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Article

2001

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How to cite

MARCEAU, Gabrielle Zoe. Conflicts of norms and conflicts of jurisdictions: the relationship between the WTO agreement and MEAs and other treaties. In: Journal of world trade, 2001, vol. 35, n° 6, p. 1081–1131. doi: 10.54648/384808

This publication URL: <https://archive-ouverte.unige.ch/unige:28977>

Publication DOI: [10.54648/384808](https://doi.org/10.54648/384808)

Conflicts of Norms and Conflicts of Jurisdictions

The Relationship between the WTO Agreement and MEAs and other Treaties

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I. INTRODUCTION

This article suggests that the issue of the relationship between the WTO Agreement and other treaties can only be appreciated when distinguishing between the normative and jurisdictional dimensions of that matter.

The conclusion of the WTO Agreement as a formal treaty and the creation of the World Trade Organization as an international organization are developments that had the effect of subjecting the WTO fully to international law. In its first report, the Appellate Body of the WTO made it clear that the WTO Agreement could not be read in clinical isolation from public international law.¹ Therefore the relationship between the WTO Agreement and other treaties has to be understood by taking into account the other international obligations of WTO Members and the fact that States are expected to comply with their international obligations in good faith.²

States' parallel and sometimes contradictory engagements, and the problem of forum shopping, are issues well discussed in international law circles. This article has the modest ambition of identifying some of the issues that may have to be addressed during the discussions that are needed to ensure that States' obligations are interpreted in a coherent manner and that WTO Members and other States do not pursue multiple dispute settlement proceedings needlessly, working instead towards ensuring that their grievances are brought before the most appropriately equipped fora for settling their disputes.

This article attempts to address the difficult and systemic issue of the legal relationship between the WTO and other treaties. It does so in using as reference the particular relationship between the WTO and Multilateral Environmental Agreements

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¹ Appellate Body report on *United States—Standards for Reformulated and Conventional Gasoline* (WT/DS2/AB/R), adopted on 20 May 1996 (*US—Gasoline*), p. 18.

² Article 26 of the Vienna Convention on the Law of Treaties (Vienna Convention): "Every treaty in force is binding upon the parties to it and must be performed by them in good faith" (emphasis added).

(MEAs), principally because the WTO Agreement and MEAs contain detailed rights and obligations and offer various dispute settlement mechanisms.

The frequent allegations of conflict between the WTO and other treaties cover different and distinct legal issues. There could be conflicts between the rights and obligations contained in two different treaties that apply between the same States (for instance, there may be conflicts between the substantive provisions of the WTO Agreement, such as the prohibition against quantitative restrictions in Article XI of the General Agreement on Tariffs and Trade 1994 (GATT), and on the other hand the obligation to impose quantitative restrictions pursuant to provisions of an MEA or to an MEA institutional decision). There could also be conflicts of jurisdiction where two institutions or two adjudicating bodies claim to have exclusive or permissive jurisdiction to address the factual or legal aspects of a matter having trade and environment dimensions. The same is true with any other treaty dealing with matters that can have trade effects.

This article suggests that the relationship between the WTO Treaty and other treaties cannot be dealt with adequately without an examination of both the substantive and procedural aspects of this relationship, i.e. the normative and jurisdictional dimensions. This is so because of the nature of the WTO dispute settlement mechanism which appears to "attract" jurisdiction rapidly for all WTO related matters to the exclusion of other fora. Thus the relationship between the WTO Agreement and other treaties can be discussed only by taking into account the applicable law before WTO adjudicating bodies, that is the law that panels are mandated to examine, i.e. the WTO law.³ It is also suggested that in most cases the proper interpretation of the relevant WTO provisions will be such as to avoid conflicts with the other international obligations of the WTO Members. Thus actions taken pursuant to MEAs (or other treaties) may often be compatible with WTO law. In case of irreconcilable conflicts, WTO adjudicating bodies are prohibited, through the dispute settlement mechanism and while making recommendations to the Dispute Settlement Body (DSB), from adding to or diminishing the rights and obligations of WTO. This would thus seriously impede their capacity to reach a conclusion that a provision of another treaty has superseded a WTO provision. It is also suggested that the issue of the alleged conflict between the WTO Agreement and other treaties cannot be dealt with satisfactorily without an examination of the overlaps (and potential conflicts) with other jurisdictions dealing with the same dispute or aspects thereof between WTO Members, and the risk of incoherent international solutions to related disputes.

To some extent, the manner in which one handles the issue of conflicts of norms and conflicts of jurisdiction depends on one's conception of the international legal order, if any. If one believes that international commitments should be understood in the light of some coherent international legal order, one favours narrow definitions of conflicts, interpretations and applications of opposing norms that promote their

³ The question put to the panel is: "Has WTO law been violated?"

harmonization, and one may claim that the general principle of good faith should oblige States to refrain from some of their dispute settlement actions. Others, arguably more realistic about the current state of international law, will be inclined to conclude that while there are rules to identify which obligations should prevail over other conflicting ones, the lack of any rule of coherence may lead to situations where concomitant jurisdictions come up with opposing results and consequential State responsibility of some WTO Members involved.

Part One of this article contains a discussion of alleged conflicts between the substantive obligations of the WTO and those of other treaties. The discussions regarding the relationship between the WTO Agreement and MEAs is used as a reference to a discussion of the WTO's relationship with any other treaties, the object or subject of which may overlap with those of the WTO. It is suggested that, in most cases, the proper application of rules on interpretation will be such as to avoid any of the alleged conflicts between WTO provisions and those of MEAs or other treaties. Situations of absolute conflict of obligations between the WTO and other treaties remain conceptually possible. It is also suggested that the discussion on conflict between provisions of the WTO Agreement and those of other treaties will not take place in a vacuum. Rather, such matters should be discussed from a perspective of the WTO dispute settlement mechanism which, because of the reach of Article 23 of the DSU, attracts jurisdiction over any dispute involving any trade restrictions. Thus comes the issue of whether WTO adjudicating bodies have the constitutional capacity to reach conclusions and recommendations enforcing autonomous norms of international law, especially if such other norms add or modify the WTO rights and obligations of the parties.

This leads us to Part Two of this article, where overlaps and conflicts of jurisdiction and competence are addressed. Unless and until States agree on specific rules, international law does not appear at the moment to be able to offer any complete solution to the numerous permutations of disputes which have been or will be brought before various and sometimes simultaneous fora. Thus it is concluded that, in order for the WTO Agreement and MEAs and other treaties to continue to be mutually supportive, WTO Members may have to examine how, when and in which sequence the same States could or should use the different mechanisms offered by these treaties.

II. PART ONE: ALLEGED CONFLICTS BETWEEN SUBSTANTIVE PROVISIONS OF THE WTO AGREEMENT AND THOSE OF OTHER TREATIES SUCH AS THE MEAs

A. THE DEFINITION OF "CONFLICT"

The issue of conflict between treaties and treaty provisions is not new. International law jurists, the International Law Commission and the 1969 and 1986

Vienna Conventions have attempted to deal with the difficult issue of parallel and contradictory engagements by States.⁴

The definition of "conflict" is relevant to the present discussion of the WTO relationship with other treaties. Ultimately, only when there is a conflict between two treaty provisions must one of them be set aside (either as suspended or abrogated). In all other situations, because good faith is to be presumed and States are obliged to implement their international obligations accordingly, it can be concluded that all States' obligations are cumulative and must be complied with simultaneously.⁵

General overall conflicts between two treaties are likely to be rare. Most conflicts arise over specific provisions of specific treaties, and most people would agree that such specific conflicts do not render the entire conflicting treaty null and void but will, rather, either lead to the suspension or extinction of a particular set of obligations thereunder or engage the State responsibility of those States that are setting aside provisions of a multilateral treaty.⁶

A conflict may be defined narrowly or broadly. Generally, in international law, for a conflict to exist three conditions must be satisfied. First, two States must be bound by two different treaties, or two different obligations. Second, the treaties (or the obligations) must cover the same substantive subject-matter. Third, the provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations.

"... [T]echnically speaking, there is a conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously. ... Not every such divergence constitute a conflict, however. ... Incompatibility of contents is an essential condition of conflict."⁷

"... 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. ... The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with themselves, failing any evidence to the contrary."⁸

⁴ For an exhaustive study of the matter, see Emmanuel Roucouas, *Engagements parallèles et contradictoires* (Academy of International Law—Collected Courses), Recueil des Cours (1987) VI, p. 1.

⁵ As further developed later, this is how, to some extent, the WTO provision(s) must be interpreted in taking into account all rules of international law applicable to the relations between the parties, with a view to avoiding conflicts with other treaties' provisions (Article 31.3(c) of the Vienna Convention).

⁶ Paragraph 5 of Article 30 of the Vienna Convention recognizes the possibility of conflicts between specific provisions of different treaties and the related State responsibility of States involved.

⁷ *Encyclopedia of Public International Law*—(North-Holland 1984), p. 468. See also Wilfred Jenks, *The Conflict of Law-Making Treaties*, The British Yearbook of International Law (BYIL) 1953, at pp. 425 *et seq.* For, in such a case, it is possible for a State which is a signatory of both treaties to comply with both treaties at the same time. The presumption against conflict is especially reinforced in cases where separate agreements are concluded between the same parties, since it can be presumed that they are meant to be consistent with each other, failing any evidence to the contrary. See also E.W. Vierdag, *The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions*, BYIL, 1988, at p. 100; Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, Vol. I., Parts 2 to 4, 1992, at p. 1280; Sir Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, BYIL, 1957, at p. 237; and Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 1984, at p. 97.

⁸ Jenks, as note 7, above.

In the WTO context, this narrow definition of a conflict was confirmed in WTO law in *Guatemala—Cement*,⁹ when the Appellate Body stated, while discussing the possibility of conflict between the special and additional rules of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) for antidumping disputes, and the general provisions of the DSU:

“A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them.” (emphasis added)

There the Appellate Body was addressing what could be called an “internal” conflict, i.e. a situation of conflicting provisions within a single treaty, the WTO Agreement.

Lorand Bartels has advocated a wider definition of conflicts. He argues that “[a] treaty which defeated the object and purpose of the earlier treaty should be seen as conflicting with this earlier treaty”.¹⁰ For Bartels, this interpretation of treaty conflict is confirmed by Article 41 of the Vienna Convention, which would prohibit parties to a multilateral treaty from concluding any treaty *inter se* that is incompatible with the effective execution of the object and purpose of the main treaty as a whole. For him, this broad definition of a conflict is also confirmed by Article 18 of the Vienna Convention, which obliges a State that has signed but not ratified a treaty to refrain from acts which would defeat the object and purpose of a treaty.

In response to Bartels’ suggestion, it may be argued that the object of Articles 18 (Obligation not to defeat the object and purpose of a treaty prior to its entry into force) and 41 (prohibiting bilateral amendment of multilateral treaties) of the Vienna Convention is not to address the issue of sequential and contradictory obligations which is expressly provided for in Articles 30 (Application of successive treaties dealing with the same subject-matter) and 59 (Termination or suspension of the operation of a treaty implied by conclusion of a later treaty) of the same Vienna Convention. How to reconcile his reading with the provisions of Articles 30 and 59 of the Vienna Convention? In the *EC—Bananas III* case, the Panel also concluded in favour of a broad definition of conflicts. It saw a conflict in the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.¹¹ In that dispute, because the panel was dealing with a single treaty it could have used the “rule for an effective interpretation” to ensure that the explicit rights provided for in another

⁹ Appellate Body Report on *Guatemala—Anti-Dumping Investigation regarding Portland Cement from Mexico* (WT/DS60/AB/R), adopted on 25 November 1998, para. 65. The same narrow definition was also used in *Indonesia—Certain Measures Affecting the Automobile Industry* (WT/DS54, 55, 59 and 64/R), adopted on 23 July 1998, paras 14.29–14.36 and 14.97–14.99.

¹⁰ Lorand Bartels, *The Relationship between Treaties*, Paper for CIEL, 2001.

¹¹ Panel Report on *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R(US) (*EC—Bananas III*), adopted on 22 May 1997, para. 7.159. In that dispute because the panel was dealing with a single treaty it could have used the “rule for an effective interpretation” to ensure that the explicit rights provided for in another parts of the WTO Agreement are respected. Thus the panel could have reached the same conclusion without extending the definition of conflict.

part of the WTO Agreement are respected. Thus the panel could have reached the same conclusion without extending the definition of conflict.

The advantage of Bartels' proposition is that it gives weight to "possibilities, privileges or rights" that are recognized in treaties, while the narrow definition, being limited to "conflicts of obligations", will often favour the most stringent obligations. If a treaty permits or allows for an action that is not envisaged in another treaty, we are not, strictly speaking, faced with a situation of conflicts of obligations. According to Jenks, quoted above, there is no conflict if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another. In the area of trade and environment, where MEAs may authorize (and not oblige) the use of trade restrictions otherwise prohibited by GATT, we would not be faced with a conflict *stricto sensu*, according to Jenks' definition of conflicts.

Yet, since the main objective of interpretation rules is to identify the intention of the parties, it is suggested that "conflicts" should be interpreted narrowly, in order to keep as much as possible of the agreement of the parties. An expanded definition of conflicts would lead to providing a third party (an adjudication body or an interpreter) with the power to set aside a provision that has been voluntarily negotiated by States. To take into account explicit "rights" provided in another treaty, one should refer to another important principle of interpretation, the *lex specialis derogat generalis* (*lex specialis*). The *lex specialis* principle of interpretation favours the application of a more specific provision over a general one. Therefore, it may appear from the intention of the parties and in application of the *lex specialis* principle, that a State may exercise an express and more specific right provided for in an earlier or later treaty, albeit inconsistent with a subsequent treaty provision drafted in general terms.¹² We discuss this rule further below.

B. RULES OF INTERNATIONAL LAW ON CONFLICT

1. *Interpretation that Will Avoid Conflicting Readings or Conflicting Obligations*

The main purpose of any interpretation is to identify the intention of the parties to the treaty. Article 31.1 of the Vienna Convention offers tools to perform this exercise, the first of which is the ordinary meaning of the terms of the treaty, in light of the object and purpose of that treaty. Article 31.2 describes what can be considered as "context". Article 31.3 mandates that some actions of the parties, following the conclusion of the treaty, may be taken into account together with the context. Articles 31.2, 31.3 and 32 offer six bases for any objective interpreter to refer to other treaties,

¹² Thus the two rules, *lex posterior derogat priori* (*lex posterior*) and the *lex specialis derogat generalis* (*lex specialis*) may at the moment be the only rules in international law—and sufficient—that offer indicative solutions to the problem of conflicting rights and obligations. The complex issue of the relationship between the *lex specialis* and the *lex posterior* is further discussed in section B below.

general principles of international law, or other legal instruments or acts, when interpreting a treaty.¹³

The ordinary meaning of a treaty's terms should reveal the parties' common intent at the time that the treaty is concluded. However, provision is made in Article 31.3 of the Vienna Convention for a consideration of actions subsequent to the conclusion of a treaty as authentic aids to interpretation. Paragraph 3(a) of Article 31 refers to any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, while paragraph 3(b) refers to any subsequent practice that constitutes the agreement of the parties regarding its interpretation.

Article 31.3(c) of the Vienna Convention is particularly relevant when interpreting treaty obligations, such as those of the WTO Agreement, which interact with various flourishing treaties. Article 31.3(c) provides that "There shall be taken into account, together with the context: ... (c) any relevant rules of international law applicable in the relations between the parties."

The term "*any relevant rules of international law ...*" seems to provide a wide mandate to examine public international law sources. Thus international custom and general principles of international law (Article 38.1(b) of the ICJ Statute), or general principles of law accepted by nations (Article 38.1(c) of the ICJ Statute), would have to be taken into account. Some treaties would also have to be taken into account (Article 38.1(a) of the ICJ Statute). The requirement that any such rule be "applicable to the relations between the parties" in the WTO/MEAs debate, implies that the two WTO Members must be parties to the MEA for it to be used in the interpretation of the WTO provision. In the absence of specific guidance, the determination of what rules are "relevant" would need to be made on a case-by-case basis, by examining criteria such as the subject of the dispute and the content (i.e. subject-matter) of the rules under consideration. For instance, a treaty signed by a limited number of countries, say, on the control of a specific disease that exists in only these countries, would be "relevant" to a dispute that involves trade measures taken in the context of the control of that disease.¹⁴ The Appellate Body in

¹³ (i) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty (forming part of the context, Article 31(2)(a)); (ii) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty (forming part of the context, Article 31(2)(b)); (iii) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (to be taken into account together with the context, Article 31(3)(a)); (iv) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (to be taken into account together with the context, Article 31(3)(b)); (v) any relevant rules of international law applicable in the relations between the parties (to be taken into account together with the context, Article 31(3)(c)); (vi) supplementary means of interpretation including, for example the preparatory work of the treaty or a legal instrument forming the "circumstances of the conclusion of the treaty under interpretation (pursuant to Article 32).

¹⁴ See for instance the Decision of the TBT Committee, "On Principles for the Development of International Standards, Guides and Recommendations with relation to Articles 2, 5 and Annex 3 of the Agreement", adopted on 13 November 2000, WTO Document G/TBT/9.

US—Shrimp used a variety of non-WTO international rules to facilitate its interpretation of WTO provisions.¹⁵

Article 31.3(c) also subsumes the principle of “evolutionary interpretation”. Sinclair stated, in respect of Article 31.3(c), that:

“there is some evidence that the evolution and development of international law may exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty, particularly if these expressions themselves denote relative or evolving notions such as ‘public policy’ or ‘the protection of morals.’”¹⁶

The International Court of Justice (ICJ) has made use of an “evolutionary” approach in certain cases, including most recently in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* where it stated: “...[The] Treaty is not static, and is open to adapt to emerging norms of international law.”¹⁷ The ICJ did the same in the *Case of the Aegean Sea Continental Shelf (Greece v. Turkey)* when it wrote: “It follows that in interpreting and applying reservation (b) with respect to the present dispute the Court has to take into account the evolution which has occurred in the rules of international law concerning a coastal State’s rights of exploration and exploitation over the continental shelf.”¹⁸

In the NAFTA context, an Arbitration Group recently concluded that the use of the term “GATT” in the cross-reference from the provisions of the FTA and NAFTA had to be interpreted to mean GATT as it evolved into the WTO Agreement.¹⁹

The European Court of Justice has also made use of such principles: “Finally, every provision of community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives

¹⁵ See the Appellate Body in *US—Import prohibition of Certain Shrimp and Shrimp Products (WT/DS58/AB/R)*, adopted on 6 November 1998, *US—Shrimp*. The Appellate Body examined the use of the term “natural resources” in a number of international conventions; see at paras 127–134. In the same case, at para. 154, it referred to other international conventions when interpreting the reference to “sustainable development” in the Preamble of the WTO Agreement. At paras 166–176, the Appellate Body also referred to international (and regional) treaties when assessing whether the US measure had been applied in a manner amounting to unjustifiable discrimination considering, in particular, the way consultations had been conducted and ought to be conducted under other international conventions. This was somewhat of an effort to trace the practice of States under other international treaties (arguably pursuant to Articles 31.2(b) and Article 32 of the Vienna Convention) with regard to the need to perform cross-the-board consultations. In this context, it is worth recalling that the Appellate Body acknowledged that the interpretation of a treaty can be affected by subsequent developments in international law, including, arguably, new customs, general principles of law and treaties. The Appellate Body Report in *European Communities—Measures Affecting the Importation of Certain Poultry Products*, adopted on 23 July 1998, WT/DS69, hereinafter *Poultry*, also stated that a bilateral treaty between Brazil and the EC could be used pursuant to Article 32 of the Vienna Convention to interpret the Scheduled obligations of the WTO Members in dispute.

¹⁶ I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, (1984, Manchester, MUP) p. 139. See also Mustafa Kamil Yasseen, *L’Interprétation des traités d’après la Convention de Vienne sur le droit des traités*, *Recueil des Cours*, 1976 – III, tome 151, p. 64, and Taslim Olawale-Elias, *The Doctrine of Inter-temporal Law*, *AJIL*, Vol. 74, (April) 1980, p. 292.

¹⁷ In the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, (1997) ICJ. See also *Namibia (Legal Consequences) Advisory Opinion* (1971) ICJ Rep. 31.

¹⁸ *Case of the Aegean Sea Continental Shelf (Greece v. Turkey)* ICJ (1978), p. 4, at paras 78–80. See also *Namibia (Legal Consequences) Advisory Opinion* (1971) ICJ Rep. 31.

¹⁹ Arbitral Panel Established Pursuant to Article 2008 of the North-American Free Trade Agreement, Final report: *In the Matter of Tariffs Applied by Canada to Certain US-Origin Agricultural Products* (2 December 1996).

thereof and to its state of evolution at the date on which the provision in question is to be applied” (emphasis added).²⁰

In *US—Shrimp*, the WTO Appellate Body stated: “From the perspective embodied in the preamble of the WTO Agreement, we note that the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’.”²¹

Arguably, Article 31.3(c) of the Vienna Convention aims at promoting some “coherence” in the interpretation of treaty obligations, so that the treaty being interpreted and other relevant international law rules are read in a way that is mutually supportive and avoids conflict, in compliance with the international law presumption against conflicts, developed by Jenks and others in the context of Article 30 of the Vienna Convention. States are presumed to enforce their treaty obligations in good faith. The good faith principle also implies that States are presumed to have negotiated all their treaties in good faith, that is taking into account all their other international law obligations (general principles, custom and treaty obligations). In this sense, States’ obligations are cumulative and, thus, should be read together. In this context, the WTO Agreement, as with any other treaty, should be interpreted taking into account other relevant and applicable rules between the same parties, with a view to avoiding conflicts with other relevant rules of international law applicable to the relations between the same countries.

In sum, the narrow definition of conflicts of obligations and the general principle of interpretation against conflicts (developed under Article 30 of the Vienna Convention), together with the obligation to interpret treaty provisions in taking into account other rules of international law applicable to the relations between the parties (Article 31.3(c) of the Vienna Convention) may be seen as implying a call for coherence in international law that should be developed between different treaties.²² It will be suggested further below that in most cases of alleged conflicts, it is possible to interpret the WTO provisions in a way that will not be in conflict with other relevant treaty provisions, in particular in light of the fact that generally the WTO provisions

²⁰ See the judgment in *CILFIT* (ECJ (1982), p. 3415, at 3430); J. Boulouis, *Les méthodes d'interprétation de la CJCE, Répertoire de droit communautaire*, Dalloz; R. Kovar, *La contribution de la Cour de justice à l'édification de l'ordre juridique communautaire*, Rec. des cours de l'académie de droit europ., Vol. IV, T. 1, 1993; H. Gaudin, *Les principes d'interprétation de la Cour de justice des Communautés européennes et la subsidiarité*, Rev. des affaires européennes, 1998, n° 1, p. 10.

²¹ Appellate Body in *US—Shrimp*, para. 130. In *US—Shrimp*, the Appellate Body also quoted Jennings and Watts (eds), *Oppenheim's International Law*, 9th editio, Vol. I (Longman, 1992), p. 1282; and E. Jimenez de Arechaga, *International Law in the Past Third of a Century*, (1978-I) 159 Recueil des Cours 1, p. 49. See also Mustafa Kamil Yasseen, *L'Interpretation des traités d'après la Convention de Vienne sur le droit des traités*, Recueil des Cours, 1976 – III, tome 151, p. 64, and T.O. Elias, *The Doctrine of Inter-temporal Law*, AJIL, Vol. 74, (April) 1980, p. 292.

²² It is also interesting to note that, so far, there does not seem to exist—in the relations between different treaties—any principle similar to that for an “effective interpretation” (“*effet utile*”), pursuant to which all provisions of a treaty must be given an effective meaning and no treaty provision should be reduced to “inutility”. The WTO Appellate Body has referred to this principle on several occasions. See, for instance, the statement of the Appellate Body in *US—Gasoline* (WT/DS2/AB/R, adopted on 20 May 1996) at page 18: “An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.” The principle of the “*effet utile*”, however, is relevant only to the interpretation of provisions within a single treaty which is presumed to be inherently coherent.

are drafted in general terms that prohibit specific actions (allowing WTO Members to reach the same results using different types of measure), which may avoid the said conflict.

2. *Irreconcilable Conflicts between Treaty Provisions*

If, after efforts of interpretation with a view to avoiding conflicts, an irreconcilable conflict between a WTO provision and another treaty provision remains, Article 30 of the Vienna Convention offers some guidance as to which treaty should prevail. Article 30 provides two main rules governing conflicts between treaties relating to the same subject-matter and the same parties: (1) specific provisions in treaties governing conflicts with other treaties must be respected (Article 30.2); (2) generally, the treaty later in time should prevail over the earlier one on the same subject-matter (*lex posterior*, Article 30.3–4). A third principle relevant to conflicts between treaties but not mentioned in Article 30 (although recognized by the jurisprudence) is that of the *lex specialis*.

Regarding the term “same subject-matter” nothing much can be said. In GATT/WTO, a matter represents a series of facts and the applicable law; that is what is relevant for a dispute. More generally, a subject-matter refers to the object of the measure challenged. For instance, one can argue that the subject-matter of a measure for which Article XX:b is invoked is the protection of health or the environment, a subject-matter which is (partly) shared by a possible MEA dealing with the protection of health or the environment.

(a) *Between the two States in dispute*

(i) Treaty clauses and cross-references

Article 30.2 of the Vienna Convention states: “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.” Short of such clear provisions, some treaties contain explicit clauses and cross-references on the relationship between the provisions of that treaty and those of other international agreements. For instance, Article 22 of the Convention on Biological Diversity provides as follows:

“The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations causes a serious damage or threat to biological diversity.”

The Biosafety Protocol refers in its preamble to the rights in other treaties:

“Recognizing that trade and environment should be mutually supportive with a view to achieving sustainable development,

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,

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements.”²³

This preamble is not a treaty provision as such but is part of the context (Article 31.2 of the Vienna Convention).²⁴ Such wording aims at specifying whether and to what extent a new convention affects the obligations deriving from older conventions and at ensuring an interpretation that would reconcile the provisions of different treaties on the same or related subject-matters.

(ii) *Lex posterior derogat priori*

In the absence of specific treaty prescriptions, and if the interpretation of the two treaties (or treaty provisions) cannot be reconciled so to avoid conflict, one would be faced with an irreconcilable conflict. Reliance on Articles 30.3, 30.4, and 59 of the Vienna Convention should provide further guidance. These paragraphs of Article 30 deal with the “Application of successive treaties dealing with the same subject matter”:

“3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.

4. When the parties to the later treaty do not include all the parties to the earlier one:

- (a) as between States parties to both treaties the same rule applies as in paragraph 3;
- (b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

Article 59 provides that:

“1. A treaty shall be considered terminated if all the parties to it conclude a later treaty relating to the same matter and: (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

²³ As drafted, the provisions above would appear to provide for the cumulative application of rights and obligations deriving from other treaties, a frequent situation in international law where States are bound by multiple and sometimes parallel obligations. On the issue of the relationship between the Biosafety Protocol and the WTO, see for instance M. Bronckers, *More Power to the WTO?*, JIEL (2001), Vol. 4, No. 1, p. 41, at 51–52; B. Eggers and R. Mackenzie, *The Cartagena Protocol on Biosafety*, JIEL (2000), Vol. 3, No. 3, p. 525; *The International Integration of European Precautionary Measures on Biosafety*, EELR Vol. 10, No. 6 (2001), at p. 183. Again recently, this situation of multiple treaty obligations applicable simultaneously was reiterated in the Arbitral Tribunal (ICSID/IOTLOS), in the *Southern Bluefin Tuna Case*: “... But the Tribunal recognizes as well that there is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. [...] the conclusion of an implementing convention does not necessarily vacate the obligations imposed by the framework convention upon the parties to the implementing convention.” Award on Jurisdiction and Admissibility of 4 August 2000, *Southern Bluefin Tuna Case, Australia and New Zealand v. Japan*, p. 91.

²⁴ As was said by the ICJ (regarding the UN Charter): “The preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law”. In *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* (1966), ICJ Reports, p. 34, para. 50.

2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties."

Pursuant to Article 30.3, when the two disputing States are parties to two treaties dealing with the same subject-matter, an effort should be made to reconcile the cumulative application of both treaties: both treaties remain in force but some priority is given to the provisions of the treaty later in time. Article 59, on the other hand, provides that in the situation where two treaties between the same parties deal with the same matter, the earlier treaty is abrogated or suspended. In this context there appears to be some inconsistency or gradation between Article 30.3 and Article 59.1(b) or 59.2 of the Vienna Convention. If there is an absolute inconsistency between the two treaties so that their simultaneous application is impossible, then the earlier treaty in its entirety is abrogated. If the inconsistency is less important and generally the simultaneous application of both treaties is still possible, the inconsistent provisions are presumed divisible and their specific application is suspended or abrogated.

It can therefore be argued that, as a first principle, all treaty provisions apply simultaneously. If two treaties are in conflict and the parties clearly wanted to terminate the earlier treaty (or if it appears clearly from either two treaties), then Article 59.1 allows for the first treaty to be terminated. Otherwise (or if the intention of the parties is not clear), both treaties continue to apply generally, but the treaty is considered separable²⁵ and the later provision prevails while the earlier one is suspended (Article 30.3). It can be added that if the parts of the treaties that clash are fundamental to the object and purpose of the respective treaties (Article 59.1(b)),²⁶ parties could not have agreed only to suspend part of the earlier treaty and thus the earlier treaty is abrogated all together.

(iii) *Lex specialis derogat generali*

Another relevant principle in the context of treaty conflicts is *lex specialis derogat generali*: the special law derogates from the general law. While this principle does not appear in the Vienna Convention, it has been recognized and applied in a number of cases by the ICJ and is recognized by the doctrine.²⁷

²⁵ Article 44 of the Vienna Convention.

²⁶ Article 58: "Suspension of the operation of a multilateral treaty by agreement between certain of the parties only: Two or more parties to a multilateral treaty may conclude an agreement to suspend the operation of provisions of the treaty, temporarily and as between themselves alone, if: (b) the suspension in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their rights under the treaty or the performance of their obligations: (ii) is not incompatible with the object and purpose of the treaty."

²⁷ For instance see *Encyclopedia of Public International Law* (North-Holland 1984), p. 468. V. Lowe refers to B. Cheng, *General Principles of International Law* (1987) 25-26; G.G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points* (1957), 33 BYIL 236; Lord McNair, *The Law of Treaties* (1961) 219; Sir R. Jennings and Sir A. Watts, *Oppenheim's International Law* (9th edition, 1992), 1280; D.P. O'Connell, *International Law* (1970) 12-13; *Chemin de fer Zeltweg (Austria v. Yugoslavia)*, (1934) 3 RIAA 1795, 1803; *Mavrommatis Palestine Concessions (Jurisdiction)* PCIJ (ser. A), No. 2, 30-31; *Chorzow Factory (Jurisdiction)*, PCIJ (ser. A), No. 9, 30; *European Commission of the Danube, PCIJ* (ser. B), No. 14, 23; *Rights of Passage Case* [1960] ICJ Rep. 6. Cf. J.L. Simpson and H. Fox, *International Arbitration* (1959), 75.

The object of such a rule is that when a subject-matter is dealt with in specific terms, the general rule is somehow set aside in favour of the specific one. For some, the *lex specialis* is only a principle of interpretation according to which a matter governed by a specific provision is thereby taken out of the scope of a general provision—the *lex specialis* and the *lex generalis* do not deal with the same subject-matter, therefore do not even conflict.²⁸ For others, the *lex specialis* is an exception to the *lex posterior* rule, which cancels out, supersedes or abrogates the general clause if it provides for a special regime of rules.²⁹

The relationship between the *lex specialis* and the *lex posterior* rules is complicated and may best be understood when specific treaty provisions are examined, so that the specific intention of the parties is well identified. In a particular case, the more thorough the coverage of the *lex specialis* provisions, the easier it will be to interpret the later and general law as not having abrogated the earlier one (Article 30.3 is respected as the earlier treaty applies to the extent that its provisions are compatible with the later one). The same result is reached if one considers that the *lex specialis* and the *lex generalis* deal with different subject-matter: the earlier treaty *lex specialis* would continue to apply with the later one (*lex generalis*), since it is compatible with it. (Article 30.3 would thus be respected.)

Thus, generally, between the two States, parties to two treaties dealing (partly) with the same subject-matter, it is suggested that, unless the parties' intention clearly provides otherwise (which intention may be reflected in the nature or the drafting of the treaties concerned), both treaties continue to apply to the greatest extent possible, although part of a previous or more general treaty may be suspended *vis-à-vis* the two States. This is again favouring the cumulative and simultaneous application of all treaty provisions.

Modification of the rights and obligations between two States leading to a suspension or abrogation of an earlier or more general treaty cannot be made without respect to the rights and obligations of third States which are parties to such a superseded multilateral treaty. This will become most relevant in the context of the relationship between the WTO Agreement and other treaties.

(b) *Vis-à-vis a third State*

Article 30.5 of the Vienna Convention is also clear that the provisions of Articles 41 and 60 of the same Convention, as well as rules on State responsibility, remain applicable in the situation where a treaty (provision) has superseded another treaty (provision). It provides that:

²⁸ The *lex specialis derogat generali* principle "which [is] inseparably linked with the question of conflict" (*idem*, p. 469) between two treaties or between two provisions (one arguably being more specific than the other), does not apply if the two treaties "... deal with the same subject from different points of view or [are] applicable in different circumstances, or one provision is more far-reaching than but not inconsistent with, those of the other" (Jenks, as note 7 above, at 425 *et seq.*) *Encyclopedia of Public International Law* (North-Holland 1984), p. 468, Fitzmaurice at p. 236.

²⁹ H. Aufricht, *Supersession of Treaties in International Law* (1952) 37 *Cornell Law Quarterly*, 655, at p. 698.

"Paragraph 4 [*lex posterior*] is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another State under another treaty."

Article 41.1 provides that:

"(t)wo or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if: ... (b) the modification in question is not prohibited by the treaty and: (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole."

Therefore, the rights of third parties to the multilateral treaty are protected. If such modification of rights and obligations between the two States constitutes an "amendment" of the treaty, Article 41.1(b) prohibits such amendment if it: (1) affects the enjoyment by the other parties to the general or earlier treaty not party to the specific or later treaty, or the performance of their obligations; or (2) relates to "a provision, derogation from which is incompatible with the effective execution of the object and purpose of the earlier or general treaty as a whole."

In all cases, both Article 60 of the Vienna Convention and the law of State responsibility remain relevant. It is now established that the law of treaties and the law on State responsibility are to be dealt with separately. For instance if States A, B and C sign a treaty and then A and B sign another one incompatible with the first, C is entitled to invoke the violation of the first treaty by A and B and to terminate or suspend the first treaty, pursuant to Article 60 of the Vienna Convention (this is for the future). Independently of this, C is also entitled to invoke the State responsibility of A and B and ask for reparation for damages caused³⁰ (although these remedies would mainly concern the past, C may even be able to ask for the cessation of the illegal act, as one of the remedies).³¹

³⁰ "[I]f the subsequent treaty prevents performance of a State's [p]rior obligations, parties to the former may regard that State as committing a material breach of the earlier treaty and act accordingly." C. Chinkin, *Third Parties in International Law*, Oxford Monographs in International Law, Oxford: Clarendon Press, 1993, at p. 73.

³¹ In para. 47 of the *Case of Gabčíkovo-Nagymaros*, cited above, the ICJ discussed the relationship between the Law on Treaties and the Law on State responsibility: "47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility. Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining—in a limitative manner—the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect (cf. Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, ICJ Reports 1950, p. 228; and see Article 17 of the Draft Articles on State Responsibility provisionally adopted by the International Law Commission on first reading, Yearbook of the International Law Commission, 1980, Vol. II, Part 2, p. 32)."

In the context of the WTO Agreement, it is not clear that WTO adjudicating bodies have the constitutional capacity to reach a conclusion that would lead *de facto* to an amendment of the WTO treaty. With general rules such as the most-favoured-nation (MFN) principle, it is not clear whether it is even possible for two WTO Members to modify their rights and obligations without affecting the rights of other WTO Members.³²

(c) *Lex posterior and lex specialis apply to interpreting a treaty*

Finally, *lex posterior* and *lex specialis* are “applicable rules of international law”,³³ which must be taken into account by a panel when interpreting a treaty such as the WTO Agreement (pursuant to Article 31.3(c)). *Lex posterior* and *lex specialis* are therefore not only to be used in situations of conflicting treaty provisions but also when interpreting a treaty—as rules to be used in the interpretation of any treaty so as to avoid conflicting readings.

C. ALLEGATIONS OF CONFLICT BETWEEN THE WTO AGREEMENT AND MEAS

There are now hundreds of treaties dealing with environmental issues. Many of these have implications for international trade. Because economic activity relies on and affects the environment, MEAs regularly encourage, and sometimes require, States to enact measures that affect the way economic activity within or between States is conducted. In addition, a narrower category of MEAs uses specific trade measures to address environmental harm by regulating the transboundary movement of certain environmentally harmful products.³⁴ Environmentalists would argue that, for a number of reasons, these trade measures are an important instrument of policy for MEAs.³⁵ The WTO matrix on MEAs identifies some 20 MEAs currently in effect which contain trade provisions. Three in particular, the Montreal Protocol on Substances that Deplete

³² At the least, the state responsibility of the two State WTO Members parties to the posterior or specific treaty, *vis-à-vis* WTO Members not parties to the superseding treaty, would be at issue. But it is doubtful whether this issue of state responsibility is a matter that can be adjudicated by WTO panels and Appellate Body, whose jurisdiction is limited only to assessing whether a WTO provision has been violated.

³³ As they constitute customary international law, one reflected in Article 30 of the Vienna Convention and the other one recognized by the jurisprudence and the doctrine.

³⁴ See the WTO Matrix on MEAs containing trade measures, WT/CTE/W/160/Rcv.1. There are more than 180 MEAs existing, of which over 20 incorporate trade measures; D. Brack, *Reconciling the GATT and Multilateral Environmental Agreements with Trade Provisions: The Latest Debate*, 6:2 RECIEL, 112 (1997).

³⁵ First, they are used to regulate trade in environmentally harmful products, and to create a regulatory framework to manage and minimize environmental risk. The Basel Convention, for example, includes trade-related obligations to ensure that hazardous waste is properly managed, transported and treated (Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, art. 4(2)(e)). Similarly, CITES (at arts III, IV and V) regulates trade in endangered species to foreclose markets for illegal products and thus remove the financial incentive for illegal poaching. Second, trade bans may encourage wide participation in MEAs by limiting the right of non-parties to trade in a particular product—such as hazardous waste—with parties to the MEA. Generally, these trade bans are narrowly tailored to target only those products associated with the environmental harm that is addressed by the MEA. Third, trade measures remove the competitive advantage that States may gain by remaining outside the MEA and therefore reduce their ability to avoid the costs of environmental obligations while enjoying the environmental benefits provided by the action of other States.

the Ozone Layer (Montreal Protocol), the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel Convention), impose an obligation on its parties to ban the import of various substances or items from countries that are not parties to these treaties.

Trade measures or trade sanctions may also be imposed by MEA States, pursuant to the discretion they retain in MEAs' non-compliance mechanisms as to how best to respond to the (potentially) non-complying MEA State. Under the Montreal Protocol, parties also adopted an indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance.³⁶ These measures include the suspension of trading rights. These may be considered as more closely relating to counter-measures, but they impose trade restrictions that may appear to be in conflict with basic WTO market access rules. Many would argue that these are situations of conflicts between MEAs and the WTO. However, Article XX of the GATT³⁷ authorizes trade restrictions, and it is suggested that Article XX should usually be interpreted so as to allow such MEA-authorized trade restrictions.

D. HOW SHOULD THESE ALLEGED CONFLICTS BE DEALT WITH?³⁸

1. *Interpretation of the WTO Agreement so as to Avoid Conflict with MEAs*

In a previous work,³⁹ I argued that, because of the permissive nature of Article XX of GATT, in most cases, trade measures required or explicitly permitted by a MEA should be considered to be compatible with the WTO. In situations where a Member invokes a relevant MEA to justify a defence based on Article XX of GATT,

³⁶ Report of MOP-4, Decision IV-5, Annex V. See also Article 18 of the Kyoto Protocol, which provides for the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance by the COP.

³⁷ The corresponding provision in the General Agreement on Trade in Services (GATS) is Article XIV, the terms of which are almost identical to Article XX of GATT.

³⁸ In the context of the Committee on Trade and Environment (CTE) discussions on the relationship between MEAs and the WTO the European Communities have suggested that when trade measures mandated by an MEA are challenged by another WTO Member, there could be a reversal of the burden of proof (WT/CTE/W/170). The reversal of the burden of proof would mean that the country challenging the measure would, just as under some provisions of the Agreement on Technical Barriers to Trade and that on the Application of Sanitary and Phytosanitary Measures, have to prove that the measures imposed by the other party do not meet the conditions of Article XX. The weakness of any proposal where a measure mandated by a MEA is considered to benefit from a WTO presumption of compatibility or for which the burden of proof under Article XX would be reversed, is that there may not be any satisfactory assessment as to whether the measure was indeed mandated or required or explicitly authorized by the MEA at issue. Who would determine when and whether a trade measure is one taken pursuant to a MEA? Would the simple allegation of MEA compliance by the WTO Member suffice to reverse the burden of proof in favour of the Member imposing the import restriction? Such an assessment (or part of it) may have been done by a MEA's institutional bodies, but how much would WTO panels rely on it? A WTO panel, in assessing whether the measure complies with Article XX, would probably interpret the relevant provisions of the MEA; hence there is a possibility that a WTO panel may reach somewhat different conclusions from a MEA-mandated institution or forum. The reversal of the burden of proof, in itself, is not sufficient to settle the issue of the tensions between MEAs and the WTO. Members will also have to deal with the issue of the conflicts of jurisdictions between MEAs and the WTO.

³⁹ G. Marceau, *A Call for Coherence in International Law: Praise for the Prohibition Against Clinical Isolation in WTO Dispute Settlement*, (1999), 33 J.W.T. 5.

the interpretation and the application of Article XX, drafted in permissive terms, should be undertaken in such a manner as to ensure (1) avoidance of conflict with; and (2) the effectiveness of the relevant MEA. Article XX permits certain unilateral actions to be taken to promote environmental goals, even in the absence of an MEA on the subject-matter.⁴⁰ It would be illogical if a WTO Member, acting in furtherance of the goals of a relevant MEA as a party to such an MEA, were to be placed in a worse position than if no such MEA existed.

In the debate regarding alleged conflicts between the WTO and MEA trade restrictions, six main types of situation can be envisaged.⁴¹ First, a set of cases involving an MEA adopted by both disputants: (1) where the disputed measure is required by an MEA; (2) where the disputed measure is not required, but is explicitly permitted; and (3) where the dispute of measure is taken in furtherance of the goals of an MEA. A second set of cases involves an MEA that has not been adopted by both disputants: (4) where the disputed measure is required by an MEA; (5) where the disputed measure is not required, but is explicitly permitted; (6) where the disputed measure is taken in furtherance of the goals of an MEA.

(a) *Situations involving an MEA adopted by both WTO disputants*

(1) The creation of an MEA with a broad membership could arguably provide a strong indication that a genuine environmental problem exists, and that the international community has agreed that a certain response is required. In some cases, it may indicate that the international community has agreed that, in certain prescribed circumstances, trade measures are a justifiable response to the risk of environmental harm. Therefore, in a situation where an MEA *requires* certain trade measures between its parties (an initial legal fact to be determined)—and these parties are also WTO Members—there is the potential for a “conflict” between the obligations under the respective MEA obligations and those of the WTO to arise (e.g. the Article XI prohibition against import bans), but no conflict between the MEA provisions and Article XX of GATT 1994. In this context, it is suggested that Article XX should be interpreted by taking into account the presumption against “conflicts”. It could be argued that a trade measure required by the terms of the MEA would be “presumed”⁴² to satisfy the requirements of Article XX.

(2) An MEA may still be relevant where trade measures are not required, but are, by contrast, explicitly permitted by the MEA. Here, the interpreter is not faced with a situation of conflict between the WTO prohibition (say, against quantitative restrictions) and MEA obligations. But the rule on *lex specialis* may lead a panel to conclude that the two WTO States had negotiated that the specific circumstances addressed by the MEA would be authorized pursuant to Article XX.

⁴⁰ See *US—Shrimps*, both the Appellate Body report and the Panel Review (Article 21.5 of the DSU).

⁴¹ These examples or part thereof were used in G. Marceau, *A Call for Coherence in International Law*, as note 39 above.

⁴² In this sense the EC proposal for a reversal of burden of proof finds application.

(3) Where the measure challenged is not required, or explicitly permitted, but is a measure that a party claims is taken in furtherance of the goals of the MEA, the situation is more complex. Nonetheless, that MEA may still constitute a “relevant rule of international law” that, in some circumstances, a panel will be obliged to take into account when interpreting and applying the provisions of Article XX for the benefit of a particular WTO Member. That the international community has identified an environmental problem as sufficiently serious to warrant an international response lends weight to a claim that a measure that furthers its goals is based on environmental motivations. This is especially true with the new “necessity test” developed by the Appellate Body, where it was made clear that assessing whether a measure qualifies for the purpose of Article XX(b) involves a process of weighing and balancing a series of factors which include the importance of the common interests or values protected by the measure, the efficacy of such measure in pursuing the policies aimed at, and the accompanying impact (trade restrictiveness) of the law or regulation on imports or exports. The Appellate Body stated that the more vital or important the policies aimed at, the easier it would be to accept as “necessary” a measure designed for that purpose. The fact that the said measure is applied in accordance with the framework set out in that MEA can also be of some relevance in assessing whether the measure was applied in compliance with the provisions of the chapeau of Article XX, since the function of the panel is to assess whether the measure is applied in good faith without being a disguised restriction on international trade.

It is important to recall that Article XX of GATT permits certain unilateral actions to be taken to promote environmental goals, even in the absence of an MEA on the subject-matter. It would be illogical if a WTO Member, acting in furtherance of the goals of a relevant MEA and as party to such an MEA, were to be placed in a worse position than if no such MEA existed.

(b) *Situations involving an MEA that has not been adopted by both WTO disputants*

For situations (4), (5) and (6) mentioned above, where the two disputants are not parties to both treaties (in our example, the WTO and the MEA), such MEA could not be seen as a “relevant rule applicable to the relation between the parties”. While there have so far been no challenges to trade measures used in MEAs, the most likely WTO challenges to such measures will come from a WTO Member non-party to that MEA that becomes subject to a trade ban imposed by a WTO Member pursuant to an MEA. Participation in such MEA may, however, be evidence that the “values or interests” protected by the measure are vital for that Member, as discussed in situation (3) above.⁴³ In this sense, the existence of an MEA could be used as part of the factual analysis of the circumstances of a dispute and the

⁴³ Appellate Body Reports in *Korea—Imports Measures on Fresh, Chilled and Frozen Beef* (WT/DS161, 169/AB/R), adopted on 10 January 2001, and in *EC—Measures Affecting Asbestos or Products Containing Asbestos* (WT/DS135/AB/R), adopted on 12 March 2001.

reasons why a Member adopted that particular trade measure and applied it in that manner. This examination should occur as part of a case-by-case analysis of the facts of the case.⁴⁴

Reference to, or compliance with, an MEA could be used as one of the elements in establishing that discrimination in the application of the measure should not be characterized as “unjustifiable”, or that its application was not a “disguised restriction on international trade” for the purposes of the Article XX chapeau. The issue would be whether the content of the MEA has been so widely accepted as to provide sufficient evidence that the challenged Member has acted in a justifiable manner. In *US—Shrimp*, for instance, the Appellate Body referred to the United States’ “behaviour” under other treaties (the Inter-American Convention) in order to conclude that its actions—with regard to India, Thailand, Pakistan and Malaysia—constituted unjustifiable discrimination.⁴⁵ Reference to other international treaties could serve to explain the historical or factual context in which a Member found itself, as well as the background that may shed light on either the policy basis of a measure or the manner and circumstances of its application. Compliance with a treaty (other than the WTO Agreement) can also be viewed as evidence of good faith or a relevant state practice, even if this is the practice of one party only; such evidence is relevant when considering whether that particular Member is covered by the provisions of Article XX of GATT.⁴⁶ In this sense, the third States not party to the MEA could not complain that they are faced with an unauthorized amendment of the WTO Agreement, since the language of Article XX offers sufficient flexibility for the imposition of an environment-motivated measure.

(c) *MEA trade restrictions have been used*

So far, trade measures taken by WTO Members pursuant to MEAs or to recommendations by institutional bodies of MEAs have not been challenged at the WTO. For instance, in the context of the non-compliance mechanism under the Montreal Protocol, the Meeting of the Parties, prior to the recommendation of the Implementation Committee, decided to impose a combination of measures, consisting *inter alia* of restrictions on Russia’s trade in controlled substances, to deal with Russia’s

⁴⁴ The reliance on MEAs to justify an Article XX measure and the interpretation of Article XX so as to ensure the avoidance of conflict and the effectiveness of relevant MEAs, should not be understood as setting aside the two-tier test enunciated by the Appellate Body in *US—Gasoline* when interpreting Article XX. Rather, in certain circumstances, the existence of such MEA and the measures taken in compliance with such MEA may lead to a presumption that the measure is necessary for the protection of health (Article XX(b))—“as evidence of the ‘vital’ importance of the common interests or values protected” by the MEA—or relating to the conservation of natural resources (Article XX(g)) and that such measures have not been applied with unjustified discrimination or as disguised restriction on trade.

⁴⁵ Appellate Body Report on *US—Shrimp* at paras 169–176.

⁴⁶ Appellate Body Report on *EC—Customs Classification of Certain Computer Equipment* (WT/DS62, 67, 68/R), adopted on 22 June 1998, at para. 93.

non-compliance.⁴⁷ Under CITES, trade suspensions have been adopted against dozens of parties and non-parties and such measures have never been challenged.⁴⁸ Finally, there are recommendations from the Contracting Parties of the International Convention for the Conservation of Atlantic Tunas (ICCAT) to ban imports of certain fish species and their products from other Contracting Parties.⁴⁹ Thus, as a general rule it is suggested that the proper application of rules on interpretation will lead to the avoidance of conflicts between the WTO treaty and other relevant treaties.

2. *When Interpretation Fails to Reconcile the WTO Provisions and the MEA*

In cases of irreconcilable conflicts (when interpretation cannot reconcile two treaty provisions), reference to Article 30 of the Vienna Convention and the *lex specialis* principle may lead to the conclusion that between two parties, a specific WTO provision has been superseded by an MEA provision. This assessment will not take place in a vacuum but will most probably be dealt before WTO panels and the Appellate Body, since Article 23 of the DSU "attracts" jurisdiction in favour of WTO adjudicating bodies to the exclusion of other fora. Therefore comes the more systemic issue as to whether and how WTO adjudicating bodies—with a delegated power to interpret WTO provisions in their examination of whether those provisions have been violated—have the legal capacity to recognize that a WTO provision has been superseded by another treaty provision; and if so, what type of conclusion they can arrive at in light of Articles 3 and 19 of the DSU, which prohibit panels and the Appellate Body from adding to or diminishing rights and obligations pursuant to the WTO treaty.

⁴⁷ Report of MOP-7. The case concerning Russia's non-compliance with the Montreal Protocol is probably the one that most clearly reflects the uncertainties surrounding trade measures taken by MEAs and their potential challenge at the WTO. The recommendation of the Implementation Committee was adopted by the Meeting of the Parties thanks to an "improvised" rule of procedure that allowed Russian opposition to be overridden. Russia never challenged this, mostly due to other financial interests that were also at stake. It could not challenge the trade restriction at the WTO either, because it is not a WTO Member. For an in-depth analysis of this case, see Jacob Werksman, *Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime*, 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1996.

⁴⁸ For instance, pursuant to CITES Resolution 5.2 "Implementation of the Convention in Bolivia" in *Proceedings of the Fifth Meeting of the Conference of the Parties*, 22 April–3 May 1985, it was recommended that "all Parties refuse to accept shipments of CITES specimens" from Bolivia if within 90 days Bolivia had not demonstrated "to the Standing Committee that it [had] adopted all necessary measures to adequately implement the Convention". Other cases involved, *inter alia*, Bolivia, Paraguay, Greece, Italy and China. Recently, see also Resolution by ICCAT Concerning an Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic Bluefin Tuna, 2 October 1995, 94-3 and Resolution by ICCAT Concerning an Action Plan to Ensure Effectiveness of the Conservation Program for Atlantic Swordfish, 22 June 1996, 95-13. Another recent example is the following. At its 18–22 June meeting in Paris, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Standing Committee set up a detailed 12-month action plan for the conservation of Caspian sturgeon species. The Standing Committee requested the Caspian range States Azerbaijan, Kazakhstan, Russia and Turkmenistan to do a series of notifications, setting up of appropriate control mechanisms, etc. It is said that in the event the ex-USSR States do not comply with these requirements, CITES will recommend its parties to suspend all sturgeon trade for the year 2002. In return for the Caspian range States' promise to freeze all further harvesting for 2001, the CITES Secretariat revised its original recommendation to cut the quotas down to 20 percent, allowing States to export their already harvested sturgeon products. BRIDGES (2001) Vol. 5, No. 26.

⁴⁹ For instance, Recommendation—Regarding Equatorial Guinea pursuant to the 1996 recommendation regarding compliance for bluefin and North Atlantic swordfish fisheries, from October 1999.

(a) *The exclusive character of the DSU for WTO-related disputes*

The “exclusive” character of the WTO dispute settlement mechanism is most relevant to the issue of the relationship between the WTO dispute settlement mechanism and that of MEAs. Article 23 of the DSU, entitled “The Strengthening of the Multilateral System”, states:

“23.1 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.*”

23.2 ... Members shall: (a) *not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding;*” (emphasis added)

Article 23 not only prohibits WTO Members from using any unilateral actions⁵⁰ but also constitutes an advance and general commitment by all WTO Members to subject their WTO-related disputes only to WTO adjudicating bodies.⁵¹ In the *US—Section 301* dispute, the panel concluded that the possibility of US unilateral measures was contrary to the very nature of the obligation contained in Article 23 of the DSU.⁵² Moreover, upon the simple allegation that a measure affects or impairs its trade benefits, a WTO Member is entitled to trigger the quasi-automatic, rapid and powerful WTO dispute settlement mechanism, to the exclusion of any other mechanism to examine the WTO violation. If a WTO Member were to act contrary to Article 23 of the DSU in pursuing the matter unilaterally or in taking it to another forum, that WTO Member would be violating the WTO Agreement and might become subject to sanctions corresponding to the level of trade benefits nullified or impaired. Since many actions of States may have trade consequences, one may appreciate the powerful reach of Article 23 of the DSU.

⁵⁰ Appellate Body Report on *US—Import Measures on Certain Products from the EC*, WT/DS 165/AB/R, adopted on 10 January 2001 (*US—Imports Measures*) at para. 111: “Article 23.1 of the DSU imposes a general obligation of Members to redress a violation of obligations or other nullification or impairment of benefits under the covered agreements only by recourse to the rules and procedures of the DSU, and not through unilateral action. Subparagraphs (a), (b) and (c) of Article 23.2 articulate specific and clearly-defined forms of prohibited unilateral action contrary to Article 23.1 of the DSU. There is a close relationship between the obligations set out in paragraphs 1 and 2 of Article 23. They all concern the obligation of Members of the WTO not to have recourse to unilateral action.”

⁵¹ See the Panel Report in *US—Import Measures* at para. 6.23: “Article 23.1 of the DSU prescribes that when a WTO Member wants to take any remedial action in response to what it views as a WTO violation, it is obligated to have recourse to and abide by the DSU rules and procedures. In case of a grievance on a WTO matter, the WTO dispute settlement mechanism is the only means available to WTO Members to obtain relief, and only the remedial actions envisaged in the WTO system can be used by WTO Members.”

⁵² This was made clear in the Panel Report on *US—Section 301*, WT/DS152/R, adopted on 27 January 2000, at paras 6.14 and 7.75: “An important reason why Article 23 of the DSU must be interpreted with a view to prohibiting any form of unilateral action is because such unilateral actions threaten the stability and predictability of the multilateral trade system... *Unilateral actions are, therefore, contrary to the essence of the multilateral trade system of the WTO...*” (emphasis added). In this sense it constitutes an *erga omnes* obligation.

(b) *The applicable law before WTO adjudicating bodies and their incapacity to add to or diminish WTO rights and obligations*

It is also most important to appreciate that Article XXIII of GATT 1994 and Articles 1.1, 4.2, 4.4, 7 and 11 of the DSU suggest that the WTO adjudicating bodies have only a "limited" competence. Pursuant to Article 1.1, the DSU will apply to disputes brought under the "covered agreements". Article 4 refers to consultations being initiated on allegations of violations of any of the WTO covered agreements. Article 7.1 provides that the mandate of the panel is "(t)o examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)" (emphasis added). Article 7.2 adds that "Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute ..." (emphasis added). Article 11 of the DSU also suggests a limited jurisdiction for panels. It requires a panel to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements" (emphasis added).⁵³ Moreover, Articles 3.2 and 19.1 of the DSU are clear: "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."⁵⁴ In all cases, the only jurisdiction of panels and the Appellate Body is that defined in the DSU, because they are a creation of the WTO and the DSU and they do not have any independent existence outside the WTO and the DSU.

This is not to say that the WTO Agreement and the dispute settlement mechanism of the WTO exist in a system hermetic to general international law. On

⁵³ The limited jurisdiction of WTO adjudicating bodies has, arguably, been confirmed by the Appellate Body in *EC—Poultry*, where it had to assess the legal value of a bilateral agreement (the Oilseed Agreement) between Brazil and the EC. The Appellate Body stated: "In our view, it is not necessary to have recourse to either Article 59.1 or Article 30.3 of the Vienna Convention ... As such, it [the Schedule of the EC] forms part of the multilateral obligations under the WTO Agreement. The Oilseeds Agreement, in contrast, is a bilateral agreement negotiated by the European Communities and Brazil under Article XXVIII of the GATT 1947, as part of the resolution of the dispute in *EEC—Oilseeds*. As such, the Oilseeds Agreement is not a 'covered agreement' within the meaning of Articles 1 and 2 of the DSU. Nor is the Oilseeds Agreement part of the multilateral obligations accepted by Brazil and the European Communities pursuant to the WTO Agreement, which came into effect on 1 January 1995. The Oilseeds Agreement is not cited in any Annex to the WTO Agreement. Although the provisions of certain legal instruments that entered into force under the GATT 1947 were made part of the GATT 1994 pursuant to the language in Annex 1A incorporating the GATT 1994 into the WTO Agreement, the Oilseeds Agreement is not one of those legal instruments." Appellate Body Report on *European Communities—Measures Affecting the Importation of Certain Poultry Products (WT/DS69/AB/R)*, adopted on 23 July 1998, at para. 79.

⁵⁴ It should be added that Article 25 of the DSU allows parties to agree on arbitration rules instead of the general panel process. The conclusion of the arbitrators would be final (no appeal) and binding. Yet the provisions on surveillance and implementation as well as those on sanctions of Articles 21 and 22 of the DSU would be applicable to the implementation of the conclusions of the arbitrators' report. It is arguable that parties could "agree" to mandate their arbitrators to apply more than only WTO law. But such arbitration has never been used and it is doubtful that two parties to a dispute would have a common interest in having provisions of other treaties applied by such WTO arbitration process, especially if it implies that the WTO rights of one WTO Member would vanish.

the contrary, Article 3.2 of the DSU requires the WTO agreements to be interpreted in light of customary rules of interpretation, and the Appellate Body has stated that these agreements must not be read “in clinical isolation of public international law”. This reference to the massive body of rules existing in public international law cannot be denied. As suggested above, Article 31 of the Vienna Convention in certain cases *requires* panels and the Appellate Body to use or to take into account various other treaties, custom and general principles of law when interpreting WTO obligations.

In *Korea—Government Procurement*, the Panel reached the conclusion that “[c]ustomary international law applies generally to the economic relations between WTO Members. Such international law applies to the extent that the WTO treaty agreements do not ‘contract out’ from it.”⁵⁵ Panels and the Appellate Body have the capacity to use and take into account general international law including other treaties when interpreting WTO provisions to the extent necessary to identify whether the applicable law between the parties, the WTO law, has been violated. This would entail resorting to certain rules of the Vienna Convention discussed above, to identify whether a WTO provision has been superseded by another treaty provision.

The difficulty is that in application of Articles 30 and 59, reaching the conclusion that a WTO provision has been superseded by another one, the WTO adjudicating bodies may effectively end up reaching a conclusion that adds to or diminishes the rights or obligations of one of the WTO Members. However, panels and the Appellate Body are prohibited from adding to or diminishing the rights or obligations of the Members in their adjudication process and in their conclusions.⁵⁶ To the extent that the conflict rules would lead to adding to or the diminishing of WTO provisions, Panels and the Appellate Body seem to be prohibited from reaching such conclusions. WTO adjudicating bodies are certainly prohibited from reaching any binding conclusion that another treaty provision has been violated—as their mandate is limited to examining whether a WTO provision has been violated. But panels and the Appellate Body also seem to be restrained in the types of conclusions and recommendations that they can reach, pursuant to Article 19.1 of the DSU which provides that “when a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement”. At best WTO adjudicating bodies could make “suggestions”,⁵⁷ yet such suggestions refer to the way the Member may implement and correct the situation condemned by the recommendation that a “WTO provision has been violated”. Article 3 of the DSU also

⁵⁵ Panel Report on *Korea—Measures Affecting Government Procurement* (WT/DS163/R), adopted on 19 June 2000, para. 7.96.

⁵⁶ This principle is clearly stated in Articles 3.2 and 19.2 of the DSU and is a fundamental one. Article 3.2 states that: “Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” Article 19.2 states that: “In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.”

⁵⁷ Article 19.1 *in fine* reads as follows: “In addition to its recommendations, the panel or the Appellate Body may suggest ways in which the Member concerned could implement the recommendations.”

states that the dispute settlement process is not the occasion to add to or diminish WTO rights and obligations of Members.

Thus the WTO adjudicating bodies, although they have to perform all the necessary reasoning to establish the state of international law and the applicable law between the two WTO Members, do not seem to have the constitutional capacity to reach any standard recommendations in situations where another treaty provision has superseded (and thus added to or diminished) a WTO provision. Since there would be no applicable WTO provision, the panel would be faced with a form of WTO *non-liquet*, if this concept is defined a situation where there is no law on the matter.⁵⁸ At best it could be argued that the reasoning and findings by a panel and Appellate Body of this nature (a WTO provision has been superseded by a provision of another treaty) would be declaratory in nature.⁵⁹

Moreover, under general international law, if the superseding treaty can be considered as "amending" the WTO treaty, such amendment would be possible only if it does not affect the rights or the performance of other WTO Members, as provided for in Article 41.1(b)(i) of the Vienna Convention. In light of the GATT/WTO basic rule on the MFN principle one may conceive many situations where the specific rights or obligation provided for in a bilateral treaty may effectively reduce the rights or obligations of other WTO Members not party to this bilateral treaty. In the WTO context, the situation is even more complicated since the WTO Agreement contains specific rules for its amendment (Article X of the Agreement Establishing the WTO), excluding the application of bilateral amendments amending a multilateral treaty (Article 41.2 of the Vienna Convention).

But it could also be argued that such superseding provision does not amend the WTO treaty because rulings or recommendations of a Panel or the Appellate Body bind only the parties to the dispute.⁶⁰ One would then argue that the WTO provisions are "suspended" as between the disputing parties to the extent that it conflicts with the superseding treaty provision without affecting the rights of the other Members. Is this possible? It could also be argued that two WTO Members can modify (a concept distinct from amending) their bilateral rights and obligations without affecting the rights of other WTO Members. For instance, two WTO Members could require that

⁵⁸ On *non liquet* see: J. Bourgeois, *WTO Dispute Settlement in the Field of Anti-Dumping Law*, J.I.E.L. (1998) Vol. 1, No. 1, 259 at 271, where the author argues that unregulated areas in the WTO could be considered as *non liquet*, allowing panels and the Appellate Body to refuse jurisdiction. See also Joel Trachman, *The Domain of WTO Dispute Resolution*, (1999) Harvard International Law Journal, Vol. 40, No. 2, p. 333, at 337. On *non liquet* generally, see Peter Hulstroj, *Three sources—No River*, *Zeitschrift für öffentliches Recht*, 1999, p. 219.

⁵⁹ In *US—Certain Measures*, the Appellate Body disagreed with the general recommendation of the Panel Report "that the US bring its measure into conformity", since the measure at issue was no longer in existence. The Appellate Body went on to consider the issue fully, recognized certain violations by the United States but did not make any recommendation for a measure no longer in existence. This conclusion by the Appellate Body may have all sorts of consequences on the types of remedies available to panels and the Appellate Body, but this is not relevant for this article. Although the political and legal context of this dispute is rather peculiar, the Appellate Body's conclusion confirms that it considers itself capable of issuing declaratory rulings.

⁶⁰ Appellate Body report on *Japan—Taxes on Alcoholic Beverages* (WT/DS 8, 9 11), adopted on 1 November 1996, at p. 13.

human rights be respected as a condition for trade between them only. Arguably, the other WTO Members—not subject to such human rights requirements—could not claim that their market access rights would be reduced by the existence of this bilateral requirement and may therefore not initiate any WTO dispute process. Can two WTO Members modify their WTO rights and obligations between the two of them? Can two WTO Members “add to or diminish” their respective WTO rights and obligations if they do not affect the trade opportunities of third WTO Members?⁶¹ If the WTO obligations are always the same for all Members—and it can be argued that they are—such bilateral modification of WTO rights and obligations may simply not be possible without affecting the rights of other third WTO Members.

3. *Other Treaties such as those Concerned with Human Rights*

The above discussion is relevant to the relationship between the WTO Agreement and any other treaties. In the area of human rights treaties, the allegations of conflicts are less well focused than with MEAs. It is often said that the stringent demands imposed on developing countries, including the requirements for minimum standards of the Trade-Related Aspects of Intellectual Property (TRIPs) Agreement, lead to situations where human rights treaty obligations are violated. It is not clear who would be in violation of those human rights obligations: the WTO Institution, the developing countries themselves *vis-à-vis* their people, the Members of the WTO, or whether there is conflict between the WTO Agreement and those treaties. Neither is it clear whether such developing countries' governments and institutions contribute to the misery of their people through inadequate distribution.

Stating that human rights are obligations *erga omnes* does not clarify their relationship with other multilateral treaties.⁶² Obligations *erga omnes* entitle any State to claim against their violation. But there is no automatic normative hierarchy of norms between obligations *erga omnes* and multilateral obligations. Only *jus cogens* obligations constitute preemptory norms of international law. If all *jus cogens* obligations are also *erga omnes*, the reverse is not true. Between *erga omnes* obligations and other multilateral treaty obligations the ordinary rules on conflicts apply. In the event of an authentic conflict between the WTO provision and a human rights treaty provision, such conflict would not necessarily be resolved in favour of the *erga omnes* human rights provision unless the same human rights provision is also *jus cogens*. If, however, a specific WTO Member—while performing its WTO obligations—was violating a human rights treaty provision, any other State could ask for reparation for that human rights violation before a human rights forum.

⁶¹ The answer to this question will also be relevant to the issue of the qualifications (legal interest) necessary for initiating a WTO dispute process.

⁶² On *erga omnes* obligations, see Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford (2001).

That some human rights constitute *jus cogens* that would prevail over any contrary treaty provisions is accepted.⁶³ But to recognize that some human rights are *jus cogens* does not imply that there is a conflict with any provision of the WTO Agreement. Again a legal conflict exists if the respect of a WTO provision implies a violation of the human rights treaties. Can WTO rules be read as obliging, or even favouring, the violation of such *jus cogens* prohibition? For instance, it appears difficult to identify a legal conflict between, on the one hand, human rights treaty provisions that would provide that "everyone has a right to a standard of living ...",⁶⁴ or "States recognize ... the right of everyone to an adequate standard of living ..."⁶⁵ and, on the other hand, Article III of the GATT that prohibits discrimination between imports and domestic production, or even the provisions of the Agreement on Agriculture which attempts to control the provision of domestic and exports subsidies in agriculture. To the extent that it is legally possible for a WTO Member to respect its human rights treaty obligations and its WTO obligations, there may not be any conflict between the two sets of provisions. The fact that States do not respect their human rights treaties obligations while at the same time the same States may be respecting their WTO obligations, does not imply that there is a conflict between the WTO obligations and the human rights obligations.

Instead of addressing the matter from a "legal conflict" perspective, the issue is rather one of willingness of States to be consistent and coherent with their human rights commitments. For instance, it may be argued that it is immoral for a State to give millions of dollars in domestic subsidies instead of giving it in foreign help; it may be immoral for some WTO Members to have the right to give agricultural export subsidies because they used to do so when the same subsidies are prohibited to the (usually poor) Members that did not provide export subsidies earlier. It may also be immoral for States not to distribute fairly the profits of trade. Unfair internal distribution of resources is not a matter covered by the WTO Agreement. Even if the content of some of the WTO rules appears unfair this does not imply that they contain obligations conflicting with the WTO treaty.

Finally, it should be recalled that as with any other international law rules, provisions of human rights treaties must be taken into account when interpreting any WTO provisions. For example, Article 31 of the TRIPS, on compulsory licensing, would have to be interpreted taking into account other international treaties, including human rights treaties. Article XX(a)(b)(e) of GATT, or the similar provisions in Article XIV of GATS, if invoked to justify trade restrictions imposed against imports from a Member, would also have to be interpreted taking into account other relevant rules of international law, including customary international law on human rights. For instance, decisions of UN bodies may be seen as evidence of a world consensus on a

⁶³ Article 53 of the Vienna Convention.

⁶⁴ Article 25 of the Universal Declaration of Human Rights.

⁶⁵ Article 11 of the International Covenant on Economic, Social and Cultural Rights.

specific subject-matter. WTO provisions cannot be read in clinical isolation from human rights treaties.

4. *Conflicts of Substantive Provisions between WTO and other Treaties*

WTO law is part of general international law. Thus when interpreting WTO provisions, all international obligations and rights of WTO Members must be taken into account in the interpretation of any such WTO provision (through the application of Article 31.3(c) of the Vienna Convention). Because good faith must be presumed, States are presumed to have negotiated and to enforce all their international obligations in a non-conflicting manner. In most cases, it will be possible to avoid conflict with the text of other treaties in interpreting the WTO provisions. In most cases involving MEAs, Article XX of GATT will become relevant and will have to be interpreted taking into account the existence of MEAs applicable to the relations between the two WTO disputing parties. Such interpretation should be done with a view to avoiding conflicts between the WTO and the MEA. In disputes involving a non-party to the MEA, participation in such an MEA will at least be a fact to take into account when assessing the importance of the value or interest claimed to be protected by the challenged Member, the efficacy of the measure and the good faith of the challenged Member, pursuant to Article XX of GATT. After all, Article XX is drafted in general terms and its object is to allow for some unilateral measures in specific circumstances; MEAs may provide situations where this is possible.

In situations of irreconcilable conflict, WTO panels and the Appellate Body—which in all probability will have exclusive jurisdiction to determine whether a WTO provision has been violated—would have the obligation to search and identify what is the “WTO applicable law” between the WTO disputants. But pursuant to Articles 1, 4, 7 and 11 of the DSU, only claims of WTO violations can be brought before WTO adjudicating bodies. If panels and the Appellate Body conclude that the WTO provision claimed to have been violated has been superseded by another non-WTO provision, they may be obliged to conclude that no WTO provision seems applicable to the relations between the parties (because the WTO provision initially applicable would have been superseded by another treaty). But WTO panels and the Appellate Body are prohibited from reaching any conclusion that would constitute an amendment to the WTO or that would add to or diminish rights or obligations under the WTO Agreement. In those rare situations where panels and the Appellate Body are not able to reconcile the provisions of the WTO Agreement with those of an MEA or other treaties through interpretation, they may not be capable of making any recommendations under WTO law, thus faced with a situation of *non liquet*. In such circumstances panels or the Appellate Body may decline jurisdiction, as the basis for their jurisdiction is a WTO applicable provision, and there may no longer be one. At best the WTO adjudicating body should declare that in international law the WTO provision has been superseded by

another treaty's provision but that the WTO dispute settlement mechanism is prohibiting from acting further on that specific claim.⁶⁶

III. PART TWO: OVERLAPS AND CONFLICTS OF JURISDICTION

Overlap or conflict of jurisdictions—what is also sometimes called conflict of competence—can be defined as situations where the same dispute or related aspects of the same dispute can be taken to two distinct institutions or two different adjudicating bodies. In certain circumstances, this may lead to difficulties relating to “forum-shopping”, where disputing entities will have the choice between two adjudicating bodies or two different jurisdictions. The issue is well discussed in international commercial law, where principles, criteria and practices have developed (such as *forum non conveniens* or *lis pendens*) to deal with those issues so that one such adjudicating body would possibly decline or suspend jurisdiction in favour of another, more appropriate or simply preferred. The availability of multiple forums can cause concerns, in that a single dispute may be examined by two different entities that may reach different and even opposite conclusions. It may also lead to waste of resources, unnecessary procedures and inconsistent development of international law. In all such cases, it is difficult even for political scientists to draw up general guidelines as to which considerations should prevail for the States' decisions relating to the selection of the best forum for each case.

This issue is now of relevance in public international law generally, because of the multiplication of international jurisdictions or quasi-jurisdictions. So far, however, rules have not yet been agreed upon. As further discussed, the use of an available jurisdiction may also lead to violations of another treaty which mandates resort to a different and exclusive forum. A call for order was made by the President of the International Court of Justice, Judge Schwebel,⁶⁷ and again by the new President, Judge Guillaume,⁶⁸ against the dangers of forum-shopping and the development of a fragmented and contradictory international law. Vaughan Lowe⁶⁹

⁶⁶ If such a superseding provision does not constitute an amendment but in fact restrains the performance of the obligations of the WTO Member invoking the non-WTO provision, an aggrieved WTO Member is entitled to reparation due to the State responsibility of that other WTO Member in not performing its obligations under the WTO treaty. This is not a matter to be adjudicated by a WTO adjudicating body.

⁶⁷ “[I]n order to minimize such possibility as may occur of significant conflicting interpretations of international law, there might be virtue in enabling other international tribunals to request advisory opinions of the International Court of Justice on issues of international law that arise in cases before those tribunals that are of importance to the unity of international law. [...] There is room for the argument that even international tribunals that are not United Nations organs, such as the International Tribunal for the Law of the Sea, or the International Criminal Court when established, might, if they so decide, request the General Assembly—perhaps through the medium of a special committee established for the purpose—to request advisory opinions of the Court.” Judge Stephen M. Schwebel, President of the ICJ, Address to the Plenary Session of the General Assembly of the United Nations, 26 October 1999, reproduced in the Internet site of the ICJ <<http://www.icj-cij.org/>>.

⁶⁸ See, for instance, the Note by Gilbert Guillaume, *La mondialisation et la Cour internationale de justice*, Forum (ILA), Vol. 2 No. 4 (2000), at p. 242.

⁶⁹ For a discussion of the application of such rules to overlapping public international law jurisdiction see Vaughan Lowe, *Overlapping Jurisdictions in International Tribunals*, Australian Year Book of International Law (2000), Vol. 20, p. 1.

has explored the issue and reached the conclusion that rules developed in international commercial law cannot be simply imported into public international law without difficulties.

In international trade law, the issue is also most relevant because the WTO dispute settlement mechanism is automatic, powerful, rapid, efficient, leads to economic sanctions and claims to be exclusive of any other forum for allegations of violations of trade-related matters. The WTO will thus often “attract” jurisdiction.

A. WHAT IS A CONFLICT OR OVERLAP OF JURISDICTIONS?

Various types of overlap or conflict of jurisdictions may occur. For the purpose of the present discussion, a conflict of jurisdiction occurs: (1) when two fora claim to have exclusive jurisdiction over the matter or similar or parallel matter; (2) when one forum claims to have exclusive jurisdiction and the other offers jurisdiction, on a permissive basis, for dealing with the same matter or a related one; or (3) when two jurisdictions offer—on a non-mandatory basis—their respective dispute settlement mechanisms to examine the same or similar matters. The problems occur when the dispute settlement mechanisms of two fora are triggered in parallel or in sequence. The difficulty is not only that two fora may claim supremacy over the matter but also that they may reach different and opposite results.

B. RULES OF INTERNATIONAL LAW ON CONFLICT AND OVERLAP OF JURISDICTIONS⁷⁰

1. *Multiple Engagements and Parallel Jurisdictions*

In recent years, treaties and organs of jurisdiction have increased drastically in number. An obvious example is that of the multiplicity of treaties, organs and jurisdictions involved in human rights issues.⁷¹ It seems accepted practice that States may adhere to different but parallel dispute settlement mechanisms for parallel or even similar obligations. As stated by the Arbitral Tribunal (ICSID/ITLOS) in the recent *Southern Bluefin Tuna* case:

“But the Tribunal recognizes as well that there is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. *There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.* ... the conclusion of an implementing convention does not necessarily vacate

⁷⁰ On the issue of conflicts of jurisdictions, see for instance J.J. Fawcett (ed.), *Declining Jurisdiction in Private International Law*, New York, Oxford University Press, 1995; Dicey & Morris, *The Conflict of Laws*, 13th edition; Vaughan Lowe, as note 69 above; T. Sawaki, *Battle of Lawsuits—Lis Pendens in International Relations*, in Japanese Annual Int'l L. 17 (No. 23, 1979–80); Vera Gowlland Debbas, *The Relationship between the ICJ and the Security Council in the Light of the Lockerbie Case*, 88 A.J.I.L. 643 (1994).

⁷¹ See Emmanuel Roucouinas, *Engagements parallèles et contradictoires*, Cours de la Haye (1987) VI, at p. 197.

the obligations imposed by the framework convention upon the parties to the implementing convention."⁷² (emphasis added)

Forum-shopping issues existed under the GATT where parties to the Tokyo Round Codes had the choice between the general GATT dispute settlement mechanism (which is procedurally less detailed, less rapid and less efficient) and those of the Codes (which arguably had less of a political impact because of the reduced membership of such Codes).⁷³

Forum-shopping issues are also frequent when dealing with regional trade agreements such as NAFTA *vis-à-vis* the WTO: the *Canada—Periodicals* dispute is a good example, in which the United States decided to initiate its dispute against Canada under the DSU of the WTO rather than the NAFTA.⁷⁴

To the extent that a dispute settlement mechanism is contained in a treaty which is applicable and relevant to a dispute, that mechanism is available to parties to that treaty. In the absence of any other specific treaty prescription, the rules and principles of treaty interpretation and on conflicts applicable to the substantive provisions of treaties (discussed in Part One above) are also applicable to the issue of the overlap or conflict of their respective dispute settlement mechanisms.

2. *Treaty Clauses Dealing with Dispute Settlement Mechanisms of other Treaties*

In their treaties, States may explicitly refer to the dispute settlement mechanisms of other treaties. For instance, Article 151.8 of the Convention on the Law of the Sea explicitly provides for the jurisdiction of multilateral trade agreements to which disputants are parties for cases of unfair economic practices, in relation to the exploration for and exploitation of minerals from the international seabed. Some MEAs contain explicit provisions on dispute settlement mechanisms of other agreements. In the revised text of the International Plant Protection Convention (IPPC),⁷⁵ Article XIII:6 provides as follows: "The provisions of this Article shall be complementary to and not in derogation of the dispute settlement procedures provided for in other international agreements dealing with trade

⁷² Award on Jurisdiction and Admissibility of 4 August 2000, *Southern Bluefin Tuna Case, Australia and New Zealand v. Japan*, p. 91.

⁷³ On this issue see J. Jackson, *Restructuring the GATT System* (1990), p. 46; Ernst-Ulrich Petersmann, *The Dispute Settlement System of the World Trade Organization and the Evolution of the GATT Dispute Settlement System Since 1948*, 31 CMLR 1157, 1203 (1994); Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 Int'l Law 389, 399-400 (1995); Miquel Montanà I Mora, *A GATT with Teeth: Law Wins over Politics in the Resolution of International Trade Disputes*, 31 Colum. J. Transnat'l L. 103, 1993—contains a discussion of the difference of views among countries towards the GATT dispute resolution system; John H. Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12 Law & Pol'y Int'l Bus. 21 (1980); D.M. McRae and J.C. Thomas, *The GATT and Multilateral Treaty Making: the Tokyo Round* (1983), 77 A.J.I.L. 51.

⁷⁴ *Canada—Certain Measures Concerning Periodicals* (WT/DS31/AB/R), adopted on 30 July 1997.

⁷⁵ The International Plant Protection Convention was amended in 1997. The new version will come into force, after two-thirds of the contracting parties have accepted it. So far, only 19 of the 113 contracting parties have done so.

matters”.⁷⁶ This provision does not clarify the relationship between the dispute settlement mechanism of the IPPC and the WTO, but it makes clear that the parties to the IPPC can use the dispute settlement provisions of the other agreements.

It is also interesting to note that paragraph 3 of Article 11 of the SPS Agreement, entitled “Consultations and Dispute Settlement”, provides that: “Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement.” This provision refers to the possibility of using other mechanisms under other international agreements, in parallel with those of the WTO Agreement.

All these references seem to point towards the cumulative application of various dispute settlement mechanisms under different treaties, in the absence any clear prescription to the contrary. This leaves open the issue of the coherence between these various mechanisms.

States may also give preference to one dispute settlement mechanism over another, as did the old FTA. Article 1801 of FTA envisaged that disputes arising under both FTA and GATT (including the Tokyo Round Codes) could be settled in either forum at the discretion of the complaining party, but that once a matter has been brought before either forum, the procedure initiated shall be used to the exclusion of any other. The purpose of this rule was not to recognize the existence of *res judicata* as such (since the applicable law was strictly different—in one forum FTA, in the other one GATT) but to introduce certainty and avoid multiple dispute settlement proceedings. As further discussed below, in the area of sanitary and phytosanitary measures (SPS), environment and other standard disputes, NAFTA went further and obliged a NAFTA State to withdraw from a GATT dispute (involving two NAFTA States) if the other NAFTA State preferred the NAFTA jurisdiction. There has not been a case in which this provision has been invoked, but we discuss the non-respect of such NAFTA prescription in section D below.

Article 23 of the DSU constitutes a specific clause in a treaty (Article 30.2 of the Vienna Convention) and it appears to prevent other jurisdictions dealing with WTO violations. As discussed in the following section, although Article 23 claims the exclusive jurisdiction of the WTO on certain matters, Article 23 could not prohibit another jurisdiction from examining violation of another treaty whose provisions run parallel to or overlap those of the WTO Agreement. Hence the need for WTO Members to address further the difficult issue of overlapping jurisdiction.

Principles and rules have been developed in international commercial law for dealing with overlap and conflict of jurisdictions. It may be worth examining whether

⁷⁶ The preamble of the IPPC also provides that “phytosanitary measures should be technically justified, transparent and should not be applied in such a way as to constitute either a means of arbitrary or unjustified discrimination or a disguised restriction, particularly of international trade”, clearly referring to Article XX GATT. The preamble further expressly refers to the WTO Agreements, when it states that it “[notes] the agreements concluded as a result of the Uruguay Round of Multilateral Trade Negotiations, including the Agreement on the Application of Sanitary and Phytosanitary Measures”.

such rules could be used in situations of multiple jurisdiction of general international law tribunals.

3. Forum Conveniens and Forum non Conveniens⁷⁷

Fawcett defines the *forum conveniens* doctrine as "a court taking jurisdiction on the ground that the local forum is the appropriate forum (or an appropriate forum) for trial or that the forum abroad is inappropriate. It is said to be a positive doctrine, unlike *forum non conveniens* which is a negative doctrine defined as a general discretionary power for a court to decline jurisdiction."⁷⁸ The determination of appropriateness of one jurisdiction over another one varies with each country. Most countries seem to focus on criteria such as connecting factors, expenses, availability of witnesses, the law governing the relevant transactions, the place where the parties respectively reside or carry on business, the interest of the parties and the general interests of justice. For some countries, courts will use the *forum conveniens* doctrine as one of the discretionary criteria on which to base their jurisdiction, while others will have express reference to such concepts providing when and how such assessment must be performed by national courts and based on what criteria.

Vaughan Lowe argues that for a series of reasons, the doctrine of *forum non conveniens* may not easily find application between international law jurisdictions or quasi-jurisdictions. In domestic jurisdictions, the defending parties have usually agreed to subject themselves to any such available jurisdiction; it may not be the case with international jurisdictions. The location of evidence, witness and lawyers is usually of minimal importance. Although demands of efficiency in the administration of justice may indicate that a specific court should decline to exercise its jurisdiction, generally "criteria developed in the context of a proper concern for the interest of private litigants make little sense in the context of inter-State proceedings".⁷⁹

It is difficult to imagine an international tribunal declaring that, although its constitution treaty provides for it, it is not a relevant jurisdiction.

4. Lis Alibi Pendens and Res Judicata

The object of the *lis alibi pendens* rule is to avoid a situation in which parallel proceedings, involving the same parties and the same cause of action, are continuing in two different States (or in two different courts of the same State) at the same time, with the risk of irreconcilable judgments.⁸⁰ It is suggested that there are four ways of dealing

⁷⁷ On this issue see T. Sawaki, *Battle of Lawsuits—Lis Pendens in International Relations*, in Japanese Annual Int'l L. 17 (No. 23, 1979–80).

⁷⁸ J.J. Fawcett, *Deciding Jurisdiction in Private International Law*, Oxford (1995), at pp. 5–6 and 10.

⁷⁹ Vaughan Lowe, as note 69 above at p. 12.

⁸⁰ J.J. Fawcett, *Deciding Jurisdiction in Private International Law*, at p. 26.

with such situations: a tribunal could decline or suspend jurisdiction or the tribunal could seek to restrain the foreign proceedings; or both sets of proceedings could be allowed to continue and the rule on *res judicata* would prevent two judgments, with rules on recognition and enforcement to determine which one would have priority; or a mechanism can be developed to encourage parties to opt for one of the fora.⁸¹

The doctrine of *lis pendens* has been referred to by the Permanent Court of International Justice in the *Polish Upper Silesia* case as a means to prevent conflicting judgments. So that "if a substantially identical case is already pending before a competent tribunal, the forum may decline to exercise its own jurisdiction".⁸²

In the situation of overlapping jurisdictions, Lowe also refers to the possibility, where the legal claims have already been decided in one of them, of a forum declining jurisdiction on the basis that a decision has already been decided by a competent tribunal—the *res judicata* doctrine.⁸³ The *res judicata* doctrine provides that the final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and, as between them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action.

Such principles may be useful for States to negotiate criteria as to when and how a jurisdiction may be identified as the prevailing one. However, in situations of overlapping or parallel international jurisdictions, the parties may be the same and the subject-matter may be related ones but, legally speaking, the applicable law would not be the same; specific defences may be available in one treaty only, or time-limits, procedural rights, and remedies may differ. It is therefore difficult to speak of *lis pendens* or *res judicata* between two international law jurisdictions.⁸⁴

5. *Abuse of Process and Abuse of Rights*

In the initiation procedures before a second jurisdiction, a State may be viewed as abusing the process or procedural rights. Abuse of process would lead a tribunal to decline jurisdiction if it considered that the proceedings were initiated to harass the defendant, or were frivolous or groundless; it is not the multiple proceedings which are condemned "but rather the inherently vexatious nature of the proceedings".⁸⁵

Although such prohibition against "abuses of rights" can be considered a general principle of law,⁸⁶ it is doubtful that a tribunal or any other adjudicating body would

⁸¹ I. J. Fawcett, as note 80 above

⁸² See Vaughan Lowe, as note 69 above, at p. 12, referring to the *Polish Upper Silesia Case* PCIJ (scr. A), No. 6, 20.

⁸³ Vaughan Lowe, as note 69 above, at p. 12. The author also refers to V. Lowe, *Res Judicata and the Rule of Law in International Arbitration* (1996) 8 *African Journal of International Law*, 38–50.

⁸⁴ As Lowe points out, in most cases the fact that a State has sought adjudication under one treaty cannot deprive it of the right to seek a declaration in respect of another treaty. See V. Lowe, as note 69 above, at p. 14.

⁸⁵ Lowe affirms that the doctrine of abuse of process is "well established, though occasions for its application are likely to be very rare", V. Lowe, as note 69 above, at p. 13.

⁸⁶ Brownlie wrote that "It is not unreasonable to read the principle of abuse of right as a general principle of law." See Ian Brownlie, *Principles of Public International Law* (5th edition), Oxford, 1998, at pp. 447–448.

find "vexatious" allegations that their constitutive treaty has been violated, especially when in all probability the claims would be drafted to capture the specific competence of that tribunal.

6. *Timing of Different Dispute Settlement Mechanisms*

There does not seem to be any rule demanding the exhaustion of one dispute settlement mechanism before another is initiated. In general international law there is a principle obliging States to exhaust local remedies before having recourse to international dispute settlement mechanisms. But the dispute mechanism of an MEA or other treaty is not a local remedy, so no parallels can be drawn.⁸⁷

Could it be argued that the general obligation of States to enforce their treaty obligations in good faith obliges them to use the most appropriate forum to settle their disputes or to use them in any sequence? This is most doubtful. If States have negotiated the possibility of referring disputes to various fora, it has to be assumed that they want to retain the possibility of using such fora on separate and distinct occasions.

7. *Reference to the International Court of Justice*

Aside from the negative political and economic aspects that surround the proliferation of international jurisdictions, the President of the ICJ has suggested that the Court be empowered with some form of reference jurisdiction to be used by international tribunals, possibly through advisory opinion requests. He pointed to the model found in Article 177 of the EC treaty (now Article 234).⁸⁸

It is doubtful, as he himself points out, that States are ready to empower the ICJ in this way; it is also doubtful that international tribunals would be willing to surrender their judiciary power. It is also difficult to imagine that States or tribunals could agree on the type of questions that could be referred to the ICJ.

It is worth exploring the possibility of making such recourse to the ICJ for an advisory opinion available to international jurisdictions. If such advisory opinions were not binding, they could always be somehow set aside with appropriate justification, thus respecting the ultimate authority of the international tribunal referring the question to the ICJ. From the WTO perspective, the ICJ would probably have to accelerate its process to respect the strict time-limits of the DSU, unless the DSU is

⁸⁷ On the issue of the exhaustion of local remedies in international law and its application in WTO law, see Pieter Jan Kuijper, *The Law of GATT as a Special Field of International Law*, (1994) NYIL, p. 227; Kuijper, *The New Dispute Settlement System*, 29 J.W.T. 6, p. 49 (1995); Ernst-Ulrich Petersmann, *Settlement of International Disputes Through the GATT: The case of Anti-dumping Law*, in Petersmann and Jaenicke (eds), *Adjudication of International National Disputes*, Fribourg University Press (1992), at p. 126; Rutsel Silvestre and J. Martha, *World Trade Disputes Settlement and the Exhaustion of Local Remedies Rule*, 30 J.W.T. Vol. 4, p. 107 (1996).

⁸⁸ See, for instance, Gilbert Guillaume, as note 68 above.

itself amended. Many issues have to be explored. Would these referral questions include those relating to the most appropriate forum, or their sequence? Or would they include only questions relating to the state of international law on a specific subject-matter? Would the parties or the tribunal ask the questions? The need for coherence, for a higher level of certainty and legal security in the years to come requires States to undertake such reflection.

It appears that at the moment no strict rules limit States in their decision between two fora. Hence the legal and political drama that may surround the multiplicity of treaties and jurisdictions. Their choice seems based on economic, political and legal opportunities. In the absence of other treaty prescriptions, the State initiating the dispute will take its decision in light of the specific facts of the case, including the expertise of adjudicators of each forum, the need for efficiency and specific remedies and thus the procedural aspects of each jurisdiction. There are other, more political considerations—such as whether States are looking for a settlement of the dispute or for a systemic declaration, or the type, importance or influence of the forum considered, which will affect the States' choice of fora.

C. EXAMPLES OF POSSIBLE OVERLAP OR CONFLICT OF JURISDICTION INVOLVING THE WTO

1. *The WTO Dispute Settlement Mechanism*

The dispute settlement mechanism of the WTO is said to be “a central element in providing security and predictability to the multilateral trading system”.⁸⁹ The WTO mechanism is more sophisticated than that of the GATT 1947 which preceded it. The system under GATT 1947 had no fixed timetables, many cases dragged on for a long time inconclusively, rulings were easier to block and implementation of reports as well as retaliatory actions were almost not regulated. The DSU, which now governs the settlement of all disputes under all WTO agreements listed in Appendix I thereof (the “covered agreements”), has elaborated on Articles XXII and XXIII of GATT 1994 by introducing a more structured process with more clearly defined stages in the procedures. We refer now to the quasi-automaticity of the dispute settlement mechanism of the WTO: panels and Appellate Body reports are now binding and sanctions against the Member at fault are automatic unless there is consensus to the contrary (the reversed or negative consensus).

As discussed in Part One of this article, Article 23 of the DSU attracts exclusive jurisdiction in favour of the DSU. Upon the simple allegation that a measure affects or impairs its trade benefits, a WTO Member is entitled to trigger the quasi-automatic, rapid and powerful WTO dispute settlement mechanism, excluding thereby the competence of any other mechanism to examine the WTO

⁸⁹ DSU Article 3.2

violation.⁹⁰ There is no need to prove any specific economic or legal interest to initiate the DSU process and the challenging Member does not need to provide evidence of the trade impact of the challenged measure.⁹¹ Moreover, the “winning WTO Member” has the ultimate right to impose economic sanctions against imports from the “losing WTO Member” that does not implement the recommendations of the panel or the Appellate Body with full satisfaction.

But as discussed above, the WTO adjudicating bodies do not have a general international law jurisdiction: they can only examine whether WTO law has been violated. Thus the applicable law before WTO adjudicating bodies is only WTO law, i.e. whether WTO law has been violated. Finally Articles 3.2 and 19.1 of the DSU are unambiguous: “The dispute settlement proceedings and the recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided for in the covered agreements.” Panels and the Appellate Body cannot make a recommendation that will lead to adding to or diminishing the rights and obligations provided for in the WTO Agreements. This would cover rights and obligations of any and every WTO Member.

2. *Treaty Clauses and Cross-references*

The regional trade agreements of FTA and NAFTA are good examples of treaties containing explicit cross-reference clauses to the GATT/WTO dispute settlement mechanisms.⁹² Article 2005 of NAFTA provides that after consultation “the dispute normally shall be settled under this Agreement”. Paragraphs 3 and 4 of Article 2005 go further and prescribe the exclusive application of NAFTA to the detriment of GATT: When the responding party claims that its action is subject to Article 104 of the Environmental and Conservation Agreements (inconsistency with certain environmental and conservation agreements), sanitary and phytosanitary measures, or standards-related measures adopted or maintained by a party to protect its human, animal or plant life or health, or its environment, and that raises factual or scientific issues on these aspects, “the complaining Party may, in respect of that matter, thereafter have recourse to dispute settlement procedures solely under [NAFTA]”.

⁹⁰ DSU Article 3.3. Concerning the submission of *amicus curiae* briefs, it has been established in several cases that there is a right, but not an obligation to receive them, even if they are unsolicited: *US—Shrimp*, para. 108. In any case, the Panel and the Appellate Body are not obliged to rely in their decisions on any such submissions received from any source: *EC—Hormones*, AB Report, para. 156, *US—Import Measures*, AB Report, para. 123.

⁹¹ The WTO jurisprudence has confirmed that any WTO Member that is a “potential exporter” has the sufficient legal interest to initiate a WTO panel process (Appellate Body report on *EC—Bananas III*, at para. 136); and in WTO disputes, there is no need to prove any trade effect for a measure to be declared WTO inconsistent (Article 3.8 DSU). This is to say, in the context of a dispute between two WTO Members, involving situations covered by both the Protocol and the WTO Agreement, any Member that considers that any of its WTO benefits have been nullified or impaired has an absolute right to trigger the WTO dispute settlement mechanism and request consultations and the establishment of a panel (*US—Shirts and Blouses*, AB). Such a WTO Member cannot be asked and cannot agree to take its dispute in another forum.

⁹² The following example is taken from Gabrielle Marceau, *Dispute Settlement Mechanisms Regional or Multilateral: Which One is Better?* 31 *J.W.T.* 3, p. 169.

According to paragraph 5 of Article 2005, if the complaining party has already initiated GATT procedures on the matter, "the complaining Party shall promptly withdraw from participation in those proceedings and may initiate dispute settlement procedures under Article 2007".⁹³

From this wording, it could be argued that primacy or at least a preference is given to NAFTA dispute settlement procedures over those of the GATT/WTO. But would the invocation of this FTA provision be sufficient to stop the WTO adjudicating body, in the light of Article 23 of the DSU which provides that a violation of the WTO Agreement can be addressed only according to the WTO/DSU rules?⁹⁴ How can Article 23 of the DSU and the quasi-automatic process of the DSU be reconciled with the preference and, in some circumstances, the exclusive priority given to the NAFTA dispute settlement process concerning obligations which are similar in NAFTA and in WTO? For instance, Article 301 of NAFTA refers explicitly to Article III of GATT. In a hypothetical case where a NAFTA country's domestic regulation violates Article III of GATT and Article 301 of NAFTA, the defending party may prefer to have the matter submitted to a NAFTA panel—it may have a valid defence under NAFTA—but the complaining party may prefer to have the matter addressed in the WTO. The situation may also be reversed. The defending party may have some procedural or political advantage in having its case debated in the WTO.

If a dispute is initiated under the DSU, it is extremely doubtful that a WTO panel would give any consideration to a party's request to halt the procedures simply because similar or related procedures are taking place under a regional arrangement and, for that matter, under an MEA. To take again the NAFTA/WTO example, a WTO panel would certainly not examine any allegation of a NAFTA violation but it could be asked to examine an alleged WTO violation which would be similar to a NAFTA violation. Could it be said that the NAFTA and the WTO provisions are dealing with the same subject-matter? Strictly speaking, the matter is different, although the content of the obligations is similar.

It would be difficult for a WTO panel to refuse to hear a WTO Member complaining about a measure alleged to be inconsistent with the WTO Agreement, because the complaining or defending Member is alleged to have a more specific or more appropriate defence or remedy in another forum concerning the same legal facts. The situation would be the same should the NAFTA parties have explicitly waived their rights to initiate dispute settlement proceedings under the WTO. Since there is no "international constitution" regulating the relationship between the dispute

⁹³ Article 2005(7) concludes that for purposes of Article 2005, dispute settlement proceedings under the GATT are deemed to be initiated by a party's request for a panel, such as under Article XXIII:2 of GATT 1947.

⁹⁴ Indeed, the explicit references to "GATT" and to "General Agreement on Tariffs and Trade 1947" raise the question whether the same rules would continue to apply to the new DSU of the WTO. However, it seems that since the first paragraph of Article 2005 refers to "any successor agreement (GATT)" and taking into account the conclusion of the recent NAFTA panel on *Tariffs—Poultry* where GATT was described as "an evolving system of law" that includes the results of the Uruguay Round, the provisions of Article 2005 of NAFTA would be applicable to the dispute settlement rules of the WTO.

settlement procedures of regional and other multilateral agreements such as NAFTA and WTO, or between the WTO and MEAs, the position taken by the parties to one of these agreements cannot foreclose them from using a different forum at the same time.

On the other hand, in initiating a parallel WTO dispute, a NAFTA party may be in violation of its obligation under NAFTA (not to take a dispute outside NAFTA), and may become the object of a related violation claim under NAFTA. In these circumstances, the NAFTA party opposed to the parallel WTO panel (the "opposing NAFTA party") would claim that the WTO panel initiated by the other NAFTA party is impairing its benefits under NAFTA. The opposing NAFTA party would arguably win its case before the NAFTA panel. Theoretically, that opposing NAFTA party would then be entitled to some retaliation, the value of which would probably correspond to the benefits that the other NAFTA party would (or could) gain in initiating its WTO panel.

In other words, it may not be practical or useful for a NAFTA party to duplicate in the WTO a dispute that should be handled in NAFTA, but there would be no legal impediment against such a possibility, since legally speaking the NAFTA and WTO panels would be considering different "matters" and would be addressing different "applicable law": the WTO panel would be looking at allegations of WTO violations and the NAFTA panel would be looking at NAFTA violations.

The reversed argument in favour of an exclusive preference for the WTO forum is also dubious. Could one argue that Article 23 of the DSU goes as far as denying WTO Members the right to sign regional trade agreements or other treaties with dispute settlement provisions where rights and obligations are parallel to those of the WTO? It is even more doubtful, seeing that regional trade agreements are explicitly permitted (with conditions) under Articles XXIV of GATT and XIV of GATS. Such is also the practice of States.

3. *Distinct but Parallel Violations*

In 2000, Argentina decided to impose safeguards quotas on entries of certain cotton products from Brazil, China and Pakistan. Brazil asked MERCOSUR's arbitrage court to rule on the trade dispute. The three arbitrators concluded that Argentina's safeguard's measure was incompatible with the Mercosur Treaty. Argentina did not remove its quotas immediately, and Brazil then asked the WTO Textiles Monitoring Body (TMB) to review the legality of the Argentinian quotas.⁹⁵ Although the WTO rules on textiles allow Members to take some safeguards actions, the TMB concluded that Argentina's safeguards measures were incompatible with the

⁹⁵ The legal issues in WTO were slightly different (from those before the Mercosur arbitrators) and could have led to very complicated questions relating to the WTO compatibility of the Mercosur customs union and whether countries in a customs union can impose safeguards measures against imports from a Mercosur country.

WTO Agreement. Since Argentina continued to refuse to comply, Brazil was forced to take the dispute to the DSB. Finally, the parties settled amicably.

It is clear that WTO adjudicating bodies do not have the authority to enforce provisions of a regional trade agreement as such.⁹⁶ But in a case such as this, the WTO adjudicating bodies would be assessing the concerned States' situation in light of their WTO relationship and not in light of their Mercosur relationship. Yet contrary findings from the Mercosur and WTO institutions would have devastating consequences for the trust that States must place in their international institutions.

Can parallels be drawn for the relationship between the dispute settlement provisions of MEAs and those of the WTO? Is it conceptually possible that an MEA adjudicating body should reach a (prior) conclusion contrary to that of the WTO adjudicating body on exactly the same factual allegation?

D. DISPUTE SETTLEMENT MECHANISMS OF MEAS AND THE WTO⁹⁷

1. MEAs

The dispute settlement mechanisms of MEAs are different in nature from those of the WTO. MEAs deal with environment problems which, in most cases, call for prevention rather than adjudication, since reparation is often difficult and may even be useless.⁹⁸ In recent years, many environmental treaties have incorporated free-standing non-compliance procedures, used as a sort of disputes avoidance mechanism.⁹⁹ Non-compliance procedures are characterized by their non-controversial nature and concentration on technical assistance. They are normally administered by a special, dedicated institutional mechanism, such as a standing or implementation committee.¹⁰⁰

Several possibilities might trigger the involvement of such a committee. Review can be initiated either by the complaint of one party against another, or by the secretariat of the MEA in any situation where it suspects a party of non-compliance. It

⁹⁶ *United States—Margin of Preferences*, BISDII/11.

⁹⁷ For a good and detailed description of the compliance and dispute settlement mechanisms of MEAs and those of the WTO, see the WTO document WT/CTE/W/191. See also WT/CTE/W/197. See also Stefan Ohlhoffa and Hannes Schloemann, *Rational Allocation of Disputes and Constitutionalisation: Forum Choice as an Issue of Competence*, in *Dispute Resolution in the WTO*, Cameron May, London (1998) at p. 302.

⁹⁸ On the dispute settlement mechanisms of MEAs generally, see Laurence Boisson de Chazournes, *La mise en oeuvre du droit international dans le domaine de la protection de l'environnement: enjeux et défis*, *Revue générale de droit international public*, 1995/1, at p. 37.

⁹⁹ See, for instance, the Montreal Protocol, CITES, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade or the Kyoto Protocol.

¹⁰⁰ The size and composition of the committee may vary, but in general, they try to reflect an "equitable geographical distribution" (e.g. Montreal Protocol) or an adequate representation of those members most likely to be affected by the MEA (e.g. proposals for the committee of the Basel Convention). Günther Handl and Eberhard Deutsch, *Compliance Control Mechanisms and International Environmental Obligations*, *Tulane Journal of International and Comparative Law*, Spring, 1997.

has also been very common under the Montreal Protocol to initiate the review through self-reporting by a party defaulting on its obligations despite its best efforts to the contrary. It might further be possible to authorize the standing or implementation committee to commence a review at its own initiative if, upon its own periodic review of the secretariat's analytical summaries of information provided by the parties, the committee concludes that there is evidence of possible non-implementation or non-compliance. This would be in cases where neither of the parties, nor the convention secretariat on its own, has taken the necessary steps to bring the case formally before the standing or implementation committee.¹⁰¹

If the committee finds that a party will not be in compliance despite best efforts, it issues recommendations in the form of a report and submits them to the Conference of the Parties to decide on the steps to bring the State back into compliance. The non-compliance procedure does not dictate a standard response to all cases of non-compliance, but allows the parties to tailor their response to the specific circumstances and needs of the non-complying party. This response may include assistance with collecting and reporting data, technical or financial assistance, technology transfer, or information transfer and personnel training.¹⁰²

If a committee finds that a party has not made a sufficient effort to meet its obligations, or if it is otherwise warranted by the circumstances, it may recommend punitive action against the non-complying party. These can range from a suspension of the party's rights and privileges under the Convention (e.g. access to financial resources from the Multilateral Fund or the Global Environmental Facility) to trade restrictions.¹⁰³ Under the Montreal Protocol, parties also adopted an indicative list of measures that might be taken by a Meeting of the Parties in case of non-compliance, including the suspension of trading rights.

For instance, in the context of the non-compliance mechanism under the Montreal Protocol, the Meeting of the Parties, prior to the recommendation of the Implementation Committee, decided to impose a combination of measures to deal with Russia's non-compliance, consisting *inter alia* of restrictions on Russia's trade in controlled substances.¹⁰⁴ Under CITES, trade suspensions have been adopted against dozens of parties and non-parties and such measures have never been

¹⁰¹ See note 100 above. The Implementation Committee of the Montreal Protocol was recently strengthened and authorized to report and make recommendations "in situations in which there has been a persistent pattern of non-compliance" (MOP Decision X/10).

¹⁰² David Hunter *et al.*, *International Environmental Law and Policy*, Foundation Press, New York 1998, p. 480.

¹⁰³ For instance, the suspension of trade with countries in non-compliance under CITES.

¹⁰⁴ Report of MOP-7. The case concerning Russia's non-compliance with the Montreal Protocol is probably the one that most clearly reflects the uncertainties surrounding trade measures taken by MEAs and their potential challenge at the WTO. The recommendation of the Implementation Committee was adopted by the Meeting of the Parties thanks to an "improvised" rule of procedure that allowed the overriding of Russian opposition. Russia never challenged this, mostly due to other financial interests that were also at stake. It could not challenge the trade restriction at the WTO either, because it is not a WTO Member. For an in-depth analysis of this case, see Jacob Werksman, *Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime*, 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1996.

challenged.¹⁰⁵ Finally, there are recommendations from the Contracting Parties of ICCAT to ban imports of certain fish species and their products from other Contracting Parties.¹⁰⁶ It is worth noting that the ICCAT Commission can also recommend the adoption of trade measures against non-Parties.¹⁰⁷ In the non-compliance mechanism the institution will effectively perform interpretations of the MEA treaty and reach conclusions on whether or not a party has complied or will be able to comply with its treaty obligations.

Most environmental treaties also contain provisions on the settlement of disputes *per se* (pure adjudication). The basic model of dispute settlement in MEAs involves a progressive process that facilitates dispute resolution by subjecting the dispute to gradually more intrusive and formal mechanisms.¹⁰⁸ The "standard menu" ranges from optional adjudication by the ICJ or arbitration, to conciliation at the request of one party.

The scope of MEAs' dispute settlement mechanisms is normally limited to disagreements arising from the interpretation or application of the MEA. In case of dispute, in most MEAs, the first step is to seek a solution through consultation, negotiation or other peaceful means between the parties. If this fails, a second stage might consist in a joint request by the disputants of intervention by a third party: good offices, fact-finding, conciliation or mediation.¹⁰⁹ Under each of these methods, the third party attempts to assist the parties to reach an agreement that ends the dispute, although the level of involvement varies.¹¹⁰ Alternatively, or for those disputes not resolved in accordance with negotiation or mediation, the case might be submitted to compulsory dispute settlement, frequently by the ICJ or arbitration, if the countries in dispute agree to it. The majority of MEAs do not oblige parties to solve their disputes through a binding adjudication process, such as that of the ICJ, although in many cases parties can set their preferences upon ratification of the treaty. Some MEAs foresee compulsory conciliation, if parties have not accepted the same or any procedure for dispute settlement.¹¹¹ For that purpose, a conciliation commission may be created at the request of any party. However, unless otherwise agreed, the decision or recommendation of the commission is again not binding. Some MEAs establish that

¹⁰⁵ For instance, pursuant to CITES Resolution 5.2 "Implementation of the Convention in Bolivia" in *Proceedings of the Fifth Meeting of the Conference of the Parties*, 22 April–3 May 1985, it was recommended that "all Parties refuse to accept shipments of CITES specimens" from Bolivia if within 90 days Bolivia had not demonstrated "to the Standing Committee that it [had] adopted all necessary measures to adequately implement the Convention". Other cases involved, *inter alia*, Bolivia, Paraguay, Greece, Italy and China.

¹⁰⁶ For instance, Recommendation—Regarding Equatorial Guinea as note 49 above.

¹⁰⁷ See also the situation described in note 49 above.

¹⁰⁸ Stephen Porter and David Hunter, *Dispute Resolution in the Context of Transboundary Environmental Impact Assessment, A Review of Selected Bilateral and Multilateral Agreements*, CIEL Discussion Paper (March 1997), in David Hunter *et al.*, as note 102 above, p. 496.

¹⁰⁹ In some MEAs, such as the Vienna Convention for the Protection of the Ozone Layer, if an agreement is not reached through negotiation the next step might be good offices or mediation by a third party. In other MEAs, mediation is part of the remedies included in the first stage (e.g. Article XXV of the Antarctic Convention on Marine Living Resources).

¹¹⁰ See note 108, above, p. 497.

¹¹¹ For instance, Article 11.5 of the Vienna Convention for the Protection of the Ozone Layer or Article 27.4 of the Convention on Biological Diversity.

parties must consider the decision in good faith (e.g. the Vienna Convention for the Protection of the Ozone Layer).

2. *MEAs and the WTO: Conflict between Compliance and Dispute Settlement Mechanisms*

The issue of the relationship between the mechanisms of MEAs and those of the WTO may present itself differently from that of the situation of the parallel dispute settlement mechanisms of regional trade agreements and the WTO. The dispute settlement mechanisms (adjudication mechanisms) of MEAs have not so far been used. Tensions may still exist between the process of an MEA's non-compliance review or control mechanism (especially if and when sanctions are ultimately imposed pursuant to such non-compliance review exercise) and the WTO dispute settlement process.

Under the provisions of an MEA, a country dissatisfied (or expecting to become so) with the actions or non-actions of another MEA State will be obliged (or at least encouraged) to participate in a non-compliance review exercise.¹¹² An MEA body may reach a decision to impose a sanction against another MEA party, as was done against Russia pursuant to a non-compliance decision of the Conference of the Parties under the Montreal Protocol. MEA parties who are also WTO Members would be faced with an MEA process that would appear inconsistent with Article 23 of the DSU which prohibits trade restrictions or any remedy being taken outside the framework of the DSU.

Conceptually, MEA States may agree to use the MEA dispute settlement mechanism to interpret a provision of the MEA with a view to determining the MEA compatibility of a trade restriction imposed pursuant to that MEA. What happens if an MEA State which is also a WTO Member is affected by such trade measure and triggers the DSU mechanism, while another MEA State concurrently triggers the MEA's dispute settlement mechanism?¹¹³ What would happen if an MEA State involved in a mandatory conciliation process, pursuant to the MEA dispute settlement provisions, is being sued by another MEA State (also a WTO Member) pursuant to the DSU?

¹¹² In general, trade measures are decided in common by the parties, but there is room for certain discretion in some cases. In CITES, trade measures are recommended by the Standing Committee, but individual Parties appear to have the discretion as to whether to implement the suspension of trade with a Party in non-compliance. Also, Article XIV:1 of CITES provides for Parties to take "stricter domestic measures" than that provided for in the treaty, which, according to some authors, can be read to include trade measures. For further information on the compliance mechanism in CITES, see Rosalind Reeve, *Cites and Compliance Past, Present and Future*, LL.M. University of London, March 2000. For further information on the trade constraints of domestic action, see Jacob Werksman, *Green House Emission Trading and the WTO*, RECIEL 8:3, at p. 1.

¹¹³ For instance, Article 27.4 of the Convention on Biological Diversity provides that if the parties to the dispute have not "[...] accepted the same or any procedure, the dispute shall be submitted to conciliation [...], unless the parties otherwise agree". Also, Article 20.5 of the PIC Convention stipulates that "if the parties to a dispute have not accepted the same or any procedure [...], and if they have not been able to settle their dispute within 12 months following notification by one party to another that a dispute exists between them, the dispute shall be submitted a conciliation commission at the request of any party to the dispute".

Is it conceptually possible for an MEA adjudicating body to reach a (prior) conclusion opposite to that of the WTO adjudicating body on exactly the same factual allegation and on the basis of the same rights and obligations? The *EC—Swordfish*¹¹⁴ dispute was concerned with the following situation. In 1999, Chile enacted swordfish conservation measures, by regulating gear and limiting the level of fishing through the denial of new permits. It was reported by Marcos Orellana Cruz¹¹⁵ that 90 percent of swordfish permits had been awarded to artisanal fishers, who enjoyed exclusive rights to fish for swordfish up to 12 nautical miles from the coast. Chile also set minimum sizes for fish and prohibited the operation of factories within its Exclusive Economic Zone. Chile effectively prohibited the utilization of its ports for the landing and service to the EC longliners and factory ships that disregarded minimum conservation standards.

The EC challenged those measures as being contrary to its WTO rights pursuant to Article V of GATT, which provides for the free transit of goods along Members' territories. Chile contended that the WTO does not limit sovereignty over its port and demanded that the EC enact and enforce conservation measures for its fishing operations in the high seas, in accordance with the United Nations Convention on the Law of the Sea (UNCLOS). Chile responded to the EC's WTO challenge by initiating the dispute settlement provisions of UNCLOS and invited the EC to the International Tribunal on the Law of the Sea (ITLOS). The EC finally agreed to the formation of an arbitral Tribunal according to UNCLOS. The substantive issues before the WTO included the right of Chile to benefit from the application of Article XX of GATT, when acting pursuant to other treaties. The issue before ITLOS could include whether Chile was entitled to regulate and limit access to swordfish (including to its national fishermen only) as part of a conservation programme.

In such a situation, it is conceivable that both instances would have examined whether UNCLOS effectively requires, authorizes or tolerates Chile's measures (depending on Chile's arguments and the standard used in the provisions of the MEA or the WTO), and whether the Chilean measures were compatible with UNCLOS, an element that could influence a WTO panel (or the Appellate Body) in its decision as to whether Chile may benefit from the application of Article XX of GATT. It is, therefore, conceivable that the two fora may reach different conclusions on the same facts or on the interpretation of the applicable law.

Fortunately, in that dispute, the parties reached an agreement to suspend both their disputes before ITLOS and before the WTO.¹¹⁶ As part of the settlement the EC/Chile Bilateral Scientific and Technical Commission resumed its work in April 2001 according to an action plan, the parameters of which are contained in their mutually agreed solution. Parties also agreed to a series of other relevant measures, mutual exchanges and regional action relating to their fishing practices.

¹¹⁴ Request for consultations in *Chile—Swordfish*, WT/DS 193.

¹¹⁵ See Marcos Orellana Cruz, *The Swordfish in Peril*, BRIDGES (July–August 2000) Year 4 No. 6, p. 11.

¹¹⁶ See document WT/DS193/3.add.1.

Thus, even if WTO Members are not to be faced with a formal conflict between two mutually exclusive jurisdictions, aspects of the same dispute may find application at the same time in the MEA jurisdiction and in the WTO jurisdiction. Based on Article 23 of the DSU and the quasi-automaticity of the DSU mechanism, it is most doubtful that any WTO adjudicating body would stop its process for the only reason that a related dispute or aspects of the same dispute are being examined in another forum, unless the parties agree to suspend the DSU process. Neither the existing MEAs, nor the WTO Agreement, provide an answer to this problem.

3. *Dealing with Overlap and Conflict*

Short of any agreement between the parties and in the absence of any international rule as to how these two different mechanisms should interact, many scenarios may emerge. As discussed before, in light of the quasi-automaticity of the WTO dispute process and Article 23 of the DSU, it is unlikely that a WTO panel would decline jurisdiction because another dispute process—albeit more relevant and better equipped—has been seized of a similar or related dispute. If both processes were triggered at the same time, it is quite probable that the WTO panel process would proceed much faster than the MEA process. What arguments may be raised before a WTO adjudication body with regard to the MEA process?

(a) *The use and interpretation of MEAs in the WTO dispute settlement*

The existence of dispute settlement or avoidance mechanisms in MEAs, whereby interpretations of the provisions of the MEA treaty would be provided for, cannot be viewed as a limitation on WTO panels and the Appellate Body to examine the content of relevant MEAs when this is necessary to perform their DSU functions, notably when interpreting WTO provisions. There may be situations where a panel will have to determine whether a challenged measure was indeed adopted pursuant to an MEA, as well as the meaning of the MEA obligations, the nature, scope and membership of this MEA, etc.¹¹⁷

The right, and sometimes the obligation, of panels and the Appellate Body to interpret a relevant MEA should not be viewed as usurpation of the authority of MEA Secretariats (or other MEA bodies) to supervise and administer the enforcement of such MEAs. It is however possible that the same MEA provision will be interpreted both by the MEA body and by the WTO adjudication body; conceptually, the two

¹¹⁷ A similar situation arose in *EC—Bananas III* (para. 162), where the Panel and Appellate Body examined the Lomé Convention to determine the scope of a Lomé waiver granted to the European Community with respect to certain of its obligations under the GATT 1947. In the dispute on *Korea—Measures Affecting Beef*, the Panel considered it necessary to examine a series of prior bilateral agreements between the parties in dealing with the said remaining restrictions in order to interpret the term “remaining restrictions” in Korea’s Schedules.

bodies may reach different and even opposite conclusions. Until there is some agreed mechanism to address these situations, no clear solution exists.

(b) *Relevant rules of international law*

MEAs' non-compliance and dispute settlement mechanisms are provisions of treaties that if binding on the two WTO Members would constitute legal rules that must be taken into account by a WTO adjudicating body (pursuant to Article 31.3(c) of the Vienna Convention) when interpreting WTO obligations. Whether and how an MEA process has been followed, its adequacy to address elements relevant to the WTO process, as well as the conclusions reached by such MEA body, can become relevant before a WTO process.

(c) *Allegations of good or bad faith*

Could it be argued that the principle of good faith requires any State to negotiate and consult fully (including in MEA fora)? The ICJ stated that "the obligation [to negotiate] constitutes a special application of a principle which underlies all international relations, and which is moreover recognized in Article 33 of the Charter of the United Nations".¹¹⁸

In *US—Shrimp*, the Appellate Body stated that the United States, contrary to Section 609, had failed to undertake "serious across-the-board negotiations" with those other Members. Such refusal was one of the elements used by the Appellate Body to conclude that the United States had applied its measures in a discriminatory manner. The Appellate Body was obviously not speaking of the DSU consultations, but rather of negotiations before the DSU process. In this context, one may argue that the "obligation to consult prior to imposing unilateral measures" has attained the level of a general principle of law.¹¹⁹ Would the obligation to consult and negotiate in good faith include the obligation to use the most appropriately equipped non-compliance control mechanism of the relevant MEA?¹²⁰ Could the absence of prior consultation with a view to reaching a co-operation agreement within the MEA be evidence of bad faith and a disregard of due process, contrary to the provisions of the chapeau of Article XX? Would this good faith principle go as far as obliging a WTO Member which is also an MEA party to use first (and exhaust) the more specific MEA mechanism, even when it overlaps with that of the WTO? This is doubtful.

Arguably, the refusal to use the MEA compliance or dispute mechanism may constitute a violation of the MEA, but would not constitute a violation of the WTO

¹¹⁸ *Continental Shelf*, ICJ 1969, para. 86.

¹¹⁹ This seems to be the way the Review panel on *US—Shrimp* (Article 21.5 DSU) (WT/DS135/RW) has interpreted the Appellate Body Report.

¹²⁰ See Nicolas Angelet, *La Mise en oeuvre des mesures coercitives économiques des Nations Unies dans la Communauté européenne*, *Revue belge de droit international*, vol XXVI, 1993, 500, at p. 525.

Agreement *per se*. But such refusal to exhaust the MEA's mechanisms—hence to consult fully and properly with the most appropriate and expert forum—could be an element used by a panel or the Appellate Body when assessing the good faith of a party to the WTO dispute settlement process. Even in situations where the DSU process has been triggered, it may also be possible for governments to continue the MEA process if they consider it necessary or beneficial to the WTO procedure, e.g. as evidence of efforts in good faith to negotiate a mutually agreed solution. In this sense, the WTO panel may examine and consider the use of the MEA compliance or dispute settlement mechanisms as legal facts.

(d) *Can the MEA process constitute relevant evidence?*

It is possible for any panel to invoke Article 13 of the DSU and request from the parties, or from any source, any relevant information. Arguably, this could include evidence from the proceedings in another forum.

Compliance with the MEA—in mandating, authorizing or favouring a trade restriction—and the very existence of such an MEA could be used as part of the factual analysis of the circumstances of a dispute and the reasons why a Member adopted that particular trade measure and applied it in that manner. This examination should occur as part of a point-by-point analysis of the facts of the case. Pursuant to the newly developed test on necessity of Article XX, compliance with an MEA provision could be used as evidence that the measure was “necessary” or that discrimination in the application of the measure should not be characterized as “unjustifiable”, or that its application was not a “disguised restriction on international trade” for the purposes of the Article XX chapeau. Respect for a non-compliance process by MEA parties can be viewed as evidence of State practice (even if this is the practice of one party only), a relevant element to be taken into account when interpreting whether that particular Member is covered by the provisions of Article XX of GATT.¹²¹

As mentioned above, a WTO Member's participation in an MEA non-compliance (or dispute) mechanism could be used as one of the elements to establish the good faith effort of that Member to negotiate a solution that would have avoided the dispute or even the imposition of the sanction by the MEA institutional body, which would become a challenged measure under the WTO Agreement.

(e) *Can MEA information be used as expert evidence?*

The WTO panel may want to require expert information from the MEA Secretariat, or it may also want to use analysis or data collected during a non-compliance

¹²¹ On State practice, see the Appellate Body Report on *EC—Computer Equipment* at para. 93 (but this is even more relevant to the issue of the relationship between substantive obligations of two different treaties discussed in Part One).

control or review mechanism. It may want to refer to witness statements or other elements of what would be revealed in an ongoing MEA process (subject to any confidentiality obligation). If one is of the view that adjudication bodies are masters of the administration of their process, arguably WTO panels could refer and make use of a related ongoing process in another jurisdiction. Article 13.2 and Annex 4 of the DSU refers to the establishment of groups of experts to provide panels with expert opinion and advise on factual, scientific or other technical matters raised in any DSU dispute. Could such a process be used to introduced into a DSU panel process any or part of any relevant MEA mechanism(s)?

(f) *Exhaustion of MEA mechanisms*

The 1996 Report of the WTO Committee on Trade and Environment (CTE) stipulated in its conclusions and recommendations that “if a dispute arises between WTO Members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA”.¹²² This statement would, at best, have the legal value of a recommendation of the CTE which would find relevance in a WTO panel, but does not constitute an amendment of Article 23 of the DSU. If the MEA encourages its Members to use the MEA non-compliance mechanism when faced with certain behaviour of one of its other members, the refusal to follow up with such MEA mechanism may constitute a violation of the MEA itself. The absence of any MEA provision as to when the MEA non-compliance or dispute mechanism is to be used generally, or in relation with that of the WTO, means it is most doubtful that there is an obligation to “exhaust” the MEA mechanism before initiating a WTO dispute.

In the absence of any formal rule applicable to the sequence of dispute settlement mechanisms, could it be argued that the non-collaboration in a non-compliance control mechanism, or the refusal to engage in, or the withdrawal from, consultation or conciliation procedures of an MEA, have any consequence in the WTO dispute settlement process? Possibly it may be taken into account, once again, in the determination of the good faith of the parties in dispute.

4. *Forum Non Conveniens and Allegation of Res Judicata*

Contrary to any *forum non conveniens* claim, Article 23 of the DSU reflects the clear intention of WTO Members to ensure that WTO adjudicating bodies can always have jurisdiction on any WTO related matter. The WTO forum is always a “convenient forum” for any WTO grievance; in fact it would even appear to be the exclusive forum for WTO matters.

¹²² WT/CTE/1 para. 178.

Res judicata allegations would not find much more support. In the example of the *EC/Chile Swordfish* dispute, if ITLOS had completed its process before the WTO panel, it would be difficult to argue *res judicata* before the WTO. The parties may be the same and the subject-matter may be a related one but, legally speaking, the applicable law would not be the same and would not even be similar to the extent that the obligations, the process and the remedies are different. As mentioned, it is generally difficult to speak of *res judicata* between two dispute settlement mechanisms under two different treaties. In the context of the WTO, Article 23 of the DSU provides that WTO grievance can only be debated within the parameters of the WTO institutions. It is difficult to see how WTO panels could decline jurisdiction or even refer to the decision of another tribunal on WTO provisions, since this other decision would necessarily be in violation of Article 23 of the DSU.¹²³

This is not to say that the decisions and conclusions of those other jurisdictions would be of no relevance to the WTO process. On the contrary, it could be argued that they constitute relevant evidence and in some instances relevant rules of international law applicable in the relations between the parties which ought to be taken into account when interpreting WTO provisions.

5. *Allegation of Abuse of Rights*

It could be argued that once a jurisdiction (WTO or MEA) has made a pronouncement on an issue, there is a presumption that parties have accepted that the issue be brought to that forum and be bound by its conclusions and findings. Could the initiation of a parallel dispute settlement mechanism (before or after the WTO one) be seen as an abuse of rights? If Members provided the WTO with a quasi-automatic dispute settlement system that can be triggered so easily, the Members' intention was obviously not to restrict the availability of such a dispute mechanism. There is nothing vexatious in having recourse to a trade tribunal (WTO) before or after the environment tribunal (MEA) has assessed the environment-related aspects of the disputes. States are presumed to have known that a single dispute could involve different issues covered by different treaties. They are presumed to have envisaged the potential for multiple jurisdiction. Were they fully aware of the consequences of their choice?

IV. CONCLUSION

At least four types of issue exist in the debate on the relationship between the WTO Agreement and MEAs and other treaties.

¹²³ This is not to say that other jurisdictions do not have the capacity to interpret WTO provisions when this is necessary for them to interpret their own treaty.

First, there are allegations of conflict between the substantive norms contained in the WTO Agreement and those of other treaties. Panels and the Appellate Body have the obligation to interpret the WTO provisions in taking into account all relevant rules of international law applicable to the relations between the WTO Members. One of those rules is the general principle against conflicting interpretation (Article 31.3(c) together with Article 30 of the Vienna Convention). Therefore, in most cases the proper interpretation of the relevant WTO provisions—themselves often drafted in terms of specific prohibitions leaving open a series of WTO compatible alternative measures—should lead to a reading of the WTO provision so as to avoid conflict with other treaty provisions. Often MEAs and other treaties will be invoked in support of a defence under Article XX of GATT (or similar provisions), allowing Members to take measures necessary for the protection of health and the environment or relating to the conservation of natural resources. In assessing compliance with Article XX of GATT, the WTO jurisprudence calls for an examination of the challenged Members' practices and behaviour, the importance of the values and interest defended by the challenged measure, the existence of alternatives and whether the measure is applied in an abusive manner. For all these elements, WTO Members' participation in the MEA or in other treaties can become relevant. Provisions of another treaty may also be invoked as a justification for not complying with WTO obligations. As is the case with MEAs, the interpreter should first proceed to see whether the WTO provisions (rights and obligations) can be interpreted so as to avoid conflicts with the provisions of the other treaties. If this is not possible there follows the next series of issues: what to do when faced with an irreconcilable conflict.

Second, if conflict cannot be avoided through interpretation, Article 30 of the Vienna Convention (*lex posterior*) and the rule on *lex specialis* may be used to identify which should be the prevailing provision (the "applicable" provision). Article 30.5 of the Vienna Convention seems to allow two States to modify (distinct from an amendment) their rights and obligations within a multilateral treaty as long as the rights of third States are not affected. Is this situation possible in the WTO? The answer to this question depends on the nature of WTO obligations. It can be argued that two WTO Members could adhere to a treaty provision modifying a WTO provision—which modification would not constitute an amendment of the WTO, or affect the rights and obligations of other WTO Members. Can two WTO Members modify their WTO rights and obligations between the two of them only? Can two WTO Members "add to or diminish" their respective WTO rights and obligations if these do not affect the trade opportunities of third WTO Members?¹²⁴ If the WTO obligations are always the same for all Members—and it can be argued that they are—such bilateral change of WTO rights and obligations may simply not be possible without affecting the rights of other WTO Members.

¹²⁴ The answer to this question will also be relevant to the issue of the qualifications (legal interest) necessary for initiating a WTO dispute process.

Since panels and the Appellate Body are prohibited, through the WTO dispute settlement mechanism and while making recommendations, to "add to or diminish rights and obligations of WTO", this may lead to situations where panels will have to recognize that there is no WTO law applicable between the parties, as the allegedly violated WTO provision has been superseded by another treaty provision. If this superseding provision adds to or diminishes any WTO provision or constitutes an amendment of the WTO, panels and the Appellate Body may have three possible courses of action: (1) they may conclude that they are faced with a type of WTO *non-liquet*, as the alleged WTO provision has ceased to apply or exist; (2) they may conclude that they never had jurisdiction to hear that matter since there was no WTO provision applicable, as it was superseded by a non-WTO provision; in these two situations, they may offer a declaratory judgment on the state of international law even if no specific remedies can be recommended since there is no violation of a WTO provision as such; (3) panels may decide that they retain jurisdiction and simply reject the claim that a WTO provision has been violated (since such WTO provision has been superseded by another treaty's provision). Any of these courses of actions would be possible only to the extent that the conclusions reached by the panels do not constitute an amendment of the WTO, or do not add to or diminish the rights and obligations of WTO Members or do not affect the rights of third WTO Members.

Third, there could be overlaps or conflicts of jurisdiction. The wording of Article 23 of the DSU makes it clear that a WTO adjudicating body always has the authority and even the obligation to examine claims of violations of WTO obligations. WTO rights and obligations can be challenged only pursuant to the WTO dispute settlement procedures and only before a WTO adjudicating body (Article 23 of the DSU).¹²⁵ In addition, the WTO jurisprudence has confirmed that any WTO Member that is a "potential exporter"¹²⁶ has the sufficient legal interest to initiate a WTO panel process. That is to say, in the context of a dispute between two WTO Members involving situations covered by both an MEA or any other treaty and the WTO Agreement, any WTO Member which considers that any of its WTO benefits have been nullified or impaired has an absolute right to trigger the WTO dispute settlement mechanism and request the establishment of a panel.¹²⁷ Such a WTO Member cannot be asked, and arguably cannot even agree, to take its WTO dispute to another forum, even if that other forum appears to be more relevant or better equipped to deal with the matter at issue. There does not seem to be any solution to the situation where two Members are faced with two treaties that contain mutually exclusive or overlapping jurisdictions.

Fourth, tensions may arise from the availability of different dispute avoidance or settlement mechanisms even in the absence of strict *de jure* conflicts but when faced with overlaps of jurisdictions. It is true that, generally, non-compliance mechanisms of

¹²⁵ Even an arbitration performed pursuant to Article 25 of the DSU would be a WTO arbitration, hence covered by the exclusivity provision of Article 23 of the DSU.

¹²⁶ Appellate Body Report on EC—*Bananas III*, at para. 136.

¹²⁷ Appellate Body Report on US—*Shirts and Blouses*, WT/DS33/AB/R, adopted on 23 May 1997, at p. 13.

MEAs have different objects and purposes to those of the WTO dispute settlement mechanism; it is thus difficult to speak of conflict or even overlap of jurisdictions *per se*, since the applicable law and the matter at issue would be different. Yet important tensions may occur. For instance, trade measures taken pursuant to recommendations by an MEA body or process could be argued to be inconsistent with Article 23 of the DSU. The dispute settlement provisions of MEAs do not include specific provisions for trade sanctions, but under general international law an MEA State could take counter-measures against the MEA State refusing to respect the conclusion of an MEA dispute settlement report. These counter-measures could be seen as contradicting the WTO prohibition against trade restrictions taken outside the institutional framework of the WTO. The benefits gained from such counter-measures may be nullified by the consequences of a violation of Article 23 of the DSU. At the moment there is no solution to these tensions.

In light of the extensive reach of Article 23 of the DSU, and the quasi-automaticity of the DSU process, it seems clear that WTO Members would have to negotiate and agree on the circumstances in which disputing parties would be obliged to exhaust the prior mechanisms of MEAs or other treaties and when they should be restrained from triggering the WTO dispute mechanism. This is true of any jurisdiction. Overlapping jurisdictions applying similar laws may reach different conclusions on very closely related matters but, at the moment, there is no solution to this matter until institutional rules are negotiated.

As for MEAs, possible solutions include strengthening the non-compliance and dispute settlement mechanisms in other treaties to enhance their effective implementation, the use of MEA experts and the involvement of MEA secretariats in panel processes. Another means would include the expansion of the dispute avoidance provisions of the WTO in parallel with the non-compliance mechanisms of MEAs. Institutional agreements reinforcing the dispute settlement mechanisms of other treaties would reduce the attractiveness of the WTO dispute settlement mechanism. But all this depends on the willingness of WTO Members to provide, for treaties dealing with the environment, human rights and subject-matters other than trade, a dispute settlement mechanism as powerful as the one they have put in place in the WTO treaty.