



Universität Hamburg

CONFLICTS WITHIN WTO LAW: THE CASE OF GATT & GATS AND QUOTAS ON TRANSIT PERMITS

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ABBREVIATIONS

AB	Appellate Body
DSU	Dispute Settlement Body
DSM	Dispute Settlement Mechanism
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ECJ	European Court of Justice
ICJ	International Court of Justice
ILC	International Law Commission
MFN	Most Favoured Nation
NAFTA	North American Free Trade
NT	National Treatment
PCIJ	Permanent Court of International Justice
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary Measures
TBT	Technical Barriers to Trade
TRIMS	Trade-Related Investment Measures
TRIPS	Trade-Related Intellectual Property Rights
UN	United Nations
UNCLOS	United Nations Convention on Law of Sea
WTO	World Trade Organization
VCLT	Vienna Convention on Law of Treaties

“Our success thus far in WTO dispute settlement is encouraging evidence that we can accomplish much more in trade and in many other areas of our shared concern for the international rule of law. It is the best evidence the world has ever seen that “international law” can be real law in the real world. Ours, though, is a fragile achievement. Our success, thus far, in the WTO is no guarantee of our continued success. We have emerged from the twilight of our imprisonment. But we have not yet escaped into the bright sunlight of freedom.”

James Bacchus, Former Chairman of the Appellate Body of WTO

INTRODUCTION

This introductory part sets forth the background of the subject matter, the main problem to be dealt by this thesis and the analytical approach to be followed. It also outlines the subsequent sections of the thesis.

Background

World Trade Organisation (WTO) is the international body governing world trade. It currently has 159 Members corresponding to approximately 97% of the world trade.¹ As stated in Article III of Marrakesh Agreement Establishing The World Trade Organisation (WTO Agreement), WTO is not only a framework body for the implementation and administration of multilateral trade agreements under its jurisdiction but it has a relatively effective enforcement mechanism -Dispute Settlement Mechanism- to ensure the implementation of those agreements. This feature assures that WTO has a unique position among other international trade arrangements.

Trade in goods, trade in services and trade related intellectual property rights are three main areas regulated by the WTO. General Agreement on Tariffs and Trade (GATT), concluded in Geneva on 30 October 1947, applied on a provisional basis between January 1948 and the establishment of WTO in 1995, regulates the trade in goods. General Agreement on Trade in Services (GATS) which was introduced as an annex to the WTO Agreement regulates trade in services. Finally, the Trade Related Intellectual Property Rights (TRIPS) Agreement regulates the intellectual property rights to the extent to what Members have agreed upon in that agreement.

¹ WTO Website

The GATT sets up the basic rules and principles of trade in goods. In addition to the GATT, trade in goods is regulated by a network of agreements which is comprised of all the legal texts in Annex 1A of the WTO Agreement.² This includes GATT 1994 which consists of the GATT 1947 text plus decisions and protocols of tariff concessions, accessions and waivers to the date, six understandings³ on certain aspects of GATT provisions, Marrakesh Protocol to the GATT 1994 on the implementation of concessions and twelve multilateral agreements on trade in goods⁴.

The General Agreement on Trade in Services (GATS) is designed to regulate the trade in services. Compared to GATT, GATS is a new agreement that entered into force in 1995 together with other Marrakesh Agreement annexes as a result of Uruguay Round of Trade Negotiations. The GATS legal system consists of the framework agreement –GATS itself-, eight sectoral annexes, one understanding⁵, eight decisions, four post-1994 protocols⁶ and the country specific schedules of commitments on liberalisation of trade in services of the WTO members.

The intellectual property pillar of the system is comprised of a single agreement – the TRIPS Agreement- with no annexes or no schedules attached. The Agreement lays down the minimum standards of protection and the conditions thereof as well as the required standards of enforcement related to types of intellectual property covered in the Agreement.

These three main pillars of the WTO system which are under the umbrella of the WTO Agreement are supported by the Dispute Settlement Mechanism (DSM) whose foundations are laid in Dispute Settlement Understanding (DSU) -Annex 2 to the WTO Agreement- and the Trade Policy Review Mechanism (TPRM) -Annex 3 to the WTO Agreement-.

² Article II of the WTO Agreement

³ Understanding on the Interpretation of Article II:1 (b) of the GATT 1994, Understanding on the Interpretation of Article XVII of the GATT 1994, Understanding on Balance-of-Payments Provisions of GATT 1994, Understanding on the Interpretation of Article XXIV of the GATT 1994, Understanding in Respect of Waivers of Obligations under the GATT 1994, Understanding on the Interpretation of Article XXVIII of the GATT 1994

⁴ Agreement on Agriculture, Agreement on The Application of Sanitary and Phytosanitary Measures, Agreement on Textiles and Clothing (no more in effect), Agreement on Technical Barriers to Trade, Agreement on Trade-Related Investment Measures, Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement), Agreement on Implementation of Article VII of GATT 1994 (Customs Valuation Agreement), Agreement on Preshipment Inspection, Agreement on Import Licensing Procedures, Agreement on Subsidies and Countervailing Measures and Agreement on Safeguards

⁵ Understanding on Commitments in Financial Services

⁶ Second Protocol to GATS on Financial Services, Third Protocol to GATS on Movement of Natural Persons, Fourth Protocol to GATS on Basic Telecommunications, Fifth Protocol to GATS on Financial Services

The DSU creates a judicial mechanism to settle disputes between WTO Members related to the WTO body of legal texts in a binding way. Unlike the earlier dispute settlement mechanism in GATT era, no Member has a power to block the process on its own and decisions are adopted almost automatically, through a negative consensus rule.⁷

TPRM is an effective transparency mechanism to monitor and review the trade policies and practices of the WTO Members. Based on the size of their respective trading volumes, Members are subject to reviews on a regular basis. An in-detail Report on all aspects of the trade policy and practices are prepared by the WTO Secretariat as well as the Member itself and other Members have a right to pose questions on any of the issues taking place in those reports.

Table 1: The Structure of the WTO

AGREEMENT ESTABLISHING WTO		
Goods (Annex 1A)	Services (Annex 1B)	Intellectual Property (Annex 1C)
GATT	GATS	TRIPS
Agriculture SPS TBT TRIMs Anti-Dumping Customs Valuation Pre-shipment Inspection Rules of Origin Import Licensing Subsidies and Countervailing Measures Safeguards		
Schedules of Commitments	Schedules of Commitments	
DISPUTE SETTLEMENT (Annex 2)		
TRADE POLICY REVIEW MECHANISM (Annex 3)		

⁷ Negative consensus refers to the case where at least one Member votes for the adoption of the Panel or the AB reports or the establishment of Panels.

Defining The Problem

The Issue

The fragmentation of international law recently became an issue of increased concern in the international law community. Diversification and specialisation in international law through numerous multilateral treaties⁸ on different subjects ranging from human rights and trade to environment and labour inevitably cause fragmentation among those different legal “regimes”, each dealing with an area of specialisation with its peculiar principles and rules. Fragmentation thus brings in further questions and difficulties. This complex network of international treaties inevitably leads to overlappings between treaties and since there is no “constitutional” legislation governing the interaction of different treaties, gray areas as well as conflicts between different regimes and treaties may likely to occur.

Being aware of those difficulties, the United Nations International Law Commission identified fragmentation as a potential risk factor for the international legal system and established a special study group to prepare a report to identify the issues and offer recommendations. This report has been adopted in 2006⁹ and since then the debate on the recommendations offered in that report and fragmentation issue in general continue.

One of the issues embedded in this discussion on the fragmentation of international law was the conflict of norms. How to define a conflict between two norms and how to resolve it when a conflict is determined are essential questions in the fragmentation debate. In that context, we have recently witnessed an enhanced attention and a growing literature¹⁰ on the issue of conflicts between norms.

WTO was clearly not out of this debate. As a so called “self-contained regime”, WTO system which has its own set of rules and principles was seen as an ideal example of a fragmented “island” in the sea of the international law. Accordingly, the status of the WTO Law within

⁸ There are more than 50000 treaties registered in the UN system.

⁹ United Nations International Law Commission (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 (A/61/10). Also appears in *Yearbook of the International Law Commission*, 2006, Vol II, Part 2

¹⁰ Some of the recent contributions came from PAUWELYN *infra* 107, BARTELS *infra* 108, MARCEAU *infra* 100, VRANES *infra* 109, SADAT-AKHAVI *infra* 239 and Marko MILANOVIC (2009) “Norm Conflict in International Law: Whither Human Rights?” *Duke Journal of Comparative and International Law*, Vol: 20:69, p 69- 131

the body of international law and the interaction of it with other special areas such as environmental law was subject to an intensive debate.¹¹

Some of the authors contributing to this debate on the place of WTO Law in international law also touched upon the issue of conflicts within the WTO Law, namely between WTO Agreements.¹² However, for most if not all of these contributions, conflicts between WTO agreements was a side issue. It was only a part of a broader discussion on the status of WTO Law and a comprehensive approach to the conflicts between WTO Agreements was not intended.

This is essentially intended by this study. We are going to focus solely on the issue of conflicts between WTO agreements. By relying on and benefiting from some of the arguments of the general debate we have mentioned above, we will try to develop a comprehensive outlook to the the issue of conflicts between WTO agreements.

As we are going to see in this study, the conflicts between the three pillars of the WTO system, GATT, GATS and TRIPS is a real issue. It is inevitable that agreements with such broad domains overlap with each other in their jurisdictions and conflicts in those overlapping areas are likely. However, it appears that such conflicts were not at all forecast by the negotiators of these agreements since there is no conflict resolution rule between them or such potential for conflicts was simply ignored. In either case, a comprehensive outlook and examination to the matter is called for.

In this study, we will be focusing on potential conflicts between GATT and GATS. This no way means that conflicts between GATT and TRIPS or GATS and TRIPS are unlikely. The reason for this choice is only practical since the existence of some jurisprudence of conflicts between GATT and GATS and specific characteristics of the TRIPS Agreement¹³ make it

¹¹ See especially MARCEAU *infra* 100, Gilbert WINHAM (2003) "International regime conflict in trade and environment: the Biosafety Protocol and the WTO" World Trade Review Vol:2 Issue:2 p 131-155, Eric NEUMAYER (2000) "Trade measures in multilateral environmental agreements and WTO: Potential for conflict, scope for resolution" *Aussenwirtschaft* 55(3), p 1-24

¹² PAUWELYN *infra* 107,

¹³ Unlike GATT or GATS, TRIPS Agreement is not a trade agreement. Instead, it lays down basic standards of intellectual and industrial property rights protection as well as standards of enforcement that the Members have to comply with. Thus, taking into account this different area of scope, one may expect that conflicts between TRIPS and other two agreements are less likely. This is, however, not always the case. See *infra* 389 for a potential conflict between TRIPS and GATT.

easier to focus on GATT and GATS relationship. It is, however, certain that whatever conclusion that we reach in this study on GATT and GATS conflicts will apply to conflicts between TRIPS and any of these agreements.

Potential for Conflicts Between GATT and GATS

GATT and GATS are two main pillars of the WTO system which were designed for two different domains. The domain of GATT is trade in goods. However, except this common understanding, there is no explicit provision in GATT to define its scope.

On the other hand, the scope of the agreement has been clearly identified in GATS in a separate Article. In Article I:1 of GATS, it is stated that “[GATS] applies to measures by Members that affect trade in services”. Then, the terms “trade in services”, “measures by members” and “services” are elaborated. As we are going to see, the domain of the GATS is intended to be so broad as to cover any kind of measure directly or indirectly affecting trade in services except “the services supplied in the exercise of governmental authority”. Moreover, this scope has been further broadened in a number of individual articles. For example, the national treatment requirement in Article XVII applies to “like services and services suppliers” making service suppliers a part of the subject matter of the article.

GATT and GATS share a number of common principles such as most-favoured-nation treatment, national treatment or market access concessions. Yet, there are significant differences in how these principles are applied due to structural differences between two agreements.

It is also crucial to determine that the domains of the two agreements are not totally distinct. Although there is commonsense on what is related to goods and what is related to services trade, there is no guarantee that a measure that is certainly in the goods domain has no relationship with services or the vice versa. Therefore, there can be measures that can be claimed to fall under both jurisdictions. It has been confirmed by various Panel and Appellate Body (AB) decisions that such an overlapping may occur.¹⁴

¹⁴ See for instance reports on *Canada – Magazine*, *Canada – Autos* and *EC – Bananas*

The main objective of this piece of work is to analyse the consequences of the mutual co-existence of these two agreements. In other words, our task is going to be examining the overlapping cases of GATT and GATS jurisdictions. The overlapping of domains does not create a problem itself when the obligations stemming from the two agreements are in the same direction. The problem arises, however, as there is at least a potential conflict between the two agreements as a result of conflicting rights or obligations.

The issue of a conflict between WTO Agreements has not been addressed in an exhaustive manner in WTO legal texts. There are only a few rules for conflict resolution such as the Article XVI:3 of the WTO Agreement or General Interpretative Note to Annex 1A of the WTO Agreement. Although the term “conflict” was used in the provisions mentioned, it has been defined in none of the WTO texts that what is meant by the term “conflict”. On the other hand, there are certain Panel and AB decisions where the issue of conflict between two norms in general has been touched upon.¹⁵

For the specific case of GATT and GATS relationship, there is no conflict resolution rule in any of the texts. Moreover, it has been never explicitly acknowledged by a Panel or AB decision that there is a possibility of a conflict between these two agreements. Instead, as we have mentioned, it has been acknowledged by the AB that overlappings of the subject matter of GATT and GATS may occur but such overlapping would not lead to a conflict as “while the same measure can be scrutinised under both agreements the specific aspects of the measure examined under each agreement could be different. Under the GATT the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of a service involved.”¹⁶ The AB offers no method or test on how to resolve a specific case other than stating “a case by case” analysis is required and thus avoids to make overarching comments on the future cases of potential conflict.¹⁷

Nevertheless, as we are going to argue throughout this work, the potential for such conflicts is not negligible. The GATT and GATS were drafted in isolation from each other. As we are going to see, the body text of GATT has been drafted in 1947 with some modifications in 1994 while GATS has been finalised in 1994. Under very complex and difficult negotiation

¹⁵ See Appellate Body Report in *Guatemala- Cement or Indonesia - Automobiles*

¹⁶ The Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, p 94

¹⁷ AB Report *EC-Bananas*, AB Report *Canada - Periodicals*

conditions, the negotiators of the GATS text had only focused on successfully finalising a compromise text and eventually had no concern – and practically no time- to avoid potential conflicts with the GATT. Under these circumstances, as we have argued above, the potential for cases of conflict between provisions such broad agreements like GATT and GATS with overlapping domains is a realistic expectation as agreed upon by many scholars.¹⁸

In this context, the main objective of this study is to obtain a thorough understanding of the potential conflicts between GATT and GATS and to review the alternative ways of resolving such conflicts. As a supplementary objective, the study intends to derive some conclusions for a more effective functioning and more credible judicial system for the WTO.

The Scope and Methodology Followed

While the scope of this study is limited examining a particular WTO issue, this work will try to approach the matter from a broader perspective and try to employ all available instruments in international law as much as possible. This will include dealing with broader questions in international law which are relevant for this study whenever necessary.

The objective of the study is not limited to a descriptive analysis of the problem. Although presenting the current picture on conflicts between GATT and GATS will be a major part of this study, it will include significant normative elements. First, it will be assumed that WTO Law is a part of a whole body of public international law. Second, it will be assumed that currently, the legal function of the WTO –resolving trade dispute arising from the application of WTO Agreements through its dispute settlement mechanism- is the most important function of the WTO besides its other functions. Accordingly, it will be assumed that preserving the credibility and effectiveness of this function is essential. Throughout this study, our evaluations of the existing rulings or approaches by the WTO judicial bodies or other resources will be based on these two assumptions.

¹⁸ Eric H. LEROUX (2007) “Eleven Years of GATS Case Law: What Have We Learnt?” *Journal of International Economic Law* Vol 10(4), p 749-793; Werner ZDOUC (1999) “WTO Dispute Settlement Practice Relating to the GATS” *Journal of International Economic Law* Vol 2(2) p 295-346; John GAFFNEY (1999) “The GATT and The GATS: Should They Be Mutually Exclusive Agreements?” *Leiden Journal of International Law* Vol:12 (1999), p 135-153 ; William J. DAVEY, Werner ZDOUC (2003) “Chapter 2: The Triangle of TRIPs, GATT and GATS” in *Intellectual Property Trade, Competition and Sustainable Development* (eds.) Cottier, Thomas; Mavroidis, Petros C. *Studies in International Economics World Trade Forum* Volume 3 Michigan University Press, p 53-84; PAUWELYN *infra* 107

Similarly, our analysis will not be limited to the approaches exhibited by the WTO adjudicating bodies which do not always share a universalistic view of international law. Rather, alternative approaches stemming from the two assumptions above will also be employed. Most importantly, in the case study that is carried out, we will not limit our legal analysis to what would the result be if this case were in front of the WTO Panel. Alternatively, we will apply a different approach and on an *arguendo* basis, try to analyse the case in a different way.

The main methodology followed in this work is the statutory interpretation of the relevant provisions of the WTO Agreements and the decisions of WTO adjudicating bodies in order to determine consistent rules applicable to cases of conflict between GATT and GATS. To support and complement this approach, other legal resources such as customary and conventional rules of treaty interpretation and conflict resolution, decisions of international courts such as International Court of Justice or European Court of Justice and views of legal scholars will be employed.

Secondly, a case study will be carried out on “quotas on road transit permits” where the patterns of legal reasoning that we will have identified during above mentioned analysis will be applied. Through this case study, we will be able to see the theoretical background that we will have had set forth in action in a hypothetical WTO Panel case which will supposedly involve a conflict between GATT and GATS provisions.

The Course of The Study

The plan of the study is as follows:

In Part I, we are going to pursue a deeper understanding of GATT and GATS by reviewing their structures, main provisions and negotiating history. In this part, a brief review of the WTO Dispute Settlement Mechanism and Dispute Settlement Understanding which is the legal basis of this system will be provided.

In Part II, we will briefly review the types of relationship between GATT and GATS provisions. For the reasons that we are going to explain, the type of relationship that we will

focus on is going to be where provisions of GATT and GATS applicable to the same subject matter potentially conflict with each other.

In Part III, we are going to make clear what we understand from the term “conflict”. For this aim, we are going to carry out a comprehensive and in detail analysis as clarifying this concept is essential for the rest of the work.

In Part IV, we will investigate the status of WTO Law within the general framework of public international law. This is necessary to comprehend to what extent we can make use of or import the principles of public international law or norms outside the WTO in order to deal with a situation of conflict between GATT and GATS.

In Part V, we will review “conflict avoidance” as conflict resolving tool. For this purpose, we will focus methods of interpretation in as existing in Vienna Convention on Law of Treaties and in WTO jurisprudence. We will also revisit other principles of interpretation that may be relevant in conflict resolving within WTO Law.

In Part VI, we are going to review the methods and basic principles of conflict resolution in public international law that might be applicable to a potential GATT – GATS conflict. These rules and principles may stem from customary international law as well as conventions such as Vienna Convention on Law of Treaties. Conflict resolving maxims; *lex superior*, *lex posterior* and *lex specialis* will be analysed in detail and their applications in the decisions of international courts as well as WTO judicial bodies will be reviewed. We will also go through explicit conflict resolving clauses existing in WTO Agreements as well as other international conventions.

In Part VII, we are going to pursue a thorough analysis of WTO jurisprudence on cases which involved a potential conflict. We are going to review those cases in some detail and try to derive certain patterns shedding light to the approach of WTO judicial bodies regarding the issue of conflicts between GATT and GATS.

In Part VIII, we are going to carry out a case study on the issue of potential conflicts between GATT and GATS. This case study on the quotas on transit permits will be an opportunity to test the theoretical background that will have had laid down for a real and specific case.

Part IX will be devoted to concluding remarks. In this part, after briefly summarizing the course and findings of the study, we are going to make conclusions based on our research and particularly on the future of the dispute settlement system of the WTO.

PART I: GATT, GATS AND THE DISPUTE SETTLEMENT SYSTEM OF THE WTO

I. GATT, GATS AND THE DISPUTE SETTLEMENT SYSTEM OF THE WTO

In this part, we are going to have a closer look to the GATT and GATS. This will include a brief review of the negotiating histories and examination of the structure and main provisions of the GATT and GATS. A closer look at the WTO Dispute Settlement System and its legal basis will also be provided.

1. General Agreement on Tariffs and Trade 1994 (GATT)

1.1 The Negotiating History

During World War II, it had been recognised by the allied powers that the new institutions of the post-war international economic order was essential not to experience another collapse of the international system as in the 1930's. The Bretton Woods Conference held in 1944 envisaged the establishment of International Trade Organisation (ITO) to regulate world trade as a third pillar of the new international economic order along with International Monetary Fund and World Bank.

The architects of the new order were certainly the United States (US) and its close ally the United Kingdom¹⁹. The US State Department prepared the draft charter for the ITO. Four international conferences were held for the negotiations on ITO.²⁰

The ambition level for the ITO was quite high. Besides trade disciplines, negotiations on ITO included disciplines on employment, business practices, investment, services and commodity agreements. In this context, a group of countries among ITO negotiators, being aware of the possible lag in the entry into effect of the ITO Charter, felt the need to expedite the negotiations for tariff concessions by separating it from the general ITO negotiations.

With this view, during the third conference in Geneva, parallel negotiations on GATT began. The progress had been satisfactory and in October 1947, an agreement was reached on GATT. On one hand, the negotiating parties desired that the tariff concessions that were agreed upon

¹⁹ Richard N. GARDNER (1985) "Sterling-Dollar Diplomacy in Current Perspective" *International Affairs* Vol:62 No:1, p 21-33

²⁰ The first one was the "Preparatory Committee" meeting held in London between October 15-November 26, 1946. The second was the "Drafting Committee" meeting held in New York between January 20- February 25, 1947. The third one was the Geneva Conference held in Geneva between April 10- October 30, 1947. The last one was Havana Conference in Havana where the ITO Charter had been declared between November 21 1947 – March 24, 1948.

came into effect as soon as possible before there was market disruption and political opposition. On the other hand, there were legal difficulties since some parts of GATT could be inconsistent with the national legislation of the parties.²¹ To overcome this dilemma, the parties preferred to apply the GATT on a provisional basis based on “Protocol on Provisional Application of The General Agreement on Tariffs and Trade” signed on October 30, 1947.²² The provisional application formula made GATT effectively in force while allowing for flexibilities granted to the parties for application.

GATT was explicitly tied to the prospective ITO. In Article XXIX of GATT, the relationship of GATT to the Havana Charter had been defined in detail. It is stated in the Article that “[i]f by September 30, 1949, the Havana Charter has not entered into force, the contracting parties shall meet before December 31, 1949, to agree whether this Agreement shall be amended, supplemented or maintained.” Moreover, much of the GATT had been taken verbatim from the related chapters of the draft Havana Charter.

Consequently, in March 1948, the negotiations on the Havana Charter establishing the ITO was finalised and the Charter was signed by 53 countries. However, the Charter could never enter into effect as it proved that it was impossible to obtain ratification in some parliaments especially from the United States Congress. After several trials, President Truman announced that he will no longer seek ratification from the Congress for the Charter. This event is generally recognised as “the official death of ITO”.²³

It is open for debate whether it was a blessing that ITO was never founded with its very wide coverage of commercial policy and its potential to create a large bureaucratic structure. On the other hand, the narrow focus of GATT made it simple and easy to implement.²⁴ Soon after it became apparent that it will be hard to realise the Havana Charter, GATT filled the gap in the international system. Although being drafted as merely a trade agreement, GATT soon evolved into a trade organisation with its own secretariat. Albeit its ambiguous legal status,

²¹ John JACKSON (2000) *The Jurisprudence of GATT and the WTO* Cambridge University Press, Cambridge, UK, p 23

²² The first eight signatories of the Protocol were Australia, Belgium, Canada, France, Luxembourg, Netherlands, the United Kingdom and the United States.

²³ *supra* 21, p 23

²⁴ A. Douglas IRWIN (1995) “The GATT in Historical Perspective” *The American Economic Review* Vol:85:2, p 325

GATT maintained its function of regulating world trade till the establishment of the WTO in 1995.

Between 1947 and 1995, until the launch of Uruguay Round, GATT system witnessed eight consecutive rounds of trade negotiations²⁵ which resulted in significant reductions in the tariffs for industrial goods. Moreover, there were “codes”²⁶ meaning plurilateral agreements on specific aspects of GATT created in Kennedy Round and especially in Tokyo Round which was the first real attempt to reform the multilateral trade system.

Finally, the GATT system took its current shape in the Uruguay Round which started in 1986. The main advance brought by the Uruguay Round was the incorporation of “single undertaking” principle. This principle made it possible that all Annex 1A Agreements on trade in goods were signed by all members as a single package and became inseparable parts of the GATT system.

The basic principles of GATT ensuring non-discrimination in international trade, most-favoured-nations (MFN) treatment and national treatment (NT) were not original creations of the negotiators. MFN clauses were, for instance, widely used in bilateral trade agreements between European countries in 18th and 19th centuries. A 1936 League of Nations MFN clause constituted the basis of the MFN provision in an earlier version of the ITO Charter, which later on significantly affected the MFN provision in GATT.²⁷

The concept of NT, that is non-discrimination between the domestic and foreign products, had also been not original to the GATT. The origin of the NT concept can be traced back the commercial privileges granted within the Hanseatic League which not only guaranteed foreign merchants market access, but also made their position equal with the domestic merchants. The concept became commonplace in the trade treaties in the second half of 19th

²⁵ These are Annecy Round (1949), Torquay Round (1951), Geneva Round (1956), Dillon Round (1960-61), Kennedy Round (1964-67), Tokyo Round (1973-79), Uruguay Round (1986-1994)

²⁶ The first anti-dumping code was created in Kennedy Round. Tokyo Round witnessed the creation of a number of codes which later on served as a basis of the multilateral agreements in Uruguay Round. Tokyo Round Codes include Subsidies and Countervailing Measures, Technical Barriers to Trade (Standards Code), Import Licensing Procedures, Government Procurement, Customs Valuation, Anti-Dumping, Bovine Meat Arrangement, International Dairy Arrangement and Civil Aircraft.

²⁷ JACKSON, *supra* 21

century and also existed in the Bern Convention for The Protection of Literary and Artistic Works (1886) and the Paris Convention for the Protection of Industrial Property (1883)²⁸

A fundamental issue regarding the NT provision during the negotiations of GATT was its scope. While a number of developing countries demanded that the scope of NT provision was kept limited solely for the goods which were listed in the schedule of concessions as the purpose of the provision was seen as the protection of tariff concessions. The United States, on the other hand, strictly opposed this view and saw a general discipline on internal measures applicable to all goods as a *sine qua non* of the new agreement. Consequently, the United States view prevailed over the others and the NT provision of GATT took its current form.²⁹

Now, having reviewed the negotiating history of the GATT briefly, we are ready to make an analysis of the GATT text.

1.2 The Structure and Key Provisions

The structure of the GATT can be identified under different approaches.³⁰ Generally speaking, the obligations in GATT can be examined under four sub-categories:

- Disciplines on Measures Affecting Importation and Exportation
- Disciplines on Domestic Instruments
- Disciplines on State Contingent Measures
- Exceptions

While the disciplines on importation and exportation target measures at the border as trade policy instruments of a Member, the disciplines on domestic instruments target measures inside the borders which may have an affect on importation or exportation. On the other hand, the disciplines on state contingent measures target the use of defensive trade policy instruments which can be triggered if certain conditions occur. Finally, the provisions on exceptions lay down the circumstances whereby a Member can be legitimately exempt from its obligations under GATT.

²⁸ Holger HESTERMEYER (2007) “Article III GATT” in *WTO Technical Barriers and SPS Measures* (eds.) Wolfrum, Rudiger; Stoll, Peter-Tobias; Seibert-Fohr, Anja Ma, Martinus Nijhoff Publishers, p 8

²⁹ John JACKSON (1969) *World Trade and the Law of the GATT: A Legal Analysis of the General Agreement on Tariffs and Trade*, Bobbs-Merrill Company, New York, p278

³⁰ See for instance, ORTINO, MAVROIDIS (2005) or VAN DEN BOSCHE (2005) for different approaches in structuring GATT obligations.

For the purpose of this study, we are only going to selectively review some key provisions of the GATT which we think are instrumental in understanding the underlying logic of the agreement.

1.2.1 Disciplines on Measures Affecting Importation and Exportation

Article I (Most-Favoured-Nation Treatment)

MFN principle, laid down in Article I, is the backbone of the GATT. It ensures non-discrimination between goods originating from different members. The text of the Article is as follows:

Article I

General Most-Favoured-Nation Treatment

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

- (a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;
- (b) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;
- (c) Preferences in force exclusively between the United States of America and the Republic of Cuba;
- (d) Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5³¹, of Article XXV which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

³¹ The authentic text erroneously reads "subparagraph 5 (a)".

4. The margin of preference on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

(b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

As stated in *Canada – Autos* by the Appellate Body (AB), “The object and purpose of Article I is to prohibit discrimination among like products originating in or destined for different countries. The prohibition of discrimination in Article I:1 also serves as an incentive for concession, negotiated reciprocally, to be extended to all Members on an MFN basis.”

The subject matter of the article includes “customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III³²”.

There is also no doubt that the MFN provision applies to all *de jure* as well as *de facto* discriminations. Again, the AB in *Canada – Autos* states that “Article I:1 do not restrict its scope only to cases in which the failure to accord an ‘advantage’ to like products of all other Members appears on the face of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words ‘de jure’ nor ‘de facto’ appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only ‘in law’, or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 also covers ‘in fact’, or *de facto*, discrimination.”

Exceptions to MFN principle are quite limited in GATT. Some exceptional situations were already counted down in the Article itself, in paragraphs 3 & 4. Apart from that, notwithstanding the general and security exceptions, the systematic exceptions allowed under

³² Article I:1. Article III of the GATT that is referred in Article I will be reviewed below.

GATT system are anti-dumping and countervailing duties, preferential treatment within regional trade agreements and preferential treatment to developing and the least developed country members under the “Enabling Clause”.³³

Article II (Schedules of Concessions)

Article II states another fundamental principle of GATT. The tariff rates cannot be raised above the “bound” rates set up in the schedules of concessions which constitute an integral part of GATT. Each member should accord treatment for the goods of any other member no less favourable than the conditions set forth in these schedules. No other duties or charges except taxes imposed in conformity with Article III, trade policy instruments or fees commensurate with the service rendered are allowed:

Article II

Schedules of Concessions

1. (a) Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.

(b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

(c) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly or mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

³³ The General Council Decision on “Differential and More Favourable Treatment Reciprocity and Fuller Participation of Developing Countries” dated 28 November 1979 (L/4903) is also known as “Enabling Clause”. Enabling Clause allows GATT Contracting Parties to provide non-reciprocal preferential treatment which would otherwise be inconsistent with Article I.

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;

(c) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (a) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty per centum, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *provided* that the CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(b) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

The main underlying legal principle attached to Article II, as interpreted by the AB in *EC – Bananas*³⁴ is that a member may yield rights and benefits in addition to its concessions but cannot retract its obligations included in the schedule. It is clear that, with this interpretation, Article II is one of the procedural building blocks of the GATT system in ensuring predictability and certainty.

Article XI (General Elimination of Quantitative Restrictions)

Article XI mandates the elimination of all import and export restrictions other than duties, taxes or other charges except the cases mentioned in the Article:

“Article XI

General Elimination of Quantitative Restrictions

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

2. The provisions of paragraph 1 of this Article shall not extend to the following:

- (a) Export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting contracting party;
- (b) Import and export prohibitions or restrictions necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade;
- (c) Import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of governmental measures which operate:
 - (i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted; or
 - (ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or
 - (iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported

³⁴ The AB Report in *EC-Bananas*, *supra* 16

commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to subparagraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under (i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors which may have affected or may be affecting the trade in the product concerned.”

The critical importance of this Article stems from the fact that it reflects the preference of the GATT system for tariffs over quotas among forms of protection. As stated by the the Panel in *Turkey – Textiles*, “[t]he prohibition on the use of quantitative restrictions forms one of the cornerstones of the GATT system. A basic principle of the GATT system is that tariffs are the preferred and acceptable form of protection.”

By various Panel and Appellate Body decisions, Article XI is interpreted to be covering a broad range of restrictive measures which made it an important and frequently invoked safeguard against any kind of non-tariff barriers.³⁵ It is also necessary to emphasize that Article XI would extend to any restrictions of the *de facto* nature³⁶ and measures which are privately applied but related to public authority³⁷.

Article V (Freedom of Transit)

This article will be elaborated in full detail in the following sections.

1.2.2 Disciplines on Domestic Instruments

Article III (National Treatment)

NT is another fundamental principle of GATT in order to ensure non-discrimination. In essence, Article III states that domestic goods should be treated equally with the imported goods once they are cleared from the customs in terms of taxation or in terms of laws, regulations and any requirements affecting their internal sale, offering for sale, purchase, transportation and distribution:

³⁵ See for instance the cases *India – Autos*, *US – Shrimp*, *EC – Asbestos* or *Canada – Periodicals* for such broad interpretations.

³⁶ See *Argentina – Hides and Leather* case. The Panel Report on Argentina- Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/R

³⁷ The Panel Report in Japan- Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R

Article III

National Treatment on Internal Taxation and Regulation

1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.
3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the extent necessary to compensate for the elimination of the protective element of the tax.
4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.
5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.
6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.
7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.
8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal

taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

As being one of the most interpreted articles of GATT, the purpose of the Article III has been reiterated several times by Panel and AB decisions. For instance, in *Japan- Alcoholic Beverages*, the AB stated that “The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures.”³⁸ And in *Canada – Periodicals* it has been stated that “[t]he fundamental purpose of Article III of GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products.”³⁹

Looking from a broader perspective, Article III is the main framework clause in GATT which treats internal measures of the members. As we have seen, border measures are more explicitly regulated in GATT: tariffs are bound, quantitative restrictions are prohibited...etc. However, in the original GATT 1947 text there are only a few provisions targeting the internal measures of the members. Later on, as a result of the Uruguay Round, more disciplines were introduced on domestic instruments with specific agreements such as SPS or TBT Agreements.⁴⁰

1.2.3 Exceptions

GATT Article XX (General Exceptions)

Article XX exhibits the general exceptions whereby an inconsistency with one of the Articles of GATT can be licensed. As stated in the *US- Gasoline* case, the exceptional cases listed in Article XX covers all obligations under GATT:

Article XX

General Exceptions

³⁸ The Appellate Body Report in *Japan- Taxes on Alcoholic Beverages* WT/DS8-10-11/AB/R, p 16

³⁹ The Appellate Body Report in *Canada- Certain Measures Concerning Periodicals* WT/DS31/R, p 18

⁴⁰ Henrik HORN, Petros MAVROIDIS (2004) “Still Hazy After All These Years: The Interpretation of National Treatment in GATT/WTO Case-law on Tax Discrimination” *European Journal of International Law*, Vol: 15:1, p 39-69

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;
- (c) relating to the importations or exportations of gold or silver;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
- (e) relating to the products of prison labour;
- (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
- (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;
- (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;
- (j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

However, the legitimisation of a measure, which would otherwise be inconsistent with another provision of GATT, is not an easy task. Again, as made clear in *US-Gasoline* case, a two-tiered examination is called for. First, there is the provisional justification of the measure in hand under the relevant paragraph of Article XX. Second, there is “further appraisal of the same measure under the introductory clauses of Article XX”.

The provisional justification under one of the paragraphs of Article XX would depend on different conditions contingent on the specific paragraph invoked but generally speaking, it would require that the measure lies within the scope of the paragraph and it is “necessary” to contribute to that legitimate objective. This “necessity” would usually mean that there lacks a reasonably available alternative that is less trade restrictive and that would achieve the same objective.

The second step of the examination would require that the measure complies with the introductory part of the Article XX, namely that it does not “constitute an arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or “a disguised restriction on international trade”

For both steps, the burden of proof will lie with the member which intends to invoke one of the exceptions in Article XX.

GATT Article XXI (Security Exceptions)

The GATT Article XXI lays down exceptions for security purposes:

Article XXI

Security Exceptions

Nothing in this Agreement shall be construed

- (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
- (i) relating to fissionable materials or the materials from which they are derived;
- (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
- (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

This includes disclosure of information that is contrary to the security interests of a member, actions necessary to protect essential security interests of a member and actions taken to fulfil United Nations obligations to maintain international peace. Article XXI has never been invoked and hence there is no legal interpretation by any WTO bodies on it.

2 General Agreement on Trade in Services (GATS)

2.1 The Negotiating History

The negotiations on launching a new round of trade talks started early in 1985. The main differences, pre-dominantly between developed and developing members, were on the agenda, namely the subjects to be treated in the new round.

In that stage, developed countries, most significantly the US, made its position clear that services should be included in the agenda along with other “new issues”⁴¹ if a new trade round is to be launched. On the other hand, a number of developing countries strongly opposed to the inclusion of services into the agenda of the new round. Ten developing countries⁴² prepared a draft text which stated that services cannot be negotiated in the new round as it was out of GATT’s competence.⁴³

However, the US, backed by major developed countries, managed to marginalise the opposition by applying an active diplomacy. Japan was among the first countries who joined the US in its cause. Soon after, it was followed by Canada, Switzerland and the EC backed by France and Britain.⁴⁴ At the last stage, where the remaining hardliner opposition came from Brazil and India, the US overtly threatened to walk away from the negotiations if the new issues are not included in the agenda.⁴⁵

The result was a partial victory for the US: Services were included in the agenda of the Uruguay Round. Yet, services were to be treated differently than the other subjects. In Punta del Este Declaration which launched the Uruguay Round, services were handled in a separate

⁴¹ Other “new issues” demanded by the US were intellectual property and investment measures.

⁴² The ten developing countries were Argentina, Brazil, Cuba, Egypt, India, Nicaragua, Nigeria, Peru, Tanzania, Yugoslavia.

⁴³ John CROOME (1995) *Reshaping the World Trading System: A History of the Uruguay Round*, Diane Publishing, p 29

⁴⁴ William J. DRAKE; Calypso NICOLAIDIS (1992) “Ideas, Interests and Institutionalization: ‘Trade in Services’ and the Uruguay Round” *International Organization* Vol:46:1, p 57

⁴⁵ See *ibid* for a comprehensive discussion on the technical background of the negotiations, incentives and positions of the major players.

part. A separate body for services negotiations was established whereas all other subjects were treated under the body for negotiations on trade in goods. The aim of the negotiations was declared as “to establish a multilateral framework of principles and rules for trade in services, including elaboration possible disciplines for individual sectors, with a view to expansion of such trade under conditions transparency and progressive liberalization and as a means of promoting economic growth...”⁴⁶ While the negotiations would take place within the scope of GATT procedures and practices, the detailed principles established for trade in goods would not apply to the services negotiations which is an indication that the developing countries could get the elbowroom that they demanded for the negotiations. A last point to be stressed is that negotiations on services were formally left out of the scope of “single undertaking” principle by the Punta del Este Ministerial Declaration, as services were handled in a totally different section, distinct from all other topics.⁴⁷

The negotiations started on north-south lines where developing countries took a defensive and sometimes obstructive stance. It was only after mid-term review in Montreal in 1988 that developing countries focused more on benefiting from the negotiations as much as possible.⁴⁸

The negotiations were very complex. During 1989, detailed discussions on the definitions of services, main principles to be applied and sectoral coverage went on. Working groups for each sector were established with a task of determining the possibilities of liberalization and the difficulties attached. Another main concern was on how the main principles of GATT such as MFN or national treatment could be applied to these sectors. Before the Ministerial Conference in Brussels in 1990, it became apparent that there would be one framework agreement that would define the basic principles for all sectors and sectoral annexes to that agreement which would set forth the specific disciplines.

One major disagreement arose on the task of the negotiations. Most developed countries felt that the services framework agreement had to be accompanied with a list of specific commitments by each contracting party. On the other hand, developing countries such as Brazil, Egypt and India were opposed to this view and argued that the mandate of the negotiations did not go beyond negotiations the general framework of rules and disciplines for

⁴⁶ Punta del Este Ministerial Declaration, 20 September 1986

⁴⁷ *Supra* 44, p 240

⁴⁸ *Ibid*, p 242-243

services.⁴⁹ Gradually, it became accepted that there should be some initial commitments at least in the form of committing on the existing regulations.

During the Brussels Ministerial Conference in 1990 and its aftermath, there were two main areas of concern: The first one was on the sectoral coverage. There were disagreements on how to handle individual sectors, most significantly financial services, telecommunications and maritime services. Developing countries such as India and Pakistan also pushed hard for the free movement of labour services. Another particular concern was the audiovisual services. The EC, led by France and to a lesser extent Germany, argued that audiovisual services –films and TV programmes- were a matter of national cultural identity and thus had to be governed by special provisions. The US, as the major exporter of audiovisual services, strictly objected this view.

The second area of concern was the nature of MFN treatment. Developed countries, particularly US, was concerned that their MFN based concessions would be free ridden by some developing countries which would be much less ambitious in their concessions. In this context, US, which was already offering a relatively free access in major sectors, demanded MFN treatment is only granted based on the exchange of commitments. Faced with strong opposition from developing countries which emphasized MFN treatment, US had to take a step back and declare that it could accept a general MFN provision in the event that satisfactory offers come from developing countries.⁵⁰

Another controversial issue on MFN treatment was how to handle the derogations. There were so many aspirations for derogations to the MFN rule and different views on how to reflect them into the text. While some countries argued that exemptions are mentioned in the text of the agreement itself, others argued that MFN rule should not be diluted and the exemptions should be listed in the annexes.

Tough and endless negotiations on these main parameters proceeded during 1992 and until the last days of 1993. The result was by all means a compromise text. As expected, the main principles applicable to trade in services including a general MFN rule were incorporated into

⁴⁹ *Ibid*, p 246

⁵⁰ DRAKE & NICOLAIDIS, *supra* 44

a framework agreement called GATS. Exemptions to the MFN provision were listed by each country as an annex to the GATS. Other main principles of GATT such as NT and binding market access commitments were made obligatory only for the sectors which were voluntarily listed in the schedules of commitments after a “request & offer” procedure for each member. Some other sector specific exemptions were included in the sectoral annexes. Financial and telecommunications services were handled in detail in sectoral annexes while maritime transport services were at least temporarily exempted from the MFN rule through another sectoral annex.

2.2 The Structure and Key Provisions

As a result of the peculiar conditions of the services negotiations that we briefly summarised, the GATS had a significantly different structure than GATT. The initial reluctance and defensiveness of developing countries as well as concerns stemming from developed countries themselves brought about a structure that allowed voluntary liberalisation, potentially disproportional commitments and less multilateralism.

Another source of discrepancy was the nature of the two domains: Generally, GATT has one legitimate means of protections which are tariffs. The GATT was structured accordingly. However, since services are often intangible and unstorable, tariffs are not a relevant means of protection for services. Instead, trade barriers in this domain take the form of prohibitions, quantitative restrictions or other domestic regulations such as licensing or authorisation requirements.

The non-existence of tariffs as a restraint to trade significantly complicated the work of negotiators who sought for incremental reductions to barriers in trade in services and as we have already mentioned a substantial amount of time was devoted to determining whether and how major GATT concepts such as MFN and NT could be applied to services. In conclusion, in GATS structure, general GATT-like principles were accompanied by general and explicit provisions to discipline internal regulations and procedures.

Benefiting from the classification by Hoekman⁵¹, we are going to examine the GATS in three parts:

⁵¹ Bernhard HOEKMAN (1995) “Tentative First Steps: An Assessment of the Uruguay Round Agreement on Service” World Bank Policy Research Working Paper No: 1455

- General concepts, principles and rules that apply to the measures affecting trade in services.
- Specific commitments that apply to the service sectors or sub-sectors that are listed in a member's schedule.
- Sectoral annexes that are designed to handle the sectoral specificities.

2.2.1 General Concepts and Principles

Article I (Scope and Definition)

Unlike GATT, there is an explicit scope article in GATS. In principle, GATS disciplines apply to all service sectors and all measures affecting trade in services. As clarified in *EC – Bananas III*, “[n]o measures are excluded a priori from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matter but nevertheless affects trade in services” However, certain sectors – audiovisual products, postal, courier, basic telecommunications and transportation services- were excluded from the final commitments as a result of the negotiation process⁵².

In the article, four different modes of services are mentioned as the elements of the definition of trade in services. These are;

- Cross border (Mode 1) – These are services supplied from the territory of one member to the territory of the other such as consulting services supplied by an enterprise in member A to the consumers in member B.
- Consumption abroad (Mode 2) – Services supplied in the territory of one member to the consumers of the other such tourism services supplied in member A to the consumers of member B.
- Commercial presence (Mode 3) – Services supplied through the presence of a business of one member in the territory of another such as the establishment of a branch of bank in member A that is headquartered in member B.

⁵² Laura ALTINGER, Alice ENDERS (1996) “The Scope and Depth of GATS Commitments” *The World Economy*, Vol: 19 Issue:3, p 315

- Temporary presence of natural persons (Mode 4) – Services supplied by national of a member in the territory of another member such as construction services supplied by a national of member A in the territory of member B.⁵³

Article II (Most-Favoured-Nation Treatment)

Article II manifests the most-favoured-nation provision for trade in services:

Article II

Most-Favoured-Nation Treatment

1. With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.
2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.
3. The provisions of this Agreement shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.

Unlike GATT, where the subject matter of the MFN provision is specifically counted, a more general and inclusive wording is used in the GATS MFN provision. The subject matter is “any measure covered by [GATS]”, that are with reference to the Article I, any measures which affect trade in services. Treatment to services or service supplier of a member should be no less favourable than the like services or service suppliers of any other country.

A critical point regarding the MFN treatment in GATS is, unlike GATT where limited exceptions to MFN treatment are allowed for pre-defined specific purposes, systematic exceptions to the MFN rule are allowed even within the Article II itself. In paragraph 2, Members are explicitly licensed to maintain measures that are inconsistent with MFN principle as long as they are listed in the MFN exemptions list in Annex I and meet the conditions thereupon.

⁵³ *Ibid*, p 308

Article III (Transparency)

There has been a special emphasis on transparency – and a stronger one than GATT- and consequently it is no surprise that transparency requirement has been stated just at the beginning of the agreement in Article III. The reason for this is clear-cut: As we have discussed above, unlike GATT, where only legitimate means of protection are tariffs, there are numerous ways of protection in GATS. Hence, it is essential that measures affecting trade in services are applied in a transparent manner in order to make traders aware of which barriers they will face. The text of the Article is as follows:

“Article III Transparency

1. Each Member shall publish promptly and, except in emergency situations, at the latest by the time of their entry into force, all relevant measures of general application which pertain to or affect the operation of this Agreement. International agreements pertaining to or affecting trade in services to which a Member is a signatory shall also be published.
2. Where publication as referred to in paragraph 1 is not practicable, such information shall be made otherwise publicly available.
3. Each Member shall promptly and at least annually inform the Council for Trade in Services of the introduction of any new, or any changes to existing, laws, regulations or administrative guidelines which significantly affect trade in services covered by its specific commitments under this Agreement.
4. Each Member shall respond promptly to all requests by any other Member for specific information on any of its measures of general application or international agreements within the meaning of paragraph 1. Each Member shall also establish one or more enquiry points to provide specific information to other Members, upon request, on all such matters as well as those subject to the notification requirement in paragraph 3. Such enquiry points shall be established within two years from the date of entry into force of the Agreement Establishing the WTO (referred to in this Agreement as the "WTO Agreement"). Appropriate flexibility with respect to the time-limit within which such enquiry points are to be established may be agreed upon for individual developing country Members. Enquiry points need not be depositories of laws and regulations.
5. Any Member may notify to the Council for Trade in Services any measure, taken by any other Member, which it considers affects the operation of this Agreement.

Article III mandates that “all relevant measures of general application which pertain to or affect the operation” of GATS should be promptly published. This is a more broad and

general requirement than its GATT-counterpart⁵⁴ where the publication of “laws, regulations, judicial decision and administrative rulings of general applications” are required and a positive list is laid down on what is to be published.

In addition, Article III sets forth a notification requirement to members for any new or amended laws, regulations or administrative guidelines. Moreover, members have to respond promptly any enquiries on their measures and international agreements affecting trade in services and provide any specific information if asked. Finally, any member has the right to notify a measure taken by another member to the Council for Trade in Services which it considers affecting the operation of GATS.

Article VI (Domestic Regulation)

While disciplines on domestic regulations may be found in GATT in a dispersed manner and particularly in specific agreements such TBT or SPS Agreements for trade in goods, GATS has an explicit disciplinary provision on domestic regulations. The reason that makes Article VI one of the most important provisions of GATS is simple: In the absence of tariffs or border protection measures, domestic regulations such as licensing requirements, qualification requirements, technical standards or other types of domestic regulations have the potential to be an important instrument of protection.

In essence, Article VI requires that members establish disciplines to ensure that such requirements or other regulations are based on objective and transparent criteria and are no more burdensome than necessary to guarantee the quality of the services and do not constitute a disguised restriction on the supply of those services thereby circumventing a commitment of that member.⁵⁵

With respect to the measures relating to qualification requirements and procedures, technical standards and licensing requirements, Article VI gives a mandate to the Council for Trade in Services to develop necessary disciplines to ensure that such requirements do not constitute unnecessary barriers to trade in services. Pending the entry into force of such disciplines, members are obliged not to apply licensing or qualification requirements or technical

⁵⁴ GATT Article X (Publication and Administration of Trade Regulations)

⁵⁵ HOEKMAN *supra* 51, p 9

standards that nullify or impair its specific commitments and in a manner which, based on objective and transparent criteria, such as competence and the ability to supply the service, not more burdensome than necessary to ensure the quality of the service. Moreover, licensing procedures should not be in themselves a restriction on the supply of the service and applied *in a manner which could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.* (emphasis added)

Article VI also lays down disciplines on the authorisation procedures and requires the existence of appeal procedures for the administrative decisions affecting trade in services in a best endeavour language.

It can be argued that Article VI with its current form is a weak provision unable to impose strict disciplines on domestic regulations which are essentially important for trade in services.⁵⁶ The main reason for this conclusion is the above mentioned provision which was emphasized. It is argued that it legitimises the restrictions that members applied at the time of the signature of the GATS.

On the other hand, Pauwelyn, for instance, based on the Panel and AB decision regarding *US-Gambling* case, argues that even with the current weak form of the Article VI, the Panel and the AB has a tendency to interpret the obligations under Article VI broader than they are by diluting the boundary between the scope of Article VI and Article XVI on market access and to perceive a breach of Article VI and a breach of Article XVI interchangeably. For Pauwelyn, this overarching interpretation risks to undermine the regulative autonomy of the members beyond what was intended by the drafters of the GATS.⁵⁷

2.2.2 Specific Commitments

The specific commitments under GATS can be examined mainly in two parts: First, there are specific liberalisation commitments laid down in each member's schedule of commitments. Second, there are rules and obligations that apply to those sectors or sub-sectors that are listed in the schedules.

⁵⁶ Aaditya MATTOO (2001) "Shaping Future GATS Rules for Trade in Services" World Bank Policy Research Working Paper No: 2596, p 88 and also Aaditya MATTOO (1997) "National Treatment in the GATS: Cornerstone or Pandora's Box" *Journal of World Trade* Vol:31 Issue:1, p 27

⁵⁷ Joost PAUWELYN (2005) "Rien ne Va Plus? Distinguishing domestic regulation from market access in GATT and GATS" *World Trade Review* Vol: 4:2, 131-170

Article XX (Schedules of Specific Commitments)

Article XX states the obligation for each member to set out schedules of specific commitments it undertakes for market access, national treatment or other additional commitments. Each schedule has to specify; the terms, conditions and limitations on market access, conditions and qualifications on national treatment, undertakings related to additional commitments, where appropriate, the timeframe for implementation and the date of entry of commitments. Schedules should also include the measures inconsistent with the Articles XVI and XVII.

In practice, schedules of commitments are the tables that summarise two things: First, it exhibits which sectors or sub-sectors are subject to the disciplines of market access and national treatment of the GATS through a positive list approach. Second, it exhibits which restrictions, e.g. violations to market access and national treatment, would be kept in place for those specific sectors that are listed, through a negative list approach.⁵⁸ In addition to sector specific commitments, schedules include “horizontal commitments” which include general laws or regulations that may limit or restrict market access or national treatment independent of the sector involved.⁵⁹

As a method, the schedules of commitments examine the four modes of supply for the each sector listed and for each mode, one of the three levels of commitment is indicated: The category “none” means that there are no restrictions on market access or national treatment for that mode of the specific sector concerned. “Unbound” indicates that a particular mode of supply is excluded from the commitment under Article XVI and XVII or any other additional commitments. While in principle, Article XVI and XVII disciplines apply to all other modes of supply, limitations or conditions which would otherwise be inconsistent with Article XVI and XVII and which the governments reserve the right to apply are described in detail. A typical and illustrative part of a schedule of commitments is given in Table 2.

⁵⁸ HOEKMAN, *supra* 51, p 11

⁵⁹ ALTINGER & ENDERS, *supra* 52, p 313

Table 2 An Exemplary GATS Schedule of Commitments

<i>Service Activities</i>	<i>Mode of Supply</i>	<i>Limitations on Market Access</i>	<i>Limitations on National Treatment</i>	<i>Additional Commitments</i>
Part I - Horizontal Commitments				
All sectors	1. Cross-border supply 2. Consumption abroad 3. Commercial presence. 4. Natural persons	None None Economic needs test Senior personnel as intra-corporate transferees.	None None Subsidies for R&D None	
Part II – Sector Specific Commitments				
Computer services	1. Cross-border supply 2. Consumption abroad 3. Commercial presence. 4. Natural persons	None None None Unbound except as provided in horizontal section	None None None Unbound except as provided in horizontal section	
Insurance services	1. Cross-border supply 2. Consumption abroad 3. Commercial presence. 4. Natural persons	Only reinsurance Only non-statutory insurances Branches of foreign companies cannot obtain licenses to provide statutory insurances Unbound except as provided in horizontal section		

2.2.3 Rules and Obligations on Market Access

Article XVI (Market Access)

Article XVI of GATS corresponds to the Article II of GATT – and to a lesser extent Article XI of GATT- in the sense that it determines the “bound” levels of protection in services. More concretely, it mandates that the services or service suppliers of any other member should be treated no less favourable than the terms and conditions specified in the schedule of commitments of each member. It has been also ensured that, where necessary, cross-border movement of capital regarding mode 1 and transfers of capital regarding mode 3 are also an integral part of the market access commitment.

In addition, the measures, being contrary to market access commitment and thus cannot be maintained unless otherwise specified in the schedules, are openly counted. These are;

- limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test,
- limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test,
- limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test,
- limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test,
- measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service,
- limitations on the participation of foreign capital in terms of maximum percentage limit on foreign share-holding or the total value of individual or aggregate foreign investment.

It should be noted that these types of restrictive measures to market access *can be* applied as long as they are specified in the schedules. In fact, they are the only type of restrictions that can be legitimately applied for the sectors where commitment is undertaken.

Article XVII (National Treatment)

National treatment in GATS is defined in the traditional GATT way as the non discriminatory application of domestic regulations between foreign and domestic services or service providers. Article XVII states that, in the sectors where a commitment is undertaken in the schedules and subject the conditions or limitations set out there each member “shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers”.

This requirement has been qualified in the following paragraphs of the Article. First, a member need not accord formally identical treatment to fulfil its obligation above. In other words, members are allowed to accord formally different treatment to the foreign services or service providers. However, the benchmark for “less favourable” treatment has also been established. Whether formally identical or formally different, a measure shall be considered as less favourable “if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to *like* services or service suppliers of any other Member.”

NT is a crucial obligation for the trade in services since in contrast to trade in goods, most restrictions lie within the national regulations. On the other hand, although Article XVII of GATS shares common concepts and similar obligations with the Article III of GATT, the transplantation of GATT Article III jurisprudence to the interpretation of GATS Article XVII, as the Panels and the AB has a tendency to do⁶⁰, is likely to produce interpretative difficulties due to the intangible character of services and other differences in wording of the two articles.⁶¹

One such difference is on the scope of the two Articles. While specific elements such as taxes, laws or regulations are counted in GATT Article III, the scope of the “no-less-favourable treatment” condition is defined as “any measures affecting trade in services” in GATS Article XVII. This literally very broad meaning was reinforced by the Panel in *EC-Bananas* case –which was upheld by the AB- that “any measure affecting the supply of a

⁶⁰ See the AB Report *EC- Bananas*, *supra* 16

⁶¹ Nu Thang VU (2006) “Interpreting GATS National Treatment Principle: Possibilities and Problems from Transplant from GATT” *Forum of International Development Studies* Vol:32 December:2006

service either directly regulating the supply of a service or governing other matters that affect trade in services” would fall within the scope of Article XVII of GATS.⁶² It is also important to note that no-less-favourable treatment requirement would apply to both services and service suppliers as made clear in Article XVII:2.

Another difference that raised concern among scholars was the uncertainty in the determination of “likeness”.⁶³ The mostly physical criteria which were developed in GATT jurisprudence to determine the likeness of two goods would not apply to services mainly due to the intangibility and instorability of services. Different criterion for the determination of likeness was suggested including inter alia the “end uses” approach or relying on United Nations Central Product Classification. Whatever criterion is selected, it seems that the peculiar nature of services allows the national regulators to create further regulatory distinctions which would make the determination of likeness quite difficult for a specific case.⁶⁴

Another problem which is likely to arise regarding the issue of likeness is whether the modes of supply should be taken into account or not. In the text of Article XVII, there has been no implicit or explicit mentioning of the concept of modes regarding the less-than-favourable treatment obligation which seems to ensure that services in different modes of supply can be compared in the consideration of likeness. Nevertheless, as we have seen above, the structure of schedules of commitments implies that national treatment commitments are mode-specific. Eventually, this creates another ambiguity for the interpretation of the Article.

A final noteworthy issue to be touched upon is the relationship between Articles XVI and XVII. In GATT, there is a clear distinction between the domains of border measures –like Article I or II or and internal measures –like Article III-. However, in GATS, since most restrictions to services trade stem from internal barriers, there is lack of clarity between the domains of market access and national treatment commitments.⁶⁵ In most cases, a measure restricting trade in services would be expected to fall within the scope of both Articles. The problem in such cases may be that, according to the scheduling methodology, commitments

⁶² *supra* 16

⁶³ MATTOO (1997) *supra* 56; ZDOUC *supra* 18; VU *supra* 61 and Markus KRAJEWSKI (2003) *National Regulation and Trade Liberalization in Services* Kluwer Law International The Hague, Netherlands, p 97

⁶⁴ See MATTOO (1997) for an illustrative example of the determination of likeness could be a hard task for a Panel.

⁶⁵ *Ibid*, p 7

with respect to a specific mode of services may not be the same in terms of market access and national treatment. Especially, when there is a commitment for national treatment but no commitment for full market access, there is the possibility that the national treatment obligation is undermined as there is still ambiguity if the host member can apply discriminatory market access restrictions through its internal regulations.⁶⁶

2.2.4 Sectoral Annexes

It had been agreed upon by the members that certain service sectors needed specific provisions. Naturally, only the sectors on which there was a compromise took place in the agreement. Those sectoral annexes included;

- Annex on Movement of Natural Persons Supplying Services under the Agreement which mainly aims at ensuring the rights of members to regulate movement of natural persons for supply of services regarding their entry, residence, citizenship or permanent employment and so on.
- Annex on Air Transport Services clarifies to which measures the Agreement applies regarding the air transport services and the exemptions.
- Annex on Financial Services⁶⁷ lays down specific disciplines on financial services giving the members an extra space for domestic regulation and recognition of each other's measures regarding financial services.
- Annex on Negotiations on Maritime Transport Services intended to leave the maritime transport services which had been a very sensitive issue in the negotiations out of the scope of MFN treatment at least temporarily, until the special negotiations on the issue succeeds.
- Annex on Telecommunications⁶⁸, which is the most comprehensive and the most interpreted annex of all, includes provisions on the non-discriminatory use of the telecommunications network as well as transparency and technical cooperation.

⁶⁶ See MATTOO (1997) for the discussion and an illustrative example of a possible conflict between market access and national treatment commitments.

⁶⁷ There is one more annex on financial services: The Second Annex on Financial Services which lays down the specific conditions of listing of MFN exemptions for financial services and modification of the commitments made in members' schedules.

⁶⁸ There is another annex on Telecommunications – Annex on Negotiations on Basic Telecommunications – setting out the requirement to start negotiations within a pre-determined period of time.

3. Main Features of the WTO Dispute Settlement System

Before starting our substantial discussion on the GATT-GATS relationship, it is worthwhile to briefly review some main features of the WTO Dispute Settlement as this system acts as the adjudicating body –the court- of the WTO and all the discussions in the rest of this work would be related to potential decisions coming out of this system.

3.1 Procedural & Formal Aspects of the Dispute Settlement in the WTO

The Dispute Settlement Body (DSB) is the formal body responsible for settling disputes in the WTO. It has been established with the WTO Agreement as a result of Uruguay Round and replaced the old dispute settlement system of the GATT era which was more dominated by diplomacy and politics.⁶⁹ It consists of representatives from each WTO Member and it is authorized to establish dispute settlement panels, adopt panel and AB Reports, monitor the implementation of its rulings and recommendations and authorize suspension of concessions under WTO Agreements if those rulings and recommendations are not respected.⁷⁰ The functions of the DSB are carried out in accordance with the Dispute Settlement Understanding which constitutes the Annex 2 to the WTO Agreement as well as the original dispute settlement Articles –XXII and XXIII- of GATT.

As we have stated, the unique character of the dispute settlement in the WTO is its compulsory character. The implementation of the decisions coming out of the DSB is closely monitored and an insistence on non-compliance may result in retaliation against the non-compliant Member. Moreover, the operation of the DSB under “negative consensus”⁷¹ principle makes the adoption of establishment of Panels and adoption of panel and AB reports almost automatic which is another element of effectiveness of the system.⁷²

The first stage of a dispute in WTO is consultations. Consultations are held in accordance with Article 4 of the DSU and they give the parties an opportunity to discuss the matter and to find a satisfactory solution without resorting to litigation. All legal claims which will be raised in the panel stage are first made during the consultations. If no mutually agreed

⁶⁹ Ernst-Ulrich PETERSMANN (1997) *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement*, Martinus Nijhoff Publishers

⁷⁰ David PALMETER, Petros MAVROIDIS (2004) *Dispute Settlement in the World Trade Organization: Practice and Procedure*, Cambridge University Press Second Edition, p 15

⁷¹ See explanation above *supra* 7

⁷² *Supra* 70, p 15

solution is reached within the pre-defined period for consultations, a request for the establishment of a panel can be made and accordingly a panel is established. It is to be noted, however, that a mutually agreed solution can be notified at any time during the stages of a dispute.

A panel is an *ad-hoc* body consisting of 3 panelists set up to resolve a particular dispute. A panel is expected to prepare and submit the panel report to the DSB which objectively evaluates the case in the light of WTO Agreements. – or covered agreements in WTO jargon- The rulings and recommendations in the panel report are binding on the parties to the dispute when the report is adopted in the DSB unless they are appealed by one of the parties.

In contrast, the Appellate Body (AB) is a permanent body of legal experts. Parties to the dispute may to the dispute to the appeal stage before the adoption of the panel report. 3 out of 7 AB Members are appointed to each dispute case. The AB can uphold, modify or reverse the legal findings of the panel. The rulings and recommendations of the AB are final and have to be complied by the respondent Member in the dispute.

If the defendant Member fails to comply with the recommendations, under the surveillance of the DSB, the defendant may offer adequate compensation to the complainant on mutually acceptable terms. If this does not happen, authorization of suspension of concessions equivalent to the injury given by the measure in scrutiny, can be requested from the DSB.

Table 3 Approximate Time Table for A WTO Dispute Settlement

60 days	Consultations
45 days	Panel set up and panellists appointed
6 months	Final panel report to parties
3 weeks	Final panel report to WTO members
60 days	Dispute Settlement Body adopts report (if no appeal)
Total = 1 year (without appeal)	
60-90 days	Appeals report
30 days	Dispute Settlement Body adopts appeals report
Total = 1 year 3 months (with appeal)	

Source: WTO Website

3.2 Main Principles Guiding Dispute Settlement in the WTO

Apart from the procedural aspects of the dispute settlement in the WTO, the DSU also lays down main legal principles guiding litigation process. Most of these principles take place in Article 3 of the DSU:

“Article 3: General Provisions

1. Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.
2. 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.
3. The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.
4. Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.
5. All solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements, including arbitration awards, shall be consistent with those agreements and shall not nullify or impair benefits accruing to any Member under those agreements, nor impede the attainment of any objective of those agreements.
6. Mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of the covered agreements shall be notified to the DSB and the relevant Councils and Committees, where any Member may raise any point relating thereto.
7. Before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be fruitful. The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort which this Understanding provides to the Member invoking the dispute settlement procedures is the possibility of suspending the application of concessions or other obligations under the covered agreements on a discriminatory basis vis-à-vis the other Member, subject to authorization by the DSB of such measures.
8. In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members

parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

9. The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.

10. It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious acts and that, if a dispute arises, all Members will engage in these procedures in good faith in an effort to resolve the dispute. It is also understood that complaints and counter-complaints in regard to distinct matters should not be linked.

11. This Understanding shall be applied only with respect to new requests for consultations under the consultation provisions of the covered agreements made on or after the date of entry into force of the WTO Agreement. With respect to disputes for which the request for consultations was made under GATT 1947 or under any other predecessor agreement to the covered agreements before the date of entry into force of the WTO Agreement, the relevant dispute settlement rules and procedures in effect immediately prior to the date of entry into force of the WTO Agreement shall continue to apply.

12. Notwithstanding paragraph 11, if a complaint based on any of the covered agreements is brought by a developing country Member against a developed country Member, the complaining party shall have the right to invoke, as an alternative to the provisions contained in Articles 4, 5, 6 and 12 of this Understanding, the corresponding provisions of the Decision of 5 April 1966 (BISD 14S/18), except that where the Panel considers that the time-frame provided for in paragraph 7 of that Decision is insufficient to provide its report and with the agreement of the complaining party, that time-frame may be extended. To the extent that there is a difference between the rules and procedures of Articles 4, 5, 6 and 12 and the corresponding rules and procedures of the Decision, the latter shall prevail.”

As it is seen, Article 3 sets out the principles on which the dispute settlement is carried out in a very detailed and descriptive manner. Some of those principles directly affect the interpretation process of the covered agreements by Panels or the AB.

Particularly, Paragraph 2 of the Article states that the Dispute Settlement Mechanism “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.*” Thus, it creates a link between interpretation process in WTO Dispute Settlement and customary rules of interpretation in public international law. The paragraph further states that “recommendations and rulings of the DSB *cannot add to or diminish the rights and obligations* provided in the covered agreements.” which is another pivotal provision in interpretation of WTO Agreements as well as determination of the role of treaties outside the WTO in this interpretation.

Another Article that is relevant for interpretation purposes of the Panel is Article 7 of the DSU which reads:

“Article 7: Terms of Reference of Panels

1. 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).”
2. Panels shall address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute.”

Article 7 of the DSU requires that a Panel is bound to address only the measures and claims referred by the complainant in its panel request. Furthermore, the Panel is bound to address “relevant provisions in any covered agreement or agreements cited by the parties to the dispute”. It is suggested the last expression in Article 7 of the DSU effectively restricts the applicable law in a WTO dispute to covered agreements and any other agreements outside the WTO system cannot be pronounced by the Panel.⁷³

While the Panels made controversial interpretations of this paragraph⁷⁴, we see nothing in this paragraph which precludes the Panel from referring to law other than covered agreements. Rather, the paragraph lays down a positive obligation on the Panel to address relevant provisions in covered agreements. However, whenever necessary, the Panel also has a right to invoke non-WTO law to interpret WTO Law and to actually determine the scope of rights and obligations of Members under covered agreements as stipulated in Article 3.2 of the DSU. Indeed, an opposite interpretation would not only contradict Article 3.2 but also the Panel’s

⁷³ See MARCEAU, *infra* 162, p 763 or BOURGEOIS & SOOPRAMANIEN, *infra* 150, p 335

⁷⁴ In *Korea-Government Procurement*, the Panel when assessing the applicability of the principles of international law on the negotiation of treaties, made the observation that: “The purpose of the terms of reference is to properly identify the claims of the party and therefore the scope of a panel's review. We do not see any basis for arguing that the terms of reference are meant to *exclude* reference to the broader rules of customary international law in interpreting a claim properly before the Panel.” The Panel Report on *Korea- Measures Affecting Government Procurement*, WT/DS163/R, p 185, footnote 755 On the other hand, the Panel in *EC- Large Civil Aircraft* commented that “Article 7.2 of the DSU requires panels to “address the relevant provisions in any covered Agreement or Agreements cited by the parties to the dispute.” The ‘covered Agreements’ cited by the United States in document WT/DS316/2 include the DSU, the GATT 1994 and the SCM Agreement. As the 1992 Agreement is not a covered Agreement cited by the United States in document WT/DS316/2, or contained in the list of covered Agreements in Appendix 1 to the DSU, or one of the instruments included in the GATT 1994, we do not have jurisdiction to determine of the rights and obligations of the parties under the 1992 Agreement.” The Panel Report on *European Communities and Certain Member States- Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, p 288 At the appeal stage, while the AB did not explicitly reverse the finding by the Panel, it did that implicitly by not rejecting the applicability of the “1992 Agreement” categorically as the Panel did. Rather, the AB investigated the relevance of the 1992 Agreement for the specific claim that was raised by one of the parties and found that the Agreement was not relevant. The AB Report on *European Communities and Certain Member States- Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, p 360-366

obligation to make an “objective assessment” of the matter including an objective assessment of the facts of the case which is set forth in Article 11 of the DSU.

The last DSU Article we are going to review is Article 11 which reads:

“Article 11: Function of Panels

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.”

While this Article lays a basic obligation for the Panel to make an objective assessment of the case, including an objective assessment of the facts in the light of the relevant WTO Agreements, some important concepts and principles regarding the dispute settlement proceeding, such as burden of proof, standard of review or *prima facie* evidence have been grounded in this Article.⁷⁵

In general, it should be noted that despite the fact that the DSM of the WTO has evolved into a judicial system from a more diplomatically/politically dominated system in the GATT era, reaching a mutually agreed solution through all means available is still the basic goal of the system. This preference has been clearly revealed in Article 3.7 of the DSU that has been cited above and repeated in a number Articles.⁷⁶ Consultations, mediation and good offices are encouraged and during the dispute proceedings, Members may withdraw their complaints at any time and notify a mutually agreed solution to the DSB.⁷⁷

⁷⁵ PALMETER & MAVROIDIS, *supra* 70, p 145

⁷⁶ Reference to a mutually agreed solution take place in four different places in the DSU.

⁷⁷ Article 5.3 of the DSU. See also PALMETER & MAVROIDIS, *supra* 70, p 86

PART II: EXPLORING THE RELATIONSHIP BETWEEN GATT AND GATS

EXPLORING THE RELATIONSHIP BETWEEN GATT AND GATS

1. Identifying the Relationship Between GATT and GATS Provisions

Interaction between GATT and GATS provisions can be analysed under two different approaches.⁷⁸ First, one may focus on the subject-matter of a particular treaty or rule. This would mean looking at what the treaty/rule is designed to regulate. So, the main task would be to clearly define the subject matter of a treaty/rule. For instance, Article 30 of the Vienna Convention on Law of Treaties (VCLT) appears to adapt this approach as it offers a conflict resolving rule regarding the “application of successive treaties relating to the *same subject matter*” (italics added). Based on this provision, it can be argued that if two successive treaties do not relate to the same subject matter, then Article 30 would not apply as presumably there is no need for that.⁷⁹ Under this approach, it is at least implicitly assumed that if the subject matters of two treaties or rules are distinct, like for instance a treaty on environmental protection and a treaty on human rights, then either they are mutually exclusive or even if they may overlap, a conflict between the two is not likely.

However, as the ILC also argues, taking into account the current fragmentation level in the international public law and the depth of treaties dealing with different subject matters, it would be hard to draw clear boundaries between the subject matters of such treaties. A treaty dealing with environmental protection might have significant trade implications and vice versa. In this sense, a strict adherence to the “same subject matter” criterion would potentially pose problems in identifying the true relationship between the provisions of two treaties.

Naturally, it could be argued, as Vierdag does, that the Article 30 of VCLT is to be interpreted flexibly in practice, allowing the Article to be applied to the cases where the application of two different rules to the same set of facts of actions leads to incompatible results.⁸⁰ Thus,

⁷⁸ United Nations International Law Commission “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law” Report of the Study Group finalized by Martti Koskenniemi

⁷⁹ Christopher BORGES (2005) “Resolving Treaty Conflicts” *The George Washington International Law Review*, Vol 37 No:3

⁸⁰ E.W. VIERDAG (1989) “The Time of the ‘Conclusion’ of a Multilateral Treaty” *British Yearbook of International Law*, Vol:60

Article 30 could be invoked to resolve the incompatibility between the provisions of two different treaties.

A second approach would be focusing on the legal subjects bound by the rules. In public international law, legal subjects are naturally sovereign states and the measures taken by those states related to a specific treaty. If a legal subject is bound by two treaties simultaneously, then this could be regarded as a *prima facie* evidence that the two treaties interact. Under this approach, legal analysis is to be made at the measure and provision level without giving priority to the boundaries regarding subject matters. If for instance, we take the example of interaction of an environmental agreement and a multilateral trade agreement, for a given measure, identifying whether the measure is an environmental measure or a trade measure would not be a prerequisite for the analysis. (although there might be cases where such an identification can easily be made.) Even if a measure is an environmental measure taken solely for environmental purposes, it might possess aspects related to trade and thus can be scrutinized under trade agreement for those aspects.

For the case of GATT and GATS relationship, discussion on these two approaches was inherent in the debate on the nature of overlaps between two agreements. There have been statements by WTO members that the coverage of the two agreements were intended to be distinct from each other and hence an overlap of the two agreements should be avoided.⁸¹ For instance, according to the EC;

“...there was no intention to create an overlap between the GATT and the GATS and certainly not with respect to the core provisions of both treaties: most-favoured-nation treatment and national treatment. The *raison d'être* of the GATS was that trade in services could not be covered by the GATT. Hence it was the intention of the negotiators in the Uruguay Round to create an instrument that would be distinct *ratione materiae* from, and complementary to, the GATT. The GATT was concerned with the treatment of imported products and not with the treatment of natural and legal persons. The GATS was concerned with the treatment of services and service providers.”⁸²

In addition, the EC argued that;

⁸¹ Such arguments were set forth by European Communities in the *EC- Bananas* case and by Canada in the *Canada-Periodicals* case.

⁸² The Panel Report on European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/USA, p 338

“that the negotiators of the GATS wanted to create an instrument of limited coverage that would be distinct *ratione materiae* from the GATT 1994, and that the simultaneous application of the GATT 1994 and the GATS leads to a clear conflict between the rights of one Member under one agreement and the rights of another Member under the other agreement. In the view of the European Communities, measures targeted at trade in a certain good, such as the imposition of an anti-dumping duty, a selective safeguard measure or a prohibitive tariff, could have repercussions on service suppliers, in particular, distribution services, and could be condemned under the GATS. This would, in turn, impede the Member's right to take measures under the GATT.”⁸³

These views were accompanied by EC's statement that the same measure cannot be scrutinized both under GATT and GATS.⁸⁴ Similar arguments were laid down by Canada in *Canada-Periodicals* and *Canada - Autos*⁸⁵

It is apparent from these statements that at least for some WTO members, the subject-matters of GATT and GATS were perceived to be mutually exclusive and there had to be clear boundaries between their coverages. A particular measure could only be examined under one of these agreements. A seemingly systematic concern behind these arguments is that since there is no explicit conflict resolution rule between GATT and GATS in any of the WTO legal texts, the cases of overlapping obligations which likely to lead to conflicts could undermine the predictability of the WTO system and cases of conflict could hardly be resolved since there is no priority defined between the two obligations.

Nevertheless, such arguments were reversed by the Panel and the AB decisions⁸⁶ and it has already been clearly established by Panel and AB decisions that the domains of GATT and GATS are not mutually exclusive. They may well overlap and as GATT and GATS are originally designed to regulate two different domains, a strict “same subject matter” criterion would be inappropriate to deal with such cases of overlap.

It is true that these two approaches are not mutually exclusive alternatives to each other. Both ways of thinking can be applied to the same case and it may be likely that both will indicate the same direction. However, for the reasons we have just explained, we will follow the second approach throughout the rest of this work.

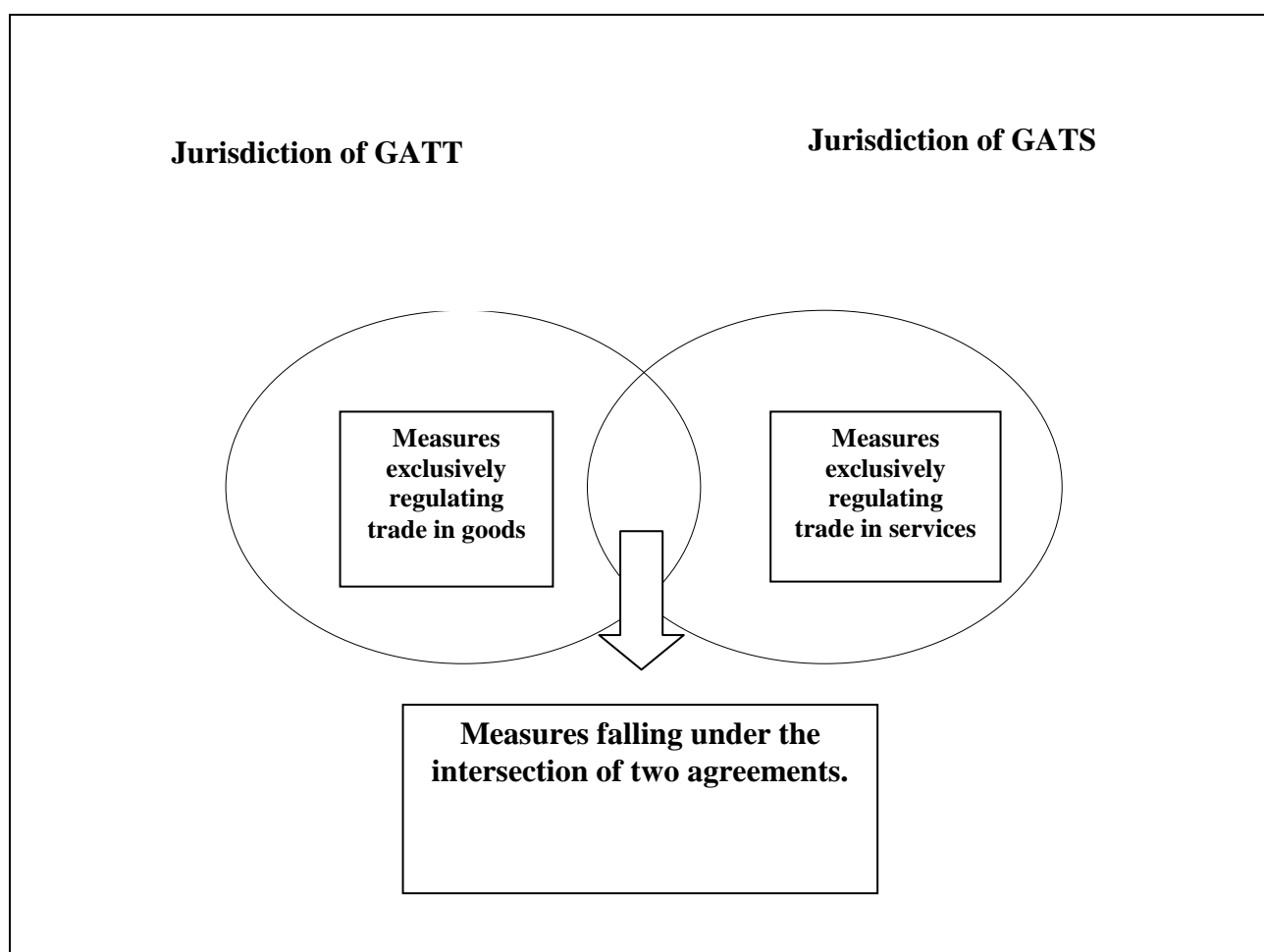
⁸³ The Appellate Body Report in *EC – Bananas supra* 16, p18

⁸⁴ The Appellate Body Report *EC – Bananas supra* 16, p17

⁸⁵ Appellate Body Report on *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R

⁸⁶ *Supra* 16

Table 4 Overlapping Jurisdictions of GATT and GATS



2. Types of Relationship Between GATT and GATS Provisions

There are at least three possible types of relationship between GATT and GATS provisions:

2.1 No Interaction

First, a given measure falls under the scope of only one of the agreements, i.e; it is either a measure solely related to the trade in goods or trade in services. A quantitative restriction on the imports of a specific product from a specific member would be a typical measure to be examined under GATT but without any other complications, no analysis under GATS is warranted. Naturally, such cases do not constitute a concern for the current study as there is no interaction to be examined.

2.2 Accumulation

Secondly, a measure may fall under the scope of both GATT and GATS but the obligations stemming from the two agreements may be in the same direction, i.e, they may overlap and accumulate at the same time. In general, such cases are not uncommon to WTO. For instance, Annex 1A Agreements which are elaborations of GATT Articles⁸⁷ are designed to accumulate with their “parent” texts. They regulate the same subject matter in a more comprehensive manner and with a few exceptions, their provisions are in the same direction with that of their parent articles.

In GATT and GATS context, such cases are also likely to occur. As an example, Article III:4 of GATT requires national treatment for “all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, *transportation, distribution* and use.” (italics added) This means transportation and distribution, which are generally regarded as services and thus would be expected to be under the coverage of GATS, are a priori included within the coverage of GATT Article III as long as they are related to “[t]he products of the territory of any contracting party imported into the territory of any other contracting party”.

2.3 Conflict

Third and final type of relationship is a conflict between two provisions. This means that the two rival provisions apply to the same measure but some kind of inconsistency occurs as a result of this simultaneous application. In other words, the two provisions do not accumulate, i.e., are not in the same direction.

Apparently, there are two pre-conditions to speak about a conflict. The first one has already been mentioned above. It is the overlap of the subject matters. Two rival provisions which are in force should be applicable to the same measure simultaneously.

The second pre-condition is not related to the subject matter of the two provisions but to the legal subjects bound by those provisions. It should be the case that there are at least two legal subjects bound by one of the provisions and at least one of them should be bound by both of the provisions.

⁸⁷ Such a relationship exist between GATT Article VI and Anti-Dumping Agreement, Article VII and Customs Valuation Agreement, Article IX and Agreement on Rules of Origin. Article XVI and Agreement on Subsidies and Countervailing Measures, Article XIX and Safeguards Agreement.

In GATT vs GATS context, this would mean that two provisions –provision X and Y- of the respective agreements apply to a measure taken by a WTO member country A. Nevertheless, for a conflict to arise, it is not sufficient that country A is bound by both provision X and Y. Rather, there should be a second country B which is in a position to claim that a benefit that is accrued to it as a result of being a party to either GATT or GATS has been undermined. Otherwise, it would not be possible to talk about a conflict between provision X and Y which only binds country A. On the other hand, in a hypothetical situation where country is bound by both X and Y but country B is bound by only one of them, there could still be a space that a conflict occurs between particular provisions of the two treaties.

As we have mentioned before, there has been no WTO dispute case where a conflict between GATT and GATS has officially been labelled. However, as we have discussed in the introductory part, there have been cases where the possibility of such a conflict has been examined. We are going to review these cases in detail in Part VII.

Moreover, there have been WTO dispute cases where the possibility of conflict between agreements other than GATT and GATS has been investigated. We will review some of these cases in the next section when we will examine the definition of norm conflict in the WTO context.

PART III: DEFINING CONFLICT OF NORMS

DEFINING CONFLICT OF NORMS

Conflict of norms is an essential concept in public international law. Unlike municipal law, where a conflict between two norms is hardly seen or easier to resolve when faced, conflict is a real phenomenon in public international law as there is a complex network of international norms and the norms are created at different contexts and through the mutual interaction of often conflicting willpowers.

In this context, to ensure consistency and coherence in public international law, it is important to find ways to deal with such conflicts: To avoid them if possible and if not possible to resolve them in a way that will preserve the intentions of the parties as much as possible.

However, it is clear that the first step before taking any action should be to properly identify a conflict. Misidentification of a conflict may lead to unintended consequences such as an unnecessary undermining of the parties' intentions. For this purpose, it is essential to have a clear definition of conflict of norms.

The aim of this section, for our practical purpose, is to explore the definition of conflict in both practice (case-law) and in theory (in doctrine) of public international law. While doing this, our focus will naturally be on the WTO Law. After briefly reviewing functions of norms in public international law, we will focus on the textual definition of the word "conflict" to be applied in international law. We will then look at the views of the scholarship on definition of a conflict. Finally, we will review the case law of ICJ and WTO in order to understand how different legal bodies actually interpreted the conflict situations.

1. Functions of Norms in Public International Law

Before starting our discussion on the definition of conflict of norms, it is important that we review the functions of norms in international public law. This is required since the type of the norm is going to be an important instrument in our discussion on conflict of norms.

In principle, there are four types of norms in public international law⁸⁸:

⁸⁸ PAUWELYN *infra* 107, p 158

- **Command:** These are norms that impose an *obligation to do something*, i.e. prescriptive norms, “must do” or “shall” norms or norms imposing a “positive” obligation. It is suggested that in the WTO context, examples of commands are relatively rare.⁸⁹ Indeed, some most important articles of GATT and GATS such as Article I, II, III are of prohibitive nature. However, there are clear commands in GATT such as Article X and in GATS such as Article III. Many articles in TRIPS Agreement that determine the required level of protection for intellectual property rights are also commands.
- **Prohibition:** These are norms that impose an *obligation not to do something*, i.e. prohibitive norms, “must not do” or “shall not” norms or norms imposing a “negative” obligation.
- **Exemption:** These are norms that grant a *right not to do something*, i.e. exempting norms or “need not do” norms. The exception articles of GATT – Article XX and XXI and GATS – Article XIV – are examples to exemptions.
- **Permission:** These are norms that grant a *right to do something*, i.e., permissive norms or “may do” norms. For example, Article XXIV of GATT explicitly allows members to form a customs union or a free trade area which is a derogation from the MFN principle. In addition, provisions of some Annex 1A Agreements, such as SPS, Agreement on Pre-Shipment Inspection explicitly allows members to take some precautionary measures which may be trade restrictive under some pre-defined conditions and thus are of the nature of permission.

Both exemptions and permissions, in general and in the WTO context are usually conditional in the sense that utilisation of the right granted is only possible if certain requirements are met.

2. Conflict of Norms in Public International Law

Before going further, it is crucial that we clearly define what we understand from the term “conflict of norms”. At the most basic level, we can obtain a general idea by looking at the dictionary definitions. For instance, Webster’s New World Law Dictionary defines “the conflict of law(s)” as a “conflict between the laws of two or more states or countries that

⁸⁹ *Ibid*, p 160

would apply to a legal action in which the underlying dispute, transaction, or event affects or has a connection to those jurisdictions”⁹⁰

Naturally, such dictionary definitions of “conflict of laws” are primarily relevant for a conflict between two norms in municipal law and conflict in public international law has some certain nuances compared with the municipal law which will also affect the concept of conflict. In other words, although both “laws” and “treaties” are two kinds of legal norms, conflict within the kinds may not mean the same thing: Normally, one would not expect a conflict between two norms within the same municipal law. Except some extraordinary political changes, they are the declarations of intention of the same sovereign authority. In international law, however, the situation is quite different. There is no single law-making authority and treaties which are the main sources of international law are concluded at different platforms often having no interaction with from each other. In Wolfram Karl’s words;

“Neither are conflicts between norms confined to international law, but they are more frequent and more difficult to solve here on the account the decentralized law-making structure and in the absence of common norm-setting agencies which are characteristic of the international legal order.”⁹¹

Similar, Jenks describes conflict of norms in international law as an inevitable consequence;

“In the absence of a world legislature with a general mandate, law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law. These instruments inevitably react upon each other and their co-existence accordingly gives rise to problems which can be conveniently described, on the analogy of the conflict of laws, as the conflict of law-making treaties.”⁹²

While both Karl’s and Jenks’ arguments are right in understanding the peculiar nature of conflicts in public international law, it should also be underlined that international law does not have some of comforts that municipal law has, in preventing and resolving conflict: In municipal law, a strict hierarchy among norms is usually defined and in most cases, a division

⁹⁰ *Webster’s New World Law Dictionary* (2006), p 88

⁹¹ KARL *infra* 97, p 936

⁹² Wilfred JENKS (1953) “Conflict of Law-Making Treaties” 30 *British Yearbook of International Law* 401, p 403

of work between different norms at the same level as well the judicial body that is authorised to resolve conflicts is codified.

Besides the above-mentioned difficulties regarding conflict of norms in public international law, there is no written definition of conflict in any legal text that may shed light on other cases in international law. Even though there are provisions dealing with the cases of conflict such as the Article 103 of UN Charter⁹³ or the Articles 30 and 31 of VCLT, in none of these legal texts, there is a definition of conflict of norms.

Under these circumstances, in our search for an appropriate definition of conflict for our work, it will be proper to have a look at two sources: One is the doctrine and the other one is the jurisprudence or “the case law” of the international legal bodies regarding the definition of conflict.

3. Conflict of Norms in Doctrine

The scholarship have divergent views on the definition of conflict in international law. The underlying main difference between different views is on how broad this definition should be. While one camp defends a strict definition of conflict, the other camp goes for a broader definition. Now, we should analyze in detail these two positions and the underlying reasons for them.

3.1 A Strict Definition of Conflict

Wilfred Jenks pioneered the literature on conflict of norms in international law by his seminal work “Conflict of Law Making Treaties” in 1953⁹⁴. His approach in this work laid down the fundamentals of the prevailing “narrow definition of conflict” in international public law and the definition of conflict he work has been cited numerous times including judicial decisions of adjudicating bodies of international organisations.

As mentioned above, Jenks sees the potential conflict of norms in international law as an inevitable phenomenon. Nevertheless, the fact that conflicts are inevitable does not mean that

⁹³ Article 103 states that “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

⁹⁴ JENKS, *supra* 92

they are to be seen as “normal”. On the contrary, conflict is something to be avoided. He gives examples from “the presumption against conflict” as a principle of statutory interpretation in national law and contract law. While admitting that the presumption against conflict is less strong in respect of law-making treaties than in the case of national legislation, he argues that the presumption against conflict also applies to the treaty law and conflicts should be avoided in international public law, too. In line with this approach, he offers the following definition of conflict:

“A divergence between treaty provisions dealing with the same subject or related subjects does not in itself constitute a conflict. Two law-making treaties with a number of common parties may deal with the same subject with different points of view or be applicable in different circumstances or one of the treaties may embody obligations more far reaching than, but not inconsistent with, those of the other. *A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.*”⁹⁵

According to Jenks’ definition, a conflict may only occur between two mutually exclusive obligations. If for instance, one obligation is stricter than the other one on the same subject matter, there is no conflict as it is possible to abide by both obligations simultaneously by following the stricter obligation. As such, it should be noted that under Jenks’ approach, a conflict is possible only between the first two types of norms described in Section 2, namely, commands and prohibitions. On the other hand, by this definition, a conflict between exemptions and permissions at one side and any other type of norm at the other side *is technically not possible* since the option of giving up right by the exemption or permission and following the other norm is available.

Nevertheless, Jenks himself is aware of the problems that this definition is likely to bring about. He admits that;

“A divergence which does not constitute a conflict may nevertheless defeat the object of one or both of the divergent instruments. Such a divergence may, for instance, prevent a party to both of the divergent instruments from taking advantage of certain provisions of one of them recourse to which would involve a violation of, or failure to comply with, certain requirements of the other. A divergence of this kind may in some cases, from a practical point of view, be as serious as a conflict; it may, for instance, render inapplicable provisions designed to give one of the divergent instruments a measure of flexibility of operation which was thought necessary to its practicability. Thus, while a conflict in the strict sense of direct

⁹⁵ *Ibid*, p 426

incompatibility is not necessarily involved when one instrument eliminates exceptions provided for in another instrument or, conversely, relaxes the requirements of another instrument, the practical effect of the co-existence of the two instruments may be that one of them loses much or most of its practical importance.”⁹⁶

This long citation, beyond doubt, reveals that Jenk’s definition ignores situations which are “as serious as conflict” and allows the cases where “one of the instruments loses much or most of its practical importance” by not recognising such cases as conflicts. In our view, this can be regarded as another way of stating that the definition systematically ignores certain types of conflict.

After Jenks, there have been a number influential figures who adapted a similar approach to the definition of conflict. For instance Wolfram Karl, under the “Conflict Between Treaties” title of the “*Encyclopedia of Public International Law*”, goes on the same line by stating that “technically speaking, there is a conflict between treaties when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously”⁹⁷.

Similarly, Friedrich Klein followed the strict definition approach in “*Wörterbuch des Völkerrechts*”⁹⁸ by acknowledging that the situations of treaty conflict are only practically relevant when the two provisions, in particular obligations, existing in two international treaties, contradict with each other in a manner which cannot be resolved.⁹⁹

More recently, Marceau¹⁰⁰ who writes on the conflict situations between WTO Agreements and Multilateral Environment Agreements, after admitting that a conflict can be defined narrowly or broadly, continues her analysis with a narrow definition based on the apparent reason that WTO adjudicating bodies have preferred such a definition.

The underlying argument of the advocates of a narrow definition of conflict is, as Jenks argues, “the presumption against conflict” and the need to “promote the coherence of international legal order”. Often in analogy with the municipal law, conflict between norms is

⁹⁶ *Ibid*, p 426

⁹⁷ Wolfram KARL, “Conflicts between Treaties” in BERNHARDT, Rudolp (eds.) *Encyclopedia of Public International Law*, North-Holland, Amsterdam, 1992, Vol:IV p935-941,

⁹⁸ Dictionary of International Law

⁹⁹ Friedrich KLEIN, (1962) “Vertragskonkurrenz” in Karl Strupp and H.J. Schlohbauer (eds.) *Wörterbuch des Völkerrechts*, Berlin: De Gruyter, p555

¹⁰⁰ Gabrielle MARCEAU (2001) “Conflict of Norms and Conflict of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties”, *Journal of World Trade*, 35 (6), 1081-1131

seen as an abnormal situation that is to be avoided with the presumption that the will of the sovereign states cannot be in different directions when signing different treaties. We will touch upon this aspect in the forthcoming section.

3.2 A Broader Definition of Conflict

The eminent German legal theorist, Karl Engisch, although not writing on international law, has been one of the earliest contributors to a broader definition which inspired the later advocates of this approach. When defining conflict, Engisch refers to the cases where “a given type is at the same time prohibited and permitted, or prohibited and prescribed, or prescribed and not prescribed [o]r if incompatible ways of conduct are prescribed at the same time”¹⁰¹ He also includes in his definition the cases where a conduct appears to be prohibited and permitted at the same time.

Hans Kelsen, who is one of the most influential legal scholars of the 20th century also adopted a more flexible approach to the definition of conflict, especially in his more recent writings.¹⁰² In one of his later essays, he defined the norm conflict;

“A conflict between two norms occurs if in obeying and applying one norm, the other one is necessarily or possibly violated.”¹⁰³

Again, in his *General Theory of Norms* dated 1979, he further clarified that;

“If one has to recognize that ‘prescribing’ and ‘permitting’ constitute two different normative functions, one cannot deny that a permission and a prescription mutually exclude each other”¹⁰⁴

¹⁰¹ Karl ENGISCH *Die Einheit der Rechtsordnung* (1935) p 46 quoted in Erich VRANES, (2006) “The Definition of ‘Norm Conflict’ in International Law and Legal Theory” *The European Journal of International Law* Volume:17 No:2, p 406

¹⁰² Kelsen, through his earlier writings, was influential on the settling down of a narrow definition. However, in 60’s, it is observed that Kelsen gave up the idea that pure logical principles (such as the basic principles of non-contradiction or deductive inference) cannot be applied directly to norms. An important result of this admittance for conflicts of norms is that there is no need to be a “logical contradiction” between two norms for us to accept that they are conflicting. In other words, the two norms do not have to be “mutually exclusive” in order to constitute a case of conflict. Vranes (see below) starts from this later point of stance of Kelsen to assert that not only conflicts between obligations but also between obligations and permissions are possible. See also Bruno CELANO, “Norm Conflicts: Kelsen’s View in the Late Period and a Rejoinder” in *Normativity and Norms: Critical Perspectives on Kelsenian Themes* (eds.) Stanley L. PAULSON & Bonnie Litschewski PAULSON, Oxford University Press, p 343-359 for a critical assesment of Kelsen’s views on this subject.

¹⁰³ Hans KELSEN, (1962) “Derogation” in *Essays in Jurisprudence in Honour of Roscoe Pound*

¹⁰⁴ Hans, KELSEN *Allgemeine Theorie der Normen* (1979) quoted in VRANES, (2006), *supra* note 7, p 402

Similarly, although not explicitly writing on the “permission-prohibition” aspect, Sir Hersch Lauterpacht¹⁰⁵ and Sir Humphrey Waldock¹⁰⁶ also apparently have a rather broader definition of conflict in their minds.

More recently, Pauwelyn¹⁰⁷, Bartels¹⁰⁸ and Vranes¹⁰⁹ made significant contributions to the issue of norm conflict in public international law all being strong advocates of a broader definition of conflict. Pauwelyn argues that all types of inconsistencies should be regarded as conflict:

“Notwithstanding the varying definitions of conflict set out earlier, adopted by different authors, it is difficult to find reasons why a conflict or inconsistency of one norm *with another norm* ought to be defined differently from a conflict or inconsistency of one *norm with other types of state conduct* (e.g., wrongful conduct not in the form of another norm) *Essentially, two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to a breach of the other*¹¹⁰.” (italics in original) In other words, if obedience to or application of one norm leads to or may lead to a breach of the other, then there is a conflict between these two norms.

Vranes also follows a similar path and focuses on the breach of norms which was, he argues, originally introduced by Kelsen. After having discussed the arguments for a wider definition extensively by both referring to the legal theory and philosophical background, Vranes’ final definition of conflict of norms is as follows:

¹⁰⁵ Lauterpacht, commenting on the Article 20 of the Covenant of the League of Nations which mandates that “the Covenant abrogates all obligations and understandings which are inconsistent with the terms of “[it]” includes “not only patent inconsistency appearing on the face of the treaty... but also what maybe called potential or latent inconsistencies” in his definition of the word “inconsistency”. See Hersch LAUTERPACHT (1936) “The Covenant as the ‘Higher Law’” *British Yearbook of International Law* 54, p 58

¹⁰⁶ During the work of the International Law Commission on drafting the VCLT, Waldock, speaking on the term “conflict” holds that “[t]he idea conveyed by that term was that of a comparison between two treaties which revealed that their clauses, or some of them, could not be reconciled with one another.”; *Yearbook of the International Law Commission* (1964), Vol:1 p 125

¹⁰⁷ Joost PAUWELYN *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003) Cambridge University Press, Cambridge, UK

¹⁰⁸ Lorand BARTELS (2008) “Treaty Conflicts in WTO Law” in in *At the Crossroads: The World Trading System and the Doha Round* (eds.) Stefan Griller Springer Verlag, Wien

¹⁰⁹ Erich VRANES (2006) “The Definition of Norm Conflict in International Law and Legal Theory” *The European Journal of International Law* Vol:17 No:2, p 395-418

¹¹⁰ “The word breach is used here interchangeably with ‘violation’, ‘incompatibility’ or ‘inconsistency’.” (footnote in original)

“There is a conflict between two norms, *one of which may be permissive*, if in obeying or applying the norm, the other one is necessarily or possibly violated.”¹¹¹ (italics in original)

Vranes thus makes a distinction between unilateral and bilateral conflicts as well as between potential and necessary conflicts. If compliance with norm A leads to a violation of norm B and compliance with norm B leads to a violation of norm A, then such a conflict is to be called a “bilateral and necessary” conflict. On the other hand, if compliance with norm A leads to a violation of norm B but the reverse is not true, then such a conflict is to be called a “unilateral or potential” conflict. The former is an example of a conflict between two obligations (prohibitions or commands) while in the latter one side of the conflict is either a permission or an exemption. For Vranes, the latter type of conflicts are only potential and “can be avoided by refraining from asserting the explicit permission.”¹¹² It should be noted that Vranes’ definition resembles the definition of the late Kelsen.

Finally, it should be noted that the recent ILC report on the fragmentation of international law also clearly adopted a wider approach by stating that the report “adopts a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem”¹¹³.

4 Conflicts in the Jurisprudence of International Adjudicating Bodies

4.1 The UN Charter and ICJ Case Law

As we have mentioned above, both UN Charter and VCLT have explicit provisions to deal with some particular cases of conflict. The Article 103 of the UN Charter states that;

“In the event of a conflict between the *obligations* of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”

While the wording of the Article 103 seems to approve that a conflict is only likely between two obligations, but not between obligations and rights, it is hard to suggest that the International Court of Justice (ICJ) case law supports this argument.

¹¹¹ VRANES *supra* 109, p 415

¹¹² *Ibid.*, p 416

¹¹³ ILC Report of The Study Group of the ILC finalized by Martti Koskenniemi “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”, 2006, p 19

In fact, there have not been many cases which would satisfactorily shed light on the definition of conflict. The often cited PCIJ cases which were concluded before the finalisation of the VCLT, such as the Oscar Schinn Case or the Austro-German Customs Union cases are far from successfully shedding light to the problem of definition. However, we believe that one relatively recent case offers some important insights. This was the Lockerbie case in front of the ICJ.

4.1.1 The Lockerbie Case

The Lockerbie case is interesting in the sense that, at least based on the allegations, it was a case of explicit right vs obligation contradiction. While one side of the dispute claimed that it has an explicit right to follow a certain conduct given by an international convention to which both sides are parties to, the other side claims that a UN Security Council Resolution obliges the other side to follow a conduct that is mutually exclusive with the first one.

The case was about the destruction of the flight 103 of the Pan American Airways that took place in 1988 near the Scottish town Lockerbie where all 243 passengers as well as 16 crew members died. The investigations on the matter revealed that the reason for the destruction was a criminal act, namely a bomb attached to the plane before it took off. The United States and the United Kingdom (UK) alleged that it was two Libyan nationals who were responsible for the crime and they put pressure on Libya to surrender these two Libyan nationals to allow prosecution in the UK. Libya took the case to the ICJ with the request that the Court decided that the UK breached its obligations under international law and cease its threats to Libya as well as violations of sovereignty and territorial integrity of Libya.

After unilateral US and UK efforts to seize the Libyan nationals for trial failed, they took the matter to the UN Security Council and obtained the Resolution 731 (1992). After referring to the US and UK requests addressed to Libya “in connection with the legal procedures related to the attacks”, the Resolution;

“urges the Libyan government immediately to provide a full and effective response to those requests so as to contribute to the elimination of international terrorism.”

The UK and the US managed to obtain two more resolutions from the Security Council which both made reference to the Resolution 731, namely Resolutions 748 and 883. However,

unlike Resolution 731 these Resolutions were taken within the Chapter VII of the UN Charter.

On the other hand, the Libyan side relied upon the “Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation” (Montreal Convention) The Article 5.2 of the Montreal Conventions states that;

“Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1... in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.”

Paragraph 1 of the same Article sets forth the cases where a Contracting State should establish its jurisdiction over an offence which includes the cases when the offence is within its territory or when the offence is committed against the aircraft registered in that State. Similarly, Article 7 of the Convention obliges the Contracting State “in which the alleged offender is found”, “to submit the case to its competent authorities”, “if it does not extradite him”.

Moreover, the Article 14.1 of the same convention states that;

“Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with Statute of the Court.”

Based on this legal background, Libya claimed that it had an “explicit right” not to extradite the accused Libyan nationals which are found in its territory and to pursue prosecution in Libya.¹¹⁴ Libya also asserted that the Montreal Convention was *lex posterior* and *lex specialis* vis-a-vis the UN Charter and the UK and US efforts in the Security Council were to circumvent Libyan rights under the Convention.

Libya’s argument that Article 5.2 and Article 7 constitutes an explicit right, which was also accepted by the UK, is true. Although these Articles do not have “mays”, it should be underlined that they have “if clauses”. In other words, they give the Party State a discretion on

¹¹⁴ The Verbatim Record of the Oral Presentation made by the Libyan Arab Jamahiriya, 17 October 1997, p35-44

whether to extradite the alleged offender or not and sets out an obligation if the Party State chooses to extradite him.

The UK first based its defence on the argument that the “rights” claimed by Libya under the Montreal Convention actually did not exist. Second, UK argued, if those rights existed at all, they would be prevailed by the UN Security Council decision No:731 and other. In UK’s defence, there is a section named “the Obligations Imposed by the Security Council Prevail over any other Rights and Obligations of the Parties”. The UK argued that;

“The Libyan Pleadings claim this in terms in various places when they say that the Council is not legally empowered to override the “rights” conferred on Libya by the Montreal Convention.[this] argument must surely founder on the rock of Article 103 of the Charter.”¹¹⁵

“[T]he Security Council took decisions which created binding legal obligations for Libya and for the United Kingdom and that, in accordance with the Article 103 of the United Nations Charter, the obligation which arises under Article 25 of to comply with those decisions of the Council takes priority over any *rights* or obligations which Libya might possess by virtue of the Montreal Convention.”¹¹⁶ (*italics added*)

In other words, even though the UK accepted that Libya had a right to prosecute the alleged criminals in its territory under the Montreal Convention, it claimed that this right was prevailed by the UN Security Council Resolutions through the Article 103 of the UN Charter.

The final judgement by the Court did not get into the discussion on whether there was a conflict between the Resolutions and the relevant provisions of the Montreal Convention as its judgement was totally in a different direction. The Court took into account that the two latter resolutions of the Security Council were decided after Libya’s application and it judged that the earlier resolution did not have a binding value. As such there was no actual legal conflict to be decided upon.

¹¹⁵ The Verbatim Record of the Oral Presentation made by The United Kingdom, 14 October 1997, p18

¹¹⁶ The Verbatim Record of the Oral Presentation made by The United Kingdom, 13 October 1997, p76

Nevertheless, the Order 14IV92 of the Court, in response to Libya's request for the indication of provisional measures maintained that;

“Whereas both Libya and the United Kingdom, as Members of the United Nations, are obliged to accept and carry out the decisions of the Security Council in accordance with Article 25 of the Charter; whereas the Court considers that *prima facie* this obligation extends to the decision contained in resolution 748 (1992); and whereas, in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention;”¹¹⁷

An objective evaluation of the Lockerbie case reveals that it has a significant explanatory power on ICJ's understanding of conflict between norms. First, leaving aside other technical issues, the case includes a genuine conflict between an obligation and an explicit right. As both sides of the dispute accepts, the relevant provision of the Convention gives the States certain rights to Libya whereas UN Resolutions create obligations for both sides. As such, the Court acknowledged that Article 103 of the Charter can be applicable to the case.

4.1.2 Vienna Convention on Law of Treaties

The VCLT, which has been negotiated under the auspices of the United Nations and is one of the main tools for interpretation of treaties, is another source that has to be taken into account. The Article 30 of VCLT, governs the cases of conflict between two successive treaties on the same subject matter. The Article 30.1 states that;

“Subject to the Article 103 of the Charter of the United Nations, the *rights* and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.” (italics added)

The same phrase, “rights and obligations” is iterated in 30.4(b). Thus, it would be safe to preclude that the VCLT admits the possibility of a conflict between two provision where one side is a “right” by referring to “rights and obligations” in a provision drafted to deal with the cases of conflict.

¹¹⁷ ICJ “Provisional Measures” Order 14 IV1992, p 15

The negotiating history of the VCLT approves this fact: An earlier draft of Article 30.1 (which was then Article 26.1) dated 1964 did not have any reference to the “rights” but only referred to the “obligations”. However, following a comment by Israel indicating that the paragraph 1 of the Article “should preferably refer not only to the obligations of States, but also to their rights.”¹¹⁸ The fact that there was no formal opposition to Israel’s proposal indicates that all parties to the Convention, at least implicitly confirmed that obligations as well as rights are included the Convention’s definition of conflict.

4.2 Conflicts in the Jurisprudence of the European Court of Justice

The European Court of Justice (ECJ), despite not being a universal body like the ICJ, is another international court whose approach to the issue matters. The definition or scope of norm conflict has not been an issue discussed extensively. On the contrary, it appears that the term “conflict” tends to be avoided and the issue of norm conflict was “under-articulated” by the ECJ.¹¹⁹

On the other hand, the Treaty Establishing the European Community (EC Treaty) set up a conflict rule for agreements between its Member States and third parties. The Article 307 (the former Article 234) of the Treaty establishes that:

ARTICLE 307

“The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.

To the extent that such agreements are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.

In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under this Treaty by each Member State form an integral part of the establishment of the Community and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting

¹¹⁸ A/CN.4/182 and Corr. 1&2 and Add. 1,2/Rev 1&3 “Law of Treaties: Comments by Governments on the draft articles on the law of treaties drawn up by the Commission at its fourteenth, fifteenth and sixteenth session” , p299

¹¹⁹ Gerard Martin CONWAY (2010) “Conflict of Norms in European Union Law and the Legal Reasoning of the European Court of Justice” PhD Thesis Submitted to Brunel University School of Law, p 183

of the same advantage by all the other Member States.”

In the first paragraph of this Article, it seems that the EC Treaty gives priority to the treaties concluded between its Member States and third parties before its entry into force if any inconsistencies occur between the two. The second and third paragraphs, however, impose an obligation on the Member States to progressively eliminate those inconsistencies in favour of the EC Treaty.

The Article has been interpreted by the ECJ in *Commission vs. Italy*.¹²⁰ This case was about tariff reductions on certain products by Italy vis-a-vis other Member States. Taking into account the fact that GATT had been concluded before the entry into force of the EC Treaty and all EC Member States were also parties to the GATT, Italy argued that it had the right to rely on its recently negotiated GATT bound rates as a basis for its tariff reductions since the Article 307 (then the Article 234) of the EC Treaty permits this act.

In response, the Court, based on the Advocate General’s reasoning had a different interpretation of the Article than Italy:

“The applicant replies that the terms 'rights and obligations' in Article 234 refer, as regards the 'rights', to the rights of third countries and, as regards the 'obligations', to the obligations of Member States and that, by virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior treaty a State *ipso facto* gives up the exercise of these rights to the extent necessary for the performance of its new obligations. The applicant's interpretation is well founded and the objection raised by the defence must be dismissed.”

As such, the Court laid down the principles of conflict resolution between a prior and latter treaty when parties to the prior treaty were not parties to the latter treaty which would later constitute the Article 30.4 of the VCLT.¹²¹ By being a party to the EC Treaty, Italy had given up its right to apply its GATT duties vis-a-vis other EC Member States as the EC Treaty was the latest treaty governing the rights and obligations of EC Member States including Italy. However, the rights of the non-EC Member states and the corresponding obligations of EC

¹²⁰ Judgement of the Court, 27 February 1962, *Commission of the European Economic Community vs the Government of the Italian Republic*, Case 10/61

¹²¹ Pietro MANZINI (2001) “The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law” *European Journal of International Law* Vol: 12 No:4, p 782

Member States under GATT would be preserved as GATT was still the latest treaty governing their mutual relationship.¹²²

Leaving aside the legal problems attached to this interpretation of the Court of Article 307¹²³, it would be safe to conclude that, judging by its text and its interpretation by the ECJ, the Article 307 is a conflict solving rule between the treaties concluded before the EC Treaty - which consist of non-EC Member parties- and the EC Treaty. As the Article refers to “rights and obligations” of the parties, it appears that according to ECJ, at least between the rights of non-EC Member states stemming from the anterior treaty and the obligations of EC Member State stemming from the EC Treaty, there can be conflicts. It follows that, although ECJ is not the appropriate authority to adjudicate such cases, at least at the conceptual level, the ECJ admits that a conflict between rights and obligations is a real possibility.

5. Conflicts in WTO Law

The notion of conflict and its resolution in WTO law will be elaborated in detail in the latter sections. In this section, however, our focus will be on how in general conflict is defined in WTO case law. As we have mentioned before, although there are provisions to deal with the potential cases of conflict in WTO Agreements, there is no explicit definition of a conflict in any of the WTO legal texts. Nevertheless, there are some dispute cases where we can derive results on the definition.

EC – Bananas

In *EC-Bananas*, the Panel, considering the interrelationship between GATT at one side and Annex 1A Agreements (TRIMS and Licensing Agreement) at the other side, made the following observation:

“As a preliminary issue, it is necessary to define the notion of "conflict" laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.”¹²⁴

¹²² Jan KLABBERS (2009) *Treaty Conflict and the European Union*, Cambridge University Press, Cambridge:UK, p121-122

¹²³ See KLABBERS p122-124 and MANZINI (2001) for an extended discussion on the problematic aspects of the Court's decision on *Commission vs Italy*

¹²⁴ The Panel Report on European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/USA, p 338

It is crucial that the conflict situation (ii) referred above is explained at some length by the Panel through a footnote:

“For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ("ATC") authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.”¹²⁵

Thus, taking into account that General Interpretative Note on Annex 1A deals with the cases of conflict between GATT and Annex 1A Agreements, the Panel unquestionably admitted that an obligation at one side and an explicit right at the other side could constitute a conflict. Moreover, the Panel established that an otherwise explanation which would ignore the explicit right and simply take into account the obligation would render the parts of WTO Agreements meaningless and be inconsistent with the object and purpose of the Members which intended to create rights and obligations different than those of GATT.

Indonesia – Autos

In *Indonesia – Autos*, the Panel followed a totally different approach and opted for a strict definition of conflict. One measure in consideration was a local content subsidy programme offered by Indonesia to its automobile industry. The complaining parties (US, EU and Japan) claimed that the measure was inconsistent with the Article III of GATT as well as the TRIMS Agreement as it accords treatment less favourable to imported products compared to domestically produced ones. In its defence, Indonesia stated that the Article 27.3 of the SCM Agreement had given the developing members including Indonesia an explicit right to maintain local content subsidies (as long as they do not cause adverse effects) and the

¹²⁵ *Ibid*, footnote 401, p 338

measure in hand, as it is a subsidy, should be exclusively examined under the SCM Agreement as it constitutes *lex specialis* vis-a-vis the GATT Article III.

The Panel, in response, reminded that there was a general presumption against conflicts in public international law by referring to Jenks and Karl. The Panel then made clear that the issue of conflict had to be examined “in the light of the general international law presumption against conflicts and the fact that under public international law a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter”.¹²⁶

As such, the Panel did not get into an examination whether the SCM Agreement gives Indonesia an explicit right or not but determined that the SCM Agreement dealt with a different aspect of the same measure and even though such a right had existed it would not have undermined Indonesia’s obligation under GATT Article III:

“We also recall that the obligations of the SCM Agreement and Article III:2 are not mutually exclusive. It is possible for Indonesia to respect its obligations under the SCM Agreement without violating Article III:2 since Article III:2 is concerned with discriminatory product taxation, rather than the provision of subsidies as such. Similarly, it is possible for Indonesia to respect the obligations of Article III:2 without violating its obligations under the SCM Agreement since the SCM Agreement does not deal with taxes on products as such but rather with subsidies to enterprises. At most, the SCM Agreement and Article III:2 are each concerned with different aspects of the same piece of legislation.”¹²⁷

The Panel Report on *Indonesia – Autos* gives important insights on the treatment of conflicts in WTO law which we will turn back in the latter sections.

Guatemala – Cement

One substantial issue subject to appeal in *Guatemala-Cement* case was the relationship between the dispute settlement provisions of the Anti-Dumping Agreement (Article 17) and the Article 6.2 of the DSU. In assessing this relationship, the AB relied upon the Article 2.1 of the DSU which states that to the extent that there is a *difference* between the rules and procedures set forth in DSU and special or additional rules and procedures of other WTO Agreements regarding dispute settlement, the provisions of the latter prevail. In this assessment the AB made the following judgement:

¹²⁶ Panel Report on *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS64/R, p334

¹²⁷ *Ibid*, p347

“Accordingly, if there is no “difference”, then the rules and procedures of the DSU apply *together with* the special or additional provisions of the covered agreement. In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them. An interpreter must, therefore, identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply.” (italics in the original)

This paragraph, especially the underlined sentence has often been cited as an evidence that the AB confirmed a narrow definition of conflict.¹²⁸ However, we are unable to share this view. There are two main reasons for that. First, the underlined sentence does not reveal any clear position that a conflict is possible only between obligations. Indeed, when we examine the dictionary meaning of the word “adherence”¹²⁹, we can easily see that “adherence” to a provision that involves an obligation is as meaningful as “adherence” to a provision that involves a right or permission. In this sense, the underlined sentence can be reasonably read as covering cases of conflict where one side is an explicit right or permission.

Second, a careful reading of the above mentioned judgement of the AB reveals that the AB uses the terms “difference” and “conflict” between two provisions interchangeably as opposed to “complementing” provisions. In our view, two provisions, where one of them prohibits a certain conduct and the other one explicitly permits it, cannot be regarded as “complementing each other” just for the fact that they are not mutually exclusive.

Moreover, as Pauwelyn elegantly shows us¹³⁰, the AB, in its former decisions, openly included the cases where there was no mutual exclusivity between the provisions, into its definition of difference. In *Brazil – Aircraft*¹³¹, the AB recognised that relevant provisions of the SCM Agreement had certain elements which were *different* than the provisions of DSU in the sense that they contained commands often one of them being stricter and the other one is

¹²⁸ See for instance MARCEAU *supra* 100

¹²⁹ The Oxford English Dictionary defines the adherence as “1. The action of sticking or holding fast (to anything or together, 2. Attachment to a person or party (adhesion) 3. Persistence in practice or tenet; steady observance or maintenance . Const. *to*.”

¹³⁰ PAUWELYN *supra* 107, p 195-197

¹³¹ Appellate Body Report on *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R

looser.¹³² Similarly, in *US-FSC* case¹³³, the AB noted that the Article XVI:4 of GATT differs very substantially from export subsidy provisions of the SCM Agreement and the Agreement on Agriculture and thus the explicit subsidy disciplines in Agreement on Agriculture clearly take precedence over the exemption of primary products from the export subsidy disciplines in Article XVI:4.

These examples show us that the AB, which used the word “difference” as almost equivalent to the word “conflict” and with the meaning “not complementing with each other”, at least implicitly accepted that a conflict may occur between two provision which are not mutually exclusive. In this sense, we believe there is sufficient space for the AB to explicitly recognise cases of conflict between rights and obligations in the forthcoming cases.

Turkey - Textiles

Most recently, in *Turkey- Textiles*, the Panel exhibited a somewhat confusing approach. Regarding quantitative restrictions put on its imports of textile products, India claimed that these measures are inconsistent with Article XI of GATT and the Agreement on Textiles and Clothing (ATC). In response, Turkey claimed the measure in question is taken within the framework of Turkey’s Customs Union with the EU and the measure is a part of Turkey’s obligations to align its trade policy with that of the EU. In this sense, Turkey asserted that the measure was justified under Article XXIV of GATT which provides exceptions to GATT provisions as long as the customs union in question is justified under the Article.

In making assessment, the Panel by initially making a clear reference to Jenks’ definition of conflict and the Panel Report on *Indonesia – Autos*, gives the impression that it will follow exactly the reasoning laid down in *Indonesia – Autos*. It then commented that:

“In view of the presumption against conflicts, as recognized by panels and the Appellate Body, we bear in mind that *to the extent possible*, any interpretation of these provisions that would lead to a conflict between them should be avoided.”¹³⁴ (*italics added*) and that:

“We understand that this principle of [effective] interpretation prevents us from reaching a conclusion on the claims of India or the defense of Turkey, or on the related provisions invoked by the parties, that would lead to a denial of either party's rights or obligations.”¹³⁵

¹³² *Ibid*, p57

¹³³ Appellate Body Report on *United States – Tax Treatment for “Foreign Sales Corporations”* WT/DS108/AB/R p 41-42

¹³⁴ The Panel Report on *Turkey - Restriction on Imports of Textile and Clothing Products*, WT/DS34/R, p 124

Nevertheless, the Panel in *Turkey - Textiles*, unlike its counterpart in *Indonesia – Autos* which did not examine whether actually a right existed or not, presumably with the judgement that the obligation will prevail in any case, went on with a detailed analysis of whether an exemption that Turkey claimed existed or not. As a result of this examination, the Panel concluded an exemption, in the sense that Turkey claimed, did not actually exist and hence the Turkey's obligations under GATT Article XI and ATC are violated.

This reasoning is important in the sense that by so doing, the Panel, at least implicitly, accepted that there could be conflict between the right given by the Article XXIV and the prohibition stemming from Article XI. It seems to us that the Panel, while initially noting down the earlier approaches by the *Indonesia – Autos* and *Guatemala – Cement*, went on with a different approach by also taking into account the contribution by the *EC – Bananas*.

6. An Appropriate Definition of Conflict to be Used in Assessing the Relationship Between GATT and GATS

As the reader might have guessed, the approach to the definition of conflict preferred by the current author is for a broad and inclusive definition. This is to say that conflicts cannot be reduced to cases between mutually exclusive provisions. We have to recognise the cases of inconsistency not only between obligations but also between obligations and rights as proper conflicts to be dealt with. As we have tried to show, this approach does not contradict with the ICJ's or the WTO AB's approach to the matter exposed in their relevant decisions. While we share most of the views of the advocates of a broader definitions expressed above, there are two main points to be made to support this position.

First, there is a logical imperative for a broader definition of conflict. A logical analysis of the types of norms described in section two reveals that every type of norm creates a corresponding duty or right to the other parties related to that norm.¹³⁶ In the case of public international law, this would be other states (in the case of a bilateral treaty the other party state and in the case of a multilateral treaty a group of state) being party to a treaty.

¹³⁵ *Ibid*, p 125

¹³⁶ See VRANES (2006), p 407- 412 for a detailed explanation of the norms establishing "relational rights" by using a deontic square.

If for instance, state A is obliged to adopt a certain conduct X, then there is a corresponding right of the state B vis-a-vis state A to legitimately expect that state A adapts conduct X. Similarly, if there is a prohibition on state A to follow a certain conduct X, there is a corresponding right of state B to expect that state A refrains from following conduct X. On the other hand, it should be underlined that an explicit right given to state A to adapt a certain conduct X also creates an obligation on state B that it does not claim conduct X from state A.

Table 5 Norms and Relational Norms

Type of Norm on State A	The Corresponding Relational Right on State B
Positive Obligation (<i>State A is obliged to adapt conduct X</i>)	A positive right of State B that State A adapts conduct X.
Negative Obligation (<i>State A is obliged not to adapt conduct X</i>)	A positive right of State B that State A does not adapt conduct X.
Positive Right (<i>State A may adapt conduct X</i>)	No right of State B to claim that State A do not adapt conduct X.
Negative Right (<i>State A may not adapt conduct X</i>)	No right of State B to claim that State A adapt conduct X.

In this context, one way of double-checking whether there is a conflict between two norms is to look at the relational rights/duties that they establish. In the case of a confrontation between a negative obligation and positive right for the same conduct on state A, the resulting relational norms would be conflicting with each other in the form of a right-no right contradiction.

The other point to be made is on the often pronounced presumption against conflict in public international law. The advocates of this view seem to perceive a narrow definition as a somewhat functional tool to preserve the coherence of the international legal system. As we have already discussed, for most of these authors, conflicts between norms is seen as an anomaly which is to be avoided. The following comment by the Panel on *Indonesia – Autos* is a perfect representative of such arguments:

“In considering Indonesia’s defence... we recall first that in public international law there is a presumption against conflict. This presumption is especially relevant in the WTO context since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum. . In this context we recall the principle of effective interpretation pursuant to which all provisions of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words. ”¹³⁷

We should note that we not only fail to share these views but also see some elements in such argument significantly flawed. First, we fail to understand why the principle of effective interpretation is especially relevant when it comes to defending certain obligations or prohibitions but not mentioned regarding the explicit rights or permissions. Indeed, it is the principle of effective interpretation that requires that explicit rights given to states as a result of a negotiation process have to be taken seriously and as seriously as an obligation or a prohibition. In our view, this is especially relevant in the WTO case, as it is not only obligations that are negotiated but also rights of the Members vis-a-vis each other which are equally important with those obligations. It is no surprise that WTO Agreement was often cited as an “inseparable package of rights and obligations”. Accordingly, the AB admitted that the WTO Agreements represent a carefully negotiated “balance of rights and obligations” between WTO Members that must be respected.¹³⁸

Second, we find the argument that “presumption against conflict is especially relevant in WTO context since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the same time, by the same Members and in the same forum” especially erroneous. It should be emphasized that the negotiating atmosphere of the Uruguay Round was in no way appropriate to tackle with the issue of potential conflicts between agreements. As we have discussed in earlier sections, numerous multilateral agreements were negotiated under time pressure and often by different negotiating teams within different working groups. The main focus of negotiating teams was on reconciling different positions on content and there was no apparent evidence that prevention of potential conflicts between treaties was a major concern during the negotiations. In this framework, it is only natural that potential inconsistencies occur in

¹³⁷Panel Report on *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS64/R, p329

¹³⁸ See The Appellate Body Report on *China-Measures Affecting Imports of Auto Parts*, WT/DS339-340-342/AB/R, p 72 or The Appellate Body Report on *United States- Restrictions on Imports of Cotton and Man-made Fibre Underwear*, WT/DS24/AB/R, p 15

particular between comprehensive and broad agreements such as GATT, GATS and TRIPS. Similar arguments, can be put forward for the relationship between other WTO Agreements.

Finally, while we definitely subscribe to the view that the integrity of the international legal system is important, conflicts between treaties are in many cases only normal and inevitable. As such, a strict definition of conflict which only includes mutually exclusive provisions, systematically nullifies explicit rights given as a result of the sovereign will of participating states. In this sense, a narrow definition to serve for the presumption against conflict is not a clear cut solution but an ignorance of the problem.

Having exhibited our preference for a broader definition, we have to clarify that this broader definition is not without borders. While in principle, we recognise cases of conflict between explicit rights and obligation or prohibitions, this naturally applies to two provisions which are at the same level of generality. In other words, it is questionable whether there is a genuine conflict between a very specific prohibition and a very general right which broadly covers the conduct that is specifically prohibited. A broad definition of conflict should not be exploited to circumvent some obligations or prohibitions faced by a party. No doubt that a case by case analysis is called to actually decide whether there is a genuine conflict or not and we will elaborate on this matter in the following sections when we analyse the relevant WTO cases in detail.

PART IV: THE PLACE OF WTO LAW WITHIN PUBLIC INTERNATIONAL LAW

IV. THE PLACE OF WTO LAW WITHIN PUBLIC INTERNATIONAL LAW

One final question that we have to answer before starting our analysis of GATT & GATS conflicts is to what extent rules and principles of public international law are applicable to conflict solving in WTO law. This will be another way of determining the status of WTO law within public international law.

This is important in analysing conflicts between GATT and GATS for a reason we have already mentioned: There are quite a few direct sources within WTO law that we can make use of in this attempt. In this context, we have to know to what extent we can “fall back”¹³⁹ on general rules and principles of public international law, or, in other words, to what extent we can rely on those general rules and principles in interpreting WTO legal texts.

It is self-evident that WTO as a legal system was established into an already existing international legal system. On the other hand, for many scholars WTO law can be regarded as a “self contained regime”¹⁴⁰ which has its own peculiar rules and principles distinct from public international law. So, would the general principles of public international law still be applied to WTO law?

At this point, it should be reminded that no legal system is totally immune to the influence of general principles of public international law. *Jus cogens* norms or obligations *erga omnes* clearly prevail over any form of *lex specialis* and thus constitute a link between international law and any special regime.¹⁴¹ The status of other norms or principles of public international

¹³⁹“Falling back” is a type of accumulation of two norms. When a specific new norm (in the form of a treaty) is created in the background of international law, that norm co-exists the general norms of international law. Thus, to the extent that the new norm does not contract out or contradict with the existing norms, the existing norms apply to the new norm, too. This may basically take two forms: First, other norms of international law can be used as a reference in the interpretation of the new norm. Second, application of the new treaty can be in the context of the existing norms of international law whereby for the gray areas on which the treaty remains silent, other norms of international law continue to apply. See PAUWELYN (2003) or SIMMA&PULKOWSKI (2006) for a more comprehensive discussion.

¹⁴⁰ According to the ILC Report, a self contained regime in its broad sense is “an interrelated wholes of primary and secondary rules, sometimes also referred to as ‘systems’ or ‘subsystems’ of rules that cover some particular problem differently from the way it would be covered under general law.” A whole field of functional specialisation such as WTO can also be regarded as a self-contained regime in the sense that special rules and techniques of interpretation or administration are thought to apply in that field.

¹⁴¹ According to the ILC Report, at least the following limitations should be considered for a self-contained regime: (1) The regime may not deviate from the law benefiting third parties, including individuals and non-State entities; (2) The regime may not deviate from general law if the obligations of general law are of “integral” or “interdependent” nature, have *erga omnes* character or practice has created a legitimate expectation

law that can be related to that special regime is only a question of case by case analysis and depends on how much that special regime is intended to be “isolated” from the general public international law by its founders.

There are mainly two dimensions of that analysis. The first is the application of public international law in the interpretation of the provisions of a special regime. The second dimension is the implementation of other norms of public international law within the domain of a specific regime together with the norms of that particular regime. Now, we are ready to review those aspects for our particular special regime, namely the WTO law.

1. Are Rules and Principles of Public International Law Applicable to the Interpretation of WTO Law?

WTO law is a subset of public international law. Hence, unless as explicitly stated somewhere within the WTO legal texts, we would normally expect that at least the principles of treaty interpretation of public international law would be applicable to interpreting WTO Agreements. Indeed, this is the case which was explicitly confirmed by the founders of the WTO. The Article 3.2 of the Dispute Settlement Understanding states that;

“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)

In this context, there is no doubt that “customary rules of interpretation of public international law” can be relied upon by the DSU in clarifying the existing provisions of WTO Agreements.

This aspect of the Article 3.2 of the DSU has been clarified a number of times by the DSB decisions and rulings. In one of the most cited cases of all, *US – Gasoline*, the AB after having referred to the Article 31 of the VCLT, stated that;

of non-derogation; (3) The regime may not deviate from treaties that have a public law nature or which are constituent instruments of international organizations. , *ibid* p83

“That general rule of interpretation has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other "covered agreements" of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"). That direction reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law.”¹⁴²

As such, the AB had clearly recognised that a treaty outside the WTO System and which not all WTO members are parties to, could be used as a source of customary rules of interpretation of public international law. Taking into account that VCLT is a codified version of the customary rules of treaty interpretation of public international law, it is no surprise that the DSB invoked VCLT as the primary resource outside the WTO Agreement.

In addition, the Panel and AB rulings made numerous references to principles and concepts that were explicitly mentioned in the VCLT (such as “good faith”¹⁴³ or “subsequent practice”¹⁴⁴) or implicitly implied in VCLT (such the principles of effective treaty interpretation, proportionality or legitimate expectations.) The DSB thus filled “the gaps” among the WTO legal texts, which were intentionally or unintentionally left open, with the concepts and principles imported from public international law or law in general.¹⁴⁵

The explanation above sufficiently allows us to safely conclude that rules and principles of public international law are applicable in the interpretation of WTO Agreements.

2. Are Rules and Principles of Public International Law Applicable Besides WTO Law?

The second question is “are rules and principles of public international law are applicable in WTO disputes besides WTO law?”. Although this question includes the aspect covered by the first question, that is the applicability of the rules and principles of public international law in the *interpretation* of WTO Agreements, it refers to a much broader application. The

¹⁴² The Appellate Body Report in United States- Standards for Reformulated and Conventional Gasoline WT/DS2/AB/R, p 17

¹⁴³ The Appellate Body Report in United States- Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R, p 61

¹⁴⁴ The Appellate Body Report in *Japan – Alcoholic Beverages supra* 38, p11-13

¹⁴⁵ While such importation of concepts or principles for interpretation purposes is totally legitimate within the DSU Article 3.2, it is sometimes blurred whether such concepts and principles merely serve for the interpretation purpose or do they go a bit further and affect the rights and obligations of members stemming from the WTO Agreements.

question is on the applicability of norms of public international, i.e. multilateral or bilateral conventions or agreements outside the WTO on substantial issues other than interpretation purposes. In other words, we need to find out to what extent “non-WTO law” can be applied in WTO dispute cases.

It should be noted that answering that question thoroughly is not an easy task and requires a comprehensive analysis which may fall beyond the purpose of this study. It may also require getting into philosophical aspects of legal theory which is also not within the capacity of the current work. However, it is intended to lay down the approach by the DSB to the matter based on previous decisions and also to discuss different points of view so as to reach a deeper understanding of the issue.

We may begin our discussion by quoting the Articles 3.2 and 19.2 of the DSU once again:

“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)

“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)

Now, it is clear that the DSU puts a significant emphasis on the mandate not *add to or diminish the rights and obligations* of the members stemming from WTO Agreements in its rulings or recommendations for the DSB. This obligation is crucial in understanding the approach by the Panel or the AB to the matter. Under normal circumstances, one may think that the application of any norm which is not within the covered agreements to a substantial issue in a WTO dispute would inevitably add or diminish the rights or obligations of a party to the dispute. In this sense, unless explicitly referred in one of the WTO Agreements¹⁴⁶, Article 3.2 and Article 19.2 seem to require that no treaty other than WTO Agreements is applied to a substantial issue in a WTO dispute between members.

¹⁴⁶ Such as Paris Convention or Bern Convention referred in TRIPS Agreement or OECD Arrangement on Guidelines for Officially Supported Export Credits.

We should, however, clarify what we understand from non-WTO law. Non-WTO law may take the form of customary international law or general principles of law. We have already established that through link provided by Article 3.2 of DSU, customary rules of interpretation are applicable in WTO disputes. Similarly, regarding general principles of law, there is a positive tendency of the AB to apply those rules to the extent that it is convinced that those principles have become a part of customary international law.¹⁴⁷ Finally, non-WTO law may take the form of procedural principles. The AB has admitted that procedural principles from general international law such due process¹⁴⁸ or *locus standi*¹⁴⁹ are applicable in WTO disputes.¹⁵⁰

These principles are, however, not normally expected to add or diminish to the rights and obligations of the WTO Members stemming from covered agreements. On the other hand, a more difficult situation arises on the applicability of treaties outside the WTO in WTO disputes. The link between non-WTO treaties and WTO dispute settlement would again be established through Article 3.2 of the DSU which refers to customary rules of interpretation of public international law. The AB frequently cited Article 31 of the VCLT as a source of customary rules of public international law. The Article 31 is as follows:

“General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

¹⁴⁷ See the discussion by the AB in *EC-Hormones* on the whether “precautionary principle” became a part of customary international law and thus be applicable in that dispute. The Appellate Body Report in *European Communities- Measures Concerning Meat and Meat Products (Hormones)* WT/DS48/AB/R, p 46

¹⁴⁸ See The Appellate Body Report in *Brazil-Desiccated Coconut*, p 22

¹⁴⁹ See the Appellate Body Report in *EC-Bananas*, p 61

¹⁵⁰ See BOURGEOIS & SOOPRAMANIEN (2009) for a more detailed discussion on the applicability of procedural rules in WTO disputes.

- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4.A special meaning shall be given to a term if it is established that the parties so intended.”

Paragraph 3.(c) of the Article states that “relevant rules of international law applicable in the relations between the parties” shall be taken into account when interpreting a treaty. It is clear that when one of the parties in a WTO dispute is not a party to an outside treaty, that treaty cannot be taken into account in that dispute. What if both parties to dispute are also parties to that other treaty? Could that treaty be regarded as “relevant rules of international law applicable in the relations between the parties” and thus applicable law in the dispute?

We should admit that scholarship is quite divided on this issue. Some scholars such as Mavroidis and Palmetier¹⁵¹, credibly asserted that for a consistent application of the VCLT for the interpretation of the WTO treaties, treaties between WTO members, whether they are multilateral or solely between particular members, should be taken into account in a dispute settlement between members which are parties to that particular treaty.

Scholars who put more emphasis on a unified international legal order such Pauwelyn, Bartels and Vranes even went further to argue that treaties outside the WTO, when relevant, are a part of the applicable law before the Panel or the AB. Pauwelyn, for instance, argued that parties could even win a WTO case based on non-WTO Law.¹⁵² For Pauwelyn, as the WTO law is a part of the system of international law, it is only natural that the DSB taking into account applicable law between the parties as a part of ““relevant rules of international law in the relations between the parties”. For Pauwelyn, the Article 3.2 of the DSU does not contradict with this statement since “it does not limit the *applicable law* before WTO Panels, nor does it deal with the relationship between WTO covered agreements and all past and future law. Rather, it confirms the rather obvious limits a WTO panel must observe in *interpreting* WTO covered agreements.”¹⁵³

¹⁵¹ David PALMETER; Petros MAVROIDIS (1998) “The WTO Legal System: Sources of Law” *The American Journal of International Law*, Vol:92 No:3, p 398-413

¹⁵² Joost PAUWELYN (2008) “How to Win a WTO Dispute Based on Non- WTO Law? Questions of Jurisdiction and Merits” in *At the Crossroads: The World Trading System and the Doha Round* (eds.) Stefan Griller Springer Verlag, Wien, p 1-54

¹⁵³ *Ibid*, p 11

In other words, for Pauwelyn, the function of the DSU 3.2 is to state that the DSB cannot create new rights or obligations for Members, thus cannot “change” the WTO treaty provisions. However, this does not affect WTO members’ rights to conclude other treaties that may have effect on their WTO rights and obligations which are also parts of the applicable law for the DSB.¹⁵⁴

Based on this conclusion, Pauwelyn discusses different cases where a WTO panel would be in a position to decline jurisdiction or justify a violation of a WTO provision based on the provisions a non-WTO bilateral or multilateral treaty between the parties of the dispute. Pauwelyn does this from a holistic perception of the body of international law and a perception that WTO law is nothing but a part of this unity.

Likewise, Bartels argued that all sources of international law are potentially applicable in a WTO dispute¹⁵⁵ Bartels suggested that Articles 3.2 and 19.2 of the DSU which prohibited the Panel and the AB from adding or diminishing the rights or obligations of Members arising from covered agreement should be read as a conflict resolving rule which ensures that in the event of a conflict between a covered agreement and an outside treaty, the former will prevail.¹⁵⁶

On the other hand, scholars who put more emphasis on the specialization aspect such as Trachtman, Marceau or McGinnes, went for a narrower interpretation of Article 3.2 of the DSU and argued that substantial provisions of outside treaties cannot be applied in dispute cases. Trachtman, for instance, argues that it is absurd to think that rights and obligations arising from other international law are applied by the DSB in the light of the clear provisions of Article 3.2.¹⁵⁷ For Trachtman, DSU is only permitted to apply WTO Law and the only two exceptions to that are the application of customary rules of interpretation and when non-WTO law is explicitly incorporated in WTO covered agreements.¹⁵⁸

¹⁵⁴ *supra*, p11

¹⁵⁵ Lorand BARTELS (2001) “Applicable Law in WTO Dispute Settlement Proceedings” *Journal of World Trade* 35(3), p 499

¹⁵⁶ *Ibid*, p 509

¹⁵⁷ Joel P. TRACHTMAN (1999) “The Domain of WTO Dispute Resolution” *Harvard International Law Journal* 333(1999), p 7

¹⁵⁸ *Ibid*, p 7

Marceau and Tomazos¹⁵⁹ fundamentally challenged Pauwelyn's wholistic perception of international law. They argued that:

“Even though WTO panels and Appellate Body cannot interpret and enforce non-WTO law other than to the extent necessary to interpret and apply WTO provisions, one should not underestimate the potential coherence that exists between WTO law and the other systems of international law. We believe Pauwelyn overemphasizes the role of conflict of norms in resolving WTO disputes. Pauwelyn ignore the ‘chaotic’ nature of international law and seeks to compartmentalize each system of international law in such a manner that almost assures that conflicts will be created as issues often overlap between different sub-systems of international law.... If Pauwelyn's argument is accepted, it would grant a specialized tribunal, such as a WTO panel, powers for which it has not been conferred or possess the capacity to address.”¹⁶⁰

Thus, having adopted a rather pessimistic view of the status of international law compared to Pauwelyn, Marceau and Tomazos are of the view that one should realistically admit the current fragmented status of international law and that each body of law should refrain from interfering another's area of jurisdiction by “peacefully co-existing”. In this context, the jurisdiction of WTO adjudicating bodies are strictly limited and the DSB is not given an authorisation to apply non-WTO law. However, Marceau and Tomazos believe that any difficulties arising in the application of WTO law stemming from the existence of non-WTO law, can be resolved through good faith interpretation and within the WTO context by invoking WTO's procedural provisions.¹⁶¹

Similarly, in a separate Article, Marceau, when emphasizing the limited jurisdictional domain of the WTO Dispute Settlement Mechanism, underlined the shortcomings of a counter approach. She argued that WTO Panels or the AB are mainly made up of trade experts and these bodies are not in a position to interpret complex treaties from other fields of specialization such as human rights or environment nor have the expertise to do so.¹⁶² For her, as the WTO constitutes a self-contained regime with specific rules and remedies, the best the DSB can do regarding the outside treaties is to take into account the norms presented there in its interpretations and to try to adopt interpretations that will avoid any potential conflicts.¹⁶³

¹⁵⁹ Gabrielle MARCEAU, Anastasios TOMAZOS (2008) “Comments on Joost Pauwelyn's Paper: How to Win a WTO Dispute Based on Non- WTO Law?” in *At the Crossroads: The World Trading System and the Doha Round* (eds.) Stefan Griller Springer Verlag, Wien, p 55-81

¹⁶⁰ *Ibid*, p 57

¹⁶¹ *Ibid*, p 65

¹⁶² Gabrielle MARCEAU (2002) “WTO Dispute Settlement and Human Rights” *European Journal of International Law* Vol:13 No:4, p 765-777

¹⁶³ *Ibid*, p 779-790

It will be appropriate to clearly state that generally the approach by the Panel or AB on this matter is in favour of the second approach. It is apparent from past decisions of the DSB that the first line of thought presented above is not accepted by the AB with respect to the treaties which are concluded outside the WTO by WTO Members. This does not, nevertheless, mean that the AB has exhibited a uniform and comprehensive approach to the matter. On the contrary, we observe a pragmatic and non-uniform approach in DSB decisions.

For instance in an often quoted GATT Panel Report, *US - Tuna II*, after having recalled that the parties to the dispute based many of their arguments on the location of the exhaustible natural resource in Article XX (g) on environmental treaties other than GATT and reminded the relevance of the VCLT in this context, stated that;

“The Panel first examined whether, under the *general* rule of interpretation of the Vienna Convention, the treaties referred to might be taken into account for the purposes of interpreting the General Agreement. The general rule provides that "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" is one of the elements relevant to the interpretation of a treaty. However, the Panel observed that the agreements cited by the parties to the dispute were bilateral or plurilateral agreements that were not concluded among the contracting parties to the General Agreement, and that they did not apply to the interpretation of the General Agreement or the application of its provisions.”¹⁶⁴

Thus, the Panel had reached the conclusion that, apparently by sticking to the phrase “between the parties” in 31.3 (c) of the VCLT, only multilateral agreements to which all WTO members are parties to can be taken into account when interpreting a WTO Agreement.

On the other hand, in *US- Shrimp*, the issue before the AB was whether an import ban on shrimps which was related to protection of sea turtles by the defendant US could be justified under GATT Article XX (g) which grants an exception for the objective of “protection of exhaustible natural resources”. Thus, the issue became whether sea turtles could be regarded as “exhaustible natural resources”.

In analysing this issue, the AB rejected the arguments of the complainant parties which suggested a strictly textual approach and claimed that sea turtles cannot be regarded as exhaustible natural resources. Rather, the AB, by citing various conventions on environmental protection and by adding that parties of the dispute were also parties to those conventions,

¹⁶⁴ The GATT Panel Report in United States- Restriction on Imports of Tuna (DS29/R), p 50

adopted an “evolutionary” approach in the interpretation of the term and concluded that it included living resources, as well. Thus, the AB changed the direction of its ruling by relying on a number non-WTO treaties:

“Given the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the *WTO Agreement*, we believe it is too late in the day to suppose that Article XX(g) of the GATT 1994 may be read as referring only to the conservation of exhaustible mineral or other non-living natural resources.”¹⁶⁵

Moreover, in recourse to Article 25.1 Panel in *US-Shrimp* case, the Panel stated that;

“Finally, we note that the Appellate Body, like the Original Panel, referred to a number of international agreements, many of which have been ratified or otherwise accepted by the parties to this dispute.²⁰⁴ Article 31.3(c) of the Vienna Convention provides that, in interpreting a treaty, there shall be taken into account, together with the context, “any relevant rule of international law applicable to the relations between the parties”. We note that, with the exception of the Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS), Malaysia and the United States have accepted or are committed to comply with all of the international instruments referred to by the Appellate Body in paragraph 168 of its Report.”¹⁶⁶

As such, the Panel clearly reversed its ruling in *US – Tuna II* and admitted that a multilateral treaty can be regarded as relevant for interpretation if the parties to dispute are also parties to it even though not all members of WTO are parties to it.

Regarding the bilateral agreements between members, in, for instance, *EC- Poultry*, the Panel, considered the relevance of the bilateral “Oilseeds Agreement” between EC and Brazil in that dispute. Taking into account that the Oilseeds Agreement was negotiated within the framework of GATT Article XXVIII, in a ruling that was explicitly confirmed by the AB, the Panel proceeded with the examination of the Oilseeds Agreement” *to the extent relevant to the determination of the EC's obligations under the WTO agreements vis-à-vis Brazil*”¹⁶⁷ (emphasis added)

In *Argentina-Poultry*, Argentina, referred to the “Olivos Protocol” signed by both parties within MERCOSUR which mandates that once a party to a dispute between MERCOSUR

¹⁶⁵ The Appellate Body Report in United States - Import Prohibition of Certain Shrimp and Shrimp Products WT/DS58/AB/R, p 50

¹⁶⁶ United States - Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 25.1 by Malaysia, WT/DS58/RW p 79

¹⁶⁷ European Communities - Measures Affecting the Importation of Certain Poultry Products, WT/DS69/R, p 56

Members states decides to bring a case either within MERCOSUR or WTO DSB, that party may not bring a subsequent case regarding the same subject-matter in the other forum. Argentina, thus, asserted that the complainant, Brazil, had no right to bring a dispute in the WTO as it had already initiated a dispute within MERCOSUR.

This case could be a decisive one in clarifying the approach of the Panel to non-WTO treaties as it represented a typical example suggested by Pauwelyn where a bilateral agreement outside the WTO between two parties requires the Panel or the AB to decline jurisdiction of the case. However, the Panel, in its ruling which was not appealed, could refrain from making a clear statement on this matter as the Olivos Protocol, though having been signed by both parties, was not yet in force and ongoing disputes were to be still considered under the Brasilia Protocol which put no restriction on the parties where to bring a dispute:

“In particular, the fact that Brazil chose not to invoke its WTO dispute settlement rights after previous MERCOSUR dispute settlement proceedings does not, in our view, mean that Brazil implicitly waived its rights under the *DSU*. This is especially because the Protocol of Brasilia, under which previous MERCOSUR cases had been brought by Brazil, imposes no restrictions on Brazil's right to bring subsequent WTO dispute settlement proceedings in respect of the same measure. We note that Brazil signed the Protocol of Olivos in February 2002. Article 1 of the Protocol of Olivos provides that once a party decides to bring a case under either the MERCOSUR or WTO dispute settlement forums, that party may not bring a subsequent case regarding the same subject-matter in the other forum. The Protocol of Olivos, however, does not change our assessment, since that Protocol has not yet entered into force, and in any event it does not apply in respect of disputes already decided in accordance with the MERCOSUR Protocol of Brasilia. Indeed, the fact that parties to MERCOSUR saw the need to introduce the Protocol of Olivos suggests to us that they recognised that (in the absence of such Protocol) a MERCOSUR dispute settlement proceeding could be followed by a WTO dispute settlement proceeding in respect of the same measure.”¹⁶⁸

How would this ruling change if the Olivos Protocol were actually in force at the time of the judgement by the Panel? It can be suggested that this ruling by the Panel left an “open door” for future rulings whereby the DSB can recognise non-WTO agreements between Members and decline jurisdiction accordingly. While this is a real possibility, we will have to wait for future dispute cases for a decisive ruling to come from the WTO judicial bodies.

In *Brazil- Tyres*, the issue was Brazil's ban on the importation of retreaded tyres and one particular aspect of the ban was the exemption of Brazil's MERCOSUR partners from the ban. Brazil argued that the exemption was a result of a ruling by a MERCOSUR tribunal and

¹⁶⁸ The Panel Report in Argentina – Definitive Anti-Dumping Duties of Poultry from Brazil WT/DS241/R, p 21

accordingly did not constitute an arbitrary and unjustifiable discrimination between Members. The AB analysed the issue and made the following comment:

“In this case, the discrimination between MERCOSUR countries and other WTO Members in the application of the Import Ban was introduced as a consequence of a ruling by a MERCOSUR tribunal. The tribunal found against Brazil because the restriction on imports of remoulded tyres was inconsistent with the prohibition of new trade restrictions under MERCOSUR law. In our view, *the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree.* Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.”¹⁶⁹ (emphasis added)

On the “arbitrariness” of the discrimination brought about by the exemption, the AB made this specific observation:

“Like the Panel, we believe that Brazil's decision to act in order to comply with the MERCOSUR ruling cannot be viewed as "capricious" or "random". Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as a decision that is "capricious" or "random". However, discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.”¹⁷⁰

Thus, it is clear that the AB did not treat the decision of the MERCOSUR tribunal as applicable law in the case. It did not accept the decision as a legitimate rationale for discrimination between WTO Members. The AB even did not accept the decision as an indication of non-arbitrary character of the measure as it only accepted relevant provisions of GATT Article XX as a reference for its interpretation.

In *EC-Bananas*, the Panel and the AB had to analyse the legal status a preferential treatment by the EU towards ACP countries which was based on the Lomé Convention between the sides. A waiver was granted in the WTO for the preferential regime which was contrary to Article I of the GATT and it was notified to the WTO as “Lomé Waiver”. Both the Panel and the AB made the same determination regarding the interpretation of the Lomé Convention:

¹⁶⁹ The AB Report in Brazil- Measures Affecting Imports of Retreaded Tyres WT/DS332/AB/R, p 90

¹⁷⁰ *Ibid*, p 91

“We note that since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in *so far as it is necessary to interpret the Lomé waiver*.”¹⁷¹

Thus, both the Panel and the AB refused to examine the Lomé Convention which had a central role in explaining the measure in question except to the extent necessary to interpret the Lomé waiver. Hence, the AB implicitly rejected the assumption that the Lomé Convention, itself, could be a part of the applicable law in the dispute.

Finally, in *Turkey –Textiles*, in considering the status of the Customs Union between the EU and Turkey, the Panel concluded that “a bilateral agreement between two Members *does not alter the legal nature of the measure at issue or the applicability of the relevant GATT/WTO provisions*.”¹⁷² (emphasis added)

While one can quote more DSB rulings, the above quoted rulings sufficiently allow us to confirm the general trend in the rulings that non-WTO treaties between WTO members are not considered as part of applicable law in the disputes and are considered relevant to the extent necessary for interpretation purposes. We have to, however, reiterate that there is no clear and uniform approach by the DSB on the matter. The tone and attitude of the rulings may change from case to case as it is exhibited in *US- Tuna II* and *US- Shrimp* cases. The AB as well as the Panel try to refrain from making comprehensive and general assessments and instead prefer analysis to the extent necessary to resolve the case.¹⁷³

On the other hand, there is still some elbow room for the WTO adjudicating bodies to advance in their rulings regarding non-WTO treaties between Members. While they could find an “escapeway” in all cases till now as it is case in *Argentina-Poultry* dispute, in my view, sooner or later the Panel or the AB will be in a position to recognise the role of bilateral or multilateral treaties in the determination of rights and obligations of Members under WTO Agreements.

¹⁷¹ The Appellate Body Report in *EC-Bananas*, p 73

¹⁷² The Panel Report in *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, p 145

¹⁷³ For Simma and Pulkowski the Panels and the AB tend to invoke non-WTO law more when the legitimacy of their decisions are under potential criticism. “By relying on rules outside the WTO regime that, in the view of many, embody legitimate concerns or internationally recognized ethical positions, the WTO’s judicial bodies have attempted to import the legitimacy offered by the ‘universe’ to the ‘planet’” See Bruno SIMMA, Dirk PULKOWSKI (2006) “Of Planets and the Universe: Self-contained Regimes in International Law” *The European Journal of International Law* Vol:17 No:3, p 511

3. The Relevance for This Study

The relevance of the discussion above on the place of WTO law within public international law for this work can be summarized as follows: WTO system is not isolated from the universal system of public international law. On the other hand, WTO law is a special regime with its specific rules and disciplines created for a particular area. Thus, for the WTO judicial bodies, rules and principles of public international law are applicable in the WTO law but only to the extent necessary to properly interpret the WTO provisions and to clarify the rights and obligations stemming from those provisions.

For our case, this means that the rules and principles of conflict resolution between provisions of two treaties which are generally recognised in international law are applicable to conflict resolution within the WTO Law, in particular between GATT and GATS. Nevertheless, for the bilateral treaties which we will come across in later sections which are relevant for our case study, there is doubt that they would be considered as substantial applicable law in a potential dispute case.

Now, we are ready to go on our discussion with the substantial issues of conflict resolution.

PART V: INTERPRETATION AND CONFLICT AVOIDANCE

V. INTERPRETATION AND CONFLICT AVOIDANCE

In the last section, we have clarified that rules and principles of conflict resolution existing in public international law are applicable to the WTO law. Now, we are in a position to begin our analysis of substantial issues of conflict resolutions relevant in our analysis of GATT and GATS conflicts. The first of those issues is conflict avoidance through an effective interpretation of treaties.

1. Conflict Avoidance as A Method of Conflict Resolution

Certainly, the best way to resolve a conflict is to avoid it. In some cases, it is possible to avoid a seeming conflict between two norms through an effective interpretation of the two together in order to avoid the conflict. We find the rules of treaty interpretation in VCLT, Article 31 and 32. Article 31 of the VCLT sets out the rules of general treaty interpretation:

“Article 31 General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.”

Moreover, Article 32 lays down the supplementary means of interpretation:

“Article 32 Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning

resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.”

2. Method of Interpretation in VCLT

The Vienna Convention was born into a controversial background where different approaches for treaty interpretation contested.¹⁷⁴ There had been three main approaches on how to interpret a treaty.

The first one is the subjective interpretation approach. According to this approach, the ultimate purpose of the treaty interpretation is and should be to determine the actual intentions of the negotiators of the treaty by using every means available. This approach is in accordance with the view that international law is based upon the will of sovereign states.¹⁷⁵ Thus, for the subjective interpretation approach, the *travaux préparatoires* (the preparatory work) of a treaty is essentially important since it is taken as the most important source to grasp the intentions of the negotiators. The text of the treaty is not unimportant but it is only the starting point of the interpretation process. During the negotiation phase of the Vienna Convention, a number of delegations, led by the US delegation, supported this approach. The eminent international law expert, Hersch Lauterpacht, who also served as the Special Rapporteur to the ILC on law of treaties was also a strong advocate of this approach.

The difficulty with this approach, as expressed by Sir Lauterpacht, is it may be the case that the parties to the treaty did not actually mean the same thing. One of the parties acting with or without good faith may give a term different meaning than the other party or it could be that there is no consensus on a particular issue and that term is intended to capture that aspect. Another difficulty is that even if the parties had a common intention, the perception of the parties regarding that term may change at a later stage.¹⁷⁶ The subjective approach also has difficulty to capture that “evolutionary” aspect regarding treaties.

¹⁷⁴ Micheal LENNARD (2002) , “Navigating by the Stars: Interpreting WTO Agreements” *Journal of International Economic Law* Vol:17-89, p20

¹⁷⁵ Andrew MITCHELL (2007) “Legal Basis for Using Principles in WTO Disputes” *Journal of International Economic Law* Vol:10:4, p803

¹⁷⁶ *Ibid*, p 804

The second approach is the textual or objective interpretation approach. This approach takes the text of the treaty as the basis of interpretation and seeks to determine the intention of the negotiators by only looking at what they said in the text as the final and the most reliable expression of their intention¹⁷⁷. Looking behind the text, in particular to the *travaux préparatoires*, is only relevant when the plain meaning in the text is unable to remove all ambiguities. During the negotiation phase of the Vienna Convention, most delegations stated their preference for this approach.

As suggested, it is the text that is agreed upon by the parties which gives effect to the intentions of them. In fact, in most cases, it is not the intentions of the parties that is agreed upon but the actual textual formulation. It might not be the case that a given text implies agreement on the intentions. On the contrary a given text may be the result of divergent, even contradicting intentions of the parties.¹⁷⁸ Moreover, a party to a treaty might not be an initial negotiator of the treaty but rather might have acceded to the treaty long after its negotiation had been completed.

While these elements seem to be clear advantages of the textual approach over the subjective approach, the textual approach is also not free of complications. The meaning of the term may be determined by its context. The meaning of a specific term within a treaty may be informed by the wording of the entire treaty or the principles attached to it. Moreover, the parties to the treaty might have intended a particular term to have a special meaning.¹⁷⁹ These are factors that may cause a specific term in a treaty to have a meaning other than its plain or ordinary meaning of the term. Under such circumstances, a strict textual interpretation may not be consistent with the underlying principles and objectives of that treaty.

The third and final approach is the teleological or objects and purpose approach. According to this approach, a treaty should be interpreted in the light of its object and purpose. Interpretation of a particular aspect of a treaty should be in a way that best fulfills that object and purpose.¹⁸⁰ An advantage of this approach can be that a treaty can be interpreted in a

¹⁷⁷ *supra* 174, p 21

¹⁷⁸ MITCHELL *supra* 175, p 804

¹⁷⁹ *Ibid*, p 805

¹⁸⁰ Gerald FITZMAURICE "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points" 33 British Yearbook of International Law (1957), p 208

dynamic way based on the facts and circumstances of each case or age.¹⁸¹ European Court of Justice is often cited as a user of this method when interpreting the EU Treaty.

A clear difficulty with this approach is that a treaty may not always have well-defined objects or purposes written down in a part of it. Alternatively, a treaty may have more than one divergent or even potentially conflicting objects or purposes. This is especially true for the WTO Agreement or its subsidiary agreements where potentially conflicting objectives are counted consecutively.¹⁸²

The method of interpretation that has been pre-dominantly adopted in the VCLT is the textual approach although some elements from the other two approaches were incorporated. This is visible in Article 31 and 32. The Article 31.1 states that:

“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

So, it is clear from the above underlined wording that interpretation shall be in accordance with the ordinary meaning of the term which indicates a textual approach. On the other hand, the expression “in the light of its object and purpose” evokes a teleological approach by explicitly mentioning the need to take into account the object and the purpose of the treaty. Moreover, the expression “in their context” aims to address the specific concern mentioned above regarding the use of a strict textual approach. Words of a treaty should be interpreted according to their ordinary meaning but also in their context. What is meant by the word “context” is defined in paragraphs 2 and 3 of the Article 31.

Finally, paragraph 4 of the Article 31 ensures that, if a specific meaning was intended to be given to a term by the parties of the treaty, that has to be taken into account.

The subjective approach only has been mentioned in the Article 32 as a clearly secondary means of interpretation. This is apparent from the title of the Article, as it is “supplementary means of interpretation”. These supplementary means of interpretation, including the

¹⁸¹ LENNARD, *supra* 174, p21

¹⁸² See the Preamble of the WTO Agreement where objectives such as “raising standards of living”, “ensuring full employment”, “large and steadily growing volume of real income and effective demand” or “expanding the production of and trade in goods and services”

preparatory work of the treaty and the circumstances of its conclusion can only be resorted to in order to confirm the meaning resulting from the application of Article 31 or the application of Article 31 leaves the meaning of a term ambiguous, obscure or leads to a result that is manifestly absurd or unreasonable.

3. Method of Interpretation in WTO Jurisprudence

As we have made clear in the previous section, WTO system is a part of a broader system of international law and rules of treaty interpretation in public international law, codified by the VCLT, undoubtedly apply to the WTO law. As a matter of course, it follows that method of treaty interpretation that is preferred in VCLT –the textual approach- is also pre-dominant in the WTO. However, some observers are of the view that there are certain nuances on how this approach has been adopted by various Panel and the AB reports, especially on the weights to be given to the exact text of treaty, to the context and to the object and purpose¹⁸³.

General Rule of Interpretation

In *Japan – Alcoholic Beverages*, the AB stated that;

“Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: "interpretation must be based above all upon the text of the treaty". The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions.”¹⁸⁴

whereas in the Panel in *US - Section 301 Trade Act* made a comprehensive description of the interpretative process under Article 31 of the VCLT:

“Text, context and object-and-purpose correspond to well-established textual, systemic and teleological methodologies of treaty interpretation, all of which typically come into play when interpreting complex provisions in multilateral treaties. For pragmatic reasons the normal usage, and we will follow this usage, is to start the interpretation from the ordinary meaning of the "raw" text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose. However, the elements referred to in Article 31 – text, context and object-and-purpose as well as good faith – are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order. Context and object-and-purpose may often appear simply to confirm an interpretation seemingly derived from the "raw" text. In reality it is always some context,

¹⁸³ See for instance, Peter- Tobias STOLL (2006), p 289 who highlights the nuances between the decisions of the Panels and the AB.

¹⁸⁴ Appellate Body Report in *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, p. 11-12

even if unstated, that determines which meaning is to be taken as "ordinary" and frequently it is impossible to give meaning, even "ordinary meaning", without looking also at object-and-purpose.¹⁸⁵ As noted by the Appellate Body: "Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: 'interpretation must be based above all upon the text of the treaty'. It adds, however, that "[t]he provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions".¹⁸⁶ (footnote kept from the original text)

This description could be contrasted with the ruling of the AB in *US-Shrimp*:

"As we have emphasized numerous times, these rules call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."¹⁸⁷

It could be argued that, the Panel in *US - Section 301 Trade Act* sees the interpretation as a "holistic" procedure rather than different steps being applied at a hierarchical order and thus seemingly giving equal weight to all three elements of interpretation mentioned in the Article 31 of the VCLT. The Panel's approach here, at first sight, contradicts with the approach of the AB in *US - Shrimp*, as the latter seems to make a clear distinction between these elements and giving priority to the text of the provision. However, we are not of the view that there are

¹⁸⁵ As noted by the International Law Commission (ILC) – the original drafter of Article 31 of the Vienna Convention – in its commentary to that provision:

"The Commission, by heading the article 'General Rule of Interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation. Thus [Article 31] is entitled 'General *rule* of interpretation' in the singular, not 'General *rules*' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule" (Yearbook of the ILC, 1966, Vol. II, pp. 219-220).

See also, Sinclair, I., *The Vienna Convention on the Law of Treaties*, 2nd Edition, Manchester University Press, 1984, p. 116:

"Every text, however clear on its face, requires to be scrutinised in its context and in the light of the object and purpose which it is designed to serve. The conclusion which may be reached after such a scrutiny is, in most instances, that the clear meaning which originally presented itself is the correct one, but this should not be used to disguise the fact that what is involved is a process of interpretation".

¹⁸⁶ The Panel Report in United States – Sections 301-310 of the Trade Act of 1974, WT/DS152/R, p 305-306

¹⁸⁷ Appellate Body Report in United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, p 41-42

conflicting understandings on the interpretation by the Panel and the AB exhibited by these two comments.

First, it should be underlined that the context of the provision is an element which is given an equal weight by both the Panel and the AB. For the Panel, it is the context which determines what the ordinary meaning is and for the part of AB, it has been clearly stated that words must be “read in their context”. Then the matter is on the role of the object and purpose of the treaty. The AB argues that only when the interpretation according to the textual meaning read in the context of the provision is inconclusive or equivocal, one might invoke the object and purpose of the treaty. In fact, this approach *does not* contradict with the approach of the Panel. Indeed, these approaches touch upon different characteristics of the same reality. The Panel tries to capture the fact that all three elements of interpretation are the elements of the same rule of interpretation so that there is only one rule of interpretation but not different and independent rules according to the Article 31 of the VCLT. In most cases, the ordinary meaning can only be determined by taking into account the context and there are cases where ordinary meaning can be properly determined only in the light of the object and purpose of the treaty.

On the other hand, the AB emphasizes that, among these three elements of the same rule of interpretation, the priority is held by the textual meaning given in the context of the provision and there may be cases where, such an interpretation is sufficient to determine the ordinary meaning of the term and there is no need further refer to the object and purpose of the treaty. In other words, while considering the textual meaning of a term within its context is a necessary condition of an appropriate interpretation, it might not always be a sufficient condition.

To further clarify that these two comments do not variate in essence with regard to the method of interpretation, we can have a look at the contexts of the cases on which the comments are made. In the *US-Shrimp* case, the AB tried to tackle with an issue of appeal with an alleged misinterpretation by the Panel. Consequently, the AB reached the conclusion that the Panel misinterpreted the GATT Article XX, in the sense that it primarily focused on the object and purpose of the WTO Agreement without properly addressing the text of the Article itself. Thus, while eventually reaching similar conclusions with the Panel, the AB applied what it states to be

the proper methodology.¹⁸⁸ In this context, the AB, in its ruling stressed the need to primarily focus on the text.

On the other side, the Panel tried to deal with a situation where it scrutinized the consistency of a Member's municipal law with a WTO agreement. For that case, the Panel tried to underline that the same term existing both in the municipal law of that Member and in a WTO agreement may eventually have different meanings due to context as well as the object and purpose of the two legal texts. The Panel undertook to highlight this aspect by emphasizing the holistic nature of the general rule of interpretation.

Finally, in *Japan- Alcoholic Beverages*, the AB declared that:

“WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system”.¹⁸⁹

In our view, this passage indicates that WTO juridical bodies have at least some level of discretion in interpreting the WTO agreements which eventually includes the weights to be given to the three elements mentioned in Article 31 of the VCLT.

Supplementary Means of Interpretation

Regarding the supplementary means of interpretation covered in Article 32 of the VCLT, the jurisprudence by WTO bodies is less abundant compared to the rule of interpretation in Article 31. Article 32 of the VCLT allows the interpreter to have recourse to supplementary means of interpretation which includes the preparatory work of the treaty and the circumstances of its conclusion if the interpretation according to the general rule in Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

The AB confirmed that Article 32, just like the Article 31, attained the status of a rule of customary or general international law.¹⁹⁰ In some cases, including *Canada- Periodicals* and *EC-Bananas*, the Panel and the AB applied Article 32 by looking at the *travaux préparatoires*

¹⁸⁸ Appellate Body Report in United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, p 43-45

¹⁸⁹ Appellate Body Report in Japan – Taxes on Alcoholic Beverages, WT/DS8/AB/R, p. 30

¹⁹⁰ *Ibid*, p 9

of the provisions in order to confirm or support the Panel or AB's conclusions resulting from the application of Article 31.¹⁹¹

Yet, in particular cases, the AB had to take into account the historical background of a provision. This is especially true for the provisions regarding the concessions given by the Members.¹⁹² In *EC-Computer Equipment*, the AB, when assessing the decision of the Panel to take into account the classification practice of a Member during the Uruguay Round in order to reach a judgement on an issue regarding the tariff concessions of that Member, made the following comment:

“In the light of our observations on “the circumstances of [the] conclusion” of a treaty as a supplementary means of interpretation under Article 32 of the *Vienna Convention*, we consider that the classification practice in the European Communities during the Uruguay Round is part of “the circumstances of [the] conclusion” of the *WTO Agreement* and may be used as a supplementary means of interpretation within the meaning of Article 32 of the *Vienna Convention*.”¹⁹³

A similar situation occurred in *Canada- Dairy* that the AB, by also referring to the *EC-Computer Equipment* case, took into account the historical background of a provision in Canada's schedule of concessions.¹⁹⁴ The two examples show that the AB accepted the historical background of a provision as part of circumstance of conclusion within the meaning of Article 32 of the VCLT. However, such background is acceptable as long as it is consistent with WTO rules.¹⁹⁵

An additional element which has been accepted by the AB to be within the supplementary means of interpretation is the principle of *in dubio mitius*. The principle of *in dubio mitius*, which originated from the Roman law and later on was used in criminal law, was first advocated to be used in interpreting treaty provisions by Lassa Oppenheim. For Oppenheim, according to this principle “if the meaning of a stipulation is ambiguous, the meaning is to be preferred which is less onerous for the obliged party, or which interferes less with the parties’

¹⁹¹ Appellate Body Report in *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, p 34 or Panel Report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, p 57

¹⁹² Peter- Tobias STOLL (2006), “Article 3 DSU” in Wolfrum, Rudiger; Stoll, Peter-Tobias; Kaiser, Karen (eds.) *WTO- Institutions and Dispute Settlement* Max Planck Institute for Comparative Public Law and International Law, Martinus- Nijhoff Publishers, p 293

¹⁹³ Appellate Body Report on *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, p 35

¹⁹⁴ Appellate Body Report on *Canada- Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, p 36

¹⁹⁵ *Supra* 193, p 293

territorial and personal supremacy, or which contains less general restrictions upon the parties”¹⁹⁶

This principle which is sometimes also called “the principle of restrictive interpretation” has first explicitly been mentioned in WTO jurisprudence by the AB in *EC-Hormones* when it was assessing the consistency of an SPS measure taken by a Member to the SPS Agreement:

“We cannot lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome, obligation by mandating *conformity* or *compliance with* such standards, guidelines and recommendations”¹⁹⁷

This statement was elaborated through a footnote:

“The interpretative principle of *in dubio mitius*, widely recognized in international law as a “supplementary means of interpretation”, has been expressed in the following terms:

‘The principle of *in dubio mitius* applies in interpreting treaties, in deference to the sovereignty of states. If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.’¹⁹⁸

While it could be debated whether this principle was really “widely recognised in international law as a supplementary means of interpretation” or not¹⁹⁹, it is a fact that this principle has now become a part of the WTO jurisprudence and has been invoked by a number of WTO Members in various cases.

4. Other Principles of Interpretation Relevant to WTO Law

In addition to the basic elements listed in Article 31 and 32 of the VCLT, there are some other principles which can be derived from these articles or can be considered within the “any relevant rules of international law applicable in the relations between the parties” mentioned in 31.3 (c).

¹⁹⁶ Christophe J. LAROUER (2009) “In the Name of Sovereignty: The Battle over In Dubio Mitius Inside and Outside the Courts” *Cornell Law Library*, Cornell Law School Graduate Conference Papers, p 5

¹⁹⁷ Appellate Body Report in *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, p26

¹⁹⁸ Appellate Body Report in *European Communities – Measures Concerning Meat and Meat Products*, WT/DS26/AB/R, p26, footnote 154

¹⁹⁹ See LAROUER *supra* 197 for an extensive discussion on the origin and use of this principle, its incorporation into the WTO Law and possible pitfalls of having done so.

4.1 Principle of Good Faith

Principle of good faith lies at the heart of almost every legal system and this statement definitely applies to international law. Indeed, in international law, it is the fundamental principle from which the rule *pacta sunt servanda* and other rules distinctively or directly related to honesty, fairness and reasonableness are derived.²⁰⁰

While good faith is closely related to a contracting party's being faithful to her obligation, it goes beyond being faithful to an obligation but also includes "faithfulness to behaving in a way so as not to disappoint the subjective beliefs of others, so long as the subjective beliefs, or expectations, can be logically deduced from the contracting party's prior actions or inactions"²⁰¹ The two main corollaries - other than *pacta sunt servanda*- of this principle applicable to the WTO law are the principles of prohibition of abuse of rights (*l'abuse de droit*) and the protection of legitimate expectations.²⁰²

Prohibition of Abuse of Rights

The principle of prohibition of the abuse of rights mandates that a party to an agreement is prevented from exercising its rights stemming from that agreement in a way that will undermine the spirit of the agreement,²⁰³ i.e., in a way which impedes the enjoyment by other states of their own rights or for an end different from that for which the right was created, to the injury of another State.²⁰⁴ In WTO framework, this principle was mostly applied to the cases of exercise of GATT Article XX exceptions or trade remedies. For example, in *US-Shrimp*, the AB, when commenting on whether a particular measure of a Member which violates a GATT provision could be legitimised within Article XX, made the following statement;

"[a] balance must be struck between the *right* of a Member to invoke an exception under Article XX and the *duty* of that same Member to respect the treaty rights of the other Members. To permit one Member to abuse or misuse its right to invoke an exception would be effectively to allow that Member to degrade its own treaty obligations as well as to devalue the treaty rights of other Members. If the abuse or misuse is sufficiently grave or extensive, the Member, in effect, reduces its treaty obligation to a merely facultative one and dissolves

²⁰⁰ Thomas COTTIER, Krista Nadakavukaren SCHEFER (1998) "The Relationship Between World Trade Organization Law, National and Regional Law", *Journal of International Economic Law*, Vol 998(1), p 125

²⁰¹ *Ibid*, p126

²⁰² *Ibid*, p 127

²⁰³ *Supra* 200, p 126

²⁰⁴ MITCHELL *supra* 175, p 11

its juridical character, and, in so doing, negates altogether the treaty rights of other Members.”²⁰⁵

It went on further that;

“The chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state’s rights and enjoins that whenever the assertion of a right ‘impinges on the field covered by [a] treaty obligation, it must be exercised bona fide, that is to say, reasonably.’ An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting.”²⁰⁶

Thus, the AB once again confirmed that²⁰⁷ Members cannot abuse the rights given to them as exceptions to their GATT obligations in a way to nullify or override those obligations and the chapeau of GATT XX prevents such abuses of rights. The AB did this by explicitly referring to the principle of abuse of rights which is to be considered within the concept of good faith.

Protection of Legitimate Expectations

Protection of legitimate expectations is another corollary resulting from the application of good faith principle. This principle, which has its roots in general international law and the jurisprudence of the ICJ²⁰⁸, can be applied to the situations where a party to an agreement had an objective reason to believe, based on another party’s words or actions that that another party will act in a certain way or refrain from acting in a certain way, and in the absence of such an action or inaction, the initial party suffers a damage.

This principle has an important place in the dispute settlement system of the WTO as it is understood to form the basis of non-violation complaints based on the Article XXIII of GATT and Article 26 of DSU.²⁰⁹ In WTO terminology, non-violation complaints refers to the situations when “any benefit accruing to [a Member] directly or indirectly [under GATT] is nullified or impaired or that the attainment of any objective of the Agreement is being impeded

²⁰⁵ Appellate Body Report in United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, p 60

²⁰⁶ Appellate Body Report on *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, p 61

²⁰⁷ A similar assessment without giving explicit reference to the principle of abuse of rights was made by the AB in *US-Gasoline*. See Appellate Body Report on United States –Standards for Reformulated and Conventional Gasoline, WT/DS4/AB/R, p 22

²⁰⁸ James CAMERON, Kevin R. GRAY (2001) “Principles of International Law in WTO Dispute Settlement Body” *International and Comparative Law Quarterly* Vol: 50 Issue:2, p 260

²⁰⁹ STOLL (2006), p 300

as the result of the application by another [Member] of any measure” even though it does not conflict with the provisions of GATT²¹⁰

In *Japan-Film*, the Panel, when commenting on a non-violation complaint, stated that;

“[The purpose of Article XXIII:1(b) is] to protect the balance of concessions under GATT by providing a means to redress government actions not otherwise regulated by GATT rules that nonetheless nullify or impair a Member’s *legitimate expectations* of benefits from tariff negotiations”²¹¹ (*italics added*)

The Panel then further clarified the concept of legitimate expectations;

“[i]n order for expectations of a benefit to be legitimate, the challenged measures must not have been reasonably anticipated at the time the tariff concession was negotiated. If the measures were anticipated, a Member could not have had a legitimate expectation of improved market access to the extent of the impairment caused by these measures.

Thus, under Article XXIII:1(b), the United States may only claim impairment of benefits related to improved market access conditions flowing from relevant tariff concessions by Japan to the extent that the United States could not have reasonably anticipated that such benefits would be offset by the subsequent application of a measure by the Government of Japan.”²¹²

However, it has been clarified by the AB that the principle of legitimate expectations, as an interpretive tool, must be applied cautiously and in a rather limited way.²¹³ In *India-Patents*, the Panel, when analysing a claim under the TRIPS Agreement and after admitting that “[t]he protection of legitimate expectations of Members regarding the conditions of competition is a well-established GATT principle”²¹⁴ and that “[t]he protection of legitimate expectations is central to creating security and predictability in the multilateral trading system”²¹⁵, went on to apply the standards on the concept of legitimate expectations derived under GATT, particularly under GATT Article XXIII, to its current TRIPS case. The AB unequivocally rejected this approach. By making a clear distinction between violation and non-violation complaints under GATT XXIII, the AB demonstrated that the jurisprudence on principle of “legitimate” or “reasonable” expectations was exclusively developed for non-violation complaints. As there were no non-violation complaints available under the TRIPS Agreement, as set out by the

²¹⁰ GATT Article XXIII.1 (b)

²¹¹ The Panel Report in *Japan- Film supra* 37, p 439

²¹² *Ibid*, p 447

²¹³ LENNARD *supra* 174, p 66; Helge Elisabeth ZEITLER (2005) “Good Faith in the WTO Jurisprudence: Necessary Balancing Element or An Open Door to Judicial Activism” *Journal of International Economic Law* 8(3), p728

²¹⁴ The Panel Report in *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, p 51

²¹⁵ *Ibid*, p 52

Article 64.2 of that agreement, it is not possible to apply this principle within the context of TRIPS Agreement.²¹⁶

The AB further refuted the claim by the Panel that, “good faith interpretation requires the protection of legitimate expectations derived from the protection of intellectual property rights provided for in the Agreement”²¹⁷ by explaining that the principle of legitimate expectations, as such, is not an interpretative element within the meaning of the Article 31 of the VCLT.²¹⁸ To determine whether a specific WTO provision is violated or not, the relevant criteria are not the expectations of a particular member whether legitimate or not. Rather, the relevant criterion whether there is a violation or not is the text of that agreement supported by other elements in Article 31. Thus, “the legitimate expectation of the parties to a treaty is reflected in the language of the treaty itself”²¹⁹.

Similarly, in *EC-Computer Equipment*, the Panel, when addressing an allegation regarding the tariff treatment of a Member within the context of Article II of GATT, made the following determination:

“It should be noted in this regard that the protection of legitimate expectations in respect of tariff treatment of a bound item is one of the most important functions of Article II.”²²⁰

Later on in the report, the Panel, when discussing the relationship between the text of the Article II and tariff schedules and legitimate expectations of the complaining party regarding the tariff treatment, stated that;

“In our view, it may, as a matter of fact, be the case that in nearly all instances, the ordinary meaning of the terms of the actual description in a tariff schedule accurately reflects and exhausts the content of the legitimate expectations. It is clearly the case that most descriptions are to be treated with the utmost care to maintain their integrity precisely because, on their face, they normally constitute the most concrete, tangible and reliable evidence of commitments made. In our view, however, this cannot be the case *a priori* for all tariff commitments. It must remain possible, at least in principle, that parties have legitimately formed expectations based on other particular supplementary factors.”

²¹⁶ The Appellate Body Report in *India- Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, p 18

²¹⁷ *Supra* 214, p 50

²¹⁸ *Supra* 216, p 18-19

²¹⁹ *Ibid*, p 18

²²⁰ The Panel Report in *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/R, p 66

Thus the Panel, contrary to the AB ruling in *India- Patents*, implicitly accepted that “legitimate expectations” can be formed by members based on factors other than the text of the treaty and moreover, those expectations can be utilised to determine a violation of the Article II.

This reasoning by the Panel was again reversed by the AB, where the AB, leaving no ambiguity, ascertained once again that the principle of legitimate expectations were only applicable to cases of non-violation complaints but not to the violation and reiterated its ruling in *India-Patents* that “subjective” or “unilateral” legitimate expectations is not an element of interpretation within the meaning of Article 31 of VCLT.²²¹

Estoppel

The principle of “estoppel” or “acquiescence” is another principle closely related to the good faith principle. Having its roots as a procedural principle in the Anglo-Saxon law, the principle has become widely recognised as part of international law.²²² “Estoppel”, in international law, prevents a complaining party to a dispute;

“contesting before a Court a situation that contrary to a clear and unequivocal representation previously made by it to another state, either expressly or impliedly, on which representation the other State was, in the circumstances, entitled to rely and in fact did rely, and as a result that the other State has been prejudiced or the State making it has secured some benefit or advantage for itself.”²²³

Principle of estoppel found limited application in WTO Law. In *Guatemala – Cement II*, in a case where Guatemala was accused of violating some procedural requirements under the Anti-Dumping Agreement, Guatemala argued that the complaining party, Guatemala, gave rise to an estoppel by “not objecting to any putative delay in notification under Article 5.5.” as Mexico made no mention of the alleged violation almost for six months after the notice of initiation.²²⁴ Thus, an acquiescence or acceptance through silence occurred by Mexico.

In response, the Panel stated that;

²²¹ The Appellate Body Report in *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, p 31

²²² COTTIER & SCHEFER, p 114

²²³ ICJ Case, *Temple of Preah Vihear* Case (1962), quoted in *ibid*, p 114

²²⁴ The Panel Report on *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, p135

“Regarding both arguments of acquiescence and estoppel we note that Mexico was under no obligation to object immediately to the violations it now alleges before the Panel.²²⁵ Mexico raised claims concerning Articles 5.5, 12.1.1 and 6.1.3 at an appropriate moment under the dispute settlement procedure envisaged by the AD Agreement and the DSU. Thus, Mexico cannot therefore be considered as having acquiesced to belated notification by Guatemala, to insufficiency in the public notice or to delay in providing the full text of the application, much less to have given "assurances" to Guatemala that it would not later challenge these actions in WTO dispute settlement.” (footnote in the original)

In *Argentina – Poultry AD Duties*, Argentina, on an alleged violation of the Anti-Dumping Agreement, asserted that the complainant, Brazil, was estopped from bringing the case to the DSU since the case was already under consideration by the MERCOSUR dispute settlement system. Argentina also relied on “Olivos Protocol” signed between MERCOSUR Member states which mandates that once a party to a dispute between MERCOSUR Members states decides to bring a case either within MERCOSUR or WTO DSB, that party may not bring a subsequent case regarding the same subject-matter in the other forum.²²⁶

The Panel rejected the Argentinian argument on the ground that an estoppel “can only result from the express or in exceptional circumstances implied consent of the complaining parties” and that there was no evidence that Brazil made an express statement that it would not bring WTO dispute settlement proceedings in respect of measures previously challenged through MERCOSUR. Nor did the record indicate exceptional circumstances requiring the Panel to imply any such statement.²²⁷ The Panel could refrain from commenting on the role of “Olivos Protocol” by relying on the fact the Protocol had not entered into force yet and thus by stating that the current proceedings were based on the Brasilia Protocol where there were no explicit restrictions for Brazil to bring a case on the same subject matter to the WTO DSB.

It could be interesting to see what the Panel’s opinion would be if the Olivos Protocol had actually entered into force at the time of Brazil’s submission to the DSB. Apparently, *according to Panel’s own definition, that situation had to be considered as a legitimate call for an estoppel*. However, then the question would be to what extent the principle of estoppel could be regarded as a principle applicable to WTO law and be used to clarify the WTO provisions.

²²⁵ Regarding acquiescence we note that the precise scope and applicability of this concept is still a matter of debate, and it is clear that not any silence can be considered to constitute consent.

²²⁶ Panel Report on *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, p 16

²²⁷ *Ibid*, p 21

In *EC – Sugar Subsidies*, on an allegation by the complaining parties about EC’s export subsidy commitments based on a schedule submitted at the time of signature of the WTO Agreement, the EC argued that the complaining parties were estopped from this complaint since they had implicitly accepted it by their “informed silence” at the time signature. The Panel rejected EC’s claim on the grounds that “silence can give rise to estoppel only if there is a legal duty to speak” to indicate one’s objection. On an appeal by EC on this aspect, the AB, not only confirmed this reasoning by the Panel but also commented on the applicability of “estoppel” in WTO Law:

“The principle of estoppel has never been applied by the Appellate Body. Moreover, the notion of estoppel, as advanced by the European Communities, would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding. We see little in the DSU that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their “judgement as to whether action under these procedures would be fruitful”, by virtue of Article 3.7 of the DSU, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3.10 of the DSU. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the DSU.”²²⁸

Thus, the AB sealed that even if the principle of estoppel could be applied in the WTO dispute settlement, this application would be very limited. The AB then went on to agree with the Panel’s ruling that there was no identification of “any facts or statements made by the complainants that where they have admitted that the EC measure was WTO consistent or where they have promised that they would not take legal action against the European Communities.”²²⁹ nor there was any evidence as alleged by the EC that there was a “shared understanding” by all participants in the Uruguay Round in deciding not to include exports of C sugar in the base quantity levels in its Schedule.²³⁰

In conclusion, as the examination of the above mentioned cases tell us, if the principle of estoppel could ever be applied in WTO Law, this can be in the event that the complaining party explicitly expressed its consent elsewhere not to make that complaint or for the case of acquiescence, only if there was a legal obligation to express dissent but it did not do so.

²²⁸ Appellate Body Report on European Communities – Export Subsidies on Sugar, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, p 108

²²⁹ *Ibid*, p 109

²³⁰ *Ibid*, p109

4.2 Principle of Effective Treaty Interpretation

Principle of effective treaty interpretation or effectiveness (*ut res magis valeat quam pereat*) is another principle that found application in the WTO jurisprudence. Effectiveness is a fundamental principle of treaty interpretation resulting from the contextual analysis as required by the Article 31 of the VCLT.²³¹ It has also been recognised as “a generally accepted rule of interpretation by the ICJ.”²³² While this principle has not been included as an explicit provision in the VCLT by the ILC, ILC stipulated that the good faith obligation in the Article potentially involves the principle of effectiveness:

“When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the object and purposes of the treaty demand that the former interpretation should be adopted.”

In other words, an effective interpretation necessitates that every single term or expression in the text of a treaty is drafted with a purpose and hence should be given an effect.

Principle of effectiveness has been invoked in various Panel and AB reports. The Panel in *Canada- Patents* laid down a definition:

“The principle of effective interpretation or ‘*l’effet utile*’ or in Latin *ut res magis valeat quam pereat* reflects the general rule of interpretation which requires that a treaty be interpreted to give meaning and effect to all the terms of the treaty. For instance, one provision should not be given an interpretation that will result in nullifying the effect of another provision of the same treaty” (footnotes omitted)²³³

In *US-Gasoline*, the AB, though not explicitly mentioning the name of the principle, affirmed that effectiveness is a relevant principle for treaty interpretation in the WTO context:

“One of the corollaries of the “general rule of interpretation” in the Vienna Convention is that interpretation must give meaning and effect to all terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing the whole clauses or paragraphs of a treaty to redundancy or inutility.”²³⁴

²³¹ CAMERON & GRAY *supra* 208, p 256

²³² The *Corfu Channel* Case, Merits (1949), p 24

²³³ The Panel Report on Canada-Term of Patent Protection, WT/DS170/R, p 14, footnote 30

²³⁴ The Appellate Body Report in United States- Standards for Reformulated and Conventional Gasoline WT/DS2/AB/R, p 23

In *Japan – Alcohol*, the AB regarded the principle of effectiveness “as a fundamental tenet of treaty interpretation, flowing from the general rule of interpretation set out in Article 31” of the VCLT.²³⁵

Finally, in *Korea – Dairy*, the AB reinforced the principle even in a stronger manner:

“In light of the interpretive principle of effectiveness, it is the duty of any treaty interpreter to ‘read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.’”²³⁶

The above made quotations leave no question that effectiveness has been “effectively” incorporated into the WTO law as a principle of interpretation. As also suggested by Van Damme²³⁷, it is understood that the reason for such an active recourse to this principle by the AB is to maintain the coherence in the WTO legal system as the complex network of “covered agreements” are all parts of the WTO Agreement. This is no surprise since the AB frequently underlines that the covered agreements constitute “an inseparable package of rights and obligations” and often prefers to make cross-referencing throughout the whole body of WTO Agreements.

The question arises, however, on the shortcomings of an over-ambitious expression of this activism as compared to the ILC approach exhibited above.²³⁸ While ideally all covered agreements and all provisions within an agreement can be interpreted harmoniously, this may not be the case in reality. As we have mentioned before, WTO Agreements were results of long-lasting and austere negotiation process and it has often been the case that due to the inability of the parties to reach agreement on fully effective provisions, the differences were melted down on more vague and unclear provisions. Moreover, as the different negotiations took place in different negotiation groups conducted by different negotiators and there was no time for a full legal wrap-up of the whole language, it is practically impossible to have a fully harmonious text throughout the whole package of WTO Agreements. In this sense, we are of the view that a more moderate approach to principle of effectiveness like that of the ILC’s would be more suitable for interpretation of WTO Agreements.

²³⁵ The Appellate Body Report in *Japan- Taxes on Alcoholic Beverages* WT/DS8-10-11/AB/R, p 12

²³⁶ The Appellate Body Report in *Korea- Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, p 24

²³⁷ Isabelle VAN DAMME (2009) “Chapter 5: Jurisdiction, Applicable Law and Interpretation” in Bethlehem, Daniel; McRae, Donald; Neufeld, Rodney; Van Damme, Isabelle, (eds.) *The Oxford Handbook of International Trade Law*, Oxford University Press, Oxford UK, p 636-637

²³⁸ LENNARD *supra* 174, p 59

Now, after having reviewed the rules of a proper interpretation as possible tools of conflict avoidance; it is time to ask what could be done if the conflict continued to exist even if all the interpretative tools mentioned above were applied properly.²³⁹ Such cases can appropriately be called genuine cases of conflict between norms and under such circumstances there would be no choice but to apply to explicit conflict resolving rules in order to determine which of the conflicting norms would prevail over the current case.

²³⁹ Sadat-Akhavi defines a third category of cases where two norms can be ‘reconciled’ even though they seem to be in conflict. Akhavi defines this category as “two norms are reconcilable when there is at least one way of complying with all their requirements.” While one has the feeling that Akhavi’s aim through introducing this category is to capture the cases where at least one of the norms gives a range of choices to fulfil its requirement and one of those choices does not conflict with the other norm. However, while giving examples to this category, he includes the cases of two permissive norms and a permission and obligation canceling each other. Judging by also how he defines this category, one has the impression that Akhavi actually adopts a narrow definition of conflict, and the seeming inconsistencies where one side of the norms is a permission can simply be “reconciled”. This is confusing since Akhavi explicitly includes the right/obligation cases when he discusses the definition of the norm conflict at the introductory chapter of his book. Under any case, in this work, we do not see it necessary to define a third category, reconciliation between two norms, if it is possible at all, can be achieved through the application of good faith interpretation and other interpretative tools that we have discussed above. See Ali SADAT-AKHAVI (2010) *Methods of Resolving Conflicts between Treaties* The Graduate Institute of International Studies Series, Martinus Nijhoff Publishers

PART VI: CONFLICT RESOLUTION: RULES AND PRINCIPLES

VI. CONFLICT RESOLUTION: RULES AND PRINCIPLES

1. Rules of Conflict Resolution

After the determination that there exists a genuine conflict between two treaties or between the provisions of the same treaty, there would be mainly two ways to resolve that conflict. The first case is the existence of an explicit conflict resolving clause in one of the treaties.

In the alternative case, when there exists no explicit conflict resolving clause in one of the treaties, rules of conflict resolution of international law may be relied on. Such rules of conflict resolution can either stem from conventional –*lex superior* or *lex posterior* - or customary international law – *lex specialis* –.

Before going on with our review, it would be useful to clarify one point. The ultimate purpose of this review is to envisage the rules of conflict resolution of the kind that we may potentially employ when resolving conflicts between WTO legal texts, in particular between GATT and GATS. As such, it is certain that we are interested in the type of conflicts where both norms continue to exist but one of them prevail over the other. The types of conflicts where one norm ceases to exist –where one of them invalidates or illegalizes the other, is not our concern.²⁴⁰ In this context, the rules of conflict resolution which are designed to resolve cases of this type such as Article 53 of VCLT²⁴¹ or the Article 59 of the same treaty²⁴² will be out of the scope of our review. Now, we can begin with our review of the rules and principles of conflict resolution in international law applicable to potential conflicts between GATT and GATS.

2. Conflict Resolving Clauses

2.1 Conflict Resolving Clauses in International Law

A conflict solving clause is defined by the ILC as “a clause intended to regulate the relation between the provisions of the treaty and those of another treaty or any other treaty relating to the matters with which the treaty deals.”²⁴³ Sadat-Akhavi defines a conflict resolving clause

²⁴⁰ Pauwelyn calls such type of conflicts as “inherent normative conflicts”.

²⁴¹ Article 53 of the VCLT deals with the cases where a treaty or a provision of it conflicts with a preemptory norm of general international law, *jus cogens*.

²⁴² Article 59 deals with the cases where one treaty is terminated or suspended by the conclusion of another treaty by its parties.

²⁴³ SADAT-AKHAVI, *supra* 239

as “a clause aiming at resolving conflicts between the provisions of one treaty and those of other treaties.”²⁴⁴ Naturally, such clauses would be applicable to the treaties entered into by the same contracting parties and would not be binding for a third party which is not a party to the treaty which includes that clause.

There are various examples of such explicit conflict resolving clauses in international legal texts. Perhaps, the most well-known of such clauses is the Article 103 of the UN Charter which we have previously mentioned and which claimed priority over any other international agreement in the event of a conflict between the two.²⁴⁵ Another similar example is the Article 8 of the North Atlantic Treaty which makes an explicit reference to both existing and future treaties entered into by its parties:

“Article 8

Each Party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international engagement in conflict with this Treaty.”²⁴⁶

It might also be the case that a treaty may claim priority over an existing treaty or treaties such as the 311 of the United Nations Convention on Law of Sea (UNCLOS):

“Article 311

Relation to other conventions and international agreements

1. This Convention shall prevail, as between States Parties, over the Geneva Conventions on the Law of the Sea of 29 April 1958.”

While it might be the case that a conflict resolving clause may claim priority over a particular treaty or treaties as in these examples, it might also declare the subordination to a particular treaty or treaties. This is usually for the purpose of giving priority to subsequent treaties to ensure future development of law on a specific matter. For instance, Article 22.1 of the United Nations Convention on Biological Diversity states that;

“Article 22. Relationship with Other International Conventions

1. 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.”

²⁴⁴ *Ibid*, p 85

²⁴⁵ *Ibid*, p 97

²⁴⁶ The North Atlantic Treaty finalized in Washington D.C. on 4 April 1949

Thus, the Convention on Biological Diversity gives a conditional priority to the existing agreements in cases of conflict between the provisions of that agreement and itself.

Similarly the Article 2103 of the North American Free Trade Agreement declares its subordination to specific treaties in matters related to taxation:

“Article 2103: Taxation

.....

2. Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention. In the event of any inconsistency between the provisions of this Agreement and any such convention, the provisions of that convention shall prevail to the extent of the inconsistency.”

Finally, a conflict resolving clause may declare the subordination of a treaty over any future treaties between its contracting parties.²⁴⁷ For instance, Article 4 of the “Vienna Convention on the Representation of States in their Relations with International Organizations” states that:

Article 4
Relationship between the present Convention
and other international agreements

The provisions of the present Convention:

.....

(b) shall not preclude the conclusion of other international agreements regarding the representation of States in their relations with international organizations of a universal character or their representation at conferences convened by or under the auspices of such organizations.

Likewise, Article 3 of the “UN Convention on the Law of the Non-navigational Uses of International Watercourses” stipulates that;

“3. Watercourse States may enter into one or more agreements, hereinafter referred to as “watercourse agreements”, which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.”

²⁴⁷ The co-existence of treaties having conflict resolving clauses of this type may lead complex situations. If for instance, both treaties deny jurisdiction on a certain issue, this might lead to a “negative conflict” and consequently it might be hard to actually determine the applicable law to the case. See SADAT-AKHAVI, *supra* 239, p 96 for an example of such a case in international law.

2.2 Conflict Resolving Clauses in WTO Law

While there is no doubt that the whole package of WTO Agreements constitute a “single undertaking” and all agreements annexed to WTO Agreement are regarded as parts of a single treaty, this does not mean that conflicts between individual agreements are not at all envisaged. This is reflected in the number of explicit conflict resolving clauses regulating the relationship between different WTO Agreements.

The first such example that comes to mind is the “General interpretative note to Annex 1A” trade in goods agreements which regulates the relationship between GATT and other trade in goods agreements existing within Annex 1A:

“General interpretative note to Annex 1A:

In the event of conflict between a provision of the General Agreement on Tariffs and Trade 1994 and a provision of another agreement in Annex 1A to the Agreement Establishing the World Trade Organization (referred to in the agreements in Annex 1A as the “WTO Agreement”), the provision of the other agreement shall prevail to the extent of the conflict.”

It is clear from this provision that the drafters of the WTO Agreements were aware of and recognised the fact that conflicts might occur between GATT and other Annex 1A Agreements such as TBT or SPS and they wanted that those other agreements prevail over GATT in the event of a conflict as being the special law or *lex specialis*.

Another such example is the Article 1.2 of the Dispute Settlement Understanding (DSU)²⁴⁸;

“2. The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a conflict between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body provided for in paragraph 1 of Article 2 (referred to in this Understanding as the “DSB”), in consultation with the parties to the dispute, shall determine the rules and procedures to be followed within 10 days after a request by either Member. The Chairman shall be guided by the principle that special or additional rules and procedures should be used

²⁴⁸ Understanding on Rules and Procedures Governing the Settlement of Disputes

where possible, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.”

This provision ensures that where there are special dispute settlement provisions in the respective WTO Agreements – which is the case for example for SPS and SCM agreements- those special provisions prevail over the DSU provisions to the extent of a conflict between the two.

Finally, a similar provision exists in the Article 21.1 of the Agreement on Agriculture:

“Article 21

Final Provisions

1. The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.”

The provision ensures that the Agreement on Agriculture is prior to other Annex 1A Agreements including GATT on matters related to agricultural products.

These examples reinforce the proposition that agreements attached to the WTO Agreements should be read in harmony to the extent that there is a conflict between them and the possibility that such conflict occur has not been neglected. It is, however, noteworthy that no similar conflict clause exist to govern the relationship between the three main pillars of the WTO Agreement which are GATT, GATS and TRIPS. This takes us to the conflict resolving rules stemming from general – conventional or customary – international law.

3. Conflict Resolving Rules in International Law

In the absence of explicit conflict resolving clauses existing in the treaties, one may resort to the conflict resolving rules generally accepted in the body of public international law which may be either codified - VCLT- or uncoded – customary international law-.

3.1 Lex Superior

Lex superior derogat legi inferiori or *lex superior* which means “the law of a superior hierarchy prevails over the law of an inferior hierarchy” is a principle that is mostly relevant

in municipal law where there usually exist a clear hierarchy between different levels of legislation such as constitution, law, regulation...etc. In public international law, this is a less likely case, since under normal circumstances, there is no such hierarchy between two treaties between two states.

Nevertheless, in international law, there are exceptional norms which are regarded to have a higher status within the hierarchy of the sources of international law. Such norms are called “peremptory norms” or *jus cogens*²⁴⁹ as defined by the Article 53 of the VCLT:

“Article 53
*Treaties conflicting with a peremptory norm of
general international law (“jus cogens”)*”

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Another reference to the concept of *jus cogens* was made in Article 64:

“Article 64
*Emergence of a new peremptory norm of general
international law (jus cogens)*”

If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

Although there is nowhere an official list of what the *jus cogens* norms are, it is generally accepted that prohibition of acts like slavery, genocide, piracy or torture all constitute *jus cogens* norms. Thus, such a norm is over any kind of treaty provision and hence in the event of a conflict with a provision from any other treaty existing in international law, the *jus cogens* norm prevails. Furthermore, the emergence of a new norm which is generally accepted as *jus cogens* terminates the existing provisions which are in conflict with the new provision.²⁵⁰

²⁴⁹ *Jus cogens* norms are sometimes confused with obligations *erga omnes*. The two concepts are different by what they define. Obligations *erga omnes* represent the norms which are by their nature a legitimate concerns for all states and thus owed to all states. It is not related to the content of the norm but to the effect of the norm that even an unaffected third party can other than the injured party can invoke the responsibility of the accused party. On the other hand, *jus cogens* is a concept related to the content and the superiority of the norm. In this sense, all *jus cogens* norms are *erga omnes* while not all obligations *erga omnes* constitute *jus cogens* norms.

²⁵⁰ See Dinah SHELTON (2006) “Normative Hierarchy in International Law” *The American Journal of International Law* Vol: 100 No:2 p 291-323 for an illuminating discussion on the nature of *jus cogens* norms and their place within public international law.

At this point, one may be curious on the status of the provisions of the UN Charter, particularly in the light of the Article 103 of the Charter which we have discussed above and which requires that the obligations of the members under the Charter prevails over obligations stemming from any other treaty. In this context, the arising question is “what would happen if a decision under UN Charter conflicts with a *jus cogens* norm?” While, so far, no decisive answer has been provided to this question, the general trend in the decisions and comments by international tribunals is that no norms including the Resolutions in connection with the UN Charter are immune to the prohibition by the *jus cogens* norms.²⁵¹

Lex Posterior

Lex posterior derogat legi priori or shortly *lex posterior* which has its roots in Roman Law is a generally accepted principle of legal interpretation. In international law context, it means “when there are two treaties regulating the same subject matter, the later treaty abrogates/prevails over the earlier treaty”. The principle stems from the contractual freedom of states which ensures that their latest expression of intent prevails over the earlier ones. Borrowed from municipal law, the principle has been gradually integrated into international law through decisions of international courts and ultimately through the VCLT.²⁵²

The principle was first invoked by PCIJ in the *Mavrommatis Palestine Concessions* Case and the Advisory Opinion on *Jurisdiction of the European Commission of the Danube*.²⁵³ In *Mavrommatis Palestine Concessions*, the PCIJ dealt with the question of which particular treaty should be applied in the current case regarding the concessions granted to Mr. Mavrommatis, a Greek national by the Ottoman Authorities. There were two applicable international instruments to the case, one being the Article II of the 1922 Mandate for Palestine under the League of Nations and the other being the the Protocol XII attached to the 1923 Peace Treaty of Lausanne. The PCIJ commented that:

“It is certain that Protocol XII is an international instrument, quite distinct from and independent of the Mandate for Palestine. It deals specifically and in explicit terms with concessions such as those of M. Mavrommatis, whereas Article II of the Mandate deals with

²⁵¹ See Kristen E. BOON (2011) “Regime Conflicts and the UN Security Council: Applying the Law of Responsibility” *George Washington International Law Review*, Vol:42 p 787-833 for a comprehensive discussion on this matter.

²⁵² The principle was recognised by early contributors such as Hugo Grotius and Emmerich de Vattel and later on referred to by Quincy Wright and Charles Rousseau who made early contributions to the issue of norm conflict. International Law Commission 1999-2009 *Vol:IV Treaties, Final Draft Articles and Other Materials*, p 711

²⁵³ KARL *supra* 97, p 937

them only implicitly. Furthermore it is *more recent* in date than the Mandate. All the conditions therefore are fulfilled which might make the clauses of the Protocol overrule those of the Mandate.”²⁵⁴ (emphasis added)

The Court further clarified that:

“The fact that Article II only refers to the Protocol in general terms, and that the Protocol is more recent in date than the Mandate, does not justify the conclusion that the Protocol would only be applicable in Palestine in so far as it is compatible with the Mandate. On the contrary, in cases of doubt, the Protocol, being a special and *more recent* agreement, should prevail.”²⁵⁵ (emphasis added)

In the *Jurisdiction of the European Commission of the Danube* case, the PCIJ was again faced with the question of determining the applicable treaty to a specific section of the river Danube namely between Galatz and Braila in Romania. An international regime for the lower or maritime Danube was established through the foundation of “European Commission of the Danube” by the Treaty of Paris in 1856. The jurisdiction of the European Commission, which was initially between the mouth of the river and Isaccea was extended to Galatz in 1878 and to Braila in 1883. Romania, which was a party to the first extension, did not sign the second treaty and thus refused this extension. In 1919, by the Versailles Treaty, this time an International Commission to regulate the upper or fluvial Danube –the part which was not regulated by the European Commission- was established whereas the jurisdiction the European Commission was confirmed. Finally, in 1921, in pursuance of the Versailles Treaty, Definitive Statute of the Danube was signed between the same contracting parties and the validity of the earlier treaties regarding the jurisdiction the European Commission was further confirmed.

In this context, in discussing whether the Definitive Statute had the authority to modify the powers and functions of the European Commission, the Court made the following comment:

“In the course of the present dispute, there has been much discussion as to whether the Conference which framed the Definitive Statute had authority to make any provisions modifying either the composition or the powers and functions of the European Commission, as laid down in the Treaty of Versailles, and as to whether the meaning and the scope of the relevant provisions of both the Treaty of Versailles and the Definitive Statute are the same or not. But in the opinion of the Court, as all the Governments concerned in the present dispute have signed and ratified both the Treaty of Versailles and the Definitive Statute, they cannot,

²⁵⁴ *Mavrommatis Palestine Concessions* (Jurisdiction), PCIJ, Ser. A, No. 2 (1924), p 30

²⁵⁵ *Ibid*, p 31

as between themselves, contend that some of its provisions are void as being outside the mandate given to the Danube Conference under Article 349 of the Treaty of Versailles.”²⁵⁶

Thus, it has been established by the PCIJ in *Mavrommatis* and *Danube* cases that the treaty between the same contracting parties which is more recent prevails over the earlier treaty on an issue which regulated by both treaties. Between these decisions and the preparations of the VCLT, *lex posterior* principle was invoked by a number of court decisions.²⁵⁷ One particular question regarding the principle in the preparation phase of the VCLT was whether the later treaty invalidates the prior treaty in the case of a conflict or whether it only prevails over it without invalidating it. Eventually, the second approach gained weight the principle has been codified in the VCLT in its current form as the Article 30²⁵⁸:

“Article 30

Application of successive treaties relating to the same subject matter

1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.
2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.
4. When the parties to the later treaty do not include all the parties to the earlier one:
(a) as between States Parties to both treaties the same rule applies as in paragraph 3;
(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.
5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a State from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.”

²⁵⁶ *Jurisdiction of the European Commission of the Danube*, PCIJ, Ser. B, No. 14 (1927), p 45

²⁵⁷ See for instance *Electricity Company of Sofia and Bulgaria*, PCIJ, Ser. A/B, No. 77 (1939)

²⁵⁸ See Mark Eugen VILLIGER (2007) *Commentary on the 1969 Vienna Convention on the Law of Treaties*, p 400-401 and Kerstin ODENDAHL “Article 30” in *Vienna Convention on Law of Treaties: A Commentary* (eds.) Dörr, Oliver; Schmalenbach, Kirsten p 505-508 for more information on the negotiating history of the Article 30.

The article consists of a number of elements. First, a hierarchical priority has been given to the Article 103 of the UN Charter through paragraph 1 raising the Charter to a *lex superior* level. Paragraph 1 also defines the scope of the Article. As we have mentioned before, it is noticeable that the paragraph speaks about “the rights and obligations of States Parties to successive treaties”, thus at least implicitly admits that a conflict is possible between rights and obligations. Furthermore, as we have discussed in Part II above the “same subject matter” criterion laid down in the paragraph is a disputed one.²⁵⁹

Second, paragraph 2 acknowledges the priority of “conflict clauses” if there are any in a given treaty. In other words, if a treaty includes a special provision to regulate its relation with other treaties, the Article 30 would not apply.²⁶⁰ One particular point to be mentioned on this paragraph is that it only indicates subordination clauses which are one category of conflict clauses where the given treaty establishes its subordination to other treaties. Conflict clauses which claim priority over other treaties are not mentioned in the paragraph.

Third, paragraph 3 deals with the colliding treaties which lack a conflict clause based on the *lex posterior* principle. When there are two successive treaties whose parties are identical and the earlier treaty has not been terminated or suspended by its parties and the latter treaty prevails over the latter to the extent of a conflict. Thus, the earlier treaty still remains in force and applicable but only to the extent that its provisions do not conflict with those of the latter treaty.²⁶¹

Fourth, paragraph 4 deals with the cases where parties to the successive treaties are not identical. In this case, two different possibilities have to be distinguished. For the states which are parties to both treaties, the *lex posterior* principle laid down in paragraph 3 continues to apply between them, thus the latter treaty prevails. For the states which are party to only one of the treaties, their rights and obligations vis-a-vis other states are only determined by the treaty which they are a party to which is a natural consequence of the *pacta sunt servanda* principle.

²⁵⁹ It appears that the earlier versions of the draft VCLT prepared by Lauterpacht, Fitzmaurice and Waldock used expressions such as “conflict”, “conflicting treaty provisions” or “treaties having incompatible provisions” instead of “relating to the same subject matter”. However, this version which was chosen at the final draft in 1966 to allow for a wider concept to include not only apparent conflicts but also incompatibilities as well as divergences. This formulation was criticised especially by the

²⁶⁰ ODENDAHL, *supra* 258, p 512

²⁶¹ *Ibid*, p 514

Finally, paragraph 5 lays down the relationship between Article 30 and the provisions dealing with state responsibility by giving priority to those provisions. In other words, when a state concludes a new treaty that is incompatible with an earlier one, it must be aware of the fact that its state responsibility in the case of a breach of the earlier treaty and the corresponding rights of the other parties of that treaty remain in force.²⁶²

On the applicability of the *lex posterior* principle in resolving a conflict between two WTO Agreements, there might be some confusion regarding the determination of the exact time of conclusion of the agreements. It is clear that all WTO Agreements attached to the WTO Agreement except GATT were concluded at the same time.²⁶³ The GATT is, however, an exception. The GATT was concluded in 1947 and it was in force as GATT 1947 until the conclusion of the Uruguay Round. In 1994, GATT 1947 was incorporated into the WTO Agreement as a part of GATT 1994 where the provisions of GATT 1947 were verbatim copied into GATT 1994. The question arising at this point is: Do the other WTO Agreements prevail over the provisions of GATT as *lex posterior* since they were essentially concluded 47 years after GATT? According to the approach taken by the AB, this conclusion seems not likely. In *Argentina – Footwear*, the AB commented that:

“We note that the GATT 1994 is the first agreement that appears in Annex 1A to the *WTO Agreement*, and that it consists of: the provisions of the GATT 1947, as rectified, amended or modified by the terms of legal instruments that entered into force before the entry into force of the *WTO Agreement*; the provisions of certain legal instruments, such as protocols and certifications, decisions on waivers and other decisions of the CONTRACTING PARTIES to the GATT 1947, that entered into force under the GATT 1947 before the entry into force of the *WTO Agreement*; certain Uruguay Round Understandings relating to specific GATT articles; and the Marrakesh Protocol to the GATT 1994 containing Members' Schedules of Concessions.”²⁶⁴

“Therefore, the provisions of Article XIX of the GATT 1994 *and* the provisions of the *Agreement on Safeguards* are *all* provisions of one treaty, the *WTO Agreement*. They entered into force as part of that treaty at the same time.”²⁶⁵

Thus, it is apparent that the AB did not admit any precedence relationship between GATT and GATS. While most GATT provisions which were concluded in 1947 were verbatim taken

²⁶² *Ibid*, p 516

²⁶³ The fact that some of the Uruguay Round Agreement were based on Tokyo Round Codes does not change this conclusion since Tokyo Round Codes were not verbatim copied into new agreements and were subject to further negotiation.

²⁶⁴ The Appellate Body Report on Argentina- Safeguard Measures on Imports of Footwear, WT/DS121/AB/R, p 26

²⁶⁵ *Ibid*, p27

into GATT 1994, the AB assumes that when WTO Agreement was signed in 1994, the contracting parties reiterated their consent to be bound by GATT and consequently GATT was “reconcluded”.²⁶⁶

This, however, does not mean that the *lex posterior* principle can never be applied in WTO context. In *EC-Poultry*, the Panel touched upon the applicability of the *lex posterior* principle in the WTO context. In a comment which has not been reversed by the AB, the Panel stated that;

“Although we note that these provisions of the Vienna Convention (which generally pertain to the legal maxim *lex posterior derogat priori*) are codification of the customary rules of interpretation of public international law within the meaning of Article 3.2 of the DSU, we also note that past panels have been careful about the application of the *lex posterior* rule on tariff schedules.”²⁶⁷

While in its analysis the Panel did not invoke the *lex posterior* principle, it explicitly recognised that principle as a part of the customary rules of interpretation of public international law applicable to the WTO disputes.

Lex Specialis

Lex specialis derogat legi generali or shortly *lex specialis* is another widely accepted principle of legal interpretation instrumental in resolving norm conflicts. The principle suggests that, in broad terms, when a matter is regulated by both a general standard and a specific rule, then the specific rule prevails over the general standard.²⁶⁸ This is based on the idea that, leaving aside the exceptions, States are free to “contract out” and derogate from generally applicable international rules and establish a different set of rules applicable between them.²⁶⁹ Having a long history and its roots in the Roman Law, the principle was included in *Corpus Iuris Civilis*.²⁷⁰ It was also explicitly mentioned in the writings of Grotius and Vattel and Pufendorf.²⁷¹

²⁶⁶ PAUWELYN *supra* 107, p 376

²⁶⁷ The Panel Report on Measures Affecting the Importation of Certain Poultry Products, WT/DS69/R, p 57

²⁶⁸ ILC Report *supra* 113, p 35

²⁶⁹ Anja LINDROOS (2005) “Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of *Lex Specialis*” *Nordic Journal of International Law*, Vol:74, p 27-66, p 37

²⁷⁰ *Supra* 113, p 34

²⁷¹ See LINDROOS, p 35-36 and ILC Report, p 36-37 for a more detailed discussion on the early history of this maxim.

According to ILC, *lex specialis* may basically appear in two different forms. It may be the case that “the specific rule should be read and understood within the confines or against the background of the general standard, typically as an elaboration, updating or a technical specification of the latter.”²⁷² For the most of such cases, the two provisions apply simultaneously and cumulatively. The relationship between certain GATT provisions and the specific agreements elaborating them, such as the relationship between GATT Article VI and the Anti-Dumping Agreement or GATT Article VII and Customs Valuation Agreement can be considered within this framework. Another form of *lex specialis* is “when two legal provisions that are both valid and applicable, are in no express hierarchical relationship, but provide incompatible direction on how to deal with the same set of facts.”²⁷³ In such cases, *lex specialis* principle acts as a genuine conflict solving rule suggesting one provision prevails over the other. One stronger version of this type *lex specialis* rules is the case of “self-contained regimes” which was mentioned above and which refer to a set of rules that claim primacy over the general rules or a system of interrelated “whole” of rules that handle a particular subject matter differently from the way it would be covered under the general law which may include special rules and techniques of interpretation and administration.²⁷⁴

Unlike *lex posterior* maxim, *lex specialis* principle has not been given a place in the VCLT. However, the principle has been codified in the “Draft Articles on Responsibility of States for Internationally Wrongful Acts” prepared by the ILC and adopted in 2001 in UN General Assembly as the Article 55:

“Article 55. *Lex specialis*”

These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.”²⁷⁵

While *lex specialis* rule have not taken place in a multilateral treaty that entered into force yet, the principle has been widely accepted by international courts albeit mostly without great

²⁷² *Supra* 113, p 35

²⁷³ *Ibid*, p 35

²⁷⁴ See ILC Report *supra* 113, p 65-69 for a detailed discussion on the definition of self-contained regimes.

²⁷⁵ In its commentary the ILC states that “When defining the primary obligations that apply between them, States often make special provision for the legal consequences of breaches of those obligations, and even for determining whether there has been such a breach. The question then is whether those provisions are exclusive, i.e. whether the consequences which would otherwise apply under general international law, or the rules that might otherwise have applied for determining a breach, are thereby excluded. A treaty may expressly provide for its relationship with other rules. Often, however, it will not do so and the question will then arise whether the specific provision is to coexist with or exclude the general rule that would otherwise apply.”

elaboration.²⁷⁶ In the above-mentioned *Mavrommatis Palestine Concessions* case, the PCIJ had already mentioned that the the Protocol XII of the Lausanne Treaty was preferred over the Mandate for Palestine of the League of Nations as the applicable law because it “dealt specifically and in explicit terms with concessions such as those of M. Mavrommatis”²⁷⁷ besides being *lex posterior*. Thus, the PCIJ also applied *lex specialis* rule in the *Mavrommatis Palestine Concessions* case.

In the *Continental Shelf (Tunisia/Libyan Arab Jamariya)* Case, the ICJ had to deal with the issue of delimitation of the continental shelf between Tunisia and Libya and by referring to a Special Agreement between the sides regarding the delimitation which requests the Court to render a judgment “by taking into account the recent trends admitted at the Third Conference on the Law of the Sea.”²⁷⁸ Regarding this requirement, the ICJ made the following observation:

“It would no doubt have been possible for the Parties to have identified in the Special Agreement certain specific developments in the law of the sea of this kind, and to have declared that in their bilateral relations in the particular case such rules should be binding as *lex specialis*.”²⁷⁹

Thus, the ICJ explicitly admitted that certain specific rules agreed upon by Parties may override the general rules of international law applicable to the matter as *lex specialis*.

In *Beagle Channel Arbitration* case between Argentina and Chile, the Arbitral Tribunal had to decide on the territorial and maritime boundaries of certain islands. The Tribunal had to consider the Boundary Treaty of 1881 between two sides. While both Article II and III of that treaty dealt with drawing the boundary regarding a specific disputed group of islands, the Tribunal identified Article II as being of a general nature and Article III as the specific rule to be applied to the matter.²⁸⁰ Regarding how to apply cumulatively the two Articles, the Tribunal stated that:

“...all conflicts or anomalies can be disposed of by applying the rule *generalia specialibus non derogant*, on which basis Article II (*generalia*) would give way to Article III (*specialia*),

²⁷⁶ ILC Report *supra* 78, p 40

²⁷⁷ *Supra* 254

²⁷⁸ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Judgment, I.C.J. Reports 1982, p 21

²⁷⁹ *Ibid*, p 38

²⁸⁰ The ILC Report *supra* 78, p 40

the latter prevailing; and hence that no logical objection can be made to an Article II allocation to Chile of, *in principle*, everything south of the Dungeness- Andes line.”²⁸¹

Thus, the Tribunal had accepted that *lex specialis* principle can be applied between the provisions of the same treaty even though there was no explicit rule regulating the relationship of those two provisions.

It is apparent that the European Court of Human Rights also frequently applied *lex specialis* maxim in interpreting the European Convention on Human Rights.²⁸² The same is true for the European Court of Justice when interpreting conventions within its jurisdiction.²⁸³

In WTO context, the *lex specialis* principle has been recognised albeit being invoked less frequently.²⁸⁴ This stems from the fact that all trade agreements²⁸⁵ are regarded as annexes to the WTO Agreement and altogether they constitute a “single undertaking”. Thus, as noted before, all provisions of those agreements are expected to apply cumulatively as if they are provisions of a single treaty.²⁸⁶ It should be recalled, however, that application of the *lex specialis* principle to resolve an apparent conflict does not invalidate or annul one of the norms. It only prescribes which of the norms is to be applied primarily in a given situations whereas both of the norms continue to co-exist. Thus, in our view, application of *lex specialis* principle in a WTO dispute case, for which an explicit conflict resolving provision of WTO Agreements does not apply, would not give any harm to the fact that all WTO Agreements are parts of a single treaty and that they apply cumulatively.

In fact, it would be hard to consider that *lex specialis* is out of the scope of “customary rules of interpretation of public international law” referred to in Article 3.2 of the DSU. The *lex specialis* principle, which has been also codified and gained the status of conventional

²⁸¹ Reports of International Arbitral Awards, Dispute between Argentina and Chile concerning the Beagle Channel, 18 February 1977, p 100

²⁸² *Supra* 78, p 41

²⁸³ *Ibid*, p 41. See also the ILC Report p 41-47 for more examples of International Courts applying the *lex specialis* maxim.

²⁸⁴ *Ibid*, p 43

²⁸⁵ With the exception of plurilateral agreements.

²⁸⁶ For decisions in this direction see for example Appellate Body Report in Brazil – Measures Affecting Desiccated Coconut, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167, pp. 12-13 or Panel Report on Indonesia – Certain Measures Affecting the Automobile Industry, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1 and 2, adopted 23 July 1998, and Corr. 3 and 4, DSR 1998:VI, 2201, para. 14.131. or alternatively Panel Report on Japan – Countervailing Duties on Dynamic Random Access Memories from Korea, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, para. 7.423.

international law under the UN umbrella as mentioned above, is a long established principle of customary international law and the fact that the principle did not take place in the VCLT does not alter this proposition. Moreover, as cited before from the *Korea-Procurement* case;

“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.”

We are of the view that *lex specialis* is indeed a part of the customary rules of international law that are mentioned in the *Korea-Procurement* case. Though it did not take place in VCLT, it has been recently codified as a part of the international body of law. Thus, it would be right to conclude that *lex specialis* is within the principles applicable in resolving conflicts between WTO Agreements.

Indeed, there have been a number of cases where *lex specialis* principle has been implicitly or explicitly invoked or mentioned. For instance, in *EC- Bananas* the AB, when discussing which of the agreements better address the issue in hand, stated that;

“Although Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures. If the Panel had done so, then there would have been no need for it to address the alleged inconsistency with Article X:3(a) of the GATT 1994.”²⁸⁷

In *US- 1916 Act*, the Panel referred to the above mentioned statement by the AB:

“We are mindful of the fact that Article X:3(a) of the GATT 1994 deals with the way domestic trade laws in general should be applied, whereas Article 1.3 of the Agreement on Import Licensing Procedures deals with the way rules should be applied in the specific sector of import licensing. In contrast, it may be said that Articles III:4 and VI do not share the same purpose. However, we view the Appellate Body statement as applying the general principle of international law *lex specialis derogat legi generali*. This is particularly clear from its remark that the *Agreement* on Import Licensing Procedures "deals specifically, and in detail, with the administration of import licensing procedures". In our opinion, Article VI and the Anti-Dumping Agreement "deals specifically, and in detail, with the administration of" anti-dumping. In the present case, the question of the applicability of Article III:4 was essentially

²⁸⁷ The Appellate Body Report on European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/AB/R, p 87

raised by the type of measures imposed under the 1916 Act. On the basis of the reasoning of the Appellate Body, we conclude that, even assuming that Article III:4 is applicable, in light of our findings under Article VI and the Anti-Dumping Agreement, we do not need to make findings under Article III:4 of the GATT 1994.”²⁸⁸

Finally, in *US-Shrimp*, the Panel, in its ruling not reversed by the AB, referred to Panel’s opinion in *US – 1916 Act*:

“Finally, we consider the Panel's discussion in *US – 1916 Act (Japan)* further relevant to this issue. After finding a violation of Article VI of the *GATT 1994*, the Panel considered whether it must also analyse a claim under Article III:4 of the *GATT 1994*. It held that, in the case before it, Article VI addressed the "basic feature" of the measure at issue more directly than Article III:4. In doing so, the Panel referred to the international law principle *lex specialis derogat legi generali* in support of its reasoning..... We agree that the principle of *lex specialis* should apply in such circumstances. Since Article VI of the *GATT 1994*, including the Ad Note, "deals specifically, and in detail", with the issue of security for definitive anti-dumping duties, those provisions address the "basic feature" of the measure at issue more directly than the other *GATT 1994* provisions cited by Thailand. Article VI and the Ad Note therefore constitute *lex specialis* that should prevail over the more general *GATT 1994* provisions cited by Thailand.”²⁸⁹

While there are other cases where the principle *lex specialis* was mentioned²⁹⁰, it is apparent from the cases cited above that this principle is among the tools available to resolve conflicts between WTO Agreements. It should, however, be mentioned that in all of the cases above, the *lex specialis* principle was not used as a conflict resolving maxim but as a rule to determine which of the two *non-conflicting* norms more specifically address a given issue.

²⁸⁸ The Panel Report on United States – Anti-Dumping Act of 1916, WT/DS161/R, p 200

²⁸⁹ The Panel Report on United States – Measures Relating to Shrimp from Thailand, WT/DS343/R, p 68

²⁹⁰ See for instance, *India- Quantitative Restrictions*, *Turkey- Textiles*, *Thailand- Cigarettes* or *US- Continued Suspension*

PART VII: WTO JURISPRUDENCE ON CONFLICTS

VII. WTO JURISPRUDENCE ON CONFLICTS

1. WTO Cases Involving Issues of Potential Conflict

After having laid down all the necessary principles of interpretation regarding the treatment of conflicts in international law and having briefly reviewed the application of those principles in the decisions of international courts, we can now look into how potential conflicts were dealt in the WTO jurisprudence.

Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico

The *Guatemala- Cement* case has been one of the cases that we have referred to when reviewing the definition of conflict present in the WTO dispute cases. As this is one of the most cited cases of conflict analysis of the AB, -together with the *Indonesia-Autos* case- it would be appropriate to revisit this case in some more detail. The *Guatemala-Cement* case was on a definitive anti-dumping measure taken by Guatemala on the imports of portland cement from a company based in Mexico. The complainant Mexico claimed that the anti-dumping duty imposed by Guatemala was inconsistent with several provisions of the Anti-Dumping Agreement as well as the Article VI of GATT.²⁹¹

One question to be answered by the Panel was whether the specific dispute settlement provisions existing in the Anti-Dumping Agreement²⁹² limited the Panel's authority to examine the consistency of only specific types of measures identified in those provisions or not.²⁹³ In answering this question, the Panel had to analyse the relationship between the dispute settlement provisions of the Anti-Dumping Agreement and the provisions of the DSU to find out whether the dispute settlement provisions of the Anti-Dumping Agreement applies

²⁹¹ The Panel Report on Guatemala- Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/R, p 3

²⁹² Particularly the Article 17.4 of the Agreement which states: "If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB."

²⁹³ *Supra* 291, p 146

exclusively to the case. By relying on the Article 1.2 of the DSU²⁹⁴ which gives priority to the special dispute settlement provisions over the rules in the DSU, the Panel considered that the dispute settlement provisions of the Anti-Dumping Agreement were different than the relevant provisions of the DSU and hence they applied exclusively to the case by *replacing* the DSU:

“This interpretation of the provisions of Article 17 provides for a coherent set of rules for dispute settlement specific to anti-dumping cases, taking account of the peculiarities of challenges to anti-dumping investigations and determinations, that replaces the more general approach of the DSU.”²⁹⁵

At the appeal stage, the AB reversed this finding by the Panel by stating that the rules of the DSU could not be replaced by the provisions of the Anti-Dumping Agreement – or one of the them could not prevail over the other- as these two instruments did not conflict with each other. In doing this, the AB laid down the well-known definition of conflict that we have reviewed before:

“Article 1.2 of the DSU provides that the “rules and procedures of this Understanding shall apply *subject to such special or additional rules and procedures* on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding.” (emphasis added) It states, furthermore, that these special or additional rules and procedures “shall prevail” over the provisions of the DSU “[t]o the extent that there is a *difference* between” the two sets of provisions (emphasis added) Accordingly, if there is no “difference”, then the rules and procedures of the DSU apply *together with* the special or additional provisions of the covered agreement. In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement *cannot* be read as *complementing* each other that the special or additional provisions are to *prevail*. A special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a conflict between them. An interpreter must, therefore, identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply.”²⁹⁶ (italics in the original)

Thus, the AB clarified that there was no inconsistency or conflict as such between the provisions of the two texts and thus the provisions of both texts should apply together.

²⁹⁴ Article 1.2 of the DSU states that: “The rules and procedures of this Understanding [the DSU] shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail”.

²⁹⁵ *Ibid*, p 148

²⁹⁶ The Appellate Body Report on Guatemala- Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/AB/R, p 23

Accordingly, the AB rejected the Panel's argument that there was a system of coherent set of rules to deal with the disputes regarding anti-dumping cases which are distinct from the DSU. One related specific issue was whether Guatemala was obliged to abide by a requirement that took place in the DSU but was not mentioned among the dispute settlement provisions of the Anti-Dumping Agreement. While the Panel had concluded that the Anti-Dumping Agreement would have prevailed over the DSU in that case, the AB also reversed this finding by making the following observations:

"Having said this, we are aware that the Panel found that Article 17.5 of the *Anti-Dumping Agreement* does not specifically require a panel request in an anti-dumping dispute to identify the specific measures at issue".⁵⁵ The Panel concluded that Article 17.5 of the *Anti-Dumping Agreement* prevails over Article 6.2 of the DSU.⁵⁶ We consider, however, that the Panel erred in reaching this conclusion. Certainly, Article 17.5 does not expressly require the complaining Member's request for the establishment of a panel to identify the "specific measures at issue" or "to provide a brief summary of the legal basis of the complaint". Indeed, Article 17.5 contains none of the explicit, detailed procedural requirements that Article 6.2 of the DSU imposes on a request for the establishment of a panel.....The fact that Article 17.5 contains these additional requirements, which are not mentioned in Article 6.2 of the DSU, does not nullify, or render inapplicable, the specific requirements of Article 6.2 of the DSU in disputes brought under the *Anti-Dumping Agreement*. In our view, there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A panel request made concerning a dispute brought under the *Anti-Dumping Agreement* must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU."²⁹⁷

The approach taken by the AB in *Guatemala- Cement* case regarding conflicts between WTO Agreements is in line with the general approach followed throughout this work. The Panel's conclusion that the ADA provision prevailed over the DSU was pre-mature as these two legal texts did not pose a real conflict either in the form of mutually exclusive obligations or one explicit right versus a prohibition. Rather, the case involved differing but not mutually exclusive obligations which could be followed simultaneously. Thus, we share the approach taken by the AB and the conclusions attached to it.

Similarly, the conflict definition laid down by the AB in this case is not inconsistent with the approach advocated in this work and on the contrary, as we have discussed in the previous sections²⁹⁸, a careful reading reveals that this definition is in harmony with the definition sought in this work. This is very important since this conflict definition laid down by the AB

²⁹⁷ *Ibid*, p 26

²⁹⁸ See Part III above.

in *Guatemala- Cement* still remains the final and decisive one at the AB level although there were attempts to modify this definition at the Panel level.

India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products

The *India – Quantitative Restrictions* case was about the quantitative restrictions taken on certain products by India to remedy its balance of payments problems. Therefore, India relied on Article XXVIII:B of GATT allowing the developing countries temporarily to impose import restrictions. The complainant – the US- , on the other hand, claimed that the restrictions imposed by India did not meet the specific criteria set out in that Article and thus had to be regarded inconsistent with the the Article XI of GATT prohibiting quantitative restrictions.

In its defence, India stated that by application of the *lex specialis* principle, the authority to assess whether a balance of payments measure is consistent with the Article XXVIII:B lies exclusively with the Balance of Payments Committee and the General Council but not with the Panel.²⁹⁹ India also pointed out the potential conflicts between the decisions of these WTO bodies with the findings of the Panel or the AB.³⁰⁰

Regarding this claim, the Panel made the following observation:

“While the two procedures may be said to apply to the same subject matter, the second condition for the application of the principle of *lex specialis*, i.e. the existence of a conflict between the two, is not met. The objective of the Committee procedure under Article XVIII:12(b)261 is a general review of a Member's policy by the BOP Committee and the General Council, whereas the DSU applies in case of a dispute between two Members related to specific measures. Moreover, the Panel in its analysis of the operation of the two procedures found no circumstances where, in practice, those procedures would conflict. In any event, the principle of *lex specialis* is only subsidiary. If the treaty provides for the relationship between the two "conflicting" rules, the principle no longer applies. In the present case, footnote 1 to the 1994 Understanding on Balance-of-Payments Provisions clearly confirms the application of the DSU to balance-of-payments matters.”³⁰¹

²⁹⁹ The Panel Report on *India – Quantitative Restrictions on Imports of Agriculture, Textile and Industrial Products*, WT/DS90/R, p 129

³⁰⁰ *Ibid*, p 154

³⁰¹ *Ibid*, p 130

The *India – Quantitative Restrictions* case is one of the few cases where the Panel, albeit very superficially, addressed the issue of the applicability of the *lex specialis* principle to a dispute in the WTO. The Panel, in this case, implicitly admitted that the principle could be invoked if the necessary conditions- the existence of the same subject matter and a conflict- were present. The Panel also rightly pointed out that the *lex specialis* principle would only apply in the absence of an explicit provision regulating the relationship of two legal texts.

Canada – Certain Measures Concerning Periodicals

The *Canada- Periodicals* case was related to a number of measures taken by Canada on certain type of periodicals which were alleged to be discriminatory between the imported periodicals and the periodicals published in Canada. The complainant – the United States- claimed that the prohibition of certain periodicals were inconsistent with the Article XI of GATT and that the differentiation in the taxation rates as well as the postal rates were inconsistent with the Article III.³⁰²

Regarding the taxation rates claim, Canada made a defence based on the argument that GATT was not applicable to the case since the measure in hand was a measure pertaining to advertising services which was solely regulated by GATS:

“Canada's argument is essentially that since Canada has made no specific commitments for advertising services under GATS, the United States should not be allowed to "obtain benefits under a covered agreement that have been expressly precluded under another covered agreement".¹²⁷ Put another way, Canada seems to argue that if a Member has not undertaken market-access commitments in a specific service sector, that non-commitment should preclude all the obligations or commitments undertaken in the goods sector to the extent that there is an overlap between the non-commitment in services and the obligations or commitments in the goods sector. Canada claims that because of the existence of the two instruments - GATT 1994 and GATS - both of which may apply to a given measure, "it is necessary to interpret the scope of application of each such as to avoid any overlap.”³⁰³

The Panel, while being suspicious that the tax measure was indeed intended to regulate trade in advertising services, assumed that this assertion was true and tried to address the claim of Canada on the non-applicability of the GATT to the case. After recalling that all WTO Agreements are annexes to the same treaty, the Panel stated citing from the *US- Gasoline* case that the general rule of interpretation in the VCLT requires that “an interpretation must give

³⁰² The Panel Report on Canada - Certain Measures Concerning Periodicals, WT/DS31/R, p 66

³⁰³ *Ibid*, p 69

meaning and effect to all terms of a treaty and an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”³⁰⁴

The Panel then made the following observation:

“The ordinary meaning of the texts of GATT 1994 and GATS as well as Article II:2 of the WTO Agreement, taken together, indicates that obligations under GATT 1994 and GATS can co-exist and that one does not override the other. If the consequences suggested by Canada were intended, there would have been provisions similar to Article XVI:3 of the WTO Agreement or the General Interpretative Note to Annex 1A in order to establish hierarchical order between GATT 1994 and GATS. The absence of such provisions between the two instruments implies that GATT 1994 and GATS are standing on the same plain in the WTO Agreement, without any hierarchical order between the two.”³⁰⁵

The Panel continued with the following determination:

“In this connection, Canada also argues that overlaps between GATT 1994 and GATS should be avoided. We disagree. Overlaps between the subject matter of disciplines in GATT 1994 and in GATS are inevitable, and will further increase with the progress of technology and the globalization of economic activities. We do not consider that such overlaps will undermine the coherence of the WTO system. In fact, certain types of services such as transportation and distribution are recognized as a subject-matter of disciplines under Article III:4 of GATT 1994.”³⁰⁶

Finally, the Panel concluded that:

“In any event, since Canada admits that in the present case there is no conflict between its obligations under GATS and under GATT 1994, there is no reason why both GATT and GATS obligations should not apply to the Excise Tax Act.”³⁰⁷

At the appeal stage, Canada reiterated similar arguments regarding the applicability of Article III to the excise tax issue:

“In Canada's view, if the GATT 1994 applied to all aspects of services measures on the basis of incidental, secondary or indirect effects on goods, the GATT 1994 would effectively be converted into a services agreement. More precisely, the GATT 1994 should not apply merely on the ground that a service makes use of a good as a tangible medium of communication. Assuming that the measure at issue is designed essentially to restrict access to the services market, the mere fact that a service makes use of a good as a vehicle or a medium is an insufficient ground on which to base a challenge under the GATT 1994.”³⁰⁸

³⁰⁴ *Ibid*, p 70

³⁰⁵ *Ibid*, p 70

³⁰⁶ *Ibid*, p70

³⁰⁷ *Ibid*, p 71

³⁰⁸ The Appellate Body Report on Canada – Certain Measures Concerning Periodicals, WT/DS31/AB/R, p 3

Thus, Canada insisted on an understanding whereby measures are to be regarded as either a services or a goods measure and primarily not based on their effects but on the purpose that they were designed for.

In response the AB did not get into a comprehensive discussion on whether GATT and GATS can be applied simultaneously to the measure but rather tried to establish that the measure was, unquestionably, a “trade in goods measure”:

“We are unable to agree with Canada's proposition that the GATT 1994 is not applicable to Part V.1 of the Excise Tax Act. First of all, the measure is an excise tax imposed on split-run editions of periodicals. We note that the title to Part V.1 of the Excise Tax Act reads, "TAX ON SPLIT-RUN PERIODICALS", not "tax on advertising". Furthermore, the "Summary" of An Act to Amend the Excise Tax Act and the Income Tax Act, reads: "The Excise Tax Act is amended to impose an excise tax in respect of split-run editions of periodicals". Secondly, a periodical is a good comprised of two components: editorial content and advertising content. Both components can be viewed as having services attributes, but they combine to form a physical product -- the periodical itself.”³⁰⁹

“Based on the above analysis of the measure, which is essentially an excise tax imposed on split-run editions of periodicals, we cannot agree with Canada's argument that this internal tax does not "indirectly" affect imported products. It is a well-established principle that the trade effects of a difference in tax treatment between imported and domestic products do not have to be demonstrated for a measure to be found to be inconsistent with Article III.2. The fundamental purpose of Article III of the GATT 1994 is to ensure equality of competitive conditions between imported and like domestic products.”³¹⁰

“We do not find it necessary to pronounce on the issue of whether there can be potential overlaps between the GATT 1994 and the GATS, as both participants agreed that it is not relevant in this appeal.”³¹¹

The *Canada- Periodicals* case did not discuss the issue of conflicting WTO norms since there was no claim of such conflicting norms existing in Canada's defence.³¹² Thus, the Panel and the AB only established that GATT and GATS can and do have overlapping domains and a measure can be scrutinized under both agreements. The Panel and the AB did not need to analyze whether there were conflicting rights and obligations in the case. However, both the Panel as well as the complainant the US, signalled that had Canada made such credible claims on the existence of such a conflict, the analysis had to be more complex.³¹³

³⁰⁹ *Ibid.*, p 17

³¹⁰ *Ibid.*, p 18

³¹¹ *Ibid.*, p 19

³¹² This point – the fact that Canada made no claim of a conflict- has been underlined by the Panel.

³¹³ At the appeal stage the US made the following comment: “The United States submits that Canada's excise tax is not exempt from Article III of the GATT 1994 on the ground that it is a "services measure" subject only to the GATS. Canada has failed to demonstrate any significant conflict between the GATT 1994 and the GATS

On the other hand, the conclusions of the *Canada- Periodicals* case were very influential in the sense that this case together with the *EC- Bananas* laid down the foundations of the approach with which all the Panel and AB decisions were going to follow regarding the overlappings of different WTO Agreements. In *Canada- Periodicals*, contrary to Canada's claim that GATT and GATS had separate domains and a measure had to be analyzed only under one of those domains, both the Panel and the AB confirmed that both GATT and GATS had overlapping domains and consequently the measures which may be regarded at the intersection of these domains can be investigated under both agreements. This conclusion also paved the way for the "different aspects approach" which was to be established in *EC- Bananas* and reinforced in *Indonesia – Autos* and which is a very important analytical instrument to analyze conflicts within the WTO context.

European Communities – Regime for the Importation, Sale and Distribution of Bananas

The *EC-Bananas* case has been one of the most influential and most disputed cases of all within WTO disputes. The case is sometimes named as *EC-Bananas III* as this is the third case on EU's banana regime after two GATT Panels.³¹⁴ As the dispute also involved various political dimensions, many aspects of it were also discussed publicly.

The *EC- Bananas* case was related to measures taken as a part of the banana regime of the EU which were in connection with a special agreement between the EU and ACP Group of countries called Lomé Convention. In general, those measures included preferential tariff rates for the bananas originated from the ACP countries through preferential application of tariff rate quotas and preferential licensing requirements for the importers of the bananas of the ACP origin. The EU and the ACP countries applied for and obtained a waiver from the WTO General Council which waived the Article I of GATT "to the extent necessary to permit the EU to provide preferential treatment for products originating in ACP States as required by

arising from this case or that, in any event, the GATS should be accorded priority over the GATT 1994. The United States argues that Canada is incorrect in suggesting that the GATT 1994 cannot apply to measures whose application affects both goods and services."(italics added), supra 229, p 9

³¹⁴ See GATT Panel Reports: European Economic Communities – Member States' Import Regimes for Bananas, DS32/R and European Economic Communities- Import Regime for Bananas, DS38/R

the relevant provisions of the Fourth Lomé Convention, without being required to extend the same preferential treatment to like products of any other contracting party.”³¹⁵

One of the substantial issues among others in the case was whether the discriminatory measures regarding the importation, sale and distribution of bananas could be questioned under GATS. The complainants alleged that the measures in question, particularly the discriminatory licensing requirements, were inconsistent with the Article II and Article XVII of GATS as they were discriminating against Latin American banana distributors in favour of the EU and the ACP banana distributors. They argued that those Latin American distributors were to be considered as suppliers within the framework of “wholesale trade services” and that this was a service sector where the EU had a full national treatment commitment in its GATS schedule.³¹⁶

In its defence, the EU argued that the measures in respect of which the Complainants have made claims were measures directed at trade in goods and not trade in services. Therefore, they could not be considered "measures affecting trade in services" within the meaning of the GATS since they regulate the importation of goods and not the provision of services.³¹⁷ For the EU, GATS was not concerned with the indirect effects on the supply of services of the measures which primarily aimed at regulating trade in goods.

The EU further argued that “a measure could not be covered by both GATT and the GATS since the coverage of the two agreements was intended, in the EC's view, to be mutually exclusive. In this connection, the EC notes that if a measure relating to trade in goods was covered by a GATT exception or a waiver, such exception or waiver could be rendered ineffectual by a finding against the measure relating to goods under the GATS and asserting its illegality in that context.”³¹⁸

Thus, the EU claimed that it was given a certain right in the GATT context through the waiver and that right could not be overridden or made ineffective by any obligations under the GATS context.

³¹⁵ The Panel Report on European Communities – Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/R/USA, p 25

³¹⁶ *Ibid*, p 366

³¹⁷ *Ibid*, p 366

³¹⁸ *Ibid*, p 367

In its analysis, the Panel first interpreted the Article I of GATS which defined the scope of the agreement. Accordingly, the Panel concluded that the term used in the Article – measures affecting trade in services- cannot be interpreted narrowly indicating that the measure in question has to have the purpose and aim of regulating, or at least directly influencing services.³¹⁹ After adopting a wider interpretation, the Panel goes on to discuss EU's claim on the overlaps of GATT and GATS:

“With respect to the claim by the EC that GATT and the GATS cannot overlap, we note that such a view is not reflected in any of the provisions of the two agreements. On the contrary, the provisions of the GATS referred to above explicitly take the approach of being inclusive of any measure that affects trade in services whether directly or indirectly. These provisions do not make any distinction between measures which directly govern or regulate services and measures that otherwise affect trade in services.”³²⁰

Thus, the Panel rejected the EU argument that the GATT and GATS should have distinctive spheres of jurisdiction and the jurisdiction of GATS should be limited to measures which primarily aimed at regulating trade in services. The Panel further clarified this position by giving examples in a long paragraph:

“Furthermore, it is our view that if we were to find the scope of the GATS and that of GATT to be mutually exclusive, in other words, if we were to find that a measure considered to fall within the scope of one agreement could not at the same time fall within the scope of the other, the value of Members' obligations and commitments would be undermined and the object and purpose of both agreements would be frustrated. Obligations could be circumvented by the adoption of measures under one agreement with indirect effects on trade covered by the other without the possibility of any legal recourse. For example, a measure in the transport sector regulating the transportation of merchandise in the territory of a Member could subject imported products to less favourable transportation conditions compared to those applicable to like domestic products. Such a measure would adversely affect the competitive position of imported products in a manner which would not be consistent with that Member's obligation to provide national treatment to such products. If the scope of GATT and the GATS were interpreted to be mutually exclusive, that Member could escape its national treatment obligation and the Members whose products have been discriminated against would have no possibility of legal recourse on account that the measure regulates "services" and not goods. It is also our view that if the drafters of the GATS had intended to impose such a serious limitation on its scope, particularly in the light of how the term "affecting" had been interpreted in past GATT panel reports and their deliberate choice of the concept of "supply" as explained above, they would have provided for the limitation explicitly in the text of the GATS itself or in the provisions of the Agreement Establishing the World

³¹⁹ *Ibid*, p 367

³²⁰ *Ibid*, p 368

Trade Organization. In the absence of such a provision, it is our view that the claim by the EC that the scope of the GATS and GATT cannot overlap has no legal basis.”³²¹

Having followed the line of thought exhibited in *Canada-Periodicals*, the Panel this time elaborated more on why GATT and GATS have and must have overlapping domains. If they did not, then there would be considerable space for Members to circumvent their obligations in one of them by keeping exclusively in the domain of the other.

Finally, regarding the claim of by the EU that an explicit right given to it by the waiver under GATT context could not be overridden by a GATS obligation, the Panel did not get into a conflict analysis as the Panel had already ruled that the waiver, while providing an exception for some GATT obligations, did not provide any justification for licensing requirements:

“With respect to the EC's view that bringing a measure relating to goods under the GATS might undermine the effectiveness of an exception or a waiver under GATT, we note that there are no applicable exceptions or waivers at issue under the GATS claims in this case. In the case of waivers, the problem raised by the EC could be avoided by appropriate drafting of waivers. In the case of exceptions, we note that Articles XII, XX and XXI of GATT and Articles XII, XIV and XIVbis of GATS are similar, thus reducing the likelihood of a conflict between GATT and GATS provisions. In any event, we need not decide in this case how to resolve a conflict that may never arise.”³²²

One very important aspect of the Panel's ruling in *EC-Bananas* was, as we have mentioned in Part III above, the Panel laid down a very comprehensive definition of conflict of norms when reviewing the General Interpretative Note. We quote again:

“As a preliminary issue, it is necessary to define the notion of "conflict" laid down in the General Interpretative Note. In light of the wording, the context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits. However, we are of the view that the concept of "conflict" as embodied in the General Interpretative Note does not relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former and GATT 1994 can both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, there is no reason to assume that a Member is not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement.”³²³

³²¹ *Ibid*, p 368

³²² *Ibid*, p 369

³²³ *Ibid*, p 338

The Panel had further explained this definition in length through a footnote that:

“For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ("ATC") authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.”³²⁴

At the appeal stage, in response to the claim of the EU, it was then the AB which was faced with the question of whether the domains of GATT and GATS may overlap. The AB, after upholding the Panel’s decision for a broad understanding of the term “affecting trade in services”³²⁵, addressed the issue of an overlap by referring also to its ruling in *Canada-Periodicals*:

“The GATS was not intended to deal with the same subject matter as the GATT 1994. The GATS was intended to deal with a subject matter not covered by the GATT 1994, that is, with trade in services. Thus, the GATS applies to the supply of services. It provides, *inter alia*, for both MFN treatment and national treatment for services and service suppliers. Given the respective scope of application of the two agreements, they may or may not overlap, depending on the nature of the measures at issue. Certain measures could be found to fall exclusively within the scope of the GATT 1994, when they affect trade in goods as goods. Certain measures could be found to fall exclusively within the scope of the GATS, when they affect the supply of services as services. There is yet a third category of measures that could be found to fall within the scope of both the GATT 1994 and the GATS. These are measures that involve a service relating to a particular good or a service supplied in conjunction with a particular good. In all such cases in this third category, the measure in question could be scrutinized under both the GATT 1994 and the GATS. However, while the same measure could be scrutinized under both agreements, the specific aspects of that measure examined under each agreement could be different. Under the GATT 1994, the focus is on how the measure affects the goods involved. Under the GATS, the focus is on how the measure affects the supply of the service or the service suppliers involved. Whether a certain measure affecting the supply of a service related to a particular good is scrutinized under the GATT

³²⁴ *Ibid*, p 338, footnote 401

³²⁵ The Appellate Body Report on European Communities – Regime for Importation, Sales and Distribution of Bananas, WT/DS27/AB/R, p 92

1994 or the GATS, or both, is a matter that can only be determined on a case-by-case basis. This was also our conclusion in the Appellate Body Report in *Canada - Periodicals*.³²⁶

Thus, the AB first time laid down “the different aspects” approach openly which would be a main principle in how we have to look at the cases of overlappings between GATT and GATS – and between other WTO Agreements whose relationship is not governed by any explicit provision- for any future cases. In this approach, as stated by the AB above, while a measure can be scrutinized under different agreements, the specific aspects of that measure examined under each agreement are different. This is in fact another way of saying that *the same aspect of a measure cannot be questioned under two agreements if the domains of those agreements are different*.³²⁷ If the trivial logical consequence of this approach holds, -which we think is the case- then as we are going to discuss further on, it will be possible to lay grounds of a systematic approach on how to deal with conflicts between WTO Agreements without invoking a problematic narrow definition of conflict.

At the core of this approach, lies *lex specialis* principle - a basic principle of conflict resolution that we have reviewed- and as we are going to see, the underlying logic of this principle is a key to resolving internal conflicts within the WTO Law.

Indonesia – Certain Measures Affecting the Automobile Industry

Indonesia – Autos is one of the cases where the issue of a conflict between WTO Agreements has been discussed extensively. The case was on a subsidy programme provided to its auto industry by Indonesia. The complainants made violation claims with regard to both the SCM Agreement on one side and the GATT Article III and TRIMS Agreement on the other side. According to complainants the local content requirements component in Indonesia’s support programme violated the national treatment provisions in GATT Article III and TRIMS, while the subsidy elements of the programme violated the relevant provisions of the SCM Agreement.

In contrast, Indonesia claimed that its support programme for its car industry was consistent with the provisions of the SCM Agreement and that it could not be scrutinized under GATT

³²⁶ *Ibid*, p 93

³²⁷ This is of course not applicable to different agreements and provisions whose domains are similar, like the relationship between GATT Article IX and the Safeguards Agreement or GATT Article III and TRIMS Agreement

Article III or the TRIMS Agreement. Moreover, GATT Article III was in conflict with the SCM Agreement in the sense that legitimate subsidies authorized by the SCM Agreement could be considered as violating the non-discrimination obligations set out in the Article III.³²⁸ Accordingly, this conflict should be resolved in favour of the SCM Agreement as this agreement constitute the *lex specialis* and thus the sole applicable law in the dispute.³²⁹ For Indonesia, an alternative way of resolving the conflict could be a wider interpretation of the Article III:8(b) of GATT so that “any measure which constitutes a subsidy within the meaning of the SCM Agreement would not be subject to Article III of GATT.”³³⁰

In that sense, Indonesia wanted to present the case as an explicit right versus prohibition conflict since the subsidies granted by Indonesia to auto industry were, according to Indonesia’s assumption, fully consistent with the SCM Agreement and were therefore allowed by the SCM Agreement. On the other hand, Indonesia did not deny that its subsidies contained certain discriminatory elements which could be regarded contrary to the Article III. However, if a conflict between the two agreements were identified and that the SCM Agreement would be identified as the sole applicable law as Indonesia suggested, the violation claim by the complainants would have lost their meanings.

The Panel’s approach to this conflict issue in Indonesia- Autos case was important and in fact was a continuation of the approach in *Canada – Periodicals* and *EC-Bananas*. As usual, the Panel started its analysis by emphasizing the presumption against conflict in international law and that all WTO Agreements were a part of the same treaty which were negotiated at the same time by the same parties.³³¹ The Panel, then, by citing from Jenks, laid down the two conditions for a conflict between two treaties or provisions to exist: that they had to cover the same substantive subject matter and that they should impose mutually exclusive obligations.³³² While this definition is a one that we have disputed extensively before,³³³ the Panel’s ruling did not fundamentally rely on this problematic definition – that there should be mutually exclusive obligations- but rather on the fact that the two legal texts –Article III and

³²⁸ The Panel Report on Indonesia - Certain Measures Affecting the Automobile Industry, WT/DS54(55-/R

³²⁹ *Ibid*, p 334

³³⁰ *Ibid*, p 339

³³¹ *Ibid*, p 335

³³² *Ibid*, p 335

³³³ See our discussion on the definition of norm conflict, *supra* Part III.

the SCM Agreement- had different purposes and were intended to regulate different practices or measures.³³⁴

“In examining this issue, we need not decide whether the test suggested by the *Bananas III* panel report with regard to the interpretative note to Annex 1 A is the correct one in the WTO context. Indonesia argues that there is a conflict because the SCM Agreement “explicitly authorizes” Members to provide subsidies that are prohibited by Article III:2 of GATT. Assuming that such “explicit authorization” is the correct conflict test in the WTO context, we find that, whether or not the SCM Agreement is considered generally to “authorize” Members to provide actionable subsidies so long as they do not cause adverse effects to the interests of another member, the SCM Agreement clearly does not authorize Members to impose discriminatory product taxes. Nor does a focus on Article 27.3 suggest a different approach. Whether or not Article 27.3 of the SCM Agreement can be reasonably interpreted to “authorize”, explicitly or implicitly, the provision of subsidies contingent on the use of domestic over imported goods (an issue we do not here decide), Article 27.3 is unrelated to, and cannot reasonably be considered to “authorize”, the imposition of discriminatory product taxes.”

Nevertheless, after making this consistent logical determination, the Panel still felt itself obliged to remind that “the obligations of the SCM Agreement and the Article III:2 were not mutually exclusive” and that “it was possible for Indonesia to respect its obligations under SCM Agreement without violating Article III:2 since Article III:2 is concerned with discriminatory product taxation, rather than the provision of subsidies as such” and vice versa “since the SCM Agreement does not deal with taxes on products as such but rather with subsidies to enterprises.”³³⁵ Thus, the Panel while applying the “different aspects of the same measure” logic which was also utilised in *EC- Bananas* and *Canada – Periodicals* cases, still referred to the problematic narrow definition of conflict seemingly “to be on the safe side”.

The Panel adhered to the same logic when analyzing whether the TRIMS Agreement could be applied to the case as Indonesia claimed TRIMS Agreement could not be applicable just like the Article III.:

“.....With respect to the nature of obligations, we consider that, with regard to local content requirements, the SCM Agreement and the TRIMs Agreement are concerned with different types of obligations and cover different subject matters. In the case of the SCM Agreement, what is prohibited is the grant of a subsidy contingent on use of domestic goods, not the requirement to use domestic goods as such. In the case of the TRIMs Agreement, what is prohibited are TRIMs in the form of local content requirements, not the grant of an advantage, such as a subsidy.”³³⁶

³³⁴ *Ibid*, p 337

³³⁵ *Ibid*, p 356

³³⁶ *Ibid*, p 340

“A finding of inconsistency with Article 3.1(b) of the SCM Agreement can be remedied by removal of the subsidy, even if the local content requirement remains applicable. By contrast, a finding of inconsistency with the TRIMs Agreement can be remedied by a removal of the TRIM that is a local content requirement even if the subsidy continues to be granted. Conversely, for instance, if a Member were to apply a TRIM (in the form of local content requirement), as a condition for the receipt of a subsidy, the measure would continue to be a violation of the TRIMs Agreement if the subsidy element were replaced with some other form of incentive. By contrast, if the local content requirements were dropped, the subsidy would continue to be subject to the SCM Agreement, although the nature of the relevant discipline under the SCM Agreement might be affected. Clearly, the two agreements prohibit different measures. We note also that under the TRIMs Agreement, the advantage made conditional on meeting a local content requirement may include a wide variety of incentives and advantages, other than subsidies.”³³⁷

This is an elaboration of the same logic applied above by the Panel for the Article III discussion. In fact, there was no requirement for the Panel to refer to a narrow conflict definition when this logic is being applied. In our view, to have a better understanding of the issue, we have to make a clear distinction between this case –where a conflict does not occur between two norms as they prohibit two different acts- and a case where a conflict occurs simply because a narrow conflict definition is applied –where a right is overridden by a prohibition as two norms are not “mutually exclusive”-.

Like in the current case and in the cases *Canada- Periodicals* and *EC-Bananas*, a measure may be a complex one having different aspects relating to different agreements. While the disciplines on granting a subsidy are primarily contained in the SCM Agreement, a complex measure mixing a subsidy with a requirement of technical regulation or a TRIM may be scrutinized under different agreements. Even though a violation regarding that other agreement is detected, the measure continues to be a legitimate one in WTO context if that aspect is modified in order to ensure its consistency with that agreement. Here, we assume that that specific aspect of the measure is not explicitly allowed under the SCM Agreement. Thinking in the other way –claiming that anything attached to a subsidy can solely and exclusively be analyzed under the SCM Agreement- can significantly undermine the coherence of the WTO system since it could be relatively easy to circumvent one WTO discipline by attaching a measure inconsistent with it into the domain of another agreement. Such a situation would occur, for instance, if a discriminatory technical regulation as a requirement of a subsidy could only be questioned under the SCM Agreement but not under

³³⁷ *Ibid*, p 341

the TBT Agreement. This could create an incentive for Members to mix up different types of measures under one complex measure to avoid an allegation of a violation.

Now, as we have mentioned above, it is clear that this reasoning does not require a narrow definition of conflict. The conclusion that there is no conflict between two norms that regulate “different aspects” of the same measure *does not* stem from the fact that what is prohibited by one of them is allowed under the other one. In the above-mentioned example, a discriminatory TBT measure is not explicitly allowed under the SCM Agreement as this area *is not* regulated by the latter. This is totally different than the presumption against conflict argument and the resulting narrow definition of conflict whereby two norms that are prohibiting and allowing the same measure could be regarded *not in conflict* as they were not mutually exclusive. Hence, the Panel could resolve the case without mentioning the narrow definition and only relying on the different aspects argument.

Now, the question remains of course, what if the same aspect of a measure is allowed and prohibited simultaneously by two different provisions. Naturally, that case would represent a genuine conflict between two provisions as applied to that specific measure. In the following sections, we will try to review a potential case that involves such a conflict.

Turkey – Restrictions on Imports of Certain Textile and Clothing Products

Turkey-Textiles case was related to some restrictions by Turkey on certain textile and clothing products. These restrictions which were on imports from India besides a number of other countries, were imposed just after Turkey entered into a customs union with the EU. The EU maintained bilateral agreements to restrict imports of textile and clothing with a number exporter countries which were consistently applied with the Agreement on Textiles and Clothing. (ATC) Turkey claimed that since it had formed a customs union with the EU, in line with the legal arrangements establishing this customs union, it had to undertake and adopt common commercial policy of the EU which also included the measures in question.³³⁸ Turkey argued that these measures were necessary for the formation of the customs union and hence were justified by the Article XXIV of GATT.³³⁹

³³⁸ The Panel Report on Turkey –Restrictions on Imports on Certain Textile and Clothing Products, WT/DS34/R, p 108

³³⁹ *Ibid*, p 108

On the other hand, the complainant India asserted that measures in the form of quantitative restrictions applied by Turkey were inconsistent with the Article XI and XIII of GATT and the Article 2.4 of the ATC and the Article XXIV did not provide an exception for these obligations as the Article XXIV requires Members forming a customs union not to raise the general incidence of regulations of commerce imposed on trade with a third Member.³⁴⁰ India also claimed that the EU and Turkey could have maintained different external textile regimes at least for a certain period since, according to India, the agreement between Turkey and the EU was only of temporary nature.³⁴¹

The *Turkey- Textiles* case is the first and up to date the only case which offered a near comprehensive interpretation of GATT Article XXIV and the legality of regional trade agreements in WTO law. The Panel in the case has extensively discussed whether the measures taken by Turkey, which were found to be inconsistent with Articles XI and XIII of GATT as well as the Article 2.4 of the ATC, could be justified under the Article XXIV.

Before going into substantial matters, the Panel exhibited its approach to the potential conflicts between WTO provisions since India, in its Panel request, had explicitly mentioned the possibility of conflict between GATT Article XXIV and the provisions of the ATC.³⁴² As usual, the Panel started by recalling that WTO obligations are cumulative and WTO Agreement constitutes a single undertaking.³⁴³ The Panel then repeated the problematic narrow definition by citing from Jenks that “a conflict of law-making treaties arises only where simultaneous compliance with the obligations of different instruments is impossible.”³⁴⁴ The Panel even further emphasized, citing from Jenks, that “there was no conflict if the obligations of one instrument are stricter than, but not incompatible with, those of another, or if it was possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another”³⁴⁵ Based on this definition, the Panel commented that:

“This principle, also referred to by Japan in its third party submission, is in conformity with the public international law presumption against conflicts which was applied by the Appellate

³⁴⁰ *Ibid*, p 108

³⁴¹ *Ibid*, p 108

³⁴² *Ibid*, p 30

³⁴³ *Ibid*, p 124

³⁴⁴ *Ibid*, p 124

³⁴⁵ *Ibid*, p 124

Body in *Canada – Periodicals* and in *EC – Bananas III*, when dealing with potential overlapping coverage of GATT 1994 and GATS, and by the panel in *Indonesia – Autos*, in respect of the provisions of Article III of GATT, the TRIMs Agreement and the SCM Agreement. In *Guatemala – Cement*, the Appellate Body when discussing the possibility of conflicts between the provisions of the Anti-dumping Agreement and the DSU, stated: "A special or additional provision should only be found to *prevail* over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them."³⁴⁶³⁴⁷

"In light of this general principle, we will consider whether Article XXIV authorizes measures which Articles XI and XIII of GATT and Article 2.4 of the ATC otherwise prohibit. In view of the presumption against conflicts, as recognized by panels and the Appellate Body, we bear in mind that to the extent possible, any interpretation of these provisions that would lead to a conflict between them should be avoided."³⁴⁸

We think that this approach by the Panel was fundamentally flawed. In fact, it may not be wrong to conclude that, with the general approach laid down above, no further analysis was required and the Panel had actually insinuated its ruling even before its legal analysis. The GATT Article XXIV grants the WTO Members a right to form regional trade agreements which would otherwise violate certain other GATT provisions. Now, if we take the presumption against conflict as the underlying principle, like the Panel did and accept the conflict definition of Jenks mentioned above, the logical consequence in one extreme is that a Member has to comply with any prohibition it could potentially violate in order to form a well-functioning regional trade agreement. This would clearly render the rights granted by the Article XXIV which is a fundamental principle of GATT, a nullity.

We have to underline that this conclusion is not at all related to whether GATT Article XXIV allows the quantitative measures on textiles by Turkey in question or not. As a matter of course, this can only be determined after a careful analysis of the relevant provisions of the Article XXIV. In our view, if after this analysis, the relevant provisions of GATT Article XXIV are determined to allow for those measures, then the Panel had to engage in a conflict resolving exercise to actually determine which of the norms are to be applied to the case. However, the position taken by the Panel above diminishes the value of that analysis as the

³⁴⁶ *Ibid*, p 124

³⁴⁷ We do not see a need to revisit the issue of the consistency of this definition in *Guatemala-Cement* with the definition of Jenks. Indeed, we have shown above – See Part III- that this definition by the AB does not really indicate a strictly narrow definition of conflict and in this sense is not in line with the definition of Jenks. Nevertheless, we observe that the Panels persistently referred to *Guatemala-Cement* as if the AB unquestionably preferred a narrow definition in that case.

³⁴⁸ *Ibid*, p 125

focus would necessarily be on the prohibitions side and the result of the analysis was almost revealed in advance.

The Panel, in its analysis of the GATT Article XXIV, focused on the two paragraphs of the Article which Turkey used as a part of its defence. The Panel first went through paragraph 5(a) of the Article XXIV. By not fully taking into account the chapeau of the paragraph³⁴⁹ which conditionally allows Members to take measures which would otherwise be inconsistent with other provisions of GATT, the Panel focused on the wording of the paragraph 5(a) and accordingly reached the following conclusion:

“We note that the language of paragraph 5(a) of Article XXIV is general and not prescriptive. While it authorizes the formation of customs unions, it does not contain any provision that either authorizes or prohibits, on the occasion of the formation of a customs union, the adoption of import restrictions otherwise GATT/WTO incompatible, by any of the parties forming this customs union.”³⁵⁰

Then the Panel went on with an analysis of the paragraph 8 (a) (ii) which was another pivotal element of Turkey’s defence and which lays down the properties of a legitimate customs union in WTO context with respect to third countries.³⁵¹ Turkey claimed that the quantitative restrictions in questions were to be allowed under GATT Article XXIV, as the definition of customs union in paragraph 8 (a) (ii) requires that “substantially the same duties and *other regulations of commerce* are applied by each of the members of the union to the trade of territories not included in the union”.

Before getting into substantial analysis, the Panel once again underlined the need for an interpretation which will avoid conflicts between the Article in consideration and other WTO provisions:

³⁴⁹ The chapeau of the paragraph is as follows: “Accordingly, the provisions of this Agreement shall not prevent, as between the territories of contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided that:*”

³⁵⁰ The Panel Report in Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/R , p 131

³⁵¹ The paragraph 8(a)(ii) of the Article XXIV is as follows:

“For the purposes of this Agreement:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories,”

“In considering Turkey's Article XXIV:8(a) defense, *we are mindful of the need to interpret Article XXIV in a manner to avoid conflicts* with other WTO provisions (see paragraph 9.95 above). The issue we must consider now is whether Articles XI (and XIII) of GATT, on the one hand, and Article XXIV:8(a)(ii), on the other hand, may be interpreted so as to avoid a conflict requiring that one provision yields to the other. For the reasons explained below, we believe that, in this case, the flexibility inherent in sub-paragraph 8(a)(ii) allows for harmonious interpretation. That interpretation is in accordance with the context of the sub-paragraph 8(a)(ii) and the object and purpose of the WTO Agreement, and, at the same time, fully respects Turkey's right to enter into a customs union with other Members.”³⁵² (italics added)

Not surprisingly, the Panel's analysis yielded the result that “the terms of Article XXIV:8 (a)(ii) do not provide any authorization for Members forming a customs union to violate the prescriptions of Articles XI and XIII of GATT or Article 2.4 of the ATC”³⁵³ and in general, “the terms of subparagraph 8(a)(ii) do not explicitly authorize Members of a customs union to violate GATT rules in their relations with non-constituent members. Nor do they implicitly require such a result.”³⁵⁴ In support of this argument, the Panel stressed the flexibility inherent in the provision and argued that a reading of the paragraph together with the paragraph 8 (a) (i)³⁵⁵ allows the Members which form a customs union to still maintain some restrictive measures between themselves so as to prevent any trade diversions which may arise as a result of not pursuing exactly the same external trade policies.³⁵⁶

It should be emphasized that the problematic aspect of the Panel's analysis does not lie with the conclusion it reached but the way it reached that conclusion. The Panel did not seriously address the question whether there was a genuine conflict between the subparagraph 8(a)(ii) and Article XI. Rather, it seems that the Panel stressed the “flexibility” inherent in the subparagraph so as to avoid a conflict between two provisions. While avoidance of a conflict is a desired outcome as we have mentioned before, this should not be at the cost of undermining or ignoring an explicit right granted to a Member. Thus, in our view a deeper

³⁵² *Ibid*, p 137

³⁵³ *Ibid*, p 139

³⁵⁴ *Ibid*, p 137

³⁵⁵ The paragraph 8 (a)(i) of Article XXIV is as follows:

“For the purposes of this Agreement:

(a) A customs union shall be understood to mean the substitution of a single customs territory for two or more customs territories, so that

(i) duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated with respect to substantially all the trade between the constituent territories of the union or at least with respect to substantially all the trade in products originating in such territories,”

³⁵⁶ *Supra* 350, p 137-138

investigation of the scope and content of the right given by the subparagraph 8(a)(ii) was warranted.

At the appeal stage, Turkey claimed that the Panel had misinterpreted the relationship between the Article XXIV and other GATT obligations by concluding that GATT Article XXIV permits derogation for only GATT Article I but not for any other GATT obligations.³⁵⁷ The AB fundamentally reversed the underlying approach in Panel's conclusions regarding Article XXIV. It criticized the Panel for not paying enough attention to the chapeau of paragraph 5(a):

“We note that, in its findings, the Panel referred to the chapeau of paragraph 5 of Article XXIV only in a passing and perfunctory way. The chapeau of paragraph 5 is not central to the Panel's analysis, which focuses instead primarily on paragraph 5(a) and paragraph 8(a). However, we believe that the chapeau of paragraph 5 of Article XXIV is the key provision for resolving the issue before us in this appeal.”³⁵⁸

Then the AB proceeded for an appropriate interpretation of the chapeau. The AB first determined that the expression “shall not prevent” in the chapeau could be read as “shall not make impossible”.³⁵⁹ Subsequently, as the chapeau gives a licence for the “formation of a customs union”, the AB engaged in an analysis of the paragraph 5 in the light of paragraph 8 (a) where the definition of a customs union was located. Accordingly, the AB made the determination that paragraph 5(a) of the Article XXIV gives a right to form a customs union to the Members which would *prevail* in the case of an inconsistency with *any other* GATT provision as long as that customs union fits the definition in paragraph 8 (a). This applies to an inconsistency between a measure that is indispensable for the formation of the customs union and any other GATT obligation:

“Accordingly, on the basis of this analysis of the text and the context of the chapeau of paragraph 5 of Article XXIV, we are of the view that Article XXIV may justify a measure which is inconsistent with certain other GATT provisions. However, in a case involving the formation of a customs union, this “defence” is available only when two conditions are fulfilled. First, the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union that fully meets the requirements of sub-paragraphs 8(a) and 5(a) of Article XXIV. And, second, that party must demonstrate that the formation of that customs union would be prevented if it were not

³⁵⁷ The Appellate Body Report on Turkey – Restrictions on Imports of Textile and Clothing Products, WT/DS34/AB/R, p 3

³⁵⁸ *Ibid.*, p 10

³⁵⁹ *Ibid.*, p 11

allowed to introduce the measure at issue. Again, *both* these conditions must be met to have the benefit of the defence under Article XXIV.”³⁶⁰

Thus, the Panel’s ruling that GATT Article XXIV could not constitute an exception for GATT provisions was found to be erroneous by the AB. According to the AB, the Panel had to address these two conditions – whether the EU-Turkey customs union was a customs union fulfilling the requirements in the Article and whether that customs union would be prevented if the restrictions imposed by Turkey did not exist- separately and form its ruling accordingly. The AB, after having concluded that the first condition was not before it as an issue to be analyzed, went on to complete the analysis regarding the second condition which the Panel had made only partially. After showing that there were alternative means available for Turkey to achieve the same objective, the AB concluded that:

“For this reason, we conclude that Turkey was not, in fact, required to apply the quantitative restrictions at issue in this appeal in order to form a customs union with the European Communities. Therefore, Turkey has not fulfilled the second of the two necessary conditions that must be fulfilled to be entitled to the benefit of the defence under Article XXIV. Turkey has not demonstrated that the formation of a customs union between Turkey and the European Communities would be prevented if it were not allowed to adopt these quantitative restrictions. Thus, the defence afforded by Article XXIV under certain conditions is not available to Turkey in this case, and Article XXIV does not justify the adoption by Turkey of these quantitative restrictions.”³⁶¹

“Consequently, we find that there is no legal basis in Article XXIV:5(a) for the introduction of quantitative restrictions otherwise incompatible with GATT/WTO; the wording of subparagraph 5(a) does not authorize Members forming a customs union to deviate from the prohibitions contained in Articles XI and XIII of GATT or Article 2.4 of the ATC.”³⁶²

United States – Tax Treatment For “Foreign Sales Corporations”

In the *US-FSC* case, the dispute concerned a set of tax exemptions existing in the US tax code. It was alleged by the complaining parties that the set of tax exemptions for “Foreign Sales Corporations” (FSCs) were contingent upon export performance and thus were inconsistent with the Article 3.1 of the SCM Agreement as well as the relevant provisions of the Agriculture Agreement. At the appeal stage, the United States challenged the Panel's

³⁶⁰ *Ibid*, p 16

³⁶¹ *Ibid*, p 18

³⁶² *Ibid*, p 134

conclusion that the FSC measure violates SCM Agreement Article 3.1(a) and the Agriculture Agreement.

One central element in the dispute was the situation of the agricultural export subsidies. Article XVI of the GATT regulates subsidies and has a specific section to deal with export subsidies. This Article, however, does not prohibit granting of export subsidies on primary products and recognizes the right of Members to grant such subsidies under certain conditions.³⁶³ On the other hand, Article 3, 8 and 9 of Agreement on Agriculture prohibits the grant of agricultural subsidies for products or amounts other than provided in their specific schedules of commitments.³⁶⁴

When examining that issue, the AB commented that;

“It is clear from even a cursory examination of Article XVI:4 of the GATT 1994 that it differs very substantially from the subsidy provisions of the SCM Agreement, and, in particular, from the export subsidy provisions of both the SCM Agreement and the Agreement on Agriculture.”³⁶⁵

“Also, and significantly, Article XVI:4 of the GATT 1994 does not apply to “primary products”, which include agricultural products. Unquestionably, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the *Agreement on Agriculture* must clearly take precedence over the *exemption* of primary products from export subsidy disciplines in Article XVI:4 of the GATT 1994.”³⁶⁶

Thus, the AB detected a “very substantial difference” between the provisions of GATT Article XVI and the Agreement on Agriculture regarding export subsidies and stated that provisions of the Agreement on Agriculture that prohibit export subsidies take precedence over the permissive provisions of Article XVI for primary products. As Pauwelyn argues, this can be regarded as an implicit indication of a broader definition of conflict adopted by the AB

³⁶³ Article XVI:3 of the GATT states: “Accordingly, contracting parties should seek to avoid the use of subsidies on the export of primary products. If, however, a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.”

³⁶⁴ Article 8 of the Agreement on Agriculture states that “Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member’s Schedule.”

³⁶⁵ The Appellate Body Report on United States – Tax Treatment for “Foreign Sales Corporations”, WT/DS108/AB/R, p41

³⁶⁶ *Ibid*, p 42

as the very substantial difference is between a prohibition and an exemption/permission.³⁶⁷ To support this argument, Pauwelyn also notes that the AB had earlier used difference and conflict interchangeably.³⁶⁸ However, it should also be noted that the AB did not invoke any conflict resolving rule in that case and simply stated that the Agreement on Agriculture prevailed over the GATT. Had the AB explicitly admitted the existence of a conflict, it should have referred to the General Interpretative Note on Annex 1A to resolve that conflict.

Argentina- Safeguard Measures on Imports of Footwear

In *Argentina-Footwear* case, the measure in hand – a safeguard measure taken by Argentina against footwear imports- was disputed by the European Communities. One of the issues in the dispute was whether the existence of “unforeseen developments” that existed as a pre-condition for safeguard measures in Article XIX of GATT would still be required after the entry into force of the Safeguards Agreement.

Argentina claimed that GATT Article XIX and the Safeguards Agreement were in conflict as “Article XIX establishes a condition (that imports should be the result of "unforeseen developments") which Article 2 of the Agreement on Safeguards does not establish. The inconsistency lies in the fact that one of the provisions contains a condition which was not taken up by the provision that "clarifies" and interprets it.”³⁶⁹

With regard to the definition of conflict, Argentina asserted that it disagreed with the conflict definition raised up in *Guatemala – Cement* case and indeed for the cases of a conflict between a provision which interprets another provision, that definition is insufficient.³⁷⁰ In such cases, “a conflict cannot be considered to exist only when compliance with one provision implies violation of the other, but must be understood to exist also if the interpretative provision includes or excludes a requirement or condition established in the interpreted provision.”³⁷¹ For Argentina, this conflict should provoke the General Interpretative Note and the Safeguards Agreement should prevail over the Article XIX as a result.

³⁶⁷ PAUWELYN *supra* 107, p 196-197

³⁶⁸ A similar approach was followed by the Appellate Body in *Brazil- Aircraft* case. See the Appellate Body Report in *Brazil- Export Financing Programme for Aircraft* WT/DS46/AB/R, p 56

³⁶⁹ The Panel Report in *Argentina – Safeguards Measure on Imports of Footwear*, WT/DS121/R, p 21

³⁷⁰ *Ibid*, p22

³⁷¹ *Ibid*, p22

The Panel, while accepting in its reasoning that the provisions of Safeguards Agreement do not override or supersede GATT Article XIX and the provisions of both legal instruments continue to apply, “the original conditions contained in Article XIX have to be read in the light of the subsequently negotiated and much more specific provisions of the Safeguards Agreement.” Thus, the Panel attached the Safeguards Agreement a somewhat priority role which “defines, clarifies, and in some cases modifies the whole package of rights and obligations of Members with respect to safeguard measures”.³⁷² Moreover, for the Panel, in the light of the principle of effective treaty interpretation, the express omission of the criterion of unforeseen developments in the new agreement is of significance³⁷³. Consequently, the Panel arrived at the conclusion that the existence of “unforeseen developments” was not a pre-condition for taking a safeguard measure in the light of the Safeguards Agreement.³⁷⁴

The Panel, however, did not deliberate on whether there was a conflict between the Article XIX and the Safeguards Agreement reminding the presumption against conflict in international law. On the other hand, the Panel emphasized that even if under the assumption that there was a conflict between the Article XIX and the Safeguards Agreement, it would resort to the General Interpretative Note and accordingly “the Safeguards Agreement would prevail over Article XIX of GATT to the extent of that conflict.”³⁷⁵

Nevertheless, this finding by the Panel has been reversed at the appeal stage. The Appellate Body underlined the unity of the WTO Agreement and emphasized that the two treaties – GATT 1994 and the Safeguards Agreement entered into force as part of that treaty at the same time, apply equally and are equally binding on all WTO Members.³⁷⁶ Thus a Member in taking a safeguard measure had to comply with the requirements in both Agreements. The AB also reversed the Panel’s finding that the express omission of the expression “unforeseen developments” must have a meaning on the grounds that had the negotiators intended to omit the unforeseen developments requirements in the Safeguards Agreements they could have done that by expressly saying this.³⁷⁷

³⁷² *Ibid*, p 148

³⁷³ *Ibid*, p 148

³⁷⁴ *Ibid*, p 151

³⁷⁵ *Ibid*, p 152

³⁷⁶ The Appellate Body Report on Argentina – Safeguards Measure on Imports of Footwear, WT/DS121/AB/R, p27

³⁷⁷ *Ibid*, p 30

The AB further underlined that the negotiators did not intend that the Safeguards Agreement entirely replace GATT Article XIX. Instead, the intention was that the two texts apply cumulatively to the extent that there was a conflict between them. As the AB saw no conflict between the two legal texts, the provisions of both had to be applied cumulatively “in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures.”³⁷⁸ Consequently, the AB ruled that the existence of unforeseen developments was still a pre-condition for the application of a safeguard measure.

The *Argentina –Footwear* case is one of the cases that emphasize the unity of the WTO Agreement and that its annexes should be read in harmony as much as possible which is a proposition that we fully share. On the other hand, the conclusion by the AB that there was no conflict between the GATT Article XIX and the Safeguards Agreement regarding the unforeseen developments requirement is also in line with the approach to the conflicts exhibited in the current study. Indeed, the fact that the unforeseen developments requirements does not appear in the Safeguards Agreement does not create a conflict between the two as conflicts can only occur between two obligations or an obligation and an explicit right. As we have argued before, the lack of an obligation does not create an explicit right itself and in the event of a clash between an obligation and lack of an obligation, there would be either no conflict or the seeming conflict would be resolved trivially in favour of the obligation.

European Communities – Export Subsidies on Sugar

The *EC-Sugar* case was related to the sugar regime of the European Communities and particularly whether the EC exceeded its export subsidy commitments regarding sugar scheduled under Agreement on Agriculture. One specific issue in the case was the legal status of a footnote in the determination of the exact level of commitment for exports of subsidised sugar for the EC. The EC had a commitment level of €499.1 million and 1,273.5 thousand tonnes of sugar in its schedule of concessions. However, a footnote was inscribed besides the term sugar in EC’s schedule which provides that this amount:

³⁷⁸ *Ibid*, p 30

"Does not include exports of sugar of ACP and Indian origin on which the Community is not making any reduction commitments. The average of export in the period 1986 to 1990 amounted to 1.6 mio t."³⁷⁹

The actual amount of subsidized sugar exported by the EC had been 4.097 million tonnes in the term before the establishment of the Panel and therefore the complainants argued that the EC had well exceeded its commitment levels and violated the Article 8 of the Agreement on Agriculture.³⁸⁰

The EC, on the other hand, argued that its exact level of commitment was not merely 1,273.5 thousand tonnes and its schedule of commitments had to be read together with the footnote mentioned above which was an integral part of the schedule. Thus, the EC contended that it had a different commitment for the exports of "ACP/India "equivalent" sugar" which was to limit it to the amount specified in the second sentence of the footnote.³⁸¹ The EC further argued that its intention with this footnote was well-known to the Members during the Uruguay Round negotiations and the complainants had implicitly admitted that intention through the signature of the WTO Agreement.

³⁷⁹ The Panel Report on The European Communities - Export Subsidies on Sugar, WT/DS283/R, p 9

³⁸⁰ Article 8.2 of the Agreement on Agriculture is as follows:

"Export Subsidy Commitments

2. (a) Except as provided in subparagraph (b), the export subsidy commitment levels for each year of the implementation period, *as specified in a Member's Schedule*, represent with respect to the export subsidies listed in paragraph 1 of this Article:

(i) in the case of budgetary outlay reduction commitments, the maximum level of expenditure for such subsidies that may be allocated or incurred in that year in respect of the agricultural product, or group of products, concerned; and

(ii) in the case of export quantity reduction commitments, the maximum quantity of an agricultural product, or group of products, in respect of which such export subsidies may be granted in that year.

(b) In any of the second through fifth years of the implementation period, a Member may provide export subsidies listed in paragraph 1 above in a given year in excess of the corresponding annual commitment levels in respect of the products or groups of products specified in Part IV of the Member's Schedule, provided that:

(i) the cumulative amounts of budgetary outlays for such subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative amounts that would have resulted from full compliance with the relevant annual outlay commitment levels specified in the Member's Schedule by more than 3 per cent of the base period level of such budgetary outlays;

(ii) the cumulative quantities exported with the benefit of such export subsidies, from the beginning of the implementation period through the year in question, does not exceed the cumulative quantities that would have resulted from full compliance with the relevant annual quantity commitment levels specified in the Member's Schedule by more than 1.75 per cent of the base period quantities;

(iii) the total cumulative amounts of budgetary outlays for such export subsidies and the quantities benefiting from such export subsidies over the entire implementation period are no greater than the totals that would have resulted from full compliance with the relevant annual commitment levels specified in the Member's Schedule; and

(iv) the Member's budgetary outlays for export subsidies and the quantities benefiting from such subsidies, at the conclusion of the implementation period, are no greater than 64 per cent and 79 per cent of the 1986-1990 base period levels, respectively. For developing country Members these percentages shall be 76 and 86 per cent, respectively."

³⁸¹ *supra* 379, p 136

In this context, the Panel had to decide on the legal status of the footnote which was alleged to be in conflict with Article 8.2 of the Agreement on Agriculture by the complainants as well as the exact level of commitment by the EC. The Panel commented that:

“To resolve the issue before it, the Panel will therefore have to examine the relationship between terms of (and commitments contained in) a Member's Schedule, in this dispute the content of Footnote 1 (on ACP/India sugar), and the provisions of the *Agreement on Agriculture*. In particular, the Panel needs to assess whether it is possible to interpret harmoniously the terms of the *Agreement on Agriculture* together with those of Footnote 1 of Section II, Part IV of the European Communities' Schedule. If this is not possible, the Panel will have to resolve such a conflict.”³⁸²

Then the Panel went on to analyse whether the footnote was in conflict with the relevant provisions of the Agreement on Agriculture. After having exhaustively discussed the obligations set out in the Agreement on Agriculture related to the export subsidy commitments, the Panel reached the conclusion that the footnote cannot be legitimately regarded as part of the schedule of the EC since it does not fulfil the requirement in the Agreement that an export subsidy commitment must have both a budgetary outlay and a quantity commitment level as its components.³⁸³ Moreover, based on previous Panel and AB rulings, the Panel, while admitting that the provisions in a Member's schedule should be treated as part of the treaty, the Panel stated that entries in the schedules of concession can only be used to clarify and qualify the concessions that they agree to assume but not to reduce or conflict with the obligations that they undertake under the WTO Agreement.³⁸⁴

Based on these observations the Panel concluded that:

“In the Panel's view, the content of Footnote 1 is fundamentally inconsistent with the basic provisions of the *Agreement on Agriculture*, as Footnote 1, on the one hand, and Articles 3, 8 and 9 of the *Agreement on Agriculture*, on the other hand, are mutually inconsistent. Therefore, the content of Footnote 1 contradicts and conflicts with the European Communities' basic obligations contained in Articles 9.1, 9.2(b)(iv), 3 and 8 of the *Agreement on Agriculture*. Consequently, it is not possible to interpret harmoniously Footnote 1 and the European Communities' basic obligations relating to export subsidies contained in the *Agreement on Agriculture*.

Consequently, the Panel finds that the content of Footnote 1 is of no legal effect and does not enlarge or otherwise modify the European Communities' quantity commitment level

³⁸² *Ibid*, p 139

³⁸³ *Ibid*, p 141

³⁸⁴ *Ibid*, p 147

specified in Section II, Part IV of its Schedule to be 1,273,500 tonnes of sugar per year, or its budgetary outlay commitment of €499.1 million per year, with effect since 2000/2001.”³⁸⁵

This conclusion by the Panel provides important insights for understanding the notion of conflicts within the WTO Agreement. First, it clearly recognizes that there is a conflict between the footnote taking place in EC’s schedule and the Agreement on Agriculture. This conflict is of an “explicit right- obligation” type. The footnote, as interpreted by the EC would give a right to export some more amount of subsidized sugar in addition to the amount that was recorded in its schedule. The Panel concluded that this right was in conflict with the obligations set out in the Agreement on Agriculture.

Second, while confirming that schedules of concessions are an integral part of an agreement, the Panel established a hierarchy between the provisions of the Agreement and the schedule when resolving this conflict in favour of the Agreement. However, as also argued by the EC, this hierarchy was not anywhere textually prescribed. The Panel, thus, implicitly assumed the existence of that hierarchy.

At the appeal stage, the AB upheld most of the rulings by the Panel regarding the legal status of the footnote. On the issue of a conflict between the provisions of the Agreement on Agriculture and the footnote, the AB followed a slightly different approach than the Panel. The AB initially tried to avoid commenting on whether there is a conflict between the two stating that an export subsidy granted should comply with the obligations in both the Agreement and the schedule.

“Similarly, in this case, we find no provision under the *Agreement on Agriculture* that authorizes Members to depart, in their Schedules, from their obligations under that Agreement. Indeed, as we have noted, Article 8 requires that, in providing export subsidies, Members must comply with the provisions of both the *Agreement on Agriculture* and the export subsidy commitments specified in their Schedules.”³⁸⁶

Then, however, the AB addressed the case of a conflict between the provisions of the Agreement and the footnote and by relying on the Article 3.1 of the Agreement³⁸⁷ which

³⁸⁵ *Ibid*, p 155

³⁸⁶ The Appellate Body Report on The European Communities - Export Subsidies on Sugar, WT/DS283/AB/R, p 76

³⁸⁷ Article 3.1 of the Agreement on Agriculture is as follows:

“Incorporation of Concessions and Commitments

states that schedules of concessions are part of GATT 1994, commented that General Interpretative Note to Annex 1A applies to this case:

“In any event, we note that Article 21 of the *Agreement on Agriculture* provides that: “[t]he provisions of [the] GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.” In other words, Members explicitly recognized that there may be conflicts between the *Agreement on Agriculture* and the GATT 1994, and explicitly provided, through Article 21, that the *Agreement on Agriculture* would prevail to the extent of such conflicts. Similarly, the *General interpretative note to Annex 1A to the WTO Agreement* states that, “[i]n the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A ..., the provision of the other agreement shall prevail to the extent of the conflict.” The *Agreement on Agriculture* is contained in Annex 1A to the *WTO Agreement*.

As we noted above, Footnote 1, being part of the European Communities' Schedule, is an integral part of the GATT 1994 by virtue of Article 3.1 of the *Agreement on Agriculture*. Therefore, pursuant to Article 21 of the *Agreement on Agriculture*, the provisions of the *Agreement on Agriculture* prevail over Footnote 1. We, therefore, do not agree with the European Communities that “there is no hierarchy between the export subsidy commitments in a Member's schedule and the *Agreement on Agriculture*.”³⁸⁸

In general, the *EC-Sugar* case was instrumental in exploring the limits of the Panel and the AB in recognizing conflicts between and within different WTO Agreements. In this case, both the Panel and the AB explicitly recognized that there was – and could be – a conflict between a WTO Agreement and its schedule of concessions. Alternatively, it could be possible in this case that both the Panel and the AB could avoid accepting even the potential existence of a conflict by simply asserting that the EC could fulfill its obligations under the relevant provisions of the *Agreement on Agriculture* without violating any other WTO provision and thus could not have entered into any substantial discussion on the possibility of a conflict between those obligations and the rights laid down in the export subsidy commitment schedules.

2. Implications from WTO Cases Involving Potential Conflicts

Many implications can be derived from the cases that we have reviewed above regarding future potential conflicts between WTO Agreements. Moreover, we should also bear in mind that we have only reviewed only some cases that according to our subjective assessment

1. The domestic support and export subsidy commitments in Part IV of each Member's Schedule constitute commitments limiting subsidization and are hereby made an integral part of GATT 1994.”

³⁸⁸ *Supra* 386, p 77

exhibited a representative character. Nevertheless, there are certain patterns that should be recognised from our examination of those cases:

- *Conflicts between provisions of different WTO Agreements are possible.*
- *The DSB (Panels or the AB) is extremely reluctant to recognise such conflicts.*
- *In the event that such a conflict is identified, tools of conflict resolution from international law are available.*
- *Even if conflicts are recognised there is no uniform and coherent approach to resolve such conflicts throughout different cases. The focus is on the resolution of the dispute with making the least amount of general and broad analysis which may at least create legitimate expectations for future cases. A pragmatic approach is followed.*
- *A conflict between a prohibition and an explicit right is potentially recognisable by the DSB.*
- *This is, however, only possible if exactly the same measure is allowed and prohibited by two different provisions simultaneously.*
- *On the other hand, a conflict does not exist when different aspects of the same measure are both allowed or prohibited simultaneously.*

Now, having reviewed all the necessary instruments, we are ready to with a case study to apply those instruments.

PART VIII: THE CASE STUDY: QUOTAS ON TRANSIT PERMITS

VIII. THE CASE STUDY: QUOTAS ON TRANSIT PERMITS

At this stage of the work, we are going to carry out a case study where we will be able to apply the theoretical background we have reviewed so far. It is clear that choosing a case which poses a genuine potential conflict between two WTO Agreements is not easy. This is especially true in the light of the previous cases that we have reviewed above, where the Panel and the AB were very reluctant to identify a conflict between two WTO Agreements even where such an identification seemed to be inevitable.

Thus, after a careful consideration of other potential candidates, we have decided to dwell on the case of quotas on transit permits as a case study of conflict between two WTO Agreements, namely the GATT and the GATS.³⁸⁹ The reasons for this choice are three-fold: First, the case exposes a potential conflict between GATT and GATS, two agreements between which no hierarchy was defined and whose relationship is not regulated by any explicit provision. Otherwise, a seeming conflict could be resolved instantly without leaving much space for further analysis of which provision is to be applied. Secondly, as we are going to see, the case is sophisticated enough to allow us to use some, if not all of the interpretational tools that we have visited in this work before and thus does not lead to a trivial resolution of the case. Finally and perhaps most importantly, we believe that the case offers a genuine potential conflict between GATT and GATS which is, as we have mentioned before, is not a frequently encountered situation.

1. Introduction to the Case

Trade in goods and transportation are two inseparable activities. International trade requires a timely and convenient delivery and thus is strictly dependent on transportation. Hence, transportation and logistical activity in a broader sense is a major factor affecting the cost of trading.³⁹⁰ In this context, a measure that significantly affects the transportation sector is highly likely to also affect the trade in goods, either directly or indirectly. Therefore, it is

³⁸⁹ Another candidate case could be measures taken on transit traffic through a Member for the purposes of protection and enforcement of intellectual property rights. In that case, there would be a potential conflict between GATT (Article V) and TRIPS Agreement (particularly Articles 51 and 52 of the Agreement). Indeed, such a dispute was officially started following the seizure of certain pharmaceutical products in the Netherlands produced in India and heading to Brazil. However, the dispute was suspended at the consultations stage and no Panel procedure was initiated by the complaining parties, India and Brazil. See DS408-409 European Union and a Member State- Seizure of Generic Drugs in Transit

³⁹⁰ See for instance David HUMMELS (2007) "Transportation Costs and International Trade in the Second Era of Globalization" *Journal of Economic Perspectives* Vol:21 No:2, p 131-154

highly possible that the domain of the provisions regulating trade in goods and the domain of the provisions regulating the transportation sector may overlap. A measure primarily aiming at regulating the transportation sector may be scrutinized under GATT as it also affects the flow of goods and vice versa.

Indeed, GATT has foreseen such overlaps and their consequences. Article III:1 and III:4 envisaged respectively that the measures affecting the transportation may be employed to afford protection to the domestic production or to provide discriminatory treatment for domestic goods:

“The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, *transportation*, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.”

“ The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, *transportation*, distribution or use. *The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.* ”

We have shown that when there are such overlapping domains exist, there is always the possibility of conflicts occurring.

It has, however, to be kept in mind that transportation is essentially a services sector. Provision of a transportation service by a national of a WTO Member to a national of another WTO Member through whichever mode constitute trade in services and hence is regulated under GATS. Members have recorded in their schedules of concessions, under the “transportation services” title, whether they have undertaken commitments for each mode and the exemptions for those commitments if there are any. Thus, in general, transportation is an area where the jurisdictions of the GATT and GATS overlap.

While this picture holds true for bilateral trade in transportation services, we have to be aware that for transit, we need a totally different approach and consequently a different understanding of the relationship between GATT and GATS. Nevertheless, before dwelling

on those peculiar properties of transit, we will look at a parallel network of international legal arrangements regarding road transportation services besides the WTO disciplines on transportation.

2. Bilateral Arrangements Regarding Road Transportation

In terms of GATS commitments, road transportation or road freight transportation³⁹¹, as it takes place in GATS to distinguish it from road passenger transportation, is a rather closed sector. As of the end of 2011, only 44 WTO Members have commitments in road freight transport services. It is noteworthy that only 27 original GATS signatories had commitments in this sector while the remaining 17 are acceded Members.³⁹² Even those commitments contain a significant number of restrictions on establishment and operations such as economic needs tests, restrictions on foreign participation, obligations to set up a domestic-law corporation, permit systems closed to vehicles registered abroad, emergency safeguard measures with respect to the number of service providers, limitations on the total number of service operations or on the total quantity of service output, limitations on the use of hired vehicles and so on.³⁹³

Instead of market access commitments under GATS, the road freight transportation, at the international level, is pre-dominantly regulated by a complex network of bilateral road transportation agreements. According to a study by the WTO Secretariat dated 2010, there have been more than 1400 such bilateral agreements signed so far worldwide.³⁹⁴ These agreements, in effect, constitute instruments for bilateral market access regarding road transportation services which also lay down the conditions of that bilateral market access. In principle, in the absence of any such bilateral agreement between two countries and GATS

³⁹¹ The road freight transportation is defined in the Services Sectoral Classification List of the WTO (document MTN.GNS/W/120) as one of the sub-sectors listed under category 11.F (“Road Transportation Services”) as 11.F.b. The corresponding UN Provisional Central Product Classification (CPC Prov.) code is 7123, which is further sub-divided at the five digit level, into seven sub-categories. These are transportation of; frozen or refrigerated goods (71231), bulk liquids or gases (71232), containerized freight (71233), furniture (71234), mail (71235) and other freight (71239), as well as freight transportation by man- or animal-drawn vehicles (71236).

³⁹² WTO Council for Trade in Services, “Road Freight Transport Services” Background Note by the Secretariat S/C/W/324, p 44

³⁹³ *Ibid*, p 18

³⁹⁴ *Ibid*, p 22

commitments and if no other regional mechanism³⁹⁵ related to road transportation exists, an authorization is needed for every transport operation on a case-by-case basis and if no authorization is granted, the goods have to change vehicles at the border crossing points.

Although the structure and the provisions of these agreement may vary from agreement to agreement and from region to region, the model agreement prepared by ECMT gives a sufficiently clear idea of how these agreements look like.³⁹⁶ In a nutshell, the model agreement, assuming initially the respective market of the freight transportation services are closed vis-a-vis each other, establishes a permit system to allow for services trade bilaterally:

“Article 6 -[Permit system]

[1] Transport operators established on the territory of a Contracting Party may, under the system of prior authorisation by permit, undertake on the territory of the other Contracting Party:

a] transport between the territories of the two Contracting Parties;

b] transport between a point on the territory of the other Contracting Party and a point on the territory of a third State, providing that the journey includes the country of establishment. This restriction does not apply to unladen runs;

c] *transit transport*.

[2] Cabotage is only permitted with the special authorisation of the host country.”³⁹⁷ (italics added)

Thus, the permit system includes permits for bilateral transport operations as well as third country transport operations. In some bilateral agreements, permits for cabotage rights (transport operation within a country) are also allowed. It is most remarkable, however, that transit transport operations are also included among those permits. These permits allow a vehicle registered in one of signatories of the agreement to pass through the territory of the other signatory. It is indeed the case that most bilateral agreements have this provision and allow permits for transit operations. As this type of permits are the ones that we are going to focus on in this work, it would be proper to further elaborate how these permits function.

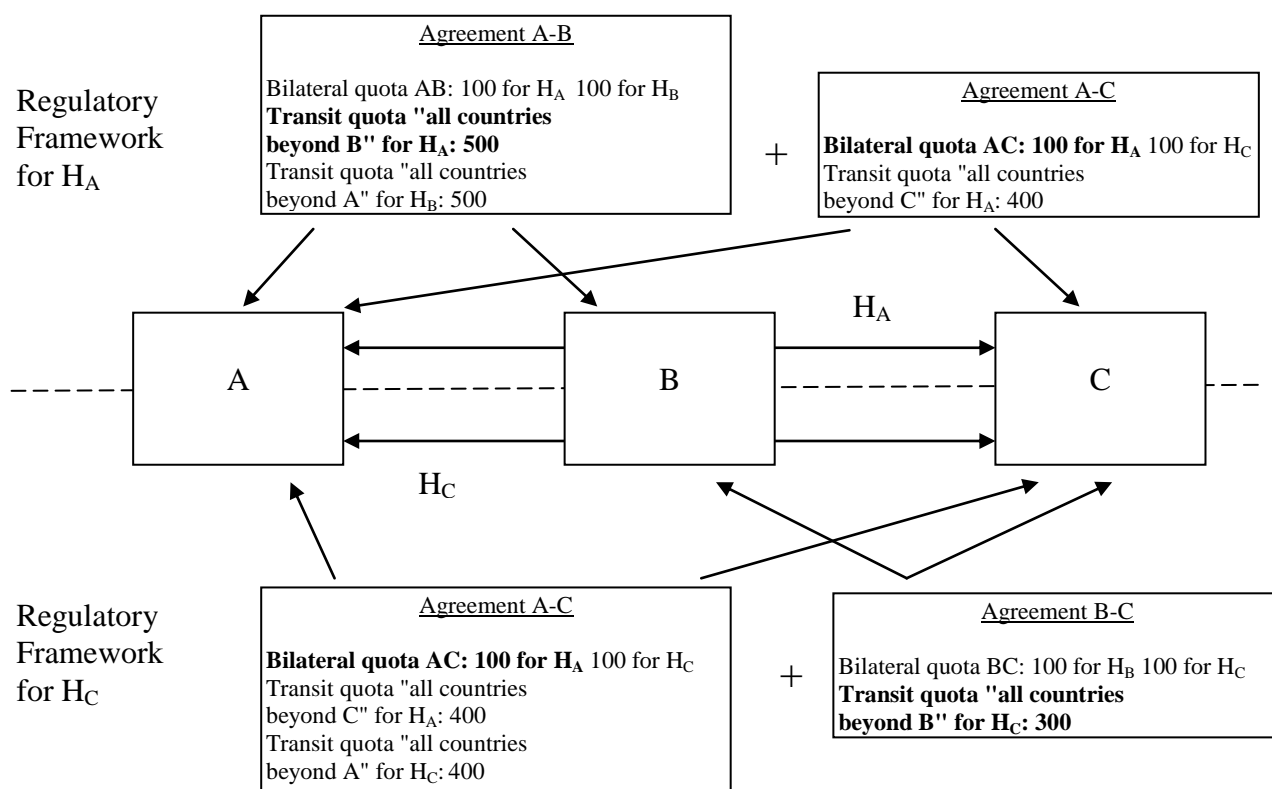
³⁹⁵ The European Union, Andean Community, North American Free Trade Agreement (NAFTA) or European Conference of Ministers of Transportation (ECMT) are examples of such regional bodies having arrangements on transportation services.

³⁹⁶ The model agreement was adopted by the Council of Ministers of the ECMT in 1997 as a possible frame of reference for bilateral road transport agreements. The Agreement is available online at www.internationaltransportforum.org on 14.10.2013

³⁹⁷ The Model Agreement

According to the Model Agreement and the common practice for the bilateral agreements, permits including transit permits are exchanged between the competent authorities of two parties on an annual basis at an agreed number by both parties. That number is also called as “quota” since it determines the upper limit of the operations in that category. Pursuant to the usual practice, the parties establish a joint committee and that joint committee meets annually where the parties negotiate the number of permits to be exchanged for the next year. Additional quotas may be granted for vehicles which meet stricter environmental or safety requirements. If one of the parties exhaust the quota before the end of the year, that party tries to obtain an additional quota from its partner. If it is unable to do so, the goods have to be carried, either by the less competitive flag or outside the framework of the bilaterally established road transport quotas.³⁹⁸

Figure 1 Illustration of the Operation of Quotas on Transit Permits



Legend: H_A = Haulier of country A
H_B = Haulier of country B
H_C = Haulier of country C

Text in bold indicates the bilateral/transit quota used by the carrier concerned.

Notes: The AC agreement is shown twice to simplify the diagram. It should be noted, however, that in each of the cases described on either side of the median line of the diagram, it is a different provision of the agreement that applies. Also for simplification purposes, the situation of the hauliers of country B has not been described in the diagram.

³⁹⁸ *Ibid*, p 20

As illustrated in Figure 1, this network of bilateral agreements acting together poses important complexities, especially in terms of transit passages. Transit permits are not necessarily exchanged between adjacent countries and a full utilisation of a bilateral quota between country A and C is dependent on the availability of transit permits obtained from country B or any other country in between A and C. As country A, which is at the end of the chain, has to negotiate the transit quotas with each and every country in between, the amount of quotas may not be the same for all transit countries. It is the lowest amount of transit quota throughout that chain that determines the capacity of operations and that number may be lower than the bilateral quotas between the country A and C.

Hence, the transit quota creates the bottleneck in a given route as the number of transportation operations between the country of origin and the country of destination is dependent on the lowest of the transit permits along the route which is another way of saying “a chain is only as strong as its weakest link”.³⁹⁹

3. Freedom of Transit

Having reviewed the concept of “transit quotas”, we are now in a position to look over the WTO disciplines on transit passages. Even before that, it would be appropriate to explore the status of such disciplines in public international law. “Freedom of transit” or “right to transit” is a widely recognised right in international law.⁴⁰⁰ For Sir Lauterpacht, who discussed extensively the existence of such a right based on previous state practices and on the views of other scholars, concluded that right to transit cannot be attached to limited number of states such as landlocked states.⁴⁰¹ Rather, right to transit arises for any state provided that two conditions are met: First, the state claiming such right of transit must be able to justify it by

³⁹⁹ *Ibid*, p 28

⁴⁰⁰ There are different views on whether freedom of transit had a status of customary international law and thus enforceable in the absence of any treaties between relevant parties. One group of scholars including McNair and Hyde believe that right to transit is not a self-executing right and it has to be based on agreements concluded with the transited states. At the heart of this view lies the argument that right to transit is subordinated to the state sovereignty of the transited state and thus the act of transiting needs the approval of the transited state. On the other hand, for other scholars, the economic interdependence of states offers an important juridical basis for the recognition of transit as a right. Provided that certain conditions are met, this right is to be recognised and an arbitrary blockage or an absolute denial of this right is obsolete. To this group belongs scholars like Lauterpacht, O’Connell and Visscher. For more information on this debate See Kishor UPRETY (2006) *The Transit Regime for Landlocked States*, World Bank Publications, Washington D.C., p 28-30

⁴⁰¹ Elihu LAUTERPACHT (1958) “Freedom of Transit in International Law” *Transactions of the Grotius Society*, Vol. 44, “Problems of Public and Private International Law”, Transactions for the Year 1958-59, p 315

reference to the consideration of necessity or convenience. Second, the exercise of the right must be such as to cause no harm prejudice to the transit state.⁴⁰²

Apart from this discussion, the principle of freedom of transit has been long a part of the conventional international law under different forms. The Covenant of the League of Nations included a provision which obliged the Members “to make provisions to secure and maintain freedom of communications and of transit.”⁴⁰³ Based on this imperative by the Covenant, in the Barcelona Conference held in 1921, the Barcelona Statute or the Statute on Freedom of Transit which was attached to the Barcelona Convention was adopted in 1921. The Statute which was the first multilateral treaty elaborating on various rights related to transit where the Contracting States were obliged to “facilitate free transit” through the measures they take, “on routes in use convenient for international transit.”⁴⁰⁴ The Contracting States were further required not to make any distinction based on the nationality of persons, the flag of vessels or any particular characteristic of the goods or vessels.⁴⁰⁵ One shortcoming of the Statute was that it only covered transit by rail and waterway but not air or land transit.

Between the Barcelona Convention and the present time, the principle of freedom of transit has been addressed in a number of multilateral treaties in different forms. Among these are the UN Convention on High Seas (1958)⁴⁰⁶, The Convention on the Territorial Sea and the Continuous Zone (1958)⁴⁰⁷, The Convention on the Continental Shelf (1958)⁴⁰⁸, New York Convention on Transit Trade of Landlocked States (1964)⁴⁰⁹ More recently, the UN

⁴⁰² *Ibid*, p 332

⁴⁰³ Article 23 (e) of the Covenant of the League of Nations

⁴⁰⁴ Statute on Freedom of Transit attached to the Barcelona Convention, Article 2

⁴⁰⁵ *Ibid*, Article 2

⁴⁰⁶ Article 3 of the Convention is as follows:

“1. In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea coast should have free access to the sea. To this end States situated between the sea and a State having no sea coast shall by common agreement with the latter, and in conformity with existing international conventions, accord:

(a) To the State having no sea coast, on a basis of reciprocity, free transit through their territory; and

(b) To ships flying the flag of that State treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to seaports and the use of such ports.

2. States situated between the sea and a State having no sea coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal State or State of transit and the special conditions of the State having no sea coast, all matters relating to freedom of transit and equal treatment in ports, in case such States are not already parties to existing international conventions.”

⁴⁰⁷ This Convention confirmed in detail the right of innocent passage through the Articles 14-23

⁴⁰⁸ This Convention obliges the coastal state “not to impede the laying or maintenance of submarine cables or pipelines on the continental shelf” by other states in Article 2 and 4.

⁴⁰⁹ The New York Convention on Transit Trade of Landlocked States has a special place among others since it is so far the only multilateral legal instrument attempting to specifically address the problems faced by landlocked countries. The convention accepted as a principle that “The recognition of the right of each land-locked State of

Convention on Law of the Sea which replaced the 1958 Geneva treaties, reconfirmed the right of access to the sea and freedom of transit to this end by the Article 125(1) of the Convention.⁴¹⁰

4. The GATT Article V

Among all provisions attempting to ensure freedom of transit existing in international legal texts currently, Article of V of the GATT is probably the strongest of all with the most extensive coverage. A strong freedom of transit provision whose elements were partially borrowed from the Barcelona Statute was already existent in the Havana Charter as the Article 33 of the Charter. The provisions in this Article were replicated almost verbatim in Article V of the GATT. The text of the Article V is as follows:

“ Article V: Freedom of Transit

1. Goods (including baggage), and also vessels and other means of transport, shall be deemed to be in transit across the territory of a contracting party when the passage across such territory, with or without trans-shipment, warehousing, breaking bulk, or change in the mode of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the contracting party across whose territory the traffic passes. Traffic of this nature is termed in this article “traffic in transit”.

2. There shall be freedom of transit through the territory of each contracting party, via the routes most convenient for international transit, for traffic in transit to or from the territory of other contracting parties. No distinction shall be made which is based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or of other means of transport.

3. Any contracting party may require that traffic in transit through its territory be entered at the proper custom house, but, except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions and shall be exempt from customs duties and from all transit duties or other charges imposed in respect of transit, except charges for transportation or those commensurate with administrative expenses entailed by transit or with the cost of services rendered.

free access to the sea is an essential principle for the expansion of international trade and economic development.” It also included a relatively strong “freedom of transit” article which is Article 2.

⁴¹⁰ The Part X of the Convention was titled “The Right of Access of the Landlocked States to and from the Sea and Freedom of Transit” The Article 125(1) which take place in this part reads as follows: “Land-locked States shall have the right of access to and from the sea for the purpose of exercising the rights provided for in this Convention including those relating to the freedom of the high seas and the common heritage of mankind. To this end, land-locked States shall enjoy freedom of transit through the territory of transit States by all means of transport.”

4. All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.

5. With respect to all charges, regulations and formalities in connection with transit, each contracting party shall accord to traffic in transit to or from the territory of any other contracting party treatment no less favourable than the treatment accorded to traffic in transit to or from any third country.⁴¹¹

6. Each contracting party shall accord to products which have been in transit through the territory of any other contracting party treatment no less favourable than that which would have been accorded to such products had they been transported from their place of origin to their destination without going through the territory of such other contracting party. Any contracting party shall, however, be free to maintain its requirements of direct consignment existing on the date of this Agreement, in respect of any goods in regard to which such direct consignment is a requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.

7. The provisions of this Article shall not apply to the operation of aircraft in transit, but shall apply to air transit of goods (including baggage).

Before proceeding with our case study, it would be worthwhile to articulate the structure and the individual provisions of the Article V. In doing that we have to bear in mind that Article has been one of the least frequently interpreted by the WTO Panels or the AB. So far, there has been only one adopted Panel report⁴¹² and no AB report on the interpretation of the Article and accordingly we are going to rely on the rulings in that report as necessary.

Paragraph 1 defines the scope of the Article. It is important that, unlike the Barcelona Statute which covers only rail and waterway transit, Article V excludes no mode of transportation *a priori*. According to the structure set forth in the Article, a concept called “traffic in transit” is defined in Paragraph 1 and all of the provisions in the rest of the Article applies to traffic in transit. It is important to note that traffic in transit not only includes the goods but also vessels and other means of transport. Thus, according to the definition of the traffic in transit in paragraph 1 of the Article, the traffic includes the goods in transit plus the means of transport that carry them. This determination is crucial since throughout the rest of the Article, the obligations are set forth for traffic in transit. The paragraph also clarifies that

⁴¹¹ Ad Article V: Paragraph 5

“With regard to transportation charges, the principle laid down in paragraph 5 refers to like products being transported on the same route under like conditions.”

⁴¹² The Panel Report on Colombia- Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R

actions such as warehousing, transshipment or change in the mode of transport do not alter the “traffic in transit” status.

Paragraph 2 lays down the basic and most fundamental obligations on freedom of transit. The first sentence of the paragraph prescribes that “there shall be freedom of transit via the routes most convenient for international transit for traffic in transit.” It should be stressed that the strong language used in the Article – the freedom of transit- is a unique one in GATT text where obligations are usually laid down in the form of multilateral concessions by the Members. However, “freedom” is a strong word that indicates a right inherent in the system and violation of that right is only possible under exceptional circumstances. This is also the result of the fact that right to transit was a right recognised in the international community long before the finalisation of GATT and that concept was imported to GATT language notwithstanding the differing general nature of the obligations in the rest of the text.

This reasoning was confirmed by the Panel in *Colombia-Ports of Entry* case where the Panel was required to interpret the paragraph 2 of the Article:

“In light of the ordinary meaning of freedom and the text of Article V:2, the Panel concludes that the provision of “freedom of transit” pursuant to Article V:2, first sentence *requires* extending unrestricted access via the most convenient routes for the passage of goods in international transit whether or not the goods have been trans-shipped, warehoused, break-bulked, or have changed modes of transport. Accordingly, goods in international transit from any Member must be allowed entry whenever destined for the territory of a third country.”⁴¹³ (Italics in the original)

Moreover, the Panel commented that:

In addition to the definition of “freedom”, the Panel notes the significance of the rest of the text in Article V:2. The opening text in Article V:2, first sentence (“*There shall be freedom of transit through the territory of each contracting party ...*”) introduces the obligation – the provision of “freedom of transit” by Members within their territory. The intermediate clause in Article V:2, first sentence (“*... via the routes most convenient for international transit ...*”) imposes a limiting condition on the obligation – that freedom of transit should be provided on the most convenient routes. The remainder of Article V:2, first sentence (“*... for traffic in transit to or from the territory of other contracting parties*”) explains that “freedom of transit” must be provided for ‘traffic in transit’ entering and then subsequently departing from the Member’s territory. The Panel notes that the term of art “traffic in transit” has been defined in the preceding section to include goods when those goods’ passage across the territory of a Member with or without trans-shipment, warehousing, breaking bulk, or change in the mode

⁴¹³ *Ibid*, p 176

of transport, is only a portion of a complete journey beginning and terminating beyond the frontier of the Member across whose territory the traffic passes.”⁴¹⁴

Thus, freedom of transit mandated by the Article V is available for traffic in transit which includes the means of transport and regardless of different transit procedures. The second sentence of the paragraph lays down another fundamental obligation regarding transit. A strong non-discrimination obligation is put forward which prescribes that no discrimination is allowed based on any elements attached to goods or means of transport which are in transit. This strong provision, in essence, exhibits the properties of a MFN provision and it can also be asserted that it has properties of a national treatment provision since there is nothing in the Article that grants the right to discriminate between domestic and transit traffic.⁴¹⁵ The Panel in *Colombia – Ports of Entry* briefly commented on this sentence:

“As a complement to [the protection in the first sentence], the Panel considers that Article V:2, second sentence further prohibits Members from making distinctions in the treatment of goods, based on their origin or trajectory prior to arriving in their territory, based on their ownership, or based on the transport or vessel of the goods. Accordingly, the Panel concludes that Article V:2, second sentence requires that goods from all Members must be ensured an identical level of access and equal conditions when proceeding in international transit.”⁴¹⁶

Paragraph 3 recognises the right of Members to that traffic in transit through its territory be entered at the proper custom house. However, this right does not allow Members to create unnecessary delays or restriction unless there is a failure to comply with the relevant customs laws and regulations. The second sentence of the paragraph 3 puts forward another fundamental discipline regarding transit. It mandates that traffic in transit shall be principally exempt from any customs duties and charges. There are two exceptions mentioned in the paragraph to this rule. First, there are transportation charges. Second there are charges on transit which are commensurate with administrative expenses entailed by transit or with the cost of services rendered. While the obligation in the second sentence is very clear, the first sentence of the Paragraph 3 is, in our view, more related to the measures at the border crossing points, mainly the customs procedures on transit traffic. So, the paragraph ensures that without prejudice to the general obligation for freedom of transit in paragraph 2, Members have the right to apply their customs laws and regulations without undermining the essence of the freedom of transit principle.

⁴¹⁴ *Ibid*, p 176

⁴¹⁵ This aspect of a national treatment for transit can be disputed though. It can be argued that traffic of the domestic stemming from the Member itself in its nature cannot be compared with the traffic in transit.

⁴¹⁶ *Supra* 412, p 176

Paragraph 4 prescribes that all charges and regulations imposed on transit should be reasonable and having regard to the conditions of traffic. While this provision is a short one, its exact consequences are somewhat unclear. For charges other than transportation charges, there is already a clear discipline in Paragraph 3. For transportation charges, the obligation for Members is that they are reasonable and having regard to the conditions of traffic. The same discipline applies to the regulations imposed on transit.

Paragraph 5 is a separate MFN provision for transit. The paragraph ensures that all charges, regulations and formalities in connection with transit, a treatment no less favourable than the treatment accorded to traffic in transit to or from any third country by Members.

Paragraph 6 is a rather complex provision which obliges a Member “to treat products, which have been in transit through the territory of another Member, no less favourably than products transported from their place of origin to their destination without going through the territory of such other Member.” It appears that the provision attempts to lay down a MFN obligation complementary to that of Paragraph 5 and which targets discrimination not in the territory of the transit country but the in the territory of the country next to it on that route to the final destination. In other words, when certain goods are transported from their origin country A to the final destination country D, then a country C on this route has to treat those goods, which already have passed through country B, no less favourable than it would treat had they not been passed through country C or had they passed through any other country. This provision which is also known as “treatment to goods proceeding in transit” has also been interpreted by the Panel in *Colombia- Ports of Entry*:

“The Panel considers the obligation in Article V:6 first sentence is straightforward: all treatment extended to goods that were transported from their place of origin to their destination without going through the territory of other contracting party, must be extended to goods that have been transported from their place of origin, and passed through the territories of such other contracting countries as “traffic in transit” prior to reaching their final destination. Such “treatment” must strictly be “no less favourable”. As the comparison is made based on a hypothetical, identical set of goods, i.e. the passage a good that was shipped from its origin via its actual route through one or more Member countries prior to arrival at its final destination is compared to the hypothetical passage of that good directly from its place of origin to its final destination, no like product analysis is required.”⁴¹⁷

⁴¹⁷ *Ibid*, p 193

It can be disputed whether the obligation in the first sentence of the paragraph applies to a Member if that Member is the final destination in a given route.⁴¹⁸ In the author's view, this case –where the next country after the transit country is the final destination of the goods- is logically a subset of the cases and hence there is no doubt that the obligation in the first sentence of the paragraph is valid in that case, too.

Finally, the second sentence of the paragraph grants an exemption from the obligation laid down in the first paragraph for direct consignment requirements existing before the entry into force of the GATT where such direct consignment is a “requisite condition of eligibility for entry of the goods at preferential rates of duty or has relation to the contracting party's prescribed method of valuation for duty purposes.” The fact that concepts such as “preferential rates of duty” or “valuation for duty purposes” are related to importation but not transit further supports the above-mentioned conclusion on the applicability to the final destination countries.

Paragraph 7 is a general exemption provision and exempts the operation of aircrafts as means of transport from the disciplines of the Article as the Havana Conference left this issue to the exclusive jurisdiction of the International Civil Air Organisation.⁴¹⁹ However, transported through this mode remains within the purview of the Article V.

5. The Services Aspect: The GATS Schedules of the Members

So far, we have seen how transportation sector is regulated by a knit network of bilateral agreements which happens to include the transit dimension. We have also reviewed the freedom of transit principles as it stands in public international law and the Article V of the GATT. The last component of the legal background of this case is in the context of GATS. As we have mentioned above, there have been a comparatively low number of commitments in the transport services section of the schedules of Members. While this being the case, transit enters into this picture in a different form, i.e. in the MFN Exemptions Schedules of the Members. In total, as of 2013, 34 WTO Members have registered their bilateral road transportation agreements as MFN exemptions to their commitments – or non-commitments-

⁴¹⁸ This aspect has been discussed in some length in the *Colombia- Ports of Entry* case by the Panel and also by the WTO Secretariat in the document TN/TF/W/2 prepared as a reference to the Trade Facilitation Negotiations. The conclusion reached by the Panel is that the obligation is valid for a country which is a final destination.

⁴¹⁹ The WTO Secretariat, TN/TF/W/2, p 7

in their schedules under the transport services section. While some of the those registered items explicitly mention transit permits, others do not explicitly mention the type of the permits and use more general and vague expressions. Below are a few examples of such registrations:

Table 6 The MFN Exemptions Schedule of the European Communities

Sector/Sub-sector	Description of the measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Road transport - passenger and freight	Provisions in existing or future agreements on international road haulage (including combined transport - road/rail) and passenger transport, concluded between the EC or their Member States and third countries, which: - reserve or limit the provision of a transport service between the contracting parties or across the territory of the contracting parties to vehicles registered in each contracting party; - provide for tax exemption for such vehicles.	Switzerland, States in Central, Eastern and South-Eastern Europe and all Members of the Commonwealth of Independent States, Albania, Turkey, Lebanon, Israel, Syria, Jordan, Egypt, Tunisia, Algeria, Morocco, Cyprus, Malta, Iran, Afghanistan, Iraq, Kuwait	Indefinite	The need for exemption is linked to the regional characteristics of the cross-border provision of road transport services

Table 7 The MFN Exemptions Schedule of Hungary

Sector/Sub-sector	Description of the measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Road transport (passenger and freight)	Measures that are taken under existing or future bilateral agreements and which reserve or limit the provision of services and specify operating conditions, including through transit permits and/or preferential road taxes, of a transport service into, in, across and out of Hungary	All countries with which bilateral agreements are or will be in force	Indefinite	To protect the integrity of road infrastructure and the environment and to regulate traffic rights in the territory of Hungary

Table 8 The MFN Exemptions Schedule of Romania

Sector/Sub-sector	Description of the measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
	Permission for vehicles registered in another specified country to transport goods and/or passengers in accordance with existing and future bilateral road agreements. Road cabotage is reserved to domestic registered vehicles	Austria, Albania, Belgium, Bulgaria, Czech Republic, Cyprus, Croatia, Denmark, Switzerland, Latvia, Lithuania, France, Finland, Italy, Iran, Germany, Greece, Luxembourg, Great Britain, Norway, Netherlands, Poland, Portugal, Spain, Sweden, Slovak Republic, Syria, Slovenia, Turkey, Hungary, and possibly other countries in future	Indefinite	The need for the exemption is linked to the regional specificity of the cross-border provision of the road transport services

Table 9 The MFN Exemptions Schedule of Jordan

Sector/Sub-sector	Description of the measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Land Transport Arrangements	Facilitation of transport and transit transport agreements.	Turkey, Iraq, Egypt, Israel, Saudi Arabia, Tunis, Yemen, Qatar, Iraq, Iran, Palestinian National Authority, Lebanon, Netherlands, Bulgaria, Romania, Sweden, Hungary, Ex-Yugoslavia, Ex-Czechoslovakia, United Kingdom, Greece, Austria, Pakistan, Poland, Belgium, Finland, Canada, Switzerland.	Indefinite	Purposes of fostering trade among the countries, in particular those contiguous to Jordan.

Table 10 The MFN Exemptions Schedule of Bulgaria

Sector/Sub-sector	Description of the measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
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	Measures taken under existing or future agreements which reserve and/or restrict the supply of these kinds of transportation services and specify the terms and conditions of this supply, incl. transit permits and/or preferential road taxes, in the territory of the Republic of Bulgaria or across the borders of the Republic of Bulgaria.	All countries with which agreements are or will be in force	Indefinite	Protection of the integrity of the infrastructure, as well as environmental protection, and regulation of traffic rights in the territory of the Republic of Bulgaria and between the countries concerned.
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Table 11 The MFN Exemptions Schedule of South Africa

Sector/Sub-sector	Description of the measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Road Transportation	Regional bilateral and plurilateral road transport agreements providing for the transport rights to carry goods and passengers to or from South Africa and between third countries concerned, to be reserved for the road transport operators of the contracting parties to existing and future agreements. Cabotage restricted to South African registered vehicles and operators.	Botswana Lesotho Swaziland Malawi Zimbabwe Other Sub-Saharan African countries	Indefinite	To enhance the development of an integrated road transport system to underpin the economic development of the region and to ensure the availability of an efficient distribution network for relief supplies in case of natural disasters such as frequently occurring droughts in the region

Table 12 The MFN Exemptions Schedule of Ukraine

Sector/Sub-sector	Description of the measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Road Transport Passenger and Freight Transportation	Measures taken under existing or future agreements which reserve and/or restrict the supply of this kind of transportation services and specify the terms and conditions of this supply, incl. transit permits and/or preferential road taxes, in the territory of Ukraine or across the borders of Ukraine.	All countries with which agreements are or will be in force	Indefinite	Bilateral intergovernmental agreements on international road transportation, international conventions. Protection of the integrity of the infrastructure, as well as environmental protection, and

				regulation of traffic rights in the territory of Ukraine and between the countries concerned.
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Thus, quotas arising from bilateral transportation agreements including transit quotas are incorporated into GATS schedules of a number of Members and hence to the GATS. It should be recalled that MFN exemptions, in principle refer to extra market access opportunities granted by that Member to some Members which would otherwise be contrary to the Article II of GATS. As such, bilateral transportation agreements which are registered as MFN exemptions under GATS schedules represent a bilateral market opening in transportation sector between the contracting parties of that agreement which does not stem from the GATS commitments of that Member. While this is in line with the general underlying logic of MFN exemptions, it is hard to find a place for transit quotas in this picture.

The reason for this difficulty stems from the fact that a transit passage across the territory of a Member involves no services trade within the purview of GATS. When a truck originated from country A passes in transit through country B, there is no provision of a service by the operator of that truck within the territory of the country B in none of the modes mentioned in GATS Article I and accordingly there is no service consumed by the nationals of country B. The only service that may be claimed to exist in a transit passage are the administrative services provided to the truck at the border crossing points or within the territory of country B such as weighing of the truck or escort service for trucks which transport certain pre-defined dangerous goods.

6. The Case: An Analysis of Transit Quotas in the Light of GATT and GATS Provisions

After having established the background of the case, we are ready to analyse the transit quotas in the light of GATT and GATS provisions. This will resemble a dispute settlement case in the WTO in response to a hypothetical complaint against a hypothetical country and that analysis will be carried out in three parts. In the first two parts, we will analyse the transit quotas under the provisions of GATT and GATS, respectively. In the third part, we will bring

together the results of these two parts and discuss the relevance of this case for the main theme of this work, namely conflicts between WTO Agreements.

7. Transit Quotas and GATT Article V

It is possible that quotas on transit permits are analysed under different Articles of GATT such as Article I, Article III and even Article XI. However, no doubt that the natural candidate for such an analysis is the Article V as it exclusively regulates the area of transit among GATT Articles.

Do Transit Quotas Fall within the Scope of Article V?

There is no explicit “scope” provision in GATT Article V. However, when we read the paragraph 1 which defines “traffic in transit” and Paragraph 2 which lays down the basic freedom of transit obligation together, it is apparent that any measure that directly or indirectly affects traffic in transit lies within the scope of Article V. Transit quotas are measures that directly limit the amount of transit traffic originated from a particular Member. Thus, there is no question that transit quotas are measures which can be analysed under the provisions of GATT Article V.

It would be also trivial to show that traffic that is subject to transit quotas is traffic in transit within the meaning of Article V since it can be easily shown that that traffic in question “begins and terminates beyond the frontier of the contracting party” which applies to the transit quotas.

Do Transit Quotas Violate Article V:2?

While in the absence of the facts of a real case it is hard to carry out a thorough analysis, it is still possible to obtain some meaningful results on the legal status of transit quotas with regard to the provisions of Article V:2.

As we have shown above, the Article V:2 mandates “freedom of transit via the most convenient routes for international transit for traffic in transit” and the expression “freedom of transit” has been interpreted by the Panel as “requiring unrestricted access” via the routes

mentioned.⁴²⁰ On the other hand, a quota on transit permits, by its nature limits and restricts the number of transit passages originated from a certain Member. Thus, the application of a transit quota touches upon the essence of the freedom of transit by impeding unrestricted or free passage. In this context, it would be reasonable to argue that a transit quota application constitute a *prima facie* breach of the Article V:2, first sentence.

It should also be recalled that Article V:2, the second sentence prohibits any distinction “based on the flag of vessels, the place of origin, departure, entry, exit or destination, or on any circumstances relating to the ownership of goods, of vessels or any other means of transport.” As we know that transit quotas are allocated based on the nationality of the truck, – which country the truck is registered in- to the extent that quotas are applied in a discriminatory manner, i.e. that they are applied to one country not to another country or a substantially different amount of quota is allocated for two similar countries, they would constitute a breach of the Article V:2, second sentence.

Based on the analysis above, we believe that there are strong grounds to conclude that transit quotas, as such, would be considered as violating the first sentence of the Article V:2.

Do Transit Quotas Violate Article V:3?

Article V:3 mandates that “except in cases of failure to comply with applicable customs laws and regulations, such traffic coming from or going to the territory of other contracting parties shall not be subject to any unnecessary delays or restrictions”. We have expressed above that this obligation in Article V:3 is more related to delays or restrictions stemming from measures at the border crossing points. Nevertheless, a quantitative limitation on the amount of traffic in transit which is determined to be violating the Article V:2, necessarily involves “an unnecessary delay or restriction” since measures which constitute a breach of Article V:2 by touching upon the essence of the freedom of transit principle are a subset of the measures creating an unnecessary delay or restriction on traffic in transit. Thus, it is most likely that transit quotas which are found to be violating Article V:2 would also be violating Article V:3, the first sentence.

⁴²⁰ The Panel Report on Colombia- Indicative Prices and Restrictions on Ports of Entry, WT/DS366/R

Do Transit Quotas Violate Article V:4?

Article V:4 states that “All charges and regulations imposed by contracting parties on traffic in transit to or from the territories of other contracting parties shall be reasonable, having regard to the conditions of the traffic.” As we have mentioned above, this paragraph allows Members to regulate traffic in transit as long as such regulations are “reasonable” and “having regard to the conditions of traffic”.

At this point, two questions arise. First, can transit quotas be regarded as “regulations” within the meaning of Article V:4? Second, if transit quotas can be regarded as regulations within the meaning of Article V:4, can they be regarded as “reasonable” and “having regard to the conditions of traffic” so that they can be justified under Article V?

On the first question, the *New Oxford Dictionary of English* defines the word regulation as a “rule or directive made and maintained by an authority” or “the action or process of regulating or being regulated”. As the Article V:4 talks about “regulations”, we understand that the word regulation in the paragraph refers to a rule or directive made and maintained by a relevant authority and when we read the word within its context –the Article V- we can conclude that the word regulation in the Article refers to a rule or directive which intends to regulate traffic in transit.

Can transit quotas be regarded as “regulations on traffic in transit” given this definition? In our understanding, a harmonious reading of the Article V:4 and other provisions of Article V as its immediate context reveals that “regulations” referred to in the Article are meant to cover regulations that are imposed on traffic in transit and are applied within the territory of the Member imposing them for pursuing a specific policy objective. Hence, a quota on traffic in transit which limits the traffic that can enter the territory of that Member cannot be regarded as a “regulation” within the meaning of Article V:4 as this measure does not aim to regulate the traffic within the territory of that Member but to limit or restrict it.

If we assume once that the word “regulations” covers transit quotas by adopting a broad dictionary meaning of the word and by disregarding the immediate context of the provision, we may come up with a rather difficult situation. It may not be too difficult for transit quotas as regulations within the meaning of the provision to pass the internal test of the provision

which consists of “reasonableness” and “having regard to the conditions of traffic” requirements.⁴²¹

As such, one may consider that transit quotas are regarded as “regulations” which are legitimate under Paragraph 4 while they are determined to be violating the Paragraph 2 and thus leading to a situation where the strong obligation to ensure freedom of transit in Paragraph 2 is circumvented through Paragraph 4. We do think such an interpretation would be incorrect and misleading since the basic freedom of transit obligation laid down in Article V:2 cannot be overridden by another provision in the same Article. Accordingly, even if we assume that transit quotas can be regarded as “regulations” within the meaning of Article V:4, this provision cannot be read as justifying the quota application which is found to be breaching Article V:2.

Do Transit Quotas Violate Article V:5?

Article V:5 lays down a MFN obligation with respect to all charges, regulations and formalities in connection with transit. In this sense, the effect of this provision with regard to the transit quotas would be similar to the effect of Article V:2 second sentence: To the extent that quotas are applied in a discriminatory way between Members, they would constitute a breach to the Article V:5.

Can a Breach of Article V be Justified through the Existence of Bilateral Agreements?

One important question remaining is on the relationship between the bilateral transportation agreements and GATT Article V. We have already detected that Article V prohibits any systemic restrictions on traffic in transit. We have also determined that transit quotas are legally the result of bilateral agreements existing between a number of WTO Members. After

⁴²¹ The criteria “being reasonable” and “having regard to the conditions of traffic” seem somewhat vague and not very demanding. The dictionary meaning of the word “reasonable” is “having sound judgement; fair and sensible”. Thus, for satisfying the reasonability condition in Article V:4, a Member has to show that the measure in hand is the result of a sound judgement and there is no obligation of the Member imposing the measure to show a strict causal relationship between the measure and the objective pursued. Similarly, “having regard to the conditions of traffic” can be read as “taking into account the conditions of traffic”. Hence, to satisfy this condition, a Member would be obliged to exhibit that the measure in question takes into account the conditions of traffic. In this context, as a transit quota application may arguably satisfy these two conditions, one may assume that a quota application does not create a *prima facie* violation of the Article V:4.

having made an interim determination that transit quotas constitute a breach of Article V- that the measure in question is prohibited by Article V-, the next task is to clarify the status of this breach vis-a-vis the provisions of a bilateral agreements. In other words, can a breach constituted by quota application be justified through the existence of an explicit right to apply them stemming from the bilateral agreements?

Answering this question requires a two-dimensional analysis: First, to analyse the positive/practical dimension, we need to ask what the approach followed by the AB would be if it was faced with this question in a dispute case? In fact, this is a question that we have already answered in earlier sections.⁴²² As we have tried to show in those sections, the AB, although exhibiting a somewhat shifty and pragmatic approach on the applicability of non-WTO law regarding a substantial issue in a WTO dispute, would hardly be in a position to rule in the direction allowing that a WTO obligation is overridden by a non-WTO norm.

The AB would refer to the last sentence of Article 3.2 of the DSU which states that “rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.” As such, the AB would not enter into a discussion whether the obligation mandated in Article V of GATT existed for those Members which have a bilateral transportation agreement between them. Instead, the AB would take it granted that this obligation existed as it stems from a “covered agreement” and as it is not authorized to diminish this obligation via its rulings, the AB would not consider the bilateral agreement between parties a part of the applicable law in that dispute. Accordingly, the answer to the question mentioned in the title by the AB would be negative.

While this would be the answer given by the AB, this is not the end of the story at least for this study. Throughout this work, we have advocated a universalistic approach to international law where Thus, it is warranted, at least from a normative point of view, to analyse what would the consequences of this approach instead of the pragmatic/isolationist approach be. The result of this analysis may be relevant for future decisions of the AB which may eventually evolve in the direction that is suggested in this work.

⁴²² See the discussion in Part IV above

If we assume that rights and obligations of WTO Members stemming both from GATT Article V and bilateral agreements are at the same level and the AB is authorized to apply relevant non-WTO law in a given case, one would have to, initially, unfold the relationship between these two set of rules.

The first question to be asked for this task is “do both norms actually exist”? Or is it the case that as one of the norms was introduced the other ceased to exist? This may occur if one of the norms is invalidated or made illegal by the other through termination, suspension or modification of it.⁴²³ In the case of the relationship between Article V and bilateral transportation agreements, it is clear that none of the treaties explicitly terminates or suspends the other. Indeed, there is no mention of GATT in in the text of bilateral agreements and no mention of bilateral agreements in the GATT 1994, either. Moreover, there is no sign of the intention in that direction in either of the treaties. Hence, Article 59 of VCLT⁴²⁴ which governs the situations where parties to a treaty come together and conclude a newer treaty on the same subject matter which is not compatible with the older treaty is not relevant in this case. There is also no question of validity of the norms here as both treaties are valid and currently being operated.

Alternatively, another situation that is to be analysed is where GATT Article V is modified or amended in accordance with Article 41 of the VCLT. Article 41 refers to the circumstances where certain parties of a multilateral treaty agree on an *inter se* modification of the treaty.⁴²⁵ Can it be the case that parties to a bilateral transportation agreement, which includes the application of transit quotas, be regarded as having modified GATT Article V as between themselves so as to permit the application of transit quotas? Article 41 of the VCLT is as follows:

⁴²³ PAUWELYN (2003), p 275-289

⁴²⁴ Article 59 of the VCLT is as follows:

*Termination or suspension of the operation of a treaty
implied by conclusion of a later treaty*

1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:

(a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or

(b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

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

⁴²⁵ Ian SINCLAIR (1984) *The Vienna Convention on the Law of Treaties* Manchester University Press, Manchester, United Kingdom 2nd Edition, p 107-110

“Article 41

*Agreements to modify multilateral treaties between
certain of the parties only*

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:
 - (a) the possibility of such a modification is provided for by the treaty; or
 - (b) the modification in question is not prohibited by the treaty and:
 - (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
 - (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.
2. Unless in a case falling under paragraph 1 (a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.”

An examination of Article 41 reveals that there are actually two possible lines whereby an *inter se* modification of a multilateral treaty would be legalised. First option is when a treaty explicitly allows such a modification. Neither in WTO Agreement nor in GATT 1994 there is a provision allowing an *inter se* modification of these agreements between certain WTO Members. Accordingly, the first option mentioned in Article 41 is not available in our case.

A second option in Article 41 may be invoked when there is no prohibition of such a modification in the treaty, when such modification does not affect the rights and obligations of the third parties under the treaty and when such a modification is not related to a provision of that treaty derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole. First, it has to be noted that, just like there being no provision in either GATT 1994 or WTO Agreement explicitly allowing an *inter se* modification of the treaties between certain parties, there is no such provision explicitly prohibiting that. Second, one can also reasonably assume that an agreement between two WTO Members to bilaterally restrict transit traffic would not directly affect the enjoyment of the rights of other WTO Members.⁴²⁶

The third condition the Article- that freedom of transit is not a provision of GATT derogation from which is incompatible with the effective execution of the object and purpose of the GATT as a whole, however, is not unambiguously fulfilled. If we assume that the object and

⁴²⁶ We are aware that this aspect can also be challenged. It is possible that such a bilateral agreement may affect trade flows a third country Member. However, this effect is not a direct effect and the complaining party will have to show a *de facto* impact on trade flows originating or destined at a third country.

purpose of GATT is to secure a rule-based and freer multilateral trading regime, there may be cases where freedom of transit is an essential element in fulfilling those objectives. For instance, in the case of a landlocked developing country, a restriction of freedom of transit may have direct effects on the normal flow of trade.⁴²⁷ Accordingly, in those cases, a derogation from the freedom of transit principle may be incompatible with the object and purpose of GATT as a whole.

In any case, one has to pay attention to paragraph 2 of Article 41 which requires a notification from the parties which intend to pursue an *inter se* modification if they would like to use this second option. We know that there is no such notification ever been made by any WTO Member. Hence, as there is a clear obligation to make that notification in the Article for the second option and second option would be the only available option for WTO Members, we reach the conclusion that a textual interpretation would not allow the justification of a breach of Article V through the application of Article 41 of the VCLT.

While a textual interpretation allows us to reach this conclusion, looking at the broader picture by reviewing the intentions as well as contexts of the two agreements would indicate the same direction. There is no apparent intention by the contracting parties of the bilateral transportation agreements to modify the provisions of GATT Article V as between themselves. Indeed, apparently these two sets of agreements have been negotiated and put forth in totally different spheres. There is no apparent sign that the negotiators of bilateral agreements took into account the existence of GATT Article V and even were aware of the existence of it.

Accordingly, none of the two norms can be claimed to invalidate, modify or abrogate the other. Rather, there is hardly any doubt that the two norms continue to co-exist. In this case we have to reveal if transit provisions of the bilateral agreements can prevail over GATT Article V so that a breach of Article V can be justified. For this to happen, it should be the case that the relevant provisions of bilateral agreements either constitute *lex posterior* or *lex specialis* vis-a-vis GATT Article V. Now, let us analyse the likelihood of each case.

⁴²⁷ See for instance Micheal L. FAYE, John W. MACARTHUR, Jeffrey D. SACHS and Thomas SNOW (2004) "The Challenges Facing Landlocked Developing Countries" *Journal of Human Development* Vol:5 No:1 or Gael RABALLAND (2003) "Determinants of the Negative Impact of Being Landlocked on Trade: An Empirical Investigation through the Central Asian Case" *Comparative Economic Studies* Vol:45, p 520-536 for a discussion of those effects.

To answer the first question, -whether provisions of bilateral agreements can constitute *lex posterior* compared to GATT Article V- we have to, by definition, make the determination that the bilateral agreement concerned is concluded⁴²⁸ *after* the conclusion of GATT 1994. The conclusion of a treaty generally refers to signature of a treaty.⁴²⁹ Thus, the conclusion of GATT 1994 is in year 1994. We also know that the majority of bilateral transportation agreements were concluded before 1994⁴³⁰. However, one more issue regarding the relevant date of conclusion of the bilateral arrangement arises here: Is it the conclusion of the bilateral treaty which allows for the negotiation of bilateral quotas or is it the signature of the bilateral protocol which determine the actual quota amount for a given year?

Even though the bilateral agreement itself states that “transit transport” is subject to a permit system and the competent authorities of each party determine the quota amount and exchange the number of permits⁴³¹, the actual amount of permits is determined in the Joint Committee Meeting through a protocol signed by both parties. Now, can these protocols be regarded as the latest statement of parties indicating that they have agreed with the quota application on transit traffic?

To answer this question, it should be recalled that the measure that is being scrutinized is quota application as such, not the way it is applied or the insufficiency of the amount of permits. Thus, it is the conclusion of the bilateral agreement itself when the parties have revealed their consent for the application of transit quotas. Moreover, it is debateable that the mere signature of such a protocol by both parties on the amount of transit permits can be considered as a “reconfirmation” of the consent of the parties for quota application. On the contrary, as we have mentioned before, there are grounds to believe that such protocols fail to reflect a genuine consent of both parties.⁴³² Under these circumstances, at least for the majority of the bilateral transportation agreements in force, the provisions of bilateral

⁴²⁸ “Conclusion” of a treaty is the expression used in VCLT referring to the point of time when parties to the treaty reveal their will to be bound by the treaty. See Vierdag (1989) for a comprehensive discussion of the time of conclusion of a treaty.

⁴²⁹ Antony, AUST (2007) *Modern Treaty Law and Practice*, Cambridge University Press, p 92

⁴³⁰ WTO Secretariat *supra* 392, p 22

⁴³¹ See Articles 6,8 and 14 of the Model Agreement

⁴³² Protocols signed after Joint Committee Meetings do not necessarily reflect a consensus or consent by both parties. Among the protocols that were reviewed for this study, there have been instances where one of the parties had explicitly recorded in the protocol that it had no consent for transit issue but signed the protocol not to endanger the agreement on other issues.

transportation agreements cannot be considered to constitute *lex posterior* vis-a-vis GATT Article V.

Finally, can provisions of a bilateral treaty constitute *lex specialis* to GATT Article V? It is true that GATT is basically a multilateral trade agreement. Nonetheless, Article V is an exhaustive provision which exclusively governs the area of transit. It not only regulates trade-related aspects of transit but also freedom of transit a right in international law. On the other hand, while bilateral transportation agreements have provisions on transit, transit quotas are only one type of quota defined in the agreement among others. Furthermore, the objective of bilateral agreements is to bilaterally open up and allocate transportation markets.⁴³³ However, as we are going to argue in later sections of this work, there is no kind of transportation service exchanged between the party transited and the party from which transit traffic originates. In this sense, transit provisions in bilateral agreements are embedded in body of various types of which are all related bilateral market access and allocation in transportation services. Transit quotas are neither an essential nor required element in fulfilling the main objective of the bilateral agreements which is ensuring bilateral market access and allocation. Hence, we are of the view that the provisions of bilateral transportation agreements *cannot* be considered as *lex specialis* vis-a-vis Article V of the GATT.

Thus, we can safely conclude that at least taking into the majority of bilateral agreements, their existence cannot justify a breach of GATT Article V.

Are the Parties to a Bilateral Agreement “Estopped” from Bringing a Case to the WTO?

As we have established that transit quotas constitute a *prima facie* breach to the Article V of GATT, the next question that arises is whether a party which is being imposed transit quotas is allowed to bring the case to the WTO as a dispute taking into account the existence of a bilateral agreement between the same parties outside the WTO. In other words, are the parties to a bilateral transportation agreement outside the WTO *estopped* from bringing the case of transit quotas to the WTO dispute settlement mechanism?

⁴³³ WTO Secretariat *supra* 392

In a hypothetical case of a dispute on transit quotas, it is a realistic possibility that the respondent argues that both parties have shown their approval on the existence of transit quotas as they are bound by the bilateral treaty and hence the complainant does not have a right to bring the case to the WTO. The reader may recall that we have analysed the applicability of the principle of estoppel in a previous section. We have seen that the Panel signalled the applicability of this principle in a WTO dispute if certain conditions hold - that there exist express or in exceptional circumstances implied consent of the complaining parties not to bring a case to the WTO- The AB, on the other hand had exhibited a less positive outlook on the applicability of the principle and ruled that even if arguably the principle of estoppel is applicable to WTO cases, this application would be in a very narrow sense and within the parameters set out in the DSU, i.e. only in the cases where parties explicitly approved the WTO-consistency of a measure or explicitly stated that they would not take legal action against each other in the WTO.

If we return to our case in the light of this background, we will be in a position to give a negative answer to question that we have posed. Although bilateral transportation agreements constitute the legal basis for transit quota application, to our knowledge, there is no explicit confirmation by any parties that these quotas are consistent with GATT Article V. Similarly, there is no explicit – or even implicit- agreement by the parties that such arrangement cannot be subject to a WTO dispute. In fact, while it is true in most cases the legal basis of transit quotas is a provision in the bilateral agreement, the actual place where quotas are determined are Joint Committee meetings held under the framework of the agreements.

Those Joint Committee meetings often witness a bargaining for quotas -bilateral or transit- and the result of the bargaining process is often affected by the diverse bargaining powers of the sides. At least for some Members⁴³⁴, due to asymmetrical bargaining powers of sides, an

⁴³⁴ We are aware that at least two WTO Members - Turkey and Georgia- has expressed their concern regarding the transit quota application and called for abolition of quotas in the WTO platform. In the document TN/TF/W/146 dated 26 June 2007 and submitted to the Negotiation Group on Trade Facilitation by Georgia and Turkey stated that “Road transport, which is the principal mode of freight transport as far as transit is concerned, is widely subject to quotas and permits, which often generate limitations in transit traffic. Problems about transit traffic quotas and permits are often addressed through bilateral agreements. However bilateral arrangements do not bring an effective solution to the problem since most transit movements involve several countries and require series of agreements. Therefore, in line with the spirit of the Article V, for transit transport issues to be addressed effectively a multilateral approach is required.” The same document also involved a textual proposal to be inserted into the prospective Agreement on Trade Facilitation which involved the following provisions: “With a view to facilitating trade, Members shall eliminate barriers to transit transport of goods.” and “Members shall establish a quota-free transit regime in road transportation.” In the document JOB/TF/100 submitted by

insufficient amount of transit permits are allocated to other side as a part of bargaining balance and despite a persistent demand for quota increase by one of the sides. Hence, at least for some Members, the amount of the transit permits allocated is by no means “voluntary” or as a result of the consent by both sides. Those Members argued that the party which believes that an insufficient amount of permits are allocated for itself cannot opt out of the bilateral quota system since this system at least offers some market bilateral market access and withdrawal from the agreement may result in facing even less transparent and more restrictive measures on transit.

Thus, it would not be possible to credibly argue that parties to a bilateral transportation agreement are estopped from bringing a complaint against the transit quota application in the WTO Dispute Settlement Mechanism.

Conclusion on GATT Article V

Our conclusion on the legal status of the transit quotas vis-a-vis the Article V of GATT based on the assessment above is that a transit quota application as described above would be considered as violating Article V, particularly Paragraph 2 and possibly also Paragraphs 3 and 5.

8. Transit Quotas and GATS Provisions

Now that we have completed our analysis under Article V of the GATT, we can start the analysis under GATS provisions. At the outset, we have to recall that quota arrangements are incorporated into GATS through the MFN exceptions schedule. Article II:2 of the GATS states that:

“2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.”

Turkey to the Negotiation Group on Trade Facilitation, the proponent Turkey elaborated the argument that the outputs from that bilateral transportation agreements were not “voluntary”. It is argued that “[I]t should be underlined that these restraints are by no means “voluntary”, similar to those in the pre-UR era. The transiting country is often not in a position to negotiate with the country transited on the number of permits. The transiting country demanding more permits is usually not able to change the outcome of the bilateral arrangement. The motivation of the transiting country accepting these restraints is, just like export restraints, to avoid even stricter or unilateral restrictions on its traffic in transit. Likewise, while the country transited may have various motivations to restrict traffic in transit through its territory, it prefers to impose restriction on traffic through voluntary restraints to avoid any claims of GATT Article V violations.”

Thus, Article II:2 of GATS allows Members to maintain a measure inconsistent with the basic MFN obligation as long as two conditions hold: that they register it under the Annex on Article II Exemptions and that the measure meets the conditions in that Annex.⁴³⁵

Regarding a transit quota application, there is little doubt that this is a measure which can be regarded within the scope of the Article II:2. Moreover, it is certain that at least some Members have listed transit quotas among their Article II exemptions. Finally, it would not be implausible to assume that quotas listed in the Annex meet the conditions laid down in the Annex on Article II Exemptions.⁴³⁶ Therefore, we can assume that transit quotas are “measures inconsistent with paragraph 1” of the Article II and which are allowed under the Article. Having established that the next task becomes exploring the legal status of the MFN exemptions schedule of a Member which includes transit quotas.

The Legal Status of MFN Exemptions Schedules

Before discussing the legal status of the MFN exemptions schedules of Members, it has to be reminded that at the end of the Annex on Article II Exemptions, takes place the following provision:

“Lists of Article II Exemptions

⁴³⁵ VAN DEN BOSCHE *supra* 30, p 342

⁴³⁶ The conditions laid down in the Annex on Article II Exemptions are as follows:

“Scope

1. This Annex specifies the conditions under which a Member, at the entry into force of this Agreement, is exempted from its obligations under paragraph 1 of Article II.
2. Any new exemptions applied for after the date of entry into force of the WTO Agreement shall be dealt with under paragraph 3 of Article IX of that Agreement.

Review

3. The Council for Trade in Services shall review all exemptions granted for a period of more than 5 years. The first such review shall take place no more than 5 years after the entry into force of the WTO Agreement.
4. The Council for Trade in Services in a review shall:
 - (a) examine whether the conditions which created the need for the exemption still prevail; and
 - (b) determine the date of any further review.

Termination

5. The exemption of a Member from its obligations under paragraph 1 of Article II of the Agreement with respect to a particular measure terminates on the date provided for in the exemption.
6. In principle, such exemptions should not exceed a period of 10 years. In any event, they shall be subject to negotiation in subsequent trade liberalizing rounds.
7. A Member shall notify the Council for Trade in Services at the termination of the exemption period that the inconsistent measure has been brought into conformity with paragraph 1 of Article II of the Agreement.”

[The agreed lists of exemptions under paragraph 2 of Article II will be annexed here in the treaty copy of the WTO Agreement.]”

Thus, the exemption lists of individual Members constitute a part of the Annex on Article II Exemptions which is attached to GATS. On the legal status of this Annex and all annexes attached to the GATS, the last Article of the Agreement states that:

“Article XXIX Annexes

The Annexes to this Agreement are an integral part of this Agreement.”

Consequently, as the list of MFN exemptions are regarded a part of the Annex on Article II Exemptions, the list is also an integral part of the GATS. While the Article XXIX has not been interpreted specifically so far by the Panel or the AB, similar provisions, like the Article II of GATT or Article 6 and 8 of the Agreement on Agriculture have been touched upon by the Panels or the AB. For instance, in *EC-Computer Equipment* the Panel made the following observation:

“A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*.”⁴³⁷

Similarly in *EC-Sugar*, the Panel stated that;

“Importantly, in *EC – Computer Equipment*, the Appellate Body clarified that although unilaterally proposed and bilaterally negotiated, tariff concessions still represent the common agreement of all Members and are thus multilateral obligations; it also concluded that “indeed, the fact that Members’ Schedules are an integral part of the GATT 1994 indicates that, while each Schedule represents the tariff commitments made by one Member, they represent a common agreement among all Members.” The Panel believes that this is true for all WTO scheduled commitments, whether pure market access concessions or any other commitments. WTO Members’ scheduled commitments, whether initially negotiated bilaterally or multilaterally, are multilateralized when made part of the WTO Agreement, and thus, they should be interpreted accordingly.”⁴³⁸

Thus, it has been established by these Panel rulings that a schedule of commitment, although reflecting the commitments of a single Member, is multilateralised and has to be treated as a

⁴³⁷ The Appellate Body Report on European Communities- Customs Classification of Certain Computer Equipment, WT/DS62/AB/R, p 31

⁴³⁸ The Panel Report on European Communities – Export Subsidies on Sugar, WT/DS283/R, p145

provision of the treaty that it is attached to. Accordingly, any such schedule or any item in that schedule has to be interpreted in line with the rules of interpretation laid down in the Article 31 of the VCLT.

We are of the view of that the same legal reasoning would apply to the MFN exemptions schedules of the Members. While the commitment schedule of a Member under Article II of the GATT or Article 6 of the Agreement on Agriculture represents a set of multilateralised obligations by a Member, the MFN exemptions schedule represent a set of explicit rights claimed by a Member and multilateralised through that schedule. As we have seen before, every obligation undertaken by a Member creates a corresponding right that can be claimed by other Members and the vice versa, thus an MFN exemptions schedule would possess the same legal value as of a commitment schedule under GATS, GATT or any other agreement.

The paralelism in the articles regulating the two types of lists supports this argument. While the Article XXIX states that all annexes including the MFN Exemptions Lists “are an integral part of this Agreement”, the Article XX of GATS which lays down the properties of the schedules of commitments states that “schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.”⁴³⁹ Thus, although Article XXIX covers all annexes including the schedules of commitments, it is noteworthy that the specific provision on the schedules of commitments has a very similar if not the same wording with that of the Article XXIX.

Can Schedules Annexed to An Agreement Conflict with A Provision of that Agreement?

A next step in elaborating the legal status of MFN exemptions lists of Members is the discussion on the possibility of a conflict between an item in the list and the treaty that it is

⁴³⁹ The text of the Article XX of GATS is as follows:

Article XX: Schedules of Specific Commitments

1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:

- (a) terms, limitations and conditions on market access;
- (b) conditions and qualifications on national treatment;
- (c) undertakings relating to additional commitments;
- (d) where appropriate the time-frame for implementation of such commitments; and
- (e) the date of entry into force of such commitments.

2. Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

attached to (or another WTO Agreement) provision. This issue has been touched upon in the GATT Panel *US-Sugar*, where the Panel on Article II of GATT concluded that:

“...Article II permits contracting parties to incorporate into their Schedules acts yielding rights under the General Agreement but not acts diminishing obligations under that Agreement.”⁴⁴⁰

Referring to that opinion, the AB in *EC-Poultry* stated that:

“In *United States - Restrictions on Imports of Sugar*, the panel stated that Article II of the GATT permits contracting parties to incorporate into their Schedules acts yielding rights under the GATT, but not acts diminishing obligations under that Agreement. In our view, this is particularly so with respect to the principle of non-discrimination in Articles I and XIII of the GATT 1994. In *EC - Bananas*, we confirmed the principle that a Member may yield rights but not diminish its obligations and concluded that it is equally valid for the market access concessions and commitments for agricultural products contained in the Schedules annexed to the GATT 1994. The ordinary meaning of the term "concessions" suggests that a Member may yield or waive some of its own rights and grant benefits to other Members, but that it cannot unilaterally diminish its own obligations.”⁴⁴¹

It should be noted that the AB in both *EC- Bananas* and *EC-Poultry* cited the Paragraph 3 of the Marrakesh Protocol to the General Agreement on Tariffs and Trade 1994 as a basis for their opinion which provides:

“The implementation of the concessions and commitments contained in the schedules annexed to this Protocol shall, upon request, be subject to multilateral examination by the Members. This would be without prejudice to the rights and obligations of Members under Agreements in Annex 1A of the WTO Agreement”

More recently, in *EC-Sugar* the Panel examined a potential conflict between an item in the export subsidy commitments of the EU – a footnote- and the Articles 3 and 8 of the Agreement on Agriculture.⁴⁴² The Panel, after having cited the above mentioned opinions, made a differentiation between the market access commitments or concessions and the export subsidy commitments it was dealing with:

“The Panel notes that the jurisprudence cited above deals with tariff concessions and this includes market access commitments within the meaning of Article 1(g) of the Agreement on Agriculture. The "export subsidy commitments" contain limitations on subsidization, constituting exceptions to the Article 8 general prohibition, and are incorporated into the Agreement on Agriculture through Article 3.1 of the Agreement on Agriculture. The Panel

⁴⁴⁰ The GATT Panel Report in *United States- Restrictions on Imports of Sugar* (L6514-36S/331), p 10

⁴⁴¹ The Appellate Body Report on *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, p 35

⁴⁴² *Supra* 379, p 147-149

recalls also that contrary to tariff concessions, export subsidy commitments are not renegotiable under Article XXVIII of the GATT 1994. Therefore, export subsidy commitments are different from tariff and other market access concessions. However, in the Panel's view, the principle that scheduled commitments cannot overrule or conflict with the basic obligations contained in a WTO multilateral trade agreement, unless explicitly authorized, remains valid and applicable to export subsidy commitments scheduled in Section II, Part IV of Members' Schedules.”⁴⁴³

Accordingly, the Panel concluded that:

“Members' Schedule cannot provide for non-compliance with provisions of the Agreement on Agriculture. Provisions in Members' Schedules relating to commitments authorized by the Agreement on Agriculture may therefore only qualify such commitments to the extent that the said qualification does not act so as to contradict or conflict with the Members' obligations under the Agreement on Agriculture.”⁴⁴⁴

At the appeal stage of the same case, the issue of the relationship between the schedules and the provisions of the agreement has been addressed again. Here, the AB confirmed the Panel's reasoning that Members could not deviate from their obligations in an agreement through the schedules attached to that agreement:

“Similarly, in this case, we find no provision under the Agreement on Agriculture that authorizes Members to depart, in their Schedules, from their obligations under that Agreement. Indeed, as we have noted, Article 8 requires that, in providing export subsidies, Members must comply with the provisions of both the Agreement on Agriculture and the export subsidy commitments specified in their Schedules. This is possible only if the commitments in the Schedules are in conformity with the provisions of the Agreement on Agriculture. Thus, we see no basis for the European Communities' assertion that it could depart from the obligations under the Agreement on Agriculture through the claimed commitment provided in Footnote 1.”⁴⁴⁵

However, it appears that the AB did not subscribe to the view that the Schedule of a Member cannot conflict with its obligation in the Agreement on Agriculture as it referred to the, the General interpretative note to Annex 1A to establish that provision of the Agreement on Agriculture would prevail in any case over the footnote in the schedule:

“In any event, we note that Article 21 of the Agreement on Agriculture provides that: “[t]he provisions of [the] GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.” In other words, Members explicitly recognized that there may be conflicts between the Agreement on Agriculture and the GATT 1994, and explicitly provided, through Article 21, that the Agreement on Agriculture would prevail to the extent of such conflicts. Similarly, the General

⁴⁴³ *Ibid*, p147

⁴⁴⁴ *Ibid*, p 148

⁴⁴⁵ The Appellate Body Report on European Communities – Export Subsidies on Sugar, WT/DS283/AB/R, p 76

interpretative note to Annex 1A to the WTO Agreement states that, "[i]n the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A ..., the provision of the other agreement shall prevail to the extent of the conflict." The Agreement on Agriculture is contained in Annex 1A to the WTO Agreement.

As we noted above, Footnote 1, being part of the European Communities' Schedule, is an integral part of the GATT 1994 by virtue of Article 3.1 of the Agreement on Agriculture. Therefore, pursuant to Article 21 of the Agreement on Agriculture, the provisions of the Agreement on Agriculture prevail over Footnote 1. We, therefore, do not agree with the European Communities that "there is no hierarchy between the export subsidy commitments in a Member's schedule and the Agreement on Agriculture."⁴⁴⁶

As also stated by the AB above, the General Interpretative Note is invoked only when there is a conflict detected between GATT and an Annex 1A Agreement and thus, the AB at least implicitly admitted in its opinion above that an export subsidy commitment in a Member's schedule can conflict with an Article of the Agreement on Agriculture.

At this point, there is a necessity to systematize the opinions that we have summarized above and to assess the implications for our case. In fact, recalling and sticking to one point that everybody agrees upon would substantially ease our work: *The schedule attached to a treaty should be regarded as a part of the treaty.* Thus the provisions in a schedule are treaty provisions, neither inferior nor superior to them. They can be regarded as a part of the treaty provision that lays down the obligation or right which is *raison d'être* of that schedule and the content of the schedule clarifies or elaborates that right or obligation by describing, drawing a framework or setting the limits of that right or obligation. This is, of course, true as long as the Schedule satisfies the conditions laid down in the treaty provision both in terms of its content and its format.

For this reason, the relationship between a provision in a schedule that meets the required conditions and a treaty provision is to be analysed in the same way as the relationship between two treaty provisions. The interpretation of a provision in such a schedule has to be based on the Article 30 and other relevant articles of the VCLT. Any conflict that may arise between such a provision and any other treaty provision has to be resolved using the conflict resolving rules or techniques that we have mentioned in this work.

⁴⁴⁶ *Ibid*, p 77

Naturally, this relationship is dependent on the type of the schedule, whether it is a commitment, a concession or an exemptions list like in our case. For instance, schedules of concessions formed as required by the Article II of GATT create an obligation on the Member not to raise its tariffs above the bound levels committed and create a right for other Members to benefit from tariff rates below the bound levels. This obligation, - not to raise its tariff rates above the bound levels- cannot be circumvented by any explicit right unless there is a clear authorization to do so.⁴⁴⁷

The schedules of export subsidy commitments as required by the Article 8 and 9 of the Agreement on Agriculture have a slightly different nature than the schedules of concessions in accordance with the Article II. Those schedules carry out a two-fold function. First, they allow a Member to provide export subsidies for certain products. Second, they impose a limitation for each product on the amount of subsidy that can be granted.

Regarding the MFN Exemptions Schedules attached to GATS, the picture is again slightly different. These schedules lay down an explicit right allowed by Article II of the GATS. So, as long as an item in that schedule is reasonable within the context of Article II, that item has to be treated as a treaty provision giving an explicit right to conduct a specific action. Naturally, this item in the schedule can theoretically conflict with another provision of GATS or another agreement.

This conclusion is, of course, without prejudice to our argument raised above that there is actually no service exchanged during a transit passage within the meaning of GATS. In a potential legal proceeding, it is possible that the Panel or the AB make the same determination and decline to proceed further analysis within GATS. In the hypothetical case below, we do not explicitly analyse this possibility, as our main purpose is to analyse a potential case of conflict between GATT and GATS. However, even if we accepted this possibility, we could have continued our conflict analysis on an *arguendo* basis.

⁴⁴⁷ For instance, safeguard application is one of those cases where there is an explicit authorization to raise the tariffs of a Member above their bound rates.

9. A Hypothetical Dispute Case

Having carried out a legal analysis of transit quotas under GATT Article V and GATS Article II, we may complete our case study by bringing together these two elements to face what legal questions can arise out of this joint analysis and to highlight the results relevant for this work. The best way to do this would be going through a hypothetical dispute case on transit quotas and to discuss what questions would be before the Panel and how they can be resolved.

Let us imagine once a hypothetical case between Ruritania and Krakozhia –two neighbouring WTO Members- where Krakozhia sues Ruritania under the WTO Dispute Settlement Mechanism with the allegation that Ruritania violates GATT Article V. Let us also assume that there is bilateral transportation agreement between Ruritania and Krakozhia which also involves allocation of a certain number of transit permits between each other. It is also the case that Ruritania, just like some Members that we have seen above, has registered transit quotas in its MFN Exemptions Schedule under the Article II of GATS. An item in the MFN Exemptions list of Ruritania looks like:

Table 13 MFN Exemptions List of Ruritania

Sector/Sub-sector	Description of the measure indicating its inconsistency with Article II	Countries to which the measure applies	Intended duration	Conditions creating the need for the exemption
Road transport (passenger and freight)	Measures that are taken under existing or future bilateral agreements and which reserve or limit the provision of services and specify operating conditions, including through transit permits and/or preferential road taxes, of a transport service into, in, across and out of Ruritania	All countries with which bilateral agreements are or will be in force	Indefinite	To protect the integrity of road infrastructure and the environment and to regulate traffic rights in the territory of Ruritania.

In our hypothetical dispute, the main allegation by Krakozhia would be that Ruritania fails to grant freedom of transit for traffic originating from Krakozhia and passing through Ruritania by quota application. Krakozhia would therefore claim that transit quota application was inconsistent with the provisions of GATT Article V, particularly with Article V:2, V:3 and to the extent that there was a discriminatory application, Article V:5, thus Ruritania violated GATT Article V.

Faced with this allegation, apart from invoking the exceptions provisions of GATT⁴⁴⁸, Ruritania may have two main lines of defence. First, it may claim that Krakozhia has already expressed its consent for the quota application through their bilateral agreement. Thus, Krakozhia is estopped from bringing a case in the WTO regarding the quota application for which it has already expressed its explicit consent outside the WTO. We have discussed the applicability of the principle of estoppel above and reached the conclusion that this principle was not applicable in our case. Hence, we can swiftly conclude that this line of defence by Ruritania would not be successful.

Secondly, Ruritania, depending on its MFN Exemptions Schedules, may claim that it has been given an explicit right to apply quotas on transit and that explicit right cannot be overridden by a treaty provision at the same level, namely GATT Article V. It is fairly easy to assume that, in response to that defence, Krakozhia would argue that even *arguendo* that explicit right existed, it could not prevail over a clear obligation – that is not hamper freedom of transit-undertaken by Ruritania mandated by Article V of the GATT.

At this point, it would be worthwhile to elaborate on this defence and the counter argument since that may provide us some important insights for the subject matter of this work. We have already established that transit quotas would be found to be violating Article V:2, first sentence and thus prohibited by Article V. We have also stipulated above that the schedules of Members are to be regarded as treaty provisions and to the extent that they create explicit rights for that Member, potential conflicts between that schedule and another treaty provision. At this moment, we have to clearly determine whether its MFN Exemptions Schedule create an explicit right for Ruritania to apply transit quotas.

Is there an explicit right to maintain transit quotas?

In accordance with the basic principles of treaty interpretation laid down in the Articles 30 and 31 of the VCLT, the existence of an explicit right depends on two conditions: First, as we have mentioned above, the Schedule can be regarded as a part of the treaty provision that

⁴⁴⁸ Invoking the exceptions provisions of GATT – the General Exceptions in GATT Article XX and Security Exceptions in GATT Article XXI- is always an option. Nevertheless, as we have mentioned in a previous section –see Part I- this option is available only after the determination of a breach and in order to justify that breach. For our practical purpose in this work, we are not particularly interested in such kind of a defence as the relevance of this case for our work stems from the interaction of GATT and GATS in it but not from the ultimate result of the case.

gives rise to its existence. Thus, the wording of the treaty provision as well as the wording of the specific item in the schedule -whether it indicates an explicit right or not- is of crucial importance. Second, the context of that wording is important in the sense that whether that explicit right is meaningful or reasonable in the context of the treaty provision and in the light of the object and purpose of the treaty has an important role in deciding whether that explicit right really exists or not.

In our case, the wording of the Article II:2 of GATS provides: “A Member *may* maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions.” It should be noted that the word “may” mostly if not always used to explicitly allow a party to conduct a certain action. Thus, a provision with “may do” is different than “not being being prohibited to do” and establishes an explicit right.

Therefore, literally, Article II:2 of GATS grants an explicit right to Ruritania to maintain a transit quota application as long as this measure is listed in and meets the conditions of the Annex on Article II Exemptions. We know that the item in the schedule of Ruritania is “Measures that are taken under existing or future bilateral agreements and which reserve or limit the provision of services and specify operating conditions, *including through transit permits* and/or preferential road taxes, of a transport service into, in, across and out of Ruritania”. Thus, there is no question that the measure is listed in the schedule. We may also assume that quota application meets the conditions of the Annex on Article II Exemptions.

The second question becomes whether it is meaningful and reasonable to think that the said schedule read together with the Article II grants such an explicit right taking into account the context of the provision and in the light of the object and purpose of GATS. When considering the context of the schedule and the Article II, one has to bear in mind that Article II basically lays down the MFN principle for GATS. Thus, a measure that is listed under the Article II schedules cannot be any measure but a genuine exception to the MFN principle to be regarded as within the legal protection that the Article II provides.

We have discussed in section 2 above that transportation services is a highly closed sector especially when cross-border supply of services (Mode 1) are concerned. In this context, the bilateral transportation agreements offer a market access opportunity for the Members which

are parties to the bilateral agreement. In other words, the market access opportunity given by Ruritania to Krakozhia in transportation services is only available for Krakozhia⁴⁴⁹ but not for other WTO Members and only within the terms and conditions laid down in the bilateral agreement. Hence, quotas allocated within the framework of bilateral agreements are, although being limited in amount, a market access opportunity for the side of the agreement in comparison to the no market access situation for non-parties to a bilateral agreement. Accordingly, quotas constitute a deviation from the MFN principle and can be reasonably regarded as exemptions to the this principle.

Transit quotas are a part of this market access framework on transportation and unless it is challenged and otherwise proved, its schedules of MFN exemptions read together with the Article II of GATS can be regarded to give Ruritania an explicit right to maintain its quotas on transit.

Is there a conflict between GATT and GATS in this case?

Before going further, we should recall one important point that we have discussed above⁴⁵⁰ regarding the conflict understanding derived in WTO law: We are to determine no conflict between two provisions if they deal with two different aspects of the same measure, i.e. if one provision prohibits one specific aspect of the measure while other provision obliges or explicitly permits another specific aspect of the same measure. In such a case, the fact that one specific aspect of a measure is obliged or permitted would not allow that Member to maintain the measure as it is. The measure has to be modified so as not to create any breach or if this is not possible it has to be changed with another measure to fulfill the same policy objective.

A conflict occurs, however, when exactly the same measure is prohibited and obliged/explicitly permitted simultaneously. In this case, modifying the measure would not work as this would necessarily mean non-fulfilment of another obligation or non-utilisation of a certain right.

⁴⁴⁹ Potentially also for other countries with which Ruritania has a bilateral transportation agreement.

⁴⁵⁰ See Part VII above.

Having this important aspect, we can now analyse our case. We had established earlier that the transit quota application by Ruritania creates a violation of Article V of the GATT. Moreover, we have recently established that Article II of the GATS together with its schedules of MFN exemptions give Ruritania an explicit right to maintain transit quotas. Adopting a narrow definition of conflict, one could conclude that there is no conflict in this case since it is possible for Ruritania to violate neither of the norms by following the obligation and skipping the right. In this case, Ruritania would have to withdraw the transit quota application without any further analysis.

This is not the approach that we are going to follow in this work. As we have argued throughout this work, a proper understanding of conflict between norms necessitates that a potential conflict between an obligation and an explicit right has to be taken seriously in order not to disregard or ignore the right acquired by one of the parties.

In the light of this explanation, it would be straightforward to conclude that in a hypothetical case, there would be determination of a conflict between GATT Article V and the specific item in the MFN Exemptions Schedule of Ruritania read together with the Article II of GATS. This conclusion, as we have shown above, does not contradict with the approach displayed by the AB on the matter. Now, the next task becomes exploring the ways to resolve this conflict in the light of the conflict resolving tools that we have reviewed in previous sections.

Resolving the Conflict

During the course of this hypothetical case study, we have shown that two different norms are applicable to the measure in question by Ruritania and adherence to these two norms yields two contradicting conducts to be followed by Ruritania. We have also shown that a good faith interpretation to avoid a potential conflict between these two norms is not possible, at least with the conflict understanding followed in this work. Consequently, we have determined that there was a genuine conflict between two norms as applied to the specific measure taken by Ruritania.

Before proceeding with ways to resolve this conflict, we have to add a few remarks on the nature of the conflict that we would be determined. We have previously stated, based on the

classification by Pauwelyn⁴⁵¹, that two types of conflicts may occur between two norms. One of them occurs when two norms cannot co-exist simultaneously and one of ceases to exist by being declared “invalid” or “illegal”. The second occurs when two norms do not conflict “as such” but adherence to two norms simultaneously is not possible for a party. In this case, none of the norms ceases to exist but one of the norm “prevails” over the other or given priority over the other. In such cases, only one of the norms is found to be applied to the current case while the norm does not apply and thus *a fortiori* cannot be breached.⁴⁵²

In our case, we clearly observe a conflict of the second type. No doubt that both Article V of the GATT and Article II of the GATS will continue to stand together and none of them can be declared invalid. However, adherence to both norms by Ruritania is impossible and faced with the allegation of a breach of one of the norms, the Panel has to decide which of the norms will apply to the case and which of them is going to be left aside.

As we have noted before, the first thing to do when faced with a genuine conflict is to search for an explicit conflict resolving clause in one of the relevant treaties. We have reviewed earlier some explicit conflict resolving clauses within the WTO system.⁴⁵³ However, neither of them regulated the relationship between GATT and GATS. Hence, there is no explicit conflict resolving clause to resolve conflicts between GATT and GATS. In the absence of such a clause, one must revert to the conflict resolving maxims in the international law that we have previously covered.

Application of Lex Superior

With the same token, there is no hierarchy established between GATT and GATS. As we have mentioned before, both GATT and GATS are annexes to the WTO Agreement – GATT being a part of Annex 1A and GATS being the Annex 1B- and accordingly they are legally at the same level. As a result, the *lex superior* principle is not applicable in our case.

⁴⁵¹ PAUWELYN, *supra* 107

⁴⁵² *Ibid.*, p 327

⁴⁵³ See Part VI above

Application of Lex Posterior

As we have noted before, the *lex posterior* principle, as codified in the Article 30 of the VCLT, regulates the cases of conflicts between successive treaties.⁴⁵⁴ It requires that in the event of a conflict the latter treaty prevails over the former to the extent of the conflict.

In our case, it could be argued that the GATT text which was adopted in 1947 and which was incorporated in GATT 1994 without any change, was the former treaty while GATS which was concluded in 1994 was the latter treaty.⁴⁵⁵ Thus, according to the *lex posterior* maxim, GATS would prevail over the GATT.

However, this is not the approach followed in the WTO jurisprudence. As Article II:4 of the WTO Agreement states, GATT 1994 is a “legally distinct” body from the GATT 1947 and GATT 1994 which also includes GATT 1947 was concluded at the same time with other annexes to the WTO Agreement such GATS and TRIPS. Indeed, the AB in *Argentina – Footwear* argued that:

“Thus, the GATT 1994 is not the GATT 1947. It is “legally distinct” from the GATT 1947. The GATT 1994 and the Agreement on Safeguards are both Multilateral Agreements on Trade in Goods contained in Annex 1A of the WTO Agreement, and, as such, are both “integral parts” of the same treaty, the WTO Agreement, that are “binding on all Members”.⁷⁰ Therefore, the provisions of Article XIX of the GATT 1994 and the provisions of the Agreement on Safeguards are all provisions of one treaty, the WTO Agreement. *They entered into force as part of that treaty at the same time.* They apply equally and are equally binding on all WTO Members.”⁴⁵⁶ (italics added)

In this context, as GATT 1994 and GATS are the parts of the same treaty which are assumed to be concluded at the same time, there is no precedency relationship between GATT and GATS. Consequently, *lex posterior* principle is also not applicable in our case.

⁴⁵⁴ See discussion in Part VI

⁴⁵⁵ Obviously, a major point in the application of *lex posterior* maxim is how to determine the actual timing of treaties in order to determine which one is earlier and which one is latter. For this purpose, it is important to determine when actually a state expressed its consent to be bound by the treaty. Usually, it is the conclusion or adoption but not the entry into force of a treaty that indicates the consent of a state. See VIERDAG *supra* 80 for a more detailed discussion on the issue of timing of the treaties.

⁴⁵⁶ The Appellate Body Report on *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, p 27

Application of Lex Specialis

Given that neither *lex superior* nor *lex posterior* maxims are applicable to the case and there is no explicit conflict resolving clause existent, can *lex specialis* principle resolve the conflict in our case? As Pauwelyn also elegantly argues⁴⁵⁷, the answer to this question is yes. As we have argued before, GATT and GATS – as well as TRIPS- are agreements with very broad domains and it is possible that those domains overlap. It is also inevitable that in those intersection areas conflicts may arise.

In this context, *lex specialis* maxim can be an appropriate tool to determine which of the two agreements is to be applied in a given case. The issue is thus to determine which norm is the more special one – that is the more effective and precise norm allowing for fewer exceptions- and thus reflects more closely or precisely the consent or expression of will of the states – Ruritania and Krakozhia- in the case.⁴⁵⁸

Nevertheless, as we have noted before⁴⁵⁹, it is hard to describe the *lex specialis* principle as a rigid and self-standing legal norm. Rather, the principle involves a legal-logical search for the more special norm. In WTO context, there are two basic and inter-related questions to be asked when we apply the *lex specialis* principle:

⁴⁵⁷ *Supra* 107, p 405

⁴⁵⁸ Indeed, a test for determining whether GATT or GATS applies to a specific measure was proposed by Canada in *Canada-Periodicals* case. Based on the assumption that GATT and GATS had mutually exclusive domains of jurisdictions, Canada argued that; “To determine which disciplines apply to a given measure, one must examine not only the object of the tax and the fiscal mechanism used, but most of all one must examine the effects of the tax, by distinguishing between principal and incidental effects. Some relevant factors for such a determination are: the nature of the economic activity covered by the measure, the structure and effects of the measure and the intention of the measure. A measure may have different aspects and may, as a result, attract different disciplines under different agreements, but no single aspect of a measure should be subject to both disciplines at the same time. In any case at the margins of the two disciplines, Canada suggests that the dominant or essential characteristics of the economic activity at issue should control the determination of whether GATT or GATS is applicable. In the case of the excise tax on split-run periodicals, the principal effect is to restrict the access of foreign publishers to the Canadian advertising market since, in principle the periodical could very well be sold on the Canadian market with advertising not specifically addressed to Canada. This is evidenced by the fact that plans for prospective split-runs for the Canadian market are based on actual sales in Canada of the original version of the magazine which does not contain specific advertising for that market.” Thus, Canada suggested that “the dominant or essential characteristics of the economic activity at issue” should be the main determinant on whether GATT or GATS is applied. Gaffney, proposed that this “object and effects” test proposed by Canada can an appropriate criterion to resolve conflicts between GATT and GATS. GAFFNEY, *supra* 18 , p 150 Another attempt to establish an analytical framework to define a boundary between GATT and GATS was made by Smith & Woods. Fiona SMITH & Lorna WOODS (2005) A Distinction Without a Difference: Exploring the Boundary Between Goods and Services in The World Trade Organization and The European Union” *Colombia Journal of European Law* 12(1)

⁴⁵⁹ See related discussion in Part VI.

- Which of the two provisions covers the area regulated by the measure in question more closely and precisely?
- Which of the domains regulated by the two provisions does the measure in question regulate or intends to regulate?

Now, we can ask these questions for our case:

Does GATT or GATS cover transit more effectively?

More precisely, is it the GATT Article V or the GATS Article II together with the MFN Exemptions List of Ruritania that covers the area of transit more closely and precisely? To answer this question, we have to once again look at the text of two provisions as well as the the object and purpose of the agreements.

It is hard to get a clue from the object and purposes of GATT and GATS as neither of the treaties clearly state a general object and purpose⁴⁶⁰ which can be directly or indirectly linked to the area of transit. Therefore, it is necessary to revert to the texts of the provisions.

As have noted before, Article II of the GATS essentially lays down an MFN obligation. The Article, as an exception to that obligation grants a right to the Members to maintain measures which are inconsistent with that obligation. It should be emphasized, however, that this right is not at all limited to transit or transportation services. In contrast, this is a right of a general feature and the measures recorded by Members based on that right ranges from financial services to fishing services. Transit quota application is only one of those measures, in our case maintained by Ruritania.

⁴⁶⁰ According the Preamble of GATT, the objectives of the Agreement can be counted as “raising standards of living, ensuring full employment, a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods” through the means of “reciprocal and mutually advantageous arrangements directed to the substantial reduction in tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce”. Similarly, according to the Preamble of GATS, the main objective of GATS is an “early achievement of progressively higher levels of liberalization of trade in services through successive rounds of multilateral negotiations aimed at promoting the interests of all participants on a mutually advantageous basis and at securing an overall balance of rights and obligations, while giving due respect to national policy objectives” and the means for that is “a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of transparency and progressive liberalization and as a means of promoting the economic growth of all trading partners and the development of developing countries”

On the other hand, Article V of the GATT literally and precisely regulates and intends to regulate transit. As we have mentioned above, Article V is a unique article among other GATT provisions in the sense that it exclusively regulates transit and it is only such Article in the whole WTO web of agreements that does so. Starting from its title to its last paragraph, the Article deals with various matters regarding transit. We have to recall that the defines the concept “traffic in transit” which includes means of transport as well as goods in transit. Thus, the role of the Article is not limited to “goods in transit” as a part of the trade in goods that GATT regulates but it the Article regulates the right to transit and its aspects related to trade.

In the light of this explanation, there is no doubt that Article V of the GATT is the provision that covers the area of transit more closely, more precisely and more effectively as compared to Article II of the GATS read together with its annexes. Thus, it would be appropriate to conclude that in terms of the coverage the Article V is the more special provision than Article II in our case.

Are the transit quotas pre-dominantly and essentially a “trade in goods” or a “trade in services” measure?

The second question to be asked on the nature of the measure. Are transit quotas essentially a “goods” or “services” measure? In other words, while the measure may have aspects related to both areas, which area it essentially intends to regulate?

For bilateral transportation quotas applied within the framework of bilateral agreements, the answer to this questions would be straightforward: They are essentially measures regulating trade in services. They allow for bilateral market access in a specific services sector and determine the conditions and limitations on that market access through bilateral quotas.⁴⁶¹

The picture for transit quotas is, nevertheless, different. Let us recall that Ruritania described the measure in its GATS schedules as the “[m]easures that are taken under existing or future bilateral agreements and which reserve or limit the provision of services and specify operating conditions, including through transit permits and/or preferential road taxes, of a transport service into, in, across and out of Ruritania”⁴⁶² This description gives the impression that

⁴⁶¹ *Supra* 392

⁴⁶² See Table 13 above.

transit quotas are among other measures under the existing or future bilateral agreements which regulate trade in services.

However, as we have noted before, there is no market access issue regarding transit quotas. In our case, traffic originating from Krakozhia *does not supply any kind of service* within the territory of Ruritania.⁴⁶³ At best, that traffic may receive some services such as sanitation, weighing or customs related services for which it can be charged for an amount commensurate with the amount of that services. Nonetheless, we have to recall that GATS is only concerned and regulates the *supply* of services but not the reception of services. Moreover, transit quotas are not measures that regulate or intend to regulate those services. For this reason, the transit quota application cannot be credibly claimed to be a measure that regulates or intends to regulate any services trade at least within the purview of GATS.

Indeed, a transit quota is a measure that exclusively regulates and intends to regulate traffic in transit. The quota application by Ruritania limits the amount of traffic *through* but not into or out of its territory. The fact that the transit quota application is a part of a broader scheme of bilateral restrictions does not change this nature of the measure. Accordingly, it would be hard for Ruritania to convince the Panel that the measure in hand is essentially a trade in services measure.

Conclusion on the Case Study

In this section of this work, we have conducted a case study which exhibits a potential conflict between GATT and GATS. An examination of the case revealed that it posed a genuine potential of a case of a conflict between two WTO Agreements whose relationship is not regulated by any explicit provision.⁴⁶⁴ It also gave us a clue on how potential cases of conflict between WTO Agreements of the same hierarchical level – GATT, GATS and TRIPS- may look like.

⁴⁶³ For legitimate and legal traffic, this is technically impossible

⁴⁶⁴ Unlike GATT and other Annex 1A Agreements whose relationship is regulated by the General Interpretative Note to Annex 1A

PART IX: SUMMARY AND CONCLUDING REMARKS

SUMMARY AND CONCLUDING REMARKS

Two main aims were present for the preparation of this work. First, it was aimed to show that conflicts between WTO Agreements are real and conceivable phenomena and they have to be taken seriously. The second aim was to lay down a theoretical framework on how to deal with such potential conflicts between WTO Agreements.

Regarding the first issue, it was shown in this work that conflicts between WTO Agreements are not only likely but they are almost inevitable. Except the GATT whose main textual body was concluded in 1947, all of other WTO Agreements which are annexes to the WTO Agreement were negotiated and concluded simultaneously. These agreements constitute a complex network of legal texts. Particularly, the three main pillars of the system – GATT, GATS and TRIPS- are comprehensive agreements designed to regulate different areas.

On the example of GATT and GATS relationship which was the focus of this work, this is even more visible. GATT is designed to regulate trade in goods while GATS was designed to regulate trade in services. However, as shown by the AB on various occasions, the domains of these two comprehensive agreements are not distinct from each other.

While there are measures falling exclusively under the jurisdiction of GATT, there are also measures falling under the jurisdiction of GATS. There are, however, a third group of measures which falls under the intersection of these two jurisdictions. Provisions of both GATT and GATS are applicable to those measures regardless of they intend to regulate trade in goods, trade in services or both. In other words, the fact that one measure is designed to regulate one of the areas, does not prevent it from being scrutinized under the other area if the measure has effects on the other area, as well.

We have seen throughout this work that this is indeed a very likely situation explicitly recognised by the AB as the trade in goods and trade in services can be so much nested with each other, particularly when specific services such sales, distribution or transportation are concerned.

Now, in those areas of intersection, the provisions of the agreements may accumulate –they can be in the same direction- which would be totally fine. Yet, as we were interested the

conflict situations which are obviously more problematic, the next question to be asked was “Are conflicts between two agreements in those areas of intersection likely?”

To answer this question, we had to first define what a conflict between two norms is. At the heart of the main arguments of this work, lies an analytical preference for a broader definition of conflict. This preference has been justified in detail. Theoretically, in international law, every obligation for one the parties that has been agreed upon at the bilateral level creates a corresponding right for the other party. While this aspect may not be so crucial for some other international conventions, this aspect is essential for WTO system where obligations are fundamentally bilateral but multilateralized. It was argued that rights of WTO Members arising from WTO Agreements are as important as obligations arising from them.

Therefore, a strict definition of conflict, which systematically tends to ignore rights in cases of a conflict with an obligation, is not only incorrect but also undermines the essence of the multilateral trading system which includes reciprocal commitments between Members which are multilateralized through WTO Agreements. Such an approach would, thus, distort the legitimate expectations by Members regarding the benefits they expect from being a party to a WTO Agreement.

After having adopted a broader definition of conflict and having accepted that conflicts may occur between WTO Agreements, we arrive at the second main task of this work: to lay down a theoretical framework to resolve those conflicts. In fact, there is already a well-developed set of tools to handle with cases of conflict in international law and in the practice of international courts. That being the case, it is important to understand to what extent those tools can be imported into the WTO practice.

A closer look at the current WTO rules on dispute settlement and the jurisprudence arising from dispute settlement practice reveals that the transposition of such tools into the WTO legal system is possible. While the Panels and the AB had a somewhat reluctant and timid approach to the use of such tools which are developed outside the WTO system, there are clearly many “open doors” left, to use them in case such uses are indispensable.

Indeed, a comprehensive review of the past dispute cases confirms this proposition. The Panels and the AB invoked such rules imported from outside the WTO legal system as

necessary. However, it is hard to argue that there is a clear uniformity in such decisions. On the contrary, it is observed that both the Panels and the AB use such rules only to the extent necessary to resolve the case in their hand and are reluctant to establish general rules that will create a precedence for the later cases.

This work argued it is not only possible but also warranted to make use of such general rules as WTO law cannot be interpreted in isolation from the body of public international law. It is also necessary that such rules are applied in a uniform manner and that the AB assumes a more active role in ensuring this uniformity.

Returning back to the cases of conflict, it was put forward in this work that, in the cases where an explicit conflict resolving rule such as the one regulating the relationship between GATT and other Annex 1A Agreements is missing, the three general maxims of conflict resolution in international law- *lex superior*, *lex posterior* and *lex specialis* – are, in principle, applicable to those cases. In practical terms, it is suggested that *lex specialis* is more likely to play a pivotal role in resolving conflicts between WTO Agreements since other maxims have less potential to find scope of application in WTO context.

It was thus shown in this work that the *lex specialis* maxim can systematically be invoked as a conflict resolving tool in WTO context, especially for resolving conflicts between GATT, GATS and TRIPS Agreements between which no hierarchy is defined. It was, however, necessary to define and elaborate the specific elements of this maxim regarding its application to conflicts between WTO Agreements. For this purpose, a number of questions were proposed to elaborate how the this maxim can be applied in a specific case of conflict between two WTO Agreements.

In addition, in this work, a case study has been carried out as an example of a potential conflict between two WTO Agreements, namely GATT and GATS. The issue of freedom of transit, particularly the case of quotas applied on transit traffic in road transportation offers an interesting and a suitable example to apply the analytical framework developed in this work. The quotas applied on transit traffic has both elements related to trade in goods and trade in services. Moreover, application of the rules related to these two different domains, the provisions of GATT or GATS, would bring about contradicting results. Thus, having

exhibited that a conflict between two agreements may potentially occur on this case, the next task becomes to resolve that conflict by applying the *lex specialis* maxim.

A careful examination of this case revealed that quotas on transit traffic, though seen as measures related to transportation services, were pre-dominantly measures related to freedom of transit which is exclusively regulated by GATT Article V. Thus, it was stipulated that the provisions of Article V should prevail over any relevant provisions of GATS regarding this specific measure and accordingly the measure was found to be inconsistent with the freedom of transit principle mandated by Article V.

Some final words have to be reserved for the relevance of this work for future WTO dispute cases. As we have mentioned before, one of the main functions of the current multilateral system is to resolve the disputes arising from the implementation of its agreements. Indeed, a binding and relatively effective dispute settlement mechanism of the WTO is an asset that WTO has and many other international organisations do not possess.

As the former Chairman of the Appellate Body has argued, “the WTO offers an example to the world for the first time of what even the skeptics are bound to acknowledge by their own terms is real “international law.” The WTO has moved beyond the anarchy, beyond the primitivism, and beyond the skepticism to construct a system in which international rules and international rulings are both made and enforced.”⁴⁶⁵ Since the establishment of the dispute settlement system, politics and diplomacy shaping the multilateral trading system were increasingly replaced by law and jurisprudence. This unique character enabled the WTO system to get closer to Grotius’ ideal international legal order where right makes might rather than vice versa than any other international legal system.

This system is, however, far from being ideal. It is hard to deny that political concerns still play a role in Panel and even in AB rulings. For various reasons, which are not the subject matter of this work, the Panel or the AB refrains from or is reluctant to apply rules of

⁴⁶⁵ James BACCHUS, Address at Harvard Law School, October 1, 2002, published in 44 *Harvard International Law Journal* Vol: 2 (2003), p 10

international law in WTO cases and avoids making jurisprudence, to the extent possible, which will be a binding precedent for future cases.⁴⁶⁶

One of the best examples of this conservative reluctance is DSB's approach to potential conflicts between WTO Agreements. We have seen throughout this work that the Panel as well as the AB avoided ruling on this issue on a comprehensive manner so as not to leave any "grey area" on the matter despite the fact that there have been a number of cases which offered this opportunity. To the contrary, a number of rulings touching upon this issue failed to clarify DSB's approach to conflicts between WTO Agreements and left a considerable space enabling interpretations in different directions.

In my view, this pragmatic approach by the DSB undermines the credibility as well as the reputation of it as a global adjudicating body. A more uniform and consistent approach "putting hand under plow" would add to the importance of the WTO in the global fora. Albeit not being preferred, the motives behind the current approach by the DSB are also understandable. All organs of the WTO other than the DSB are highly politicised and a "mutually agreed solution" to a dispute, whatever the means to reach that outcome are, are still regarded as the underlying principle in the WTO. The DSB of the WTO is not a "world court" to resolve disputes on international trade and revolutionary attempts by the DSB to behave like that may put it under fire from at least a part of the WTO community itself.

Finally, taking also into account the current *impasse* at the Doha Development Round of trade negotiations, the arguments that the WTO's judicial role as an international trade court to settle the disputes Member states arising from WTO Agreements should be strengthened are shared by the current author. If this is going to happen, a more "juridical" approach is called for in the dispute settlement system. Further development and institutionalisation of WTO law will not only contribute to development of international law as a whole but also establish the WTO as one of the bodies promoting international legal order. A more appropriate approach to the issue of conflicts by the DSB can be a step in that direction.

⁴⁶⁶ While there is no formal precedent or *stare decisis* applied in DSB decisions, any general ruling made by the AB creates legitimate expectations for the parties in future cases that the AB rules similarly faced with a similar case.

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