# A "Footnote as a Principle". Mutual Supportiveness in an Era of Fragmentation

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# A "FOOTNOTE AS A PRINCIPLE". MUTUAL SUPPORTIVENESS AND ITS RELEVANCE IN AN ERA OF FRAGMENTATION

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## A. Transcending the Logics of Norms Conflict: From "Harmonization" to "Mutual Supportiveness"

Multiple events or situations have been qualified as "footnotes to history". But footnotes are to history what they might also be to the progressive development of international law. In other words, they are neither the proper avenue for the crystallization of norms of customary international law nor the adequate receptacle of norms *in statu nascendi*. Footnotes are indeed often ignored or simply forgotten due to their isolated status in international documents, be they legal or non-legal documents.

The treatment of the principle or concept of mutual supportive ness in the Report of the International Law Commission (ILC) on *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* is an (un)conscious attempt at reducing mutual supportiveness to a "footnote to history". The ILC Report mentions mutual supportiveness only in two instances, and then only briefly. First, to say that the "technique"[1] of mutual supportiveness "seems more appropriate to play down that sense of conflict and to read the relevant materials from the perspective of their contribution to some generally shared–'systemic'–objective".[2] Second, to convey that "often regimes operate on the basis of administrative coordination and 'mutual supportiveness' the point of which is to seek regime-optimal outcomes"[3] before concluding that "while this is clearly appropriate in regard to treaty provisions that are framed in general or 'programmatory' terms, it seems less proper in regard to provisions

[1] Report of the Study Group of the International Law Commission finalized by M. Koskenniemi, Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682, 207, para. 412 (2006).

[2] Id.

[3] Id., at 252, para. 493.

establishing subjective rights or obligations the purpose of which it is to guarantee such rights".[4]

The ILC concludes in the Appendix to the above-mentioned Report by mentioning "*rules, methods and techniques for dealing with collisions*" of norms and regimes but does not refer to mutual supportiveness as such. All of a sudden, mutual supportiveness was turned into "mutual accommodation".[5] The ILC limited itself to acknowledging that "in case of conflicts or overlaps between treaties in different regimes, the question of which of them is later in time would not necessarily express any presumption of priority between them. Instead, States bound by the treaty obligations should try to implement them as far as possible with *the view of mutual accommodation* and in accordance with the principle of harmonization".[6]

Yet mutual supportiveness has not emerged *ex nihilo* in the international legal discourse and is not a legal epiphenomenon. Its birth or rise was precipitated by the phenomenon of international legal pluralism,[7] also referred to as "fragmentation",[8] "diversity", "cacophony", "interconnected islands",[9] "regime-collisions", "global law", and "internormativity".[10] Mutual supportiveness has emerged as a means to cure "postmodern anxieties"[11] caused by the so-called phenomenon of "fragmentation" of international law. Rüdiger Wolfrum recognized the problem very early in seminal works.[12]

Although it is undeniable that mutual supportiveness has emerged and developed in a specific context–that of the relationship between

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[4] Id.

[5] Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L. 702, 1, 7 et seq., para. 26 (2006).

[6] Id., paras. 27, 28 (italics added).

[7] See W. W. Burke-White, International legal pluralism, 25 Michigan Journal of International Law 963–979 (2004).

[8] See B. Simma, Fragmentation in a Positive Light, 25 Michigan Journal of International Law 845–847 (2004). See also P. S. Rao, Multiple International Judicial Forums: A Reflection of the Growing Strength of International Law or its Fragmentation?, 25 Michigan Journal of International Law 929–961 (2004).

[9] J. Pauwelyn, Bridging Fragmentation and Unity: International Law as a Universe of Inter-connected Islands, 25 Michigan Journal of International Law 903–927 (2004).

[10] L. Boisson de Chazournes, Gouvernance et régulation au 21ème siècle: Quelques propos iconoclastes, in: L. Boisson de Chazournes/R. Mehdi (eds.), Une société internationale en mutation: quels acteurs pour une nouvelle gouvernance?, 19–40 (2005).

[11] M. Koskenniemi/P. Leino, Fragmentation of International Law? Postmodern Anxieties, 15 Leiden Journal of International Law 553–579 (2002).

[12] See for example R. Wolfrum/N. Matz, Conflicts in International Environmental Law (2003).

trade agreements and multilateral environment agreements (MEAs)–there is no doubt that mutual supportiveness is rooted in legal principles capable of rationalizing fragmentation. Furthermore, mutual supportiveness benefits from more solid legal ground–in terms of its quantitative and qualitative incorporation in international instruments–than the so-called "principle of harmonization" which has extensively been referred to and supported by the ILC in its study on fragmentation of international law.

"Harmonization" is intrinsically linked to the "presumption against normative conflict".[13] Mutual supportiveness is inherently linked to a principle (not a presumption!) of normative cohesion or normative interconnection between different regimes. In other words, the concept of harmonization implicitly accepts that normative conflicts may arise if the presumption against conflict is rebutted while mutual supportiveness "plays down that sense of conflict",[14] not to say excludes *in toto* the idea of conflict. No international instrument embodying the principle (or concept) of mutual supportiveness gives credence to the idea of conflict. They all refer to a "relationship"[15] between different treaty regimes, or to "common" objectives pursued by different treaty regimes or to the absence of "policies contradiction".[16]

By emphasizing the "principle of harmonization", in reality the ILC was just putting another hat on the presumption against conflict. It is a bit like pouring old wine into new bottles. The ILC itself started its analysis of "harmonization" by stating that "treaty interpretation is diplomacy, and it is the business of diplomacy *to avoid or mitigate conflict*. This extends to adjudication as well".[17] Dealing more specifically with the function of "harmonization" (also called "systemic integration") the ILC went on to affirm that "although harmonization often provides an acceptable *outcome for normative conflict*, there is a definite limit to harmonization: 'it may resolve apparent conflicts; it cannot resolve genuine conflicts'".[18] It is obvious that conflict is at the

[13] See W. Jenks, The Conflict of Law-Making Treaties, 30 British Yearbook of International Law 425 (1953): "It seems reasonable to start from a general presumption against conflict".

[14] Supra note 1, at para. 412.

[15] See for instance the Doha Declaration, 14 November 2001, Ministerial Conference, WT/MIN(01)/DEC/1, para. 31, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.doc.

[16] Decision on Trade and Environment, 15 April 1994, Ministerial Decision, available at http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm.

[17] Supra note 1, at para. 35 (italics added).

[18] Supra note 1, at para. 42 (italics added).

core of the very legitimization of the principle of harmonization by the ILC.

The ILC also makes the proposition according to which "…it is still possible to reach the conclusion that although the two norms seemed to point in diverging directions, after some adjustment, it is still possible to apply or understand them in such way that no overlap or conflict will remain. This may sometimes call for the application of the kinds of conflict-solution rules which the bulk of this Report will deal with. But it may also take place through an attempt to reach a resolution that integrates the conflicting obligations in some optimal way in the general context of international law. Inasmuch as the question of conflict arises regarding the fulfilment of the *objectives* (instead of the obligations) of the different instruments, little may be done by the relevant body".[19] Suggesting that to integrate "conflicting obligations in some optimal way in the general context of international law" can be understood as a rephrasing of the presumption against conflict in international law as traditionally framed in the *Georges Pinson* case within the following semantics: "every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way".[20]

"Harmonization" is thus inextricably linked to the presumption against normative conflicts in the mindset of the ILC, despite the limitations attached to that presumption.[21] One may wonder why the ILC has not further explored the concept of mutual supportiveness and declined to consecrate it among the bulk of rules or principles susceptible of harnessing and tackling fragmentation. In the above-mentioned extract, the ILC asserted that "it is still possible to apply or understand them in such way that no overlap or conflict will remain". This is exactly

[19] Supra note 1, at para. 43 (italics in the original).

[20] *Georges Pinson* case, Franco-Mexican Commission, Annual Digest of Public International Law Cases, para. 50 (1927–1928).

[21] See A. Lindroos, Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*, 74 Nordic Journal of International Law 31 (2005). The author puts the idea into context according to which special regimes (*lex specialis*) operate entirely within the framework of international law: "… to some extent, therefore, these legal orders appear to exist in a normative jungle, where each system may create solutions entirely opposite to the solutions of another system, and where general international law may be interpreted and applied in different ways. Yet at the same time, these autonomous regimes operate within the framework of international law and rely upon that framework to a varying degree. Although these systems are part of the wider framework of international law, their relationship to it and to each other is far from clear".

what mutual supportiveness enhances and thereby promotes transcending the logics of conflict. It is thus not clearly understandable why mutual supportiveness has been relegated to the status of "footnote to history" in the conclusions of the ILC study on fragmentation.

Based on a "realist" approach, the present contribution will first attempt to define what mutual supportiveness is. Then, using an "impressionist" approach, the trend of legalization of the principle of mutual supportiveness will be underlined. As concluding remarks, the contours of mutual supportiveness in treaty interpretation will be stressed, while highlighting the relevance of the principle in the context of the unity/fragmentation debate.

## B. A "Realist" Approach to Mutual Supportiveness: Beyond Collisions of Norms

The concept of mutual supportiveness appeared with the need and concern for strengthening coherence, balance and interaction between trade and environment. One might argue that there is already a certain *coherence* among trade agreements (in particular WTO agreements) and MEAs. In both cases, the objective of *sustainable development* is explicitly stated.[22] However, the coherence which is sought in today's international relations goes beyond the traditional approach of coherence as mere "compatibility" between legal regimes. No one doubts that trade agreements and MEAs are compatible, i.e. that the rights and obligations contained therein (in those agreements) do not necessarily exclude each other and that both regimes can find application.

Nevertheless, coherence entails and even requires a further step: that is for trade agreements and MEAs to be "mutually supportive" or "mutually reinforcing" legal regimes. As recognized more broadly by the Tribunal in the *Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway*: "today, … international law require[s] the integration of

[22] See Preamble to the Agreement Establishing the World Trade Organization: "*Recognizing* that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development …." Available at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

appropriate environmental measures in the design and implementation of economic development activities …. Environmental law and the law on development stand not as alternatives but as *mutually reinforcing*, *integral concepts*, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm. This duty, in the opinion of the Tribunal, has now become a principle of general international law".[23]

Compatibility presupposes that each regime operates in isolation from every other without any links being made between them (this situation can be referred to as a "neutral relationship"). In other words, MEAs would pursue environmental objectives without taking into account trade agreements. And trade agreements would pursue commercial objectives without integrating the substantive norms contained in MEAs. Compatibility gives the image of a sort of "Cold War" state between trade agreements and MEAs where only "peaceful coexistence" is sought, with no trespassing allowed from one regime to another. A good illustration of a regime articulated round compatibility is Annex 104 (Relation to Environmental and Conservation Agreements) of the NAFTA, which reads as follows:

> "1. In the event of *any inconsistency* between this Agreement and the specific trade obligations set out in:
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> a) the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, March 3, 1973, as amended June 22, 1979,
>
> b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, September 16, 1987, as amended June 29, 1990,
>
> c) the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, March 22, 1989, on its entry into force for Canada, Mexico and the United States, or d) the agreements set out in Annex 104.1, such obligations *shall prevail to the extent of the inconsistency*, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, *the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement*".[24]

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[23] *Arbitration Regarding the Iron Rhine ("Ijzeren Rijn") Railway* (Belgium v. The Netherlands), Permanent Court of Arbitration, Award of 24 May 2005, para. 59. Available at http://www.pca-cpa.org/showpage.asp?pag_id=1155 (italics added).

[24] North American Free Trade Agreement (NAFTA), 17 December 1992, Article 104, available at http://www.nafta-sec-alena.org (italics added).

The Arbitral Tribunal in the *S.D. Myers* case confirmed that NAFTA Annex 104 has to be read through the lens of a "compatibility" dynamic. The tribunal stressed that "the drafters of the NAFTA evidentially considered which earlier environmental treaties would prevail over the specific rules of the NAFTA in case of conflict. Annex 104 provided that the Basel Convention would have priority if and when it was ratified by the NAFTA Parties. Even if the Basel Convention were to have been ratified by the NAFTA Parties, it should not be presumed that CANADA would have been able to use it to justify the breach of a specific NAFTA provision because *…where a party has a choice among equally effective and reasonably available alternatives for complying…. with a Basel Convention obligation, it is obliged to choose the alternative that is …least inconsistent… with the NAFTA*. If one such alternative were to involve no inconsistency with the Basel Convention, clearly this should be followed".[25]

However, the Arbitral Tribunal in the *S.D. Myers* case perceived "compatibility" and "mutual supportiveness" as interchangeable concepts, without giving its full meaning to mutual supportiveness. Indeed, in the course of its reasoning, the tribunal asserted that "the Preamble to the NAFTA, the NAAEC and the international agreements affirmed in the NAAEC suggest that specific provisions of the NAFTA should be interpreted in light of the following general principles: Parties have the right to establish high levels of environmental protection. They are not obliged to compromise their standards merely to satisfy the political or economic interests of other states; Parties should avoid creating distortions to trade; environmental protection and economic development can and should be *mutually supportive*".[26] Nevertheless, the approach of the tribunal was clearly not guided by a "mutual supportiveness" perspective since it considered that priority should be given to trade concerns. The tribunal considered that a "logical corollary" of the general principles referred to in the previous quotation (among which is the principle of mutual supportiveness) "is that where a state can achieve its chosen level of environmental protection through a variety of equally effective and reasonable means, *it is obliged to adopt the*

[25] In a NAFTA Arbitration under the UNCITRAL Arbitration Rules, *S.D. Myers, Inc. (Claimant) and Government of Canada (Respondent)*, Partial Award, 13 November 2000, 49–50, paras. 214–215, available at http://www.naftalaw.org/Disputes/Canada/SDMyers/SDMyersMeritsAward.pdf (italics in original).

[26] Id., 50–51, para. 220 (italics added).

*alternative that is most consistent with open trade*. This corollary also is consistent with the language and the case law arising out of the WTO family of agreements".[27]

Compatibility is usually also provided for in international agreements through "safeguard clauses" which can read as follows: "the provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement"[28] or "the provisions of this Convention shall not affect the rights and obligations of any Party deriving from a bilateral, regional or international agreement".[29]

Here the subtle interaction between compatibility, "harmonization" and the presumption against normative conflict appears. Indeed, the above-mentioned safeguard clauses constitute a concrete legal formulation of the presumption against normative conflict. It is interesting to note that the ILC has not really perceived the autonomy and singularity of mutual supportiveness as a means for dealing with fragmentation. In its Report on fragmentation, the ILC mentions no fewer than forty-four times the issue of "compatibility" and only about twenty times the question of "coherence", to conclude that "coherence is, however, a formal and abstract virtue".[30] Moreover, compatibility is seen by the ILC essentially as a necessary corollary of the so-called principle of harmonization. In the Report on fragmentation it is pointed out that "when two States have concluded two treaties on the same subject-matter, *but have said nothing of their mutual relationship*, it is usual to first try to read them as *compatible* (the principle of harmonization)".[31]

Besides equal compatibility with harmonization, the ILC confirms that compatibility (or harmonization) produces a sort of "neutral relationship" between different treaty regimes. The Report underlines that "between the parties, anything may be harmonized *as long as the will to harmonization is present*. Sometimes, however, that will may not be present, perhaps because the positions of the parties are so wide apart from each other–something that may ensue from the impor tance of the clash of interests or preferences that is expressed in the normative conflict, or from the sense that the harmonizing solution

[27] Id., 51, para. 221 (italics added).
[28] Convention on Biological Diversity, 5 June 1992, Article 22, para. 1.
[29] United Nations Convention to Combat Desertification, 17 June 1994, Article 8, para. 2.
[30] Supra note 1, 248, at para. 491.
[31] Supra note 1, 118–119, at para. 229 (italics added).

would sacrifice the interests of the party in a weaker negotiation position. In this respect, *there is a limit to which a 'coordinating' solution may be applied to resolve normative conflicts*. Especially where a treaty lays out clearly formulated rights or obligations to legal subjects, care must be taken so as not to see these merely as negotiating chips in the process of reaching a coordinating solution".[32]

Mutual supportiveness absorbs the "coordinating solution" as an *end* which has to be achieved by any necessary means. "Harmonization" comprehends this "coordinating" or "harmonizing solution" as a *means* which has to be put aside when it goes against the will of states or when it deals with specific rights and obligations. In other words, on the one hand, the ILC indicates that "harmonization" is strongly dependent on the will of the parties to a dispute when the issue of so-called normative conflicts arises between two states within the context of a dispute. As such, for example, a judge or an arbitrator does not have discretion in harmonizing different treaty regimes if the parties oppose it. "Harmonization" or compatibility thus rests upon a subjective appreciation. On the other hand, the ILC presupposes that "harmonization" is materially almost impossible to implement whenever different rights and obligations are at stake. In this perspective, "harmonization" seems to be dependent on the existence of similar rights and obligations in the two treaty regimes subject to harmonization.

By contrast, mutual supportiveness is based on an objective appreciation. A judge or an arbitrator is not subject to the will of the parties in deciding whether or not he/she should take mutual supportiveness into consideration when different treaty regimes are at stake. And parties to a dispute are supposed, not to say are bound, to foster in good faith mutual supportiveness between instruments to which they are parties.[33] Moreover, mutual supportiveness does not focus on substantive rights and obligations, but rather on the objectives pursued by different treaty regimes. In this context, mutual supportiveness implies "peaceful and active cooperation" between various agreements, such as trade agreements and MEAs. Mutual supportiveness means that while focusing on their own tasks and competences, the trade and environment regimes should be "mutually reinforcing" since they are both

[32] Supra note 1, 27, at para. 42 (italics added).

[33] See the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, 20 October 2005, available at http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html.

seeking to achieve sustainable development. In order to maintain mutual supportiveness, each framework should remain responsible and competent for the issues falling within its primary area of competence.[34]

The fact that the trade and environment regimes should each focus on their primary competence does not mean, however, that the WTO agreements, for instance, cannot deal with principles and rules which affect the environment. At the same time, MEAs are not, and should not be, prevented from including rules and principles that affect trade. Rules and principles on international trade may indeed affect environment and health; similarly, MEAs may have an impact on trade. Therefore, whilst each regime should focus on its primary competence, it is not prevented from adopting measures which affect the other regime. However, the concerns and interests of each regime should be taken into account by the other one and deference[35] should be paid to the primary competence of the other regime in a spirit of mutual supportiveness.

Concretely, for example, if there is a trade dispute over agricultural biotechnologies, the WTO should have primary competence to deal with that dispute and to apply and interpret trade agreements. However, mutual supportiveness will require the WTO fully to take into account the rules embodied in instruments and standards dealing with biotechnology in order to solve the dispute and to interpret WTO agreements. As has been explained, "the interpretation must actually not just try to avoid, or to interpret away, a conflict of norms; on the basis of its wording it should result in support for the *functioning of either of the two treaties involved*".[36]

This is another difference from "harmonization" as conceived by the ILC in its Report on fragmentation, since the latter has underscored that "where a treaty lays out clearly formulated rights or obligations to

[34] See L. Boisson de Chazournes/M. M. Mbengue, Trade, Environment and Biotechnology, in: T. Cottier/D. Wüger (eds.), Genetic Engineering: Challenges Posed by a New Technology to the World Trading System, 229–237 (2007).

[35] For an in-depth study of this concept see F. X. Perrez, The Cartagena Protocol on Biosafety and the relationship between the multilateral trading system and multilateral environmental agreements, 10 Swiss Review of International and European Law 518–527 (2000).

[36] P. J. Kuijper, Conflicting Rules and Clashing Courts: The Case of Multilateral Environmental Agreements, Free Trade Agreements and the WTO, Issue Paper No. 10, ICTSD Programme on Dispute Settlement, 15, para. 52 (2010), available at http://ictsd.org/downloads/2010/11/j_kuijper_web_6.pdf (italics added).

legal subjects, *care must be taken so as not to see these merely as negotiating chips in the process of reaching a coordinating solution*".[37] Rights and obligations conferred by MEAs may be *different from or complementary* to rights and obligations contained in WTO Agreements but they are not *mutually exclusive*. And if they are not mutually exclusive they can be *mutually supportive*. As stated by the Arbitral Tribunal Constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) in the *Southern Bluefin Tuna* case, "…it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. … There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; …."[38]

In sum, mutual supportiveness enhances "positive interaction"[39] or builds "constructive and interactive relationships"[40] between trade and environmental measures. Environmental treaties and trade agreements are part of international law as a legal system. In that sense, environmental treaties and trade agreements are subsystems which meet international law's principle of normative integration, and in order to remain a part of the international legal system, each of these specific subsystems has to be able to "resist pressures to break away from it".[41] The best way of promoting such resistance is to focus on mutual supportiveness. The principle of mutual supportiveness gives a specific dynamic and rationale to the interface between trade agreements and MEAs.

Mutual supportiveness excludes the very idea of conflict be tween environmental treaties and other international agreements. It presupposes various attitudes. It insists on the relevance of *ex ante*

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[37] Supra note 1, 27, para. 42 (italics added).

[38] *Southern Bluefin Tuna* (New Zealand v. Japan; Australia v. Japan), Award on Jurisdiction and Admissibility, Decision of 4 August 2000, rendered by the Arbitral Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea, para. 52, available at http://untreaty.un.org/cod/riaa/cases/vol_XXIII/1–57.pdf.

[39] See Decision on Trade and Environment, 15 April 1994, Ministerial Decision, available at http://www.wto.org/english/tratop_e/envir_e/issu5_e.htm.

[40] See WHO, International Trade and Health: Draft Resolution, Executive Board, 117th session, Doc. EB117/10, 1 December 2005, available at http://www.who.int/gb/ebwha/pdf_files/EB117/B117_10-en.pdf.

[41] Y. Shany, The Competing Jurisdictions of International Courts and Tribunals, 100 (2003).

coordination. In other words, when states negotiate new international agreements they should pay attention to the fact that these instruments should pay deference to preexisting international instruments. *Ex ante* coordination[42] might thus result in an *ex post* synchronization between treaty regimes through the ranging of different substantive rights and obligations under the *chapeau* of common or quasi-common objectives (as for example sustainable development). For instance, Article 21 (entitled: International consultation and coordination) of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions provides that "Parties undertake to *promote the objectives and principles of this Convention in other international forums*. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles".[43]

It is reassuring to note that even the ILC considered *in fine* that the approach based on conflicts of norms was not suitable when dealing with different treaty regimes. Making its way towards the path of mutual supportiveness, the ILC acknowledged that "international law will need to operate within an area where the demands of coherence and reasonable pluralism will point in different directions. In order for it to do this successfully, *increasing attention will have to be given to the collision of norms and regimes and the rules, methods and techniques for dealing with such collisions*".[44] "Collisions" and no more mention of "conflicts". The use of a softer terminology also shows that something more than the "principle of harmonization" is needed to deal with instances of fragmentation in the international legal order. Mutual supportiveness is at the forefront of such a need for convergence. Its legal status is progressively shaped.

### C. An 'Impressionist' Approach: Towards the Legalization of Mutual Supportiveness

Mutual supportiveness is not a mere political slogan. Various international instruments, albeit in the context of the "trade and environment

[42] See W. Czaplinski/G. Danilenko, Conflicts of Norms in International Law, 21 Netherlands Yearbook of International Law 12 (1990): "The best way of avoiding conflicts between treaties is to include compatibility clauses in the treaty texts".

[43] Italics added.

[44] Supra note 1, 249, para. 493.

debate", have incorporated the principle or concept of mutual supportiveness. Here are some examples:

The Preamble to the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998, states:

> "Recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,
>
> Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environment protection,
>
> Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements …."

The Preamble to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000, reads as follows:

> "Recognizing that trade and environment agreements 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 …."

The Preamble to the Stockholm Convention on Persistent Organic Pollutants (POPs), 2001, states:

> "Recognizing that this Convention and other international agreements in the field of trade and the environment are mutually supportive…".

The Preamble to the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001, reads as follows:

> "Recognizing that this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security;
>
> Affirming that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements;
>
> Understanding that the above recital is not intended to create a hierarchy between this Treaty and other international agreements;
>
> Aware that questions regarding the management of plant genetic resources for food and agriculture are at the meeting point between

> agriculture, the environment and commerce, and convinced that there should be synergy among these sectors …."

For its part, the WTO Doha Ministerial Declaration, 2001, states that:

> "With a view to *enhancing the mutual supportiveness of trade and environment*, we agree to negotiations, without prejudging their outcome, on: (i) the relationship between existing WTO rules and *specific trade obligations* set out in multilateral environmental agreements (MEAs). The negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question. The negotiations shall not prejudice the WTO rights of any Member that is not a party to the MEA in question…."[45]

The WTO Hong Kong Ministerial Declaration, 2005, reads as follows:

> "We reaffirm the mandate in paragraph 31 of the Doha Ministerial Declaration aimed at enhancing the mutual supportiveness of trade and environment and welcome the significant work undertaken in the Committee on Trade and Environment (CTE) in Special Session. We instruct Members to intensify the negotiations, without prejudging their outcome, on all parts of paragraph 31 to fulfill the mandate.
>
> We recognize the progress in the work under paragraph 31(i) based on Members' submissions on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). We further recognize the work undertaken under paragraph 31(ii) towards developing effective procedures for regular information exchange between MEA Secretariats and the relevant WTO committees, and criteria for the granting of observer status".[46]

The legal formulations of mutual supportiveness vary depending on the instrument at stake. For instance, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention) and the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity recognize "that trade and environmental policies should be mutually supportive with a view to achieving sustainable development". The 2001 Stockholm Convention on Persistent Organic Pollutants (POPs) goes further and is much more affirmative when underlining that the POPs Convention "and other international agreements in the field of trade and the environment are mutually

[45] Para. 31, available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.doc (italics added).

[46] Paras. 30 and 31, the Hong Kong Ministerial Declaration, 18 December 2005, is available at http://www.wto.org/english/thewto_e/minist_e/min05_e/final_text_e.htm.

supportive". Some other treaties like the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture stress the need for a "*synergy*" between environmental treaties and other international agreements. Despite variations in formulations, all instruments acknowledge that environmental treaties and other international agreements pursue the same objective, i.e. the promotion of sustainable development. They also all emphasize the absence of a hierarchy between environmental treaties and other international agreements.

Two elements of the trade and environment relationship can be deduced from these instruments: a "functional" element and a "relational" element. The "functional" element indicates that trade and environment agreements pursue the same objective, i.e. the promotion of sustainable development. The "relational" element deals with the transversal character of the sectors regulated under trade and environment agreements. Because of their transversal aspect, many sectors are a meeting point between environment and trade and create an intrinsic relationship between the two domains.[47] The "functional" and "relational" elements strengthen the principle according to which there is no hierarchy between MEAs and trade agreements (in particular WTO agreements), and both are of equal status in the international legal system. They also emphasize that mutual supportiveness, and not just mere "harmonization", must be sought.

Therefore, mutual supportiveness appears to be the key which would enable different treaty regimes to communicate through the same doors when they pursue similar objectives, albeit through distinct rights and obligations. This is another factor which showcases one of the weaknesses of the ILC Report on fragmentation. The ILC considered that "inasmuch as the question of conflict arises regarding the fulfilment of the *objectives* (instead of the obligations) of the different instruments, little may be done by the relevant body".[48] However, some treaty regimes purport (at least partially) to achieve similar objectives

[47] M. Koskenniemi, Study on the Function and Scope of the Lex Specialis Rule and the Question of 'Self-Contained Regimes', UN Doc. ILC(LVI)/SG/FIL/CRD.1/Add.1 (2004), at 3: "… denominations such as 'trade law' or 'environmental law' have no clear boundaries. For example, maritime transport of oil links to both trade and environment. Should the obligations of a ship owner in regard to the technical particularities of a ship, for instance, be determined by reference to what is reasonable from the perspective of oil transport considered as a commercial activity or as an environmentally dangerous activity?", available at http://untreaty.un.org/ilc/sessions/55/fragmentation_outline.pdf.

[48] Supra note 1, 28, para. 43 (italics in the original).

(such as sustainable development). In such a case mutual supportiveness excludes the idea of hypothetical unsolvable conflicts of norms.

The approach of the ILC derives from the rationale it adopted in its treatment of fragmentation. In the words of the Report on fragmentation, "the rationale for the Commission's treatment of fragmentation is that the emergence of new and special types of law, so-called 'self-contained regimes' and geographically or functionally limited treaty-systems, creates problems of coherence in international law. …. The emergence of 'environmental law', for example, is a response to growing concern over the state of the international environment. 'Trade law' develops as an instrument to regulate international economic relations. …. Each rule-complex or 'regime' comes with its own principles, its own form of expertise and its own 'ethos', not necessarily identical to the ethos of neighbouring specialization. 'Trade law' and 'environmental law', for example, have highly specific objectives and rely on principles that may often point in different directions".[49]

Albeit comprehensible, this approach ignores the fact that mutual supportiveness, rather than encouraging one to see treaty regimes as "self-contained regimes", advocates seeing those regimes as "cross-fertilization regimes" (in French, *régimes à vases communicants*) being governed by converging "ethos". The ever-increasing acknowledgment of mutual supportiveness in treaty practice dealing with trade and environment is moving in this direction.

It is noteworthy that the principle of mutual supportiveness is being progressively and expressly implemented in other areas. The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions is an illustration of the migration of mutual supportiveness to new legal fields. That instrument achieved a further step forward by, for the first time, including mutual supportiveness in the *operative* part of a treaty, i.e. among the core obligations and not just in a preamble as used to be the case. Article 20 reads indeed as follows:

> "Article 20–Relationship to other treaties: mutual supportiveness, complementarity and non-subordination
>
> 1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, …

[49] Supra note 1, 14, para. 15.

(a) *they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties* (italics added); and
(b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties."

Another step forward was taken with the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (ABS Protocol) by the Tenth Conference of the Parties to the Convention on Biological Diversity (CBD COP 10).[50] This protocol shows a pioneering and new approach in respect of the incorporation of mutual supportiveness in international instruments. Indeed, the ABS Protocol embodies the principle of mutual supportiveness both in its preamble and in its operative part. The preamble to the ABS Protocol states:

> "Recognizing that international instruments related to access and benefit-sharing should be mutually supportive with a view to achieving the objectives of the Convention…."

And Article 4, para. 3 of the ABS Protocol provides:

> "This Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to this Protocol. Due regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol."

The second sentence in Article 4, para. 3 of the ABS Protocol, according to which "due regard should be paid to useful and relevant ongoing work or practices under such international instruments and relevant international organizations, *provided that they are supportive of and do not run counter to the objectives of the Convention and this Protocol*" (italics added), stresses the emergence of a new dimension. Traditional

[50] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 29 October 2010, Conference of the Parties to the Convention on Biological Diversity, Nagoya, Japan, Tenth meeting, 18–29 October 2010, available at http://www.cbd.int/nagoya/outcomes.

formulations of mutual supportiveness have often been limited to reminding one that there was no subordination of the environment regime *vis-à-vis* the trade regime. The ABS Protocol goes a step further. It requires the trade and other international legal regimes positively and actively to promote the objectives of the ABS Protocol in a mutually supportive manner in case they want the parties to the ABS Protocol to be supportive of their objectives. This entails deeper *ex ante* coordination and more *ex post* synchronization between treaty regimes.

Free Trade Agreements (FTAs) also incorporate the principle of mutual supportiveness for dealing with environmental protection. For example, Article 17.12 of the 2004 Central America-Dominican Republic-United States Free Trade Agreement (CAFTA) reads as follows:[51]

> "The Parties recognize that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. The Parties further recognize that this Chapter and the ECA can contribute to realizing the goals of those agreements. Accordingly, *the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party and trade agreements to which they are all party*."

Some other recent FTAs like the 2008 FTA between Canada and the European Free Trade Association (EFTA) recognize in their preambles "the need for mutually supportive trade and environmental policies in order to achieve the objective of sustainable development".[52]

In the field of investment protection, some voices are promoting the principle of mutual supportiveness. The 2005 IISD Model International Agreement on Investment for Sustainable Development provides that "the Parties agree that the provisions of other international trade agreements to which they are a Party are consistent with the provisions of this Agreement. The Parties shall seek to interpret such agreements in

[51] The text of the Central America-Dominican Republic-United States Free Trade Agreement, 5 August 2004, is available at http://www.caftaintelligencecenter.com/subpages/What_is_CAFTA.asp (italics added).

[52] Free Trade Agreement Between Canada and the States of the European Free Trade Association (Iceland, Liechtenstein, Norway and Switzerland), 1 July 2009, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/efta-aele.aspx.

a mutually supportive manner".[53] In the commentary attached to that provision it is said, "this Article sends an important legal signal that the Parties or a dispute settlement panel should interpret this agreement to be consistent with trade agreements where there are overlapping provisions, and should interpret those provisions in trade agreements to be consistent with this agreement. It seeks a mutually supportive approach in the event of potential conflicts."[54]

A further step forward in the process of legalization will be achieved by a clear recognition of the principle of mutual supportiveness by international courts and tribunals. For the time being, mutual supportiveness has not yet benefited from explicit recognition. Nevertheless, the analysis and assessment of the process of "legalization" of the principle of mutual supportiveness based on an impressionist approach allows one to grasp the wide array of its manifestations and expressions. Beyond the words *per se*, mutual supportiveness is above all a "spirit". Looking carefully at the practice of the WTO dispute-settlement bodies, one cannot ignore the "spirit" of mutual supportiveness which speaks out from some reports.

Think, for example, of the decision of the Appellate Body in the *Brazil–Tyres* case in which the Appellate Body clearly recognized that "certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short-term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions–for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the incidence of diseases that may manifest themselves only after a certain period of time–can only be evaluated with the benefit of time."[55] This acknowledgment of environmental complexity could play a vital role in building bridges between environment

[53] H. Mann et al. (eds.), IISD Model International Agreement on Investment for Sustainable Development, Article 34, at 47 (2nd ed. 2005), available at http://www.iisd.org/pdf/2005/investment_model_int_handbook.pdf.

[54] Id.

[55] *Brazil–Measures Affecting Imports of Retreaded Tyres*, Report of the Appellate Body, WT/DS332/AB/R, 17 December 2007, para. 151.

treaties and trade agreements. Perhaps the future of mutual supportiveness lies in a sort of *informal integration* of that principle, but with a formal purpose, which is to strengthen the ties between environment treaties and trade agreements.[56] This informal integration can be channelled through treaty interpretation.

## D. Modes of Treaty Interpretation as Vehicles for Mutual Supportiveness

One cannot but agree with the ILC when it states in its Report on fragmentation that mutual supportiveness could be seen as a technique appropriate to play down the "sense of conflict and to *read the relevant materials from the perspective of their contribution to some generally shared–'systemic'–objective*".[57] Such a statement paves the way for a different approach in treaty interpretation when dealing with two or more distinct treaty regimes.

The prevailing approach has been to consider that an adequate pathway to prevent so-called conflicts between two distinct treaty regimes was Article 31.3 c) of the Vienna Convention on the Law of Treaties (1969). Article 31.3 c) allows one when interpreting a conventional instrument (e.g. a WTO agreement like the GATT) to take into account another conventional instrument (e.g. a MEA like the Cartagena Protocol on Biosafety to the Convention on Biological Diversity). In that perspective, the latter instrument is conceived as a "relevant rule of international law applicable in the relations between the parties".

Using the gateway of Article 31.3 c) of the Vienna Convention on the Law of Treaties might be useful in some circumstances to promote mutual supportiveness between treaty regimes. However, it quickly appears that Article 31.3 c) may also be too formalistic to foster informal integration of mutual supportiveness. Indeed, the expression "applicable in the relations between the parties" can have a perverse effect by limiting the array of treaty instruments that may be taken into account to ensure *coherence* with other distinct treaty regimes. The limitation would result from the fact that "applicable in the relations between the parties" implies that before a treaty is considered by a

[56] See L. Boisson de Chazournes, Environmental Treaties in Time, 39 Environmental Policy and Law 290, at 293–298 (2009).

[57] Supra note 1, 207, para. 412 (italics added).

treaty interpreter in the light of the principle of mutual supportiveness, he/she has first to make sure that *all* states are parties to that treaty. Albeit limited in the scope of application, such an approach, relying on what may be called the "external context" of a treaty (i.e. rules binding parties to a treaty outside the regime of that treaty), is sometimes favoured in practice. For instance, Article 17.12 of the 2004 Central America–Dominican Republic–United States Free Trade Agreement (CAFTA) which was referred to above[58] embodies this approach:

> "The Parties recognize that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. The Parties further recognize that this Chapter and the ECA can contribute to realizing the goals of those agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of *multilateral environmental agreements to which they are all party and trade agreements to which they are all party*" (italics added).

This is a rather minimal implementation of mutual supportiveness since it is materially impossible that parties to MEAs will always be *mutatis mutandis* parties to the same trade agreements and parties to trade agreements will be parties to the same MEAs. The WTO Panel in the European Communities — Measures Affecting the Approval and Marketing of Biotech Products case has been eager to strengthen the legitimacy of a "take it all or leave it all" approach when it comes to mutual supportiveness. The European Union, which was one of the parties to the *EC–Biotech* case, argued before the Panel that it should interpret WTO agreements in light of the Cartagena Protocol on Biosafety since the dispute related to genetically modified organisms (GMOs) and it was a party to it. The Panel swept aside that argument and stressed that in light of the wording of Article 31.3 c) of the Vienna Convention on the Law of Treaties it could take into account only those instruments to which *all* WTO members were parties.[59] A more plausible understanding of Article 31.3 c) would at least have been to understand the reference to "parties" as parties to that dispute.[60]

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[58] See supra note 51.

[59] European Communities — Measures Affecting the Approval and Marketing of Biotech Products, Report of the WTO Panel, WT/DS291/R-293/R, 29 September 2006, paras. 7.67–7.71.

[60] See supra note 1, 226–228, paras. 448–450.

Another gateway in treaty interpretation, more susceptible of reinforcing mutual supportiveness between treaty regimes, is provided by Article 31.1 of the Vienna Convention on the Law of Treaties. Article 31.1 sets the primary and necessary step in treaty interpretation: "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 31.1 is traditionally not seen as a means of fostering coherence between treaty regimes. This is because it is usually perceived as dealing with coherence *within* a treaty regime as such and not with coherence *vis-à-vis* another treaty regime. To put it in concrete terms, when a treaty interpreter proceeds to interpret under Article 31.1 of the Vienna Convention on the Law of Treaties, he/she is concerned with clarifying the meaning, the scope and the effect of the provisions contained in the treaty which is subject to interpretation. The treaty interpreter is not primarily seeking to build coherence between that treaty and other treaties (coherence *vis-à-vis* another treaty regime).

Yet Article 31.1 of the Vienna Convention on the Law of Treaties can serve as a pathway *par excellence* for mutual supportiveness. Article 31.1 focuses on the "internal context" of treaties, that is to say, rules and principles that parties to a treaty are bound to implement in light of a given treaty regime. Within the internal context of treaties, one main vector of mutual supportiveness is the object and purpose of a treaty. Indeed, the ILC saw mutual supportiveness as a tool "to *read the relevant materials from the perspective of their contribution to some generally shared–'systemic'–objective*".[61]

Using the rationale of Article 31.1 of the Vienna Convention on the Law of Treaties as a means of ensuring mutual supportiveness implies that a treaty interpreter, when faced with an issue (or a subject-matter) under a given treaty regime (e.g. WTO law), should *ipso jure* take into consideration other treaty regimes (e.g. MEAs) which also govern the issue and are part of the same "internal context".[62] As an illustration, a WTO Panel and/or the WTO Appellate Body when dealing with questions in relation to risk assessment of GMOs, can duly take into account

[61] Supra note 1, 207, para. 412 (italics added).

[62] L. Boisson de Chazournes/M. M. Mbengue, A propos du principe du soutien mutuel–Les relations entre le protocole de Cartagena et les accords de l'OMC, 4 Revue Générale de Droit International Public 829–862 (2007).

within the context of the SPS Agreement[63] the procedure of risk assessment as embodied in the Cartagena Protocol.[64] Both WTO law and the Cartagena Protocol pursue the objective of sustainable development ("*shared systemic objective*"). And both WTO law and the Cartagena Protocol are confronted here with the same subject-matter, i.e. assessing the risks relating to the international trade in GMOs (which can be renamed a "shared specific subject-matter" or "shared specific trade obligations (STOs)"). Owing to their similar object(s) and purpose(s), mutual supportiveness can be sought between distinct treaty regimes by a treaty interpreter without having to consider whether or not the states concerned by the interpretation are parties to *the same treaties*.

To sum up on the basis of the GMOs example, since WTO law and the Cartagena Protocol "share" the objective of sustainable development, an interpretation relying upon the object and purpose of WTO law under Article 31.1 would necessarily lead to taking the Cartagena Protocol into account and *vice versa*. In the same vein, since WTO law and the Cartagena Protocol target trade, an interpretation relying upon the object and purpose of WTO law under Article 31.1 would necessarily integrate the Cartagena Protocol and *vice versa*. This is the quintessence of mutual supportiveness under Article 31.1 of the Vienna Convention on the Law of Treaties. It allows one to transcend the formalistic veil of Article 31.3 c) of the Vienna Convention on the Law of Treaties and to build coherence within the international legal order. It also guarantees that every interpretation and application of a particular treaty regime takes into account the "contemporary concerns of the community of nations"[65] as reflected in other treaty regimes. This is what mutual supportiveness is militating for. Its importance in an era of fragmentation of international law needs not to be underlined.

[63] On the SPS Agreement see A. Seibert-Fohr, WTO–Technical Barriers and SPS Measures, in: R. Wolfrum/P.-T. Stoll (eds.), Max Planck Commentaries on World Trade Law, Vol. 2, at 564 (2007).

[64] On this point see L. Boisson de Chazournes/M. M. Mbengue, A propos des convergences entre le Protocole de Cartagena et les Accords de l'Organisation mondiale du commerce (OMC), 20 Revue québécoise de droit international 1–40 (2009).

[65] United States–Import Prohibition of Certain Shrimp and Shrimp Products, Report of the WTO Appellate Body, WT/DS58/AB/R, 12 October 1998, para.129.