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### Resolving Treaty Conflicts

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# RESOLVING TREATY CONFLICTS

CHRISTOPHER J. BORGEN\*

## INTRODUCTION

Should the rules of the World Trade Organization trump international environmental agreements? How are treaties between the United States and its European partners affected by the construction of the European Union? What can be done to avert conflict among Russia, Iran, and certain central Asian states over the control of the oil beneath the Caspian Sea? Although seemingly disparate topics, all of these dilemmas are, in part, disputes over whether certain treaties should be given preference over other treaties. These conflicts are fueled by many different political and economic concerns. Regardless of the source of concern, however, as a matter of international law, the question remains the same: Is there a principled method by which sovereign states in the international system can resolve conflicting obligations between treaties? Due to treaty proliferation in recent years, this question is more important than ever.

The viability of international law, as a legal system, rests largely on the viability of treaties as a source of law. In the second half of the twentieth century, the international state system was supported by the development of treaties.<sup>1</sup> States focused the majority of their regime-building efforts on three sets of concerns: restraining interstate conflict, securing human rights, and managing the economic system. States used treaties as the primary tool in the construction of these international institutions and in the codification

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1. While other sources of law such as customary international law are no less juridically important than treaties, treaties occupy a place of privilege in any discussion of the state of international law. For example, the *TREATY HANDBOOK*, published by the United Nations (UN), states that "[t]reaties are the primary source of international law." UNITED NATIONS, U.N. *TREATY HANDBOOK*, Foreword (n.d.), <http://untreaty.un.org/English/TreatyHandbook/hbframeset.htm> (last visited Mar. 10, 2005).

of these norms.<sup>2</sup> Moreover, treaties shift issues from the political arena into a juridical, rule-based, forum. As of 2005, there were approximately 50,000 treaties on file in the U.N. Treaty System.<sup>3</sup>

The very success of treaties as a policy tool has caused a new dilemma: a surfeit of treaties that often overlap and, with increasing frequency, conflict with one another. For the treaty partners of states that have adopted conflicting treaties, this results in a lack of certainty as to which—if either—treaty would be honored.<sup>4</sup> After the successes of the last fifty years, international law may become increasingly dysfunctional in the first decades of the twenty-first century due to the sheer number of these treaties and the lack of useful, principled, methods to resolve conflicts between them.

The International Law Commission (ILC) has turned its attention to the problem of treaty conflicts and the potential fragmentation of international law more broadly with the organization of the Study Group on Fragmentation of International Law (Fragmentation Study Group) in 2002.<sup>5</sup> The Fragmentation Study Group will consider fragmentation as a consequence of the expansion and diversification of international law.<sup>6</sup> Its initial view is that while fragmentation in and of itself is not new, it is increasing.<sup>7</sup> This increase in fragmentation underlies recent concerns about friction between trade law, on one side, and environmental law and human rights law, on the other,<sup>8</sup> as well as the overlapping and competing

2. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: INTERNATIONAL AGREEMENTS, Introductory Note (1987) ("The law of international agreements has increased in significance and scope since the Second World War, as international agreements have assumed a larger place in the life of the international community of states and in international law.").

3. See generally UNITED NATIONS, U.N. TREATY COLLECTION: ACCESS TO DATABASES, at <http://untreaty.un.org/English/access.asp> (last visited Mar. 10, 2005).

4. See Thomas M. Franck, *The Courts, The State Department and National Policy: A Criterion for Judicial Abdication*, 44 MINN. L. REV. 1101, 1101 (1959–1960) ("Disorder, as it is known to a lawyer, is perhaps less frequently an absence of legal order, than a surfeit of it[.]"); see also David Kennedy, *Tom Franck and the Manhattan School*, 35 N.Y.U. J. INT'L L. & POL. 397, 397 (2003).

5. The Sixth Committee of the General Assembly (which deals with legal affairs) supported the International Law Commission's (ILC) recommendation for a broad study dealing with treaty conflicts, and that such a study should be oriented on the guide provided by the Vienna Convention on the Law of Treaties. Int'l Law Comm'n, *Report of the Study Group on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. GAOR, 55th Sess., at 6, U.N. Doc. A/CN.4/L.644 (2003). The goal of the Group is to fashion a toolbox for responding to fragmentation.

6. Int'l Law Comm'n, *Report of the Study Group on Fragmentation of International Law*, U.N. GAOR, 54th Sess., at 2, U.N. Doc. A/CN.4/L.628 (2002).

7. *Id.*

8. See, e.g., JOOST PAUWELYN, *CONFLICT OF NORMS IN INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW* (2003).

jurisdictions of international tribunals,<sup>9</sup> and the general coherence of the international legal system.

This Article addresses a particular cause of fragmentation—unresolved conflicts between treaties—and considers how lawyers and policymakers may respond to the challenges posed by treaty proliferation and conflict. I argue that treaty conflicts are a key underlying cause of fragmentation and that the current rules are inadequate to provide clear, systematic solutions to treaty conflicts.

An initial problem is that there is no generally accepted definition of what constitutes a conflict between treaties.<sup>10</sup> A conflict in the strict sense occurs when a party to two treaties cannot simultaneously honor its obligations under both. A divergence between treaties, however, need not always be a conflict.<sup>11</sup> Consider the following: State A forms a treaty (Treaty I) with State B promising that B will have access to A's markets at terms no worse than any other state. Some years later, State A becomes part of a regional economic treaty with States C, D, E, and F. This second treaty (Treaty II) requires that member states accord each other, *and only each other*, the best terms of market access. B insists that A is required by Treaty I to give B the same terms as C, D, E, and F. Those states argue that A is required by Treaty II to deny B the terms of trade that they receive under Treaty II. Using this narrow definition of what constitutes a conflict between treaties, however, is too restrictive.<sup>12</sup> States are not only concerned with when it is impossible for a state to abide by two treaties, but also when one treaty frustrates the goals of another. Thus, treaty conflicts can be conceived more broadly as when a state is party to two or more treaty regimes and either the mere existence of, or the actual performance under, one treaty will frustrate the purpose of another treaty. Under either

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9. See, e.g., Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101 (1998) [hereinafter Charney, *Is International Law Threatened*]; Jonathan I. Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999) [Charney, *Impact*]; YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003).

10. PAUWELYN, *supra* note 8, at 166 ("The definition of when two norms of international law are in 'conflict' has, surprisingly, attracted little attention. Most authors writing on the topic of interplay or hierarchy of norms do not even provide a definition.").

11. C. Wilfred Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 426 (1953) [hereinafter Jenks, *Law-Making Treaties*]; see also PAUWELYN, *supra* note 8, at 167.

12. Other ILC Rapporteurs argued for broader definitions. Hersch Lauterpacht focused on "inconsistency" of norms, and Humphrey Waldock on the idea that conflict occurred when two treaties could not be reconciled. See PAUWELYN, *supra* note 8, at 168. For information concerning ILC Rapporteurs on the law of treaties, see *infra* Part III.A and accompanying discussion.

this definition or the stricter construction, the questions for the policymaker are the same: Which treaty should prevail? Are there any useful, principled methods to resolve this conflict?

I use the phrase "useful, principled methods" deliberately. I do not claim that there are no principled methods of resolving treaty conflicts; rather, we have many that are rarely used. I do not claim that there are no useful methods for resolving treaties; instead, the methods currently employed have been somewhat effective but have little or nothing to do with legal principle and much to do with power and politics. Thus, the goals of many states involved in treaty-making—decreasing the politicization of international relations and increasing rule-based decision making and conflict resolution—are actually undercut by their own efforts because treaty congestion leads to political bargaining, not principled action.

The method of resolving treaty conflicts is ostensibly found in the Vienna Convention on the Law of Treaties (VCLT).<sup>13</sup> Completed in 1969 and effective as of January 27, 1980, the VCLT is the "treaty on treaties," setting forth canons of treaty interpretation, general rules governing how treaties operate, and means of avoiding or resolving potential disputes.<sup>14</sup> Article 30 of the VCLT

13. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT]. Article 30, entitled Application of Successive Treaties Relating to the Same Subject-Matter, states:

1. The Charter of the United Nations, the rights and obligations of States and international organizations 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 2 parties each of which is a party to both treaties, the same rule applies as in paragraph 3;
  - (b) as between a party to both treaties and a 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 or for an international organization from the conclusion or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.

14. Although the United States has signed, but has not ratified, the VCLT, parts of it are treated as "codifying existing international law; United States courts have also treated particular provisions of the Vienna Convention as authoritative." RESTATEMENT (THIRD) OF

addresses conflicts between “successive treaties relating to the same subject-matter.” As Richard D. Kearney and Robert E. Dalton, two of the U.S. negotiators of the Vienna Convention, wrote in the *American Journal of International Law*:

In essence [Article 30 of the VCLT] provides that: (a) if a treaty says it is subject to another treaty, the other treaty governs on any issue of compatibility; (b) as between parties to one treaty who become parties to a second, the second governs on any point where it is incompatible with the first; (c) if some of the parties to the first treaty are not parties to the second treaty, and vice versa, the first governs between a party to both and a party only to the first; the second governs between a party to both and a party only to the second.<sup>15</sup>

Thus, the normative framework of Article 30 applies only in certain defined instances. Beyond Article 30, disputes are also resolved through reference to general principles of treaty interpretation adapted from related areas such as the law of contracts, statutory interpretation, and state practice in regard to treaties.

The VCLT was drafted before the North American Free Trade Agreement (NAFTA), before the World Trade Organization (WTO) Agreements, before the burgeoning of the European Union (E.U.), and before the enactment of most of the over 1300 bilateral investment treaties that now exist among 160 states.<sup>16</sup> Generally, “[m]odern developments have led to an unprecedented increase in the number of treaties.”<sup>17</sup>

The current issue, in part, is whether the VCLT and these general principles address the needs and nuances of modern state

THE FOREIGN RELATIONS LAW OF THE UNITED STATES: INTERNATIONAL AGREEMENTS, INTRODUCTORY Note (1987).

15. Richard D. Kearney & Robert E. Dalton, *The Treaty on Treaties*, 64 AM. J. INT’L L. 495, 517 (1970).

16. The same year that the VCLT entered into force (and eleven years after its language was drafted) the U.N. Secretary-General wrote that “[a]s the body of international law created by multilateral treaties increases, greater and greater problems arise about possible conflict between treaties already in force, whether on a world-wide or regional or otherwise restricted basis, and new proposed instruments.” *Analytical Review of the Process: Report of the Secretary-General*, para. 49, U.N. Doc. A/35/312 (1980), revised by U.N. Doc. A/35/312/Corr. 1 (1980). By 1984, another commentator wrote:

As hundreds or thousands of treaties appear every year, the task of coordination has assumed formidable dimensions. If, as early as 1932, Rousseau described the task as one of the most urgent problems in the international order and Jenks again stressed its eminent practical importance in 1953, this is all the more true today.

Wolfram Karl, *Conflicts Between Treaties*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 935, 936 (Rudolf Bernhardt ed., 2000).

17. Rudolf Bernhardt, *Treaties*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 16, at 926, 930.

practice. Do we have the tools and the techniques to continue the expansion of international law in a manner that allows for both the effectiveness of individual treaties as well as the stability of the system as a whole?

I argue that the VCLT's treaty conflict provisions are neither an accurate *description* of current state practice, nor are they adequate *prescriptions* for how states should act. Nevertheless, although the VCLT is significantly flawed in regard to resolution of conflicting treaties, there exists no better single rule or set of rules as to how to resolve such conflicts. Rather than relying on the VCLT, therefore, lawyers and policymakers need to use various tools and adopt new "standard operating procedures" to address treaty conflicts.

This Article proceeds in five parts. Part I describes treaty conflicts in terms of the subject-matter and the structure of the treaties. Part II considers techniques of resolving treaty conflicts as alternatives to application of the VCLT. Strategies include the drafting of clauses to avoid potential conflicts and the use of interpretive techniques to analyze texts that have already been written. Part III turns to the codification of conflict resolution rules in the VCLT and considers their strengths and weaknesses. Part IV analogizes from other types of textual conflicts, such as conflicts between contracts or between statutes. Part V draws from the previous sections to suggest options in addressing treaty conflicts, including: (a) ending the "same subject-matter" rule in assessing whether or not treaties conflict and in the application of conflict resolution rules; (b) increasing the use of purposive interpretation to assess and resolve treaty conflicts; (c) drafting more detailed conflict avoidance clauses in treaties; and (d) increasing the use of a procedure of assurance to determine the intention of a state that has ratified conflicting treaties. While there is no single solution to this complex dilemma, there are ways to minimize some of the unwanted effects of the proliferation of treaties. Part V also broadens the focus from these specific recommendations and considers the implications of the preceding discussion on the status of international law as a coherent legal system.

Responding to treaty conflicts requires more than just a revision of the relevant provisions of the VCLT; it requires a more rigorous approach to envisioning how treaties affect one another, a practice of drafting treaty clauses that takes this interplay into account, and a more purposive means of interpretation that will better spot potential treaty conflicts. As dilemmas tend to have more than one cause, addressing them usually requires more than one technique.

I take my task—and the task of international lawyers concerned about the efficacy of international law—from the challenge posed by Wilfred Jenks, former Director-General of the International Labour Organization, to “encourage[ ] the adoption of procedures which will minimize the occurrence of such conflict . . . [and] to formulate principles for resolving such conflict when it arises.”<sup>18</sup> I will begin by mapping the new landscape of treaty congestion and treaty conflict.

## I. A TYPOLOGY OF TREATY CONFLICTS

Although there are many ways to describe how treaties conflict, two descriptive methods are particularly relevant. The subject-matter perspective focuses on whether the treaties overlap in terms of substantive provisions. This perspective contrasts with structural analysis of treaty conflict, which looks at considerations such as the number of state parties, which states are parties to each treaty, and the general function of each treaty. Both the subject-matter perspective and structural analysis are needed to respond to the effects of treaty congestion.

### A. *The Subject-Matter Perspective*

A treaty may be defined as “a consensual agreement between two or more subjects of international law intended to be and considered by the parties as binding and containing rules of conduct under international law for at least one (normally for all) of the parties.”<sup>19</sup> While this is the broad definition of what may be considered a treaty under international law, the VCLT defines a treaty for its purposes as “an international agreement concluded between States in a written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>20</sup>

By its own terms, therefore, the VCLT does not apply to various international agreements that one would consider legally binding and/or “treaties” in the popular sense of the word. For example, an oral agreement between two countries does not fall under the purview of the VCLT, nor do agreements between states and multinational corporations, such as oil concessions. Conflicts involving agreements not governed by the VCLT would be resolved using

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18. Jenks, *Law-Making Treaties*, *supra* note 11, at 405.

19. Bernhardt, *supra* note 17, at 927.

20. VCLT, *supra* note 13, art. 2(1)(a).



general principles of interpretation, discussed below in Part II. Similarly, agreements between states and international organizations or among international organizations are not covered by the VCLT but are the domain of the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, which has the same treaty conflict provisions as the VCLT.<sup>21</sup>

The VCLT's conflict provisions apply only to successive treaties with the same subject-matter. This formulation has led to much debate over whether or not certain treaties are concerned with the "same subject-matter." For example, NAFTA and the General Agreement on Tariffs and Trade (GATT) cover much of the same subject-matter, although GATT covers many other subjects as well. Similarly, one can see that the Inter-American Convention on Human Rights and the International Covenant on Civil and Political Rights essentially cover the same subject-matter as well. While a case could be made either way, the stronger argument is that these treaties would meet any reasonable test for "same subject-matter."

Some of the most important potential conflicts arise, however, when treaties of seemingly different subject-matter overlap either in effect or in regulatory scope. The most common scenario is that of "trade linkage," such as where there are conflicts between trade and environmental treaties or between trade and human rights treaties.

Analyses focusing solely on overlapping subject-matter are often driven by a normative concern favoring one regime—the international trading system, the web of environmental agreements, and so forth—over another. Although it is important to consider the substantive results of treaty conflicts, it is important also to consider underlying structural issues. For example, the trade linkage scenarios can also be considered as part of a broader set of conflicts between liberalizing instruments and regulating instruments.<sup>22</sup> This requires thinking about the form and function of the treaties and of the international legal system itself, rather than only reviewing tactical considerations regarding two specific conflicting norms.

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21. Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, U.N. GAOR, U.N. Doc. A/Conf.129/15 (1986). As of March 16, 2005, this treaty has not come into force.

22. Jenks, *Law-Making Treaties*, *supra* note 11, at 415. Jenks noted that, at the time of his writing on treaty conflicts, the field of communications (e.g. radio and telecommunications) was an area of particularly serious conflicts. *Id.* at 416.

### B. *Treaty Architecture and Conflict*

In considering the form and function of treaties in the international system, one can describe treaties a number of ways. For example, treaties may be bilateral—between two parties—or multilateral. While many treaties can generally be described as liberalizing or regulating, such as the trade versus environment example above, a more precise examination of treaty norms reveals—as Pauwelyn describes—that norms in international law have one of four basic functions: (1) command norms obligating states to do something; (2) prohibitive norms obligating states not to do something; (3) exempting norms giving states the right not to do something; and (4) permissive norms giving states the right to do something.<sup>23</sup>

This characterization is important when comparing the legal obligations of two competing treaties. Treaties can also be categorized by analogy to domestic agreements, such as “legislative” or “contractual” treaties. Legislative treaties “lay down rules for the behaviour of the parties over a period of time in certain subject areas . . . [whereas contractual] treaties may provide for an exchange of certain goods or acts.”<sup>24</sup>

The VCLT does not formally recognize the categorization of treaties as legislative or contractual. Moreover, there is no formal hierarchy among treaties, with the possible exception of the U.N. Charter, which by its terms and the needs of the international community trumps all conflicting successive treaties.<sup>25</sup>

In the absence of a governing hierarchy, therefore, one can describe treaty conflicts on a systemic basis as being the conflict of universal, multilateral, or bilateral regimes with other universal, multilateral, or bilateral regimes.<sup>26</sup> I differentiate between multilateral treaties and universal treaties not because there is a technical legal difference between them, but in order to take into account cases where some multilateral treaties with limited membership (such as NAFTA or the European Union) may overlap with

23. PAUWELYN, *supra* note 8, at 158–59.

24. Bernhardt, *supra* note 17, at 929; *see also* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 25 (2001) (discussing “constitutional” versus “contractual” treaties).

25. U.N. CHARTER art. 103; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 323 cmt. b (1987).

26. This typology leads to six possible types of structural conflicts: (1) Universal/Universal; (2) Universal/Multilateral; (3) Universal/Bilateral; (4) Multilateral/Multilateral; (5) Multilateral/Bilateral; and (6) Bilateral/Bilateral. For each of these types of conflicts, it is also necessary to determine whether the treaties relate to the same or different subject-matter.

other multilateral treaties that are open to accession by any state (such as the U.N. Charter or the GATT).<sup>27</sup>

Commentators have focused on three broad structural categories of treaty conflicts: (1) conflicts between bilateral treaties; (2) the problem of increasing membership; and (3) the problem of decreasing membership. Conflicts between bilateral treaties occur when States A and B are parties to Treaty I, States A and C are parties to Treaty II, and A's obligations to C are incompatible with A's obligations to B. This can be diagrammed as AB:AC.<sup>28</sup>

Two examples of conflicts between bilateral and multilateral treaties are those of increasing membership (AB:ABCD) and decreasing membership (ABCD:AB).<sup>29</sup> The decreasing membership scenario is of particular interest and is often referred to as the problem of *inter se* agreements, or agreements between certain parties of an earlier treaty. The validity of *inter se* agreements is a vexing problem and will be considered in the discussion of *The Oscar Chinn Case*, below at Part II.C.3.

Additionally, one can envision a conflict between multilateral treaties where there is a partial unity of parties (ABCD:ABEF) and where the obligations of A and B to E and F are incompatible with those to C and D.<sup>30</sup>

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27. Also note that multilateral treaties may be one-issue treaties, or the constitutive treaties of regional organizations—such as the European Union (EU) or the Organization of African Unity. Regional organizations merit special mention as a particular case of treaty-making because, aside from the original constitutive treaty, regional organizations can often have a high density of regulatory activity, as in the E.U., or interpretative activity, as in NAFTA and the E.U. Generally speaking, states form regional organizations and assign to them decision-making capabilities to facilitate policy coordination through regularized channels of information sharing and institutionalized fora for policy discussion and negotiation. Coordination is predicated on the states involved having common areas of interest that can be used as a basis of ongoing cooperation. Consequently, the set of interstate responsibilities tend to be more robust within regional organizations. Additionally, while the intraorganizational obligations and rights may be coherent, there is an increased possibility of incoherence or conflict between a state's rights to the other members of its regional organization, as opposed to its responsibilities to non-member states with which it is a party to another treaty regime. There is also a related problem concerning directives from multiple regional organizations. A further form of conflict can thus be hypothesized specifically in the case of regional organizations: State A is a member of Regional Organizations I and II; Regional Organization I has promulgated Directive 1; Regional Organization II has promulgated Directive 2; both directives are binding on State A and they are incompatible with one another. Similar scenarios could include Directive 2 being incompatible with the constitutive treaty of Regional Organization I, and so forth.

28. See W. Czaplinski & G. Danilenko, *Conflict of Norms in International Law*, 21 NETH. Y.B. INT'L L. 3, 24 (1990). The designation of each treaty as Treaty I or II is based on which treaty was earlier (or later) in time.

29. See Karl, *supra* note 16, at 936.

30. *Id.*

The cases of complete unity of parties (AB:AB) have at times been dismissed as being of relatively little interest because the issue of treaty conflict is simply whether the later treaty was meant to supersede the earlier treaty. Such an analysis ignores the problem of two treaties that may not be concerned with the same subject, which nonetheless overlap in a manner such as that one treaty could frustrate the purpose of the other. Thus, while there may be no intent to supersede the earlier treaty, the later treaty may nonetheless render it dysfunctional.

The variety of treaty conflicts has led to a number of possible solutions, including techniques of drafting treaties, the application of general principles of law and interpretation, and ultimately, codified rules in the VCLT. While all of these potential solutions co-exist, their relationship to each other is at times uneasy. Moreover, in practice very few of these potential solutions are used effectively. I will turn to each of these approaches and assess the theory of conflict resolution that animates each technique. I will then compare and contrast this assessment with the ways in which states do or do not deploy these strategies.

## II. PREVENTIVE ACTION AND GENERAL PRINCIPLES

In 1917, the international lawyer Quincy Wright summarized treaty conflict resolution rules as follows:

[W]here the signatories are the same, the later [treaty] rules, but where the signatories are different the earlier rules, for in that case one of the signatories of the first treaty, not having assented to its abrogation, the other signatory was not competent to abrogate it alone, by the conclusion of a conflicting treaty with a third state.<sup>31</sup>

Thirty-five years later, in 1952, Hans Aufricht provided the following basic methods of resolving a conflict: (1) finding that the later treaty supersedes the earlier; (2) using an express declaration in the later treaty to repeal the earlier treaty; (3) including a declaration in the later treaty that it is not at variance with the earlier treaty; (4) including a provision that no conflicting later treaties may be concluded; and (5) forming an agreement to promulgate new terms and supersede currently existing treaty obligations.<sup>32</sup>

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31. Quincy Wright, *Conflicts Between International Law and Treaties*, 11 AM. J. INT'L L. 566, 576 (1917) (citations omitted).

32. Hans Aufricht, *Supersession of Treaties in International Law*, 37 CORNELL L.Q. 655, 656-57 (1952).

While there are some similarities in both descriptions, they are especially notable for their use of different techniques. Wright focuses on structural aspects, such as the identities of the parties to the treaties, while Aufricht is more concerned with the actual substance of the treaties. Taken together, though, these descriptions provide a succinct summary of the main alternatives to the VCLT for treaty conflict resolution. I will turn to these techniques and doctrines, which were used to resolve treaty conflicts prior to the codification of the VCLT, in order to understand their doctrinal outlook and assess their efficacy in actual cases. Based on this analysis, I will discern the shortcomings the drafters of the VCLT attempted to address with the codification of the VCLT.

### A. *Drafting Techniques*

The best solution to treaty conflicts is to prevent potential problems from occurring in the first place. Thoughtful drafting of treaty provisions is probably the most effective way to avoid or resolve potential treaty conflicts.<sup>33</sup> A well wrought treaty obviates the need for other tools; if the treaties are not actually incompatible, then there is no need to resort to the VCLT or general principles of interpretation.<sup>34</sup> The two basic types of clauses are: (1) clauses that provide for the priority of the present treaty; and (2) clauses that provide for the priority of another treaty.<sup>35</sup>

The first basic type—clauses that provide for the priority of the present treaty—state that the current treaty will supersede conflicting treaties. Hans Blix and Jirina Emerson catalogued six general subtypes of such clauses: (1) the present treaty prevails over all other treaties; (2) the present treaty prevails over all earlier treaties; (3) the present treaty prevails over earlier treaties for parties to the present treaty; (4) the parties to the present treaty undertake an obligation not to enter into later treaties inconsistent with the present one; (5) supplementary agreements are permitted only if they are compatible with the present treaty; and (6) the parties to

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33. See, e.g., Karl, *supra* note 16, at 936.

34. See *id.* (stating that “[i]ncompatibility of contents is an essential condition of conflict”).

35. THE TREATY MAKER'S HANDBOOK 210–22 (Hans Blix & Jirina H. Emerson eds., 1973). Anthony Aust also sets out a typology of different types of conflict avoidance clauses. Examples include: “The treaty prevails over all other treaties past, and future,” ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 174 (2000); “[t]he parties shall not enter into later inconsistent treaties,” *id.* at 175; “[a]n existing treaty shall not be affected,” *id.* at 176; “[f]or parties to it the treaty prevails over earlier treaties,” *id.* at 177; “[c]ompatible supplementary treaties are permitted,” *id.* at 179.

the present treaty undertake an obligation to modify existing treaties that they may have with third parties.<sup>36</sup>

A clause may be written to apply to specific agreements, as in the case of the Food Aid Convention of 1999, which states in Article XXVI that “[t]his Convention shall replace the Food Aid Convention, 1995, as extended, and shall be one of the constituent instruments of the International Grain Agreement, 1995.”<sup>37</sup>

Clauses prohibiting later conflicting treaties specifically state that signatories shall not enter into later treaties that would conflict with the current agreement. Article 8 of the NATO Treaty is an example of such a clause: “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.”<sup>38</sup>

Related to this is the special case of the U.N. Charter, which “prevails over all other treaties past and future.”<sup>39</sup> The International Court of Justice (ICJ) analyzed U.N. Charter Article 103 in the *Lockerbie Case*, where it found that, because a Security Council Resolution was promulgated under the auspices of the UN and thus under Article 103, such a resolution trumped any conflicting treaty including, in this case, the Montreal Convention.<sup>40</sup>

The second basic type—clauses providing for the priority of another treaty—state that one or more treaties should be given priority over the current treaty. Aust has styled this clause to mean that “an existing treaty shall not be affected.”<sup>41</sup> Blix and Emerson list four general subtypes of clauses in this category: (1) existing treaties prevail; (2) existing or future treaties giving greater benefits prevail; (3) present treaty is modified to conform to a future treaty; and (4) supplementary agreements, not necessarily consistent with the present treaty, are permitted.<sup>42</sup>

36. THE TREATY MAKER'S HANDBOOK, *supra* note 35, at 210–17.

37. Food Aid Convention of 1999, Apr. 13, 1999, art. XXVI, 2073 U.N.T.S. 135.

38. North Atlantic Treaty, Apr. 4, 1949, art. 8, 63 Stat. 2241, 34 U.N.T.S. 243, 248.

39. AUST, *supra* note 35, at 174.

40. *Id.* at 175 (citations omitted); Karl, *supra* note 16, at 939. Article 103 of the U.N. Charter states that “[i]n 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.” U.N. CHARTER art. 103.

41. AUST, *supra* note 35, at 176.

42. THE TREATY MAKER'S HANDBOOK, *supra* note 35, at 217–22.

Article 90 of the U.N. Convention on Contracts for the International Sale of Goods, provides the following example:

This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the parties have their places of business in States parties, to such agreement.<sup>43</sup>

Other phrases typical in such clauses would involve some declaration that the present treaty is "compatible with, or not to be construed as impairing" an earlier treaty.<sup>44</sup> This is exemplified by Article 4(2) of the 1991 Protocol on Environmental Protection to the Antarctic Treaty, which states that "[n]othing in this Protocol shall derogate from the other instruments in force within the Antarctic Treaty system."<sup>45</sup>

Clauses providing for the priority of the existing treaty or the priority of another treaty may both exist within a single text. A treaty may use a combination of these clauses to provide a comprehensive description of its relation to other treaties. Article 311 of the U.N. Convention on the Law of the Sea (UNCLOS) plays such a role, stating:

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

This Convention shall not alter the rights and obligations of States parties which arise from other agreements compatible with this Convention and which do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.

Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.<sup>46</sup>

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43. U.N. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 90, S. TREATY DOC. NO. 98-9 (1998), 1489 U.N.T.S. 3.

44. Karl, *supra* note 16, at 939.

45. Aust, *supra* note 35, at 177 (quoting Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, S. TREATY DOC. NO. 102-22, 30 I.L.M. 1455, 1463).

46. United Nations Convention on the Law of the Sea, Dec. 10, 1982, art. 311, 1833 U.N.T.S. 397.

If there are no such express provisions of priority within the four corners of the agreements, or if any such clause is ambiguously worded, one would turn to principles of treaty interpretation and the law of treaty conflicts to resolve a dispute.

### B. *General Principles of Interpretation*

Prior to the VCLT, policymakers relied primarily on general rules of interpretation derived from Roman law and from domestic canons of statutory or contractual construction.<sup>47</sup> Whether any of these principles has achieved the status of customary international law is a matter of debate, but regardless, they continue to play an important role in textual analysis in determining whether treaties conflict by their terms and, if so, ascertaining the possible resolutions.<sup>48</sup> General principles have been used in cases prior to the enactment of the VCLT and, after the VCLT's entry into force, as a supplement to its codified norms. While an exhaustive review of general principles of interpretation is worthy of a book of its own, for the purposes of this Article, certain norms are of special interest.

Certain rules of interpretation focus on which treaty is earlier or later in time. *Lex prior*, for example, would specifically enforce the first—or earlier—treaty. This rule is focused on cases where there is a divergent membership between the two treaties.<sup>49</sup>

By contrast, *lex posterior derogat legi priori* (*lex posterior*) considers the evolving intent of the parties and favors the most recent treaty by the same parties. *Lex posterior* was applied by the Permanent Court of International Justice (PCIJ) in numerous cases including the *Mavrommatis Concession Cases* and the *Electricity Company of Sofia*

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47. The terms "construction" and "interpretation" have been used as different aspects of analyzing what a statutory or contractual text "means." Although these terms are distinguished by some academic authors, I will use them interchangeably here.

48. "General principles" refer to common principles and practices among the major legal systems of the world. Consequently, researching general principles is generally viewed as an exercise in comparative law. See Wolfgang Friedmann, *The Uses of "General Principles" in the Development of International Law*, 57 AM. J. INT'L L. 279, 282 (1963). But see Christopher A. Ford, *Judicial Discretion in International Jurisprudence: Article 38(1)(c) and "General Principles of Law"*, 5 DUKE J. COMP. & INT'L L. 35, 66–72 (1994) (critiquing comparativism as a technique). The goal is not to find a rule that is recognized in all the major systems of the world, but rather "that in applying [such a 'general principle'] he will not be doing violence to the fundamental concepts of any of those systems." H.C. GUTTERIDGE, *COMPARATIVE LAW* 65 (2d ed. 1949). Different authors have differing views of what constitutes the major legal systems of the world, but one will likely need to consider common law and civil law (with possible subdivisions into those based on the Napoleonic Code or the German system), as well as Islamic and Chinese systems, and quite possibly others as well.

49. Karl, *supra* note 16, at 937.



*Case*.<sup>50</sup> Aufricht's summary of pre-VCLT treaty conflict resolution techniques focused on *lex posterior*. In his view, there were five requirements for *lex posterior* to work: (1) the later treaty has the same subject as the earlier treaty; (2) the later treaty covers the same parties as the earlier treaty; (3) the later treaty is on the same level or a higher level as the earlier treaty; (4) the scope of the later treaty is of the same degree of generality as the earlier treaty; and (5) the legal effect or effects of the later treaty are different from the earlier.<sup>51</sup>

Andrea Schulz, in analyzing treaty conflict rules in a study for the Hague Conference on Private International Law, notes that where neither treaty is clearly more specific, neither *lex prior* nor *lex posterior* "[has] been generally accepted as default rules of unwritten public international law."<sup>52</sup> Neither rule of interpretation, therefore, has risen to the level of becoming a customary rule.

Another frequently invoked interpretive rule is *pacta sunt servanda*. Meaning "the agreement shall be honored," this norm is considered a cornerstone of international law and has been codified as Article 26 of the VCLT.<sup>53</sup> While the application of *pacta sunt servanda* is generally accepted, however, its actual effect in a case of conflicting treaties is not universally agreed upon.

Some scholars interpret *pacta sunt servanda* as not favoring the earlier treaty but rather making each treaty enforceable, even though they may pose potentially incompatible obligations.<sup>54</sup> Others, however, claim that *pacta sunt servanda* favors the earlier treaty. Aufricht, for example, argues that *pacta sunt servanda* would "interdict" a later treaty between State A and State C if it was without the consent of State B and would "be at variance with previous treaty obligations" of either A or C toward B.<sup>55</sup> Note that under either theory it is clear that Treaty I shall be honored unless a State makes the policy choice of breaching and incurring responsibility.

50. *Id.* (citing *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.), 1924 P.C.I.J. (ser. A) No. 2, at 31 (Aug. 30); *Electricity Company of Sofia*, 1939 P.C.I.J. (ser. A/B) No. 77, at 92 (Apr. 4)); *see also* Jurisdiction of the European Commission of the Danube Advisory Opinion, 1927 P.C.I.J. (ser. B) No. 14, at 23 (Dec. 8).

51. Aufricht, *supra* note 32, at 700.

52. ANDREA SCHULZ, THE RELATIONSHIP BETWEEN THE JUDGMENTS PROJECT AND OTHER INTERNATIONAL INSTRUMENTS 14 (Hague Conference on Private International Law, Prel. Doc. No. 24, 2003), [http://hcch.e-vision.nl/upload/wop/genaff\\_pd19e.pdf](http://hcch.e-vision.nl/upload/wop/genaff_pd19e.pdf) (last visited Mar. 16, 2005).

53. VCLT, *supra* note 13, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

54. *See, e.g.*, Schulz, *supra* note 52, at 14.

55. Aufricht, *supra* note 32, at 672-73.

The disagreement concerns the effect of *pacta sunt servanda* on Treaty II: Is the second treaty abrogated or should it simply be followed to the fullest extent possible without frustrating the first treaty?

While this question has stirred much debate among jurists, as in the cases discussed below, the view that the second treaty is automatically “interdicted” is less persuasive as it collapses *pacta sunt servanda* with the *lex prior* rule. By contrast, interpreting *pacta sunt servanda* such that each treaty would remain in effect would give this rule a meaning different from either *lex prior* or *lex posterior*. Rather than assigning automatic priority to either the earlier or the later treaty, this interpretation of *pacta sunt servanda* would thus give the state the choice and risk of breaching either or both treaties depending on the obligations of the treaties and the state’s actions. This opens the door to state responsibility and places the burdens on the potentially breaching state or states to negotiate a solution.

Instead of deciding which treaty controls based on the order of the conclusion of the treaties in conflict, the interpretive rule *lex specialis* focuses on the scope and precision of the treaties, giving effect to the more narrowly gauged treaty. While this interpretive norm is not used in the VCLT, *lex specialis* has traditionally been applied in conflicts between multilateral treaties of general application and in special international regimes for specific issue areas.<sup>56</sup> *Lex specialis* can also be formulated to focus on the breadth or narrowness of specific clauses. Scope of issue area is not the only way to interpret *lex specialis*; some have argued that regimes that cover only a few states or a specific geographic area may be considered *lex specialis*. When applied to treaties as a whole, the *lex specialis* rule is usually read to mean that the specific treaty supersedes the general treaty. In applying *lex specialis* to conflicts between specific and general clauses in two instruments, there are three possible scenarios: (1) the *lex specialis* rule is applied such that the specific clause cancels out the general clause; (2) the specific clause is deemed supplementary to the general clause; or (3) the general clause is considered as overriding the specific clause.<sup>57</sup>

It is not uncommon to see more than one of these general principles of interpretation being used to resolve a treaty conflict. *Lex specialis* and *lex posterior* are often used in conjunction with one

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56. Jenks, *Law-Making Treaties*, *supra* note 11, at 414.

57. Aufricht, *supra* note 32, at 697.

another when the narrower treaty is also the later treaty.<sup>58</sup> While these general principles may dovetail in certain instances, inasmuch as they are adopted in large part from domestic canons of statutory construction, it should be of little surprise that many of these general principles conflict with one another. In his famous article on domestic statutory interpretation, *Canons of Construction*, Karl Llewellyn showed that "there are two opposing canons on almost every point."<sup>59</sup> The same holds true for general principles applicable to the interpretation of treaties. For example, there is at the very least a tension between the notions of *lex posterior* (favoring the later treaty) and *pacta sunt servanda* (favoring the earlier treaty), if not an outright clash of norms.

The catalog of interpretative canons led to a lack of certainty not only as to how a treaty *should* be interpreted but also as to how it would *in fact* be interpreted, thus decreasing the value of the treaty itself, as it was no longer as effective in reducing future uncertainty. Interpretative ambiguity implicates the perceived efficacy of treaties. The response of the international community was to enact a bright line rule that would set forth how future treaties would be formed and interpreted, as well as how conflicts between them would be resolved. Like other efforts at codification, the end result defined certain key factors which may or may not have previously been the focus of debate, but ultimately became issues of material importance in resolving treaty conflicts. For the VCLT, the inquiry into resolving treaty conflicts focused on whether or not the treaties were "successive" and whether or not they concerned the "same subject-matter." The strengths or flaws of the VCLT will turn on whether these conceptions are responsive to the current needs of the international community.

### C. *Treaty Conflicts Prior to the Vienna Convention on the Law of Treaties*

The majority of reported international tribunal cases explicitly addressing the resolution of two conflicting treaties were decided during the period between World War I and World War II. Some of the prominent decisions concerning treaty conflict from this interwar period are helpful in tracing the evolution of the doctrine that was forming at the time.

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58. *Id.* at 698-99.

59. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950).

## 1. *Costa Rica v. Nicaragua*, 1916

In 1916 the Central American Court of Justice (CACJ) heard a treaty dispute which had a significant effect not only on the law of resolving treaty conflicts but also on Central American politics and the role of international dispute resolution.<sup>60</sup> At issue was the use of the San Juan River, which is shared by Costa Rica and Nicaragua. In 1858 these countries entered into the Cañas-Jerez Treaty, which provided, in part:

Article 6. The Republic of Nicaragua shall have exclusive dominion and the highest sovereignty over the waters of the San Juan River . . . but the Republic of Costa Rica shall have in those waters perpetual rights of free navigation . . . .

Article 8. . . . Nicaragua agrees not to conclude [any contracts for canalization or transit subsequent to this treaty] without first hearing the opinions of the Costa Rican Government respecting the disadvantages that may result to the two countries . . . and in the event that the enterprise should cause no injury to the natural rights of Costa Rica, that opinion shall be advisory.<sup>61</sup>

The Cañas-Jerez Treaty soon became a focal point of interpretive disputes between Nicaragua and Costa Rica, culminating in the two states seeking binding arbitration. U.S. President Grover Cleveland sat as the sole arbitrator and issued an award in 1888 that found that Costa Rica had a right to navigate the San Juan River (within certain geographic limits) for commercial purposes and that:

10. The Republic of Nicaragua remains bound not to make any grants for canal purposes across her territory without first asking the opinion of the Republic of Costa Rica . . . .

11. The Treaty . . . does not give the Republic of Costa Rica the right to be a party to grants which Nicaragua may make for interoceanic canals; though in cases where the construction of the canal will involve injury to the natural rights of Costa Rica, her opinion or advice . . . should be more than “advisory” or “consultative.”<sup>62</sup>

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60. *Costa Rica v. Nicaragua*, 11 AM. J. INT’L L. 181 (Cent. Am. Ct. J. 1916); *see also* *El Salvador v. Nicaragua*, 11 AM. J. INT’L L. 674 (Cent. Am. Ct. J. 1917) (concerning whether the Bryan-Chamorro Treaty violated the 1907 Treaty of Amity among the Central American states). *See generally* PROJECT ON INTERNATIONAL COURTS AND TRIBUNALS, CENTRAL AMERICAN COURT OF JUSTICE INFORMATION PAGE (n.d.) (information regarding the Central American Court of Justice (CACJ)), at <http://www.pict-pecti.org/courts/CACJ.html> (last visited Mar. 10, 2005); GUYORA BINDER, TREATY CONFLICT AND POLITICAL CONTRADICTION 22 (1988).

61. *Costa Rica v. Nicaragua*, 11 AM. J. INT’L L. at 192–93 (quoting Cañas-Jerez Treaty, Apr. 15, 1858, Costa Rica-Nicar., art. 6, art. 8, 118 Consol. T.S. 440).

62. *Id.* at 194 (quoting Cleveland Award, March 22, 1888).

In July 1913 a Costa Rican newspaper published the text of a treaty it claimed had been secretly entered into by Nicaragua and the United States concerning the construction of a canal utilizing the San Juan River. The Costa Rican Ambassador to Nicaragua sought an assurance from Nicaragua stating "categorically whether the text of said convention as therein published is authentic, as well generally as in each of its paragraphs, and, if not, that you make the appropriate corrections."<sup>63</sup>

The Nicaraguan Secretary of Foreign Relations replied in August of that year that his government was "keeping secret the convention entered into with the United States . . . and that, since it relates to a pact not yet perfected, it is not proper for the Government of Nicaragua, on its part . . . to make any official declaration regarding any of the steps in such negotiations."<sup>64</sup> The Costa Rican government learned from non-official sources that same month that the U.S. Senate had had before it a treaty with Nicaragua concerning a canal project but that the treaty had been withdrawn and was being replaced by a new text. Costa Rica was able to learn nothing more from Nicaragua or the United States and subsequently assumed that the project was dead.

Then, in February 1916, the Costa Rican Ambassador to the United States saw a small item in the *Washington Star* reporting that a canal treaty that had been previously signed by the United States and Nicaragua was being reported out of the Senate Foreign Relations Committee for advice and consent of the full Senate.

The Bryan-Chamorro Treaty was ratified by the United States on February 18, 1916.<sup>65</sup> Its first operative article states:

Article I. The Government of Nicaragua grants in perpetuity to the Government of the United States, forever free from all taxation or other public charge, the exclusive proprietary rights necessary and convenient for the construction, operation, and maintenance of an interoceanic canal by way of the San Juan River and the great Lake of Nicaragua or by way of any route over Nicaraguan territory, the details of the terms upon which such canal shall be constructed, operated, and maintained to be agreed to by the two Governments whenever the Government of the United States shall notify the Government of Nicaragua of its desire or intention to construct such canal.<sup>66</sup>

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63. *Id.* at 187.

64. *Id.* at 187-88.

65. Bryan-Chamorro Treaty, Feb. 18, 1916, U.S.-Nicar., 34 Stat. 1661.

66. *Id.* art. I.

Costa Rica filed suit against Nicaragua before the CACJ to determine whether the conclusion of the Bryan-Chamorro Treaty violated Nicaragua's obligations and/or Costa Rica's rights under the Cañas-Jerez Treaty—this case thus concerned two bilateral treaties with a partial diversity of parties. Costa Rica's argument turned more on contract theory than on international legal doctrine, focusing on the texts of the treaties, as "it is to those instruments alone that she must have recourse for the solution of the difference that has arisen, for the contract is the supreme law between the parties whether they be simple individuals or collective political entities."<sup>67</sup> Costa Rica argued that Nicaragua "could not dispose unrestrictedly of the San Juan River" and that "by virtue of the Cañas-Jerez Treaty and the Cleveland Award, Costa Rica has a *consultative* voice which Nicaragua *must* invoke" in cases such as this.<sup>68</sup> Costa Rica sought an order from the CACJ declaring the Bryan-Chamorro Treaty null and void.

Among other arguments, Nicaragua responded that "absolutely nothing" in the Bryan-Chamorro Treaty "refers to a sale; an option only is stipulated for the conclusion of a treaty at the appropriate time."<sup>69</sup> Consequently, Nicaragua argued, it would be impossible to know if and when there actually would be a canal project and, if so, whether it would be built via the San Juan River or using another route.

The CACJ found that Nicaragua had been under a legal obligation to consult with Costa Rica and that Costa Rica "possess[ed] the right to be heard decisively" regarding any possible canal with a San Juan River route, although not for any other possible route.<sup>70</sup> Moreover, the CACJ was not persuaded by Nicaragua's defense that the Bryan-Chamorro Treaty only granted an option; rather, the treaty "effects a perfect sale" because "[t]o grant in perpetuity' is to alienate, to transfer ownership . . ." whereas there is no such alienation in an option.<sup>71</sup> The CACJ concluded that the ratification of the Bryan-Chamorro Treaty violated the rights granted to Costa Rica in the Cañas-Jerez Treaty. Thus, the *lex prior* treaty controlled.

One could argue that the original agreement between Nicaragua and Costa Rica was honored due to the doctrine of *pacta sunt ser-*

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67. *Costa Rica v. Nicaragua*, 11 AM. J. INT'L L. at 198.

68. *Id.* at 197–98 (emphasis added).

69. *Id.* at 204.

70. *Id.* at 209.

71. *Id.* at 217–18.

*vanda*. This resolution, however, still leaves the legal status of Treaty II, the Bryan-Chamorro Treaty, an open question. After stating its legal conclusion regarding the primacy of the earlier treaty, the CACJ noted that it did not have jurisdiction over the United States. Although the United States was a party to Treaty II, it was not a party to the treaty establishing the CACJ's jurisdiction. Consequently, any attempt by the CACJ to declare the Bryan-Chamorro Treaty null and void would have no binding force on the United States.

The CACJ thus concluded as to the legal status of the Bryan-Chamorro Treaty that "this Court can make no declaration whatsoever."<sup>72</sup> The court declared that the later treaty violated Costa Rica's rights, but was silent regarding the treaty's legal status and as to remedies for Costa Rica.

## 2. *The Austro-German Customs Union, 1931*

Seven years prior to the *Anschluss* of 1938, in "one of the most difficult, and from some points of view, one of the most important" cases considered by the PCIJ, the court assessed the legality of a customs union that Germany and Austria sought to establish.<sup>73</sup> The Protocol of March 19, 1931 (1931 Protocol), signed by the two countries, set out their plan "to assimilate the tariff and economic policies of their respective countries."<sup>74</sup> The government of the United Kingdom, however, was concerned that the 1931 Protocol violated the terms of the Treaty of Saint-Germain, signed in September 1919 at the conclusion of World War I,<sup>75</sup> and of Protocol No. I to the Treaty of Saint-Germain, signed in Geneva in 1922 (1922 Protocol).<sup>76</sup> Consequently, the United Kingdom sought an advisory opinion from the PCIJ as to the legal status of the 1931 Protocol.

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72. *Id.* at 229.

73. ALEXANDER P. FACHIRI, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE: ITS CONSTITUTION, PROCEDURE AND WORK* 317 (2d ed. 1932). The Permanent Court of International Justice (PCIJ) was the precursor to the International Court of Justice (ICJ) and was part of the League of Nations. Many examples of treaty conflicts arose in the wake of the Treaty of Versailles as subsequent agreements were assessed in relation to the peace settlement. While *Customs Regime Between Austria and Germany*, 1931 P.C.I.J. (ser. A/B) No. 41 (Sept. 5), is one such example of a conflict leading to some insight, most "throw little light" on the general problem. Jenks, *Law-Making Treaties*, *supra* note 11, at 420 n.1.

74. *Customs Regime*, 1931 P.C.I.J. (ser. A/B) No. 41 at 50.

75. Convention Revising the General Act of Berlin, Sept. 10, 1919, 49 Stat. 3027, 8 L.N.T.S. 25 [hereinafter Treaty of Saint-Germain].

76. Restoration of Austria, Protocol No. 1 (Declaration), Oct. 4, 1922, 12 L.N.T.S. 386 [hereinafter 1922 Protocol].

Article 88 of the Treaty of Saint-Germain states that:

The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership in the League of Nations, by participation in the affairs of another Power.<sup>77</sup>

While the Treaty of Saint-Germain set forth the basic terms of the peace between the Allied Powers and Austria, the 1922 Protocol set forth the rights and responsibilities of France, the United Kingdom, Italy, and Czechoslovakia on the one hand, and Austria on the other, in the context of economic aid being granted by these particular Allied Powers to Austria. In this respect, Austria promised "in accordance with the terms of Article 88 of the Treaty of Saint-Germain, not to alienate its independence; it will abstain from any negotiations or from any economic or financial engagement calculated directly or indirectly to compromise this independence."<sup>78</sup>

The question before the PCIJ was "whether, from the point of view of law, Austria could, without consent of the Council [of the League of Nations], conclude with Germany the customs union . . . without committing an act which would be incompatible with the obligations she had assumed under the provisions quoted above."<sup>79</sup> Such a formulation did not question whether the *act of ratifying* the 1931 Protocol was a breach of the Treaty of Saint-Germain and the 1922 Protocol; rather, it asked whether *undertaking the acts contemplated* in the latter protocol would violate the earlier agreements. The PCIJ was comparing two earlier-in-time multilateral treaties (the Treaty of Saint-Germain and the 1922 Protocol) with one later bilateral treaty (the 1931 Protocol) where there was a diversity of parties between the later bilateral treaty and each of the earlier multilateral treaties.

The PCIJ concluded that although the proposed customs union itself would not alienate Austria's independence and thus not cause a problem under the Treaty of Saint-Germain. However, the PCIJ reasoned that

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77. *Id.* art. 88.

78. *Customs Regime*, 1931 P.C.I.J. (ser. A/B) No. 41 at 43 (quoting 1922 Protocol, *supra* note 76).

79. *Id.* at 45.



[i]f the regime projected by the [1931 Protocol] be considered as a whole from the economic standpoint adopted by the [1922 Protocol], it is difficult to maintain that this regime is not calculated to threaten the economic independence of Austria and that it is, consequently, in accord with the undertakings specifically given by Austria in [the 1922 protocol] with regard to her economic independence.<sup>80</sup>

The PCIJ thus concluded, by a vote of eight to seven, that such a regime "would not be compatible" with the 1922 Protocol.<sup>81</sup>

As with the CACJ's *San Juan River Case*, the *Austro-German Customs Union* opinion is as interesting for what it does not say as for what it does say. Although the PCIJ found that the 1931 Protocol would not be compatible with the 1922 Protocol, it does not say what should be done. As this was an advisory opinion, no remedies were ordered or damages awarded. The PCIJ simply gave a statement as to compatibility. While the implication is that the later treaty would be held void, the PCIJ does not actually state this conclusion at any point. Thus the PCIJ found, in a manner similar to the CACJ, that *lex prior* was the implicitly favored method of conflict resolution, though the PCIJ did not explicitly void the later treaty. This follows Quincy Wright's explanation that where there is a diversity of parties, the earlier treaty remains effective.

### 3. *The Oscar Chinn Case*, 1934

The *Oscar Chinn Case*<sup>82</sup> was concerned with the regulation of river commerce in the Congo Basin, which was administered by Belgium as a colonial power. Belgium had enacted new commercial regulations that, Oscar Chinn, a British citizen argued, had the effect of driving some businesses into bankruptcy. Chinn owned one of those businesses, and the United Kingdom argued the case on his behalf before the PCIJ. At issue was whether the Belgian regulations violated Belgium's obligations under international law. The court concluded that they did not, but did not clarify which international legal obligations were implicated. The United Kingdom and Belgium were parties to two treaties concerning commerce in the Congo Basin: the Berlin Act of 1885,<sup>83</sup> which had thirteen signatories, and the Convention of Saint-Germain of 1911,

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80. *Id.* at 52.

81. *Id.* at 53.

82. *Oscar Chinn (U.K. v. Belg.)*, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12).

83. General Act of the Conference of Berlin Respecting the Congo, Feb. 26, 1885, 23 Stat. 332, 165 Consol. T.S. 485, *reprinted in* 3 AM. J. INT'L L. SUPP. 7 (1909) [hereinafter *Berlin Act*].

which was an *inter se* agreement among only some of the parties who had been party to the Berlin Act. The United Kingdom argued that the Convention superseded the Berlin Act and that the Belgian law violated Belgium's obligations under the Convention.

The PCIJ's opinion in *Oscar Chinn* did not turn on an issue of a treaty conflict. In fact, the majority did not even perceive that such a conflict was an issue before them. According to three dissenting judges, this was a grave error. Their opinions shed light on the jurisprudence of treaty conflicts prior to the VCLT, as they grappled with the question of the effect of a conflict on the later *inter se* agreement.

Sir Cecil Hurst of the United Kingdom noted in his dissenting opinion that the PCIJ should have considered whether the convention superseded the Berlin Act as between the United Kingdom and Belgium. At issue, in his view, was whether Belgium and the United Kingdom had pledged "by the terms of the Berlin Act not to terminate or to modify, even as between themselves, the provisions of that instrument except in agreement with all other States which were parties to it."<sup>84</sup> According to Judge Hurst, there were two possible results: (1) that "a new treaty made in violation of such a pledge would be devoid of juridical effect"; or (2) that such a treaty "would merely be a wrongful act entitling a State which was not a party to the Convention of Saint-Germain, but was a party to the Berlin Act, to demand reparation."<sup>85</sup> Judge Hurst did not conclude which result this case would produce.

Judge van Eysinga, however, decided to address this issue directly in his dissenting opinion. He reasoned that the Saint-Germain Convention was an *inter se* agreement by some of the parties to the Berlin Act and was prohibited by the terms of Article 36 of the Berlin Act, which stated: "The signatory Powers of the present General Act reserve to themselves to introduce into it subsequently, *and by common accord*, such modifications and improvements as experience may show to be expedient."<sup>86</sup>

The Berlin Act does not include any means of denunciation or concluding *inter se* agreements.<sup>87</sup> In contrast to the contractual reasoning used by the CACJ in the case concerning the San Juan River canal, the interpretive style used by Judge van Eysinga and

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84. *Id.* at 122.

85. *Id.* at 123.

86. *Id.* at 133 (van Eysinga, J., dissenting) (emphasis added) (quoting Berlin Act, *supra* note 83, art. 36).

87. *Id.*

the other dissenters likens the Berlin Act to legislation rather than to contract:

The General Act of Berlin does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute a *jus dispositivum*, but it provides the Congo Basin with a régime, a statute, a constitution. This régime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Powers is required.<sup>88</sup>

Moreover, Judge van Eysinga argued that the validity of the Convention of Saint-Germain did not rely on "whether or not any government has disputed its validity[.]"<sup>89</sup> The unstated implication of his argument is that, due to the obligations under the Berlin Act, the Convention of Saint-Germain was not valid.

Judge van Eysinga went further than Judge Hurst. Rather than just spotting the issue that the Berlin Act and the Convention of Saint-Germain might conflict, he concluded that they do conflict and that the earlier treaty should control. He further implied that the later treaty was invalid. But this final point, the legal status of the later treaty, is the question that still bedevils the international legal community. Is it actually invalid or just of secondary importance to the earlier treaty?

In his dissent, Judge Schücking observed that international legal doctrine concerning the validity of a later-in-time treaty "is not very highly developed."<sup>90</sup> Nonetheless, he believed that the majority's implied analysis—that the later treaty can be valid until signatories to the earlier treaty assert their rights—is incorrect, as it did not conform with the *intention* of the states that drafted the Berlin Act. Inasmuch as they intended to draft an act that could not be modified by a later *inter se* agreement, no such later treaty could be valid. By this argument, the later treaty would be "automatically null and void."<sup>91</sup>

All of these discussions however, are in the dissenting opinions. As the conflict issue was not discussed in the majority's opinion (beyond a reference that both Belgium and the United Kingdom are signatories to the Convention of Saint-Germain, and that neither party said it should not apply), whether the majority would agree with the reasoning of any of the dissenters as to how to

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88. *Id.* at 133–34.

89. *Id.* at 135.

90. *Id.* at 148 (Schücking, J., dissenting).

91. *Id.* at 149.

resolve a treaty conflict is left to conjecture. As Guyora Binder explained,

[s]ome scholars have argued that the majority's rejection of [the position of the dissenters] indicated a repudiation of the view that the latter of two conflicting treaties is void. To the extent that the majority addressed the issue, however, they were non-committal; thus, most scholars have considered the case inconclusive.<sup>92</sup>

#### D. Analysis

While Binder is correct that the *Austro-German Customs Regime* case is inconclusive, read in conjunction with the other cases, it is possible to discern patterns and similarities. Where there was a diversity of parties between the first and second treaty, the PCIJ and the CACJ tended to find that the earlier treaty, the *lex prior*, was still in effect as a matter of doctrine. Although they relied on *lex prior*, the courts nonetheless showed a reluctance to void the later treaty either on jurisdictional grounds as illustrated in *San Juan River*, or by not explicitly recognizing that the later treaty conflicted with the earlier treaty, as evident in *Oscar Chinn*. Rather, the *Austro-German Customs Regime* case and the *Oscar Chinn* dissent exemplify the observation that since "tacit or implied abrogation [of an earlier treaty] is not favored," where a later treaty may conflict with an earlier treaty, courts are likely to attempt to harmonize the treaties absent an explicit conflict.<sup>93</sup> Sir Humphrey Waldock, the third Rapporteur on the Law of Treaties for the ILC, "point[ed] out that the jurisprudence of the Permanent Court, particularly in the *Oscar Chinn* and *European Commission of the Danube* cases, had rejected inconsistency as a ground for invalidity."<sup>94</sup> These opinions imply that, while there was a doctrinal bias toward finding that the earlier treaty would remain in effect, none of the judges, except perhaps for Judge van Eysinga in his *Oscar Chinn* dissent, were comfortable with deciding that the later treaty must be void.

While the tribunals were reluctant to void later agreements, they also were not eager to actually ratify later *inter se* agreements. This was clearest in the *Oscar Chinn* dissents, but Hans Aufricht also read the *Austro-German Customs Regime* case as finding that the customs union was an *inter se* treaty that gave Germany certain privileges in

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92. BINDER, *supra* note 60, at 24.

93. Aufricht, *supra* note 32, at 657.

94. Kearney & Dalton, *supra* note 15, at 518.

its relationship with Austria when those privileges were denied to third parties.<sup>95</sup>

The PCIJ's *Oscar Chinn Case* is also notable for Judge van Eysinga's analogy to legislation, as opposed to the contractual reasoning in the CACJ's *San Juan River Case*. The Berlin Act was treated as a quasi-constitutional document, implicitly of a higher order than the subsequent *inter se* agreement. While such hierarchization is not required for van Eysinga's result, it provided rhetorical weight to his reasoning.

These early opinions highlighted three problems with pre-VCLT treaty conflicts doctrine. First, it was unclear when a treaty conflict actually existed. The *Oscar Chinn* dissenters brought this issue to the foreground by insisting that a treaty conflict existed but that the majority just did not see it—or if they did, they did not want to consider it.

The second main problem of the conflicts doctrine of that time was the disagreement over the status of the conflicting later-in-time treaty. In failing to apply the strict forms of *lex prior* or *lex posterior*, the courts seemingly did not want to find either that the earlier treaty controlled or that the later treaty abrogated it.

The *San Juan River Case* exemplified the third dilemma of conflicts doctrine: the limits of a decentralized legal system. Due to lack of jurisdiction, judges cannot affect the rights of third parties who are not part of the treaty system to which the court belongs. As the United States was not a signatory to the CACJ's foundational treaty giving that court jurisdiction, the CACJ held that it did not have the competence to render a decision invalidating the Bryan-Chamorro Treaty and thus affect the rights of the United States.

To address these weaknesses, as well as the vagueness of the general principles and customary rules governing treaty conflict resolution, the international community turned to codification of the rules. This codification, however, turned out to be a less than successful solution to treaty conflict resolution, and further led to new problems.

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95. Aufricht, *supra* note 32, at 678.

### III. THE VCLT AND THE MODERN RESPONSE TO TREATY CONFLICTS

#### A. *Codifying Conflict Rules*

The VCLT was but the latest attempt to codify the law of treaties. Jurists ranging from Bluntschli to David Dudley Field drafted various codifications.<sup>96</sup> Especially influential among these early efforts was the Harvard Law School's *Research in International Law*, which published a Draft Convention on the Law of Treaties in 1935.<sup>97</sup>

Only after the ILC set to the task of codification, however, did this project transform from mere aspiration to an actual concerted effort among states. A series of ILC Rapporteurs tackled the various issues of codification; unfortunately, they did not agree when it came to the issue of treaty conflicts. Sir Hersch Lauterpacht, in his first report to the ILC as the Rapporteur on the Law of Treaties, concluded that Treaty II "would be void if its performance involved breach of a treaty obligation previously undertaken by one or more of the contracting parties."<sup>98</sup> Next, Sir Gerald Fitzmaurice, Lauterpacht's successor, concluded that Treaty II would be invalidated *only* if its conflict with Treaty I concerned an issue of *jus cogens*—peremptory norms of international law; otherwise, the parties should reconcile amongst themselves incompatibilities between the treaties.<sup>99</sup> Ultimately, Sir Humphrey Waldock, the third Rapporteur, "abandoned the invalidity aspect" altogether.<sup>100</sup>

Although during their twenty years of study and drafting the ILC Rapporteurs held differing views as to the best methods for resolving treaty conflicts, the VCLT was finally completed and opened for signature in 1969. It came into force in 1980, and as of 2005, has ninety parties.<sup>101</sup> As with any treaty, only states that have signed and ratified the VCLT are bound by it. Nonetheless, a "good number of the Convention's provisions reflect pre-existing

96. See JOHANN KASPAR BLUNTSCHLI, *LE DROIT INTERNATIONAL CODIFIÉ: DES TRAITÉS* (3d. ed. 1881), reprinted in 29 AM. J. INT'L L. SUPP. 1208 (1935); DAVID DUDLEY FIELD, *OUTLINES OF AN INTERNATIONAL CODE: TREATIES* (1876), reprinted in 29 AM. J. INT'L L. SUPP. 1207 (1935).

97. HARVARD RESEARCH IN INT'L LAW, *DRAFT CONVENTION ON THE LAW OF TREATIES*, 29 AM. J. INT'L L. SUPP. 657 (1935).

98. SHABTAI ROSENNE, *BREACH OF TREATY* 86–87 (1985). This was slightly modified in Lauterpacht's second report "to refer specifically to a bilateral or a multilateral treaty or any provision thereof, while the last phrase of the condition was reworded to read 'to impair an essential aspect of [the prior treaty's] original purpose.'" *Id.* at 87.

99. *Id.*

100. Kearney & Dalton, *supra* note 15, at 518.

101. UNITED NATIONS, U.N. TREATY COLLECTION: ACCESS TO DATABASES, at <http://untreaty.un.org/English/access.asp> (last visited Mar. 10, 2005).

practices and the prevailing *opinio juris*.”<sup>102</sup> Although the international legal community largely views the VCLT as a codification of current customary international law, at the time of its conclusion there was no agreed-upon state practice for the resolution of treaty conflicts.<sup>103</sup>

As is generally the case in codifications, the VCLT attempts to draw bright line rules. The VCLT's treaty conflict rules appear in Article 30, and they apply to “successive treaties relating to the same subject-matter.”<sup>104</sup> Although originally a cause of some disagreement, states now generally agree that determining the time of the earlier treaty is based on date of adoption, not entry into force.<sup>105</sup>

Paragraph 2 of VCLT Article 30 gives treaty drafters the opportunity to decide how successive treaties should be prioritized with respect to their legal effect: “When a treaty specifies that it is subject to, or that it is not to be considered incompatible with, an earlier or later treaty, the provisions of the other treaty prevail.”<sup>106</sup> However, as will be evident, the most common problem is when the parties have not signaled their intentions. The VCLT then considers, in Paragraph 3, the case of complete unity of parties, stating that: “[if] the earlier treaty is not terminated or suspended under Article 59 [of the VCLT], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.”<sup>107</sup>

According to the ILC Commentary, Article 30 “comes into play only *after it has been determined under [Article 59] that the parties did not intend to abrogate, or wholly to suspend the operation of the earlier treaty.*”<sup>108</sup> Article 59, for its part, is of limited use, applying only

102. Bernhardt, *supra* note 17, at 927; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: INTERNATIONAL AGREEMENTS, Introductory Note (1987) (viewing VCLT as indicative of customary international law on treaties).

103. Schulz, *supra* note 52, at 13.

104. VCLT, *supra* note 13, art. 30(1).

105. AUST, *supra* note 35, at 183.

106. VCLT, *supra* note 13, art. 30(2).

107. *Id.* art. 30(3).

108. [1966] 2 Y.B. Int'l L. Comm'n 253; *see also* U.N. OFFICE OF LEGAL AFF., FINAL CLAUSES OF MULTILATERAL TREATIES: HANDBOOK 85, U.N. Sales No. E.04.V.3 (2003) (“[U]nless there is evidence of contrary intention, the parties are presumed to have intended to terminate or modify the earlier treaty when they conclude a subsequent treaty that is incompatible with the earlier one.”) [hereinafter MULTILATERAL TREATIES HANDBOOK], <http://untreaty.un.org/English/FinalClauses/Handbook.pdf> (last visited Mar. 18, 2005).

when all the parties to Treaty I are also parties to Treaty II.<sup>109</sup> Thus, if the earlier treaty is not completely abrogated, one applies Article 30, making the earlier treaty subsidiary to the later treaty. Furthermore, Article 30 provides that the earlier treaty only applies to the extent that it is compatible with the later treaty. In all other respects, the later treaty holds; thus, Article 30(3) effectively codifies the *lex posterior* rule.<sup>110</sup>

Article 30(4) considers the more difficult case of when the later treaty does not include all of the parties of the earlier treaty. The VCLT states that the rule set forth in Paragraph 3 (the *lex posterior* rule) applies to states that are party to both treaties. When one state is party to both treaties and another state is only party to one, then the treaty to which they both belong governs their relationship.<sup>111</sup>

Although the VCLT was a good attempt at a solution to the problem of treaty conflicts, its flaws are becoming more evident as state practice evolves. I will first turn to some of the problematic issues that have become apparent in the theory behind Article 30 and then, in Part C, consider how Article 30 and the related general principles have been applied in practice, or may be applied in certain scenarios.

## B. Codifying Solutions and Discovering New Problems

### 1. Discerning Which Treaties Have the Same Subject-Matter

First, by its terms, the VCLT is only applicable when supposedly conflicting treaties are successive and related to the "same subject-matter." Aust argued that "[t]he meaning of the expression 'relating to the same subject-matter' is not clear but should probably be construed strictly, so that the article would not apply when a general treaty impinges indirectly on the content of a particular provision of an earlier treaty."<sup>112</sup> Consequently, the VCLT is not applicable to the thornier issues of what happens when treaties have different foci but overlapping issue areas. Moreover, the Article 30 rules would not be well calibrated if applied to these dilemmas. For example, if States A, B, C, and D have a human rights

109. See E.M. Vierdag, *The Time of Conclusion of a Multilateral Treaty*, 59 BRIT. Y.B. INT'L L. 75, 91 (1988).

110. See MULTILATERAL TREATIES HANDBOOK, *supra* note 108, at 85 ("[I]n the case of successive treaties relating to the same subject-matter concluded among the same parties, the principle of *lex posterior derogat priori* applies.").

111. VCLT, *supra* note 13, art. 30(4).

112. AUST, *supra* note 35, at 183 (citations omitted).



treaty among themselves and then subsequently negotiate a trade agreement with implications concerning human rights, it is questionable whether one should simply conclude that the earlier human rights treaty applies only to the extent that its norms are consistent with the trade accord.

## 2. The Problem of Successive Treaties

The drafting of Article 30 presents yet another problem. Article 30 refers to "States parties to successive treaties," yet, as Vierdag points out, "a treaty that is only adopted has as yet no 'parties' in the sense of Article 2(1)(g) (a 'party' is a State bound by a treaty and for which the treaty is in force)."<sup>113</sup> The issue, therefore, is a question of when a state becomes bound by the rules of Article 30.

Vierdag argues that while Article 30 constructs a conflict resolution regime based on the idea of "successive" treaties, this "does not necessarily correspond at all with the actual acquisition of rights and the incidence of obligations under treaties in force by particular States parties to them."<sup>114</sup>

## 3. The Written and Unwritten Rules of Conflict Resolution

The VCLT is not merely a summary of the rules of conflict resolution. Rather, it is one aspect of treaty conflict resolution that may affect certain cases. Alongside the VCLT, the general principles of treaty conflicts still exist, as do various drafting and procedural techniques, such as clauses of abrogation and precedence. Andrea Schulz's gloss on the current conflict rules (incorporating both the VCLT and general principles) is that

in the absence of a clause [of precedence or abrogation,] the prevailing treaty would normally be the more specific one, no matter whether it is earlier or later than the more general treaty . . . . If none of the instruments concerned is more specific than the other, the more recent treaty will prevail in case of incompatibility of individual provisions.<sup>115</sup>

According to Schulz, the "same subject-matter" clause is generally read narrowly in order to have recourse to the *lex specialis* rules.<sup>116</sup> As *lex specialis* was not incorporated in the VCLT, it can be applied only if in the interpretation stage it is found that the treaties in question are not the same subject-matter and thus not

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113. Vierdag, *supra* note 109, at 94–95 (paraphrasing VCLT, *supra* note 13, art 2(1)(g)).

114. *Id.* at 97.

115. Schulz, *supra* note 52, at 6.

116. *See id.*

within the purview of VCLT Article 30. In such a case, the decisionmaker may apply general principles of interpretation and conflict resolution, such as the *lex specialis* principle.

In this manner we find that policymakers facing a potential conflict have to make judgment calls as to whether they believe the issue is governed by the VCLT. If it is not, then they must assess which general principles best apply and how the rules may affect potential negotiations to resolve the conflict.

While the codification of treaty conflict rules in the VCLT marked a new era in treaty law, Article 30 of the VCLT has in practice been applied only occasionally. In an era of greater-than-ever treaty congestion, why are we not seeing greater use of the VCLT by tribunals? As one jurist observed on the topic of conflicting treaties, “[t]here is . . . little judicial precedent, and diplomatic practice seems to be more expressive of political rather than legal considerations.”<sup>117</sup> There are two aspects to this observation. First, although formal adjudication may assist conflict resolution, it may be difficult for the parties to determine which tribunal or tribunals would have jurisdiction. Consequently, states may avoid the use of tribunals altogether for fear of further complicating a situation they would prefer to resolve relatively quickly.

Second, and perhaps more importantly, states and tribunals have rarely mentioned the possibility that two treaties might conflict. International tribunal cases that have wrestled with questions of treaty conflict are primarily from the era of the League of Nations. Why have we not seen similar adjudication applying the VCLT since World War II? When instances of treaty conflicts are mentioned it is usually by academics or other observers. Further, when such conflicts do attract the attention of decisionmakers, they tend to be resolved in *ad hoc* political bargains rather than by an application of blackletter principles.

The following cases represent a range of fact patterns. Some are actual conflicts that resulted in political negotiations; others are drawn from analyses of potential conflicts; and still others are hypotheticals posed by academics. The cases are divided into two groups. The first group concerns treaties that have the same subject-matter. As these are the types of conflicts the VCLT addresses, I will compare actual state practice to expected doctrine. The second group of cases concern treaties that do not have the same subject-matter foci, but whose effects overlap and possibly frustrate

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117. Karl, *supra* note 16, at 936.

one another. While VCLT Article 30 does not apply, it is necessary to consider these incidents, as they are possibly the most prevalent and significant form of treaty conflict today.

### C. *The VCLT and Treaty Conflict Resolution in Practice*

#### 1. Recent Incidents: Same Subject-Matter

Most, if not all, recent incidents of treaty conflicts have not been resolved by tribunals but by political negotiation. Of particular interest in the following cases is the theory that treaties that may affect each others' goals do not conflict because they do not regulate the "same subject-matter." Such an argument is neither legally correct nor practically sound.

##### a. The Caspian Sea Treaties

One brewing disagreement concerns which treaty, or treaties, governs the exploitation of the huge reservoirs of oil beneath the Caspian Sea.<sup>118</sup> Russia, Iran, Azerbaijan, Kazakhstan, and Turkmenistan all border the Caspian Sea, sail its waters, exploit the resources of the sea itself, and either currently drill or expect to drill for oil beneath the sea-bed. The preexisting legal regime governing navigation on the Caspian Sea and use of its resources is a 1940 bilateral treaty between the Soviet Union and Iran, establishing a condominium over the Caspian Sea.<sup>119</sup> In the wake of the dissolution of the Soviet Union, four successor states with different interests now border the Caspian Sea. The new Caspian littoral states (Russia, Azerbaijan, Kazakhstan, and Turkmenistan) have begun drafting treaties among themselves regarding the disposition of the Caspian Sea.<sup>120</sup> The growing concern is over which legal regime or regimes among the Iran-U.S.S.R. Treaty and the new treaties should control.

Under the law of state succession, a new state arising out of the dissolution of a previous state is bound by that existing state's trea-

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118. See generally Kamyar Mehdiyoun, *Ownership of Oil and Gas Resources in the Caspian Sea*, 94 AM. J. INT'L L. 179 (2000); Faraz Sanei, Note, *The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with Its Geopolitical Realities*, 34 VAND. J. TRANSNAT'L L. 681 (2001); Kaveh L. Afrasiabi, *The Legal Regime of the Caspian Sea: Beyond the Conflicting Treaties*, available at <http://www.payvand.com/mews/o3/sep.1106.html> (last visited Dec. 10, 2003).

119. See Treaty of Commerce and Navigation, Mar. 25, 1940, Iran-U.S.S.R., 144 BRIT. & FOREIGN ST. PAPERS 419 (1940-1942) (translated from the Persian).

120. See Mehdiyoun, *supra* note 118, at 183-87; Sanei, *supra* note 118, at 755-60.

ties.<sup>121</sup> In this case, only Russia has explicitly stated that it would remain bound by the Soviet Union's international commitments. In practice, however, there has been a case-by-case analysis with respect to which of the other republics are bound by which treaties.

The new states contend that, even if the 1940 treaty was in force, it would either be modified by the later treaties, or—in Azerbaijan's view—not be of legal consequence because it does not cover the same subject-matter as the new treaties.<sup>122</sup> The Iran-U.S.S.R. Treaty was signed prior to the discovery of oil beneath the Caspian sea-bed, and accordingly did not consider the possibility of oil. Based on this reasoning, the new states are attempting to negotiate a more favorable legal regime, while Iran is reticent to drop its claim that the earlier treaty still governs.

Although a key factor in this incident is the proper application of the law of state succession (a topic beyond the scope of this article), this case is nonetheless indicative of modern problems concerning treaty conflicts. Assume that Russia, Azerbaijan, Kazakhstan, and Turkmenistan are all still bound by the original Iran-U.S.S.R. Treaty: What is the result? Some new states have argued that, inasmuch as the treaty does not concern the same subject-matter as any later agreement, it is irrelevant in the disposition of subsoil drilling rights.<sup>123</sup> This case illustrates how a rigid use of the same-subject-matter clause can provide justification for seemingly related treaties to be viewed as distinct. The purpose of the 1940 treaty was to establish a condominium between Iran and the Soviet Union over the Caspian Sea. Simply maintaining that the treaty is not of the same subject-matter is not a legally satisfying response.

Moreover, this approach reinterprets what was essentially jurisdictional language in the VCLT—stating that Article 30 *would apply* in cases of successive treaties of the same subject-matter—as definitional language stating that a treaty conflict can only exist when treaties are concerned with the same subject-matter. This misconstrues the purpose of the VCLT, which does not attempt to define when a conflict does or does not exist but rather only assigns rules of conflict resolution in certain circumstances. In arguing that

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121. See generally Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 1155 U.N.T.S. 331.

122. See Afrasiabi, *supra* note 118, at \*1–\*2; Sanei, *supra* note 118, at 755 (concerning Azerbaijan).

123. *Id.*

there is no conflict between the later treaties and the 1940 Treaty, the new littoral states have moved into novel legal territory as to what comprises a treaty conflict.

While asserting that the treaties do not concern the same subject-matter and thus do not conflict is neither an accurate description of the facts in this case nor of the state of the law in general, it is equally unsatisfying simply to conclude that these new states must be bound by a 1940 treaty signed by a now-dissolved, undemocratic, imperial government. The disposition of the Caspian Sea is an example of the need for good faith negotiations among the parties. The issue is not whether states should be able to negotiate—rather, the issue is whether there is a proper understanding of the legal status quo when the negotiations begin. Such negotiations, however, are most likely to be successful if the expectations of the parties are taken into account at the beginning of negotiations. Iran's expectations are defined in part by its belief that the treaties are in conflict and that international law would favor the enforcement of the 1940 treaty. The new littoral states' expectations are formed in part by their argument that the treaties are not in conflict, and even if they were, international law would favor the later treaties. Such mismatched expectations complicate negotiations. A clearer set of guidelines leading to shared expectations as to which treaty or treaties would be favored under international law would give the parties a better sense of the relative strength of their negotiating positions. While the legal strength of a negotiating position may have little or no impact on certain negotiations, at the margins, it provides the parties a sense that, should negotiations fail and third-party dispute resolution be invoked, one party may have a distinct advantage. Thus, effective treaty conflict rules may not necessarily be applied, but they may contextualize and facilitate political negotiations.

#### b. Government Procurement in the European Union

The clash between E.U. regulations and a preexisting treaty between Germany and the United States provides a recent example of a conflict that resulted in political bargaining rather than in any principled application of conflict resolution rules.<sup>124</sup>

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124. Portions of the following narrative are drawn from Julie Grimes, *Comment: Conflicts Between EC Law and International Treaty Obligations: A Case Study of the German Telecommunications Dispute*, 35 HARV. INT'L L.J. 535 (1994); see also U.S. DEPARTMENT OF STATE, FY 2001 COUNTRY COMMERCIAL GUIDE: EUROPEAN UNION (2001) [hereinafter DOS Report], [http://www.globalatlanticpartners.com/pdf/eu\\_ccg2001.pdf](http://www.globalatlanticpartners.com/pdf/eu_ccg2001.pdf) (last visited Aug. 18, 2004); U.S.

The conflict concerned Germany's obligations to the United States under the German/U.S. Treaty of Friendship, Commerce and Navigation (FCN Treaty), in light of its competing obligations under the Treaty of Rome (establishing the European Community (E.C.)) and subsequent E.U. legislation.<sup>125</sup> The FCN Treaty, which predated the Treaty of Rome, included a section on nondiscrimination in government procurement allowing the United States to receive most favored nation treatment, which entitled U.S. companies to receive the same treatment as the best rate given to the companies of any nationality—German or foreign—in government procurement.

In 1993, the European Union enacted the E.U. Utilities Directive (Directive), which provided that when a company from a state that is not a member of the E.U. bids on a procurement contract solicited by an E.U. state, the E.U. state will mark-up the non-member-state company bid by a certain percentage, thus making such companies relatively uncompetitive compared to bidders from E.U. member states.<sup>126</sup>

Germany, relying on Article 234 of the Treaty of Rome, concluded that the FCN Treaty governed any utilities procurement bids submitted by U.S. companies. Germany used a treaty that was not only earlier-in-time to the Directive, but also arguably a necessary context within which the Directive must be interpreted.<sup>127</sup> Other E.U. states were concerned with this result, as six other E.U.

Department of State, *U.S. Concerned by Government Procurement Practices*, May 5, 2001, reprinted in part in WASHINGTON FILE [hereinafter Washington File], at <http://usembassy-australia.state.gov/hyper/2001/0501/epf208.htm> (last visited Aug. 18, 2004); TRADE NEWS BULLETIN, Feb. 3, 1993, at <http://www.etext.org/Politics/Trade.News/Volume.2/tnb-02.021> (last visited Aug. 18, 2004)

125. *Id.* at 536–37; see Treaty of Friendship, Commerce, and Navigation, Oct. 29, 1954, U.S.-F.R.G., 7 U.S.T. 1839; Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

126. U.S. TRADE REPRESENTATIVE, ANNUAL REPORT ON DISCRIMINATION IN FOREIGN GOVERNMENT PROCUREMENT 4 (2001).

127. Article 234 of the Treaty of Rome provides:

The rights and obligations arising from conventions concluded before the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries on the other hand, shall not be affected by the provisions of this Treaty.

In so far as such conventions are not compatible with this Treaty, the Member State or States concerned shall take all appropriate steps to eliminate any incompatibility found to exist. Member States shall, if necessary, assist each other in order to achieve this purpose and shall, where appropriate, adopt a common attitude.

Member States shall, in the application of the conventions referred to in the first paragraph, take due account of 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 therefore inseparably linked with the creation of com-

members had such provisions in FCN treaties with the United States and possibly other similar provisions in bilateral treaties with other non-E.U. countries. If Germany's interpretation of its obligations under international law were correct, the effectiveness of the Directive and of other E.U. legislation would be moot.

The other E.C. countries objected to the German interpretation.<sup>128</sup> The European Community pushed for the mark-up to be applied against U.S. companies, prompting the United States to respond with retaliatory tariffs against E.C. goods.<sup>129</sup> After a time, the United States and the European Community negotiated a side agreement allowing U.S. companies to bid on contracts in certain sectors without a mark-up.

The VCLT would have favored the U.S. claim against Germany on the logic that Germany's preexisting commitment to the United States was not extinguished by the Treaty of Rome. Germany could have been in breach of the FCN had it marked up U.S. bids.

The relevant VCLT provisions notwithstanding, this dispute turned into an E.C.-U.S. trade skirmish, highlighting how the rules of treaty conflict resolution have fallen into disuse, even in cases that seemingly come under the sweep of VCLT Article 30.

## 2. Recent Incidents: Different Subjects, Overlapping Interests

### a. Trade and the Protection of Endangered Species

#### i. SPAW and CITES

Professor Chris Wold has analyzed whether there is a conflict between the Protocol Concerning Specially Protected Areas of Wildlife (SPAW)<sup>130</sup> to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean, and the Convention on the International Trade in Endangered Species of Wild Flora and Fauna (CITES).<sup>131</sup> Wold's analysis of

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mon institutions, the conferring of competences upon such institutions and the granting of the same advantages by all other Member States.

*Id.* art. 234.

128. Grimes, *supra* note 124, at 541.

129. U.S. TRADE REPRESENTATIVE, *supra* note 126, at 4 ("After bilateral negotiations did not resolve this issue, the United States imposed sanctions in May 1993.")

130. Protocol Concerning Specially Protected Areas and Wildlife to the Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, Jan. 18, 1990, S. TREATY DOC. NO. 103-5 (1993) [hereinafter SPAW], available at <http://www.cep.unep.org/pubs/legislation/spaw.html> (last visited Mar. 17, 2005).

131. Convention on the International Trade in Endangered Species of Wild Flora and Fauna, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; see CHRIS WOLD, LEGAL ASSESSMENT OF COMPATIBILITY ISSUES BETWEEN THE PROTOCOL CONCERNING SPECIALLY PROTECTED AREAS AND WILDLIFE (SPAW) TO THE CARTAGENA CONVENTION AND THE CONVENTION ON INTERNA-

whether there is a conflict between Articles 10 and 11 of SPAW and the trade measures of CITES is particularly interesting for the different modes of reasoning he employed in concluding that there is no conflict.<sup>132</sup> SPAW entered into force in 2000 and currently has 11 parties; CITES entered into force in 1975 and currently has 164 parties.

Articles 10 and 11 of SPAW require state parties to regulate commercial trade in species that it lists as endangered or threatened.<sup>133</sup> States are prohibited from trading in plant and animal species that are listed on SPAW Annexes I and II. By contrast, CITES regulates trade in the species on its appendices through the use of import and export licenses, but only prohibits *commercial* trade in species listed on CITES Appendix I, permitting trade for educational and conservation-driven purposes.<sup>134</sup>

Wold argued that SPAW and CITES do not concern the same subject-matter.<sup>135</sup> Citing Ian Sinclair, he noted that “relating to the same subject-matter” must be strictly construed.<sup>136</sup> Wold concluded that “SPAW generally covers conservation and management of listed species while CITES focuses specifically on regulating trade in species adversely affected by trade.”<sup>137</sup> Instead of applying the VCLT, he turned to general principles of treaty construction.

Assessing whether *lex posterior* should be applied, Wold concluded that dating which treaty is first-in-time is overly problematic. Although dates when the treaties came into force are clearly estab-

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TIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES) (1999), [http://www.lclark.edu/org/ielp/objects/opinion\\_spaw.pdf](http://www.lclark.edu/org/ielp/objects/opinion_spaw.pdf) (last visited Mar. 17, 2005).

132. WOLD, *supra* note 131, at 12–14.

133. Article 10 of the SPAW states, in part:

1. Each Party shall identify endangered or threatened species of flora and fauna within areas over which it exercises sovereignty, or sovereign rights or jurisdiction, and accord protected status to such species. Each Party shall regulate and prohibit according to its laws and regulations, where appropriate, activities having adverse effects on such species or their habitats and ecosystems, and carry out species recovery, management, planning and other measures to effect the survival of such species. Each Party, in keeping with its legal system, shall also take appropriate actions to prevent species from becoming endangered or threatened.
2. With respect to protected species of flora and their parts and products, each Party, in conformity with its laws and regulations, shall regulate, and where appropriate, prohibit all forms of destruction and disturbance, including the picking, collecting, cutting, uprooting or possession of, or commercial trade in, such species.

SPAW, *supra* note 130, art. 10.

134. CITES Art. III (1975) *available at*: <http://www.cites.org/eng/disc/text.shtml#III> (last visited Mar. 25, 2005).

135. WOLD, *supra* note 131, at 9–10.

136. *Id.* at 10.

137. *Id.*



lished, his concern was whether the relevant dates should instead be the dates when the specific species are entered onto the annexes and appendices. This practice would make any temporal rule extremely difficult to administer. Turning next to the *lex specialis* rule, Wold noted that, as CITES is focused on international trade, CITES is more specific than SPAW.

Concentrating on the international trade provisions of SPAW, Wold argued that a prohibition of trade under SPAW does not frustrate a party's ability to implement CITES when a species is listed under both treaties unless CITES required a party to allow trade that would be rejected under SPAW.<sup>138</sup> This is an application of the narrowest possible definition of "conflict." As argued above in Part I such a strict definition simply does not address the situations that concern policymakers—such as when one treaty can frustrate the purpose of another treaty. In this instance, Wold is using a mode of analysis more akin to the techniques of conflict of laws than to the contractual analysis of the CACJ in *Costa Rica v. Nicaragua*.<sup>139</sup>

In sum, Wold's analysis is of interest for three reasons: (1) his finding that SPAW and CITES do not pass the "same subject-matter" test; (2) the difficulty of determining which treaty would be first in time; and (3) his implicit analogy to domestic conflict of laws doctrine.

Arguing that SPAW and CITES are not related to the same subject-matter exemplifies how the VCLT as construed today would not be applied to the conflicts that have caused such concern in recent years: conflicts between treaties that regulate overlapping areas from different perspectives—in this case trade and endangered species protection. Not applying the VCLT relegates the question to the panoply of general principles of conflict and the canons of treaty interpretation, which can lead to varying expectations among the parties as to which principle should be applied and thus which treaty should be enforced.

Wold's own analysis focused on the problem of which treaty was first in time. He acknowledged that there are many possible ways to date these treaties, particularly due to the various entries in the annexes and appendices. Similarly, his conclusion that a trade treaty is more specific than a species protection treaty is eloquent—but the opposite argument could be made just as convinc-

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138. *Id.* at 8.

139. *See, e.g.,* *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993). For a comparison of conflicts of treaties to conflict of laws, see Gregory H. Fox, *International Organizations: Conflicts of International Law*, 95 AM. SOC'Y INT'L L. PROC. 183 (2001).

ingly. At times, specificity is in the eye of the beholder. These observations reinforce the importance of drafting procedures that promote shared expectations as to which treaty would control.

ii. *The Biosafety Protocol and the WTO*

Other commentators have asked whether the norms of the Biosafety Protocol to the Convention on Biological Diversity (Biosafety Protocol) regulating the international movement of bio-engineered living organisms conflict with the trade regime set forth in the WTO Agreements. The potential breadth of the Biosafety Protocol illustrates the difficulty of drafting new treaties that do not overlap with previous treaties. As Sabrina Safrin observed, “given the breadth of biotechnology, which encompasses, *inter alia*, microbes, medicine, food, forests, and fish, as well as research and commerce, the negotiators faced a palpable risk of unintentionally modifying other agreements through the provisions of the Protocol.”<sup>140</sup>

First, one should examine whether the Biosafety Protocol has a savings clause or other similar clause that would avoid conflicts between the treaties. In fact, the parties to the Biosafety Protocol have been criticized for not drafting an effective savings clause.<sup>141</sup> Rather than including a traditional clause of precedent or of abrogation within one of the operative articles, the parties included the following language in the preamble:

*Recognizing* that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,

*Emphasizing* that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,

*Understanding* that the above recital is not intended to subordinate this Protocol to other international agreements . . . .<sup>142</sup>

140. Sabrina Safrin, *Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreement*, 56 AM. J. INT'L L. 606, 614 (2002).

141. JEFFREY WAINCYMER, CARTAGENA PROTOCOL ON BIOSAFETY 1, 15 (n.d.) (noting also that “it would have been extremely simple to protect those rights by a clearly expressed savings clause”), <http://www.apec.org.au/docs/waincymer2001.pdf> (last visited Mar. 17, 2005).

142. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 39 I.L.M. 1027 (2000).

An opposing view maintains that not only is the savings clause adequate, it is possibly unnecessary.<sup>143</sup> Proponents of this view also recognize, however, that states

that pressed for the inclusion of a savings clause to make clear that WTO disciplines continue to apply to trade in LMOs covered by the [Biosafety] Protocol were concerned that, absent the inclusion of such a clause, some countries might implement the Protocol in a manner that violated their WTO obligations.<sup>144</sup>

Assuming, for the sake of argument, the absence of a usable savings clause, do the VCLT's rules increase certainty as to the relationship between the Biosafety Protocol and the WTO Agreements? First, one must decide whether these treaties are concerned with the same subject-matter. The most common answer is that they are not. Construing "same subject-matter" narrowly leads to the conclusion that one treaty deals with trade, the other with the environment. Once again, the VCLT would not apply to the resolution of this particular conflict.

If the states are party to both treaties, under *lex posterior* the later treaty applies. However, if one treaty is more specialized, *lex specialis* applies. If there are more than two states involved in the potential conflict and there is imperfect diversity, then as between any two states, the treaty to which they are both party controls.

Under such circumstances, without clear rules or procedures that the parties can apply themselves, the parties may seek adjudication, but will likely be uncertain as to which tribunal possesses jurisdiction over the dispute. Assessing the relationship of the Biosafety Protocol to the WTO Agreements calls into question the role of dispute resolution in a decentralized system: If states party to both treaty regimes disagree as to which treaty applies in a given case, which treaty's dispute resolution mechanism should apply? For example, if a party sought review by the WTO Dispute Resolution Board, would that tribunal be competent—either in the jurisdictional sense or in the broader sense of having the necessary expertise—to assess the Biosafety Protocol and its relationship to

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143. For example, Professor Sabrina Safrin, a former State Department lawyer involved with the negotiations believes that

while the "savings clause" language ultimately included in the Biosafety Protocol preserves countries' rights and obligations under the WTO Agreements, the Biosafety Protocol and the WTO Agreements are less on a collision course than some may fear, and the importance of the savings clause may have been overestimated by all sides to the controversy.

Safrin, *supra* note 140, at 607.

144. *Id.* at 610–11.

the relevant WTO agreements?<sup>145</sup> This issue presents a second level of treaty conflict: when the conflicting treaties themselves have different—and possibly conflicting—modes of dispute resolution. While this issue has been a topic of much academic debate,<sup>146</sup> no international tribunal or international organization has spoken clearly to the issue. This observation highlights that, absent adequate institutionalized dispute resolution, the existence of rules and procedures that the parties can use themselves to solve conflicts is critical.

#### b. Vierdag's Radio Regulations Scenario

Vierdag suggested a particularly interesting scenario: whether the International Radio Regulations (IRR), adopted by the World Administrative Radio Conference in 1971, could be considered to conflict with the International Covenant of Civil and Political Rights (ICCPR),<sup>147</sup> concluded in 1966.<sup>148</sup>

In assessing whether two treaties are concerned with the same subject-matter, Vierdag suggested that “[i]f an attempted simultaneous application of two rules to one set of facts or actions leads to incompatible results it can be safely assumed that the test for sameness is satisfied.”<sup>149</sup> He argued that the IRR regulation would be considered an abrogation of ICCPR Article 19(2).<sup>150</sup>

This conflict could implicate *lex specialis*. Based on the broad wording of Article 19(2), which frustrates any special particularities, Vierdag concluded “[i]t is not proper to apply a principle such as *generalalia specialibus non derogant* if the *generalalia* in one instrument are so phrased as to rule out any *specialia* in another instrument.”<sup>151</sup>

Vierdag identified the problem of time of conclusion:

145. See WAICYMER, *supra* note 141, at 5.

146. See generally SHANY, *supra* note 9; Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999); Charney, *Is International Law Threatened*, *supra* note 9; Charney, *Impact*, *supra* note 9.

147. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

148. Regarding the International Radio Regulations, see generally Vierdag, *supra* note 109, at 98 n.80.

149. *Id.* at 100.

150. *Id.* Article 19(2) states: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” ICCPR, *supra* note 147, art. 19(2).

151. Vierdag, *supra* note 109, at 100.

If State A became party to the Covenant in 1978, and the Radio Regulations became operative for it in 1982, the latter prevails, whereas for neighboring State B, which acceded to the Covenant in 1984, these Regulations are superseded by the Covenant. It is important to point out here that "A" and "B" may also stand for groups of two or more States.<sup>152</sup>

Vierdag's observations prefigured Wold's concerns regarding the concept of successive treaties: which is earlier and which is later. Vierdag illustrated that this problem becomes even more complex in multilateral treaties, as there are more possible permutations.

### c. The Judgments Convention and Possible Conflicts

Andrea Schulz's analysis of possible treaty conflicts resulting from the adoption of a proposed Convention on Jurisdiction, Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (Judgments Convention) included the following hypothetical. Suppose that "a number of States . . . have concluded a treaty on jurisdiction, recognition and enforcement, and the only basis of (exclusive) jurisdiction is the nationality of a particular person (e.g. of the child in cases of child protection measures)."<sup>153</sup> A subset of those states then conclude an *inter se* agreement that does two things: (1) bases jurisdiction on habitual residence and not on nationality; and (2) allows for enforcement of judgments from any other state party to Treaty II without any inquiry into whether the rendering state had jurisdiction.<sup>154</sup> Consider that States A, B, and C are parties to Treaty I but only A and B are parties to Treaty II. If State A exercises jurisdiction over a national of State C based on habitual residence and a party subsequently seeks to have the decision enforced through State B, as between A and B, Treaty II controls, mandating enforcement.<sup>155</sup> As between B and C, Treaty I is in force and B may only enforce judgments that the rendering state based on nationality, which, in this case, was not the basis of judgment.

This scenario was proposed as exemplifying, if not the violation of a right, then the frustration of the object and purpose of a treaty.<sup>156</sup> The first issue that "is not easy to determine" is whether

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152. *Id.* at 101-02.

153. Schultz, *supra* note 52, at 11 n.35.

154. *Id.*

155. *Id.*

156. *Id.* at 11.

Treaty II actually affected State C's rights under Treaty I.<sup>157</sup> This scenario underscores how third parties may be affected by later treaties.<sup>158</sup> One may argue that under the VCLT this later agreement was a breach of Treaty I, due to the prohibitions of Article 41, which states that *inter se* agreements may be concluded only when, among other factors, the modification "does not affect the enjoyment by the other parties of their rights under the [first] treaty or the performance of their obligations."<sup>159</sup> Schulz argues that, even if Treaty II was read to violate Article 41, it would still be favored due to the *lex posterior* rule—although in this case State B may face state responsibility in relation to State C. Schulz also notes that state practice has evolved such that this result is not followed and is often avoided by use of carve-out clauses in the later treaty, which protect the rights of third parties to the earlier treaty.<sup>160</sup>

Schulz's hypothetical exemplifies how the rules of the VCLT, which allow each treaty to control as between its members, provide no real solution to the underlying conflict. Rather, the VCLT rules merely put the problem back into the arena of diplomatic negotiation.

#### D. *Comparing and Contrasting the Effects of Different Conflict Resolution Techniques*

These examples indicate not only some of the problems in the current state of treaty conflicts doctrine, but also how state practice has evolved. To envision how well the VCLT has responded to the problems posed by the preexisting customary system, one may hypothesize how the *San Juan River Case*, the *Austro-German Customs Union Case*, and the *Oscar Chinn Case* might have been decided had the VCLT been the controlling law. Following this examination, I will turn to the modern incidents and consider them in comparison to the earlier cases.

#### 1. Reading the Early Opinions in Light of the VCLT

The CACJ's opinion in the *San Juan River Case*<sup>161</sup> is noteworthy in part for its doctrinal result favoring the earlier treaty. If this case

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157. *Id.* at 11 n.35.

158. Schulz notes that there are no existing treaties that overlap the Judgments Convent and explicitly allow *inter se* modifications. *Id.* at 12. This does not mean, however, that such modifications will not be attempted in a given treaty regime.

159. VCLT, *supra* note 13, art. 41(1)(b)(i).

160. Schulz, *supra* note 52, at 12 n.37.

161. See *supra* Part II.C.1 and accompanying discussion.

had been decided under the VCLT, assuming that the two treaties would have been considered as having the same subject-matter, Article 30(4)(b) would have applied such that the earlier treaty—the Cañas-Jerez Treaty—would govern the relationship between Costa Rica and Nicaragua, and the Bryan-Chamorro Treaty would govern the relationship between the United States and Nicaragua. This result does not actually resolve the conflict. Such a rule provides that both treaties would be valid, and, assuming that Nicaragua cannot undertake all its obligations in both treaties, Article 30(4)(b) gives Nicaragua the choice of which treaty it would honor and which it would breach. Thus, the VCLT would not make the Bryan-Chamorro Treaty void *ab initio*. Article 30(4)(b) has a rule based on actual performance as opposed to anticipatory repudiation. The likely practical result would be a political negotiation between at least two of the states to decide which treaty would prevail.

The *Austro-German Customs Union Case*,<sup>162</sup> if decided under the VCLT, would have similarly led to the split result of finding both treaties effective among their respective parties.

The holding of the *Oscar Chinn Case*<sup>163</sup> favored the later treaty, but did not address the issue of conflicts. The dissent, which did address treaty conflicts, argued for an interpretation finding the later treaty void *ab initio*. Once again, applying the VCLT would lead to a different result, under the same logic as described in the discussion of the *San Juan River Case*.

Aside from the reticent CACJ, the tribunals adjudicating these early cases attempted to set forth a “final accounting” of which treaties remained in power and which did not. While this rigid all-or-nothing jurisprudence is disfavored today, it was admirable in its attempt to describe a coherent set of rights and responsibilities among the parties. Application of the VCLT would not have led to such a result; rather, it would have involved an attempt to read both treaties as applicable among their respective parties, creating a need for renegotiation. The use of political means to sort out legal issues, as seen in the *San Juan River Case*, is borne out in the more recent cases.

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162. See *supra* Part II.C.2 and accompanying discussion.

163. See *supra* Part II.C.3 and accompanying discussion.

## 2. Comparing and Contrasting the Old and New Incidents

The differences between the cases from the interwar period and the more recent examples of treaty conflicts are striking. What guidance can the interwar cases provide regarding the manner in which current norms should evolve in order to account for increasing levels of treaty congestion and conflict?

The early cases were the product of legalistic decisionmaking before tribunals. It is important to note that these disputes actually were resolved by tribunals, as opposed to negotiation between the parties themselves. The cases that discussed treaty conflicts favored the earlier treaty and found the later treaty void *ab initio*. Conversely, the *Oscar Chinn* majority, which did not explicitly consider issues of treaty conflict, found that a later *inter se* agreement controlled as between the parties. The dissenters, however, argued that resolving an underlying treaty conflict was required for the case, and thus they would have found the earlier treaty controlling. Such reasoning is principled but relatively rigid. It does, however, give the parties a strong sense of foreseeability: later-in-time treaties on the same subject-matter will be void if they conflict with an earlier treaty.

If recent incidents were resolved, they were not solved in courtrooms, but rather through negotiations. The negotiated results are not linked examinations or explications of legal principles such as *pacta sunt servanda* or *lex posterior*. In the E.C. procurement example, involving Germany's competing obligations to the United States and subsequent obligations to the European Community, the parties played a game of "chicken" in which they used trade sanctions as threats to attempt to force each other to back down. In the Caspian Sea example, Iran staked a legal claim but, for the moment, at least, to no avail, particularly as the legal claim was based on a time before the new littoral states involved even existed. The modern style is political, flexible, and based on power at the negotiating table—hoary legal principles hold little sway in the hard bargaining. At the same time, there is little predictability as to outcome; it is unclear which treaties will be honored and which will not. Short of a full-blown renegotiation, there is little sense as to the legal status of the parties. The modern style is more adaptable and less legal, with little foreseeability.

Is this modern style necessarily a bad thing? Perhaps it is the best possible outcome, as the objective is not to have all treaty conflicts adjudicated by a tribunal; the goal, rather, is to increase the coherence of the system so that the treaties do not become individ-



ually devalued due to a concern that they may not be respected when perspectives on diplomacy change. Finding techniques that make the likely outcome of a treaty conflict predictable at an earlier time will allow for better decision-making and planning. More generally, such predictability can bolster the idea that treaties are part of a coherent international legal system. The challenge is to maintain a certain amount of flexibility, which is clearly required in today's politics, while simultaneously increasing the predictability of outcomes. The answer lies not in a place, such as a court to hear more and more of these conflicts, nor in a rule, such as a rewritten VCLT Article 30. Rather, the answer lies in a process. What is required to address this problem is a series of standard procedures ranging from drafting tools to interpretive techniques, as well as a new understanding of what makes effective conflict rules. These incidents illustrate that there is no single tool; therefore, we need a toolbox full of options. Once there is clarity as to what those options are and in what types of situations they are used, the predictability of outcomes will increase, thus protecting the value of treaties.

To get a sense of which tools belong in this toolbox, it is helpful to analogize from similar issues arising out of the law of contracts and of statutory interpretation.

#### IV. ANALOGIES TO OTHER TEXTUAL CONFLICTS: TREATY AS CONTRACT/TREATY AS STATUTE

##### A. *Alternate Paradigms of Resolving Treaty Conflicts*

Treaties are often said to be functionally similar to domestic statutes or contracts between private parties. For example, in the realm of contracts, courts have determined the relationship of multiple contracts among an overlapping set of private parties. Although the dominant analogy has historically been to contracts, during the 1950s writers realized that analogies to legislation or federalism may be fruitful in devising responses to the problems of treaty conflicts.<sup>164</sup> In the case of statutes, for example, we see two modes of conflict resolution: (1) the use of canons of construction to determine how to read the texts; and (2) applying rules concerning the conflict of laws to determine if either law is better suited for application than the other.

Such comparisons in legal reasoning concerning treaties are endemic. However, the ILC's Fragmentation Study Group noted:

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164. See, e.g., Jenks, *Law-Making Treaties*, *supra* note 11, at 406.

There was also agreement that drawing analogies to the domestic legal system may not always be appropriate. It was thought that such analogies introduced a concept of hierarchy that is not present on the international legal plane, and should not be superimposed. It was suggested that there is no well-developed and authoritative hierarchy of values in international law. In addition, there is no hierarchy of systems represented by a final body to resolve conflicts.<sup>165</sup>

Thus, while treaties are in some respects similar to contracts and in other respects more like legislation, one must keep in mind that treaties are, in fact, *sui generis* and the solution to conflicting treaties may draw from, but should not be cabined by, the techniques used for resolving contractual or statutory conflicts.

### 1. Contractarian Approaches

Treaties are often described as contracts between states.<sup>166</sup> This approach has been particularly apparent in U.S. jurisprudence, which often characterizes treaties in this manner.<sup>167</sup> As the VCLT is, in part, based on principles of contract law—stemming from common law and civil law systems—it may be useful to look directly

165. *Report of the Study Group on Fragmentation of International Law*, *supra* note 6.

166. *See, e.g.*, BEDERMAN, *supra* note 24, at 25. *But see* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: INTERNATIONAL AGREEMENTS, Introductory Note (1987). Although the contractarian approach to analyzing the law of treaties has many adherents and real advantages, one must nonetheless be cautious of overstressing the analogy:

The international law of international agreements, indeed, is derived in substantial part from general principles common to the contract laws of state legal systems, and international law may continue to draw on such principles. . . . But the international law of international agreements has its own character, and analogies from contract law of any particular country are to be used with caution. In many respects there is no analogy in the law of international agreements to national laws of contracts; for example, the law of international agreements knows no doctrine of consideration . . . and no statute of frauds. Concepts of duress, mistake, and fraud as grounds for voiding an international agreement have developed slowly and differently.

*Id.* (citation omitted).

Moreover, other systemic characteristics, such as the form and function of international courts and tribunals, can affect what the members of the system agree upon as substantive norms, as a “concept may be acceptable in national contract law where it is enforced by impartial adjudication, but not in international law where there is often no effective means of third party dispute resolution.” *Id.*

167. *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984) (stating that “[a] treaty is in the nature of a contract between nations”); *Alcan Aluminum Corp. v. United States*, 165 F.3d 898, 904 (Fed. Cir. 1999) (stating that treaties are interpreted as contracts between nations; as such, general rules of construction apply, including weight given to the intent of parties); *Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 457 (7th Cir. 1998) (stating that treaties are contracts subject to special rules of contract interpretation); *New York Chinese TV Programs, Inc. v. U.E. Enterprises, Inc.*, 954 F.2d 847, 852 (2d Cir. 1992).

to the principles of contract law in these traditions to consider what techniques they may offer, by analogy, to solve the problem of conflicting treaties.<sup>168</sup> As with our discussion of statutes, we will consider both methods of contractual interpretation and possible responses to conflicts between contracts. This latter topic will center on the legal status of the second contract and, in particular, will examine whether the second contract can be considered a breach or an anticipatory repudiation of the first contract.

#### a. Contractual Interpretation and Party Intent

The dominant method of contract interpretation in the United States is the plain meaning rule.<sup>169</sup> The essential idea of the rule is that in some cases, the language, when taken in context, "is so clear that evidence of prior negotiations cannot be used in its interpretation."<sup>170</sup> In practice, however, the plain meaning rule has been liberalized to the point of considering evidence from past negotiations—similar by analogy to *travaux préparatoire*—in the analysis to determine whether or not the contractual language was clear. The Restatement (Second) of the Law of Contracts (Restatement) and academic commentators have advocated an even greater use of intent-based analysis of contractual meaning. This is not surprising, as the use of intentionalist reasoning is the norm in most legal systems.

The construction of contracts in civil law countries is organized around one of two premises: (1) that "it is the *intention* of the promisor which counts," or (2) that "priority is given to the external phenomenon of expression . . . the internal will of the prom-

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168. International law generally looks to all major legal traditions in forming general principles of law. Pre-VCLT general principles of the law of treaties, however, and the VCLT itself were primarily influenced by the civil and common laws and we will draw primarily from those wells in our search for greater understanding of the treaty norms. Regarding other traditions, see, for example, Feng Chen, *The New Era of Chinese Contract Law: History, Development and a Comparative Analysis*, 27 BROOK. J. INT'L L. 153 (2001); Nabil Saleh, *The Law Governing Contracts in Arabia*, 38 INT'L & COMP. L.Q. 761 (1989).

169. Professor Joseph Perillo notes that "[a]lthough the Plain Meaning Rule has been condemned by the writers, the UCC, the Restatement (Second) and an increasing number of courts, the great majority of jurisdictions still employ the rule." JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 151 (5th ed. 1998) (citations omitted). Although some scholars continue to distinguish "interpreting" a contract (finding the meaning of the words) from "constructing" a contract (discerning the legal operation of the contract), I will use the terms interchangeably, based on the same logic that Professor Farnsworth had in his treatise: "This distinction between interpretation and construction is a difficult one to maintain in practice and will not be stressed here." ALAN FARNSWORTH, CONTRACTS 453 (3d ed. 1999).

170. FARNSWORTH, *supra* note 169, at 476.

isor is treated as significant only in so far as it coincides with the normal objective meaning that a reasonable man would attribute to its expression.”<sup>171</sup>

The French Code, for example, emphasizes intention, rather than the meaning of the words. Article 1156 of the Code states: “In agreements it is necessary to search into the mutual intention of the contracting parties, rather than to stop at the literal sense of terms.”<sup>172</sup> Accordingly, the French Code focuses on a subjective interpretation of contractual language. Nevertheless, the French Code also “directs the judge to take account of objective factors, for example, to interpret unclear terms so as to bring them in line with the ‘meaning of the contract’ or ‘usages’ . . . .”<sup>173</sup>

This evolution within, and the convergence among, legal systems of contract doctrine lends support to the use of purposive reasoning in treaty interpretation, as will be discussed below.

#### b. Contractual Conflicts, Breach, and Anticipatory Repudiation

By way of analogy to the problem of conflicting treaties, consider the following hypothetical situation under the different laws of contracts: On January 1, A signs a contract to sell computers exclusively to B as of February 1 (Contract I); on January 2, A agrees to sell 100 computers to C at a certain price; C requires delivery by March 1 (Contract II). The scenario is similar to potentially conflicting bilateral treaties with partial diversity of parties. Under what conditions, if any, is Contract II a breach, repudiation, or an anticipatory repudiation of Contract I?

Whether signing Contract II is a breach of Contract I would turn on whether Contract I had terms explicitly forbidding the formation of Contract II. If Contract I provided that “A promises not to enter into any sales contracts with C,” then signing Contract II with C would be a breach of Contract I. It is generally agreed under U.S. law that a contract to break a contract is unenforceable on grounds of public policy.<sup>174</sup> This hypothetical scenario described at the beginning of this section, however, is a bit more nuanced.

171. KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 401 (Tony Weir trans., 3d ed. Oxford University Press 1998) (1977).

172. C. CIV. art. 1156 (Fr.); see also ZWEIGERT & KÖTZ, *supra* note 171, at 402.

173. ZWEIGERT & KÖTZ, *supra* note 171, at 402; see also C. CIV., arts. 1158, 1159 (Fr.).

174. RESTATEMENT (SECOND) OF CONTRACTS § 194 (1981). Moreover, “one who intentionally and without just cause induces another to commit a breach of contract with a third person is guilty of a tort and is liable in damages to such third person.” Grace McLane Giesel, *Bargains Inducing Breach of Contract with a Third Person*, in 15 CORBIN ON CONTRACTS § 85.16 (Joseph M. Perillo ed., 2003).

In Contract I, A promises to sell computers exclusively to B as of February 1. In Contract II, A agrees to sell 100 computers on the understanding that C requires delivery by March 1. It is not entirely clear whether simply signing Contract II would be a breach of Contract I. Depending on facts such as the actual date of delivery—before or after February 1—stronger or weaker cases can be made as to whether performance is a breach. One would need to examine the wording of Contract I and the intent of the parties in forming it to discern whether entering into Contract II constituted a breach, or if actual performance of Contract II would be required.

One may also consider whether either making the second contract or performing its obligations constituted some form of repudiation of the first contract. According to the Restatement, a repudiation can be either (1) a statement that the obligor would commit a breach that would give the other party the right to damages for a total breach; or (2) "a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach."<sup>175</sup>

In this exclusive sales scenario, the central question is whether merely signing Contract II would be a breach of Contract I, or whether some other action is required for there to be a breach. One response to this question is that signing Contract II would not be sufficient to breach or repudiate Contract I and that actual performance would be necessary. Another view, however, could be based on the idea that Contract II would be an anticipatory repudiation, also known as an anticipatory breach, of Contract I.

This first response is supported by the view that any statement being used as an attempted repudiation "must be sufficiently positive to be reasonably understood as meaning that the breach will actually occur. . . . In addition, the intention not to perform must be communicated and must be made to a party to the contract, not to a mere stranger to it."<sup>176</sup>

This analysis focuses on Contract II as a communication of an intent to breach Contract I. How that communication is made and to whom determines, in part, whether a mere communication

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175. RESTATEMENT (SECOND) OF CONTRACTS § 250 (1981); see also FARNSWORTH, *supra* note 169, at 605–06 ("A repudiation is a manifestation by one party to the other that the first cannot or will not perform at least some of its obligations under the contract. . . . [T]o have legal effect, the threatened breach . . . must be serious enough that the injured party could treat it as total if it occurred.").

176. FARNSWORTH, *supra* note 169, at 606.

would be sufficient to rise to the level of a repudiation. In this case, simply forming Contract II does not mean it will be communicated directly by A to B (the party of Contract I). Yet, even if it were, there could be doubt as to whether and how performance would occur under Contract II. For example, A could choose to breach Contract II. The result of this analysis is that both contracts would be legally binding on A, and A would be in the position to choose whether it would breach Contract I by performing Contract II.

Regardless of whether making a shipment to C or another third party prior to February 1 would constitute a breach of A's obligations to B under Contract I, and so long as making Contract II itself was not a breach of Contract I, the Uniform Commercial Code (UCC) allows B to seek an assurance from A that A will perform its duties under Contract I. The failure by A to give such an assurance could be treated by B as a repudiation of Contract I.<sup>177</sup> Thus, while there may be ambiguity as to which contract would survive, there is a technique—the demand for assurance—that can help resolve the issue relatively quickly.

The second line of reasoning is that Contract II would be an anticipatory repudiation of Contract I. This result is based on the assumption that the second contract would in some way decrease the value of the first contract by calling its expected benefit into question. In this analysis, the issue is not whether Contract II is actually performed, but whether the risk of Contract II's performance causes one to discount the value of Contract I. For example, if B, the obligee of Contract I, wanted to sell his rights under Contract I to D, D's pricing of Contract I would likely be lower in light of the existence of Contract II.

Underpinning this view is that signing Contract II would not merely be repudiation by words, but an act. Moreover, a "promisor's voluntary affirmative act that renders the promisor actually or apparently unable to perform without a breach is a repudiation."<sup>178</sup> The Restatement seems to support this opinion as the proper reading of a conflict between two contracts, offering the following example:

On April 1, A contracts to sell and B to buy land, delivery of the deed and payment of the price to be on July 30 . . . . A says

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177. RESTATEMENT (SECOND) OF CONTRACTS § 251.

178. FARNSWORTH, *supra* note 169, at 607.

nothing to B on May 1, but on that date he contracts to sell the land to C. A's making the contract with C is a repudiation.<sup>179</sup> In such a case, the injured party would have a claim of damages for total breach and would not have to perform under Contract I.<sup>180</sup>

Returning to our scenario of the computer sales contracts, German and Swiss law in particular have a rule similar to anticipatory breach in the doctrine of "positive breach of contract" (*positive Forderungsverletzung*). A positive breach can occur when a promisor "unequivocally evinces his intention not to perform."<sup>181</sup> This could include, for example, a vendor shipping goods to a third party, contrary to an exclusivity promise. The application of this rule where there has been actual performance under the second contract is clear—whether it would apply as well at the mere signing of the contract is more ambiguous.

To determine whether the mere existence of Contract II breaches Contract I, it is necessary to focus on the intent of the parties. When contractual language is clear, intent is found relatively easily. In cases such as the computer sales scenario, a more involved analysis of intent and prior negotiations would likely be necessary. The law of contracts, however, has made clear that, aside from scenarios where Contract II is a breach of Contract I, there may also be instances in which Contract II is an anticipatory repudiation of Contract I. In either case, a proper analysis would require an appreciation of the goal or purpose of Contract I and whether Contract II frustrates the expectation of Contract I's benefit. This supports, by analogy, the sense that in considering possible treaty conflicts, the heart of the matter is not whether treaties have the same subject-matter, but whether one treaty disrupts the intended operation of the other.

### c. Comparison to the VCLT and the Limits of the Contractarian Analogy

Although there are many points of comparison between treaties and contracts on the issue of textual conflicts, there are three core lessons to be drawn from this discussion: (1) the importance of intent in textual interpretation; (2) anticipatory repudiation as a useful legal framework for considering treaty conflicts; and (3) the role of assurance.

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179. RESTATEMENT (SECOND) OF CONTRACTS § 250, illus. 1, 5.

180. FARNSWORTH, *supra* note 169, at 607–08.

181. ZWIGERT & KÖTZ, *supra* note 171, at 493.

The first lesson of domestic contract law is the general evolution and convergence of methods of contractual interpretation around the idea of intent. The story of contractual interpretation is one in which the intent of the parties—tempered by certain external standards such as reasonableness and context of the transaction—is generally accepted as a useful, and often necessary, technique of contractual interpretation. Civil law systems have generally been open to examining the intent of the parties, and have also accepted the addition of objective standards. In common law countries, rules of interpretation—such as the plain meaning rule of the United States—have undergone a process of liberalization to allow, in certain instances, evidence of negotiations to be used in the first-stage inquiry into the clarity of the contract's language. The Restatement, for example, allows for the use of the intent of the parties. With the exclusion of certain countries, such as the United Kingdom, there seems to be a general acceptance of the use of some form of intent-based interpretation of contractual meaning. These developments argue in favor of greater use of purposivist reasoning in the interpretation of treaty texts when analyzing a real or potential treaty conflict.

The second main insight of domestic contract law is the role of anticipatory repudiation. In relation to the conflicting contracts scenario, common law countries—and to a certain extent the Germanic civil law systems—embrace the doctrine of anticipatory repudiation. The VCLT does not explicitly refer to this doctrine. Article 60, concerning the termination or suspension of a treaty due to its breach, defines a material breach as “[a] repudiation of the treaty not sanctioned by the [VCLT]; or a violation of a provision essential to the accomplishment of the object or purpose of the treaty.”<sup>182</sup>

Much attention has focused on whether the law on treaties encompasses a norm of anticipatory breach: “In other words, [can] a state . . . violate a treaty simply by creating a conflicting obligation, or [must it] actually fail to perform?”<sup>183</sup> Current analysis does

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182. VCLT, *supra* note 13, art. 60(3). A material breach has different effects under a bilateral or a multilateral treaty. Under a bilateral treaty, it gives the injured party or parties the option to terminate or suspend the operation of the treaty. 1 OPPENHEIM INTERNATIONAL LAW 1301–02 (Robert Jennings and Arthur Watts eds., 9th ed. 1992) [hereinafter OPPENHEIM (NINTH)]. Such termination can occur in a multilateral treaty when there is unanimous agreement (but for the breaching party); short of a unanimous agreement to terminate, the parties may suspend the operation of the treaty. VCLT, *supra* note 13, art. 60(2); see also OPPENHEIM (NINTH), at 1302.

183. BINDER, *supra* note 59, at 28.



not address the problem of treaty conflicts in these terms; as such it is not a developed norm. Based on analogies from the domestic cases of contractual conflicts, however, the idea of anticipatory repudiation is a useful one, as it focuses attention on the underlying goals of each treaty. This, in turn, urges a more systematic inquiry into the interrelationship of treaties.

A third lesson learned from domestic contract laws is the role that assurance can play in clarifying the legal status of agreements. This is essentially what Costa Rica sought from Nicaragua when it first learned of the secret treaty between Nicaragua and the United States. Upon receiving Nicaragua's refusal to give any assurance, Costa Rica did not pursue the issue; under a regime closer to contract law—especially U.S. contract law—failure to give an assurance would amount to a repudiation of the contract. Thus, if a norm of assurance were formalized in international relations, potential conflicts could be clarified expeditiously by countries effectively being asked to choose between (1) assuring that they would not break their obligations under Treaty I; (2) refusing to give an assurance and thus repudiating—essentially denouncing or possibly breaching—Treaty I; or (3) realizing that a conflict exists and offering to renegotiate with one or more treaty partners. Such “standard operating procedures” can play an important role in clarifying relationships absent the existence of a neutral third-party dispute resolution body, such as an international tribunal.

## 2. Analogies to Domestic Statutory Interpretation and Conflicts

General principles of treaty interpretation have been drawn from methods of statutory interpretation in addition to the law of contracts. The proliferation of multilateral treaties in particular has led to a reassessment of the contracts analogy:

[W]e are no longer faced with a conflict between two contracts concluded by one state vis-à-vis two different states, but two sub-systems, binding on all states involved, under which contradictory law was made. The best domestic law analogy may be that of two legislators, each creating contradictory laws.<sup>184</sup>

While most general principles of international law were defined in the early twentieth century, norms of domestic statutory interpretation have continued to evolve significantly. Domestic statutory interpretation, therefore, provides a model against which one may compare the current norms of treaty interpretation and assess whether the international norms have evolved in a manner similar

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184. PAUWELYN, *supra* note 8, at 18.

to their domestic counterparts. As domestic legal systems have increased in complexity, how has statutory interpretation evolved and what lessons can be applied to treaty interpretation?

a. Statutory Interpretation and Conflict

As in the case of contractual interpretation, methods of statutory interpretation in the United States have evolved from simply using the plain meaning of the text, to interpreting the language based on an analysis of the underlying goal or purpose of the statute. The plain meaning rule was commonly used in the United States prior to the 1940s; in *Caminetti v. United States*, the U.S. Supreme Court gave a classic explanation of the rule:

[W]hen words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent.<sup>185</sup>

This definition points to the very weakness of the rule: when the meanings of words are not “free from doubt,” then the plain meaning rule is simply used to justify whichever definition the court chooses to apply.<sup>186</sup>

Today, statutory interpretation in the United States often turns on an analysis of the goals of the legislature in enacting a certain law. These analyses have focused on ideas such as legislative “intent” or “purpose,” terms with definitions that “have not been applied consistently.”<sup>187</sup> The doctrines of intent and purpose are generally distinguished in that “lawyers tend to identify the immediate legislative purpose with ‘legislative intent’ and reserve the term ‘legislative purpose’ for any broader or remote (‘ulterior’) legislative purpose.”<sup>188</sup>

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185. *Caminetti v. United States*, 242 U.S. 470, 490 (1917); see also Arthur W. Murphy, *Old Maxims Never Die: The “Plain Meaning Rule” and Statutory Interpretation in the “Modern” Federal Courts*, 75 COLUM. L. REV. 1299, 1300 (1975); OTTO J. HETZEL et al., LEGISLATIVE LAW AND PROCESS: CASES AND MATERIALS 405 (2d ed. 1993).

186. HETZEL et al., *supra* note 185, at 392, 700–02 (citing J.W. HURST, DEALING WITH STATUTES (1982)).

187. *Id.* at 392.

188. F. Reed Dickerson, *Statutory Interpretation: A Peek at the Mind and the Will of a Legislature*, 50 IND. L.J. 206, 224 (1975).

Intentionalism is probably the most commonly used method of statutory interpretation in the United States.<sup>189</sup> Intent is discerned through the use of legislative history—a method that has had anything but a quiet history in legal academia and practice.<sup>190</sup>

Some argue, however, that purposivism, as opposed to intentionalism, is now the general theory of statutory interpretation.<sup>191</sup> Professors Henry Hart and Albert Sacks formulated purposivism in such a manner to suggest that as “every statute . . . has some kind of purpose or objective,” so (in Eskridge’s paraphrase) “ambiguities can. . . be intelligently resolved, first, by identifying that purpose and the policy or principles it embodies, and then by deducing the result most consonant with that principle or policy.”<sup>192</sup> The technique of purposivism—use of legislative history—is similar to that of intentionalism and likewise falls victim to the same criticisms of indeterminacy. Recent criticisms have also used public choice theory and interest group theory to argue that the interrelationship of rational legislators and interest groups does not lead to purposive statutes but rather to legislation that distributes benefits to well organized groups.<sup>193</sup>

Looking to the norms of other legal systems, “[i]f there were a Restatement of International Statutory Interpretation, the main rule would be that ordinary meaning of the statutory language (or in appropriate cases, the technical meaning of the word) prevails except under special circumstances.”<sup>194</sup> The disagreement between systems is centered around defining these special circumstances. The use of legislative history is a particular flashpoint. “Jurisdictions seem evenly split about whether the ‘plain’ meaning

189. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 325 (1990).

190. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 624, 676 (1990) [hereinafter Eskridge, *The New Textualism*]. The recent critiques by Justice Scalia are perhaps the best known indictments of the use of legislative history, a process which Charles Curtis called “fumbling about the ashcans of the legislative process for the shoddiest unenacted expressions of intention.” Richard I. Nunez, *The Nature of Legislative Intent and the Use of Legislative Documents as Extrinsic Aids to Statutory Interpretation: A Re-Examination*, 9 CAL. W. L. REV. 128, 131 (1972) (quoting Charles Curtis); see also HETZEL et al., *supra* note 185, at 439. The central dilemma is the indeterminacy in fixing a single intent for a group of legislators. Eskridge & Frickey, *Practical Reasoning*, *supra* note 189, at 326.

191. Eskridge & Frickey, *supra* note 189, at 333.

192. William N. Eskridge, Jr., *The Case of the Speluncean Explorers: Twentieth Century Statutory Interpretation in a Nutshell*, 61 GEO. WASH. L. REV. 1731, 1743 (1993) (citations omitted).

193. Eskridge & Frickey, *supra* note 189, at 334–35; see also Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423 (1988).

194. Daniel A. Farber, *The Hermeneutic Tourist: Statutory Interpretation in Comparative Perspective*, 81 CORNELL L. REV. 513, 517 (1996) (reviewing INTERPRETING STATUTES: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1991)).

can be overridden by especially strong evidence of legislative intent.”<sup>195</sup> Neil MacCormick and Robert Summers note that this division is not apparent when comparing common law and civil law countries.

#### b. Statutory Conflicts and Clashing Canons

Courts have used canons of construction to sort out many of these interpretive issues. However, as Karl Llewellyn wrote in an influential article on statutory interpretation in 1950, “there are two opposing canons on almost every point.”<sup>196</sup> Llewellyn’s article sets out a series of “thrusts”—theses of statutory interpretation—that were replied by “parries”—equally accepted anti-theses of interpretation. For example, one canon states that “[a] statute cannot go beyond its text,” while another argues that “[t]o effect its purpose a statute may be implemented beyond its text.”<sup>197</sup> This conflict is analogous to one of the problems with treaty interpretation—the varied conflicting general principles of construction, which lead to indeterminacy of outcomes.

Numerous canons pertain to statutory conflicts. Perhaps the most commonly noted canon states that the last-enacted statute controls over previously enacted statutes.<sup>198</sup> Another—the purpose rule—states that one should “interpret ambiguous statutes so as to best carry out their statutory purposes.”<sup>199</sup> Yet another canon requires that the specific control the general.<sup>200</sup> This latter canon is the domestic origin of the international version of *lex specialis*. Additionally, in light of the VCLT’s same subject-matter clause, it should also be noted that the *in pari materia* rule, which states that “similar statutes should be interpreted similarly, unless legislative purpose and history suggests material differences.”<sup>201</sup> Note that both the purpose rule and the *in pari materia* rule specifically men-

195. *Id.* at 518.

196. *See* note 59 and accompanying text.

197. Llewellyn, *supra* note 59, at 401.

198. HETZEL et al., *supra* note 185, at 600–06.

199. WILLIAM N. ESKRIDGE et al., LEGISLATION AND STATUTORY INTERPRETATION 381 (2000) [hereinafter ESKRIDGE, LEGISLATION].

200. *See* Preshler v. Rodriguez, 411 U.S. 475, 489–90 (1973).

201. ESKRIDGE, LEGISLATION, *supra* note 199, at 381. But see Llewellyn, who viewed this formulation as two opposing canons: “[s]tatutes *in pari materia* must be construed together;” and “[a] statute is not *in pari materia* if its scope and aim are distinct or where a legislative design to depart from the general purpose or policy of previous enactments may be apparent.” Llewellyn, *supra* note 59, at 402. Llewellyn’s formulation, it should be noted, is from an earlier article whereas the Eskridge formulation is from a more recent piece assessing how the U.S. Supreme Court applied canons from its 1986 through 1993 terms.

tion discerning the purpose of the statute in question. We see, therefore, that although mechanistic rules such as the last-in-time rule—*lex posterior*—are used to resolve domestic statutory conflicts, in the United States there is also an accepted use of purposive analysis to decide: (1) whether statutes are similar, and (2) how to interpret ambiguous language. The former is of particular interest, given the manner in which the same subject-matter clause has been used as a method to determine whether there is a treaty conflict.

In contrast, practice in the United Kingdom is rooted in the text, with a bias against the use of outside sources or purposivist interpretation. As one commentator noted:

American courts never followed the British practice of forbidding any resort to legislative history, and even under the plain meaning rule there were many ways in which a court could look at legislative history, if it wanted to—by characterizing words as “ambiguous,” by finding that their plain meaning led to “absurd” results, or by using extrinsic aids to “confirm” the plain meaning.<sup>202</sup>

### c. Comparison to the VCLT

The primary technique of treaty interpretation, as defined by VCLT Article 31, is textual. The first Paragraph 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 or purpose.”<sup>203</sup> The context for such interpretation includes other agreements made in connection with the conclusion of the treaty and considers, among other things, any subsequent agreements concerning the interpretation of the treaty or subsequent practice concerning treaty application as well as relevant rules of international law.<sup>204</sup>

While treaties are to be interpreted to effect their purposes, purpose is assumed to be clear from the plain meaning of the text. If it is not, then as a subsidiary means of reasoning, one may turn to *travaux préparatoire*, the international analog of legislative history.

International lawyers can learn from the the manner in which domestic lawyers use purposivist reasoning as a tool to discern when statutes are *in pari materia*. This technique places the purpose of the statute at the center of the inquiry. This technique is

202. Murphy, *supra* note 185, at 1301.

203. VCLT, *supra* note 13, art. 31(1).

204. *Id.* arts. 31(2), 31(3).

easily contrasted with the formalist misapplication of the same-subject rule seen in international law—if two treaties by their terms are not about the same subject, then they do not conflict. This is the reasoning of the new littoral states in the Caspian Sea Treaties, as well as in Wold's argument comparing SPAW and CITES. Such formalism misses the point: The specific words in the text are not the issue; the issue is the frustration of the treaty's purpose. Purposivist statutory reasoning asks whether, beyond formalist results, the aims of two potentially conflicting statutes concern the same subject. Applying purposivist reasoning to treaty conflicts, the inquiry becomes whether two treaties have the same, or similar, purposes. The inquiry then shifts to whether one treaty frustrates the purpose of another treaty, regardless of whether or not they seem to relate to the same subject-matter. Bringing purposivism forward as an interpretive tool furthers the description of how treaties actually affect one another in practice.

#### d. Conclusion: Statutory Analogy

The disagreement between different legal systems over the role of purposivism partially explains why it is not more prevalent in the international sphere. It is not the most widely-accepted technique with which to address problems of statutory construction. Yet, regardless of how many states currently use purposivist reasoning in their domestic statutory interpretation, this technique provides certain distinct advantages when used in the area of treaty conflicts.

### 3. Analogies to Statutes and Contracts: General Conclusions

Similarities exist in how the doctrines of contractual and statutory interpretation have evolved. Both began as being primarily—if not solely—concerned with the plain meaning of the text. However, increasing complexity and ambiguity have led to an evolution in each of these areas toward giving greater weight to the intent of the parties and the use of external evidence, such as related writings and legislative history.

Treaty interpretation, by contrast, is still relatively textual. Although itself a proposition open to controversy and criticism, the use of *travaux préparatoire* in treaty interpretation is more controversial than the use of legislative history in domestic statutory interpretation. Allowing for more purposive interpretation, however, can lead to a more finely-tuned approach to resolving treaty conflicts by increasing awareness of when one treaty may actually frustrate

the purpose of another. Accordingly, both contract drafters and legislators aim to avoid textual conflicts, in part by being mindful of the texts and the purposes of other statutes and contracts. This will be further discussed in relation to treaties in Part V, below.

The laws of legislation and contracts differ, however, in terms of possible solutions to existing textual conflicts. Excluding situations involving clauses of priority, a broad range of canons of construction is utilized by courts to resolve legislative conflicts. Particularly because some of these statutes may differ from areas of domestic regulation, and because the various canons of construction can contradict each other, it is important to have access to a competent court of general jurisdiction that can both analyze the conflicting texts and choose from among the possible canons in a manner which would be deemed procedurally and substantively fair by all the parties.

Contractual conflicts are often resolved by the parties themselves, without judicial involvement. Finding litigation to be too time consuming and costly, parties may instead rely on background rules, such as those described in the Restatement or the UCC, to provide a sense of their relative rights and thereby frame any negotiation. Norms such as anticipatory repudiation and the practice of assurance set out procedures and default rules that allow parties to resolve conflicts in a principled manner, should they wish to do so. Moreover, they provide a level of foreseeability as to the likely outcome if a negotiated result is not achieved and the parties resort to litigation or arbitration. The importance for states to be able to resolve treaty conflicts without resorting to third-party dispute resolution—which either may not exist or may be particularly time-consuming—makes this analogy particularly relevant.

Based on these analogies and in light of the earlier examples, it is now possible to set out the various tools and practices that would be useful in attempting to minimize the frequency and severity of treaty conflicts.

## V. FROM CONFLICTS TO COHERENCE IN THE INTERNATIONAL LEGAL SYSTEM

### A. *Tools and Techniques for Resolving Treaty Conflicts*

Implicit in the critique of the current state of the treaty conflicts doctrine is the issue that black-letter rules are only of nominal use in practice. As the United Nations recognized in the *Final Clauses of Multilateral Treaty Handbook*, VCLT Article 30 “may not be suffi-

cient to address all the problems arising with respect to the priority of the application of a particular treaty.”<sup>205</sup> *Ad hoc* negotiation is more prevalent than consistent application of Article 30. Perhaps even more worrisome than inconsistent application of Article 30 is that, in this era of treaty proliferation and congestion, there has been no in-depth consideration of the application of treaty conflict rules by an international court or other international institution since the 1930s.

It may well be that the international community would prefer to address rules of treaty conflict through political negotiations without being bound by fixed rules. However, if the project of international lawyers is to foster coherence among the sources of international law, then some form of strategy is necessary to address the manner in which the structure of international law has changed.

The various examples and doctrinal considerations suggest seven tools and techniques that may be especially promising: (1) revising how states decide which conflicts are worthy of attention; (2) using treaty drafting to avoid potential conflicts; (3) using purposivist interpretation more frequently; (4) using assurance in an expanded and more formalized manner; (5) institutionalizing safeguards against treaty conflicts; (6) incorporating better background rules for instances where safeguards and other techniques are not effective; and (7) refining the processes states use to build the international legal system.

### 1. Discerning Relevant from Irrelevant Conflicts

The VCLT attempts to solve conflicts between treaties with the same subject-matter. While this is useful in certain instances, it does not apply to the problems of greatest concern today. In 1953 Jenks argued for an understanding of treaty conflicts broader than simply a same subject-matter test, contending that if treaties “deal with related questions or have repercussions upon one another in any other way,” there is the “possibility of conflict.”<sup>206</sup> Of significant concern are subsequent treaties, regardless of professed subject-matter, that frustrate the purpose of preexisting treaties. In such cases, the political goals of state parties are inhibited by their own actions and, on a more abstract level, such conflicts undermine the structural role of treaties within the international system.

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205. MULTILATERAL TREATY HANDBOOK, *supra* note 108, at 86.

206. Jenks, *Law-Making Treaties*, *supra* note 11, at 404.



Whether or not these treaties happen to have the “same subject-matter” is less important than the effects of the treaties themselves and how those effects relate to the underlying purpose of the treaties. For example, treaties concerning the protection of the rights of groups of people “may tend to cut across the provisions of instruments dealing with particular subjects or problems.”<sup>207</sup> Such treaties are probably not concerned with the same subject-matter. Jenks’s concern, therefore, stems from the actual results of such treaty provisions rather than their expressed subject-matter.

## 2. Drafting Treaties to Avoid Conflicts

Of course, the best type of conflict avoidance takes place in the drafting stage, as is evinced by Article 30(2) of the VCLT. Commentators have highlighted the importance of clauses of abrogation or precedence, though their effectiveness depends on how well they are drafted. In 1945 Jenks wrote that “[t]he existence of a manual of common forms for standard articles could give a great stimulus to the adoption of suggestions designed to remedy the characteristic shortcomings of the technique of international legislation by means of the multipartite instrument.”<sup>208</sup> Nearly a decade later he lamented that “[t]he technical legal equipment necessary to give a picture of the international statute book as a whole is still defective in the extreme.”<sup>209</sup> This defect is still in need of remedy.

Perhaps of greatest use are the *Final Clauses of Multilateral Treaty Handbook*, published by the United Nations, and *The Treaty Maker’s Handbook*, published by the Dag Hammarskjold Foundation, both of which collect examples of different types of conflict avoidance clauses.<sup>210</sup> While these collections can help novice drafters get a sense of current and then-current practices, there is an underlying problem: standard practice does not result in adequately comprehensive treaty avoidance clauses.

Since the VCLT focuses on treaties covering the same subject-matter, and the VCLT’s conflict rules mentioning such clauses are under the rubric of successive treaties on the same-subject-matter, such clauses tend to be narrowly written, looking only to previous treaties that seem directly related. Yet, as we have seen, the main

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207. *Id.* at 415.

208. C. Wilfred Jenks, *The Need for an International Legislative Drafting Bureau*, 39 AM. J. INT’L L. 163, 175 (1945) [hereinafter Jenks, *Legislative Drafting Bureau*].

209. Jenks, *Law-Making Treaties*, *supra* note 11, at 431.

210. See generally MULTILATERAL TREATY HANDBOOK, *supra* note 108; THE TREATY MAKER’S HANDBOOK, *supra* note 35.

area of current concern in treaty conflicts is the effect of treaties with different subjects but overlapping areas of concern. Savings clauses that take into account this broader perspective are more likely to anticipate and avoid a greater number of possible future conflicts. This technique requires negotiators to think of the international legal system as a web of related agreements that can affect one another. This system may require treaty parties to consult with parties to other treaty regimes to which their states already belong, but the positive results are twofold.

First, not only will this technique prevent conflicts, but it will also have the salutary effect of spurring international lawyers, who profess to be working within an international legal system, to more carefully consider the shape and operation of that system as a whole. This is essential if international law is to operate as a true legal system. Mutual consultation by international organizations prior to the submission of draft conventions for ratification has been suggested as one important step.<sup>211</sup>

Jenks further argued that:

Invaluable as is much of this literature on special subjects, it does not fill the need for an international equivalent of Halsbury's *Laws of England* describing comprehensively in the context of the previous law the content of the whole body of law-making treaties now in force for any considerable number of parties. Even the texts currently in force are not conveniently available. Matters of this kind are too easily dismissed as of secondary importance, but they have a direct practical bearing on the quality of the craftsmanship which can be brought to the improvement of the international statute book.<sup>212</sup>

In the age of digital communications, progress has been made with regard to the growth of networked databases and search engines geared towards the dissemination of information about treaties.<sup>213</sup> Nevertheless, it still remains that too few comprehensive resources are used too infrequently at the drafting stage.

Some may argue that these issues can be addressed by recognizing a formal hierarchy among treaties. This proposal could be achieved by amending the VCLT to allow for default rules of hierarchy. Such default rules may favor, for example, law-making or quasi-constitutional treaties—, such as the U.N. Charter, the Rome Treaty of the EC, or the GATT—over more narrowly defined or

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211. See Jenks, *Law-Making Treaties*, *supra* note 11, at 430.

212. *Id.* at 431.

213. See, e.g., EISIL, *supra* note 101.

“contractual” treaties.<sup>214</sup> The interpretive debate under this norm would then become whether a certain treaty was “law-making” or not. This strategy, however, has some significant weaknesses. For example, it ignores that there is an ever-increasing number of law-making regimes and, as such, a growing risk of conflicts among them.

Furthermore, such a formal, systemic hierarchization of treaties may in fact clash with the VCLT. As one writer concluded:

Confidence in international intercourse requires certainty of compliance with any juridical commitment. Therefore, as a rule, there cannot be any hierarchic superiority between treaties. Any exception to this rule touches on a cornerstone of international law, as it tampers with the rule *pacta sunt servanda*. The superiority of a given treaty should be clearly manifested. Rules to this effect, especially Article 103 of the UN Charter, should be strictly interpreted.<sup>215</sup>

This criticism is based on the concern that hierarchization would decrease state parties' confidence in a treaty remaining effective with the force of law, as a hierarchically superior later-in-time treaty could trump a lower-ranked treaty. This concern could be minimized if, rather than adopting some general scheme of hierarchization throughout the international system, states made greater use of clauses of priority. Such clauses should enumerate related prior treaties and explicitly state that the current treaty is hierarchically superior or inferior to each prior treaty. Such a strategy is already used in various treaty regimes, but a more thorough analysis of potential conflicts during the time of treaty negotiation could lead to more comprehensive clauses of abrogation or precedence. Using a purposive analysis of treaties would be especially useful in the drafting of such clauses, as it would include the broadest number of potentially conflicting treaties. The drafter could then make a clearer decision as to which treaties should in fact be primary in relation to the new treaty. This practice would assist in subsequent treaty interpretation and aversion of conflicts.

### 3. Interpretation to Spot and Stop Conflicts

But what of existing treaties? As previously mentioned, one of the troubling aspects of treaty conflicts is the deafening silence of international tribunals. Due to the “generally accepted” presump-

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214. Note how, in some instances, this would effectively reverse the canonical principal of *lex specialis*.

215. Ignaz Seidl-Hohenveldern, *Hierarchy of Treaties*, in *ESSAYS ON THE LAW OF TREATIES: ESSAYS IN HONOR OF BERT VIERDAG* 7, 18 (Jan Klabbets & René Lefeber eds., 1988).

tion against a conflict of norms, “the state relying on a conflict of norms will have the burden of proving it.”<sup>216</sup> Pauwelyn discusses, as an example, the *EC-Hormones* case before the WTO, where the Dispute Settlement Board stated that “WTO members, as sovereign entities, can be *presumed* to act in conformity with their WTO obligations. A party claiming that a Member acted *inconsistently* with WTO rules bears the burden of proving that inconsistency.”<sup>217</sup>

While this practice describes the allocation of burdens in formal judicial proceedings, it is in the interest of negotiators to be cautious and to assume that clauses that may conflict will conflict, and thus they should utilize clear conflict avoidance devices such as clauses of abrogation or precedence and third party agreements.

Perhaps even more troubling is how cases that would seem to conflict are read out of existence by the application of the same subject-matter clause from VCLT Article 30. In this manner, Article 30 plays a role for which it was not meant—rather than simply being read to describe the rules to apply for certain types of conflicts, it is being used to support the argument that because these treaties are not concerned with the same subject-matter, no conflict exists between them.

Resolving such conflicts requires bringing the ideas of intent and purpose to the foreground in matters of treaty construction. As Pauwelyn wrote, “Jenks’s call for negotiators to ‘form the habit of regarding proposed new instruments from the standpoint of their effect on the international statute book as a whole’ has not always been heard.”<sup>218</sup> Discerning intent or purpose from *travaux préparatoire* in international treaty-making poses certain daunting challenges. Many of these challenges can be addressed, however, by considering the domestic processes and techniques of statutory construction.

It is important to keep in mind that while treaty interpretation under international law is used only as a matter of definition, one may not go beyond the “clear meaning” of the words.<sup>219</sup> Interpretation cannot make a conflict disappear.

[I]f interpretation leads to the conclusion that one norm in and of itself, or as implemented or relied upon by a state, *does* consti-

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216. PAUWELYN, *supra* note 8, at 240.

217. European Communities—Measures Concerning Meat and Meat Products (Hormones) para. 9, WT/DS26/ARB (Decision by the WTO Arbitrators on European Communities, July 12, 1999).

218. PAUWELYN, *supra* note 8, at 15 (quoting Jenks, *Law-Making Treaties*, *supra* note 11, at 452).

219. *Id.* at 245–46.

tute a breach of another norm, that is where the role of interpretation of treaty terms as a conflict-avoidance technique stops. To put it differently, interpretation of the terms in question may resolve apparent conflicts; it cannot resolve genuine conflicts.<sup>220</sup>

#### 4. Assurance

Although interpretation alone cannot resolve a conflict, the parties themselves are able to do so. Accordingly, where a party has interpreted the texts of the treaties and believes there is a potential conflict, the first step should be to seek assurance. In a potential AB:AC conflict—in which A and B have formed Treaty I and A and C have formed Treaty II—if B is concerned with whether A will honor its obligations, B should seek assurance from A that A does not intend to breach its obligations under Treaty I. The process of assurance-seeking may cause A to notice a potential conflict of which it had not previously been aware, and thus gives A, B, and C the opportunity to negotiate a solution among themselves. If A does not believe there is any potential conflict, then B's request affords A and B the opportunity to discuss what is clearly a divergent interpretation of their treaty. If A gives B the requested assurance, then B can feel relatively confident that Treaty I will be honored.

If, however, A refuses to give assurance, B may view this refusal as an act giving B the right to terminate its obligations under Treaty I without incurring any state responsibility even if A has not actually breached. Under such a regime, Costa Rica would have been able to immediately withdraw from the Cañas-Jerez Treaty once Nicaragua refused to give any assurance. Such a default rule would give the parties a better sense of their relative positions and facilitate any re-negotiation by providing them with a common understanding of the legal context. Thus, making assurance-seeking a standard procedure in international relations would facilitate the resolution of potential conflicts by the parties themselves.

#### 5. Institutionalized Safeguards

Another technique is to establish certain safeguard procedures within international institutions. For example, Rosenne suggested that a possible solution concerning the UNCLOS scenario would be to assign a monitoring role to the U.N. Secretary-General, due to his double role as depositary of UNCLOS specifically, and in the

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220. *Id.* at 272.

registration and publication of treaties more generally, under Article 102 of the U.N. Charter.<sup>221</sup>

Similarly, the Economic and Social Council (ECOSOC) has been tasked with coordinating the efforts of U.N. specialized agencies. Article 63(2) of the UN Charter gives ECOSOC the responsibility to “coordinate the activities of the specialized agencies through consultation with and recommendations to such agencies and recommendations to the General Assembly and the Members of the United Nations.”<sup>222</sup>

The *Review of Multilateral Treaty-Making Process* submitted to the General Assembly in 1980 noted the administrative procedures that parties used to avoid conflicts. The International Labour Organization, for example, “developed a particularly careful practice of identifying [conflicting] treaties, including both those within its own organization and those concluded or under consideration outside, about which information is received pursuant to [information-sharing arrangements between international organizations organized by the United Nations].”<sup>223</sup>

While institutional safeguards may be a helpful addition to our growing catalog of responses to treaty conflicts and legal fragmentation, one should not put too much emphasis on any one tool. Rosenne believes that while administrative procedures can be useful, “their role must not be exaggerated.”<sup>224</sup> Conflicts will persist.

## 6. Background Rules

Recognizing that conflicts will persist, policymakers need to establish some elemental rules to undergird the treaty-making process.

### a. Good Faith and Clean Hands

Good faith is a critical element of all aspects of international law.<sup>225</sup> Concerning treaty conflicts, good faith is especially relevant regarding whether the parties to a later conflicting treaty knew of the existence of an earlier conflicting treaty at the time the later treaty was concluded. The need for good faith is particularly stark

221. ROSENNE, *supra* note 98, at 90.

222. U.N. CHARTER art. 63(2).

223. *Analytical Review of the Process: Report of the Secretary-General*, para. 49, U.N. Doc. A/35/312 (1980), revised by U.N. Doc. A/35/312/Corr. 1 (1980).

224. Rosenne, *supra* note 98, at 95.

225. See, e.g., VCLT, *supra* note 13, art. 31(1) (“A treaty shall be interpreted in good faith[.]”).

when there is a diversity of parties between the two treaties (AB:AC). If C subsequently seeks enforcement of A's obligations under Treaty II, that would conflict with A's obligations under Treaty I. At issue, in part, is "C's good faith in [making Treaty II], which depends *inter alia* on C's knowledge of treaty AB."<sup>226</sup> If C knew of the earlier conflicting treaty, then it should not be able to rely on VCLT Article 30(4) to enforce Treaty II, as such a result would reward C's bad faith at B's expense. Rather, the international system should clarify that the norm of good faith prohibits a state from invoking the VCLT or general principles such as *lex posterior* when acting in bad faith.

#### b. Anticipatory Repudiation.

Commentators agree that if a later-in-time treaty is prohibited by an earlier treaty, then the conclusion of the later treaty is a breach of the earlier, and depending on the circumstances, may rise to the level of being a material breach.<sup>227</sup> The more difficult issue is when the later treaty is not explicitly prohibited by the earlier treaty. Drawing from contract law, international law should recognize a doctrine of anticipatory repudiation where the act of negotiating and concluding a treaty that would frustrate the purpose of an earlier treaty may be viewed as a repudiation of that earlier treaty. In such a case, conclusion of the later treaty would constitute an act of material breach and give rise to issues of state responsibility.

### 7. Role for Soft Law<sup>228</sup>

Finally, it is possible that one of the techniques that will alleviate the problem of future treaty conflicts will emanate not from a canon of construction, a hierarchization of treaties, or a new clause within treaties. Rather, this term may emanate from the increased use of so-called "soft law."

The term soft law refers to instruments that, although not legally binding, can play a part in the creation of a norm. Corporate codes of conduct, joint declarations after diplomatic conferences, and "gentlemen's agreements" between countries are examples of

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226. Vierdag, *supra* note 109, at 94.

227. See, e.g., ROSENNE, *supra* note 98, at 85.

228. I am indebted to Peggy McGuinness of the University of Missouri at Columbia for suggesting this line of inquiry.

soft law instruments,<sup>229</sup> which tend to be used to a greater degree in the spheres of environmental and human rights policy than in national security or military affairs.<sup>230</sup>

Soft law may provide a means for states to build a consensus on a new regime prior to formalizing a treaty. As this new regime is refined through soft law instruments such as declarations, white papers, and gentlemen's agreements, states will be able to analyze the relationship of the nascent regime to current treaties in force. As they are not legally binding, soft law norms are relatively easy to adjust and allow for a period of trial and error. This interval of soft law would allow states to clarify and address potential conflicts through a variety of means, including reconsideration of how to draft any forthcoming treaty on the subject, or how to promulgate optional protocols—perhaps including savings clauses or similar language—under existing treaties to address possible crises.

This soft law process would stand in contrast to the working group scenario which has dominated the drafting of numerous recent multilateral treaties, and the political negotiations in subject-specific committees building towards a final text. While these latter techniques can lead to achieving hard bargains and technically precise language, they can also be akin to running while wearing blinders: you are focused on your goal, but fail to notice what is happening around you.

There is, however, a precautionary note on using soft law. Waincymer considers how regimes relying on soft law can be overtaken by those using so-called hard law:

In the early years of international environmental agreements, some of these concerns may have been less important as they did not seek to generate much in the way of clear rights and obligations and were described by many as elements of "soft law." The history of trade regulation has, on the other hand, shown a desire to establish immediately binding rights and obligations together with accountability standards, supported by a reasonably unique and largely effective system of binding dispute resolution.<sup>231</sup>

These differing styles may not only lead to conflict, but may favor the vindication of trade rights over more amorphous environmental rights. Consequently, any increased use of soft law would

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229. See, e.g., Lawrence L.C. Lee, *The Basle Accords as Soft Law: Strengthening International Banking Supervision*, 39 VA. J. INT'L L. 1 (1998).

230. On soft law generally, see COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000); *A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371 (1988).

231. Waincymer, *supra* note 141, at 15.



require careful coordination so as not to inadvertently disadvantage one area of international law at the gain of another.

B. *From Conflicts to Coherence in the International Legal System*

The combination of tools, rules, and techniques will assist policy-makers in making the international legal system more efficient and coherent. Perhaps most importantly, they will provide the means to avoid many future conflicts. Treaty conflict and fragmentation is, for the moment, a nascent problem that is increasingly present, but not yet endemic. The concern is that not only will the number of treaties continue to increase, but also that states will actually use them and refer to them more often. In this manner, the success of international legalization as a strategy can prefigure its own crisis. As exemplified by the U.N.'s decision to organize a Study Group on Fragmentation, the time to design solutions is now, before a proliferation of such conflicts causes serious systemic stress.

Taken together, the procedures and rules suggested above lead to four advantages over the current system. First, they would increase certainty for decision makers that their agreements would be honored, or at the very least, define their legal recourse if agreements are not honored. Furthermore, emphasizing more comprehensive clauses of priority that are drafted to avoid conflicts with the purposes—rather than merely the plain words—of other treaties leads to better fine-tuning of how texts interact. Moreover, if some ambiguity exists, the use of assurance as a standard procedure encourages the parties to discuss their intentions. Assuming that most states act in good faith most of the time, if a disagreement becomes apparent, the parties may renegotiate. If a party refuses to give an assurance, then it grants the other state the right to terminate. If a party acts in bad faith and gives an assurance but then breaches, the non-breaching state has the added evidentiary weight of the assurance in any subsequent dispute resolution or negotiation. Thus, while assurance is not a perfect solution, it at least gives incentives for dialogue and provides a framework of defaults that does not currently exist.

Second, the suggested rules and procedures allow for flexibility without sacrificing normativity. In an AB:AC conflict, Article 30 of the VCLT allows each treaty to remain effective between each of the parties, leaving them to negotiate whatever solution they want. One can view this as flexible to a fault, as there are no underlying norms to guide the negotiations. The result may resemble the E.U./Germany/U.S. government procurement dispute, where the

“renegotiation” was essentially a trade skirmish. At a certain point, flexibility gives way to inefficiency. While accepting that political negotiations can in some instances be the best solution to a treaty dispute, the use of background norms such as procedures for assurance, tying good faith to treaty enforcement, and applying anticipatory repudiation on an international level, gives the parties a sense of which side has the stronger normative argument. This does not, however, mean that the state with the stronger normative argument would get all that it wants in political negotiations, as neither state may in practice be willing to take the time and expense to use third-party dispute resolution. Yet, at the very least use of background norms gives all states a common normative perspective. Such a common perspective is noticeably lacking in many intractable conflicts, such as that over Caspian Sea oil, where the parties have very different views over which legal regime controls.

A third advantage of the suggested rules and procedures over the current system is that these techniques and rules emphasize the types of conflicts that policymakers are most concerned about—when the conflict causes the purpose of the parties to one or more treaties to be frustrated. By contrast, the current rules pertain primarily to issues that are of little concern—whether the treaties are, narrowly speaking, about the same subject.

Finally, for an international system to operate efficiently without a single executive or any effective courts of general jurisdiction, it must contain rules and procedures that the parties to a potential dispute can apply themselves, without recourse to an international tribunal. The jurisdictional problems of the *San Juan River Case* and the current arguments over who should decide trade or environment conflicts show that this is not a theoretical problem; rather, it is at the heart of the matter.<sup>232</sup> With problematic third-party adjudication in the international realm, an added emphasis is needed on the negotiation and drafting processes to avoid conflicts, as well as in designing rules that the parties themselves may apply.

International law could become a more coherent system by having less law, but better rules to interpret and resolve conflicts

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232. The issue of jurisdictional conflicts is beyond the scope of this Article and has been considered at length elsewhere. See, e.g., *supra* note 9; *supra* note 146. Absent the ICJ, there are no international tribunals of general jurisdiction (and even in the case of the ICJ, that is only technically true; query whether parties would want to bring complex trade law problems to the ICJ, for example). This is in contrast to the realm of domestic law conflicts where one can access competent courts of general jurisdiction.

between norms. Neither treaty congestion nor the existence of treaty conflicts alone does violence to the idea that international law is a system; rather, the damage is caused by the lack of consistent and effective means of resolving such conflicts.

Legal regimes are used as a means to depoliticize international relations. Yet, increasing the number and scope of regimes leads to increasing treaty conflicts that can only be resolved through political negotiations. In part, the increase in legal regimes beyond a certain point makes state compliance with any particular regime more difficult. Schachter notes that “[s]ome observers have felt that the proliferation of numerous specialized treaties has exceeded the absorptive capacity of many governments.”<sup>233</sup> Rather than increasing compliance, the sheer number of treaties undermines it. Schachter continues:

Some international lawyers, sensitive to the deluge of new treaties and international legal decisions, have concluded that we are getting too much law (just as many feel that in national society we are getting too many laws). Sir Robert Jennings, [who later became] a judge on the International Court, said in 1976 that “the danger today is that international law may be submerged under the rival empires of paper emanating from assemblies of government delegations.”<sup>234</sup>

If a state absorbs too many legalistic regimes in a particular policy area, it may find itself having to negotiate with its various partners as to its obligations and rights. After a point, therefore, increased legalization paradoxically leads to increased politicization if clear background rules do not contextualize the negotiations.

Regardless of whether there are useful conflict avoidance clauses or conflict resolution norms, an appreciation of the problems of overlapping regulatory regimes and treaty conflicts leads to a certain skepticism concerning the wisdom of drafting broad treaties that sacrifice strategy—long term viability and stability—for tactics—a perception that something is being done about a problem.

If international lawyers wish to claim that international law functions as a coherent system, they must treat it as such. Fostering the habits and procedures that build coherence—from how clauses are drafted to the underlying rules governing state practice with respect to treaties—is of primary importance.

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233. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 79 (1991).

234. *Id.*

## CONCLUSION

Treaties set forth norms of expected behavior. The lack of a principled method of treaty conflict resolution decreases the predictability of outcomes of actual and potential conflicts and consequently debases the value of treaties. I have argued that there is no single rule that will resolve the problem of treaty conflicts. Rather, what is needed is a recognition that the current rules maintain a level of uncertainty that is detrimental to the coherent functioning of the international legal system.

There are two basic requirements for an effective response to treaty conflicts: (1) default rules that give better predictability as to which treaty would be enforceable in the case of conflict; and (2) standard procedures for treaty negotiators and drafters to maximize the probability of avoiding conflicts.

Where parties are assessing a potential conflict, the international system should recognize default rules such as: (1) refusing to give assurance gives rise to a right of termination by the other party; (2) good faith and clean hands are required for treaty enforcement; and (3) in some cases, the later treaty may be an anticipatory repudiation of the earlier treaty, so parties must proceed at their own risk.

Standard procedures of treaty drafting should make greater use of: (1) purposive interpretation to spot conflicts that would frustrate the intent of the parties; (2) comprehensive clauses of priority; (3) coordination with other parties; and (4) use of institutionalized safeguards.

Taken together, these tools and techniques do not constitute a simple solution to the fragmentation caused by treaty conflicts. No such simple solution exists. It is better, however, to focus on minimizing the effects of a treaty conflict, rather than covering it over with a formalistic solution that does not address the underlying problems.<sup>235</sup>

The solution to one dilemma patterns the next problem. The success of treaties has led to the increased concern over regulatory overlap, treaty conflicts, and the inadvertent hierarchization of substantive areas of international law. Over-construction has led to systemic stress. This Article has suggested means to appreciate the broader systemic implications of the lack of connection between the norms of the VCLT and the actions of states. Through methods of treaty drafting that take into account the structure of the

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235. See Jenks, *Law-Making Treaties*, *supra* note 11, at 434.

international legal system and through methods of treaty interpretation that recognize how treaties in one policy area can affect treaties in another, we can minimize—though never eliminate—the scope of subsequent treaty conflicts.