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The Role of Non-WTO Law in the WTO Dispute Settlement

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Summary

Due to the proliferation and specialisation of international regulations and organisations, public international law has become more fragmented. International environmental law, human rights law, labour law and trade law have all developed in different fora. This fragmentation of international law can lead to conflicts between norms. Since many multilateral environmental agreements (MEAs) use trade restrictions as a means to protect the environment, there is a particularly large risk for conflicts in the area of trade and environment. Furthermore, one of the criticisms against the World Trade Organisation (WTO) is that detrimental environmental effects of trade liberalisation are not sufficiently taken into account. This has led to a discussion about the role of the WTO in public international law and about the notion of the WTO as a 'self-contained regime'. The question arises, how environmental concerns can be better accommodated within the framework of the WTO in order to liberalise world trade without compromising the environment.

Therefore, this thesis poses the question to what extent the adjudicating bodies of the WTO should apply non-WTO law in case it conflicts with WTO law. It sheds light on the relationship between norms in public international law in general and between the WTO agreements and MEAs in particular. A comparison between certain provisions in the SPS Agreement¹ under the WTO and the Biosafety Protocol to the Convention on Biological Diversity² illustrates what kind of conflicts can emerge between a WTO agreement and an MEA, in the context of international trade in GMOs (genetically modified organisms).

Based on the principle of *pacta sunt servanda* and the principle of good faith, this thesis argues that the WTO panels and the Appellate Body should apply non-WTO law to which both parties to the dispute are bound, when settling a dispute under one of the WTO covered agreements. They should do so even when the non-WTO rule is invoked as a defence against a violation of WTO law, and may conflict with the WTO rule. In order to make sure that the intentions of the states parties are not circumvented, it is further argued that conflict between norms should be defined narrowly, so as to only encompass situations in which a state cannot simultaneously comply with its obligations under both norms.

¹ Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, 1867 U.N.T.S. 493.

² Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, 2226 U.N.T.S. 557.

Sammanfattning

Till följd av den ökande mängden internationella organisationer och regler med sina egna specifika syften, har folkrätten blivit mer fragmenterad. Den internationella regleringen av miljö rätt, arbetsrätt, handelsrätt och mänskliga rättigheter har skett inom olika organisationer. Denna fragmentering av rätten kan leda till konflikter mellan normer. Eftersom många multilaterala miljööverenskommelser ('MEAs') använder sig av handelsrestriktioner för att skydda miljön, är risken för konflikter mellan handels- och miljö rätten särskilt stor. En av kritikpunkterna mot Världshandelsorganisationen (WTO) är dessutom att det internationella handelsregelverket inte tar hänsyn till skadliga miljöeffekter i tillräckligt stor utsträckning. Detta har lett till en diskussion om WTO:s roll inom folkrätten samt om föreställningen om WTO som en 'self-contained regime'. Frågan är hur WTO ska kunna ta hänsyn till miljöargument på ett bättre sätt och på så sätt jobba för en friare handel utan att samtidigt offra miljön.

I den här uppsatsen ställs därför frågan i vilken utsträckning de dömande organen inom WTO ska tillämpa icke-WTO-rätt när den står i konflikt med WTO-rätten. Uppsatsen tittar på förhållandet mellan normer i folkrätten i allmänhet och mellan WTO-avtalen och multilaterala miljööverenskommelser i synnerhet. En jämförelse mellan ett antal utvalda artiklar i SPS-avtalet³ och Biosäkerhetsprotokollet till Konventionen om biologisk mångfald⁴ illustrerar vilken sorts konflikter som kan uppstå mellan ett WTO-avtal och en MEA.

Med principen om *pacta sunt servanda* och principen om 'good faith' som stöd argumenterar den här uppsatsen för att WTO:s dömande organ ska tillämpa icke-WTO-rätt, till vilken båda parter är bundna, när de avgör en tvist angående ett av WTO-avtalen. Detta gäller även när icke-WTO-regeln åberopas i försvar mot ett brott mot WTO-rätten och alltså kan stå i konflikt med WTO-regeln. För att säkerställa att statsparternas avsikter inte kringgås, föreslås vidare att konflikt mellan normer borde definieras smalt så att det endast omfattar situationer när en stat inte kan uppfylla sina förpliktelser under båda normerna samtidigt.

³ Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, 1867 U.N.T.S. 493.

⁴ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, 2226 U.N.T.S. 557.

Abbreviations

AIA	Advance Informed Agreement
Biosafety Protocol	Cartagena Protocol on Biosafety to the Convention on Biological Diversity
CBD	Convention on Biological Diversity
CITES Convention	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CTE	Committee on Trade and Environment
DNA	Deoxyribonucleic acid
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
EU	European Union
GATT	General Agreement on Tariffs and Trade
GMO	Genetically modified organism
ICJ	International Court of Justice
ICJ Statute	Statute of the International Court of Justice
IMF	International Monetary Fund
LMO	Living modified organism
MEA	Multilateral environmental agreement
PCIJ	Permanent Court of International Justice
SPS	Sanitary and phytosanitary
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
UN Charter	Charter of the United Nations
US(A)	United States (of America)
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organisation
WTO	World Trade Organisation
WTO Agreement	Marrakesh Agreement establishing the World Trade Organization

1 Introduction

1.1 Background

Due to the proliferation and specialisation of international regulations and organisations, public international law has become more fragmented. International environmental law, with around 200 multilateral environmental agreements (MEAs), has not developed in the same forum as international human rights law, labour law or trade law, the latter being largely governed by the trade agreements under the umbrella of the World Trade Organisation (WTO). This fragmentation of international law can lead to conflicts between norms. Since many MEAs use trade restrictions as a means to protect the environment, the risk for conflicts in the area of trade and environment is obvious. Furthermore, one of the criticisms against the WTO is that detrimental environmental effects of trade liberalisation are not sufficiently taken into account. This has led to a discussion about the role of the WTO in public international law and about the notion of the WTO as a 'self-contained regime'. The question arises, how environmental concerns can be better taken into account within the framework of the WTO in order to liberalise world trade without compromising the environment.

While the WTO dispute settlement system provides the WTO adjudicating bodies with compulsory jurisdiction for all disputes under the WTO agreements, most MEAs only use negotiation and conciliation procedures as obligatory means to settle a dispute.⁵ As a consequence, the WTO adjudicating bodies are faced with disputes involving defences based on a wide range of environmental concerns. Thus, the question arises to what extent they should take these defences based on non-WTO law into consideration.

When examining the relationship between the WTO agreements and MEAs, biotechnology, described as being at the crossroads of trade and environment,⁶ is an interesting area for a thorough review. International trade in genetically modified organisms (GMOs) raises questions about the potential risks of modern biotechnology and about what measures a state is allowed to adopt in order to protect human health and the environment.

⁵ The Convention on Biological Diversity, for example, only contains an obligation to negotiate and a compulsory conciliation system in the event of a dispute. The jurisdiction of the International Court of Justice is only optional. *See* art. 27, Convention on Biological Diversity, 5 June 1992, 1760 U.N.T.S. 143.

⁶ Boisson de Chazournes and Moïse Mbengue 2008, p. 208.

1.2 Aim

The aim of this thesis is to examine to what extent the WTO *ad hoc* panels and the Appellate Body should apply non-WTO law in case it conflicts with WTO law. Multilateral environmental agreements will be used as an example of non-WTO law.

1.3 Method and Material

In order to answer to the posed question, a traditional legal analysis will be used. This amounts to describing and analysing traditional sources of law. The relationship between norms in international law will be examined. This includes a discussion about the presumption against conflict of norms and what role other rules of international law play in the interpretation of a treaty. Furthermore, the different definitions of conflict of norms in international law will be discussed.

MEAs will be used as an example of non-WTO law. The thesis will examine how the WTO relates to public international law in general and to MEAs in particular. In the illustration of the potential conflicts between a WTO agreement and an MEA, focus will be on the area of international trade in GMOs. The relationship between the SPS Agreement⁷ under the WTO and the Cartagena Protocol on Biosafety to the Convention of Biological Diversity will be examined.⁸

The aim of this thesis makes it possible to analyse both *de lege lata* and *de lege ferenda*. The focus will be on a traditional legal analysis *de lege lata* to answer to the raised question according to public international law as it stands today.

The sources used for this thesis are international treaties, such as the WTO Agreement,⁹ the SPS Agreement, the Convention on Biological Diversity, the Cartagena Protocol on Biosafety and the Vienna Convention on the Law of Treaties,¹⁰ and journal articles and books written by legal scholars, authoritative in their respective fields. Case law from the WTO panels and the Appellate Body as well as from the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) will also be consulted. The cases chosen throw light on the question of the applicable law before the WTO judiciary. Soft law, such as WTO Ministerial

⁷ Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, 1867 U.N.T.S. 493.

⁸ Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29 January 2000, 2226 U.N.T.S. 557.

⁹ Marrakesh Agreement establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 154.

¹⁰ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

Declarations, will also be considered to a certain extent in the section about the WTO and the environment.

The authoritative publication on normative conflicts by Jenks¹¹ will serve as a basis for the chapter on the relationship between norms in public international law. For arguments in favour of the application of non-WTO law by the WTO judiciary the works of Pauwelyn¹² and Vranes¹³ will be consulted. To give an account of the arguments against the application of non-WTO law in the WTO dispute settlement, the publications of Marceau¹⁴ and Trachtman will be turned to.¹⁵

1.4 Delimitations

Although public international law can be difficult to analyse separately from the political considerations behind it, this thesis will concentrate on the legal questions.

This thesis examines conflicts in the applicable law. Inherent normative conflicts will not be addressed.

1.5 Definitions

The use of the term ‘international law’ will always refer to public international law.

The phrases ‘WTO dispute settlement bodies’, ‘WTO judiciary’ and ‘WTO adjudicating bodies’ will all refer to the WTO *ad hoc* panels and the WTO Appellate Body.

The terms ‘LMO’ (living modified organism) and ‘GMO’ (genetically modified organism) will be used with the same meaning.

¹¹ W. Jenks, ‘Conflict of Law-Making Treaties’, 30 *The British Yearbook of International Law* (1953) pp. 401-453.

¹² J. Pauwelyn, ‘The Role of Public International Law in the WTO: How Far Can We Go?’, 95 *The American Journal of International Law* (2001) pp. 537-578 [cit. Pauwelyn 2001]; J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Relates to other Rules of International Law* (Cambridge University Press, Cambridge, 2003) [cit. Pauwelyn 2003]; J. Pauwelyn, ‘Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands’, 25 *Michigan Journal of International Law* (2004) pp. 903-916 [cit. Pauwelyn 2004].

¹³ E. Vranes, *Trade and the Environment. Fundamental Issues in International Law, WTO Law, and Legal Theory* (Oxford University Press, New York, 2009).

¹⁴ G. Marceau, ‘Conflicts of Norms and Conflicts of Jurisdictions. The Relationship between the WTO Agreement and MEAs and other Treaties’, 35 *Journal of World Trade* (2001) pp. 1081-1131.

¹⁵ J.P. Trachtman, Review of ‘Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law’ by J. Pauwelyn, 98 *The American Journal of International Law* (2004), pp. 855-861.

The phrase ‘precautionary approach’ will be used without prejudice to the question of the existence of a ‘precautionary principle’ in international law.

1.6 Structure

Chapter 2 addresses the relationship between norms in public international law in general. After an introduction to the special character of public international law, the concept of fragmentation of international law, the presumption against conflict and art. 31(3)(c) of the VCLT is presented. Furthermore, chapter 2 also addresses the different definitions of conflict and the conflict rules used in international law.

After giving an introduction to the concept of biological diversity and to the benefits and concerns associated with GMOs, chapter 3 presents the SPS Agreement and the Biosafety Protocol, how they regulate their relationship to other international agreements and interlinkages and conflicts between the two agreements.

Chapter 4 on the role of MEAs in the WTO dispute settlement begins with an account of the trade and environment agenda within the WTO. Then the WTO dispute settlement system is presented with a focus on the question of the applicable law. The next section addresses the question of non-WTO law in the WTO dispute settlement. This includes an account of the leading doctrine, relevant provisions in the Dispute Settlement Understanding (DSU)¹⁶ and in the WTO Agreement and relevant case law. Lastly, one example from the comparison between the SPS Agreement and the Biosafety Protocol is discussed against the background of the different approaches suggested in the doctrine.

In chapter 5, the questions that have arisen will be discussed based on the findings in the previous chapters.

Chapter 6 contains conclusions and an attempt to answer to the posed question.

¹⁶ Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 U.N.T.S. 3, Annex 2 (Understanding on Rules and Procedures Governing the Settlement of Disputes) 1869 U.N.T.S. 401.

2 Relationship between Norms in Public International Law

2.1 The Special Character of Public International Law

There are some major differences between national law and public international law. Firstly, the national legal system is hierarchical, *i.e.* the law is above the individuals and the individuals do not create or change the law. The international system, on the other hand, is horizontal, *i.e.* law only exists between the states, not above them. All states are sovereign and state consent is the basis for new law to evolve.¹⁷

Secondly, the international system is decentralised¹⁸ in that it has no legislature with a general mandate,¹⁹ no world court and no world executive.²⁰

Thirdly, there is a prevailing view among legal scholars that no formal hierarchy of sources exists in public international law.²¹ Article 38.1 of the ICJ Statute,²² listing the sources that the Court shall apply, which is regarded as constituting the sources of public international law in general, does not establish a hierarchy between the different sources.²³ As a consequence, all norms of public international law, with the exception of *jus cogens* norms,²⁴ have equal force, irrespective of their source.²⁵ The implications of this for the use of conflict rules will be discussed further in chapter 2.4.2.

¹⁷ Pauwelyn 2001, p. 538; Shaw, p. 6.

¹⁸ Pauwelyn 2001, p. 535.

¹⁹ Brownlie, p. 3; Jenks, p. 403.

²⁰ Shaw, p. 3.

²¹ Akehurst, p. 275; Czaplinski and Danilenko, p. 7; Pauwelyn 2001, pp. 536-537; Pauwelyn 2003, p. 94. This view was also confirmed in the Report of the Study Group on Fragmentation, International Law Commission, 58th Session Geneva, 1 May-9 June and 3 July-11 August 2006, *Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, para. 31, <http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/1_9_2006.pdf>, visited on 12 March 2009.

²² Statute of the International Court of Justice, Annex to the Charter of the United Nations, <www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>, visited on 9 May 2009. The primary sources are international conventions, international custom and general principles of law. Subsidiary sources are judicial decisions and the teachings of the most highly qualified publicists.

²³ Brownlie, p. 5; Pauwelyn 2003, p. 94.

²⁴ Akehurst, pp. 281-282; Brownlie, p. 5; Pauwelyn 2003, p. 98.

²⁵ Czaplinski and Danilenko, pp. 7-8.

2.2 Fragmentation of International Law

Jenks wrote about the fragmentation of international law already in the beginning of the 1950s. He regarded fragmentation as a consequence of the absence of a world legislature with a general mandate. Treaties are adopted in different international organisations and constellations.²⁶ In this decentralised system, specialised regimes with special objectives such as trade law, human rights law and environmental law have evolved.²⁷ When considering the large extent to which the body of international law has grown since the end of the Second World War, it is not difficult to understand that fragmentation is an even bigger issue today than when Jenks first addressed the topic.²⁸ The question of fragmentation of international law was considered important by the International Law Commission, which included the issue in its work programme in 2000.²⁹

International jurists have identified both positive and negative effects of the increasingly fragmented system of international law. One of the negative effects is that it leads to conflicts between norms, which will be discussed in chapter 2.4.³⁰ Furthermore, increasing fragmentation can threaten the reliability and credibility of the international legal system.³¹

The specialisation of international law can, however, lead to better compliance, since the special needs and interests of states are better accommodated.³² While acknowledging this strength, Pauwelyn stresses that what must be avoided are 'self-contained islands' of international law as a consequence of fragmentation. Burke-White argues that the dangers of fragmentation have been exaggerated and sees an increasing legal pluralism as something that has positive effects on the international legal order. Nevertheless, Burke-White recognises the problem of conflicting obligations and the need for further work to solve this issue.³³

²⁶ Jenks, p. 403.

²⁷ Martineau, p. 1.

²⁸ International Law Commission, 58th Session Geneva, 1 May-9 June and 3 July-11 August 2006, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, (A/CN.4/L.682), p. 10, para. 7, <http://untreaty.un.org/ilc/guide/1_9.htm>, visited on 12 March 2009.

²⁹ On the 58th session of the International Law Commission in 2006, the Study Group adopted its report from the work on fragmentation containing 42 conclusions based on a study finalised by the chairman Martti Koskenniemi. See International Law Commission, 58th Session Geneva, 1 May-9 June and 3 July-11 August 2006, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, A/CN.4/L.682, <http://untreaty.un.org/ilc/guide/1_9.htm>, visited on 12 March 2009.

³⁰ *Ibid.*, p. 246, para. 486; Jenks, p. 403.

³¹ Hafner, pp. 856-858.

³² *Ibid.*, pp. 858-859; Lindroos and Mehling, p. 858.

³³ Burke-White, pp. 963, 965, 977 and 979.

In summary, the common view is that fragmentation of international law is an unavoidable consequence of the absence of a world legislature. It can have positive effects in form of specialised regimes with better chances of state compliance. At the same time, it inevitably leads to conflicts between norms, which may weaken the credibility of international law.

2.3 Treaties as a Part of Public International Law

2.3.1 Presumption against Conflict of Norms

There is a generally accepted presumption against conflict of norms in international law.³⁴ It is presumed that a new norm is not in conflict with already existing international law.³⁵ This presumption stems from the fact that all new legal rules are born into the existing system of international law and from the principle of good faith, *i.e.* that states are expected to consider their existing international obligations when negotiating new treaties. Hence, if a treaty does not ‘contract out’ of an existing rule, that rule continues to apply to the new treaty.³⁶ This means that explicit treaty language is needed for a new norm to deviate from an earlier norm³⁷ and that the state claiming a conflict of norms has the burden of proving it.³⁸

The presumption against conflict of norms is a presumption against the existence of a conflict. If there is a real conflict, it is not the presumption in favour of the earlier rule³⁹ but then the conflict has to be solved by a relevant conflict rule. It is also only a presumption and express language or other clear evidence of the intention to deviate from existing law can break through the presumption.⁴⁰

On the one hand, one could argue that the presumption against conflict is less strong in international law than in national law since international treaties are developed by different organisations and not by one legislature. On the other hand, it can be presumed that when the parties to two treaties are more or less the same, it was not the intention to make the new treaty inconsistent with the older one.⁴¹

³⁴ See the *Case Concerning Right of Passage over Indian Territory (Portugal v. India)*, 26 November 1957, ICJ, Preliminary Objections, *I.C.J. Reports 1957*, p. 125, at p. 142; Boisson de Chazournes and Moïse Mbengue 2008, pp. 218-219; Czaplinski and Danilenko, p. 13; Jenks, p. 427; Pauwelyn 2003, p. 240.

³⁵ Jenks, p. 451.

³⁶ Pauwelyn 2001, pp. 428, 542 and 550.

³⁷ Boisson de Chazournes and Moïse Mbengue 2008, p. 219; Pauwelyn 2003, pp. 240-241.

³⁸ Pauwelyn 2003, pp. 240-241.

³⁹ *Ibid.*, p. 242.

⁴⁰ Jenks, p. 429.

⁴¹ *Ibid.*

2.3.2 Article 31(3)(c) VCLT

Norms can interact in two ways; they can either accumulate or conflict.⁴² Accumulation, meaning that norms of international law apply to each other with a gap-filling function and as a tool for interpretation, is the result of the presumption against conflict. Only when stated in a treaty that it derogates from another norm⁴³ or when a treaty norm conflicts with another norm does this other norm not apply to the treaty.⁴⁴ The question is if a norm can be interpreted in the light of another norm of international law in order to avoid conflict.⁴⁵

The role of other international law in treaty interpretation is expressed in art. 31(3)(c) VCLT, which stipulates that when interpreting a treaty one should take into account “any relevant rules of international law applicable in the relations between the parties”. This provision is not only binding between the parties to the VCLT but also reflects customary law.⁴⁶ The prevailing view is that the term ‘rules of international law’ includes all rules laid down in the primary sources of international law, *i.e.* in international conventions, international custom and general principles of law.⁴⁷ ‘The parties’ means *all parties* that have consented to be bound by the treaty and for which the treaty is in force.⁴⁸ The relevant rules of international law can both be rules existing at the time of conclusion of the treaty and rules that were adopted later and exist at the time of interpretation.⁴⁹ The latter approach is called ‘evolutionary interpretation’ and the possibility for this was confirmed by the Appellate Body in the *US – Shrimp* case.⁵⁰

The WTO judiciary “cannot add to or diminish the rights and obligations provided in the covered agreements”.⁵¹ There are different views among legal scholars on the meaning of this phrase. Pauwelyn argues that it only

⁴² Pauwelyn 2003, p. 161.

⁴³ In which case there is not even a conflict, *see ibid.*, p. 216.

⁴⁴ *Ibid.*, p. 201. The relevant conflict rule then has to decide which of the two norms prevails. *See further* chapter 2.4.2.

⁴⁵ Pauwelyn 2003, p. 247.

⁴⁶ Linderfalk, p. 7.

⁴⁷ *Ibid.*, p. 177; Marceau, p. 1087; Pauwelyn 2001, p. 575.

⁴⁸ VCLT art. 2(1)(g); Birnie *et al.*, p. 21; Linderfalk, p. 178. *See also European Communities — Measures Affecting the Approval and Marketing of Biotech Products (United States v. European Communities)*, WTO, Panel report circulated on 29 September 2006, WT/DS291/R, para. 7.68, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm>, visited on 8 May 2009.

⁴⁹ Pauwelyn 2001, p. 574.

⁵⁰ *United States – Import Prohibition of Certain Shrimp and Shrimp Products (India, Malaysia, Pakistan, Thailand v. USA)*, WTO, Appellate Body report circulated on 12 October 1998, WT/DS58/AB/R, paras. 129-131, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>, visited on 6 April 2009; *see also* the Separate Opinion of Judge Weeramantry to the ICJ Judgement of 25 September 1997 in the *Gabcikovo-Nagymaros Project case (Hungary v. Slovakia)*, *I.C.J. Reports 1997*, p. 7, at p. 114; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 21 June 1971, Advisory Opinion, *I.C.J. Reports 1971*, p. 16, at p. 31, para. 53.

⁵¹ Art. 3.2 and 19.2 of the DSU.

addresses the interpretation of the WTO covered agreements and that the WTO adjudicating bodies cannot change the WTO Agreement when interpreting it. In his opinion, it does not address the jurisdiction or the applicable law, nor is it a conflict clause giving WTO law priority over other international law.⁵² This question will be further discussed in chapter 4.3.2.1 in the context of the applicable law before the WTO adjudicating bodies.

2.4 Conflict of Norms

2.4.1 Definition of Conflict

Conflicts between norms are inevitable due to the decentralised character of international law and the lack of hierarchy of norms.⁵³ To decide when two norms do not accumulate, and cannot be applied in each other's context, a definition of 'conflict' is required. Interesting to consider at the outset is at what level normative conflicts normally arise. In practically all cases, the conflict ought to be between separate provisions in two treaties and not between two whole treaties. It is hard to imagine a whole treaty running totally against the objectives of another treaty with predominantly the same parties.

There is a difference between 'inherent normative conflicts' and 'conflicts in the applicable law'. An example of an 'inherent normative conflict' is when a norm is in conflict with a *jus cogens* norm. The norm that is not *jus cogens* is not only in the particular conflict not applicable, but is void and terminates.⁵⁴ In the case of a 'conflict in the applicable law', on the other hand, both norms continue to exist and the conflict has to be solved in the particular case through a relevant conflict rule.⁵⁵ The focus of this thesis is on 'conflicts in the applicable law'.

A norm can prescribe, prohibit or permit a certain act. To define 'conflict of norms', one has to decide if only incompatibilities between obligations and prohibitions or also incompatibilities between obligations or prohibitions and permissions should be encompassed.⁵⁶

The first, narrow, definition seems to be prevailing in public international law.⁵⁷ This view was first advocated by Jenks, who meant that a conflict

⁵² Pauwelyn 2003, pp. 353-354 and 465.

⁵³ International Law Commission, 58th Session Geneva, 1 May-9 June and 3 July-11 August 2006, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, A/CN.4/L.682, p. 246, para. 486, <http://untreaty.un.org/ilc/guide/1_9.htm>, visited on 12 March, 2009.

⁵⁴ Arts. 53 and 64 VCLT; Pauwelyn 2003, p. 436; Vranes, pp. 66-67.

⁵⁵ Pauwelyn 2003, p. 327.

⁵⁶ Vranes, pp. 12-13.

⁵⁷ See e.g., Czaplinski and Danilenko, p. 12; Marceau, p. 1086. See also Vranes, p. 16, who, however, argues for a broader definition *de lege ferenda*, see note 33.

between two treaties only arises when a party to the two treaties cannot simultaneously comply with its obligations under both treaties. Simplified one can say that according to this strict definition there is no conflict between a WTO agreement, which prohibits trade restrictive measures and an MEA, which contains a right, but no obligation, to adopt trade restrictive measures. It is possible to comply with both agreements by simply refraining from exercising a right under the MEA.⁵⁸ Also the WTO Appellate Body and panels have predominantly applied the narrow definition.⁵⁹

Pauwelyn finds Jenks' definition too strict and defines conflict wider, so as to also encompass the case of conflicting permissions and obligations or prohibitions. According to Pauwelyn, two norms are in conflict "if one constitutes, has led to, or may lead to, a breach of the other".⁶⁰ This view is also supported by Vranes.⁶¹ He argues that if one does not recognise incompatibilities between permissions and obligations or prohibitions as a conflict, priority rules will not be applicable and the rule establishing only a permission will have to give way even if it is more specific or later in time than the other rule. This is especially problematic in the case of WTO law and MEAs, since MEAs usually only authorise, but do not prescribe trade restrictive measures.⁶² Although not defining this situation as a conflict, Jenks acknowledged the problem of divergence between the provisions, which would leave the MEA without effect.⁶³

2.4.2 Conflict Rules

In case of a conflict in the applicable law between two norms they cannot both be applied at the same time. Hence, one has to solve the conflict by finding out which of the two norms prevails. To begin with, conflict clauses in the two treaties should be consulted to find out how the parties wanted conflicts to be solved.⁶⁴ If no such provisions are found in the treaties themselves, one has to turn to the conflict rules in general international law.⁶⁵ In national law, the commonly used conflict rules stipulate that *lex*

⁵⁸ Jenks, pp. 425-426 and 451.

⁵⁹ See e.g., *Guatemala-Anti-Dumping Investigation Regarding Portland Cement from Mexico (Mexico v. Guatemala)*, WTO, Appellate Body report circulated on 2 November 1998, WT/DS60/AB/R, para. 65,

<www.wto.org/english/tratop_e/dispu_e/cases_e/ds60_e.htm>, visited on 1 April 2009; *Indonesia – Certain Measures Affecting the Automobile Industry (EC v. Indonesia)*, WTO, Panel report circulated on 2 July 1998, WT/DS54/R, WTDS59/R, WTDS64/R, note 649, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds54_e.htm>, visited on 1 April 2009; *Turkey – Restrictions on Imports of Textile and Clothing Products (India v. Turkey)*, WTO, Panel report circulated on 31 May 1999, WT/DS34/R, para. 9.92, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds34_e.htm>, visited on 1 April 2009.

⁶⁰ Pauwelyn 2003, pp. 170 and 175-176.

⁶¹ Vranes, p. 19 *et seq.*

⁶² *Ibid.*, pp. 10 and 19.

⁶³ Jenks, p. 451.

⁶⁴ Art. 30(2) VCLT; Pauwelyn 2003, p. 437; Vranes, p. 67.

⁶⁵ Pauwelyn 2001, pp. 545 and 547.

superior derogat inferiori, lex posterior derogat priori and *lex specialis derogat generali*.⁶⁶

The *lex superior* rule, laying down that rules from a higher source prevail over rules from a lower source, only has a limited application in international law since *jus cogens* norms are the only superior norms.⁶⁷

The *lex posterior* rule states that later rules prevail over earlier rules.⁶⁸ Art. 30(3) VCLT lays down the *lex posterior* rule in the context of treaties and stipulates that

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

The decisive date for deciding which treaty is the earlier one under art. 30(3) VCLT is the adoption of the treaty, not its entry into force. The basis for the *lex posterior* rule is the contractual freedom of states. States have the right to change their opinion and their last expression of intent should be decisive. Consequently, Pauwelyn argues that even if a treaty contains a conflict clause, the *lex posterior* principle still applies, possibly leaving the conflict clause without effect.⁶⁹ The *lex posterior* rule only applies to successive treaties with the same subject-matter⁷⁰ and the same parties.⁷¹ However, it also applies when not all parties to the earlier treaty are also parties to the later treaty. For that case, art. 30(4) VCLT stipulates that the later treaty only applies to the parties that are bound by both treaties. For the other parties, the earlier treaty continues to apply.

It can be difficult to apply the *lex posterior* rule on treaties that are amended and concluded again in its entirety. GATT is an example of this. When the WTO Agreement was adopted in 1994 the whole GATT 1947 was ‘reconcluded’.⁷² The question is if GATT was still the last expression of intent of the parties.

The *lex specialis* rule stipulates that a particular rule prevails over a general rule. Due to the difficulties in applying the other conflict rules the *lex specialis* rule plays a more important part in international than in national law. A rule can be more general than another either because the subject-matter is broader or because it has more states parties.⁷³

⁶⁶ Akehurst, p 273.

⁶⁷ *Ibid.*, p. 273.

⁶⁸ *Ibid.*, p. 273; Vranes, pp. 55-56.

⁶⁹ Pauwelyn 2003, pp. 355, 362 and 370.

⁷⁰ See the title to art. 30 and art. 30(1) VCLT.

⁷¹ Art. 30(3) VCLT.

⁷² Pauwelyn 2003, p. 376.

⁷³ Akehurst, p. 273.

Concerning the question which of the *lex posterior* and the *lex specialis* rules prevails, a common opinion among legal scholars may seem difficult to identify at first sight. Pauwelyn holds the view that the *lex posterior* rule should prevail over the *lex specialis* rule. The *lex specialis* rule would only come into play in case treaties are not successive⁷⁴ or if otherwise the *lex posterior* rule does not apply. Vranes, on the other hand, gives the *lex specialis* rule priority over the *lex posterior* rule in case the *lex specialis* provisions are “clearly intended to continue to apply”.⁷⁵ When examining the views of Pauwelyn and Vranes, they are probably not as different as they first may seem. Vranes only holds the view that the *lex specialis* rule should prevail if the particular provision is “clearly intended to continue to apply”. Since this can be said to amount to a conflict clause, it is not excluded that Pauwelyn would agree with this statement.⁷⁶ On the relationship between the two conflict rules, Czaplinski and Danilenko observe that, although the *lex posterior* rule is the rule stipulated in the VCLT, the ICJ has tended to apply the *lex specialis* rule when it can be said which norm is more particular.⁷⁷ Marceau holds the view that the hierarchy between the two conflict rules is best established from case to case to identify the intention of the parties.⁷⁸

In summary, while the opinion in the doctrine seems to lean more towards the priority of the *lex posterior* rule over the *lex specialis* rule, the ICJ has tended to look more at the degree of particularity of the norm.

⁷⁴ Pauwelyn 2003, pp. 437-438.

⁷⁵ Vranes, p. 67.

⁷⁶ Pauwelyn 2003, p. 437.

⁷⁷ Czaplinski and Danilenko, p. 20.

⁷⁸ Marceau, p. 1093.

3 The SPS Agreement and the Biosafety Protocol

3.1 Biological Diversity

The Convention on Biological Diversity (CBD) defines biological diversity, or 'biodiversity', as "the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems".⁷⁹

There are two different approaches to the value of biodiversity. The 'anthropocentric' approach values biodiversity because of its contribution to human welfare. The 'ecocentric' approach, on the other hand, sees the intrinsic value of biodiversity, independent from its value for human beings.⁸⁰ Biological diversity is important for human welfare because of its contribution to food and medicines. Food security in developing countries depends on the variety of plant genetic resources. Moreover, the major importance of plants in health care is easily illustrated by the estimation made by the World Health Organisation (WHO) that 80 percent of the people in developing countries use primarily traditional medicine and that about 85 percent of these medicines involve the use of plant extracts. Biodiversity is also essential because of its contribution to the 'ecosystem services'. Nutrient recycling, sedimentation processes and water regulation are some of the regulatory functions of ecosystems, which support the ecological activity. In order for this to function properly, the biological diversity has to be on a healthy level.⁸¹

The loss of biodiversity has significantly increased within the last 150 years. The reasons for the loss are *inter alia* the alteration and loss of natural habitat, over-harvesting, the introduction of alien species and diseases, pollution, and climate change.⁸²

The negotiations leading to the adoption of the Convention on Biological Diversity at the Rio Earth Summit in 1992 were characterised by the different wishes of the developed and developing countries. These differing interests can be explained by the fact that most of the world's biodiversity is located in the developing countries, while the developed world holds the financial means and the know-how to exploit it. Simplified, one can say that the north wanted to secure access to genetic resources, while the south wanted to keep their national sovereignty over these resources, to receive

⁷⁹ Art. 2 CBD.

⁸⁰ See para. 1 of the preamble to the CBD; Biber-Klemm and Szymura Berglas, p. 7.

⁸¹ Biber-Klemm and Szymura Berglas, pp. 7-9.

⁸² *Ibid.*, pp. 10-11.

financial support for their conservation and a share in the profit made by their exploitation. The CBD is a compromise between these different interests.⁸³ It is a framework convention, whose three main objectives are: the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising from the utilisation of genetic resources.⁸⁴ It has almost reached universal membership with 191 states parties.⁸⁵

3.2 Modern Biotechnology – Benefits and Concerns

After having discovered the structure of the DNA in the 1950s, science took another big step in the 1970s by isolating individual genes, refashioning them and copying them into cells. This technique of modern biotechnology is faster and more exact than the more random approach of selective breeding, which has been used for centuries.⁸⁶

Modern biotechnology can be used within medical science, plant and animal breeding and food production.⁸⁷ It can have many positive effects on agriculture, for example herbicide and disease resistant crops, crops adapted to extreme environmental conditions,⁸⁸ more nutritious food and higher yields.⁸⁹

However, GMOs also cause ethical, religious and socio-economic concerns as well as concerns about the risks to human health and the environment, including risks to the biological diversity.⁹⁰ There are concerns that genetically modified plants might transmit their genes to other plants through pollen or that they out-compete other plants because of their superior traits.⁹¹ The risks of GMOs on human health and the environment are, nonetheless, still controversial and uncertain.⁹² The regulation of modern biotechnology to prevent negative effects is part of biosafety or biosecurity.⁹³

⁸³ McGraw, pp. 29 and 32.

⁸⁴ Art. 1 CBD.

⁸⁵ <www.cbd.int/convention/parties/list/>, visited on 20 April 2009.

⁸⁶ Behrens, pp. 44-45.

⁸⁷ Lohninger, p. 38.

⁸⁸ Böckenförde, p. 27.

⁸⁹ Behrens, p. 45.

⁹⁰ *Ibid.*, pp. 45-46; Böckenförde, p. 51.

⁹¹ Safrin, p. 606.

⁹² Behrens, p. 45; Birnie *et al.*, p. 629; Eggers and Mackenzie, p. 525.

⁹³ Behrens, p. 46.

3.3 The SPS Agreement

The Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) is one of the trade agreements under the umbrella of the WTO. All these ‘WTO-covered agreements’ are a package and all WTO members are automatically parties to all the covered agreements.⁹⁴ The WTO has 153 member states.⁹⁵

The SPS Agreement supplements the requirements laid down in art. XX (b) GATT,⁹⁶ which is the general exception for trade measures necessary to protect human, animal or plant life or health. It applies to “all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade”.⁹⁷ ‘Sanitary or phytosanitary measures’ are measures applied to protect human, animal or plant life or health from risks coming from *inter alia* pests, diseases, additives, toxins and disease-causing organisms in foods or beverages.⁹⁸

The SPS Agreement is an attempt to find a balance between the right to adopt measures to protect health and the environment and the prohibition against protectionism.⁹⁹ To this end, the Agreement gives member states the right to adopt SPS measures, but “only to the extent necessary to protect human, animal or plant life or health”.¹⁰⁰ The measures have to be based on scientific principles and cannot be adopted without sufficient scientific evidence¹⁰¹ and a risk assessment.¹⁰² In order to justify SPS measures, the risk has to be ‘ascertainable’.¹⁰³ However, the member states can decide their own appropriate level of protection, which can also be ‘zero risk’.¹⁰⁴ Furthermore, the SPS Agreement prohibits SPS measures that amount to arbitrary or unjustifiable discrimination or a disguised restriction on international trade.¹⁰⁵

The SPS Agreement contains the possibility for a precautionary approach. In case of insufficient relevant scientific evidence, SPS measures may still be adopted based on available pertinent information, but only on a

⁹⁴ Art. II(2) WTO Agreement.

⁹⁵ <www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm>, visited on 8 April 2009.

⁹⁶ General Agreement on Tariffs and Trade, 30 October 1947, 55 U.N.T.S. 187.

⁹⁷ Art. 1.1 SPS Agreement.

⁹⁸ Art. 1 Annex A to the SPS Agreement.

⁹⁹ See the preamble to the SPS Agreement; Roberts, p. 378.

¹⁰⁰ Arts. 2.1 and 2.2 SPS Agreement.

¹⁰¹ *Ibid.*, art. 2.2.

¹⁰² *Ibid.*, art. 5.1.

¹⁰³ *European Communities – Measures Concerning Meat and Meat Products (Hormones) (United States v. European Communities)*, WTO, Appellate Body report circulated on 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 186,

<www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm>, visited on 8 May 2009.

¹⁰⁴ *Australia – Measures Affecting Importation of Salmon (Canada v. Australia)*, WT/DS18/AB/R, WTO, Appellate Body report circulated on 20 October 1998, para. 125,

<www.wto.org/english/tratop_e/dispu_e/cases_e/ds18_e.htm>, visited on 24 April 2009.

¹⁰⁵ Arts. 2.3 and 5.5 SPS Agreement.

provisional basis. The member state must try to obtain the necessary information and review the measures within a reasonable period of time.¹⁰⁶

That WTO law allows trade restrictive measures that are based on health concerns to be taken with a precautionary approach has been confirmed by the WTO Panel in the *Asbestos* case.¹⁰⁷ The Panel concluded that it would be impossible for a state to legislate in the field of public health, if one would "make the adoption of health measures concerning a definite risk depend upon establishing with certainty a risk..."¹⁰⁸

SPS measures that follow international standards, guidelines or recommendations are seen as necessary and presumed to be consistent with the SPS Agreement and with GATT.¹⁰⁹ If there is a scientific justification, a member state is allowed to adopt SPS measures that are more far-reaching than they would be if they were based on relevant international standards.¹¹⁰

3.4 The Cartagena Protocol on Biosafety

The provisions on biosafety in the Convention on Biological Diversity¹¹¹ are vague and were not considered to give enough protection against the risks that modern biotechnology can pose to biodiversity and human health. Hence, the idea of a biosafety protocol took form already during the first Conference of the Parties to the CBD in 1994. However, the divergence between the trade interests of the USA¹¹² and other countries exporting GMO crops on the one hand and the environmental and health concerns of countries importing GMO crops on the other hand made it difficult to reach an agreement.¹¹³ Nonetheless, in Montreal on 29 January 2000, consensus was finally reached and the Cartagena Protocol on Biosafety (the Biosafety Protocol or the Protocol) could be adopted. It entered into force on 11 September 2003. To date, the Protocol has 153 Parties.¹¹⁴

The objective of the Biosafety Protocol can be found in art. 1:

"In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology

¹⁰⁶ Art. 5.7 SPS Agreement.

¹⁰⁷ *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products (Canada v. European Communities)*, WTO, Panel report circulated on 18 September 2000, WT/DS135/R,

www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm, visited on 14 April 2009.

¹⁰⁸ *Ibid.*, para. 8.221. This case concerned trade restrictions based on art. XX (b) GATT.

¹⁰⁹ Art. 3.2 SPS Agreement.

¹¹⁰ *Ibid.*, art. 3.3.

¹¹¹ Arts. 8(g) and 19(3) Biosafety Protocol.

¹¹² The USA, who has signed but not ratified the CBD, still participated in the negotiations of the Protocol.

¹¹³ Birnie *et al.*, pp. 629-630.

¹¹⁴ www.cbd.int/convention/parties/list, visited on 27 March 2009.

that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.”

The scope of the Protocol is laid down in art. 4, stipulating that it

”shall apply to the transboundary movement, transit, handling and use of all living modified organisms that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.”

‘Living modified organism’ (LMO) is defined in art. 3(g) as ”any living organism that possesses a novel combination of genetic material obtained through the use of modern biotechnology”. The definition of ‘living organism’ in art. 3(h) exempts products derived from materials of LMO origin, for example cereal derived from genetically modified crops,¹¹⁵ from the scope of the Protocol. Further, also ”pharmaceuticals for humans that are addressed by other relevant international agreements or organisations” are exempted from the application of the Protocol.¹¹⁶

The key mechanism of the Biosafety Protocol is the Advance Informed Agreement (AIA) procedure.¹¹⁷ The AIA procedure applies prior to the first intentional transboundary movement of LMOs for intentional introduction into the environment.¹¹⁸ The export country has to notify the import country and provide the information specified in Annex I,¹¹⁹ including a risk assessment.¹²⁰ On the basis of the information provided by the exporter, the import state shall within 270 days after the receipt of the notification make a decision on the import.¹²¹ It can either approve the import with or without conditions,¹²² prohibit the import,¹²³ request additional information¹²⁴ or inform the export state that it needs more time to make a decision.¹²⁵ Important to note is that silence from the import state does not mean that it consents to the import.¹²⁶ The Protocol requires decisions on imports of LMOs intended for intentional release into the environment to be based on a risk assessment, undertaken in a scientifically sound manner.¹²⁷

The AIA procedure does not apply to LMOs in transit,¹²⁸ LMOs destined for contained use,¹²⁹ LMOs intended for direct use as food or feed, or for

¹¹⁵ Behrens, pp. 47-48.

¹¹⁶ Art. 5 Biosafety Protocol.

¹¹⁷ Behrens, p. 48.

¹¹⁸ Art. 7(1) Biosafety Protocol.

¹¹⁹ *Ibid.*, art. 8(1).

¹²⁰ *Ibid.*, art. 15, Annex I (k), Annex III para. 3.

¹²¹ *Ibid.*, art. 10(3).

¹²² *Ibid.*, art. 10(3)(a).

¹²³ *Ibid.*, art. 10(3)(b).

¹²⁴ *Ibid.*, art. 10(3)(c).

¹²⁵ *Ibid.*, art. 10(3)(d).

¹²⁶ *Ibid.*, art. 10(5).

¹²⁷ *Ibid.*, arts. 10(1), 15 and Annex III.

¹²⁸ *Ibid.*, art. 6(1).

processing¹³⁰ or to the intentional transboundary movement of LMOs identified by the Conference of the Parties as being not likely to have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.¹³¹ Accordingly, the AIA procedure applies primarily to seeds, release of fish and of modified microorganisms.¹³²

Art. 10(6) gives expression to the precautionary approach of the Protocol and stipulates that

“[l]ack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, *shall not prevent that Party from taking a decision*, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects”. (Emphasis added.)

The issue of agricultural commodities was one of the last issues to be resolved during the negotiations of the Protocol.¹³³ For LMOs intended for direct use as food or feed, or for processing, another procedure than the AIA procedure is foreseen in the Protocol. This group of LMOs constitutes 90 percent of the world trade in GMOs¹³⁴ and includes *inter alia* corn, cotton and soy.¹³⁵ The Protocol leaves the regulation of this area of GMOs much more to the parties than the GMOs falling under the AIA procedure.¹³⁶ In contrast to the AIA procedure, which requires consent from the import state, the procedure in art. 11 is based on a system of information provided by every state party through the Biosafety Clearing-House Mechanism, a central internet server,¹³⁷ concerning national decisions on LMOs for direct use as food or feed, or for processing. This includes *inter alia* an approval to place an LMO on the market. Annex II contains a list of the minimum information required, including the same kind of risk assessment as required in the AIA procedure.¹³⁸ The decision by the import state on the importation of an LMO intended for direct use as food or feed, or for processing can be based on its domestic regulations, when consistent

¹²⁹ *Ibid.*, art. 6(2). ‘Contained use’ is defined in art. 3(b) of the Biosafety Protocol as “any operation, undertaken within a facility, installation or other physical structure, which involves living modified organisms that are controlled by specific measures that effectively limit their contact with, and their impact on, the external environment”. Hence, the AIA procedure does, *inter alia*, not apply to vials for scientific research. See Safrin, p. 608.

¹³⁰ Biosafety Protocol, art. 7(2).

¹³¹ *Ibid.*, art. 7(4).

¹³² Behrens, p. 48.

¹³³ Pythoud, p. 321.

¹³⁴ Lohninger, p. 152.

¹³⁵ Birnie *et al.*, p. 640.

¹³⁶ Eggers and Mackenzie, p. 542.

¹³⁷ Böckenförde, p. 170.

¹³⁸ Biosafety Protocol, arts. 15, 11(1), Annex II (j) and Annex III.

with the objective of the Protocol.¹³⁹ Also this system allows for a precautionary approach in the decision-making process.¹⁴⁰

The Protocol lays down minimum standards and a state party is allowed to adopt more far-reaching measures to protect biological diversity, provided that the measures are consistent with the Protocol and with the state's other obligations under international law.¹⁴¹ Both the AIA procedure and the procedure for LMOs intended for direct use as food or feed, or for processing allow for socio-economic considerations in the decision-making process. These considerations must, however, be consistent with the contracting party's other international obligations.¹⁴²

3.5 Relationship to Other Conventions

3.5.1 The SPS Agreement

The SPS Agreement contains no conflict clause, which establishes its relationship to other conventions. Art. 11(3), lays down that "[n]othing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement". However, this paragraph only refers to provisions about consultations and dispute settlement, not to whole agreements. This conclusion can be drawn from the title of art. 11, reading "Consultations and Dispute Settlement".

Since the SPS Agreement is a 'WTO-covered agreement', one also has to look for conflict clauses in the WTO Agreement. However, the WTO Agreement contains no such clauses.¹⁴³

As stated in chapter 2.3.2, the provisions stipulating that the WTO panels and the Appellate Body "cannot add to or diminish the rights and obligations provided in the covered agreements"¹⁴⁴ are no conflict clauses.¹⁴⁵ For different views on the meaning of these provisions in the context of the applicable law before the WTO judiciary, see chapter 4.3.2.1.

3.5.2 The Biosafety Protocol

Art. 30(2) of the VCLT stipulates that "[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier

¹³⁹ Biosafety Protocol, art. 11(4).

¹⁴⁰ *Ibid.*, art. 11(8).

¹⁴¹ *Ibid.*, art. 2(4).

¹⁴² *Ibid.*, art. 26.

¹⁴³ Pauwelyn 2003, pp. 343-344.

¹⁴⁴ Arts. 3.2 and 19.2 DSU.

¹⁴⁵ Pauwelyn 2003, pp. 352-353.

or later treaty, the provisions of that other treaty prevail.” This is called a ‘savings clause’ because it ‘saves’ the earlier or later treaty from being overcome by the other treaty.

In its art. 22, the Convention on Biological Diversity contains such a savings clause, which reads:

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

The Draft Protocol from the sixth meeting of the Open-Ended ad hoc Working Group on Biosafety, which was presented to the states parties at the first extraordinary meeting of the Conference of the Parties to the CBD, contained a savings clause in its art. 31 with the same wording as art. 22 of the CBD.¹⁴⁶ However, this paragraph was not accepted by the states parties. At the end of the negotiations, the chairman proposed a text with the same language as the three preambular paragraphs governing the relationship to other conventions in the recently adopted Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.¹⁴⁷ This was the text that broke the deadlock and the states parties could, after some changes, reach agreement on the following three preambular paragraphs:

“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 agreement”.

The final text is a compromise between the positions of the EU and the Miami Group, constituted of the USA and other GMO exporting states.¹⁴⁸

The first of the three paragraphs shows the attempt to find a balance between protection of the environment and trade interests generally. It is not a conflict clause, but has a mere conflict-preventing aim.¹⁴⁹

The second and third paragraphs have led to confusion since they seem to contradict each other. On the one hand, the second paragraph lays down a provision, which could be interpreted as a savings clause, giving way for preexisting treaties in case of a conflict. On the other hand, the third

¹⁴⁶ Report of the Sixth Meeting of the Open-ended ad hoc Working Group on Biosafety, UNEP/CBD/ExCOP/1/2, 15 February 1999, Draft Protocol on Biosafety, Appendix I, p. 35, Art. 31, <www.cbd.int/doc/?mtg=BSWG-06>, visited on 17 April 2009.

¹⁴⁷ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10 September 1998, 2244 U.N.T.S. 393.

¹⁴⁸ Afonso, p. 435.

¹⁴⁹ Böckenförde, p. 231 *et seq.*

paragraph seems to undo the savings clause language of the second paragraph by stating that it is not intended to subordinate the Protocol to other agreements.

The ambiguous relationship between the second and third paragraphs can be interpreted very differently. On the one hand, the second paragraph can be seen as a savings clause, with the effect that the WTO agreements would prevail over the Protocol in case of a conflict. In this vein, Safrin argues that the third paragraph only reflects the political concerns during the negotiations that environmental agreements are not of lower status or importance than trade agreements and that it does not take away the effect of the savings clause in the second paragraph, which has the effect of giving priority to preexisting agreements.¹⁵⁰

On the other hand, Afonso is of the view that the second and third paragraphs have the effect that the Protocol contains no clear conflict clause¹⁵¹ and that the preambular paragraphs are only to be seen as a call for harmonising interpretation between the Protocol and earlier treaties.¹⁵² The reason for this interpretation is the third paragraph's effect on the second paragraph and the fact that the wording of the second paragraph is not the same as a conventional savings clause. Afonso, however, admits that the reached compromise on the relationship between the Protocol and other conventions is ambiguous and that in case of a dispute, raised for example before a WTO panel, the WTO panel will try to interpret the WTO agreement and the Protocol so as to avoid establishing the existence of a conflict between the two.¹⁵³

3.6 Interlinkages and Conflicts between the SPS Agreement and the Biosafety Protocol

A decision to deny or restrict the import of an LMO under the Biosafety Protocol can be an SPS measure under the SPS Agreement, if the objective of the measure is to protect human, animal or plant life or health from pests or diseases as defined in para. 1 of Annex A to the SPS Agreement. Therefore, there is a possibility for concurrent applicability of and conflicts

¹⁵⁰ Safrin, pp. 618-620. One has to keep in mind that, although stating that “[t]he views, perceptions, and opinions expressed in this piece are solely those of the author and do not reflect those of the U.S. Department of State, the United States government, or the government of any other country”, Safrin was a legal counsel to the U.S. delegation during the negotiations of the Biosafety Protocol and the United States strongly advocated the inclusion of a savings clause in the Protocol.

¹⁵¹ Afonso, p. 435. One has to consider that Afonso presents the negotiations and the text adopted from the perspective of the European Union, which was against the inclusion of a savings clause in the Protocol. *See also* Böckenförde, p. 236; Eggers and Mackenzie, p. 534.

¹⁵² Afonso, p. 436. *See also* Böckenförde, p. 235; Eggers and Mackenzie, p. 534.

¹⁵³ Afonso, p. 437.

between the two agreements. The relationship between the Protocol and the WTO agreements was one of the most controversial issues during the negotiations of the Protocol.¹⁵⁴

The Biosafety Protocol and the SPS Agreement have different objectives. While the objective of the Protocol is the safe transfer, handling and use of LMOs in order to protect biological diversity and human health,¹⁵⁵ the SPS Agreement was adopted to control the negative trade effects of a state's SPS measures.¹⁵⁶

The following comparison concentrates on two potential areas of conflict between the two agreements: the possibility to adopt measures that discriminate between different countries or that protect domestic industries and the extent to which a decision on imports of GMOs can be based on a precautionary approach. There might be other potential conflicts between the SPS Agreement and the Biosafety Protocol. Discrimination and the precautionary approach were, however, the most controversial issues during the negotiations of the Protocol¹⁵⁷ and they illustrate the different objectives of trade agreements and MEAs. When discussing the potential conflicts, the states in the examples are assumed to be bound by both the SPS Agreement and the Biosafety Protocol.

3.6.1 Discrimination

GATT contains a prohibition against discrimination. This is expressed in the principle of most favoured nation treatment¹⁵⁸ and the national treatment principle.¹⁵⁹ Art. XX of the GATT lays down general exceptions to these principles. Art. XX (b) stipulates an exception for measures necessary to protect human, animal or plant life or health. These measures are, however, neither allowed to constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, nor can they be a disguised restriction on international trade.¹⁶⁰ Art. 2(3) of the SPS Agreement reiterates the prohibition against arbitrary or unjustifiable discrimination and disguised restrictions on international trade.

The Biosafety Protocol, however, does not contain a prohibition against discrimination between contracting parties in connection with the import decision under the AIA procedure, regulated in art. 10(3). The same holds for art. 11(4) concerning decisions on import in the context of the system for

¹⁵⁴ Afonso, p. 423; Boisson de Chazournes and Moïse Mbengue 2008, p. 210.

¹⁵⁵ Art. 1 Biosafety Protocol.

¹⁵⁶ Para. 1 of the Preamble to the SPS Agreement.

¹⁵⁷ Safrin, p. 611.

¹⁵⁸ Art. I GATT. The principle of most favoured nation treatment stipulates that a member state cannot treat the products of one member state better than 'like' products of another member state.

¹⁵⁹ Art. III GATT. According to the principle of national treatment, a member state has to give products from other member states the same treatment as 'like' domestic products.

¹⁶⁰ See the so called 'chapeau' in art. XX (1) GATT.

LMOs intended for direct use as food, feed or for processing. The following comparison concentrates on art. 10(3).

The question is, if there is a conflict in the application between the prohibition against discrimination in arts. I, III and XX of the GATT and art. 2(3) of the SPS on the one hand and art. 10(3) of the Protocol on the other hand. When applying the strict definition of conflict, the decisive is if a party to the Biosafety Protocol that is also a WTO member can simultaneously comply with the non-discrimination provisions of the GATT and the SPS Agreement and with art. 10(3) of the Protocol.

If a state allows the import of an LMO from one party to the Protocol but not to another party and both these parties are WTO members, this would probably violate the prohibition against discrimination in WTO law.¹⁶¹ If the state would treat all WTO members equally when deciding on imports of LMOs under the Biosafety Protocol, this would not violate the Protocol. It is needless to say that the Protocol does not entail an *obligation* to discriminate. It only lacks a prohibition against discrimination.

Hence, there is no real conflict between these provisions according to the narrow definition of conflict. Is there a conflict if one applies Pauwelyn's broader definition of conflict? The question then is, if the Protocol contains a *right* to discriminate. One could argue, with the *Lotus* case¹⁶² as a basis, that the absence of a prohibition against discrimination amounts to a right to discriminate. The judgement in the *Lotus* case was, however, very controversial and has received a lot of criticism and one could probably not successfully argue that this 'negative permission' exists in international law.¹⁶³ Consequently, the application of the broader definition of conflict leads to the same conclusion. There is no conflict between arts. I, III and XX of the GATT and art. 2(3) of the SPS on the one hand and art. 10(3) of the Protocol on the other hand. There is also no divergence since non-discriminating import bans on LMOs are not less effective in reaching the objective of the Biosafety Protocol than discriminating import bans. Hence, a state taking a decision on the import of an LMO under the Biosafety Protocol has to make sure that it fulfils the obligation of non-discrimination in the GATT and the SPS Agreement. This follows from the principle of *pacta sunt servanda* and the principle of good faith. The question of the application of the Biosafety Protocol by the WTO judiciary does not arise.

¹⁶¹ Safrin, p. 612.

¹⁶² In the *Lotus* case, the question was if Turkey was allowed to arrest and charge a French officer from the French steamer *Lotus*, which had collided with a Turkish ship on the high seas, once it reached a Turkish port. The Court laid down a rule of 'negative permission', stating that in the lack of a rule prohibiting a state's jurisdiction, a state could not be restricted from exercising its jurisdiction. See the *Case of the S.S. "Lotus" (France v. Turkey)*, 7 September 1927, PCIJ, p. 19, <www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf>, visited on 22 April 2009.

¹⁶³ See e.g., Pauwelyn 2003, pp. 154 and 161; Shaw, p. 656.

3.6.2 Precautionary Approach

The second potential area of conflict has to do with the extent to which a state party can invoke a precautionary approach when taking a decision on an SPS measure or on an import of LMOs. As seen in chapters 3.3 and 3.4, both the Biosafety Protocol and the SPS Agreement contain the possibility for a precautionary approach.¹⁶⁴

Art. 5(7) of the SPS Agreement reads:

“In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.”

Art. 10(6) of the Biosafety Protocol reads:

“Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects.”

Two potential conflicts can be found between the precautionary language of the two provisions. Firstly, while under the Protocol, precautionary measures may exist without time limit,¹⁶⁵ under the SPS Agreement, these measures can only be provisional.¹⁶⁶ Does this constitute a conflict between art. 10(6) of the Protocol and art. 5(7) of the SPS Agreement? If a state bans the import of an LMO based on a precautionary approach without “seeking to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time”, it violates art. 5(7) of the SPS Agreement.

The Biosafety Protocol does, however, not *prohibit* that the party of import tries to find additional information in order to make a more objective risk assessment and to review the import decision. Art. 12 of the Biosafety Protocol even lays down that a party of import may review and change its decision.¹⁶⁷ Hence, there is no conflict according to the strict definition of conflict. The party of import can comply with both art. 5(7) of the SPS Agreement and art. 10(6) of the Biosafety Protocol simply by trying to obtain the necessary information and by reviewing its decision.

¹⁶⁴ Arts. 10(6) and 11(8) Biosafety Protocol; art. 5(7) SPS Agreement.

¹⁶⁵ Art. 10(6) and 11(8) Biosafety Protocol.

¹⁶⁶ Art. 5(7) SPS Agreement.

¹⁶⁷ Art. 12(1) Biosafety Protocol.

Is there a conflict according to the broader definition of conflict? A party of export may request the party of import to review its decision, *inter alia* if “additional relevant scientific or technical information has become available.”¹⁶⁸ However, the Protocol does not give the party of export a right to require that the party of import seeks to obtain the necessary information. The party of import is only required to review its decision, if “[a]dditional relevant scientific or technical information *has become available*” (emphasis added). Accordingly, one could argue that, under the Biosafety Protocol, the party of import has a *right* not to seek to obtain the necessary information. Hence, the relationship between art. 5(7) of the SPS Agreement and arts. 10(6) and 12 of the Protocol can be described as a conflict according to the broad definition of conflict. A discussion on how this situation should be solved is held in chapter 4.3.4.

Secondly, it is disputed whether the phrase ‘lack of scientific certainty due to insufficient relevant scientific information’ in art. 10(6)¹⁶⁹ of the Biosafety Protocol allows for a precautionary approach to a larger extent than the phrase ‘insufficient relevant scientific evidence’ in art. 5(7)¹⁷⁰ of the SPS Agreement.

One view is that there is no conflict between the precautionary approach in MEAs and in WTO law.¹⁷¹ However, one could also argue that the SPS Agreement would only allow for a precautionary approach when the scientific evidence does not suffice to carry out a risk assessment in the first place and that the Biosafety Protocol would in addition allow for precautionary measures when the potential adverse effects of an LMO are still uncertain after the risk assessment.¹⁷²

In the *Japan – Apples* case,¹⁷³ the Appellate Body made a difference between ‘lack of scientific certainty’ and ‘insufficient relevant scientific evidence’. However, the question was not addressed in the context of the

¹⁶⁸ *Ibid.*, art. 12(2).

¹⁶⁹ Art. 10(6) of the Biosafety Protocol reads “Lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of the living modified organism in question as referred to in paragraph 3 above, in order to avoid or minimize such potential adverse effects.”

¹⁷⁰ Art. 5(7) of the SPS Agreement reads “In cases where relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time.”

¹⁷¹ Perez, pp. 280, 283 and 285.

¹⁷² See Zarrilli, p. 246.

¹⁷³ *Japan – Measures Affecting the Importation of Apples (United States v. Japan)*, WTO, Appellate Body report circulated on 26 November 2003, WT/DS245/AB/R, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds245_e.htm>, visited on 14 April 2009.

Biosafety Protocol. The Appellate Body stated that “[t]he application of Article 5.7 is triggered not by the existence of scientific uncertainty, but rather by the insufficiency of scientific evidence.” According to the Appellate Body, “[t]he two concepts are not interchangeable.”¹⁷⁴ It continued by stating that the “‘relevant scientific evidence’ will be ‘insufficient’ within the meaning of Article 5.7 *if the body of available scientific evidence does not allow, in quantitative or qualitative terms, the performance of an adequate assessment of risks as required under Article 5.1 and as defined in Annex A to the SPS Agreement*”¹⁷⁵ (emphasis added).

One must remember that art. 5(7) of the SPS Agreement speaks of *relevant* scientific evidence. The Panel in the *Japan – Apples* case reminded of this by stating that “[a]rticle 5.7 was obviously designed to be invoked in situations where little, or no, *reliable* evidence was available on the subject matter at issue”¹⁷⁶ (emphasis added). The Panel also stated that “[i]t is possible that, in a given situation, a lot of scientific research may have been carried out on a particular issue without yielding sufficiently ‘relevant’ – within the meaning of Article 5.7 - or reliable evidence. In such a case, however, there is little or no reliable evidence on the subject matter at issue.”¹⁷⁷ This view was also confirmed by the Appellate Body.¹⁷⁸ This seems to contradict the view that the SPS Agreement would not allow for precautionary measures when the potential adverse effects are still uncertain after the risk assessment.

If there is not sufficient relevant scientific evidence to carry out a risk assessment according to the strict requirements in art. 5(1) and Annex A of the SPS Agreement, a risk assessment still has to be carried out, but it does not have to fulfil these requirements. This conclusion can be drawn from the wording of the last sentence of art. 5(7) of the SPS Agreement, reading that “[m]embers shall seek to obtain the additional information necessary for a *more objective* assessment of risk” (emphasis added).

Although the Appellate Body has established that there is a difference between ‘lack of scientific certainty’ and ‘insufficient relevant scientific information’, one has to bear in mind that the language of the Biosafety Protocol is ‘lack of scientific certainty *due to insufficient relevant scientific information*’ (emphasis added).¹⁷⁹ Hence, if scientific uncertainty regarding the risks of GMOs is a result of insufficient relevant scientific evidence, an

¹⁷⁴ *Ibid.*, para. 184.

¹⁷⁵ *Ibid.*, para. 179.

¹⁷⁶ *Japan – Measures Affecting the Importation of Apples (United States v. Japan)*, WTO, Panel report circulated on 15 July 2003, WT/DS245/R, para. 8.219, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds245_e.htm>, visited on 24 April 2009.

¹⁷⁷ *Ibid.*, para. 7.9.

¹⁷⁸ *Japan – Measures Affecting the Importation of Apples (United States v. Japan)*, WTO, Appellate Body report circulated on 26 November 2003, WT/DS245/AB/R, para. 185, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds245_e.htm>, visited on 14 April 2009.

¹⁷⁹ The statement made by the Appellate Body in the *Japan – Apples* case was not in the context of the Biosafety Protocol.

import ban ought to be consistent with both the Biosafety Protocol and the SPS Agreement. I think it is hard to see what besides ‘insufficient relevant scientific evidence’ could be the reason for ‘scientific uncertainty’. If one has sufficient relevant scientific evidence to make a risk assessment in accordance with art. 5(1) and para. 4 of Annex A to the SPS Agreement (in particular to evaluate “the likelihood of entry, establishment or spread of a pest or disease”), the risks cannot be uncertain. Zarrilli is, however, of another view, arguing that the present scientific uncertainty concerning the risks of GMOs on human or animal health and on the environment, justifying precautionary measures under the Protocol, would not justify a precautionary approach under art. 5(7) of the SPS Agreement.¹⁸⁰

In the recent *EC – Approval and Marketing of Biotech Products* case,¹⁸¹ the EC argued that its safeguard measures could not be examined exclusively under the SPS Agreement. The Panel should also take account of the precautionary principle, as a general principle of international law and as laid down in the Biosafety Protocol. The Panel referred to the Appellate Body’s statement in the *EC - Hormones* case¹⁸² that art. 5(7) of the SPS Agreement reflects the precautionary principle.¹⁸³ Since the Panel examined whether the EC safeguard measures were consistent with art. 5(7), it did not see a need to also examine them according to an alleged precautionary principle outside of the WTO law context.¹⁸⁴ Hence, the decision of the Panel did not give any clarity on the question of the relationship between the precautionary principle in the SPS Agreement and the one in the Biosafety Protocol.

In summary, in my view there is no conflict between the phrases ‘lack of scientific certainty due to insufficient relevant scientific information’ as set out in art. 10(6) of the Biosafety Protocol and ‘insufficient relevant scientific evidence’ in art. 5(7) of the SPS Agreement. A state can simultaneously comply with its obligations under both provisions. The broad definition of conflict leads to the same result since the situation is not one of conflicting permissions and prohibitions. Hence, the question of the applicability of non-WTO law in the WTO dispute settlement does not arise. This opinion is, however, not shared by all and further case law could help clarify the controversial question.

¹⁸⁰ Zarrilli, p. 246.

¹⁸¹ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (United States v. European Communities)*, WTO, Panel report circulated on 29 September 2006, WT/DS291/R,

www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm, visited on 8 May 2009.

¹⁸² *European Communities – Measures Concerning Meat and Meat Products (Hormones) (United States v. European Communities)*, WTO, Appellate Body report circulated on 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R,

www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm, visited on 8 May 2009.

¹⁸³ *Ibid.*, para. 124.

¹⁸⁴ *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (United States v. European Communities)*, WTO, Panel report circulated on 29 September 2006, WT/DS291/R, paras. 7.3220 and 7.89,

www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm, visited on 8 May 2009.

4 The Role of MEAs in the WTO Dispute Settlement

4.1 The WTO and the Environment

International trade law and environmental law have developed in different fora¹⁸⁵ and with different objectives. Since the adoption of GATT in 1947, international trade law has had the objective of trade liberalisation.¹⁸⁶ Since free trade can have negative effects on the environment, many MEAs use trade restrictive measures as a means to protect the environment. Consequently, the risk of conflicts between the WTO agreements and MEAs is obvious. The WTO member states have acknowledged this and the preamble of the WTO Agreement stipulates that the economic development of the member states should be reached

“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”.

Furthermore, the Doha Ministerial Declaration presents the concept of ‘mutual supportiveness’ of trade and environment.¹⁸⁷ Thus, the WTO does not see trade liberalisation and protection of the environment as incompatible objectives.

When establishing the World Trade Organisation in Marrakesh on 14 April 1994, the member states also established a Committee on Trade and Environment (CTE), which addresses *inter alia* “the relationship between the provisions of the multilateral trading system and trade measures for environmental purposes, including those pursuant to multilateral environmental agreements.”¹⁸⁸ According to Birnie *et al.*, the CTE has, however, not reached much progress on this issue, much because of the different interests of the developed and the developing countries, the latter seeing the high environmental requirements as discrimination against their domestic products. Hence, it is most probable that the WTO panels and the Appellate Body will have to solve the question of the relationship between MEAs and WTO law.¹⁸⁹

¹⁸⁵ Brown Weiss and Jackson, p. 4.

¹⁸⁶ Birnie *et al.*, p. 753.

¹⁸⁷ Ministerial Conference, Fourth Session, Doha, 9-14 November 2001, Ministerial Declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1, <www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>, visited on 20th February 2009.

¹⁸⁸ *Decision on Trade and Environment*, WTO, 14 April 1994, <www.wto.org/english/docs_e/legal_e/56-dtenv_e.htm>, visited on 20 April 2009.

¹⁸⁹ Birnie *et al.*, pp. 762-763.

4.2 The WTO Dispute Settlement System

The new WTO dispute settlement system was established together with the WTO in 1994. The rules of procedure are laid down in the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), contained in Annex 2 to the WTO Agreement. The DSU is an integral part of the WTO Agreement and binding on all WTO members,¹⁹⁰ making the WTO dispute settlement system compulsory. Through the DSU, the Dispute Settlement Body (DSB) was established. Its task is to establish panels, adopt panel and Appellate Body reports, monitor the implementation of rulings and recommendations and to authorise the use of trade sanctions against parties failing to implement decisions against them.¹⁹¹

The WTO adjudicating bodies have a broad, exclusive jurisdiction, which excludes settlement under other dispute settlement systems.¹⁹² The jurisdiction is limited to claims under the WTO-covered agreements.¹⁹³ However, some trade agreements, *inter alia* the SPS Agreement, have additional special dispute settlement rules and procedures. These special rules are listed in Appendix 2 to the DSU and prevail over the general rules in the DSU.¹⁹⁴ In the context of the SPS Agreement, art. 11(2) is such a special rule. It addresses the advisory function of technical experts in cases involving scientific or technical issues.

The dispute settlement procedure consists of five phases: consultations,¹⁹⁵ panel procedure,¹⁹⁶ appellate review,¹⁹⁷ implementation¹⁹⁸ and 'enforcement'.¹⁹⁹ The panels are put together on an *ad hoc* basis by the DSB.²⁰⁰ The DSB has to establish a panel on request of a party, unless there is 'negative consensus', *i.e.* unless it agrees with consensus against the establishment.²⁰¹ The function of the panels is to

“make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.”²⁰²

¹⁹⁰ Art. II(2) WTO Agreement.

¹⁹¹ Art. 2(1) DSU.

¹⁹² *Ibid.*, art. 23.

¹⁹³ *Ibid.*, art. 1(1). The covered agreements are listed in Appendix 1 to the DSU. *See also* Marceau, p. 1102; Vranes, p. 72.

¹⁹⁴ Art. 1(2) DSU.

¹⁹⁵ *Ibid.*, art. 4.

¹⁹⁶ *Ibid.*, art. 4(3), 4(7) and 4(8).

¹⁹⁷ *Ibid.*, art. 17.

¹⁹⁸ *Ibid.*, art. 21.

¹⁹⁹ *Ibid.*, art. 22. Since the WTO does not possess any possibility to itself enforce decisions the DSU lays down what measures the member states can adopt in order to make the concerned state comply with the recommendations and rulings.

²⁰⁰ Arts. 6 and 8 DSU.

²⁰¹ *Ibid.*, art. 6(1).

²⁰² *Ibid.*, art. 11.

If a panel arrives at the conclusion that a measure violates WTO law its decision contains a recommendation that the member state should bring the measure in conformity with WTO law.²⁰³

The new possibility for judicial review of panel decisions by the Appellate Body has replaced the political review through the GATT Council.²⁰⁴ The Appellate Body can uphold, modify or reverse the decision of the panel.²⁰⁵ The appeal is limited to legal questions.²⁰⁶

Reports of the panels and the Appellate Body are automatically adopted by the DSB unless there is consensus in the DSB against the adoption.²⁰⁷ Within 30 days from the adoption of a panel or Appellate Body report, the member state concerned shall inform the DSB on how it intends to implement the recommendations and rulings.²⁰⁸ The DSB has the task to monitor the implementation.²⁰⁹

If the concerned member state does not implement the recommendations and rulings within the time limit established through art. 21(3) DSU, the complaining state can require the concerned state to enter into negotiations about compensation. If the parties have not agreed on satisfactory compensation within 20 days, the complaining state may request the DSB to authorise trade sanctions in the form of suspension of concessions or other obligations towards the concerned state. These measures are only temporary and the full implementation of the recommendations is always preferred.²¹⁰ The authorisation to suspend concessions is decided by 'negative consensus'.²¹¹ The member state concerned can, however, request that the question of suspension of concessions is referred to arbitration.²¹² After the final decision by the arbitrator, the DSB shall approve the potentially new request for authorisation of trade sanctions, in case it is in conformity with the arbitration decision. Also the new request for authorisation can be prevented by 'negative consensus'.²¹³

Short time limits make the procedure fast and efficient.²¹⁴ A panel only has six,²¹⁵ or in exceptional cases nine months,²¹⁶ for its examination of the case. The Appellate Body has 60, or in exceptional cases 90 days, from the

²⁰³ *Ibid.*, art. 19(2).

²⁰⁴ Petersmann, p. 186.

²⁰⁵ Art. 17(13) DSU.

²⁰⁶ *Ibid.*, art. 17(6).

²⁰⁷ *Ibid.*, arts. 16(4) and 17(14).

²⁰⁸ *Ibid.*, art. 21(3).

²⁰⁹ *Ibid.*, art. 21(6).

²¹⁰ *Ibid.*, arts. 22(1) and 22(2).

²¹¹ *Ibid.*, art. 22(6).

²¹² *Ibid.*, art. 22(6).

²¹³ *Ibid.*, art. 22(7).

²¹⁴ Ohlhoff, p. 687.

²¹⁵ Art. 12(8) DSU.

²¹⁶ *Ibid.*, art. 12(9).

date a party appeals the panel decision to the date when the Appellate Body has to circulate its report.²¹⁷

Since the establishment of the new compulsory dispute settlement system, the settlement of trade disputes enjoys increased authority.²¹⁸ In comparison with the dispute settlement system under GATT 1947 it is a more unified system with broader jurisdiction²¹⁹ and it is seen as more formally judicial than the old system,²²⁰ relying to a higher extent on the rule of law. This makes the procedure more predictable, reducing the risk of power abuse. Positive is also the new possibility for judicial appeal before the Appellate Body as well as the short time limits, making the procedure very efficient.²²¹ In addition, the use of the 'negative consensus' principle on many issues²²² takes away the risk that political deadlock among member states is misused to block decisions, such as the adoption of reports. Under the old system, the GATT Council, including the respondent state, had to agree with consensus on the establishment of a panel and on the adoption of the panel report.²²³

Nonetheless, the dispute settlement system still has some shortcomings, such as the fact that the proceedings are not public, that the dispute settlement is, unlike in EC law, not connected with the national legal systems, and that the implementation of the WTO decisions still has to become more efficient.²²⁴ Moreover, the WTO panels and the Appellate Body are not bound by existing decisions, which can be seen as making its case law rather weak and uncertain.²²⁵

The question of the applicable law before the WTO panels and the Appellate Body will be addressed in the next section.

4.3 Non-WTO Law in the WTO Dispute Settlement

4.3.1 An Account of the Leading Doctrine

The question of the applicable law before the WTO adjudicating bodies is controversial. Two main doctrines among legal scholars can be distinguished.

²¹⁷ *Ibid.*, art. 17(5).

²¹⁸ Lindroos and Mehling, p. 861.

²¹⁹ Petersmann, p. 178.

²²⁰ Birnie *et al.*, p. 765; Petersmann, p. 188.

²²¹ Weiß, pp. 169 and 170.

²²² Petersmann, p. 188.

²²³ Weiß, p. 124.

²²⁴ *Ibid.*, pp. 169-170.

²²⁵ Graff, p. 421.

Firstly, the view that the law to be applied by the WTO panels and the Appellate Body is limited to the WTO-covered agreements is advocated by Marceau and Trachtman.²²⁶

Secondly, with the notion of the WTO as a part of public international law as starting point Pauwelyn is the most pronounced proponent of the application of non-WTO law by the WTO judiciary.²²⁷ This view is also supported by Vranes.²²⁸

Apart from different interpretations of the provisions in the DSU Pauwelyn and Trachtman have different views on the system of international law in general. Trachtman sees a difference between the law that applies generally to the conduct of states and the law that is applicable before an international court. He argues that not only a court's jurisdiction, but also the law that it shall apply, is limited by the mandate given to it by the states parties. Accordingly, Trachtman holds the view that the *pacta sunt servanda* principle would be violated by the application of non-WTO law, since it would be contrary to the agreement, which gives the WTO adjudicating bodies their mandate.²²⁹

Pauwelyn, on the contrary, argues that the *pacta sunt servanda* principle would be violated if not all international law would be part of the applicable law before the WTO judiciary.²³⁰ Furthermore, it would run against the principle of good faith, since the parties to a treaty are expected to keep their other international obligations in mind when agreeing to new obligations.²³¹ Pauwelyn and Vranes hold the view that the fact that the WTO panels only have jurisdiction under the WTO-covered agreements does not mean that the applicable law is also limited to these.²³² Non-WTO law invoked by a state as a defence does not change the jurisdiction of the WTO panel or the Appellate Body.²³³ Pauwelyn is of the view that the fact that WTO law exists in the wider context of public international law does not stop when the law is applied before a WTO panel.²³⁴ On the contrary, he argues that also the WTO dispute settlement system is a part of public international law and not a 'self-contained regime'.²³⁵ Consequently, Pauwelyn holds the view that a state must be able to invoke non-WTO law as a defence against a claim of violation of WTO law,²³⁶ insofar as this law is binding on both disputing parties.²³⁷ The argumentation here should be used on all

²²⁶ Marceau pp. 1082 and 1103-1104; Trachtman, p. 858.

²²⁷ Pauwelyn 2003, p. 476.

²²⁸ Vranes, p. 90.

²²⁹ Trachtman, pp. 857-859.

²³⁰ Pauwelyn 2003, p. 461.

²³¹ Pauwelyn 2001, p. 428.

²³² Pauwelyn 2003, p. 460.

²³³ Vranes, p. 84.

²³⁴ Pauwelyn 2003, p. 460.

²³⁵ *Ibid.*, pp. 461 and 467.

²³⁶ *Ibid.*, 2003, p. 459.

²³⁷ *Ibid.*, 2003, pp. 471-472 and 476.

international tribunals, according to Pauwelyn. Only in this way will contradictions between decisions be avoided²³⁸ and the unity of international law guaranteed.²³⁹ Important to note is that Pauwelyn does not advocate for different *interpretations* of the WTO agreements for different member states, since this would cause a risk to the uniformity of the WTO law.²⁴⁰

While the arguments of Pauwelyn and Vranes are more or less confined to the fact that WTO is a part of the wider context of public international law and that this law applies to the WTO law unless the WTO has ‘contracted out’ of it, the jurists advocating against the applicability of non-WTO law by the WTO judiciary invoke provisions in the DSU as evidence that the applicable law is limited to the WTO covered agreements.

4.3.2 Provisions in the DSU and the WTO Agreement

4.3.2.1 Articles 3(2) and 19(2) DSU

Art. 3(2) of the DSU reads as follows:

”The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the *covered agreements*, and to clarify the existing provisions of those agreements *in accordance with customary rules of interpretation* of public international law. Recommendations and rulings of the DSB *cannot add to or diminish the rights and obligations provided in the covered agreements.*” (Emphasis added.)

Trachtman sees the reference to the covered agreements in art. 3(2) as limiting not only the jurisdiction of the WTO adjudicating bodies, but also the applicable law.²⁴¹ Pauwelyn, however, is of the view that the reference to the covered agreements in art. 3(2) only addresses the jurisdiction and not the applicable law.²⁴² Moreover, Pauwelyn argues that only because art. 3(2) confirms the applicability of customary rules of interpretation, this does not exclude the application of all other rules.²⁴³ The WTO does not have to refer to all rules that should apply to it. The situation is rather the opposite. All other rules apply, *unless* the WTO has ‘contracted out’ of them.²⁴⁴ See further chapter 4.3.3 for case law on this issue.

²³⁸ *Ibid.*, p. 461.

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*, p. 476.

²⁴¹ Trachtman, p. 858.

²⁴² Pauwelyn 2003, p. 465.

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*, p. 466.

The provision in art. 3(2) laying down that the decisions by the WTO judiciary "cannot add to or diminish the rights and obligations provided in the covered agreements" is reiterated in art. 19(2), which reads:

"In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body *cannot add to or diminish the rights and obligations provided in the covered agreements.*" (Emphasis added.)

Marceau is of the view that these two provisions exclude non-WTO rules from the law to be applied by the WTO judiciary in case of a conflict, since a conflicting non-WTO rule would "add to or diminish the rights and obligations" of the WTO members.²⁴⁵ According to Pauwelyn and Vranes, however, the fact that the decisions cannot "add to or diminish the rights and obligations provided in the covered agreements" only means that the WTO judiciary cannot amend the WTO agreements when interpreting them.²⁴⁶

4.3.2.2 Article 7 DSU

Another provision in the DSU, which could be seen as addressing the applicable law, is art. 7 with the title "Terms of Reference of Panels".

Art. 7(1) of the DSU reads:

"Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:

"To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)." (Emphasis added.)

Art. 7(2) of the DSU reads:

"Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute."

Trachtman also invokes art. 7 as evidence against the application of non-WTO law by the panels because of the references to the covered agreements.²⁴⁷ Pauwelyn, however, argues that the reference to the applicability of the covered agreements in art. 7 does not exclude the applicability of all other international law.²⁴⁸

²⁴⁵ Marceau, pp. 1082 and 1103-1104.

²⁴⁶ Pauwelyn 2003, p. 465; Vranes, p. 83.

²⁴⁷ Trachtman, p. 858.

²⁴⁸ Pauwelyn 2003, p. 466.

4.3.2.3 Article 11 DSU

Art. 11 of the DSU with the title “Function of Panels” reads:

“The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an *objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements*, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.” (Emphasis added.)

In the same vein as in connection with arts. 3(2) and 7, Trachtman interprets art. 11 as limiting the applicable law before the WTO adjudicating bodies to the WTO covered agreements.²⁴⁹ While stating that the reference to the covered agreements in art. 11 only addresses the jurisdiction and not the applicable law,²⁵⁰ Pauwelyn also expresses the view that the obligation to objectively assess the applicability of the relevant covered agreements in art. 11 means that the WTO panels “may be required to refer to and apply other rules of international law”.²⁵¹

4.3.2.4 Article X WTO Agreement

The procedure for the amendment of the WTO Agreement is laid down in arts. X(1) and X(3)-(5), which stipulate that amendments can only be made with consensus²⁵² or with two-thirds majority.²⁵³ On the one hand, it could be argued that an agreement made between two parties, which changes the legal relationship between these parties and makes a WTO rule inapplicable, would violate the WTO rules on amendment. This view is advocated by Trachtman who sees art. X as the only way to change the legal relationship between WTO members.²⁵⁴

On the other hand, based on his opinion that the WTO is part of public international law, Pauwelyn states that the WTO law cannot only be affected by explicit amendments, as laid down in the WTO Agreement, but also when two or more parties agree to use their contractual freedom and change their legal relationship by adopting a new treaty. In Pauwelyn’s own words: “The WTO Treaty changed the 1994 landscape of international law, but

²⁴⁹ Trachtman, p. 858.

²⁵⁰ Pauwelyn 2003, p. 465.

²⁵¹ *Ibid.*, pp. 468-469.

²⁵² Art. X(1) WTO Agreement.

²⁵³ Art. X(3)-(5) WTO Agreement.

²⁵⁴ Trachtman, p. 859.

post-1994 treaties can also change this landscape, including the legal relationships between WTO members in the WTO.”²⁵⁵

4.3.3 Case Law

The fact that the law that a court has to apply is not limited by its jurisdiction was confirmed by the ICJ in the *Lockerbie* case.²⁵⁶ While the jurisdiction of the Court was confined to the 1971 Montreal Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation,²⁵⁷ it still took Security Council Resolution 748²⁵⁸ into account, which ordered *inter alia* that Libya should extradite the two Libyan nationals accused of having placed a bomb on the American civil airplane exploding over Lockerbie. The Court rejected Libya’s request to the Court to indicate as provisional measures *inter alia* that the United States should refrain from coercing Libya to surrender the accused individuals to any jurisdiction outside of Libya. The reason for this was that Libya’s obligations under the Security Council Resolution prevailed over its obligations under the Montreal Convention, according to art. 103 of the UN Charter.²⁵⁹ It is interesting to note that Security Council resolutions are not contained in the list of the applicable law before the ICJ in art. 38(1) of the ICJ Statute but that the Court still applied one when invoked as a defence.

Turning to the question whether the WTO adjudicating bodies have applied non-WTO law when settling disputes under the covered agreements, an important case was the first one before the Appellate Body, the *US – Gasoline* case.²⁶⁰ In that case, the Appellate Body stated that art. 3(2) of the DSU reflects “a measure of recognition that the [GATT] is not to be read in clinical isolation from public international law”.²⁶¹

²⁵⁵ Pauwelyn 2003, pp. 474-475.

²⁵⁶ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, <www.icj-cij.org/docket/files/89/7209.pdf>, visited on 29 April 2009.

²⁵⁷ Convention for the Suppression of Unlawful Acts against Safety of Civil Aviation, 23 September 1971, 974 U.N.T.S. 177; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, 3 March 1992, Application instituting proceedings, <www.icj-cij.org/docket/files/89/7209.pdf>, visited on 29 April 2009.

²⁵⁸ UN Security Council Resolution 748, 31 March 1992.

²⁵⁹ Charter of the United Nations, 24 October 1945, 1 UNTS XVI; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, 14 April 1992, ICJ, Provisional Measures, *I.C.J. Reports* 1992, p. 114, at p. 126, para. 42.

²⁶⁰ *United States - Standards for Reformulated and Conventional Gasoline (Venezuela v. United States)*, WTO, Appellate Body report circulated on 29 April 1996, WT/DS2/AB/R, p. 17, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds2_e.htm>, visited on 17 April 2009.

²⁶¹ *Ibid.*, p. 17.

Furthermore, in the *US – Shrimp* case,²⁶² the Appellate Body referred to non-WTO law when interpreting the phrase ‘exhaustible natural resources’ in art. XX(g) of the GATT.²⁶³ The non-WTO law invoked consisted of *inter alia* the Rio Declaration on Environment and Development,²⁶⁴ the Law of the Sea Convention,²⁶⁵ the CITES Convention,²⁶⁶ the Convention on Conservation of Migratory Species²⁶⁷ and the Convention on Biological Diversity.

The WTO panels and the Appellate Body have not only taken non-WTO law into account when interpreting the WTO agreements but also showed an open approach towards applying non-WTO law to fill gaps in the WTO law. In the *US – Wool Shirts and Blouses* case,²⁶⁸ the Appellate Body referred to the practise of other international courts when establishing the rule on burden of proof to be applied within WTO proceedings.²⁶⁹ Moreover, in the *Brazil – Desiccated Coconut* case,²⁷⁰ the Appellate Body applied the principle of non-retroactivity of treaties laid down in art. 28 VCLT.²⁷¹

In the *Korea – Procurement* case,²⁷² the Panel made the following statement concerning art. 3(2) of the DSU:

“Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not ‘contract out’ from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.”²⁷³

²⁶² *United States – Import Prohibition of Certain Shrimp and Shrimp Products (India, Malaysia, Pakistan, Thailand v. USA)*, WTO, Appellate Body report circulated on 12 October 1998, WT/DS58/AB/R,

<www.wto.org/english/tratop_e/dispu_e/cases_e/ds58_e.htm>, visited on 8 May 2009.

²⁶³ *Ibid.*, paras. 130-131.

²⁶⁴

<www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>, visited on 7 May 2009.

²⁶⁵ United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 3.

²⁶⁶ Convention on international trade in endangered species of wild fauna and flora, 3 March 1973, 993 U.N.T.S. 243.

²⁶⁷ Convention on the conservation of migratory species of wild animals, 23 June 1979, 1651 U.N.T.S. 356.

²⁶⁸ *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India (India v. United States)*, WTO, Appellate Body report circulated on 25 April 1997, WT/DS33/AB/R, p. 14, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds33_e.htm>, visited on 29 April 2009.

²⁶⁹ *Ibid.*, p. 14.

²⁷⁰ *Brazil – Measures Affecting Desiccated Coconut (Philippines v. Brazil)*, WTO, Appellate Body report circulated on 21 February 1997, WT/DS22/AB/R, p. 14, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds22_e.htm>, visited on 29 April 2009.

²⁷¹ *Ibid.*, p. 14.

²⁷² *Korea – Measures Affecting Government Procurement (United States v. Korea)*, WTO, Panel report circulated on 1 May 2000, WT/DS163/R,

<www.wto.org/english/tratop_e/dispu_e/cases_e/ds163_e.htm>, visited on 29 April 2009.

²⁷³ *Ibid.*, para. 7.96.

The Panel further stated (in a footnote) that the reference to rules of interpretation does not exclude the application of other rules of international law.²⁷⁴ However, it is important to note that, as stressed by Vranes, the Panel said that customary law applies *to the extent there is no conflict or inconsistency* but it did not address the question whether a non-WTO rule could prevail over a WTO rule in case of a *conflict*.²⁷⁵

As seen above, the WTO judiciary has been open towards applying non-WTO law in the interpretation of WTO law and when filling gaps not regulated in WTO law. The question is if it has also applied non-WTO law when invoked as a defence against a claim of violation of one of the WTO agreements, *i.e.* if the WTO adjudicating bodies have let a non-WTO rule prevail over a WTO rule in case of a conflict between the two.

In the *Argentina – Footwear* case,²⁷⁶ the Panel had ruled that a tax collected by Argentina violated art. VIII:1(a) of the GATT.²⁷⁷ Argentina had invoked an obligation that it had towards the International Monetary Fund (IMF) to collect this tax and argued that the Panel had “erred in law in failing to take into account Argentina’s obligations to the IMF in its interpretation of Article VIII.”²⁷⁸ The Appellate Body considered the alleged obligation towards the IMF and if it should prevail over art. VIII:1(a) of the GATT. It did, however, not alter the decision of the Panel, since it was of the view that there was nothing in the agreements invoked that showed that the obligation towards the IMF should prevail over its obligation in the GATT.²⁷⁹ In assessing whether the obligations towards the IMF should prevail, the Appellate Body looked at a number of non-WTO covered agreements. Vranes represents the view that this first step by the Appellate Body to examine non-covered agreements invoked as a defence shows that it would also be willing to let a non-WTO rule prevail over a WTO rule under certain circumstances.²⁸⁰

²⁷⁴ *Ibid.*, para. 7.96, note 753.

²⁷⁵ Vranes, p. 82.

²⁷⁶ *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items (United States v. Argentina)*, WTO, Panel report circulated on 25 November 1997, WT/DS56/R, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds56_e.htm>, visited on 29 April 2009.

²⁷⁷ *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items (United States v. Argentina)*, WTO, Panel report circulated on 25 November 1997, WT/DS56/R, para. 6.80, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds56_e.htm>, visited on 29 April 2009. Art. VIII:1(a) GATT reads: “All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.”

²⁷⁸ *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items (United States v. Argentina)*, WTO, Appellate Body report circulated on 27 March 1998, WT/DS56/AB/R, para. 65, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds56_e.htm>, visited on 29 April 2009.

²⁷⁹ *Ibid.*, para. 70.

²⁸⁰ Vranes, p. 81.

However, in the *Poultry* case,²⁸¹ the Appellate Body did not apply the Oilseeds Agreement, a bilateral agreement between the EC and Brazil, since it was no WTO-covered agreement.²⁸² It did, however, acknowledge the importance of the Oilseeds Agreement for the interpretation of the WTO rule in question.²⁸³

In the *EC – Hormones* case,²⁸⁴ the European Communities invoked the precautionary principle as a defence against the complaints by the United States and Canada that the EC import prohibition of hormone treated meat and meat products violated WTO law.²⁸⁵ The European Communities argued that the precautionary principle is ‘a general customary rule of international law’ or ‘a general principle of law’.²⁸⁶ Nonetheless, the Appellate Body did not find it necessary to consider the question of the existence of a precautionary principle in international law.²⁸⁷ It stated that the precautionary principle “does not, by itself, and *without a clear textual directive* to that effect, relieve a panel from the duty of applying the normal (i.e. customary international law) principles of treaty interpretation”.²⁸⁸ Therefore, the Appellate Body ruled that the precautionary principle does not prevail over arts. 5(1) and 5(2) of the SPS Agreement.²⁸⁹

The decision in the *EC – Hormones* case is invoked by Trachtman against the application of non-WTO law by the WTO judiciary, since it did not rule on the status of the precautionary principle in international law.²⁹⁰ Also Vranes acknowledges that the argumentation of the Appellate Body is problematic because of its requirement for non-WTO law to be ‘incorporated’ in order to be applicable in the WTO.²⁹¹

Here should also be reminded of the *EC – Approval and Marketing of Biotech Products* case,²⁹² addressed in chapter 3.6.2, in which the Panel did

²⁸¹ *European Communities – Measures Affecting Importation of Certain Poultry Products (Brazil v. European Communities)*, WTO, Appellate Body report circulated on 13 July 1998, WT/DS69/AB/R, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds69_e.htm>, visited on 8 May 2009.

²⁸² *Ibid.*, paras. 79-81.

²⁸³ *Ibid.*, paras. 84-85.

²⁸⁴ *European Communities – Measures Concerning Meat and Meat Products (Hormones) (United States v. European Communities)*, WTO, Panel report circulated on 18 August 1997, WT/DS26/R/USA, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm>, visited on 29 April 2009.

²⁸⁵ *Ibid.*, para. 9.1.

²⁸⁶ *European Communities – Measures Concerning Meat and Meat Products (Hormones) (United States v. European Communities)*, WTO, Appellate Body report circulated on 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, para. 121, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm>, visited on 29 April 2009.

²⁸⁷ *Ibid.*, para. 123.

²⁸⁸ *Ibid.*, para. 124.

²⁸⁹ *Ibid.*, para. 125.

²⁹⁰ Trachtman, p. 858.

²⁹¹ Vranes, p. 80.

²⁹² *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (United States v. European Communities)*, WTO, Panel report circulated on 29

not look at other international law in connection with the precautionary principle, invoked by the EC, but relied exclusively on the meaning of the precautionary approach in art. 5(7) of the SPS Agreement.²⁹³ That the Panel did not take the Biosafety Protocol into account was clear, since not all WTO members, including the complaining parties to the dispute, were bound by the Protocol.²⁹⁴

4.3.4 Example: Comparison between the SPS Agreement and the Biosafety Protocol

For the discussion on the consequences of the two approaches discussed in the previous section, the comparison between the right to take precautionary measures in art. 5(7) of the SPS Agreement and arts. 10(6) and 12 of the Biosafety Protocol will be used. According to the strict definition of conflict, there is no conflict, since a state can comply with its obligations under both agreements by reviewing its decision in accordance with art. 5(7) of the SPS Agreement, which it is allowed to do under the Biosafety Protocol. Since the WTO panels and the Appellate Body tend to apply this strict definition,²⁹⁵ they would probably not see a conflict in this case and require that the state concerned comply with its obligation under art. 5(7) of the SPS Agreement to review its SPS measures.

According to Pauwelyn's definition of conflict there is, nonetheless, a conflict between the *obligation* to seek to obtain the necessary information under the SPS Agreement and the *right* not to do so under the Biosafety Protocol.²⁹⁶ Pauwelyn argues that when one WTO rule and one non-WTO rule are applicable to the same situation and they are in conflict, the relevant conflict rule in the WTO agreement, in the non-WTO agreement or in general international law has to decide which of the two rules prevails.²⁹⁷ As concluded in chapter 2.4.2, one first has to look for conflict clauses in the treaties themselves. Since neither the SPS Agreement nor the WTO Agreement contains any conflict clause and the status of the three preambular paragraphs concerning the Biosafety Protocol's relationship to other conventions is unclear, one has to turn to conflict rules in the VCLT and in customary law. One could then argue that the *lex posterior* rule gives the Biosafety Protocol priority, since it was adopted after the SPS Agreement.²⁹⁸ Concerning the requirement that the two agreements have to relate to the same subject-matter, different views exist. Boisson de Chazournes and Moïse Mbengue are of the view that MEAs and trade

September 2006, WT/DS291/R,

www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm, visited on 8 May 2009.

²⁹³ *Ibid.*, para. 7.3220, 7.89.

²⁹⁴ *Ibid.*, para. 7.75.

²⁹⁵ *See supra*, note 66.

²⁹⁶ *See* chapter 3.6.2.

²⁹⁷ Pauwelyn 2001, p. 560.

²⁹⁸ The SPS Agreement was adopted on 15 April 1994 and the Biosafety Protocol on 29 January 2000.

agreements do not relate to the same subject-matter.²⁹⁹ Zarrilli, however, does not see any bar to the application of the *lex posterior* rule in trade and environment conflicts.³⁰⁰ One could also argue that if two agreements are simultaneously applicable they have to address the same subject-matter, at least to a certain extent. Since not all parties to the SPS Agreement are parties to the Biosafety Protocol, art. 30(4) VCLT would come into play instead of art. 30(3).

Also the *lex specialis* rule ought to give priority to the Biosafety Protocol since the particular area of trade in GMOs that may have adverse effects on biological diversity³⁰¹ is smaller than “all sanitary and phytosanitary measures which may, directly or indirectly, affect international trade.”³⁰² Hence, if the *lex posterior* rule is found to be inapplicable because the two agreements do not relate to the same subject-matter, at least the *lex specialis* rule ought to give priority to the provisions of the Biosafety Protocol.

If a WTO member that is also a party to the Biosafety Protocol would adopt a precautionary SPS measure without reviewing its decision in accordance with art. 5(7) of the SPS Agreement, the WTO judiciary should declare this obligation in art. 5(7) of the SPS Agreement inapplicable since arts. 10(6) and 12 of the Biosafety Protocol have overruled it. This conclusion can be drawn from the argumentation of Pauwelyn and Vranes. However, the WTO judiciary cannot judicially enforce the non-WTO rule. It can only enforce claims under the WTO covered agreements since this is dependant on its jurisdiction.³⁰³

Marceau, who argues for the narrow definition of conflict,³⁰⁴ would probably not see a conflict in this case. However, in the case of a conflict, Marceau sees the possibility that the WTO judiciary may find itself in a situation where no WTO provision is applicable to the dispute, since the otherwise relevant rule has been overruled by a non-WTO rule. In that case, Marceau argues that the panels and the Appellate Body have to deny jurisdiction over the dispute, since the basis for their jurisdiction would no longer exist.³⁰⁵

²⁹⁹ Boisson de Chazournes and Moïse Mbengue 2008, pp. 223-224.

³⁰⁰ Zarrilli, p. 250.

³⁰¹ Art. 4 Biosafety Protocol.

³⁰² Art. 1(1) SPS Agreement.

³⁰³ Pauwelyn 2003, p. 473.

³⁰⁴ Marceau, p. 1086.

³⁰⁵ Marceau, pp. 1107-1108.

5 Analysis

Although the WTO judiciary is not bound by its own decisions,³⁰⁶ it can be expected to follow its own jurisprudence in order not to jeopardise its credibility. Hence, its case law can give an idea of how it will decide in the future.³⁰⁷ The cases examined in this thesis show that the WTO panels and the Appellate Body have applied non-WTO law when interpreting the WTO agreements and when filling gaps not regulated by WTO law. However, while showing openness towards the invocation of non-WTO law as a defence in the *Argentina – Footwear case*,³⁰⁸ the Appellate Body did not apply the Oilseeds Agreement in the *Poultry case*³⁰⁹ since it was no WTO covered agreement.³¹⁰ Furthermore, the reluctance of the Appellate Body in the *EC – Hormones case*³¹¹ and of the Panel in the *EC – Approval and Marketing of Biotech Products case*³¹² to examine the status of the precautionary principle in international law shows a more negative approach towards the application of non-WTO law in case it conflicts with WTO law.

An important question is what significance these panel and Appellate Body decisions have for the answer to the question of this thesis. Because of the more formally judicial procedure, the mentioned decisions can probably be given more weight than the decisions of the panels under GATT 1947. However, while in national law the judgements of the highest courts are sources of law, in international law judicial decisions are only a subsidiary means for the determination of legal rules.³¹³ Hence, the panel and Appellate Body decisions can only serve as a help to determine if there is a rule in international law as it stands today, which stipulates that the WTO judiciary should apply non-WTO law.

Marceau argues that arts. 3(2) and 19(2) of the DSU show that the WTO judiciary cannot apply a non-WTO rule if it conflicts with a WTO rule,

³⁰⁶ Graff, p. 421.

³⁰⁷ Lindroos and Mehling, p. 874.

³⁰⁸ *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and other Items (United States v. Argentina)*, WTO, Appellate Body report circulated on 27 March 1998, WT/DS56/AB/R, para. 70, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds56_e.htm>, visited on 29 April 2009.

³⁰⁹ *European Communities – Measures Affecting Importation of Certain Poultry Products (Brazil v. European Communities)*, WTO, Appellate Body report circulated on 13 July 1998, WT/DS69/AB/R, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds69_e.htm>, visited on 8 May 2009.

³¹⁰ *Ibid.*, paras. 79-81.

³¹¹ *European Communities – Measures Concerning Meat and Meat Products (Hormones) (United States v. European Communities)*, WTO, Appellate Body report circulated on 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R, paras. 123-124, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm>, visited on 8 May 2009.

³¹² *European Communities – Measures Affecting the Approval and Marketing of Biotech Products (United States v. European Communities)*, WTO, Panel report circulated on 29 September 2006, WT/DS291/R, para. 7.3220, 7.89, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds291_e.htm>, visited on 8 May 2009.

³¹³ Art. 38(1)(d) ICJ Statute.

since it would “add to or diminish the rights and obligations” of the WTO members.³¹⁴ I do not agree with this statement, since only non-WTO law by which the state concerned is bound can be applied. Hence, the rights and obligations of the state are not added to or diminished, since it already had the non-WTO right or obligation, albeit outside of the WTO. Nevertheless, since the provisions do not read “add to or diminish the rights and obligations *of the member states*” but “add to or diminish the rights and obligations *provided in the covered agreements*” (emphasis added), the more accurate argumentation seems to be the one made by Pauwelyn and Vranes. They argue that the provisions only address the limits of the *interpretation* of the WTO agreements, more precisely that the WTO judiciary cannot act as a legislator and change the WTO agreements when interpreting them.³¹⁵

Concerning the question of the references to the covered agreements in arts. 3(2), 7 and 11 of the DSU, Pauwelyn holds the view that these only address the jurisdiction, while Trachtman sees them as also limiting the applicable law to these agreements. Their different views derive from their different views on the mandate given to an international court. While they both agree that an international court only has jurisdiction to the extent that it has been expressly given to it by the states concerned, Trachtman argues that also the applicable law has to be expressly referred to by the states parties. Pauwelyn, on the other hand, is of the view that the WTO judiciary can and shall apply all relevant rules of international law, unless the WTO has ‘contracted out’ of them. This view is supported by the Panel decision in the *Korea – Procurement* case.³¹⁶ That an international court’s jurisdiction does not limit the law that it shall apply and that reference to applicable law in the rules of procedure does not imply that a court cannot apply other international law, was also confirmed by the ICJ in the *Lockerbie* case.³¹⁷

I agree with Pauwelyn³¹⁸ that the principle of *pacta sunt servanda* is not violated by the application of a non-WTO rule in case it conflicts with a WTO-rule. The reason for this is that only rules, to which the disputing states have agreed, can be applied. If a state has consented to be bound by an MEA, one has to expect that it also wants to be bound by this MEA when it interacts with trade law. Otherwise, states are not seen as one entity but divided into different entities, depending on whether the issue is trade, environment or human rights. This, contrary to the view of Trachtman,³¹⁹ would violate the principle of *pacta sunt servanda* and the principle of good

³¹⁴ Marceau, pp. 1082 and 1103-1104.

³¹⁵ See Pauwelyn 2003, p. 465; Vranes, p. 83.

³¹⁶ *Korea – Measures Affecting Government Procurement (United States v. Korea)*, WTO, Panel report circulated on 1 May 2000, WT/DS163/R, para. 7.96, <www.wto.org/english/tratop_e/dispu_e/cases_e/ds163_e.htm>, visited on 29 April 2009.

³¹⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, 14 April 1992, ICJ, Provisional Measures, *I.C.J. Reports* 1992, p. 114, at p. 126, para. 42.

³¹⁸ Pauwelyn 2001, p. 428 and 2003, p. 461.

³¹⁹ Trachtman, pp. 857-859.

faith and it would jeopardise the unity of international law. Both the principle of *pacta sunt servanda* and the principle of good faith are general principles of international law³²⁰ and, therefore, part of the primary sources of international law.³²¹

The procedure for amendment of the WTO Agreement in art. X lays down how changes can be made to the WTO Agreement. Thus, two WTO members cannot decide on their own to change the WTO Agreement, since this requires consensus or a two-thirds majority. This does not mean, however, that two or more WTO members cannot agree to adopt a new treaty among each other, which overrules some of the WTO rights and obligations between them. This conclusion can be drawn from the fact that state consent is the basis for international law and that states can use their contractual freedom to change their legal relationships, except when it comes to *jus cogens* norms. WTO law does not contain *jus cogens* norms, from which the members are not allowed to deviate by adopting a new treaty. A new treaty can, however, only be adopted as long as the rights of the other WTO members are not affected. Consequently, two WTO members could not adopt a bilateral treaty stating that the principle of most favoured nation treatment no longer applies to them.

Although the three potential conflicts between the SPS Agreement and the Biosafety Protocol examined in this thesis had been controversial during the negotiations of the Biosafety Protocol, none of these potential conflicts turned out to be a real conflict according to the strict definition.³²² In one of the cases, a conflict according to the broad definition was found.³²³ This suggests that conflicts between MEAs and trade agreements according to the strict definition are rare. This should be welcomed, since it demonstrates that states keep their existing international obligations in mind when negotiating new agreements. Since the comparison between MEAs and WTO agreements in this thesis was confined to three specific questions of two agreements,³²⁴ no further conclusions about the relationship between MEAs and WTO agreements in general can be drawn.

The definition of ‘conflict of norms’ in international law today is a strict definition, defining conflict as a situation in which a state cannot simultaneously comply with its obligations under two norms.³²⁵ While, as

³²⁰ Shaw, pp. 103-104.

³²¹ Art. 38(1)(c) ICJ Statute.

³²² The strict definition defines ‘conflict of norms’ as a situation when a state cannot simultaneously comply with its obligations under two norms.

³²³ The broad definition of conflict defines ‘conflict of norms’ as a situation when one norm “constitutes, has led to, or may lead to, a breach of the other”. See Pauwelyn 2003, pp. 170 and 175-176. A conflict according to the broad definition was found between the requirement for review of precautionary SPS measures in art. 5(7) of the SPS Agreement and the right in the Biosafety Protocol not to review an import decision based on a precautionary approach. See chapter 3.6.

³²⁴ See chapter 3.6.

³²⁵ See e.g., Czaplinski and Danilenko, p. 12; Jenks, pp. 425-426 and 451; Marceau, p. 1086.

stated above, conflicts between MEAs and WTO agreements according to this strict definition ought to be rather rare, the number of conflicts according to the broader definition is probably significantly larger. The reason for this is that MEAs mostly only contain rights, while trade agreements are based on prohibitions and obligations. Hence, the WTO agreements 'benefit' from a strict definition of conflict. In the doctrine, arguing against a broad definition of conflict seems to go hand in hand with arguing against the application of non-WTO law by the WTO adjudicating bodies.³²⁶

An interesting question is why MEAs only contain rights and no obligations. One could argue that if the states parties had agreed that the provisions in an MEA should prevail over the provisions in WTO agreements, they would have provided the MEA with clear language to that effect. They could have done this by basing the MEA on obligations, in which case there would be a conflict according to the strict definition. Conflict rules would be applicable and an MEA would prevail over an earlier WTO agreement as *lex posterior*. The states parties could also have provided the MEA with an unambiguous conflict clause stating that it shall prevail over earlier agreements. This argumentation leads to the conclusion that the definition of conflict to be used in international law should continue to be the strict one first advocated by Jenks. Only this approach guarantees not to circumvent the intentions of the states parties. That conflict should be defined narrowly is further supported by the presumption against conflict of norms and the fact that a state party arguing for the existence of a conflict has the burden of proving it.³²⁷

³²⁶ See e.g., Marceau, pp. 1086 and 1104, arguing for a narrow definition of conflict and against the application of non-WTO law by the WTO judiciary. See also Pauwelyn 2003, pp. 170 and 476, arguing for a broader definition of conflict and in favour of the application of non-WTO law by the WTO judiciary.

³²⁷ See chapter 2.3.1.

6 Conclusions

The jurisdiction of the WTO adjudicating bodies is confined to the WTO covered agreements. The law that they shall apply is not. This conclusion can be drawn from the principle of *pacta sunt servanda* and the principle of good faith. Hence, the WTO Appellate Body should apply non-WTO law by which both disputing parties are bound. They should do so even when a non-WTO rule is invoked as a defence against a violation of WTO law, and may be in conflict with a WTO rule. In this thesis, MEAs were only used as an example of non-WTO law and this conclusion may also apply to other areas of non-WTO law, such as human rights law and labour law.

If a WTO panel or the Appellate Body comes to the conclusion that the non-WTO rule prevails over the WTO rule, it should declare that the WTO rule is not applicable in that case because it has been overruled by the non-WTO rule. It can, however, not enforce the non-WTO rule but only decide that the defending party has not violated WTO law. For enforcement of the non-WTO rule, the defending party has to turn to the dispute settlement mechanism of the relevant non-WTO agreement.

Furthermore, this thesis suggests that ‘conflict of norms’ should be defined according to Jenks’ strict definition and only encompass the situation when a party to the two treaties cannot simultaneously comply with its obligations under both treaties. Only by defining ‘conflict of norms’ in this narrow way, the WTO adjudicating bodies can make sure that they do not give a non-WTO rule priority over a WTO rule against the intention of the states parties. This conclusion is also supported by the presumption against conflict of norms. Applying Pauwelyn’s definition of conflict would take it too far. Environmental concerns should only be taken into account when the states concerned have consented to it. That a right in an MEA to take a trade restrictive measure should overrule a prohibition in a WTO agreement to take such a trade restrictive measure cannot be assumed to be the common intention of the parties to the MEA. Accordingly, until the states parties to MEAs manage to agree to change their rights into obligations, the prohibitions of the WTO agreements have to prevail. This is not meant as giving trade interests priority over environmental concerns and I am aware that political consensus on obligations in MEAs is difficult to reach. Nonetheless, environmental goals cannot be reached by circumventing the requirement for state consent in international law.

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