[chapter]

WTO Law and the "Fragmentation" of International Law: Specificity, integration, conflicts

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I. The development of international trade law as a branch of general international law

Ever since in its first report the Appellate Body stated in unambiguous terms that "WTO agreements are not to be read in clinical isolation from public international law,"[2] the relevance for the WTO legal context of international law rules and principles has been acknowledged. By necessary implication this goes beyond the application of customary rules of interpretation in WTO dispute settlement proceedings, as explicitly provided by Article 3.2 of the DSU.[3]

International trade law is not just an academic label for a specific sector of international relations governed by legal rules. WTO law, which is at the core of international trade law, is the result of the Uruguay Round multilateral negotiations and is reflected in the interconnected agreements, signed as a single undertaking, that are administered by the WTO.[4] The WTO is a distinct international organization comprising 150 Members and whose rules govern

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[1] Member, WTO Appellate Body.

[2] Appellate Body Report, *US – Gasoline*, at 17, DSR 1996:I, 3, at 16.

[3] See Panel Report, *Korea – Procurement*, para. 7.96.

[4] The "covered agreements" in WTO parlance.

more than 97% of world trade in goods and services.[5] This body of law is thus part of an institutional setting. Besides the substantive rules governing the conduct of Members, there are organizational rules for the functioning of the WTO; procedural norms for the administration of the substantive rules, such as in relation to waivers, interpretation, and amendments; and, finally, those pertaining to the settlement of disputes, monitoring of implementation and sanctions. The system has to be viewed as a "living organism:" further negotiations involving all Members are envisaged. Thus, through subsequent agreements, existing provisions are completed, modified, or replaced.

These almost obvious reflections help to pinpoint some basic features of international trade law that distinguish it from other areas of international law. Trade law is an organic regime; its specificity is not based only on the fact that it is a distinct sector *ratione materiae* of international law. In this respect, trade law is closer to the law of the sea (notwithstanding the lack of institutional mechanisms and the limited compulsory jurisdiction provided within the latter) than to human rights or environmental law, which result from a patchwork of loosely connected multilateral and regional agreements.

The foremost effect of this peculiarity is that international trade law is a specific regime, not just a complex of provisions sharing a common purpose and identity of subject matter. Multilateral trade agreements are part of a single instrument, as Annexes to the *WTO Agreement*. Thus they share a common purpose and have an overall objective, irrespective of the specific aims pursued by each of them. Regional arrangements must be compatible with the rules of the multilateral agreements admitting them (although, in practice, compatibility

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[5] "The WTO in Brief", available at <http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm>.

rarely has been tested). Fundamental consistency between different provisions of the various covered agreements must be assumed. Any conflict between provisions must be capable of being reconciled not just by application of the specific rules provided for this purpose[6], but also in the light of the *WTO Agreement*'s overall object and purpose.

The presumption of internal consistency does not exclude that the processes of interpretation and application of WTO law are subject to the more general principles of international law. On the contrary, this approach is consistent with the *lex specialis* rule that is one of the recognized criteria to resolve divergences and conflicts between norms. Specific guidance sometimes may not be available within the WTO framework; moreover a conflict – apparent or real – may arise with non-trade agreements, that is, with rules that WTO Members have agreed to in other areas.

Specificity of content and unity of organization does not mean isolation from the general context of international relations governed by international law.[7] If the rules and principles in the WTO agreements do not resolve an issue of interpretation, recourse to those of the international legal system at large must be possible. In the light of this, WTO law may not be considered a self-contained regime that is subject only to its internal criteria of application and interpretation

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[6] See, for example, the General interpretative note to Annex 1A to the *WTO Agreement*, which provides that, in the event of conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A (all of which relate to trade in goods), the provision of the other agreement shall prevail to the extent of the conflict.

[7] No evidence of such "opting-out" has been expressed in the Uruguay Round or in the current DDA. To the contrary, non-trade concerns and international regulation of predominantly non-trade issues are explicitly mentioned in Ministerial Declarations (for example, the Doha Ministerial Declaration, para. 6), preambles to agreements (for example, the *SPS Agreement*), and specific provisions (for example, Article 2.2 of the *TBT Agreement*).

and thus impermeable to those applicable to all international relations governed by law.

There is a further feature of WTO law that distinguishes it from most other subsectors of international law, namely, its dispute settlement system.[8] Its unique features are well known: it is centralized, exclusive, compulsory, binding, based on law and administered by independent adjudicatory bodies (not to mention its effectiveness due to the multilateral surveillance of implementation). It is thanks to these features – that equate *de facto* the activity of WTO dispute settlement bodies to that of an international judiciary – and the consequent systematic recourse to the dispute settlement system by WTO Members that an impressive body of jurisprudence has emerged.

My focus here is not on how a number of provisions of the covered agreements have been interpreted in the case law. The contribution of panels and the Appellate Body to the understanding, strengthening, and coherence of the trading system has been the object of many studies, especially from the perspective of the first 10 years of the dispute settlement system.[9]

I wish rather to examine the contribution of this case law in terms of the proper role and methodology of the interpretive function in international law at large. The case law of panels and the Appellate Body is relevant in this context for a variety of reasons. From a strictly legal point of view, since the DSU directs panels and the Appellate Body to interpret the WTO agreements in accordance with customary rules of interpretation, any application of those principles is by

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[8] A further feature (which is not relevant here) is the existence within the WTO of specific rules for determining breaches of WTO law and resort to countermeasures, as laid down in the DSU. This regime qualifies as *lex specialis* in accordance with Article 55 of the ILC's Articles on Responsibility of States for International Wrongful Acts.

[9] See generally G. Sacerdoti, A. Yanovich, and J. Bohanes (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge University Press, 2006).

definition a contribution to the development of international law in that respect. But there are also aspects that make WTO jurisprudence relevant outside the realm of trade disputes and the WTO agreements.[10]

The detailed, systematic approach followed by the Appellate Body in using Articles 31 and 32 of the *Vienna Convention*, coupled with its extensive jurisprudence, provide an important body of cases that analyze in-depth the scope and interrelation of those provisions. This has prompted, it seems, more attention from other international tribunals to the need to explain their interpretive approach and choices in the light of those rules.[11] In turn, such close attention to those principles, and the accumulation of cases where they have been applied to a variety of agreements and in different settings, have also highlighted some of their limits and possible shortcomings, at least in some settings, while underscoring in other respects their flexibilities and potentials.[12]

The contribution of WTO case law has been rendered even more relevant by the approach taken by the Appellate Body to the question whether, in order to

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[10] For a recent contribution focusing on "juridical culture" and language, see E. Menezes de Carvalho, "The Juridical Discourse of the World Trade Organisation: The Method of Interpretation of the Appellate Body Reports" (2007) 7(1) *Global Jurist*, available at <www.bepress.com/gj/vol7/iss1/art4>. More generally, see Asif H. Qureshi, *Interpreting WTO Agreements* (Cambridge 2006).

[11] See the contributions of judges of various international courts in Sacerdoti, Yanovich and Bohanes, *The WTO at Ten*, at 453 ff.

[12] For instance, the exact scope of "context," and in particular whether the participation of *all* original signatories of a treaty is required in subsequent agreements "between the parties" in order for such agreements to be taken into account for interpretative purpose (Article 31(3)(a) of the *Vienna Convention*); the type of "relevant rules of international law applicable between the parties" to be taken into account under Article 31(3)(c) of the *Vienna Convention* and the effect of their application on the agreement invoked in a given dispute; and, reliance on *travaux préparatoires* beyond the instances listed in Article 32(a) and (b). A discussion of the interpretive tools of the *Vienna Convention* 25 years after its entry into force was undertaken at a conference held in London, in January 2006, under the auspices of the British Institute of International and Corporative Law.

resolve trade disputes, priority must be given to interpretative criteria drawn from the WTO system itself before looking at the rules and principles of international law generally.

When warranted, the Appellate Body has looked for interpretive guidance beyond the trade agreement at issue in the dispute, giving precedence to "WTO materials," such as other WTO agreements and the GATT or Uruguay Round *travaux préparatoires*, simply by using the interpretive tools of the *Vienna Convention*. Reliance on "context" has been especially fruitful because this criterion directs the interpreter to look at progressively wider concentric circles, from other provisions of the very agreement at issue to other WTO texts (which are formally part of a single treaty, namely, the *WTO Agreement*), before looking to other instruments or sources. Recourse to "external sources" thus becomes unnecessary, an approach that is in conformity with the priority of the *lex specialis.*

II. The debate on the "fragmentation" of international law

The contribution of the WTO adjudicatory bodies to the development of international law has to be viewed in the light of the current debate on the "fragmentation" of international law. In 2000, the ILC decided to include in its work program the topic "Risks ensuing from the fragmentation of international law." After a lively debate and several studies, the ILC finalized, in 2006, the report of its ad hoc Study Group "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law."[13] At its 58th session held in 2006, the ILC adopted the "Conclusions" of

[13] Report of the ILC Study Group, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law", Doc. A/CN.4/L.682, 13 April 2006. The Study Group's *rapporteur* was Professor Martti Koskenniemi.

that report. The ILC decided to address the issue of fragmentation because of the widespread concern in international legal circles that the expansion of the coverage of international law through the conclusion of multilateral and regional treaties and the growing number of institutions covering specific fields (from trade, to human rights, social economic cultural cooperation, environment, etc.) created the risk that the unity of the system could be impaired. This risk appeared to be increased by the "proliferation" of international tribunals and similar bodies applying international law within these sectors without being subject to coordination, review or hierarchical relations.

International law appears to be somehow a victim of its own success and of its expansion and consequent diversification. While the international system remains weak as a political entity, with weak central institutions – notably, the United Nations and its Security Council – a series of rules-oriented and institutionalized regimes have emerged for the regulation of specific areas of concern to the community of States and, indeed, to mankind at large. A lawless society is becoming organized, not through centralization and coordination, but through sectoral negotiation and partial institutionalization. The potential negative consequences of this type of expansion include conflicting jurisprudence and decision-making, forum-shopping, loss of legal security, and conflict of obligations. However, expansion and diversification, with the ensuing risk of fragmentation, is an inevitable response to the demands of a pluralistic word.

Except when international peace and security is at risk, the international community lacks vertical, hierarchical mechanisms and institutions endowed with the legal authority to settle conflicts between policies and decisions emanating from such different fora, impose harmonization, settle conflicts of jurisdiction or guarantee uniform interpretation of the law.

The process of resolving conflicts implies a horizontal approach, that is, choosing between and/or reconciling provisions of the same hierarchical level, rather than giving priority to one source over the other (which would imply a vertical approach).[14] The logical, but also practical, aspiration to consistency in the principles that govern international relations between the same entities (sovereign States and organizations established by them) in distinct, but connected, sectors can be pursued only bottom-up, rather than top-down – in other words, by giving value to the common principles originating from the history of international legal relations (custom and its evolution, especially through codification and common acceptance of certain basic principles). This means recognizing common roots and that the various regimes and regional undertakings are part of a common universal community to which certain common rules and principles apply. The diversity of specific rules and the different institutional settings are thus capable of being interpreted consistently by drawing on common principles and shared criteria embedded in legal reasoning.

Indeed, in its work the ILC focused on the *Vienna Convention* as the instrument that unites all treaty regimes. This is not the place for an in-depth examination of the Study Group and its Conclusions, the latter being a kind of guidelines or recommendations for interpreters, international lawmakers, and

[14] The ILC Study Group's approach, however, may underestimate the growing recognition of a priority of values reflected in the concepts of *ius cogens* and of obligations *erga omnes*. See generally Paolo Picone, *Comunità internazionale e obblighi "erga omnes"* (ESI, 2006).

"executives" of States and organizations.[15] The ILC noted that, "in an increasingly specialized legal environment, few institutions are left to speak the language of general international law, with the aim to regulate at a universal level, relationships that cannot be reduced to the realization of special interests and that go further than technical coordination."[16] The ILC noted that it is one such institution recalling that the work of codification and development it carries out has been precisely about elucidating the content of "general international law" as a kind of international public good. The ILC accordingly focused on relationships that are capable of bridging different sectoral regimes and techniques and principles that can avoid or resolve conflicts. In view of the limited scope for maintaining the unity of the international legal system through hierarchy and authority, the ILC focuses on existing instruments and methods to solve the perceived risks of fragmentation and conflict by pursuing *harmonization* and *systemic integration*.[17]

The study thus analyzes in-depth the role of:

- *lex specialis* (including special regimes and regionalism);

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[15] The expansion and diversification of international law has brought about the expansion and diversification of what used to be a limited and closed community of international legal experts. It was from them, acting under different *chapeaux,* that international legal thinking emanated. The risk is now that of overspecialization (fragmentation) and isolation. Hence the importance of international legal associations, conferences and exchanges, beyond those linking national or specialized bars, and of the maintenance of channels of professional exchange between the domestic legal professions and international law experts. In this respect, the choice of the members of the Appellate Body should be noted. Its diversified composition has featured a mix of international law and other professors, arbitrators, trade experts/diplomats, national judges, practicing lawyers, and former officials of national authorities and international organizations. This composition and background may explain its interpretive approach, which recognizes the interaction of WTO law with the rest of international law, and the attention that its case law has drawn from outside the "community" of trade specialists.

[16] ILC Report, para. 255.

[17] The ILC Report describes conflict broadly as a situation "where two rules or principles suggest different ways of dealing with a problem." Ibid., para. 25.

- successive norms (including the application of successive treaties relating to the same subject matter and modification of multilateral treaties between certain parties only);[18]
- the interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties;"[19] and
- "relation of importance," such as Article 103 of the UN Charter, *jus cogens*, and obligations *erga omnes*.[20]

In its report, the ILC gives an overview of the problems resulting from fragmentation and broadly indicates the rules, principles, and techniques available to solve not just specific conflicts of norms, but more generally divergent approaches in the application of international law. Reliance on interpretation based on the principles of the *Vienna Convention* and integration of the various regimes through harmonization are two possible techniques. Contextual relationships between legal provisions of different origin must be observed; priority of application is, according to the ILC report, a preferable criterion than that of invalidating or dismissing one of the provisions invoked when there is an apparent or real conflict.[21]

The ILC report offers a valuable in-depth analysis of the role of *lex specialis*, which underlies several provisions of the *Vienna Convention*, although it is nowhere spelled out as such. Keeping the WTO system in mind, the work of the Study Group is especially relevant where it concludes that, "[t]he application of

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[18] Articles 30 and 41 of the *Vienna Convention* respectively.

[19] Article 31(3)(c) of the *Vienna Convention*.

[20] The expression "relation of importance" is being used because the ILC considers that "the rules and principles of international law are not in a hierarchical relationship to each other." ILC Report, para. 324.

[21] Ibid., para. 410 ff.

the special law does not normally extinguish the relevant general law" and that the latter will, in accordance with the principle of harmonization, "continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter."[22]

The work of the ILC is also valuable where it points out that no special regime is really self-contained. "No legal regime is isolated from general international law,"[23] which has always a supplementary role to play, whose extension depends, in part, on the level of detail and completeness of the special regulation.

In its analysis, the ILC report relies heavily on the example of WTO law, its jurisprudence and surrounding academic debate. Indeed the transformation of the loose GATT system – considered to be predominantly diplomatic in nature – into a rules-oriented organization is a typical case of the current expansion and diversification of international law. It is not by chance that the term "self-contained regime" has been adopted by some commentators in respect of the multilateral trading system, somehow purporting to carry over to the WTO certain sociological features of GATT. The ILC report rejects this view and treats WTO law as part of international law at large.[24] This is consistent with the Appellate Body's approach and with the approach taken by the drafters of the DSU in requiring that the WTO agreements be interpreted in accordance with the customary rules of interpretation of public international law.

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[22] ILC Conclusions, para. 9. Nevertheless, some commentators believe that the Appellate Body has taken upon itself the responsibility of "gap-filling" in relation to some of the WTO agreements. For a rebuttal, see generally R.H. Steinberg, "Judicial Law Making at the WTO: Discursive, Constitutional and Political Constraints" (2004) 98 *American Journal of International Law* 247.

[23] ILC Report, para.193.

[24] Ibid., para. 134.

For a WTO observer, another valuable contribution of the ILC study on fragmentation is the discussion of the scope of Article 31(3)(c) of the *Vienna Convention* according to which "any relevant rules of international law applicable in the relations between the parties" must be taken into account together with the context for purpose of interpretation. The ILC report views this provision as more than a tool for correct interpretation: it is also an instrument for conflict resolution. Indeed, through interpretation of a specific treaty in the light of other applicable rules (be they customary or treaty-based), conflicts may often become more apparent than real, and contradictions may be solved through harmonization, keeping in mind the parameter of systemic integration.[25]

III. WTO law: a contribution to the unity of international law or to its diversification?

Diversification of international law is a necessary corollary of the expansion of its coverage. It should be viewed as a positive development that makes law more relevant for the pursuit of shared objectives. The ILC report shows that diversification does not necessarily entail fragmentation in the sense of incoherence. In any case, the operation of general rules and principles must be upheld; they are an important feature of the overall system. Conflicts should thereby be avoided or resolved through harmonization, that is, reconciliation, in accordance with the consensual basis of international legal relations.

The development of the WTO system is often mentioned in the ILC Report and the Appellate Body's case law is referred to in support of the view that "WTO covered treaties are creations of and constantly interact with other norms

[25] ILC Conclusions, paras. 17–21.

of international law."[26] The analysis carried out in the report and its Conclusions can contribute to the operation of WTO law and mechanisms, by underscoring the balance that exists between internal specificity and "external consistency."

The ILC report noted the distinction between the limited subject matter jurisdiction that a tribunal may have (WTO trade agreements in the case of panels and the Appellate Body) and the law to be applied in order to decide cases properly falling within that jurisdiction. While a claimant must assert and give evidence that a right based on a covered agreement may have been breached by the other party in order that its claim may be adjudicated, a defense may be raised that the right invoked has been derogated from in some other agreement between the parties, which would prevail or act as a bar in accordance with the *Vienna Convention*. More generally, the rules of interpretation of treaties would have to be resorted to in the process of determining whether the covered agreements grant the right invoked, and whether there has been a breach.[27]

It is interesting to recall how in recent instances the Appellate Body has reconciled the specificity of the WTO agreements with other agreements invoked in dispute settlement either to assist in the interpretation of international trade law, or as a bar to its application. In *EC – Chicken Cuts*, the relevance of the Harmonized System (HS), found in the World Custom Organization's *Harmonized Commodity Description and Coding System Convention* (*HS Convention*), was raised as context for ascertaining the proper tariff classification of the products at issue under the WTO Schedule of Commitments of the European

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[26] ILC Report, para.45. The ILC Report refers also to various academic contributions on WTO law (at notes 42, 170, and 171).

[27] Ibid., para. 45. See also ILC Conclusions, para. 19(a): "The parties are taken to refer to customary international law and general principles of law for all questions which the treaty does not itself resolve in express terms."

Communities. No party disputed that the HS was relevant, but the panel was uncertain whether it should be considered under Article 31(2)(b) of the *Vienna Convention*, or rather under Article 31(3)(c).[28] The *HS Convention* entered into force in 1988; it predates the WTO agreements and was not "made in connection with the conclusion" of the GATT either; nor had it been made by some WTO Members and "accepted by the other parties as an instrument related to the treaty," notwithstanding some reference to it for specific purposes in various WTO agreements, so that the applicability of Article 31(2)(a) or Article 31(2)(b) was unclear.

The Appellate Body considered it unnecessary to rely on Article 31(3)(c) in respect of a treaty that had a close connection with the GATT. It noted that "prior to, during, as well as after the Uruguay Round negotiations, there was broad consensus among the GATT Contracting Parties to *use* the Harmonized System as the basis of their WTO Schedules, notably with respect to agricultural products."[29] The Appellate Body concluded: "In our view, this consensus constitutes an 'agreement' between WTO Members 'relating to' the *WTO Agreement* that was 'made in connection with the conclusion of' that Agreement within the meaning of Article 31(2)(a) of the *Vienna Convention*."[30]

The dispute in *Mexico – Taxes on Soft Drinks* presented a more difficult issue. Mexico invoked an alleged breach by the United States of another unconnected treaty, the NAFTA, in order to justify its noncompliance with certain GATT provisions. However, Mexico did not rely on the general principles of State

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[28] The panel concluded that the HS qualified as context under Article 31(2) of the *Vienna Convention*. Panel Report, *EC – Chicken Cuts*, para. 7.189.

[29] Appellate Body Report, *EC – Chicken Cuts*, para. 199. (original emphasis)

[30] Ibid.

responsibility, which specify conditions for the use of countermeasures.[31] It rather sought to justify its position relying on Article XX(d) of the GATT 1994, claiming that the measures it was maintaining were necessary to "secure compliance" by the United States of its obligations under the NAFTA. The Appellate Body distinguished the question of jurisdiction from the merits, stating that it had no competence to decide a dispute arising under the NAFTA.[32] As to the merits, the Appellate Body went on to evaluate the claim under Article XX(d). It concluded that the conditions for its application were not met, because the terms "necessary to secure compliance with laws and regulations" in Article XX(d) of the GATT 1994 did not encompass WTO-inconsistent measures applied by a WTO Member to secure compliance by another WTO Member with that other Member's international obligations under non-WTO law.[33]

IV. The relation between trade and environment: preventing conflicts through harmonization

One issue that has received a lot of attention is that of possible conflicts between WTO provisions and obligations and those binding WTO Members under other treaties, notably, those concerning the protection of the environment. This

[31] Article 49 ff of the ILC Articles on State Responsibility.

[32] See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 56.

[33] See ibid., paras. 68, 77, and 79.

subject has been dealt with in depth in a number of scholarly contributions.[34] The debate continues on how to reconcile the application of trade rules with the preservation of non-trade values recognized by the international community through binding and nonbinding instruments, when the latter impinge on trade relations. However, more recently, the focus appears to have shifted from environment to health and food safety, especially in relation to the "precautionary principle."

Environment is one of those subsectors addressed by the ILC when dealing with the risks of fragmentation of international law as a consequence of its expansion and diversification. International environmental law is structurally peculiar in that it is "non-organized." Multilateral environmental agreements (MEAs) are not universal in participation; their substantive coverage is usually quite specific; institutions and dispute settlement mechanisms are rare; unity and coordination is mostly based on nonbinding principles (soft law) – notably the Rio Declaration of 1992 – whose exact content and scope is often disputed and applied differently by the various States. National sovereignty appears to be less constrained by international commitments in environmental and related matters than by commitments related to trade. This is in contrast to the general feeling that the common interest of mankind is involved when issues relating to climate change and the preservation of the global environment are at stake.

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[34] See, for example, G. Marceau, "Conflicts of Norms and Conflict of Jurisdiction: The Relationship between the WTO Agreements and MEAs and other Treaties" (2005) 35(6) *Journal of World Trade Law* 1081; F. Francioni, "WTO Law in Context: The integration of international human rights and environmental law in the dispute settlement process", in Sacerdoti, Yanovich, and Bohanes, *The WTO at Ten*, at 143; E.-U. Petersmann, "Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralisation of Dispute Settlement in International Trade" (2006) 27 *University of Pennsylvania Journal of International Economic Law 273*; and, more generally, Joost Pauwelyn, *Conflicts of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* (Cambridge, 2003).

It is natural, therefore, for the object and purpose of MEAs to be different than that of the WTO; it is also to be expected that their underlying policy or legal principles diverge. The same can be said for the institutional and procedural devices that may be preferred as to environmental protection and that are not found within the WTO: for example, majority voting, common international regimes, and reliance on ceilings or quotas as instruments of regulation, based on the impact of national industries and economies on the environment. However, the elaborate dispute settlement mechanism of the WTO has no match in other sectors.

I would like to focus on how the trading system has increasingly recognized, within its boundaries and in its operation, principles, values and concerns that have emerged and have been developed in the "environmental arena." The same national societies that are concerned with the preservation of the environment have subscribed to a liberal trading system. Governments negotiating in one forum have been mindful of the interests they are pursuing in different negotiations, and cautious to preserve their freedom when considering the acceptance of international commitments where they feel that a matter requires essentially domestic regulation.

This "preventive approach" that favors harmonization and coordination *ex ante,* rather than resolving conflicts of application *ex post* has taken various forms. First, through the exceptions in Article XX of the GATT 1994, which are subject to the nondiscrimination and anticircumvention provision of its introductory sentence:

> [N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
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> (*a*) necessary to protect public morals;
>
> (*b*) necessary to protect human, animal or plant life or health;
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> . . .

> (*g*) relating to the conservation of exhaustible natural resources . . . .

This approach is not as rigid as it may appear. This is because the notions of "necessity" and relationship allow, or even require, a degree of flexibility as the Appellate Body has recognized in several cases.[35]

Another method has been that of referring to non-trade concerns in policy statements and in instructions for the negotiation of trade agreements. Thus, in one of the initial paragraphs of the Doha Ministerial Declaration of 2001, the Ministers declared:

> We strongly reaffirm our commitments to the objective of sustainable development, as stated in the Preamble of the Marrakesh Agreement. We are convinced that the aim of upholding and safeguarding an open and non-discriminatory multilateral trading system and acting in the protection of the environment and the promotion of sustainable development can and must be mutually supportive. We recognize that under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it consider appropriate subject to the requirement that these measures are not applied in a manner which constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or a disguised restriction on international trade . . . .[36]

An additional technique has been that of incorporating specific non-trade concerns in the relevant texts themselves, by either (a) mentioning them in the preamble of specific WTO agreements, thus making them a parameter for its operation and for the interpreter in case of a dispute; or (b) referring to them in a specific provision of any such agreement. An example of the first approach is the first preambular paragraph of the *SPS Agreement*, which states: "*Reaffirming* that no Member should be prevented from adopting or enforcing measures necessary

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[35] See Appellate Body Report, *Korea – Various Measures on Beef*, paras. 161–164; and Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 70. See also, Appellate Body Report, *US – Gambling*, paras. 306–308.

to protect human, animal or plant life or health." The Preamble refers also to the desire of Members to further the use of "standards, guidelines and recommendations developed by the relevant international organizations," thus establishing important links with specialized work carried out there.

An example of the second approach is Article 2.2 of the *TBT Agreement*, which reads, in part:

> For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, *inter alia:* national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment.

WTO adjudicative bodies, especially the Appellate Body, have relied on these normative indications and have recognized non-trade values in the interpretation of the WTO agreements. The Appellate Body relied on a kind of "evolutionary" interpretation of the GATT 1994, in the light of the reference to "sustainable development" in the Preamble to the *WTO Agreement*, when it held, in *US – Shrimp*, that the concept of "exhaustible natural resources" in Article XX(g) of the GATT 1994 encompasses also living resources.[37]

In *EC – Asbestos*, the Appellate Body reversed the panel as to the elements to be considered in order to find likeness between products under Article III of the GATT 1994 when one of the two competing products was a carcinogen and the other was not. The Appellate Body considered that "evidence relating to the health risks associated with a product may be pertinent in an examination of

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[36] Doha Ministerial Declaration para. 6. More detailed instructions are spelled out in para. 31 dealing with "Trade and Environment."

[37] Appellate Body Report, *US – Shrimp*, paras. 129 and 130.

'likeness' under Article III.4 of the GATT 1994." It added that consumers' tastes and habits were also relevant for this purpose.[38]

In *EC – Hormones*, the Appellate Body was guided by the need "for the maintenance of the carefully negotiated balance between the shared but sometimes competing, interests of promoting international trade and protecting the health of human beings."[39] The Appellate Body recognized that a Member may decide to set for itself, as a matter of right, a level of protection higher than that implied in the relevant international standard in accordance with Article 3.3 of the *SPS Agreement*.[40] The Appellate Body further acknowledged that a proper risk assessment could set out different views, and that responsible and representative governments acting in good faith may base their measures on the minority view "coming from qualified and respected sources," rather than on "mainstream" scientific opinion.[41] Following the same approach, the Appellate Body stated in the same case that it is "essential to bear in mind that the risk that is to be evaluated in a risk assessment under Article 5.1 is not only risk ascertainable in a science laboratory operating under strictly controlled conditions, but also risk in human societies as they actually exist, in other words, the actual potential for adverse effects on human health in the real world where people live and work and die."[42]

These excerpts from Appellate Body case law show that up to now the Appellate Body has been able to resolve potential conflicts by interpreting the WTO agreements in a manner that takes account of the references to non-trade

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[38] Appellate Body Report, *EC – Asbestos*, paras. 113 and 121.

[39] Appellate Body Report, *EC – Hormones*, para. 180.

[40] Ibid., paras. 104 and 172..

[41] Ibid., para. 194.

concerns and values present or implied in those agreements, including the precautionary principle. The Appellate Body has been wary of addressing the issue of the relevance and effect of the precautionary principle in the abstract, stressing that is reflected in various specific provisions, especially of the *SPS Agreement*, so that it can be taken into account when interpreting the relevant provisions in accordance with "the normal (that is, customary international law) principles of treaty interpretation."[43]

One should not hastily conclude that specific conflicts may not arise, or that they may not be resolved differently depending on the organization, body, or tribunal that would assert jurisdiction. The choice of fora might influence the results, depending on the approach and interests that prevail in the fora. However, awareness of different values and purposes recognized as legitimate in other sectors, where they are principally regulated, has increased considerably in recent years through coordination and deference to the work of those bodies that are most competent *ratione materiae* to interpret and apply certain bodies of law.[44] The awareness that conflicts may arise through diversification of international regulation has positively influenced treaty-making, academic reflection, and case

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[42] Ibid., para. 187.

[43] Ibid., paras. 123–125. The panel in *EC – Approval and Marketing of Biotech Products* took the position that, "[s]ince the legal status of the precautionary principle remains unsettled, like the Appellate Body before us, we consider that prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so." Panel Report, *EC – Approval and Marketing of Biotech Products*, paras. 7.87–7.89.

[44] See, for example, A. Rosas, "With a Little Help from my friends: International Case-Law as a Source of Reference for the EU Courts" (2005) 5(1) *The Global Community – Yearbook of International Law and Jurisprudence* 203, at 230: "While the case law of international courts and tribunals is not formally binding on EU Courts, their practice seems to be based on the idea that it makes sense to take this case-law into account as much as possible, as the EU Courts are not necessarily well equipped to 'know better' than the international dispute settlement bodies set up to apply and interpret public international law."

law.[45] Should real conflicts emerge in adjudication, the ILC report on fragmentation offers valuable indications on how they may be resolved in a non-traumatic way.

[45] For a sophisticated (but also ambiguous) example of reliance on various techniques in order to harmonize different treaties, see the 2005 UNESCO *Convention on the Promotion and Protection of the Diversity of Cultural Expressions*:

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, without subordinating this Convention to any other treaty,

(a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; 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.