Introduction

> Certainly, international law must adapt itself to the variety of fields with which it has to deal, as national law has done. It must also adapt itself to local and regional requirements. Nonetheless, it must preserve its unity and provide the players on the international stage with a secure framework.[1]

How should a WTO panel react when faced with the argument that an allegedly WTO inconsistent trade restriction is justified under an environmental treaty, IMF rules or customary international law? How should they react when parties make objections, claims or defences based on rules of general international law, not explicitly covered in the WTO treaty itself, such as rules on burden of proof, standing, good faith, due process, error in treaty formation or the binding nature of unilateral declarations? Those are the type of questions that gave rise to this book. They are very real and practical questions and as a legal adviser to WTO panels, I was often asked to answer them. In the *US – Shrimp* dispute, for example, the United States invoked a number of multilateral environmental treaties in defence of its import ban on shrimp coming from countries which, in the US view, did not sufficiently protect endangered turtles. In *EC – Hormones*, the European Communities claimed that their ban on hormone-treated beef, allegedly inconsistent with WTO rules for not being based on sound science, was justified with reference to the 'precautionary principle', a principle which, in the EC's view, was

[1] 'The Proliferation of International Judicial Bodies: The Outlook for the International Legal Order', Speech by His Excellency Judge Gilbert Guillaume, President of the ICJ, to the Sixth Committee of the UN General Assembly, 27 October 2000, p. 4, posted on the internet at http://www.icj-cij.org/icjwww/ipresscom/SPEECHES/iSpeechPresident_Guillaume_SixthCommittee_20001027.htm.

part of customary international law. In *Argentina – Footwear*, the statistical tax imposed on imports was, according to Argentina, nothing more than an implementation of an agreement it had reached with the IMF. The relationship between WTO rules and other rules of international law is at the forefront also of the ongoing Doha Development Round. The Doha Declaration explicitly listed 'the relationship between existing WTO rules and specific trade obligations set out in multilateral agreements (MEAs)' as one of the topics on the negotiating agenda.[2] The relationship between the three pillars of trade, environment and development, and the norms that each of these pillars may produce, is at the heart also of the 2002 Johannesburg Summit on Sustainable Development.

An answer to those questions of relationship between WTO rules and other rules of international law goes beyond the specifics of a trade dispute, even beyond the peculiarities of the WTO legal system. Answering those questions necessarily implies an expression of one's view of international law as a whole. Should a trade dispute before the WTO be examined only in the light of WTO rules? Is there such a thing as general international law that binds all states and could it be a uniting factor as between the different branches of international law so that it should apply also to the WTO treaty? Or should the WTO rather be left untouched and operate only within its limited sphere of trade rules? These are considerations of extreme systemic importance for the system of international law. In addition, they are heavily value-laden and go to the heart of much of the critique against globalisation: is globalisation only about the economy and making profits or is it counterbalanced also by other factors such as environmental protection, development of weaker regions, social protection and safety nets?

The above-mentioned problems related to the interplay between different treaty regimes and between treaties and custom or general principles of law, not only surface in the WTO. Given the increased overlap as between different regimes of international law – be it the UN Security Council dealing with human rights and war crimes; the World Bank addressing environmental sustainability; or the WHO negotiating a treaty to regulate the sale of tobacco products – the question of how different norms of international law interact is omnipresent. On 8 May 2002, the International Law Commission even set up a Study Group

[2] Doha Ministerial Declaration, paragraph 31(i), adopted on 14 November 2001, WT/MIN(01)/DEC/1 dated 20 November 2001.

on the topic of the 'Fragmentation of international law', to be chaired by Professor Bruno Simma.[3] In terms of specific disputes the question was raised prominently also before, for example, the European Court of Human Rights (in the *Al-Adsani* case where the prohibition on torture set out in the Convention played out against customary international law rules on state immunity) and the House of Lords in the *Pinochet* case (where the relationship between the Torture Convention and customary rules on immunity for heads of state were at stake). ITLOS, as well, has been asked to deal with disputes that raise questions under treaty regimes other than UNCLOS (see, for example, the *Swordfish* dispute, a dispute that was brought also before the WTO; and the more recent *MOX Plant* case, raising questions not only under UNCLOS but also under the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), the EC treaty and the Euratom treaty).

This book does not go into specific cases of interplay or conflict between WTO rules and other rules of international law. Rather, it attempts to provide a conceptual framework within which the interplay between norms can be examined. It is hoped that this framework will be useful also for the resolution of conflicts not involving WTO norms.

Chapter 1 sets out the parameters of this book, limiting its scope, in particular, to situations of 'conflict' as between two established 'norms' or 'rules' of international law. This first chapter also elaborates on a number of reasons why conflict of norms is a field of study of both systemic and practical importance in modern international law and, more particularly so, in WTO law.

Chapter 2 introduces the specific case study that will be used throughout this book, namely the law of the World Trade Organization. It assesses the place of WTO law in the wider spectrum of public international law, sums up the different sources of what will be referred to as 'WTO law' and, of crucial importance, introduces the distinction between 'reciprocal' and 'integral' obligations and the legal consequences attached to it.

In chapter 3, we examine whether there is, as in most domestic legal systems, a hierarchy of 'sources' of international law, that is, formal hierarchies depending on the source of the norm in question. We examine the relative importance of judicial decisions and doctrine as a

[3] Daily Bulletin, Fifty-fourth session of the ILC, posted on the internet at http://www.un.org/law/ilc/sessions/54/jourchr.htm.

'source of law', including the question of 'conflicting judicial decisions'; the status of 'general principles of law'; and the intricate relationship between custom and treaties.

In chapter 4, the focus is shifted away from 'sources' of law, to specific 'norms' of law. We examine the process and definition of 'accumulation' and 'conflict' of norms and highlight the importance of 'fall-back' and 'contracting out' of general international law for a theory on conflict of norms.

Moving then to the specific problem of 'conflict' of norms, chapter 5 stresses the exceptional nature of 'conflict', given the presumption against conflict and the process of treaty interpretation to be resorted to in order to avoid a conflict between two norms. For those cases where genuine conflict nonetheless arises, chapters 6 and 7 attempt to set out solutions. Chapter 6 deals with what we will call 'inherent normative conflicts'; chapter 7 with 'conflict in the applicable law'.

We conclude this book with one of its most important chapters, namely that on how the general theories developed earlier apply in the concrete circumstances of WTO dispute settlement. In this final chapter we will come back to some of the specific WTO disputes referred to earlier in this introduction and explain them in the light of the theory defended in this book.

1 The topic and its importance: conflict of norms in public international law

> The measure of success which is achieved in eliminating and resolving conflicts between law-making treaties will have a major bearing on the prospect of developing, despite the imperfections of the international legislative process, a coherent law of nations adequate to modern needs.[1]

What follows is about 'conflict', more particularly conflict between 'norms' of 'public international law'. The prime example referred to will be the law of the World Trade Organization. The crucial question in this case study is: how does WTO law relate to other rules of public international law? The internal hierarchy between norms which are part of the WTO treaty[2] is also addressed. We not only examine these questions *in abstracto*. We also assess them in the more concrete context of WTO dispute settlement.

Conflict

The scope of this work is limited to situations of 'conflict' between legal norms. The main question is, therefore: when there is a conflict between two norms, which of the two norms should be applied? This question relates to the hierarchy of norms in international law.

Before suggesting ways to resolve conflict of norms, we shall have to define first what is meant by 'conflict'. In many instances, what may

[1] Wilfred Jenks, 'Conflict of Law-Making Treaties' (1953) 30 BYIL 401 at 453.

[2] When referring to the 'WTO treaty' we mean the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, concluded in Marrakesh, Morocco, on 15 April 1994, published in WTO Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations, The Legal Texts* (Geneva, 1995). The sources of the wider notion of 'WTO law' are discussed in chapter 2 below, pp. 40–52.

seem like a conflict will not *be* a conflict but only a divergence which can be streamlined by means of, for example, treaty interpretation. This necessary exercise of identifying when exactly two norms are 'in conflict' means that we cannot limit this study to setting out a number of rules of priority in international law. In addition, we shall need to address the definition of conflict and the different avenues that may lead to convergence of norms in a conflict that is apparent only, not real.

Conflict of norms

Norms versus the pre-normative and norms versus process

Crucially, only conflict between *legally binding norms* is dealt with. We use the notion of 'norms' and that of 'rules' interchangeably. We shall not address the interplay between norms and elements of a pre-normative character. As a result, this work does not generally address, for example, the influence of pre-normative elements (such as the *travaux préparatoires* of a treaty or state practice) on the interpretation, modification or termination of norms.[3] Nor shall we address the impact of what is referred to as 'soft law' even though an increasing number of authors consider this soft law to be of a normative value, albeit not legally binding in and of itself.[4] Others, in contrast, are of the opinion that soft law is of a pre-normative value only and is, in fact, not law at all.[5] Pre-normative elements, as well as norms that are not legally binding, may well be crucial in treaty interpretation so as to resolve apparent (but not genuine) conflicts. Yet, our focus here will be on what to do in case such harmonious interpretation is *not* possible, that is, on what to do in case an international adjudicator is faced with a genuine conflict between two legally binding norms.

[3] For an overview of the impact of subsequent practice on treaties, see Wolfram Karl, *Vertrag und Spätere Praxis im Völkerrecht* (Berlin: Springer, 1983).

[4] See, for example, Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1991) 12 *Australian Yearbook of International Law* 22. Elsewhere, Pellet makes a distinction between 'le juridique' and 'l'obligatoire', soft law being part of the former, not the latter (Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public* (Montreal: Wilson & Lafleur, 1999), para. 254).

[5] In this sense, see, particularly, Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, who is of the view that acts that 'do not create rights or obligations on which reliance may be placed before an international court of justice or of arbitration' and acts '[the] failure to live up to [which] does not give rise to international responsibility' are of a pre-normative character only (*ibid*., at 415).

Our focus on legally binding norms, and the conflicts that may arise between them, results from the need to delimit the scope of this study. It does not in any way imply that international law is, or should be, limited to a number of positive rules. As Rosalyn Higgins expressed in the first two sentences of her general course at The Hague: 'International law is not rules. It is a normative system . . . harnessed to the achievement of common values.'[6] That international law is not just 'rules' – or what Higgins refers to as 'accumulated past decisions' – but rather a continuous 'process' – from the formation of rules to their refinement by means of application in specific cases, with multiple actors, institutions and legally relevant instruments and conduct at play – will become apparent across this work.[7] Still, the topic of this book is conflict and hierarchy between legally binding norms, in particular, *as they may be invoked before an international court or tribunal*. The hierarchy of actors, institutions and values will shed valuable light on this examination, but is not our main concern here.[8]

In the words of Bos, the standpoint taken in this study is that of the 'consumer' of international law, not that of the 'producer' of international law.[9] States before an international court or tribunal, where conflicting norms may be invoked, are, indeed, 'consumers' of international law or 'law-takers'. From that perspective, it is crucial to know what the law is, where it can be found and how the judge will apply it

[6] Rosalyn Higgins, 'General Course on Public International Law' (1991-V) 230 *Recueil des Cours* 23.

[7] Criticising the traditional theory on the sources of international law, Abi-Saab phrased it thus: 'Elle [the traditional theory] représente le développement du droit en termes d'explosions et de ruptures, plutôt que de transitions et de transformations, ou comme un processus continu et en constante évolution . . . Nous aboutissons ainsi à une théorie de création juridique par "big bang" . . . En réalité cependant, le droit international, comme tout droit, ne provient pas d'un "néant" ou d'un vide social' (Georges Abi-Saab, 'Les Sources du Droit International: Essai de Déconstruction', in *Le Droit International dans un Monde en Mutation, Mélanges E. J. De Arechaga* (Montevideo: Fundación de Cultura Universitaria, 1994), 29 at 47).

[8] As Weiler and Paulus remarked on the question put to them, 'Is there a hierarchy of norms in international law?': 'Should we not also be thinking of international law as process rather than, or as well as, norms? Operationally, does the image of the lawyer determining the content of norms and actors behaving or misbehaving accordingly really capture international legal process? Normatively, is the hierarchy of norms going to tell the true story of what is important and what is unimportant in international law rather than, say, the hierarchy of actors or of institutions?' (Joseph Weiler and A. L. Paulus, 'The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?' (1997) 8 EJIL 545 at 554).

[9] Maarten Bos, 'The Recognized Manifestations of International Law' (1977) 20 GYIL 9 at 11–13.

in case there is, for example, a conflict of norms. However, given the lack of a centralised 'legislator' in international law, as well as the optional nature of international adjudication, states are also, even mostly, 'producers' of international law or 'law-givers'. From that perspective, clearly circumscribing what international law is and is not, is of less importance. The 'law-giver' can give her own interpretation to existing norms and always produce new norms to her liking. International law from this abstract 'producer's' viewpoint – the one we will *not* adopt here – is more open to extra-legal considerations and corresponds perhaps better with everyday reality in international relations. Nevertheless, the narrower 'consumer's' approach, increasingly important in fields, such as the WTO, with compulsory dispute settlement procedures, is what will preoccupy us in this study. As Peter Hulsroj warned:

> Clearly a question on how a state can be expected to react in a given situation cannot be answered by purely analysing the norms that would follow from Art. 38 of the Statute of the ICJ, but must embrace norms dictated by history, self-interest, potential political fall-out, etc. Only, I believe that law pragmatically must be understood to be the norms that an ultimate arbiter, the courts, will find to apply to a given legal conflict – and this again means that legal norms are the ones that in some form or another can be derived from the source definition in Art. 38 of the Statute of the ICJ. All other norms are then extra-legal norms and it would be dangerous to ask an ultimate arbiter to disregard this distinction . . . since predictability will be lost and the ultimate arbiter will be put on an almost impossible task, namely to define norms based on all-encompassing empiricalism.[10]

Norms versus laws and norms versus obligations

As far as the title of this study is concerned, it was tempting to use the term 'conflict of international *laws*', as opposed to 'conflict of *norms* in public international law'. The temptation is there, for the term 'conflict of international *laws*' would echo the more familiar field of study known as 'conflict of laws' or 'private international law': that is, the discipline dealing with conflict between different *domestic* laws in disputes having links with two or more *domestic* legal systems. Wilfred Jenks seems to have succumbed to this temptation when entitling his seminal piece 'Conflict of Law-Making Treaties'. He noted, for example, that 'some of the problems which [law-making treaties] involve may present a closer

[10] Peter Hulsroj, 'Three Sources – No River, A Hard Look at the Sources of Public International Law with Particular Emphasis on Custom and "General Principles of Law"', (1999) 54 *Zeitschrift für öffentliches Recht* 219 at 236.

analogy with the problem of the conflict of laws than with the problem of conflicting obligations within the same legal system'.[11]

Modern international law is, indeed, composed increasingly of treaty-based *sub-systems* (such as that of the WTO, the Framework Convention on Climate Change or the World Intellectual Property Organization). These sub-systems could be said to have their own sector-specific 'international law', law-maker and law-enforcement mechanism. Like national laws within the discipline of 'conflict of laws', these sub-systems of public international law interact and may give rise to conflict. It is, indeed, this type of conflict (say, between WTO law and the law developed under the Framework Convention on Climate Change) that inspired this work and will attract most of our attention. Nevertheless, to talk of these sub-regimes as being separate 'international laws' which may 'conflict' would give the wrong signal. First, it would lose sight of *general* international law in creating the impression that these sub-regimes are 'self-contained regimes' to be evaluated exclusively with reference to norms created *within* the particular sub-regime. Second, it could be understood by some as elevating what are basically treaty norms (say, WTO provisions) of a *contractual* nature to the status of 'law' in the strict domestic law sense of norms imposed by an independent 'legislator' on all subjects (i.e. states) of the sub-regime independently of their will.[12]

Another alternative to 'conflict of norms' (besides 'conflict of international laws') could have been 'conflict of obligations'. However, to talk of conflict of *obligations* would obscure the fact that international law is composed of obligations *and* rights. As we shall see below, a conflict may consequently arise not only as between two contradictory obligations, but also as between an obligation and an explicit right.[13] At the same time, it is worth noting that in practice a conflict of norms will always boil down to, and need examination in terms of, a conflict between *rights* and/or *obligations* resting on one or several states. There is no such thing as norms 'in the air'. Norms, at least those we shall further examine (that is, those that are legally binding), are imposing obligations on, or

[11] Jenks, 'Conflict', 403.

[12] Sir Gerald Fitzmaurice has argued, for example, that treaties, including so-called 'law-making treaties', are not, in the proper sense of the word, formal sources of *law*: 'They may, according to circumstances, afford evidence of what the law is, or they may lead to the formation of law and thus be material sources. But they are in themselves sources of obligation rather than sources of law' (Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in *Symbolae Verzijl* (The Hague: Nijhoff, 1958) 153 at 154).

[13] See chapter 4 below, pp. 184–8.

granting rights to, particular states. They are in that sense 'subjective'. But this does not mean that norms can always be reduced to the form of bilateral right–duty relations between two states, of a contract-type nature. Increasingly, the rights and obligations set out in norms of international law are of a collective or communitarian character. As a result, their breach can then, for example, be invoked by all (participating) states.[14]

The fact that a conflict of norms can hence be reduced to conflict of rights and/or obligations resting on one or several states – albeit not always of a *contract*-type nature – is another reason *not* to talk of 'conflict of international *laws*', or 'conflict of *treaties*'. Although the general nature of the treaties in question may well determine whether or not a given norm in one treaty should prevail over that in another treaty, in the end, conflict must be narrowed down to a conflict between two given norms: more particularly, the rights and/or obligations set out by these norms as they apply between particular states. A conflict is rarely one between treaties or sub-systems of international law *in their entirety*, where one treaty or sub-system *in its entirety* needs to give way to another treaty or sub-system, that is, the way one domestic law may need to give way to another domestic law in the field of conflict of laws.[15] Although some conflicts may lead to the invalidity, termination or non-application of an entire treaty,[16] all conflicts require at least some examination of the specific rights and obligations set out in the relevant treaties.

Conflict of norms in public international law

Importantly, this study is *not* about the vertical conflict between *national law* and *international law*, such as the question of whether a *national* regulation enacted to protect the environment is in conflict with WTO rules.

[14] See, for example, Article 42 (defining the notion of 'injured state') and Article 48 (on invocation of responsibility by a state other than an injured state) of the ILC's Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the ILC at its 53rd session, 2001 (Report of the ILC on the work of its 53rd session, General Assembly Official Records, 56th session, Supplement No. 10 (A/56/10), chapter IV.E.1, hereafter '2001 Draft Articles on State Responsibility').

[15] For an exception, see Article 59(1) of the Vienna Convention on the Law of Treaties dealing with the termination of a treaty implied by the conclusion of a later treaty (for example, in case 'the provisions of the later treaty are so far incompatible with those of the earlier treaty that the two treaties are not capable of being applied at the same time').

[16] See, for example, Arts. 53, 59 and 63 of the Vienna Convention on the Law of Treaties.