) necessary to secure compliance with laws and regulations which are not inconsistent with the provisions of this Agreement; […]

(f) imposed for the protection of national treasures of artistic, historic or archaeological value;

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; [...]".[51]

Therefore, in order to qualify for such exceptions, the measure must fulfill two conditions. First, it must fall under one of the exceptions listed in Article XX(a)-(i). Let it suffice to say in this connection that panels and the Appellate Body have in practice shown a certain deference to the Members invoking the exception, both in adjusting the interpretation of the various exceptions to the times and by leaving the choice of the level of protection to the country concerned.[52]

Secondly, the measures must fulfill the conditions of the *chapeau*, in short they may not abuse the exceptions and thus become purely protectionist.[53]

Elements from the national treatment provision of Article III GATT have been combined with elements from Article XX GATT and a recognition of the right of WTO Members to impose certain technical barriers to trade as well as to take sanitary and phyto-sanitary measures for the protection of human, animal and plant life and health. Thus the **Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)** and the **Agreement on Technical Barriers to Trade (TBT)** have become important instruments for reconciling the demands of free trade and its international legal instruments.

The SPS and TBT Agreements explicitly recognize the right of Members to take measures "necessary for the protection of human, animal or plant life or health",[54] subject to certain conditions laid down in these agreements. If measures satisfy the conditions imposed under the SPS or conform to international standards, guidelines or recommendations, they are to be presumed to comply with the SPS Agreement itself, GATT 1994 in general and to fulfill the necessity requirement of Article XX (b) in particular.[55] Measures permitted under the SPS must conform, *inter alia*, to the conditions that they be based on scientific principles and evidence, not be discriminatory or "constitute a disguised restriction on international trade", and not be more trade-restrictive than necessary to achieve an appropriate level of protection.[56] In addition, Annex C imposes a requirement that procedures undertaken to check and ensure the fulfillment of sanitary measures be carried out in a manner not less favourable for imported products than for like domestic products.[57]

Similarly, TBT directs that technical regulations and conformity assessment be not more trade-restrictive than necessary, be based on

international standards where appropriate and it imposes a national treatment requirement on products in relation to technical regulations.[58]

Finally there is one more WTO provision that may serve in certain circumstances to reconcile the rules of the WTO Agreements with incompatible rules laid down in other international agreements, and that is the power of the Ministerial Conference (and by delegation the General Council) to grant a **waiver** (Article IX:3 WTO Agreement) from specific WTO obligations. Such waivers, however, are subject to strict conditions: normally they should not be granted for more than a year and, if they are, they should be reviewed every year and might be adjusted in the light of that review (Article IX:4 WTO Agreement).

Accordingly, where there is an irreconcilable conflict between two regimes (under our definition also including situations wherein an obligation in GATT prevents the exercise of a right under another treaty), a WTO Member wishing to undertake action inconsistent with its WTO obligations should request a waiver of its obligations. Admittedly, the wording, context and even the history of Article IX:4 of the WTO Agreement[59] support the view that waivers should be regarded as exceptional and temporary measures that could help individual WTO Members escape violations of particular WTO obligations in exceptional situations. In contrast, in GATT and WTO practice, waivers have been granted to groups of states without a strict requirement of exceptional circumstances and have been routinely renewed. This development suggests that waivers may be useful tools to reconcile conflicts between obligations (and possibly also rights) under the WTO on the one hand and other regimes on the other. However, in its 2008 EC-Bananas III report the Appellate Body took position in favour of a strict interpretation.[60] This position is understandable; otherwise waivers could easily become equivalent in function to amendments or modifications of schedules, which have their own procedures and requirements, or to grandfather clauses under the old GATT, a practice that the Uruguay Round negotiators wanted to leave behind them.[61]

Another problem with seeing waivers as a lasting solution to potential conflicts between WTO obligations on the one hand and obligations under e.g. MEAs on the other is that such an approach presumes a less than self-evident hierarchy in favour of the WTO.[62]

Now one may ask whether the conflict rules laid down in the WTO with a view to regulate the relationship between the different parts of the WTO Agreement and its various annexes have any bearing on a possible conflict of norms between the WTO Agreements and other rules of international law. The conflict rule between the WTO Agreement itself and the other so-called multilateral trade agreements is of a constitutional nature, with the WTO Agreement prevailing in all cases.[63] On the other hand, conflicts between the GATT 1994 and the multilateral agreements on trade in goods have to be solved, on the basis of the *lex specialis* principle in favour of the latter.[64] It is submitted that, if any guidance can be had at all from these "internal" conflict rules, only the *lex specialis* principle may be of some help, since the constitutional hierarchy that applies between the WTO Agreement and its Annexes is in any case absent in the relation between the WTO Agreements and other international treaties.

3.4. Types of conflicts between WTO and other International Legal Rules, in particular MEAs

3.4.1 Brief overview of conflict rules in some major fields of international law

The objectives of the WTO system of trade liberalization by means of non-discrimination and the elimination of quotas can, and not infrequently do, come into conflict with the object and purpose of other treaties and regimes and/or with specific provisions of treaties covering other specialized fields of

law. A much cited example of a regime that is considered to lead to conflicts with the WTO system is international environmental law, rendering this field a suitable case to highlight problems related to conflicts that can arise between WTO covered agreements and other fields of international law, although this report will also refer to other fields of international law from time to time.[65]

First of all, it is important to analyze the explicit conflict rules that may exist in other treaty regimes. In this respect it is striking that older treaty regimes that go back to even as far as to before the Second World War (such as international labour law) or that were developed soon after that war (such as the basic worldwide and regional human rights declarations and conventions) do not contain conflict rules at all. In the case of **human rights** treaties it is unlikely that a direct clash between the trade law regime and a human rights treaty regime would easily occur; it is more likely that national courts would uphold basic human rights (including those based on an international treaty regime) in a confrontation with trade law based on WTO obligations.[66] There have also been a few unilateral attempts at allegedly enforcing human rights by trade measures that have not been particularly successful, since they also attempted to control trade and investment of third countries, which tended to show that one country's enforcement of human rights is another country's attempt at throttling a competitor's legitimate trade.[67] The creation of the so-called Kimberley Group for certifying the legitimate trade in rough diamonds and eliminating the trade in so-called "blood diamonds" that played a big role in the financing of warlords and dictators in the West- and Central-African regions can be seen as another attempt to uphold at least minimum human rights through trade measures. This has been uncontroversial, as witnessed by the granting of a WTO waiver for the Kimberley system.[68]

In the field of **international labour law**, a certain "division of work" has been agreed on with the International Labour Organization (ILO) during the Singapore Ministerial Conference.[69] Moreover, both the WTO Agreement and the GATT 1994 contain preambular paragraphs that emphasize the importance of full employment, thus stressing the presumption against conflict between the ILO Convention and the WTO Agreement. In order to induce countries to adhere to specific international labour conventions under the ILO, WTO Members have sometimes required beneficiary countries of their General System of Preferences (GSP) schemes to ratify and observe these conventions in order to obtain (additional) GSP privileges. The possibility of such discrimination seems to have been accepted in principle by the Appellate Body, though its execution fell foul of the non-discrimination provision of the so-called Enabling Clause.[70] It should be noted that these and other measures that threaten to restrict trade on the basis that other countries did not respect ILO Conventions[71] are not due to a conflict of norms between ILO Conventions and WTO law. The WTO members that take these measures are not confronted by any legal conflict as discussed in section 2.1. Rather, the measures are attempts at unilateral enforcement of ILO rules, on the argument that their imperfect application in the target country does not respect the need for a "level playing field" in international trade.[72] This may create somewhat of a conflict between the different ILO and WTO compliance systems, but is not a consequence of an existing conflict between primary ILO and WTO rules.

International investment law and international investment protection form a combination of a large number of so-called bilateral investment agreements and a few multilateral agreements of this nature, such as Chapter 11 of the North American Free Trade Agreement (NAFTA). These agreements come with their separately available dispute settlement mechanisms, such as the Permanent Court of Arbitration, the Paris and London Courts of Arbitration and the International Centre for the Settlement of Investment Disputes (ICSID). This combination

of instruments knows no explicit conflict rules. This should not surprise, since the beneficiaries of the rights under investment protection (legal and moral persons) are of a different nature from the bearers of rights under most trade and economic agreements, including WTO law (states). Investment protection complemented by investment arbitration has evolved from a system of diplomatic protection to one of private rights against the state. The private person or corporation may invoke the protection directly against the state concerned.

This does not exclude the fact that there may be considerable overlap and potential for conflict between trade cases and investment arbitration cases. When the latter take the guise of international "regulatory takings" cases, they often seem to pursue the same goal, or at least the same issues, as trade cases, and to use the same concepts, most notably national treatment. There has been extensive analysis of the difference in interpretation of the national treatment principle as between WTO panels and investment arbitration panels.[73] However, there may be good reasons for this, since a near-identical provision can legitimately be interpreted differently when the object and purpose of the treaties in which these identical provisions are contained are different.[74] The problem is primarily with contending jurisdictions and not so much with differing interpretations of the same principle and the absence of a substantive conflict rule; the investment arbitration cases initiated in Softwood Lumber IV are a prime example.[75] With regards to services regulation — which is acceptable under certain conditions according to Article VI of GATS — it is similarly conceivable that an investment arbitration tribunal, for instance, might come to a different conclusion than a WTO panel on the same regulation, qualifying it as contrary to fair and equitable treatment. This might be the case especially when the regulation suddenly fundamentally changes the conditions under which an investment has to operate.

3.4.2 Conflict rules in MEAs: The development of mutual supportiveness

As far as the relationship between trade and the environment in particular is concerned,[76] the preamble of the WTO Agreement starts out with a recognition that the "relations [of the parties] in the field of trade and economic endeavour should be conducted [...] allowing for 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".[77] Significantly, the Doha Declaration further emphasized "that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be *mutually supportive*".[78]

In the field of conflict rules in international law, the notion of **mutual supportiveness** is a new contribution from the field of international environmental law. Older international agreements in the field of environmental law, even when they contain provisions restricting trade or using trade as enforcement mechanisms, do not yet use the concept.[79] However, the concept crops up in various degrees of precision in a number of MEAs that were negotiated beginning in the late nineties of the last century.[80] In addition, the UNESCO Cultural Diversity Convention contained article 20 laying down the principle of mutual supportiveness between the Convention and other treaties.[81]

It has already been argued above that the principle of mutual supportiveness cannot be dismissed as just another way of expressing the presumption against conflict, also called the harmonization principle, for the interpretation of two treaties in their mutual relationship.[82] It is a rule of interpretation and for avoidance – or rather solution – of conflict

that goes a step further than merely taking account of another relevant agreement that is in force between the parties in interpreting an agreement under the rule of Article 31(3)(c) of the Vienna Convention. Unlike according to the narrow interpretation given by the WTO panel in *Biotech* to the latter rule (demanding that the parties to the two agreements must be identical as between the WTO and the agreement that should be taken into account for the interpretation of the WTO rule, in that case the Biosafety Protocol),[83] according to mutual supportiveness the two agreements should take account of and support each other right from the beginning of the interpretation, when the terms of the treaty are interpreted in their context and in the light of the object and purpose of either (Art. 31(1) VCLT).[84] The interpretation must actually not just try to avoid, or to interpret away, a conflict of norms; on the basis of its wording it should result in support for the functioning of either of the two treaties involved. Otherwise the principle of mutual supportiveness would have no clearly identifiable meaning.[85]

It must be noted, however, that the interpretative rule of mutual supportiveness so far is restricted to a limited number of international agreements and that no international court or tribunal has had the opportunity to have recourse to it. Nevertheless, the concept ought to be taken entirely seriously, since it obviously reflects the need to slightly rebalance the mere presumption against conflict between treaties in specific cases.

3.4.3 The WTO and MEAs: Different types of conflict

One of the reasons for the recognized high potential for conflicts is the fact that the processes of diversification and expansion of international law rules addressed in this study are especially prominent in international environmental law. This development was due *inter alia* to expanding human activity and technological innovations leading to increasing damage to the environment, as well as to growing awareness of existing and emerging problems and recognition of the fact that environmental problems are generally of a transnational character. As a result, international environmental law has seen perhaps the most striking mushrooming of law-making treaties in the past decades. Increased awareness of environmental problems and increased willingness to tackle them has resulted in over 200 treaties regulating environmental issues, the most important of which have been joined by around 170 states, considerably more than the numbers of Members of the WTO. Moreover, the past decades have witnessed not only a proliferation of multilateral environmental agreements, but also of annexes and protocols to those, rendering the party-non-party divide and the resulting legal issues even more complicated.[86]

It should be noted, however, that environmental protection and trade liberalization do not as such constitute conflicting objectives. Trade can have a positive impact on the environment by increasing welfare and hence the budget available for environmental protection, or by contributing to more efficient use of natural resources. In fact, as we just saw, environmental treaties have been considered by the WTO agreement itself and by the Doha declaration to be mutually supportive. On the other hand, international trade may elevate environmental problems by increasing the industrial demand for scarce natural resources or through the international movement of environmentally hazardous materials or goods. Hence MEAs not uncommonly aim at curbing trade. Admittedly only some 30 multilateral environmental agreements contain specific trade measures,[87] but many more could affect trade indirectly.

It should be pointed out right away that MEAs, contrary to unilateral state measures for the protection of the environment, profit from a *"prejugé favorable"*, a kind of presumption of innocence of protectionist intent in the WTO system. This preference for widely supported international contractual norms is, for instance, clearly expressed in the reference to international standards in the SPS and TBT Agreements. As was pointed out earlier,

following such standards — whether agreed in governmental or non-governmental international standard-setting bodies — creates a presumption of conformity of its health and environmental measures with the WTO agreements for the country following such standards. There is little doubt that MEAs, though it is said nowhere explicitly in the WTO Agreements, could count on sharing in this positive view that the WTO takes of international agreements.[88]

MEAs may contain (or their decision-making bodies may mandate) trade measures, for various (and often multiple) reasons. The most obvious types of measures are those in the first place related to the environmental objective, i.e. to regulate or control trade in specific products, goods, etc. between the parties. Examples of such trade-related environmental measures can be found in MEAs concluded with the aim of prohibiting or limiting trade in endangered species (CITES) to ensure their preservation, or to restrain trade in environmentally hazardous waste or products, reaffirming states' rights to refuse entry of such products (Basel Convention, PICs Convention). Others prescribe trade restrictions in support of measures for the gradual, but eventual total elimination of certain environmentally hazardous products, such as CFCs and PCBs (Montreal Protocol, POPs Convention).

It is important to point out here parenthetically that all the Conventions just mentioned are fairly simple in nature. They regulate, or in the long run even seek to end, trade in fairly well-defined categories of products that are considered very noxious to the environment or of species that are threatened with extinction. Both the products and the dangers are well defined and recognized; the measures are accordingly also clear. An agreement like the Protocol on Biosafety is of a different nature, because it concerns a whole category of products, genetically modified organisms, many of which are not yet even known. Accordingly, the risks posed by these products to health and the environment are equally unknown. In short, scientific uncertainty and therefore precaution play a much greater role than in the other MEAs mentioned above. Hence, the notion of mutual supportiveness is probably much more vital for MEAs like the Cartagena Protocol and its closest relative inside the WTO family, the Agreement on Sanitary and Phytosanitary Measures.

There is little doubt that such restrictions or even the eventual total prohibition of trade in such goods, as mentioned in the earlier category of MEAs, will generally be covered by one of the exceptions of Article XX GATT, most probably the one in favour of "measures necessary to protect human, animal or plant life or health". The test of necessity would easily be passed on the basis that the banning or restraint of trade is set out in the relevant MEA. Thus there will be no need to have recourse to one of the conflict rules of general international law, such as *lex posterior or lex specialis* or to one of the conflict rules in the MEAs themselves, including the new conflict rule of mutual supportiveness.

There might be a problem in cases where it could be argued that Process and Production Methods (PPMs) are involved, since the legitimacy of such methods in the WTO is controversial.[89] This could be the case where, as in the Montreal Protocol, trade in products produced with CFCs or at least containing CFCs, such as refrigerators, would also be banned.[90] However, *US-Shrimp* also seems to have been about a PPM, since the *method* of catching shrimp was what triggered their import ban in the US. The approach of the AB in that case stands for the proposition that justification under the exception of Article XX is still possible in such cases – even though it failed in that particular case, because the conditions of the *chapeau* were not fulfilled.[91]

This raises another question, namely whether MEAs must necessarily submit to the exception of Article XX, as the conditions imposed not only by the necessity criterion, but also by the *chapeau* of the article may be quite onerous. The criterion of necessity has been interpreted

as requiring that a less restrictive, or even the least restrictive, measure be found to achieve the non-trade objective, while the *chapeau* has been seen to demand a certain proportionality in application of the measure.[92] If one regards MEAs as true *lex specialis* or in some cases as *lex posterior*, they would not need to satisfy these criteria and could be applied in their own right. However, in practice this question has not yet needed to be resolved.

Both the above types of MEAs not infrequently contain supportive (or "positive") measures, inspired by the recognition of common but differentiated responsibilities of state parties. Such provisions aim primarily at enabling developing countries to comply with their obligations assumed under the MEA. Supportive measures may include, *inter alia*, technology transfer, financial assistance and capacity building. Such supportive measures may cause tensions with WTO provisions. For example, the preparation of an international regime for Access and Benefit Sharing (ABS) within the framework of the Convention on Biological Diversity (CBD) entails possible repercussions on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement), in particular its Article 27.1 and 3(b) on the patentability of products, especially the possibility to exclude plants and animals from such patentability. Moreover, part of the ABS regime is a requirement for the disclosure of the origin of the genetic material and the related traditional knowledge so as to ensure fair and equitable sharing of benefits arising out of the utilization of genetic resources with the states or communities being the holders of such resources. The compatibility of such disclosure requirements at the moment of the patent application with Articles 27-29 TRIPs was and is controversial. Article 29 in particular contains a rather narrowly circumscribed disclosure obligation. It would seem, however, that the possibilities of either an amendment to Articles 27-29 or an authoritative interpretation under Article IX:2 of the WTO Agreement are being actively considered. It would seem, therefore, that conflict-avoidance techniques are being mobilized in a timely fashion.[93]

Another type of trade restrictions commonly employed in MEAs relate to trade with non-parties. Restrictions of this kind (concerning trade in products linked to the environmental objective) are often imposed to provide greater incentives for participation (i.e. to discourage free-riding) and to avoid that non-parties not subject to the – often costly – obligations imposed on participants have a comparative advantage (e.g. Montreal Protocol, Article 4). Insofar as non-parties to an MEA are parties to the WTO, this could lead to problems, at least in theory. In practice, however, the number of parties to the Montreal Protocol is considerably higher than the number of Members of the WTO. Consequently, a Member that is not a party to the Montreal Protocol would be an exception.[94] Moreover, the danger posed by CFCs is sufficiently established for a Member, party to the Montreal Protocol, to invoke Article XX GATT and prevail, even without relying formally upon being a party to the Montreal Protocol as a justification.

Finally, a few MEAs contain trade-related compliance and enforcement mechanisms. Under these rules, parties may suspend trade or trade-related benefits in goods, products or species covered by the MEA to sanction non-compliance by a party to the MEA (CITES, Montreal Protocol). In principle these sanctions could be very problematic, since the WTO knows an exception only for UN trade sanctions. No other regime of sanctions is covered by the exception of Article XXI(c) GATT. Article XX(d) GATT is of no avail either, since it only covers enforcement measures for laws and regulations that are not inconsistent with the GATT. This would not be the case for the trade-restrictive measures one would be attempting to enforce.[95] It is here, perhaps, that the new interpretative principle of **mutual supportiveness** may come to the rescue, assuming that it applies more generally than alone to the MEAs in which it is explicitly mentioned and that indeed it demands that

an MEA must be able to follow its object and purpose, whilst the WTO Agreements are supposed to be supportive of that. Surely prohibiting trade in endangered species subject to some very specific exceptions and thus ensuring their survival is the key element of CITES. Any binding measures to ensure compliance with this central objective should be allowed to operate unhindered by WTO rules in order to enable CITES to realize its object and purpose. In such a situation the WTO can only be supportive by taking a step back, since its fundamental object and purpose would not be seriously affected by doing so. That, of course, would require that the Appellate Body take a step back and hardened watchers of the Centre William Rappard will say that this is as yet unlikely to happen, because the AB **must** apply WTO law, when asked to do so by a complaining party. The point made here, however, is that the application of WTO law may require that the interpretative principle of mutual supportiveness is applied to the relevant WTO rules, which does not imply non-application of WTO law, but application in a restrained way that would not harm the object and purpose of the WTO Agreements.

3.4.4 Different degrees of conflict: the WTO and MEAs

Also important from the perspective of this study are the "degrees" of conflicts that can arise between WTO obligations on the one hand, and obligations and rights laid down in international environmental law and other regimes on the other. In other words, rather than the types of substantive conflicts that may arise, what seems to matter strictly speaking from the perspective of conflicts of norms (and state responsibility) is whether the measures contemplated or undertaken in violation of WTO obligations and in furtherance of another regimes concern:

a) Implementation of *explicit and mandatory obligations* under another regime (whether aimed e.g. to regulate trade or to ensure compliance). A good example of such a provision is Article III of CITES, which completely prohibits the trade in endangered species listed in Annex I to the Agreement and permits it only for very specific purposes. CITES and the Montreal Protocol are two MEAs that use strong trade restrictions as sanctions for parties that do not comply and are normally considered successful in doing so.

b) Implementation of measures *explicitly permitted* (e.g. in the form of a list of possible measures) but not mandatory under the other regime, or those *not explicitly identified* but which could be implemented to reach an obligation of result. The Kyoto Protocol to the UN Framework Convention on Climate Change (UNFCCC) lists in Article 2 a large number of possible/authorized measures that industrialized countries could take in order to reduce their emissions of greenhouse gases. In principle the categories would be broad enough to encompass border tax adjustments in order to tax the externalities of imported products in the same way as the externalities of national production. The same can be said about the way in which parties are authorized to control production and consumption of greenhouse gases. There is an obligation of result, but in reality states have used a large number of techniques to reach their goals: voluntary restraint agreements with industry; labeling requirements, special requirements for import permits, etc.

c) Those undertaken in support of the goals of the other regime, without any explicit requirement of conduct or result in the relevant treaty.[96] An example of a supporting measure creating tensions with the TRIPs Agreement has already been briefly outlined above.

Situation a) has in fact already been discussed above. The trade prohibition or restriction in certain goods is a mandatory rule that is contrary to mandatory rules of the WTO, but can in fact be easily accommodated under the Article XX exceptions to the GATT. These exceptions are in principle of no avail in the case of the mandatory trade measures prescribed with a view to enforcement, but

– as already argued above – the principle of mutual supportiveness, interpreted as a need to give support to the central object and purpose of the MEA, would leave enforcement through trade measures intact.

Situation b) encompasses a number of different situations. We first consider the case where an international agreement permits a number of specifically mentioned, alternative measures, which all help to reach the object and purpose of the MEA in question, but leaves the choice to the states parties to the agreement. Here it would seem that the choice the state concerned finally makes must be deemed necessary to reaching the object and purpose and should therefore be covered by the exceptions of the WTO Agreements, if necessary with the help of the principle of mutual supportiveness. However, if the choice of the measure under the actual circumstances of the case clearly is excessively trade restrictive or discriminatory compared to other suggested measures in the MEA, the criterion of the less-trade restrictive measure reasonably available should be applied. In that case, the fact that the MEA had listed different alternative measures ought to work against the state concerned and they should all considered to be *ipso facto* "reasonably available". The principle of mutual supportiveness should also work the other way round and hence a "normal" application of the principles of Article XX to the different alternative measures suggested in the MEA (but not to possibly available measures outside the MEA) would seem to be justified.

The other variant of situation b) where a state party to the MEA takes a measure that allegedly would be in pursuit of a prescribed obligation of result of the MEA, without any measure being specifically and mandatorily provided or even being suggested, would actually invite the same approach. However, the measure taken would not benefit from the presumption of being necessary to reach the obligation of result. The obligation of result should benefit from a presumption of being worthy due to its being incorporated in the MEA, but for the rest the normal procedure for testing a national measure for conformity with Article XX GATT should be fully applied.

Finally, situation c) would seem to call for a normal application of the exception clauses of GATT or GATS without any particular presumption or *préjugé favorable* applied whatsoever.

However, one may well wonder to what extent all of the above is not simply legal speculation, since so far there has not yet been a specific challenge to any of the MEAs. In 2003, Brack and Gray wrote that the absence of such challenge did not mean that the trade provisions of MEAs had escaped criticism.[97] Indeed not, but seven years on we can say that such challenge has still not occurred, the Biosafety Protocol having been pushed to one side in the *EC-Biotech* case. One can now be more assured than in 2003 that such a challenge has become quite unlikely in respect to the "classical" MEAs limited to one product or well-defined category of products. As was pointed out above, the Biosafety Protocol is a different matter, since the national measures that may be authorized on its basis will be more varied and characterized by greater scientific uncertainty, and hence precaution, than those taken pursuant to the "classical MEAs". The same is true for the Kyoto Protocol.

3.5 Types of conflicts between WTO and FTAs

3.5.1 "Conflict rules" contained in FTAs

FTAs and CUs — in the following we will concentrate on FTA's — are typically *inter se* agreements that do not respond to the rules of general international law for such agreements. Instead the "mother agreement", in this case the WTO, has provided special rules. Article XXIV GATT 1994 and Article V GATS lay down the conditions under which these special *inter se* agreements are considered to serve the objective of world-wide trade liberalization rather than hinder it and are, therefore, allowed. As we have seen above, they fulfill the function of conflict rules in this situation.

If the FTAs are in conformity with the rules of Articles XXIV GATT and V GATS, there is deemed to be no conflict with the WTO. In other words, there is a hierarchy between the WTO and FTAs and their respective legal systems.

The intention of FTAs to remain within the bounds of the conditions that are set for them by Article XXIV GATT and Article V GATS is often confirmed in their preambles or introductory articles. These tend to recognize that there is a hierarchical relationship between the two. For instance Article 101 NAFTA reads as follows:

> "The Parties to this Agreement, consistent with Article XXIV of the General Agreement on Tariffs and Trade, hereby establish a free trade area".

However, it is also inherent in CUs and FTAs that they want to go further in their liberalization than GATT and GATS. This is expressed in Article 103 of NAFTA:

> "In the event of any inconsistency between this Agreement and [GATT 1994 and GATS], this Agreement shall prevail to the extent of the inconsistency, except as other wise provided in this Agreement".

Phrases comparable to Article 101 of NAFTA come back with slight variations in more recent FTAs concluded by the US and nowadays also refer to the relevant GATS provision, as in the following Article 1.1 of the FTA between US and Korea (not yet in force):[98]

> "Consistent with Article XXIV of GATT 1994 and Article V of GATS, the Parties hereby establish a free trade area in accordance with the provisions of this Agreement".

The EU participates in one customs union, with Turkey, that was brought about by a Decision of the Association Council EC-Turkey. It unifies the commercial policies of the EU and Turkey by Turkey largely aligning its policy on the Union's common commercial policy. Oddly enough it is not the general provision on the major aspects of commercial policy, such as the regimes on export and import, safeguards and anti-dumping, that refers explicitly to conformity with Article XXIV GATT, but the more controversial provision on the uniformity of the textiles import regime that does so.[99]

Older FTAs concluded by the EC or EU normally do not contain such an explicit reference to Article XXIV GATT or Article V GATS. However, the Euro-Mediterranean Agreements of the late 1990's began by referring implicitly to Article XXIV GATT.[100] Also the recent FTAs, called Economic Partnership Agreements, with the Parties to the Cotonou Agreement state that one of the "specific objectives of the agreement" is "to establish an agreement consistent with Article XXIV of the GATT 1994".[101]

The main interest of these references back from a CU or an FTA to the WTO provisions laying down the conditions under which a CU or FTA can be deemed to be in conformity, resides in the fact that this could play a role in the interpretation of the CU or FTA by national courts in its Member States and by any court or dispute settlement system of the CU or FTA itself.[102] This is important, since the newer FTAs concluded by the US contain straightforward references to such important GATT provisions such as Article III (national treatment) and XI (prohibition of quantitative restrictions), as well as to the exceptions clauses of Article XX GATT and Article XIV GATS.[103] In its most recent FTAs, the EU is not in the habit of referring directly to articles from the WTO Agreements, but lightly paraphrases such Articles as III and XX of GATT.[104] Thus the reference to the GATT and the GATS Articles setting out the conditions for CUs and FTAs can be helpful in reminding the national courts concerned and the courts of the relevant FTAs or CUs themselves that a WTO-conformant interpretation might be desirable, unless there is a good reason inherent in the object and purpose of the FTA to deviate from the interpretation normally given by the WTO panel and Appellate Body.

3.5.2 Actual conflicts of norms between WTO and FTAs

As is clear from the preceding section, it is not very likely that conflicts of norms between the WTO and CUs or FTAs would lead to direct conflicts in concrete cases. The first question that may arise in an actual case is whether the CU or FTA is in conformity with the requirements of Article XXIV GATT and/ or Article V GATS. This is, of course, what happened in the well-known *Turkey-Textiles* case.[105] In that particular case, the customs union that had been formed between Turkey and the European Union demanded that "in conformity with the requirements of Article XXIV of the GATT" Turkey would follow substantially the same commercial policy as the EU in respect of its restrictions on the importation of textiles and clothing.[106] That is to say, within a year after the conclusion of the WTO Agreement on Textiles and Clothing, which required that all quantitative restrictions be brought into conformity with the WTO within the next year or phased out according to a plan within the next ten years,[107] Turkey had added all Community restrictions to any of its own that remained. Could this action be shielded by invoking the requirements of Article XXIV of GATT?

The answer given by the panel and the Appellate Body (AB) was clearly in the negative. On appeal, the AB developed a seemingly general test for a CU and an FTA being in conformity with the requirements of Article XXIV. The AB agreed that Article XXIV could be held up as a defense against WTO inconsistent measures by members of a CU or an FTA, but stated that this was subject to two conditions based on paragraphs 5a and 8a of Article XXIV. In the case of a CU these conditions were:

- The customs union must fully meet the conditions of these two paragraphs, which implies that it covers substantially all the trade between the members and that the common external tariff is on the whole not higher or more restrictive than the general incidence of the duties and regulations of commerce of the individual members before the creation of the CU.
- The formation of the CU would be prevented if it were not allowed to introduce the measure at issue.[108]

The AB could not rule on the first condition, since the panel had not ruled on it, simply assuming for the sake of argument that the EU was a customs union, and there was no appeal against this assumption.[109] On the second condition, the AB ruled that it had not been fulfilled, because the EU and Turkey could have used the flexibility inherent in the "substantially all the trade" criterion.[110]

It is controversial whether this two-pronged test employed by the AB is too demanding, especially as the AB chooses to speak only of the "formation of the customs union", which creates the impression that later measures decided by the organs of the customs union could never fulfill this test. This certainly seems excessive, also given the fact that strictly speaking Decision 1/95 was not the first formation of the customs union between Turkey and the EU, but only the decision on the final phase. It is therefore submitted that the second test must be interpreted as stating that the formation or *the continued existence* in conformity with the conditions of Article XXIV GATT (or Article V GATS) of the customs union (or FTA) would not be possible. It must remain doubtful, however, whether the criterion of "being prevented" or "being in the impossibility" of continuing to conform to the demand of Article XXIV:5a and 8a is a proper test. Especially the reference to the possible recourse to the flexibility of "substantially all the trade" does not seem to be a good suggestion from the AB. It is quite conceivable that in other situations than the wholesale take-over of textile restrictions a less trade-restrictive measure than going back with respect to the criterion of "substantially all the trade" would have been possible. Therefore, a proportionality or reasonableness test might well be preferable, especially in the case of mature and long-lived FTAs or CUs.

Turkey-Textiles is the one case that speaks squarely to the interpretation of Article XXIV GATT and implicitly also Article V GATS. There are a few other WTO cases that have indirect consequences for FTAs and CUs existing under these articles, namely cases that tend to show that recourse of a member of a CU or an FTA to safeguards and even to the exceptions clause of Article XX GATT may have repercussions for itself and its partners. The restrictions on trade resulting from the invocation of safeguards or from the recourse to the exceptions of Article XX must be applied to the partners in an FTA or a CU, if their exports to the member taking the measure have contributed to the injury in the case of safeguards or cause the same harm to the environment or to health.[111] The implications of this ought not to be too serious inside FTAs when the exceptions of Article XX are involved. Most FTAs have clauses that refer to Article XX or are paraphrases of its content and these ought to be invoked in cases that deserve recourse to Article XX.[112] However, in cases involving safeguards, the consequences are that the member invoking safeguards must leave its FTA partners out of the determination of injury in order to protect them from the effect of its safeguard measures. This is a direct consequence, however, of how the application of safeguard measures is codified in the Agreement on Safeguards and is in no way linked to Article XXIV GATT.[113]

There is a further problem posed by CUs and FTAs: their internal systems of enforcement and sanctions.[114] In normal circumstances these are purely *inter se* matters and do not affect third states that are also WTO Members. A case is unlikely to arise in such a situation, as the matter will be entirely dealt with among FTA member states by the competent FTA institutions. If they do affect third states, presumably the criteria of *Turkey-Textiles* will apply.

It would seem self-evident after this account of the hierarchy between the WTO and FTAs as well as CUs, as expressed in the WTO conformity clauses inserted in most FTAs and CUs and in the case law of the Appellate Body, that the biggest problem in this area is not so much caused by conflict of norms, but by overlapping jurisdictions of the relevant courts or arbitration tribunals and the conflicting rulings that may result. Even if the rulings do not really conflict, because they are handed down within the framework of different treaty systems or systems of dispute settlement, they nevertheless may contribute to legal uncertainty insofar as they deal with closely connected cases or with the same concepts, the latter in particular in cases where FTAs refer to or paraphrase WTO provisions. These questions will be discussed in the sections dealing with conflict and overlap between jurisdictions, after a brief evaluation of this section on conflict of norms.

3.6 Evaluation

The description and analysis above have shown that there are indeed serious problems, both potential and real, concerning conflicts of norms between the WTO and other international agreements. We have taken "conflict" in a large, but realistic, sense, including where a prohibition in one treaty is confronted by a right or permission in another. The serious problems can scarcely surprise, given that the first important book on the subject already appeared seven years ago and has been followed by many other studies.[115] Above we have dealt in particular with conflicts of norms in relation to MEAs and to FTAs, because these are a cause of particular concern for many people given that environmental problems will only become more urgent in the coming years and the proliferation of FTAs continues unabated. In terms of FTAs, the EU seems to have taken the relay from the US in the game of serial negotiation of such agreements and China has also entered the fray.

However, conflicts of norms have been a reality in modern international law for some time now and there are many techniques available to deal with the problem, as has been shown above. A very old rule in international law

is that of the presumption against conflict between treaties concluded between the same parties. Classical treaty law, as embodied in the 1969 Vienna Convention on the Law of Treaties, has developed detailed rules on the so-called *lex posterior* principle. Although not found in the Vienna Convention, it is now fairly generally accepted that *lex specialis* also is a principle that can be applied in cases of (seeming) conflict between agreements. The Vienna Convention also encourages contextual interpretation of treaty provisions, not only within the same agreement, but also by taking into account the other rules of international law in force between the parties – which may be rules of general international law, principally customary international law, as well as other treaty provisions in force between the parties.

Next to these general rules of international law that help avoid or reconcile what initially looks like conflicts between treaties, many treaties have their own rules of conflict. They may state that they are without prejudice to rights and obligations under other agreements or they may be giving priority to or permission to conclude other agreements, on condition that they satisfy certain requirements. Alternatively they may claim priority for the agreement in question over all or some specified other agreements. Such clauses may lead to companion clauses that are "avoidance of conflict" clauses that declare that they satisfy or strive to satisfy the conditions set in other agreements (FTA clauses referring to Article XXIV GATT and V GATS are a prime example).

The newest addition to these conflict clauses are the clauses claiming mutual supportiveness between the treaty in question and (categories of) other agreements (which may or may not be specifically mentioned). It would seem important to give clear meaning and content to the notion of mutual supportiveness between treaty regimes, primarily in the field of trade and the environment. If it is to mean anything beyond another manifestation of the presumption against conflict and its *alter ego* harmonious interpretation, it must denote a greater mutual respect for the object and purpose of the agreements involved in an alleged clash.

All these different principles and explicit conflict rules provide many possibilities for the WTO panels and Appellate Body to take account of other treaty rules. The instruments are there and, as long as the WTO dispute settlement organs have recourse to them in conformity with the customary rules of treaty interpretation (see Article 3.2 DSU), they should be able to manage conflicts of norms in a way that could be recognized by all sides as acceptable and beneficial. This management of conflict will only be recognized as such if it is irreproachable from the point of view of legal technique, but daring from the point of view of substance, to give real value and contextual meaning to the other treaties being used in the interpretation of WTO provisions.

If the use of interpretative rules to manage conflicts remains entirely in the hands of the dispute settlement organs of the WTO, the recourse to explicit clauses regulating conflict is a matter for the political and "legislative" organs of the WTO, when drafting new WTO provisions or agreements, or when formulating authoritative interpretations under Article IX:2 of the WTO Agreement and granting waivers to (groups of) Members while subjecting these to certain conditions under Article IX:3. More generally, states and international organizations, not only in their capacity as WTO Members, but also as members of other international organizations or parties to other treaties, are capable of agreeing on explicit conflict clauses, which make the relationship between treaty instruments clear and thus make the relationship between treaties easier to interpret for dispute settlement institutions. The options are limited: *lex posterior*; *lex anterior* and *lex specialis*. If nothing explicit is stated and no intention can be derived from the context, the harmonization principle is applicable. Clauses to convey one of the desired results

are relatively simple and have well-recognized forms in international law. If one wants the later treaty to prevail over the earlier one (*lex posterior*) an explicit way of doing so is by inserting: "This treaty shall replace, and succeed to, (articles a-z of) treaty X". If, on the other hand, one wants the later treaty to respect the older treaty (*lex anterior*), the classical formula is: "Subject to (articles a-z of) Treaty Y, the present treaty will regulate matter Z". The relationship of *lex specialis* is normally expressed by reference in the preamble or one of the first articles of a new treaty to the provision of an older treaty, which contains the intention to develop certain matters further.[116] In general, it would be desirable for the WTO and other international organizations and treaty bodies to make their intentions clear by resorting to such simple model clauses as mentioned above.[117]

If it is only a matter of the panels and the Appellate Body having uncontested jurisdiction over the matter, the problem remains relatively simple, but a conflict of norms acquires a special edge if it is accompanied by potential or actual conflicts of jurisdiction and it is to those that we now turn.

4. CONFLICTS OF JURISDICTION

4.1 Introduction

Overlaps or conflicts of jurisdiction between different international courts result from the clash of or the overlap between so-called **jurisdictional clauses.**[118] These are clauses contained in the relevant international treaty, which indicate the scope of the powers granted by the parties to the international tribunal that they have created in order to solve their disputes concerning the interpretation and application of that treaty and the legal acts adopted on its basis. This is what is called the jurisdiction of an international court. Just as national laws on the organization of the judicial branch of government contain provisions that define the jurisdiction of national courts territorially (i.e. the geographical area of their powers), *ratione materiae* (i.e. the kind of disputes they can judge: civil disputes, administrative disputes, constitutional disputes, tax disputes etc.), in relation to other courts (question of the exclusivity of their jurisdiction) and as to their level (tribunal of first instance, court of appeals, supreme court), so an international agreement may create an international judicial body and circumscribe its jurisdiction in similar ways.

Normally the territorial scope of the jurisdiction of international courts and tribunals is not much of a problem. There are no judicial districts or circuits. The authority of the court stretches as far as the territory of all the parties to the treaty in question, unless the treaty contains specific rules in this respect. As to the level of their competence: there are only two true international court systems, with their own hierarchy: the WTO panels and the Appellate Body and the EU court system, with the Civil Service Court, the General Court and the European Court of Justice properly speaking. Among the aspects of jurisdiction that are important for the purpose of the study there is, first, the **scope of the jurisdiction** *ratione materiae*. Normally this scope will be circumscribed by the scope of the treaty. That is the purely material scope of jurisdiction, but there is also the scope as to cause of action and the available remedies: interpretation only, annulment of legal acts, constitutional review etc. and their different legal consequences. Secondly, the **exclusive or non-exclusive nature of the jurisdiction** is of great importance for the question of whether clashes or overlaps of jurisdiction will readily occur or not.

The issues with respect to conflicts or overlap of jurisdiction between different international courts and tribunals will be analyzed below, starting with a discussion of the WTO jurisdictional clauses and continuing with the same clauses of other international agreements, primarily MEAs and FTAs. This will then lead to an analysis of the different types of jurisdictional clashes that may result from the co-existence of these different jurisdictional clauses and how they have been or can be resolved.

4.2 WTO Jurisdictional Clauses and Their Interpretation

The WTO has a number of strong and exclusive rules of jurisdiction for its dispute settlement system. The most important one is Article 23(1) of the DSU, which reads as follows:

> "When 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 objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding".

The second paragraph of Article 23 then specifies that Members shall not unilaterally decide that they have suffered nullification or impairment under the WTO Agreements. In this respect they must follow the reports of panels and the Appellate Body, which have been adopted by the DSB. In addition, Members are prohibited from taking unilateral countermeasures; if they want to proceed to suspension of concessions and other obligations under the WTO Agreement they

must follow the procedures of Articles 21 and 22 of the DSU and obtain the authorization of the DSB, as well as abide by the binding arbitration procedures laid down in those articles.

There is thus little doubt that the jurisdiction of WTO panels and the Appellate Body is compulsory and exclusive where it concerns alleged breaches of the WTO Agreements. The potential consequences for trade countermeasures taken in response to a breach of general international law and entirely in conformity with the (customary) rules for countermeasures codified in Articles 49-54 of the draft Rules on State Responsibility are considerable.[119] In principle, the probable wrongfulness of such countermeasures under the WTO is precluded by Article 22 of the draft Rules of State Responsibility, but it could be argued that, by establishing the WTO, Members have contracted out of this general rule of international law and let go of trade measures as potential countermeasures under general international law.[120] Trade sanctions ordered by the Security Council are an obvious exception to this, covered by both Article 103 of the UN Charter and Article XXI GATT on security exceptions. The crucial question is, of course, to what extent trade sanctions provided for as countermeasures by other international agreements than the UN Charter, such as for example MEAs, will inevitably be seen as a suspension of concessions or other obligations unauthorized by the DSB under Article 23(2) DSU and obligatorily falling under the jurisdiction of the WTO dispute settlement system. We will come back to that after having considered the jurisdictional clauses of MEAs and FTAs.

How broadly the exclusive jurisdictional clause of Article 23 has been interpreted by the WTO dispute settlement system is best illustrated by the panel report concerning *EC-Commercial Vessels*[121] and the particular meaning it gave to the notion of "seeking the redress of a violation of obligations" under the WTO. This case was part of a broader conflict between the EC and Korea over the alleged subsidization of Korean shipyards and the so-called "Temporary Defense Mechanism" (TDM) that the EC had taken in retorsion. Technically a retorsion is an unpleasant, but legal measure taken as a reply to a measure of another country which may be legal or illegal, but causes prejudice to the country taking the retorsion. In the particular case the panel came to the conclusion that the EC measures taken in reaction to the alleged subsidization of the Korean shipyards were indeed not in violation of WTO rules on non-discrimination and subsidization, but nevertheless "sought the redress" of an alleged violation of WTO obligations by Korea. Hence the EC retorsion was contrary to the obligation of Article 23(1) DSU.[122] One may seriously doubt that it ever was the intention of the DSU negotiators to disqualify not just trade countermeasures, but also trade retorsions, i.e. measures entirely legal under the WTO and under other rules of international law, by the wording of Article 23(1). Indeed, the panel decision concerned has never been confirmed by the Appellate Body.[123] Nevertheless the panel's interpretation of Article 23(1) DSU as also covering retorsions taken in response to an alleged breach of WTO obligations, still stands. The feeling that any unilateral measure, whichever its nature, that arguably seeks the redress of breaches of WTO law amounts to a circumvention of the obligatory and exclusive access to the WTO dispute settlement system obviously strongly colours the position that WTO panels and the Appellate Body will take in cases coming before them, even when it concerns trade measures that are legal under general international law and other international agreements.[124]

Another provision that circumscribes the nature of the jurisdiction of the dispute settlement organs of the WTO and is of considerable importance in the framework of this report is Article 3(2) of the DSU. It reads as follows:

> "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The members recognize that it serves to preserve the rights and obligations of members under the covered agreements, and to clarify the existing provisions of those

agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

This provision is on the one hand teleological, at least as long as it concerns to ensure security and predictability of the international trading system. And as such, as the panel in *US - Section 301 of the Trade Act* recalled, it serves to remind everyone that the ultimate beneficiaries of the system are those that engage in international trade and that the WTO, therefore, can be said to have an *indirect effect* for them.[125] On the other hand, the last phrase and the beginning of the middle phrase of the provision are rather conservative in their outlook and, as Georges Abi-Saab has noted, almost inevitably make every Appellate Body Member into a strict constructionist and, in the words of René-Jean Dupuy, into an "obsédé textuel".[126]

Meanwhile the end of the middle phrase refers to the customary rules of interpretation of public international law. Whilst it seems entirely normal for an international tribunal to apply these rules, in reality it represented a revolution for the WTO dispute settlement system and its continuity with the GATT.[127] Although some late GATT panels - some of which were not adopted - had already referred to the rules of interpretation of international law in order to have recourse to the full method of interpretation that was normal for other international courts and tribunals, was new for panels. This caused a shock to many Members, including to some of those that had actively participated in the DSU negotiations. The most controversial of these rules of interpretation, as we have already mentioned earlier, was the one enjoining an interpreter to read the provisions of the WTO Agreements, if necessary, in the light of the other rules of international law applicable between the parties, such as other treaties applicable between the parties and other rules of general international law.[128]

4.3 Selected Jurisdictional Clauses of Other International Agreements

4.3.1 Exclusive and compulsory clauses

The WTO jurisdictional clause (Article 23 DSU) explained and commented on above is clearly an exclusive and compulsory clause, except for the small opening left for an arbitration procedure. It is extremely strict and it is impossible to go to any other dispute settlement procedure in order to have a dispute between Members on the interpretation or the application of the WTO Agreements settled and subsequently enforced. As the Appellate Body put it:

> "This [….] exclusive dispute resolution clause is an important new element of members' rights and obligations under the DSU".[129]

As we saw, unilateral action by Members with a view to the enforcement of a panel or Appellate Body reports is not lawfully possible outside the procedures laid down in Articles 21 and 22 of the DSU, which is essentially a system of authorized and regulated countermeasures.

In this respect, the WTO can only be compared to the European Union, where the member states are explicitly bound to follow the methods of dispute settlement laid down in the treaties in case of a dispute about their interpretation and application.[130] It is not unlikely that the drafters of the DSU were inspired to some extent by this provision of EU law. In addition, the Court of Justice has explicitly ruled that the remedies of international law, such as countermeasures, are no longer applicable in Union law, since Union law provides for a complete system of adjudication and remedies.[131]

Another regional integration organization that seems to have been inspired by the European model is the Andean Community. Member countries are prohibited from submitting any dispute that may arise from the application of provisions of the legal system of the Andean Community "to any other court or arbitration system or proceeding whatsoever" other than

the Court of Justice of the Andean Community.[132] It should be taken into account that the Andean Court of Justice, for the moment, has built strong and consistent case law primarily in the field of intellectual property. The influence of this strong jurisdictional clause is, in practice, currently limited to that particular field.[133]

Between two international court systems with strong exclusive jurisdictional clauses, overlap of jurisdiction or jurisdictional conflict is highly unlikely, even impossible. The same case will simply not be decided by two such jurisdictions. This is inherent in the way their jurisdictional provisions are drafted and in the way in which in law the notion of "the same case" is normally defined; namely as a case between the same parties on the basis of the same cause of action relating to the same legal issue as another case. What may happen in practice is that jurisdictions in two such systems are asked to rule on what in substance is the same or nearly the same legal problem. To give an example, an anti-dumping case before a WTO panel and an anti-dumping case before the European Court of Justice or before a NAFTA Chapter 19 panel will never treat "the same case". In the WTO case the parties will be the two Members concerned, the law applied will be the WTO Anti-Dumping Agreement and the cause of action will be breach of its provisions. In an ECJ case, the parties will be a private party and the authority applying the anti-dumping law of the EC, the law applied will be EU anti-dumping law and the cause of action will be annulment of the decision of the anti-dumping authorities. In a NAFTA case the parties will be two of the state parties, the binational panel will exercise judicial review and will apply the national anti-dumping law of the NAFTA state that took the trade defense measure. Nevertheless one of the reasons adduced for breach of WTO obligations and for annulment of the anti-dumping decision at issue in the EC or NAFTA procedures may be, for instance, the problem of "zeroing" (a controversial technique for calculating the so-called dumping margin), that is to say, the legal issue to be decided in all three cases may be the same.[134]

If even systems with strong exclusive jurisdictional clauses, which in principle do not overlap, may be confronted with and decide legal issues that are substantially the same, there is little doubt that the chances of this happening are all the greater if the jurisdictional clauses are less evenly matched. The question will arise how courts and tribunals from different dispute settlement systems deal with this situation. That question will be broached after other jurisdictional clauses and their interaction have been discussed below.

4.3.2 Exclusive jurisdiction with limited choice of forum

FTAs that explicitly refer to GATT or WTO provisions have a certain interest in leaving the possibility open that disputes about the interpretation of these direct references to such GATT and WTO articles are decided by the WTO dispute settlement system. Hence treaties like NAFTA and Mercosur provide for two ways to settle disputes, either by the own system of the treaty or the dispute settlement of the WTO (Articles 2003-2005 of NAFTA and Article 1 Protocol of Olivos). Basically in both systems the choice of going to Geneva rather than to the dispute settlement system of NAFTA or Mercosur is in the hands of the requesting party, although in some instances the responding party can have some influence on the choice of the requesting party (Article 2005 (3) and (4) of NAFTA). Both systems provide that once the choice has been made between initiating a dispute before the own dispute settlement mechanism or before that of the WTO, the choice shall be definitive and no parallel proceedings may be opened in the other forum. Therefore, in principle these provisions, sometimes called "fork-in-the-road-provisions",[135] exclude competing jurisdiction in the same case. It is a preventive application of the principle of *lis alibi pendens*. However, in the case of NAFTA, the "fork-in-the-road-provision" does not operate in fully automatic manner at the request of the complaining party.[136] In most other FTAs concluded since, this has been rectified and the choice at the fork in the road is placed in the hands of the complainant.[137]

In reality, however, it should be taken into account that in NAFTA the rule of the definitive choice applies only to inter-state litigation. Hence investor-state arbitration (Chapter 11) and cases concerning commercial defence (Chapter 19) are not covered. In any case there would never be full identity between the parties in Chapter 11 cases and other cases, since Chapter 11 investment protection cases are initiated by private parties. It is obvious that in practice this considerably increases the chances of legal issues that are identical or near-identical being decided in different forums, even inside NAFTA.[138] Thus it is quite possible that a national treatment case brought by one NAFTA member against another under the trade provisions on national treatment is replicated by a foreign investor from the complaining NAFTA member starting a case for breach of the national treatment or fair and equitable treatment clauses in respect of his investment in the sector hit by the discriminatory measures. Moreover, because of a breakdown in the consensus necessary for selecting the roster of panelists under Chapter 20 of NAFTA concerning inter-state trade cases, it has become possible for a party to obstruct the selection of a panel member *ad infinitum* in inter-state cases and thus to ensure the jurisdiction of WTO panels in all cases in which such party believes that this is favourable to it, in this way profiting from its own obstruction.[139] This was the situation underlying a certain stage of the US/Mexico cane sugar and high fructose corn syrup (HFCS) saga.[140]

Box 5: "Fork-in-the-Road" Provisions

The so-called "fork-in-the-road" provisions (FIRPs) have their origins in Bilateral Investment Treaties (BITs). Their function in these treaties was to make the choice of a claimant between national courts and the international investment protection procedure definitive; in short the claimant could not go forum shopping for the best result in his favour. Article 8.2 of the Argentina-France BIT reads as follows: "Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one or the other of these procedures shall be final". Once the investor has made his choice, there is no going back.

The formula is simple and of great clarity. A similarly clear FIRP can nowadays be found in Article 20.3 of the Central American Free Trade Agreement (CAFTA), where it is applied to the choice between the dispute settlement mechanism included in CAFTA itself or the WTO procedure. This article reads as follows: "(1) Where a dispute regarding any matter arises under this Agreement and under another free trade agreement to which the disputing parties are party or the WTO Agreement, the complaining party may select the forum in which to settle the dispute; (2) Once the complaining party has requested a panel under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of all others."

Matters are a bit more complicated in the framework of NAFTA dispute settlement (Chapter 20 of NAFTA). The basic rule is clear; Article 2005.1 of NAFTA reads as follows: "Subject to paragraphs 2, 3 and 4, disputes regarding any matter arising under both this Agreement and the GATT, any agreement negotiated thereunder, or any successor agreement, may be settled in either forum at the discretion of the complaining party". Paragraph 6 of the same Article then reads: "Once dispute settlement procedures have been initiated under [this Agreement] or [….] under the GATT, the forum selected shall be used to the exclusion of the other". This is again a clear FIRP which is in the hands exclusively of the complainant. However, paragraphs 3 and 4 of Article 2005 give some influence to the defendant in specific cases, namely those relating to a number of specific environmental agreements, such as CITES, the Montreal Ozone Layer Convention etc., to SPS measures and standards in relation to, again, environmental matters and the protection of human, animal and plant life and

Box 5: *Continued*

health. In such cases, where "the responding Party requests in writing that the matter be considered under this Agreement, the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under this agreement. In order for this provision to work without further problems, the procedure under NAFTA itself must be absolutely watertight. At first sight this would seem to be the case, but in reality the composition of NAFTA panels is dependent on selection from a roster and there is no safety valve foreseen, in case one of the parties does not join the consensus for the establishment of a roster. This is what happened; the US did not collaborate in the composition of the roster foreseen in Article 2009 and hence the automatic composition of panels is excluded.

The NAFTA also provides for automatic dispute settlement in investment cases (Chapter 11). These cases are started by private investors, who may choose to have recourse to the ICSID Convention or the Additional Facility Rules of ICSID, or the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL, Article 1120). However, such cases are *ipso facto* not identical to cases about substantively the same issue as, for instance, a national treatment case brought under the inter-state procedures of Chapter 20, since the parties will be different. NAFTA does not contain rules about what course of action should be followed in such cases by the arbitral tribunals or WTO panels involved. If that is the case in NAFTA, where parties knew from the beginning that different procedures might need to co-exist in one and the same treaty, it is obvious that in trade and investment agreements, where such linkage is absent, rules on how to handle disputes in different jurisdictions that are substantially the same should be treated.

4.3.3 Exclusive jurisdiction with some flexibility

Provisions that provide for exclusive jurisdiction, but with some flexibility, can be found in the European Convention on Human Rights and Fundamental Freedoms (ECHR) and in the Convention on the International Centre for the Settlement of Investment Disputes (ICSID). Article 55 of the ECHR provides that in principle the High Contracting Parties will not turn to any means of dispute settlement other than those provided for in the Convention, except in cases in which they conclude a special agreement to that effect. Although the facility to conclude special agreements in order to settle disputes about the application of the ECHR certainly offers some escape from the exclusive jurisdiction of the European Court of Human Rights, the scope of this exception has been regarded as unclear by the experts.[141] Moreover, it would seem that this exception probably has been used only very sporadically, if at all.

A similar clause, leaving the parties the possibility to agree differently *inter se*, is found in Article 26 of the ICSID Convention.[142] This article states that consent of the parties to arbitration under the ICSID Convention shall be deemed consent to such arbitration to the exclusion of any other remedy. It should be taken into account, of course, that the consent to arbitration under ICSID is normally expressed under a different treaty, normally a bilateral (or exceptionally multilateral, as in the case of the Energy Charter) investment protection agreement.[143] Therefore, the bilateral agreement and the ICSID Convention read together basically establish an exclusive, compulsory jurisdiction over investment disputes, unless the escape of an otherwise agreed method of dispute settlement is available in the relevant bilateral investment treaty (BIT).

It should be added, of course, that the kind of disputes that come before these two jurisdictions are largely cases between individuals and states. Once again, therefore, there will be

no identity of disputes in the formal sense with cases that come before the WTO, since *ipso facto* there will be no identity of parties. However, in respect of the substantive identity of the legal issues presented to these tribunals and those before the WTO, especially the ICSID may well score high. As we saw in our discussion of the conflict of norms above, ICSID tribunals are bound to apply some of the same norms as the WTO judicial organs, most notably the national treatment clause. Their application of the concept of fair and equitable treatment may well encompass notions of fairness that are also inherent in other WTO provisions, such as the concept of "arbitrary and unjustifiable discrimination among countries where the same conditions prevail" from Article XX of GATT.

4.3.4 Non-exclusive jurisdiction clauses with optional declaration

Non-exclusive jurisdictional clauses, which are also non-compulsory, can be found in a large number of MEAs. The provisions on dispute settlement in important recent MEAs have broadly the same structure and are even identical or near-identical in some cases. They start by stating that parties shall settle their disputes concerning the interpretation and application of the MEA in question by negotiation or other peaceful means. Sometimes good offices or mediation by a third party is explicitly mentioned, in case negotiation is not successful. Subsequently the relevant articles state that a party, at the moment of ratification, approval or at the moment of accession may make a declaration to the depositary through which the party, with respect to any dispute relating to the interpretation and application of the MEA in question and on condition of reciprocity, recognizes one or both of the following methods of dispute settlement as compulsory:

i) Arbitration in accordance with procedures laid down in an Annex to the MEA or to be adopted in such an Annex by the Conference of the Parties (COPs) at a future date.

ii) Submission to the International Court of Justice.[144]

The number of such declarations under the various MEAs has remained limited.[145]

It is obvious that such clauses for dispute settlement are extremely weak compared to the compulsory and exclusive jurisdiction for all Members of WTO, when they seek the redress for a violation or a nullification or impairment under the WTO Agreements covered by the DSU. Disputes under an MEA that have a trade aspect that arguably touches upon rights and obligations under the WTO will almost inevitably end up before a WTO panel because of this unbalance between the jurisdictional strength of the respective dispute settlement procedures. The power of attraction is almost entirely on the side of the WTO.

However, many MEAs, unlike the WTO, do not rely primarily on disputes between their parties to uphold and enforce the rights and obligations under the treaty. They have created so-called compliance procedures carried out by specific treaty bodies charged with this task. The most far-reaching of these procedures has been developed in the framework of the Kyoto Protocol to the UN Framework Convention on Climate Change. However, the compliance measures that can be prescribed by the Enforcement Branch of the Compliance Committee in the end principally relate to the rights and facilities that parties can enjoy under the Kyoto Protocol itself and do not touch on matters that would fall under the WTO. As we have already seen in the section on the conflict of norms, mainly the MEAs that have a direct trade focus because they concern the production and/or trade of environmentally noxious products, such as ozone-depleting substances, waste and PCBs, would have similar problems with their compliance mechanisms. Whatever one may say about MEAs' compliance procedures and their relatively high effectiveness, they do not lead to judicial decisions, as for instance in the EC.

4.3.5 Residual jurisdiction

A situation of residual jurisdiction occurs when a court's jurisdiction operates when no other international court or tribunal has or exercises

jurisdiction. A famous example of this kind of jurisdictional clause can be found in Article 282 of the UN Law of the Sea Convention. This article basically states that, if parties to a dispute have agreed, through another general, regional or bilateral agreement, that such dispute shall be subject, at the request of any party to the dispute, to a procedure that entails a binding decision, it is that procedure that will apply, rather than the jurisdiction of the International Tribunal for the Law of the Sea (ITLOS), unless the parties agree otherwise.

It is clear that such a provision makes the ITLOS very vulnerable to any international court or tribunal that may also be in a position to exercise jurisdiction over a law of the sea case, like the International Court of Justice that has continued to decide cases on the law of the sea.[146] However, such vulnerability may, if anything, be even greater to courts that have an exclusive and compulsory jurisdiction in a certain domain, but nevertheless have an opportunity to decide law of the sea cases. This is exactly what happened in the MOX-plant case. In that case, which concerned the nuclear facilities at Sellafield in the UK on the Irish Sea and in particular a new plant for the production of nuclear fuel (called MOX), Ireland sought to obtain the fulfillment from the UK of certain information and cooperation obligations under the environmental chapter of UNCLOS. To that end Ireland started an arbitration procedure under UNCLOS Annex VII. However, when the UK invoked the fact that the Court of Justice of the European Community might well have exclusive competence over the dispute, because Ireland sought to interpret UNCLOS provisions in the light of environmental Community law and this would entail interpretation by the Arbitral Tribunal of provisions of Community law – which, according to Article 244 TFEU was reserved to the European Court of Justice (ECJ) – the Arbitral Tribunal suspended its procedure, awaiting a possible judgment of the ECJ.[147] Indeed, the ECJ claimed exclusive jurisdiction over the subject matter in an infringement case brought by the European Commission against Ireland, citing Article 282 of the UNCLOS as support for the contention that the exercise of its prerogative of exclusive jurisdiction over the case was fully justified in the light of that article's emphasis on the residual character of the dispute settlement mechanisms of the UNCLOS.[148]

This view of the ECJ has been strongly criticized in the literature, but we can leave that aside here. What is important is to draw the lessons of the weakness of the jurisdictional provisions of the kind laid down in the UNCLOS.[149]

4.3.6 Litispendence, *res judicata*, and comity

As we have seen above, the so-called "fork-in-the-road provisions" in NAFTA and in other agreements have a preventative function of avoiding **litispendence,** that is to say that two identical cases are pending before two or more different international tribunals, e.g. a NAFTA panel and a WTO panel.[150] This is a phenomenon that is not exceptional in private international law, where for example the same alleged breach of a transnational contract may give rise to two identical cases in different national court systems. Private international law has certain rules for such situations in which a court of one system lets the other case go forward and abstains from taking jurisdiction itself ***(lis alibi pendens)***. The same is true of ***res judicata***, which is the rule by which the court of one national system finds out that the same case has already led to a definitive judgment in another national jurisdiction and refuses to decide the same case again.[151] Both rules are closely linked, since they rely on the same notion of what constitutes the same case as has already been explained above: same parties, same cause of action, same claim.[152] However, there remains the question of whether such rules, which are well-known from the domain of private international law, can be transferred lock, stock and barrel to the domain of public international law. There are some indications that *res judicata* has found some application in public international law.[153] Moreover, a strong argument has been made that the rule of *res judicata* is a general principle of law recognized in the law of most

states in the world and can, therefore, be applied by international courts and tribunals in the domain of public international law pursuant to Article 38 of the Statute of the ICJ. Since, as has been demonstrated, the rule of *lis alibi pendens* has the same roots as *res judicata*, it would be unreasonable to apply the one but not the other.[154] Nevertheless a very strict application of the criteria for the identity of cases recalled above might seriously restrict the usefulness of the techniques of *res judicata* and *lis alibi pendens*, even if they would be fully applicable.

Here one can call in aid another notion that originated in private international law, namely comity. This is the notion that, even if fully clear rules determining which national court has jurisdiction in a particular international case are not available, there are certain principles of **comity** that should lead a court to cede jurisdiction to another court rather than accept competing jurisdictions. Such considerations have been well expressed by the Arbitral Tribunal in the MOX Plant case. The Tribunal referred *inter alia* to "considerations of mutual respect and comity which should prevail between judicial institutions" and recalled that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the parties".[155] Comity was thus invoked in order to avert the dangers of *lis alibi pendens* and *res judicata* with possibly contradictory results, while the Tribunal did not clutch to the strict notion of the identity of cases, speaking as it did of "conflicting decisions on the same *issue*".

4.4 Actual Cases of Jurisdictional Overlap in Practice: Trainwrecks do Happen!

4.4.1 The Mexico/US sugar, HFCS and Soft Drinks saga

It is difficult to give a complete and objective reconstruction of the long-standing dispute between Mexico and the United States concerning the trade in sugar, artificial sweeteners, and the products, such as soft drinks, in which sugar and sweeteners are part of the production process.[156] For the purposes of studying the consequences of jurisdictional overlap and the difference in "strength" of the relevant jurisdictional clauses, it is enough to concentrate on the last phase of the conflict before the WTO panel and the Appellate Body. Let it suffice here, as a matter of historical background, to recall that NAFTA contained an annex on trade in sugar,[157] according to which the US was bound to open its sugar market further to Mexican cane sugar imports. It is controversial if or to what extent this further opening remained part of the agreement after the US Congress approved NAFTA. There was a US side letter that seemingly reneged on these promises, but Mexico contested the validity of this side letter. In any case, the US market was not opened further to Mexican cane sugar, whilst the Mexican market opened up to US-produced HFCS. Mexico started an anti-dumping procedure against HFCS imported from the US and also requested the institution of a NAFTA panel under Chapter 20 (inter-state procedure) in order to determine the status of the US concessions in respect of Mexican cane sugar. The HFCS anti-dumping duties were attacked by the US under the WTO DSU and Mexico was condemned both for the original investigation imposing the duties and for the inadequate implementation of the panel report.[158] The same anti-dumping duties were also attacked under Chapter 19 of NAFTA with the same result. There has been serious criticism of this ruling on the basis that the NAFTA panel gave too much heed to the WTO panel result without paying sufficient attention to national (in this case, Mexican) anti-dumping law, which is the yardstick for the procedures under Chapter 19.[159]

At the same time, the US used the inadequate implementation of Chapter 20 dispute settlement and notably the absence of consensus on the roster of panelists to block the selection of panelists for a NAFTA panel that Mexico had requested. This blocking continued for years. Mexico then decided to impose an extra tax on soft drinks that used

HFCS as sweeteners, whilst soft drinks that used cane sugar as sweetener were not taxed. While neutral on the surface, the tax clearly discriminated *de facto* against US soft drinks that were produced mostly with HFCS. It is not fully clear whether this tax was imposed as a primitive way to re-establish balance, after the US sugar concessions, in Mexico view it, were not honoured, or whether this was a countermeasure against the US for consistently blocking and so causing a breakdown in the NAFTA dispute settlement that was intended to be automatic and compulsory. However, there are many indications that the latter was the case. This is rather ironic, since in the GATT days the US had always argued that — if there was a breakdown of dispute settlement because of the blocking of the establishment of a panel — its right under general international law to take unilateral trade measures as countermeasures was revived. Mexico thus turned the tables on the US.

However, the US case under the WTO DSU against the Mexican retaliatory tax on HFCS in soft drinks was successful, and hence Mexico was denied the right it possibly believed it had under general international law. That is the right to take countermeasures of a trade nature in response to the US blocking of the NAFTA panel. Before the panel and the Appellate Body, however, Mexico never explained the fullness of its case. It merely argued that the panel and the Appellate Body should not rule on the case, instead of advancing the claim that the WTO could not be used as a means of taking away its right to take countermeasures under general international law. Even its plea of abstention was not fully developed and did not contain an unambiguous invocation of the fork-in-the-road provision of Article 2005(6) NAFTA.[160] It could have argued that it was immaterial that the NAFTA panel was not composed, but that it had elected to bring the case to NAFTA and that, therefore, NAFTA was competent to settle the dispute. It might have fallen foul of the problem of identity of cases, since at first blush Mexico's NAFTA case was against the US interpretation of the NAFTA Annex on sugar and the US WTO case was about the Mexican surtax on soft drinks sweetened with HFCS.[161] Obviously, the US simply went on to argue that the surtax was the only problem and that it had a right to have that case decided.

Since a court normally is only as good as the parties before it, one should not blame the Appellate Body for in the end following the US lead, since there could indeed be little doubt that the tax was contrary to GATT Article III:2 and could not be excused under Article XX(d). The Appellate Body was clearly worried by the idea that it would have to apply NAFTA law in taking a position about the US blocking of the composition of the Chapter 20 panel, arguing that it was strictly limited to applying WTO law.[162] The main interest, however, of the AB report resides in the insistence with which it argues that because of the compulsory nature of the WTO dispute settlement system (which it situates mainly in the interplay between Articles 23 and 3(2) and 3(3) of the DSU) it hardly has an option of refusing jurisdiction.[163] The Appellate Body even explicitly supported the panel's statement that a WTO panel "would seem… not to be in a position to choose freely whether or not to exercise its jurisdiction".[164] On the other hand, "mindful of the precise scope of" Mexico's arguments, the AB explicitly states that it expresses no view "as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it".[165] In other words, although Mexico had perhaps not made the best possible arguments, the chances that a panel could ever decline to exercise jurisdiction exist, but would seem to be very slim, since panels fundamentally are not free to do this, in the view of the Appellate Body.

This conclusion is worrisome to the extent that the AB's conclusion would seem to emphasize too much the lack of freedom of panels to decline jurisdiction. In this way, the Appellate Body may well have given too little weight to the inherent unfairness of a situation in which one party unlawfully frustrates an available

dispute settlement procedure agreed between the parties and nevertheless obtains the full protection of the compulsory dispute settlement mechanism of the WTO on what is fundamentally the same issue. The AB's reference to "other circumstances" in which a panel might refuse to rule on the merits of a case is perhaps testimony to this sentiment. Some have concluded that this may leave an opening for the Appellate Body in the future to regard such problems of "unclean hands" as a question of lack of admissibility, whereas the compulsory jurisdiction of the WTO dispute settlement system would be fully maintained.[166]

Obviously the drafters of the DSU had sought to establish a system of dispute settlement that was watertight and no longer gave room for unilateral action. On the other hand, they were not yet aware of the coming explosion of judicial and quasi-judicial bodies and litigation that was about to take place, both in trade itself and in closely related areas, like investment arbitration. This is a situation to which the panels and the Appellate Body will have to adapt. No doubt they will remain the *primi inter pares,* that is the first choice so to speak, of the international courts in the field of trade, but some accommodation of other systems of dispute settlement in this field must be possible when the circumstances warrant it. One would think that the Appellate Body's invocation on other occasions of its inherent judicial powers,[167] which include the *compétence de la competence*, i.e. the power to define the court's own jurisdiction, would also include the power not to exercise one's own jurisdiction if there were overriding reasons to do so.[168]

In whichever way one chooses to define the questions of basic fairness discussed above, as a matter of admissibility or by distinguishing the exercise of jurisdiction from the presence of jurisdiction as such, it would seem obvious that some adaptation of primarily the WTO dispute settlement system as the system with the greatest power of attraction among many other dispute settlement mechanisms requires some adaptation.[169]

4.4.2 The *Brazil-Retreaded Tyres* case

Brazil *Retreaded Tyres* is another case on which a lot of ink has been flowing. A short summary of the case risks being necessarily incomplete and may even seen as unbalanced.[170] What is important for the purpose of this report is to focus the attention on how the Appellate Body treated the ruling of a Mercosur tribunal. This Tribunal ruled that the Brazilian restrictions on the importation of re-treaded tyres and on tyre carcasses from which re-treaded tyres could be produced constituted new obstacles to trade within Mercosur. Hence, the restrictions had to be eliminated within Mercosur, and in particular in the trade with Uruguay, which was a traditional supplier of re-treaded (re-moulded) tyres to the Brazilian market. This ruling of the Mercosur tribunal shot a hole in the general applicability of the Brazilian import restrictions and made them clearly discriminatory. The question was whether this Mercosur exception was at odds with Brazil's defense of the measure as justified by Article XX(b) as a measure necessary for the protection of human health, because it was applied in a manner that constituted a means of arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

The panel had taken the view that the discrimination between the Mercosur countries and the EU was undeniable, but that it was not unjustifiable, because the effect was negligible. Moreover, the discrimination was not arbitrary because it was the result of a judicial decision. The AB did not agree with the panel's *de minimis* approach to unjustifiable discrimination: the effects could not be the sole reason for deciding that discrimination was not unjustifiable. Effects of discrimination might play a role in the weighing and balancing test, but there should always be a link with the objective of the impugned measure – which was clearly absent here, if the objective was the protection of human health.[171]

As to the arbitrary nature of the Mercosur exception, the AB agreed that court-ordered measures were normally not arbitrary, but that this was not really the point here because of the need that there be a link between the measures actually taken and the objective pursued. The measure, with the gaping hole of the Mercosur exception, was no longer consistent. This was the reason why the measure no longer bore a reasonable relationship to its professed objective.[172] This aspect was emphasized by the AB, when – in a clear attempt to show that it did not blame its brethren of the Mercosur Tribunal — it berated Brazil for not pleading the human health exception from the Mercosur Treaty (Article 50d) in the case before that Tribunal.[173] Pleading that exception might have led to an intra-Mercosur barrier similar to the one now in place only in Brazil's trade with third countries, and would have demonstrated that Brazil was entirely serious "*tous azimuths*" about protecting human health.

In short, this case stands *inter alia* for the idea that consistency is important for health based exceptions to GATT and that lack of consistency may well be indicative of abuse of such exceptions, which the *chapeau* of Article XX seeks to prevent. It would seem that the strong criticism leveled at the Appellate Body for having maltreated the Mercosur Tribunal[174] is perhaps a wee bit exaggerated. The judgments of other international tribunals certainly deserve a certain amount of deference, but given that the Brazilians had totally neglected to plead the health exception (which was available) before the Mercosur Tribunal and thus had shown doubt about the consistency of their measure, there was no escaping at least some indirect criticism. Moreover, the consequences of the divergence between the judgments of the Mercosur Tribunal and of the AB are quite limited in the end as they do not stand in the way of the basic value of free trade within an FTA. That is because the health exception was available and could be legitimately applied by Brazil and, furthermore, the consequences still permitted Brazil, with a few modifications, to maintain the essence of its health-based measures.

4.4.3 The Softwood Lumber cases

The Softwood Lumber cases are, if possible, even more complicated than the previous examples of clashes of jurisdiction. However, they are so illustrative of what must be qualified as serious excesses of conflicting jurisdiction that they deserve at least a sketch.[175]

In 2001, after the expiry of the 1996 Softwood Lumber Agreement that resolved the third softwood lumber episode between Canada and the US, the parties almost immediately started new procedures. The core of all these disputes was (again) the question of whether the remuneration against which Canada grants so-called stumpage rights to loggers on public lands constitutes a fair price or is too low and thus amounts to a subsidy. Alternatively, this allegedly too low price for stumpage rights allows Canadian loggers to export lumber at prices below normal value, which makes them guilty of dumping. Hence, Canadian softwood lumber is hit by US countervailing duties and/or US anti-dumping duties, which are invariably appealed by Canada, either before a NAFTA binational panel under Chapter 19 or before a WTO panel, followed by an appeal to the Appellate Body. This has led to diverging reports from the NAFTA and WTO panels or Appellate Body. This should not be entirely surprising, since although the parties are identical (the two States), the law applied is different. WTO law is applied by the panel and the AB, whilst a NAFTA binational panel under Chapter 19 must apply US subsidy and anti-dumping law. It has also been signaled that NAFTA panels progressively became more and more assertive, as the US countervailing duty and anti-dumping authorities tried to re-issue decisions that differed little from earlier measures that had been condemned by a panel. Finally, the panels were giving rather specific instructions to these authorities, perhaps precisely because NAFTA's rules on the implementation of Chapter 19 panel reports are not very detailed or explicit. On the other hand, the WTO implementation mechanism continued to work, as usual, at arms length, thus allowing the national authorities

to redo the determinations following the panel and AB reports.[176]

Matters were further complicated by the fact that three Canadian forest product firms started a NAFTA Chapter 11 investment case against the US. These proceedings ran in parallel with renewed negotiations for the conclusion of another Softwood Lumber Agreement. In an earlier decision in a Chapter 11 case a US investor in Canadian lumber operations had obtained the ruling of principle that measures to implement the 1996 Softwood Lumber Agreement (limitation of export permits and the costs of obtaining them from the Canadian government) are not merely measures related to trade in goods, but also measures in respect of investment.[177] Inspired by this ruling, the Canadian firms argued broadly along the same lines, namely that certain conduct by US authorities in the framework of anti-dumping and countervailing duty investigations (retention of certain duties that had to be returned) constituted measures in respect to investment. Luckily for the stability of the new Softwood Lumber Agreement that was concluded on 26 September 2006, the panel managed to distinguish the case at hand from the case just mentioned above.[178] The panel arrived at the conclusion that in NAFTA there was a presumption that there should be no overlap between the different procedures, and saw this presumption confirmed after an exhaustive analysis of the structure of the NAFTA and the way it handles restrictions and exclusions. This seemed to end the threat to the new Softwood Lumber Agreement of 2006, but because of one technicality not entirely.[179] This necessitated Canada and the US to amend the Softwood Lumber Agreement within three weeks after its conclusion in an attempt also to settle the remaining claims of the Canadian companies.[180] The episode illustrates well the complications that investment arbitration parallel to trade cases can cause, even within a single treaty, such as NAFTA. The complications may be larger when the investment protection procedures are wholly apart from the trade litigation.

4.5 Evaluation

It is obvious that conflicts of jurisdiction have considerable drawbacks in and of themselves. In addition, they give a sharper edge to conflicts of norms. If jurisdictional rules are drafted in such a way as to grant exclusive and compulsory jurisdiction, as is the case with the WTO dispute settlement system as well as with the European Court of Justice and the NAFTA panels (insofar as the parties have elected to prefer them over WTO panels), the international courts and tribunals have an unmistakable tendency to crowd out the jurisdiction of other international dispute settlement bodies. As a consequence, the dispute is inevitably decided under the substantive rules of the "stronger jurisdictional system" (or the system with the greatest power of attraction), if they are arguably applicable to it, rather than the substantive rules of a system that might be equally or better applicable, but has "weaker" jurisdictional provisions. Thus important questions of basic fairness relating to access to relatively weaker systems of dispute settlement are ignored, as in the Mexico/US sugar case. Moreover, systems with residual jurisdiction, like the ITLOS,[181] often find themselves sidelined in disputes that they might solve equally well or better, as compared to the international courts and tribunals to which the dispute is finally brought. The same is true in theory, but not so much in practice, for the relatively weak voluntary dispute settlement systems of MEAs.

The picture is further complicated by the problem of the identity of cases. As is clearly demonstrated by a number of issues that played out in different forms in NAFTA and in the WTO, one can maintain that technically the disputes are not the same, since the applicable law is different (anti-dumping in NAFTA and WTO) or the parties are different (investment disputes in NAFTA and anti-dumping or anti-subsidization procedures in NAFTA or the WTO). The complications that result are such that the whole thing becomes highly contentious, even bad-tempered and unmanageable, or nearly so. As we saw in Softwood Lumber, in the end

the governments had to step in and conclude an agreement that settled and unraveled the litigation through a package deal. And even then, the companies involved were in a position to derail the settlement by investor claims that argued that the settlement took away (part of) their investment and the agreement had to be amended, but with an uncertain outcome.

To summarize, conflicts of jurisdiction, combined with the possibility to move between different *"voies de droit"*, can bring about international tensions rather than help to defuse them. It is interesting to note, however, that the experience within Europe seems to indicate that, if courts with (near)-equally strong jurisdictions (compulsory and exclusive to slightly different degrees) confront each other, such as the ECJ, the European Court on Human Rights (ECtHR) and the Court of the European Free Trade Association (EFTA), but are also "condemned to co-exist", they succeed to do so reasonably well, showing each other a modicum of deference and happily citing and borrowing from each other's judgments and rulings.[182] This is accompanied by meetings between these courts, which originally were informal, but have taken on a much more regular and organized character over the last few years. This seems to have benefited the coherence between the judgments of these different courts within Europe to a rather remarkable degree.

5. CONCLUSIONS AND RECOMMENDATIONS

5.1 Where do the Interests of Developing Countries Lie?

Before coming to conclusions with respect to conflicts of norms and conflict of jurisdictions, it may well be useful to ask ourselves the question of how developing countries figure in all of this and where their interests lie.

There is little doubt that developing countries, big and small economically and politically speaking, like all WTO Members have an interest in good, effective and well-functioning dispute settlement in the WTO. They need to defend their interests at the WTO, and for this they may need to have recourse to dispute settlement. On the whole, dispute settlement has worked for developing countries, not just for the larger ones like Brazil, which have become sophisticated litigators in their own right, but also for the smaller ones. Obviously, the latter, just like small developed countries, suffer from the natural asymmetries in size that are inherent in the international system and for which the power of the law, such as it is, is only a partial cure. Such asymmetries of power also exist within national systems of law and have similar effects. Nevertheless, this partial cure is well worth having and it is only just that there are mechanisms of "legal aid" in the system that help also smaller developing countries obtain the assistance necessary to defend their rights.

Most countries, presumably have no interest in a dispute settlement system that gives too much leeway to competing jurisdictions and to many parallel proceedings that only create uncertainty. In such situations the WTO dispute settlement system can no longer fulfill the main objective of the system, namely – in the words of Article 3.2 DSU "providing security and predictability to the international trading system". Developing countries, moreover, in many instances will also not have required legal capacity, that is the human or financial capacity to carry out the very large-scale operations that are necessary to work in competing jurisdictions or parallel proceedings.In addition, these are often legal operations for which the existing mechanisms for legal aid in the WTO system (including the Advisory Centre on WTO Law) are not available and/or equipped and probably should not be equipped.

It should be said that such parallel procedures and fights over jurisdiction that have happened in the last years, especially in NAFTA, should serve as a warning, since in the end they become a festival for lawyers that manage to weave an ever tighter web of national cases, RTA cases, WTO cases and investment cases. Though in the end large state participants in the dispute settlement system will take up the burden of following, intervening in, and litigating such cases, it would seem generally advisable that all states, whether developing or developed, seek ways to restrict such competing or parallel procedures. Normally it is the function of dispute settlement to depoliticize trade disputes, but in such complex cases that are fought in so many national and international jurisdictions, this function is lost and is turned into its opposite: such cases stir up political trouble rather than dampening it down.

5.2 Conclusions

Conflict of norms, taken in a broad sense, is a serious problem that deserves our full attention. Many examples of actual and potential conflicts of this nature, as between WTO law and other international agreements that directly or indirectly touch upon trade and the treatment of traded products behind the border, have been reviewed above, of necessity in a rather cursory fashion sometimes. However, this report cannot but revert to the result of other research that has been carried out on this topic for almost a decade now. The result of that research is that conflict of norms is a problem that can be solved and in many instances has been solved, since international law has provided many instruments

for international courts and tribunals, including the WTO panels and Appellate Body, to do so. The instruments are rules of interpretation that are derived from general international law and the law of treaties. Often they are specific rules of conflict or priority that have been written into the international agreements that contain the substantive rules of international law to be applied and interpreted, not only by international courts and tribunals, but also by the states parties to them and the international organizations or the Conferences of the Parties within whose framework such rules are elaborated.

Take what we have called the "classical trade-related MEAs" above. In spite of much speculation and dire warnings among scholars and practitioners, they have never been contested in WTO cases since they were first created, mainly in the late nineties and early 2000's. WTO law, technically at odds as it may be with some provisions of this category of MEAs, has not been mobilized against them. For all practical purposes, they have been recognized as *lex specialis* that is carved out of WTO law. What seemed a bold, even excessive suggestion seven years ago,[183] has now been confirmed by a practice of non-litigation in the WTO.

The newer type of framework approach to MEAs as applied in the areas of biodiversity and climate change creates more complicated problems. This is because the WTO dispute settlement system has to react to changing approaches to very broad categories of products, the concrete manifestations of which are still unknown (biotechnological products and their trade) or to approaches to addressing a truly global problem that may take many forms, including the creation of new markets, such as emission trading rights. Even within these new kinds of environmental instruments, however, a distinction can be made between different instruments. On the one hand, there are instruments such as the Biosafety Protocol that by nature are very closely linked to trade in goods and for which the development of the notion of mutual supportiveness is very important for its relation with the SPS agreement. On the other hand, there are instruments like those based on the UNFCCC in the area of climate change, which are further removed from trade and are more self-contained. The compliance regime of the Kyoto Protocol, for example, is very much centred on influencing the position of states parties through measures acting on the self-created system of emission rights that is one step removed from the WTO system. Meanwhile, the idea that risk assessment needs to have a scientific basis is common to the Biosafety protocol and the SPS Agreement and needs to be handled with great care and mutual supportiveness. That does not detract from the fact that a future instrument to succeed the Kyoto Protocol may have WTO repercussions. This would rather be the consequence of the fact that such an instrument would leave states the freedom to impose border tax adjustments once they take measures to curb greenhouse gas emissions at the national level through recourse to taxation. That freedom would have to be used in conformity with the WTO rules and case law on the subject. In order to provide greater certainty than that provided by waiting for litigation on the matter, one might take a leaf from the experience of the Kimberley system and negotiate a waiver under the WTO that sets uniform legislative criteria for such border tax adjustments.[184]

5.3 Recommendations

Drawing on what has been written above on conflicts of jurisdiction, it is important to recall the law of the strongest or most attractive jurisdiction. A jurisdictional system, like that of the WTO, that is compulsory, exclusive and provides for a full set of reasonably effective remedies, will continue to exercise great "gravitational pull" on disputes. Potential complainants will be stimulated to define their problems in terms of WTO law and try to obtain access to the system in that way. Even though the WTO panels and the Appellate Body have

the inherent power to abstain from exercising jurisdiction (or deny admissibility) and should use it more, it is perhaps asking too much to believe that this will not remain the exception and that they will not go on deciding issues that require the interpretation, in an incidental manner, of non-WTO agreements, if only because it is necessary to solve a WTO case. Given this reality, it is of great importance that the WTO dispute settlement organs use their powers under Article 13 of the DSU to seek information from those that can shed light on the meaning and interpretation of the agreements.[185] Perhaps they could be inspired by a practice, introduced by the ICJ after an amendment to its Rules of Court in 2005,[186] of sending a letter to the states and international organizations that are parties to the agreements that the ICJ is asked to interpret. With a slight modification, namely that such a letter should also be sent to any international organization or COP within whose framework the agreement to be interpreted was elaborated, such a practice could be of great help in achieving dispute settlement outcomes that stay in harmony with agreements that play a role in dispute settlement procedures before panels and the Appellate Body.

Given the law of the strongest jurisdiction, it would be wise, if states decide that their international agreement on a trade-related subject or their FTA or CU is in need of a serious dispute settlement system, to make their system as watertight as possible in order to avoid the problems of multiple litigation between the same or near-identical parties on the same issue. If parties nevertheless want to create the possibility to also have issues of WTO law decided by WTO panels, for instance because their regional agreement refers to WTO provisions, they should draft a very strong "fork in the road" provision, which cannot possibly be broken. In such cases it is important not only that the "fork in the road provision" itself is stringent, but also that all other elements of the specific dispute settlement system are foolproof.

Another possibility for regulating the relationship between dispute settlement inside FTAs and CUs and the WTO DSU machinery might be to create a system of preliminary references from the FTA and CU courts to the WTO Appellate Body on questions of interpretation of WTO provisions. At the present stage, however, this might not be realistic.

It was already mentioned earlier that the relationship between two equally "strong" jurisdictional systems perhaps paradoxically seems to be characterized by greater mutual reference and even deference than when the jurisdictions are less evenly matched. We have also seen the tendency to create informal consulting structures between such courts, which at least between European Courts have grown into very regular meetings. It would be important that the Appellate Body continues and expands the meetings it is already having for instance with the European Court of Justice. These are useful places to informally discuss problems such as the identity of cases and the flexibilities that might be possible in order to take account of the substantive identity of issues, rather than always rely on the classical criteria: same parties, same cause of action, same legal questions. However, such consultation practices can only work among standing courts and many of the structures of dispute settlement in the broader trade world are based on non-permanent structures. It may thus be necessary to have recourse to treaty-based solutions on such issues.

Treaty-based solutions may also be necessary in order to reduce or to limit multiple litigation between investor-state cases and state to state trade litigation. Somehow, a line should be drawn between trade cases disguised as investor-state cases that are designed to re-litigate or to complicate an ongoing trade case, and cases where investor protection is a real problem, quite apart from an ongoing trade case on broadly the same issue. That may actually be too difficult to do through hard and fast treaty rules. In order to be able to take account of the subtleties of individual cases, it may rather be necessary to work on the (further) development of a doctrine of forum non conveniens in public international law as it exists already in private international law

through the practice of the panels and the courts concerned. This is not impossible, as has already been shown by the Order of the UNCLOS Arbitral Tribunal in the MOX-Plant case, ceding jurisdiction to the ECJ.

5.4 Summary of Conclusions and Recommendations

- Conflicts of norms are almost inevitable and natural in international law. In principle, there is an **extensive toolbox available to treaty-makers as well as to courts in order to solve conflicts of norms**.

- **Conflicts of norms can be prevented at the "legislative" level** by writing explicit clauses into the relevant international agreements, which clearly lay down which agreement will prevail: the older one, the newer one, or the more specialized one. In the text some simple formulae for such clauses are suggested.

- Conflicts of jurisdictions are in principle avoidable. If they are allowed to occur, they serve to sharpen the conflicts of norms and easily become dysfunctional. In most cases, they become an expensive festival for lawyers.

- **A well-working and credible dispute settlement system is in the interest of both developed and developing countries**, not just in trade, but also in the field of investment. Both groups have an interest in curbing conflicts of jurisdiction in particular.

- **Well-working dispute settlement means** not only an effective system (as now exists in the WTO), but also **a well-balanced system that leaves room for the rules and courts of other treaty-systems**. Only a dispute settlement system that is capable of leaving such room is a "grown-up" dispute settlement system.

- **Conflicts of norms have proved not to be much of a problem for "classical trade-related MEAs"**. They have never been and are no longer likely to be contested in WTO cases. They are recognized as "*lex specialis*".

- **"Framework MEAs" can be distinguished in two categories: (1) The CBD and its progeny**, for which it is very important to develop further the notion of "mutual supportiveness", since they are so close to agreements like the SPS and TBT agreements; and **(2) the UNFCCC and its progeny**, which are much more in a world of their own and which are unlikely to clash with WTO rules.

- **It is important to take the notion of mutual supportiveness seriously and to develop it seriously**; it is vital for a balanced co-existence between WTO and a large number of framework MEAs. Otherwise the law of the "strongest dispute settlement system" risks working to the detriment of these MEAs. Fortunately, there are no examples of this so far.

- In connection with the possibility that border tax adjustments may be used on a considerable scale in connection with the climate change MEAs, it is advisable to negotiate a WTO waiver that would contain a minimum harmonization for such measures (following the example of the Kimberley Arrangement).

- It is **important that the panels and the Appellate Body** create a rule or a practice that is based on a broad reading of Article 43(2) and (3) of the ICJ Rules of Court, which empowers them to **send letters systematically to the international organizations or MEA secretariats** that are responsible for the administration of, or a party to, the multilateral agreements **that play a role in the procedures brought before them**. This will be an intensification and systematic application of existing practice under Article 13 DSU.

- In order to avoid jurisdictional conflicts it is of the **utmost importance that the jurisdictional clauses** of the dispute settlement systems created within the framework **of FTAs are completely watertight**, so that either recourse to the WTO dispute settlement system is clearly excluded or the relevant "fork in the road" rule leads

to an irreversible choice between the FTA system and the WTO system. If the first choice is made, the FTA system should again be fully watertight in all other aspects (choice of panelists etc).

- **Regular contact between the WTO Appellate Body and other international courts** or (arbitral) tribunals in neighbouring fields, including investment, **should continue and be improved and strengthened**. If the other dispute settlement systems do not have a permanent court or secretariat, serious thought should be given to formulate minimal treaty rules on the relations between the two systems.

- It is **of great importance that international courts and tribunals** in neighbouring fields, like trade, investment, the environment etc. try to **develop a doctrine of *"forum non conveniens"*** between themselves, **or** at the very least **use their inherent powers to abstain from exercising jurisdiction or rule on admissibility if there are serious reasons to do so**.

ENDNOTES

1 Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, UN Doc. A/CN.4/L.682 (April 13, 2006), at 11.

2 The second approach won out at the Vienna Conference on the Law of Treaties because it was considered that the "objective" will of the parties was in the end best expressed in the text and context of the Treaty. The other school attached more importance to the "real" will of the parties and preferred that parties have great liberty on adducing evidence from the preparatory work and the circumstances surrounding the treaty. The ILC in the end considered these to be mere "complementary means of interpretation", as they were less "authentic" expressions of the will of the parties and possibly subject to greater manipulation. See Yves Le Bouthillier, 'Commentaire de l'article 32' in Olivier Corten & Pierre Klein, *Les Conventions de Vienne sur le droit des traités. Commentaire article par article* (Bruylant, Bruxelles 2006), 1340 ff.

3 GATT Panel Report, *United States - Taxes on Automobiles*, DS31/R (report not adopted); and GATT Panel Report, *United States - Restrictions on Imports of Tuna*, DS21/R–39S/155 (report not adopted).

4 GATT Panel Report, *United States - Taxes on Petroleum and Certain Imported Substances* (Superfund), BISD 34S/136.

5 Appellate Body Report, *US - Gasoline,* WT/DS2/AB/R (adopted May 20, 1996), at 17.

6 See Article XXIV (6) GATT.

7 See Articles V and Vbis of GATS. The hierarchical relationship, as we will see below is based on two points: the recognition in the FTA or CU that conformity to Article XXIV GATT and/or V GATS is necessary (Section 3.5.1) and the case law of the AB, which subjects FTAs to full scrutiny in the light of Article XXIV (Section 3.5.2).

8 For instance the human rights regime in Western Europe and the Americas, each with its own regional human rights court with compulsory jurisdiction. In the trade area itself NAFTA, Mercosur and Caricom have dispute settlement systems that are well-established and have strong jurisdictional provisions.

9 The author would like to acknowledge the important research assistance for this chapter of Dr. Zsuzsanna Deen-Racsmany.

10 E.g. Wilfred Jenks 'The Conflict of Law-Making Treaties'(1953) *30 British Yearbook of International Law,* 401–453, at 435 "a conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible. … There is no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another".

11 E.g. ILC Study Group Report, UN Doc. A/CN.4/L.682, at 19, para. 25. See also Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands' (2004) 25 Michigan Journal of International Law, 903–927, at 907, cf. Joost Pauwelyn, (italic font) Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law (CUP, Cambridge 2003), 7-8) Nele Matz-Lück, 'Treaties, Conflicts between' Max Planck Encyclopedia of International Law, obtained from http://www.mpepil.com para. 6.

12 Erich Vranes, 'Comments on Joost Pauwelyn's' paper, in Stefan Griller ed., *At the Crossroads: The World Trading System and the Doha Round*, Springer, Vienna 2008, pp. 83-98, at 85-86. Vranes points out that in legal theory so-called contradictory conflicts (permission v. prohibition and permission v. obligation) and contrary conflicts (prohibition v. obligation) are all recognized as legal conflicts. See also Erich Vranes, *Trade and the Environment, Fundamental Issues in International Law, WTO Law, and Legal Theory*, OUP Oxford 2009, Chapter 1, *The definition of 'Conflicts of Norms'*, 9-38.

13 This may or may not be a problem. In the case law of the European Court of Justice it was argued that it was in conformity with the normal rules of treaty interpretation to give a different interpretation to the prohibition of quantitative restrictions and all measures of equivalent effect within the framework of the object and purpose of a Customs Union Agreement (CU) from that within the framework of an FTA. In the first case a one-time use of the intellectual property right was considered to trigger exhaustion for the whole CU, but the same effect was not considered inescapable for an FTA which, unlike a CU did not have a single external barrier. See Case 270/80, *Polydor* [1982] ECR 329.

14 *Ius cogens* or peremptory norms of international law are norms from which no derogation is permitted and which is accepted and recognized as such by the international community as a whole. Examples are the prohibition of aggression, the prohibition of torture, the right to life etc. See Article 53 of the Vienna Convention on the Law of Treaties.

15 Article 103 of the UN Charter reads as follows: "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".

16 Treaties may however in fact enjoy primacy as constituting *lex specialis*. See further Section 3.2.2 below.

17 Ibid.

18 In cases of irreconcilable conflict, rules of interpretation may nevertheless be useful to determine priority of the conflicting obligations.

19 ILC Report, UN Doc. A/CN.4/L.682 at 25, para. 37ff.

20 See Cartagena Protocol, preambular paragraphs 8-10, which read as follows: "(8) recognizing that trade and environment agreements should be mutually supportive with a view to reaching sustainable development; (9) Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements; (10) Understanding that the above recital is not intended to subordinate this Protocol to other international agreements".

21 See Rotterdam Convention, preambular paragraphs 9-11, which read as follows: "(9) recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development; (10) Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection; (11) Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements".

22 See Stockholm Convention, preambular paragraph 9, which reads as follows: "Recognizing that this Convention and other international agreements in the field of trade and the environment are mutually supportive".

23 See UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, of which Article 20(1) imposes a good faith obligation on the parties in the application of the treaty and then continues as follows: "Accordingly, without subordinating this Convention to any other treaty (a) they shall foster mutual supportiveness between the Convention and other treaties, and (b) when interpreting and applying other treaties…. Parties shall take into account the relevant provisions of this Convention. (2) Nothing in this Convention shall be interpreted as modifying rights and obligations of Parties under other treaties".

24 Doha Declaration, para. 31, which reads as follows: "With a view to enhancing the mutual supportiveness of trade and environment, we agree to negotiations, without prejudging their outcome, on (1) the relationship between the existing WTO rules and specific trade obligations set out in Multilateral Environmental Agreements".

25 An exception are Laurence Boisson de Chazournes et Makane Moïse Mbengue, 'A propos du soutien mutuel: les relations entre le Protocol de Cartagena et les accords de l'OMC' (2007) 4 Revue Générale de Droit International Public, 829–863.

26 The text of Article 20(1) is construed so as to start out with the basic notion of good faith which "accordingly" obliges parties (a) to foster mutual supportiveness and (b) the harmonization principle when interpreting other treaties. For the full text of Article 20(1), see note 23 above.

27 See section 3.4.2., page 17 ff.

28 Anthony Aust, *Modern Treaty Law and Practice* (CUP, Cambridge 2000) at 195. Gabrielle Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties' (2001) 35(6) Journal of World Trade 1081–1131, at 1088–1089. ILC Study Group conclusions, UN doc. A/CN.4.L.702, at 15–16, conclusions 22–23. The text mentions that such systems are "more or less self-contained, since none of them has achieved a state of total isolation from general international law and other such regimes." This stands to reason, since even States have proved not to be impermeable to international law.

29 Bruno Simma, 'Self Contained Regimes' (1985) 16 Netherlands Yearbook of International Law, 111-136, and Bruno Simma & Dirk Pulkowski, 'Of Planets and the Universe: Self-Contained Regimes in International Law' (2006) 17(3) European Journal of International Law, 483–529. ILC Study Group conclusions, UN doc. A/CN.4.L.702, at 15–16, conclusions 22–23. The text mentions that such systems are "more or less self-contained, since none of them has achieved a state of total isolation from general international law and other such regimes." This stands to reason, since even States have proved not to be impermeable to international law.

30 Especially the fact that such special systems have their own form of remedies and that the normal rules on countermeasures in international law are not applicable to them is of great importance. The case where this first arose was the holding in captivity of the personnel of the US Embassy of Iran. In the view of the ICJ the only remedy available to Iran for the fact that some of the personnel had indulged in (alleged) non-diplomatic activities was the declaration of *persona non grata*. Hence the alleged unlawful activity of the personnel of the Embassy could not excuse the breaches by Iran of international diplomatic law and were not lawful countermeasures. In other words diplomatic law is impermeable to the normal remedies of general international law, see ICJ Reports 1979, 3, at 11. See also Simma, op.cit. NYIL 1985, at 117.

31 One of the first acute observers of the development of international organizations into such regimes was Wilfred Jenks in the late 1940's and early '50's. See *op. cit.* fn. 10, at 448. He spoke about "autonomous interpretation" of the treaties establishing such organizations, i.e. an interpretation that was driven by the needs of the organization and did not follow the normal rules of interpretation of international law.

32 See Section 2 above.

33 Article 23(1) DSU.

34 Article 22(2), (3), and (4) DSU.

35 Article 22(5) and (6) DSU.

36 Article 22(6) and (7) DSU.

37 At the time of the preparation of the VCLT the "treaty density" of the international system was much lower than at present and it was still considered risky to create a kind of hierarchy between treaties which formally all were concluded at the same inter-state level.

38 See e.g. ILC Study Group conclusions, UN doc. A/CN.4.L.702, at 8, conclusion 5.

39 Article 34 VCLT.

40 ILC Study Group conclusions, UN doc. A/CN.4.L.702, at 9, conclusion 6.

41 In some ways, therefore such preambular clauses are used as if they are part of the preparatory record mentioned in Article 32 VCLT as secondary means of interpretation. Such clauses are accordingly to be invoked when the application of other means of interpretation listed in Article 31 VCLT "(a) leaves the meaning ambiguous; or (b) leads to a result which is manifestly absurd or unreasonable".

42 Nele Matz-Lück, 'Treaties, Conflict Clauses' Max Planck Encyclopedia of International Law', obtained from http://www.mpepil.com para. 10.

43 See page 19, 22 and 30 of this study.

44 See Joost Pauwelyn, *Conflict of Norms In Public International Law. How WTO Law relates to Other Rules of International Law*, Chapter 8.

45 GATT 1947, preambular para. 2. Italics added.

46 GATT 1947, Article III(1). The national treatment requirement is subject to a number of exceptions listed in Article III, none of which appear relevant for the purposes of this study.

47 See, for instance, Steve Charnovitz, 'The Law of Environmental "PPM's" in the WTO: Debunking the Myth of Illegality' (2002) 27 Yale Journal of International Law, 59-110.

48 GATT 1947, Article XI. This prohibition is subject to a number of exceptions listed in Article XI, none of which appear relevant for the purposes of this study.

49 Appellate Body Report *US — Gasoline,* at 24.

50 Italics added.

51 For an elaborate discussion of the application of Article XX(b) and (g) see WTO Committee on Trade and Environment. "GATT/WTO Dispute Settlement Practice Relating to GATT Article XX, paragraphs (b), (d) and (g)". Note by the Secretariat. WT/CTE/W/203 (March 8, 2002). Article XIV of GATS is largely identical to Article XX of GATT. TRIPS does not have a similar exception, because exceptions can be found in the individual IP conventions.

52 In respect of "public morals" the panel is ready to give Members leeway to apply the exception according to their own systems and scale of values, Panel Report, *US - Gambling*, WT/DS/285/R (adopted April 20, 2005 as modified by Appellate Body Report), para. 6.461. In respect of the protection of human health, Brazil's view that the accumulation of waste tyres indirectly posed risks to human health, because it raised the risk of certain mosquito-borne diseases, was accepted by the Panel in *Brazil - Retreaded Tyres*, WT/DS332/R, (adopted December 17, 2007 as modified by the Appellate Body) para. 7.84. In respect of exhaustible natural resources, the AB in *US - Gasoline* made it clear that "clean air" could be an exhaustible natural resource, just as in respect of fisheries, even "renewable resources" like fish stocks could nevertheless be deemed to be "exhaustible", se AB Report *US - Shrimp*, WT/DS58/AB/R (adopted November 6, 1998), paras. 129-131.

53 Appellate Body Report, *US - Gasoline*, at 22. See further on the logic behind this seemingly illogical reversal of the literal requirements of the article the Appellate Body Report in *US - Shrimp*, paras. 119–120.

54 SPS Article 2(1), TBT preamble, para. 6.

55 SPS Article 2(4) and 3(2), respectively.

56 SPS Articles 2(2)-(3), 5(6), respectively. See too Article 5(7) SPS on the issue of scientific evidence.

57 SPS Annex C, Art. 1(a).

58 TBT Articles 2(1)-2(4), 5(1)(1)-5(1)(2).

59 On the interpretation of Article IX, see, for instance, Isabel Feichtner, 'The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests' (2009) 20(3) European Journal of International Law, 615–645.

60 "In our view, the function of a waiver is to relieve a Member, for a specified period of time, from a particular obligation provided for in the covered agreements, subject to the terms, conditions, justifying exceptional circumstances or policy objectives described in the waiver decision. Its purpose this is not to modify existing provisions in the agreements, let alone create new law or add to or amend the obligations under a covered agreement or Schedule. Therefore, waivers are exceptional in nature, subject to strict disciplines and should be interpreted with great care". Para. 382 Appellate Body Reports, followed by the rest of the text. *European Communities - Regime for the Importation, Sale and Distribution of Bananas, Second Recourse to Article 21.5 of the DSU by Ecuador,* AB-2008-8, WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA (adopted November 26, 2008).

61 One may recall the grandfather clauses for US agriculture and for specific legislation in respect of sea transport between US harbours, which were terminated. See also the World Trade Report 2009, obtained from http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report09_e.pdf at 39.

62 See, e.g. Train for Trade, UNCTAD, Trade-related Multilateral Environmental Agreements, Module 5 http://r0.unctad.org/trade_env/rene/mod5entext.doc, at 8.

63 Article XVI:3 WTO Agreement: "In the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provisions of the Agreement shall prevail to the extent of the conflict". This paragraph is once more an indication of the extremely narrow, and in our view unrealistic, view of conflict of norms held by the drafters of the WTO.

64 General Interpretative Note on Annex IA: "In the event of a conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex IA to the Agreement establishing the World Trade Agreement, the provisions of the other agreements shall prevail to the extent of the conflict".

65 Admittedly, however, international environmental law is not the sole field of international law which may come into conflict with international trade law and more specifically with WTO covered agreements. Conflicts are perceivable also between the WTO trade regime on the one hand and international law related, for instance, to the protection of cultural diversity, human health (WHO International Health Regulations and the Framework Convention on Tobacco Control), human rights, international labour law, international investment law (ICSID and bilateral investment treaties) on the other. The present subsection gives a brief overview of conflicts of norms between WTO covered treaties and rules pertaining to other fields of international law, before concentrating on MEAs.

66 Cf. the ECJ case involving the fundamental rights problems inherent in the implementation of Security Council resolutions imposing asset freezes etc. on individuals, Case C-415/05P, *Kadi v. Council* and Commission, Judgment of 3 September 2008. On WTO and human rights more generally, see Gabrielle Marceau, 'WTO Dispute Settlement and Human Right' (2002) 14(4) European Journal of International Law, 753-814; and Lorand Bartels, 'Trade and Human Rights' in Daniel Bethlehem, Donald McRae, Rodney Neufeld & Isabelle van Damme (eds.), The Oxford Handbook of International Trade Law (OUP, Oxford 2009), 571-596.

67 See e.g. *US – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38. However, this case was marred by the US argument that it also represented a case of unilateral security sanctions – which probably contributed to the fact that the case was settled in a bilateral deal between the EC and the US.

68 This system of certification was probably covered by Article XX, but in order to be 100% sure a waiver was requested and obtained, see Waiver concerning the Kimberley Certification Scheme for Rough Diamonds, May 15, 2003, WT/L/518, valid for three years and annually renewed after 2006.

69 See Singapore Ministerial Declaration, para. 4, reconfirmed in the Doha Ministerial Declaration, para. 8, at http://www.wto.org/english/thewto_e/coher_e/wto_ilo_e.htm, last visited September 17, 2010.

70 Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries* WT/DS246/AB/R (adopted April 20, 2004).

71 Jeroen Denkers, *for The World Trade Organization and Import Bans in Response to Violations of Fundamental Labour Rights* (Intersentia, Antwerp 2008).

72 Needless to recall that one country's "level playing field" in labour law is another country's "destruction of its natural comparative advantage".

73 Nicholas DiMascio & Joost Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin' (2008) 102 American Journal of International Law, 48-89.

74 See fn.13 above, with reference to established case law of the European Court of Justice. This is the reason that DiMascio's and Pauwelyn's attempt to fashion a "common core" again as between investment and trade cases seems a bit superfluous.

75 See below Section 4.3(c).

76 It is interesting to note that most of the important international agreements on the environment since CITES 1973 have been ratified by more States and regional economic integration organizations (REIO's) than the WTO. According to the information on their websites the major environmental conventions hover around 170 parties or more, whilst the WTO has currently 153 Members. This is not surprising given the onerous accession procedures of the WTO, but is nevertheless not without significance.

77 WTO Agreement, preamble, para. 1.

78 Doha Declaration, para. 6. Emphasis added; see also para. 31.

79 See 1973 Convention on International Trade in Endangered Species (CITES), the 1986 Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) and the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel Convention),

80 See the 1998 Rotterdam Convention on Prior Informed Consent (PIC Convention), the 2000 Cartagena Biosafety Protocol to the Convention on Biodiversity (Biosafety Protocol) and the 2001 Stockholm Convention on Persistent Organic Pollutants (POPs Convention). For the text of the various provisions on mutual supportiveness see notes 20-25 above.

81 See note 23 above.

82 See notes 20-25 above and accompanying text. As stated there, this cannot be reconciled with the way in which the mutual supportiveness principle and the harmonization principle are presented as two different principles flowing from the basic principle of good faith in Article 20(1) of the UNESCO Cultural Diversity Convention. It is also not relevant that, apart the Cultural Diversity Protocol, the notion of mutual supportiveness is only mentioned in the recitals of MEAs. Since it is a principle of interpretation, the preamble or recitals of international agreements is not the wrong place to put such a principle, even if it is not dispositive, as is a normal article of a treaty.

83 See Panel Report in *EC - Biotech*, WT/DS/291,292,293/R (adopted November 21, 2006), paras. 7.65-7.75, severely criticised by the ILC Study Group on Fragmentation, UN Doc. A/CN.4/L.682, at 226-227, because it would deny the fact that the Biosafety Protocol is widely ratified (actually by some 6 States more, though not exactly the same ones, that have ratified the WTO) and therefore, even absent a special clause on mutual supportiveness, would be seen as compatible and to be taken into account in the interpretation of their other treaty obligations, including those from the WTO, by nearly all countries concerned. Obviously, the situation, as presented by the case, was complicated by the fact that the US is nearly the only country in the world that has not ratified the "mother" convention of the Biosafety Protocol, the Convention on Biological Diversity (CBD), or the Protocol itself. Thus the position of the US is almost comparable to that of the "persistent objector" in the formation of customary law and the Panel, therefore, was not in a position to oppose the CBD and the Protocol to the US in the Biotech case. The same was true to a somewhat lesser degree for Argentina and Canada, which did not ratify the Protocol, but are parties to the CBD.

84 For an interpretation of mutual supportiveness that comes to the conclusion that the object and purpose of the other agreement has to be respected, see Laurence Boisson de Chazournes & Moïse Makane Mbengue, 'A propos du principe de soutien mutuel. Les relations entre le Protocole de Cartagena et les Accords de l'OMC' *(2007) Revue Générale de Droit International Public, 829-862, at 836*. It has often been argued that the way in which the principle of mutual supportiveness is followed in the preamble

of the Cartagena Protocol by two paragraphs which are seemingly contradictory (one saying that the Protocol shall not be interpreted as implying a change in the rights and obligations of the parties under other existing treaties, and the other declaring that the preceding recital does not imply the subordination of the protocol to other international agreements) indicates that it has very little value, even as a principle of interpretation. However, it has been pointed out that this merely indicates that mutual supportiveness should fully rule the interpretation, precisely because the Protocol is neither supreme over, nor subjugated to, other treaties, see Hélène Ruiz-Fabri, *Concurrence ou complémentarité entre les mécanismes de règlement des différends du Protocole de Carthagène et ceux de l'OMC* in Jacques Bourrinet & Sandrine Maljean-Dubois (dir.), *Le commerce international des organismes génétiquement modifiés* (CERIC, Aix-Marseille 2002), 149–176, at 160.

85 Boisson de Chazournes & Mbengue, op. cit, at 851-852. Thus –and they are well aware of it - they nibble away at the requirement of state consent that undergirds all of international law. However, they see the preamble as creating an objective regime for the interpretation of the Biosafety Protocol in relation to other international agreements, and in particular the WTO, stating that this was a prime concern of all participants in the negotiation.

86 Train for Trade, UNCTAD, Trade-related Multilateral Environmental Agreements, Module 5 http://r0.unctad.org/trade_env/rene/mod5entext.doc, at 12.

87 A WTO document (WT/CTE/W/160/Rev.4), identified 238 MEA's of which 38 contained trade related measures or whose decision-making bodies have adopted resolutions containing such measures.

88 Cf. the strong reference to the CITES Convention in the Appellate Body Report in *US-Schrimp*, *para*. 132 in order to support the US position that sea turtles are an exhaustible resource.

89 *See* on PPM's with further references, Dan Bodansky & Jessica Lawrence, 'Trade and Environment' in Daniel Bethlehem, Donald McRae, Rodney Neufeld & Isabelle van Damme (eds.), The Oxford Handbook of International Trade Law (OUP, Oxford 2009), 506-537, at 525 ff.

90 However, in that particular case, this would not be truly a prohibition of a PPM, since the dangerous product remained incorporated in the product of which trade was also prohibited, so that it might be defined as a normal product standard.

91 See Appellate Body Report, US – Shrimp, para. 138 ff.

92 Which seems to have been relaxed in the *Brazil- Retreaded Tyres* case, WT/DS/332/AB/R (adopted December 17, 2007) where the AB was content with a measure which merely *contributed* to the objective sought.

93 See doc. UNEP/CBD/WG-ABS/7/INF/3/Part 2, March 3, 2009.

94 As we saw in note 81 above, this is a situation that applies more generally, when comparing numbers of ratifications of MEA's and of members of the WTO; actually most of them are ratified by more than the present 153 WTO Members. These numbers do not imply that all WTO members have ratified all MEA's.

95 Once again, however, the problem is much less serious, if not entirely non-existent in practice, the number of parties to CITES, for example, being appreciably larger than to the WTO, combined with a lack of likelihood that parties to CITES would want to have recourse to the WTO in order to undermine their own sanctioning system.

96 This categorization is a simplified version of the scheme contained in an EU proposal submitted to the WTO Committee on Trade and Environment, WTO TN/TE/W/1 (March 21, 2002), at 6–7. Marceau uses a similar typology in 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties' (2001) 35(6) Journal of World Trade 1081–1131, at 1097.

97 Duncan Brack & Kevin Gray, *Multilateral Environmental Agreements and the WTO*, (RIIA and IISD, London September 2003), at 19.

98 Text available at http://www.ustr.gov/.

99 Cf. Article 12(1) and Article 12(2) of Decision 1/95 of the EC – Turkey Association Council on implementing the final phase of the Customs Union, December 22, 1995, OJ 1996, L35, 1 – 47. The latter provision became a bone of contention in the WTO *Turkey - Textiles* case discussed below.

100 See Euro-Mediterranean Agreement establishing an Association between the European Communities and their member States and the Kingdom of Morocco, preambular para. 11 and Article 6, OJ 2000 L 70/2.

101 For example Article 3(1)(a) of the Agreement Establishing a Framework for an Economic Partnership Agreement between the European Community and its Member States, on the one part, the East-African Community Partner States on the other part, available at http://ec.europa.eu/trade.

102 In this connection it is perhaps interesting to note that, for instance, the Treaty of Ascunsion establishing Mercosur (available at www.sice.oas.org/trade/MRCSR/TreatyAsun_e.ASP) and the Revised Treaty of Chaguaramas establishing the Caribbean Community including the Caricom Single Market and Economy (available at www.caricom.org) do not contain a reference back to these WTO rules, whilst they dispose of courts that are fast growing in importance.

103 See, apart from the reference to conformity with Article XXIV, the references to Articles III, XI and XX GATT 1994 in Articles 1.1, 2.2, 2.8 and 21.1 respectively in the US – Morocco FTA, available at www.ustr.gov.

104 See Articles 18 and 40 respectively of the EU-East-African Community FTA, see above note 99.

105 Appellate Body Report, *Turkey - Restrictions on Imports of Textile and Clothing Products* WT/DS34/AB/R (adopted October 22, 1999).

106 See Article 12(2) of Decision 1/95, note 97 above.

107 Article 3(1) and (2) of the Agreement on Textiles and Clothing.

108 See *Turkey - Textiles*, loc. cit. note103 above, para. 58.

109 Ibid. para. 60.

110 Ibid. para. 62.

111 See Appellate Body Report, *Argentina - Footwear* WT/DS121/AB/R (adopted January 12, 2000) and *US - Steel Safeguards*, WT/DS248, where safeguards were concerned, and Appellate Body Report, *Brazil - Retreaded Tyres*, for a case involving the invocation of Article XX GATT.

112 See the discussion below of the *Brazil - Retreaded Tyres case*, in which the so-called Mercosur exception played a role, p. 00 below.

113 See *US - Steel Safeguards*, WT/DS248/AB/R (adopted December 10, 2003), para. 433 ff. on "parallelism", i.e. the notion that, if a country includes the importation of the relevant goods from its FTA partners in the total imports causing injury, the safeguard measures must also be imposed on such imports.

114 On this issue: Gabrielle Marceau & Julian Wyatt, 'Dispute Settlement regimes Intermingled: Regional Trade Agreements and the WTO' (2010) 1(1) Journal of International Dispute Settlement, 67-96.

115 Joost Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*.

116 See the preamble of the Biosafety Protocol where reference is made to Article 19 on the Convention of Biological Diversity.

117 It should be noted that the WTO organs so far have been notorious for refusing any serious legal vetting of negotiated draft texts as has become standard in UN law-making conferences. See Pieter Jan Kuijper, 'A Legal Drafting Group for the Doha Round – A Modest Proposal',(2003) 37(6) *Journal of World Trade,* 1031-1036.

118 One of the most influential scholarly works on the topic is: Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (OUP, Oxford 2003).

119 For these draft articles, see James Crawford, *The International Law Commission's Articles on State Responsibility, Introduction, Text and Commentaries*, Cambridge 2002. These Articles have been taken note of by a Resolution of the General Assembly of the UN, but have not been converted into an International Convention. Nevertheless, they have obtained already considerable authority, having been mentioned on numerous occasions in judgments of international courts and tribunals.

120 This seems to be the conclusion implicitly flowing from *Mexico - Taxes on Soft Drinks,* WT/DS308, see below Section 4.4.1.

121 Panel Report, *EC - Commercial Vessels*, WT/DS301/R (adopted June 20, 2005). The companion case was Panel Report, *Korea - Commercial Vessels*, WT/DS273/R (adopted April 11, 2005).

122 It is not possible in this context to do justice to the elaborate reasoning of the panel, see Panel Report, *EC - Commercial Vessels*, para. 7.184–7.220.

123 The EC never appealed the panel report and there has been no other comparable case.

124 It is a mere formality to point out that Article 23(1) is not a fully exclusive clause, since Article 25 opens the possibility of arbitration - a possibility that has seldom been used and is unlikely to be used very often in the future.

125 Panel Report, *US - Section 301 - 310 of the Trade Act*, WT/DS152/R (adopted Januari 27, 2000), paras. 7.71 ff., culminating in 7.78 "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".

126 See Georges Abi Saab, 'The Appellate Body and Treaty Interpretation', in: Giorgio Sacerdoti, Alan Yanovich & Jan Bohanes, *The WTO at Ten: The Contribution of the Dispute Settlement System* (CUP, Cambridge 2006), 453–464, at 461.

127 See also Section 2 above.

128 See above fn 80 and 81 and accompanying text, where we have also discussed the question of who are "the parties" in this context.

129 Panel Report, *US - Section 301 of the Trade Act*, para. 7.43.

130 Article 244 TFEU (ex Article 292 EC Treaty).

131 Cases 90 and 91/63 Commission v Belgium and Luxemburg (Dairy cases), [1963] ECR, English Special Edition 625.

132 Article 42 Treaty creating the Court of Justice of the Cartagena Agreement (as amended by the Cochabamba Protocol), available at http://www.comunidadandina.org. See also Article 47 Cartagena Agreement, ibid.

133 See Laurence R. Helfer, Karen J. Alter & Florencia Guerzovich, 'Islands of Effective International Adjudication: Constructing an Intellectual Property Rule of Law in the Andean Community' (2009) 103 American Journal of International Law, 1–48.

134 This statement needs to be somewhat qualified. It should be clear that because of the different legal contexts in which the question of zeroing arises and the perhaps different factual context, the application of the law to the facts might legitimately lead to different results in some cases. This does not detract from the fact that the underlying problem is the same.

135 This is a term initially reserved to provisions in investor-state arbitration, indicating a definitive choice between bringing a case to the national courts of the state where the investment is situated or to an international arbitration panel under a Bilateral Investment Treaty. See for instance Article 8(2) of the Argentina-France BIT, mentioned in Rudof Dolzer & Christoph H. Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008), at 216.

136 In some situations the requesting party can be forced to stay within the NAFTA dispute settlement, see second and third sentences of Article 2005.2 NAFTA, obtained from www.ustr.gov.

137 See CAFTA-DR, Article 20.3, available on www.ustr.gov.

138 As has indeed happened, notably in the Softwood Lumber litigation between the US and Canada, where WTO cases, NAFTA commercial defence cases and NAFTA and other investor-state cases were involved. See Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO–NAFTA "Spaghetti Bowl" is Cooking' (2006) 9(1) Journal of International Economic Law 9, 197–206; and Chi Carmody, 'Softwood Lumber Dispute (2001–2006)' (2006) 100(3) American Journal of International Law, 664 – 674.) See below Section 4.4.3.

139 See Articles 2009 and 2011 NAFTA. As long as the roster of panelists has not been established in accordance with Article 2009, the selection procedure of Article 2011 cannot function properly, since in that case a peremptory challenge against a proposed panel member that is not on the roster will be the normal situation instead of the exception, from which one can always fall back on the roster (Article 2011 Section 3).

140 See *Mexico - Soft Drinks*, WT/DS308. See below Section 4.4.1.

141 See Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals*, (OUP, Oxford 2003), at 188-191.

142 Text of Article 26: "Consent of the parties to arbitration under this Convention shall,unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention". Obtained from http://icsid.worldbank.org.

143 See Article 24(3) of the US 2004 Model BIT, which gives a choice between ICSID and its Additional facility Rules, the UNCITRAL Arbitration rules, or, if claimant and respondent agree) another arbitration institution. Model BIT obtained from www.ustr.gov.

144 See Article 11 of the Convention for the Protection of the Ozone Layer 1986; Article 27 of the Vienna Convention on Biological Diversity 1992; Article 14 of the UN Framework Convention on Climate Change 1992; Article 18 of the Rotterdam Convention on Prior Informed Consent 2000; Article 20 of the Stockholm Convention on Persistent Organic Pollutants 2001.

145 For instance none of the declarations listed in respect of ratification, approval or accession of the Vienna Convention for the protection of the Ozone layer is a declaration under Article 11 accepting Arbitration and/or the ICJ as compulsory means of dispute settlement, see www.ozone.unep.org.

146 The ICJ continues to be quite active with respect to maritime cases, in particular the delimitation of maritime boundaries. Of the some 15 pending cases before the ICJ, two relate to maritime boundary limitation, namely *Nicaragua v. Colombia and Peru v. Chile*, while the Court also decided recently the maritime boundary disputes between Romania and the Ukraine (2009) and Malaysia and Singapore (2008). Information available at www.icj-cij.org.

147 See Order No. 3 in the *Ireland v. United Kingdom (The MOX-Plant case)*, paras 20-30, available at http://www.pca-acp.org.

148 Case C-459/03 *Commission v Ireland (MOX-Plant)*, [2006] ECR I-4635, points 122-127.

149 Note that this weakness is further emphasized by the provision of Article 281 UNCLOS that states that Parties to the Convention which are parties to a dispute may agree on other methods to settle their dispute by peaceful means and that the judicial dispute settlement mechanism of UNCLOS will only kick in when these other methods have yielded no result and recourse to judicial settlement is not excluded. This clause has also been very strictly interpreted in the so-called *Southern Bluefin Tuna* case and has thus even more limited the room for maneuver of the ITLOS. See on the jurisdiction of ITLOS, Shany, op. cit., at 201-207, and sources mentioned there.

150 Shany, op. cit., at 218-221, mentions a few examples of clauses giving rules for litispendence in human rights instruments among themselves, in particular Article 5(2) of the Optional Protocol to the ICCPR which clearly states that the Committee shall only take individual complaints unless it has ascertained that the same complaint has not been made in the framework of any other human rights instrument.

151 The rule is also applied within national legal systems between courts of different judicial districts or circuits.

152 Campbell Mclaghlan, *Lis Pendens in International Litigation*, (Martinus Nijhoff, Leiden/ Boston 2009), at 355-356.

153 Ibid., at 355 ff.

154 Ibid., at 356, quoting Reinisch. For a different view, see Joost Pauwelyn & Lutz Eduardo Salles,"Forum Shopping Before International Tribunals: (real) Concerns, (Im)Possible Solutions", 2009 *Cornell International Law Journal* Vol. 42 , 76 – 118, at 102ff.

155 See Order No. 3 in the *Ireland v. United Kingdom (The MOX-Plant case)*, para. 28, available at http://www.pca-acp.org.

156 Panel Report, *Mexico - Anti-dumping Investigation of High-Fructose Corn Syrup (HFCS) from the US*, WT/DS132/R (adopted February 24, 2000) and Appellate Body Report, *Mexico - Anti-dumping Investigation of High-Fructose Corn Syrup (HFCS) from the US*, Recourse to Article 21.5 of the DSU by the US, WT/DS132/AB/RW (adopted November 21, 2001).

157 NAFTA Annex 704.2 Appendix B. Trade in sugar.

158 Panel Report, *Mexico - Anti-dumping Investigation of High-Fructose Corn Syrup (HFCS) from the US,* WT/DS132/R (adopted February 24, 2000) and Appellate Body Report, *Mexico - Anti-dumping Investigation of High-Fructose Corn Syrup (HFCS) from the US*, Recourse to Article 21.5 of the DSU by the US, WT/DS132/AB/RW (adopted November 21, 2001).

159 See Vacek-Aranda, op.cit. at 150-151.

160 The Appellate Body report states that Mexico declared during the oral hearing that the so-called exclusion clause of Article 2005(6) of NAFTA "had not been exercised". See Appellate Body Report, *Mexico - Soft Drinks*, WT/DS308/AB/R (adopted March 24, 2006), para. 54 and fn. 110. This was a very puzzling statement to make, since there is nothing to "exercise" under Article 2005(6); the clause works all by itself unless a Party makes an explicit request, but such request can only relate to the interaction with special NAFTA rules on environmental matters, SPS- or standards related matters, none of which were at issue in the case.

161 Indeed the panel had already pointed this out and was supported by the AB on appeal, Appellate Body Report, *Mexico - Soft Drinks*, para. 54 and fn. 107.

162 WT/DS 308/AB/R, *Mexico-Soft Drinks,* para. 56. One might argue that that would merely have been a ruling incidental to deciding whether Mexico was justified in taking countermeasures that would preclude the panel and the AB from exercising jurisdiction. There have been other occasions where WTO panels have taken a position on other agreements than the WTO itself, if that was necessary to decide the case before them, for instance on the Cotonou agreement in the bananas cases. However, as we have seen, Mexico did not make this full argument and hence the AB's reluctance is understandable.

163 Ibid., paras 52-53.

164 Ibid., para. 53.

165 Ibid., para. 54. Note that the AB is keeping strictly to legal arguments and unlike the arbitral panel in the MOX-Plant case is not willing to use broader and vaguer concepts, such as "mutual respect and comity between judicial institutions".

166 See Pauwelyn and Salles, op. cit. fn 150. The doctrine of "unclean hands" means that one cannot appear before a Court in good faith, once one has contributed negatively to the dispute that one wants to have solved by the Court.

167 Many decisions concerning the "organization of its own court room" are considered to be part of its inherent power as a (quasi-)judicial body by the Appellate Body, see for instance Appellate Body Report, *US - Shrimp*, paras. 104-106.

168 See in this connexion: Laurence Boisson de Chazournes, *'The Principle of Compétence de la Compétence in International Adjudication and Its Role in an Era of Multiplication of Courts and Tribunals',* in Mahnoush H. Arsanjani, Jacob Katz Cogan, Robert D. Sloane & Siegfried Wiessner (eds.), *Looking to the Future: Essays in Honor of W. Michael Reisman,* Leiden (Brill 2010), 1027-1063, at 1058 ff.

169 In the end the Sugar/HFCS cases were settled by a compromise agreement concluded in July 2006, not too long before the US market, in accordance with NAFTA, would open up fully to Mexican cane sugar on January 1, 2008, see Kornis, op. cit.

170 Appellate Body Report, *Brazil - Retreaded Tyres*. The AB report has been criticized for reasons related to the weighing and balancing test developed in the case (see Chad P. Brown & Joel P. Trachtman, 'Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act' available at http://ssrn.com/abstract=1222981), but for the aspects discussed in the text, see Geert van Calster, 'Faites Vos Jeux – Regulatory Autonomy and the World Trade Organization after Brazil Tyres' (2008) Journal of Environmental Law, 1-16; and Nikolaos Lavranos & Nicolas Vielliard, 'Competing Jurisdictions between Mercosur and WTO' (2008) 7 The Law and Practice of International Tribunals, 205-234.

171 WT/DS332AB/R, *Brazil - Measures affecting imports of re-treaded tyres*, para. 226 – 230.

172 Ibid, para. 231-233.

173 Ibid., para. 234. The AB recalled that the panel had made a similar remark. The panel, however, did not draw the same consequences from this observation

174 See Lavranos/Vielliard, op. cit., *passim*.

175 See Joost Pauwelyn, 'Adding Sweeteners to Softwood Lumber: The WTO – NAFTA "Spaghetti Bowl" is Cooking (2006) 9(1) *Journal of International Economic Law,* 197–206; and Chi Carmody, 'Softwood Lumber Dispute (2001-2006)', (2006) 100(3) *American Journal of International Law*, at 664–674.

176 See Chi Carmody, op.cit., at 673.

177 See *Pope & Talbot v. Government of Canada*, Award by the Arbitral Tribunal in relation to Preliminary Motion to Dismiss, January 26, 2000, obtained from http://ita.law.uvic.ca/documents/PreliminaryTribunalAwards_Pope_000.pdf.

178 See the case of *Pope & Talbot v. Government of Canada*, note 176 above.

179 *Canfor Corporation & Terminal Forest Products Ltd. v. USA,* Decision on Preliminary Question, June 6, 2006, paras. 237–246, obtained from http://ita.law.uvic.ca/documents/CanforTerminalDecision6June2006.pdf. However, there was the detail that the claims with respect to the restitution of duties levied under the so-called Byrd amendment by the US authorities were not covered by the ruling and on that point the litigation could continue.

180 The amending agreement and therewith the new Softwood Lumber Agreement itself were entirely dependent on the companies being willing to sign the private settlement of claims agreement that was attached to the amending agreement.

181 See Section 4.3.5 above.

182 See Pieter Jan Kuijper, *La jurisprudence Usine MOX est-elle symptomatique d'un dialogue de sourds entre la CJCE et les autres juridictions internationales?* in Yann Kerbrat (dir.),

Forum shopping et concurrence des procédures dans le contentieux international, (Bruylant, Brussels, forthcoming).

183 See Joost Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law,* at 491.

184 Obviously it is also possible to go a step further and negotiate a kind of interface agreement between trade and climate change, as suggested by Steve Charnovitz, Gary Hufbauer & Jisun Kim, *Global Warming and the World Trading System* (Peterson Institute for International Economics, Washington 2009), Chapter 5.

185 This right is well-established in WTO case law and has also been used regularly. A good recent example is *EC-Biotech Products*, in which many international secretariats were consulted by the Panel, including the Secretariat of the CBD, of the Codex Alimentarius Commission, of the UNEP and the FAO. See Panel Report, *EC-Biotech Products*.

186 See Article 43(2) and (3) Rules of Court, amended in 2005 in order to enable the Court to address such letters not only to States, but also to intern.

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