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CONFLICTS OF NORMS AND JURISDICTIONS BETWEEN THE WTO AND MEAS

Including Case-Studies of CITES and the Kyoto Protocol

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Abbreviations

AGP	WTO Agreement on Government Procurement
CDM	Clean Development Mechanism
CER	Certified Emission Reduction
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CTE	WTO Committee on Trade and Environment
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICJ	International Court of Justice
ILO	International Labour Organization
JI	Joint Implementation
MEA	Multilateral Environmental Agreement
MFN	Most-Favoured-Nation
PPMs	Process and Production Methods
SCM	WTO Agreement on Subsidies and Countervailing Measures
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention on Climate Change
Vienna Convention	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

1 Introduction

1.1 Presenting the Topic

During the last decades an overall environmental awareness has evidently emerged among the world's citizens as well as the countries as such. As a consequence of this development environmental issues have been subject to new regulations at a domestic as well as an international level. As a reaction to the development of an increasing number of Multilateral Environmental Agreements (MEAs) and their provisions including trade affecting measures, the World Trade Organization (WTO), has become forced to consider environmental issues. Consequently, the top interest of the WTO to liberalize world trade is set against the urgent need of protecting the environment. This tension between trade and environmental policies has given rise to an extensive debate and one interesting question is whether it is possible to cumulatively liberalize trade and introduce a higher protection for the environment.¹ This development is also of immediate interest to the ongoing Doha Round, which is the first WTO round to directly deal with environmental concerns. The relationship between the WTO and MEAs has lately been lively debated. Several proposals have been made in attempt to clarify the relationship, but so far no consensus has been reached.

As environmental concerns mainly are left outside the WTO system these issues instead are left to be dealt with in other international agreements. Therefore, MEAs are essential as to regulate provisions for the protection of the global environment and to address important environmental problems. Examples of issues addressed in MEAs are air pollution, biodiversity, climate change and hazardous waste disposal. Environmental issues like these constitute examples of issues that can not be addressed accurately on a national level. To solve or at least decrease these problems international efforts will have to be made.² Today more than 250 MEAs are in force regulating environmental issues and of these around 30 may affect trade.³ Although sustainable development, involving environmental aspects, always has worked as a principle of trade liberalization the recent development with an increasing number of MEAs has increased the intensity of the debate concerning linkages between trade and non-economic issues and the relationship between WTO rules and specific trade obliga-

¹ Biermann, F, *The Rising Tide of Green Unilateralism in World Trade Law, Options for Reconciling the Emerging North-South Conflict*, page 421.

² Alam, S, *Trade Restrictions Pursuant to Multilateral Environmental Agreements: Developmental Implications for Developing Countries*, page 983.

³ Brack, D and Gray, K, *Multilateral Environmental Agreements and the WTO*, page 4f.

tions set out in MEAs. This as a consequence of that those MEAs often conflict with fundamental principles of the WTO system.⁴

Potential as well as factual conflicts may arise on several levels between the WTO system and provisions set out in MEAs. Measures that are permitted or accepted in one agreement can be forbidden in another. Furthermore, potential conflicts often arise already before national environmental measures are imposed or even when new agreements are negotiated. The impact of the WTO may also have an effect on decision makers and negotiators, who may hesitate to decide on rules and programmes as a consequence of that they may be questioned before the WTO.⁵

Conflicts may arise concerning which dispute-settling mechanism that shall have the jurisdictional power as well as which law that shall be applicable before that mechanism. Such conflicts are possible as a consequence of that provisions of MEAs might be considered when interpreting WTO law. Due to such jurisdictional conflicts the certainty achieved by international relations can be disrupted.⁶ To date, it is mainly the WTO that has a powerful and effective dispute settlement mechanism as well as the possibility to use sanctions against wrongdoing parties.⁷ As the WTO may not be the most appropriate organ to cope with complicated environmental issues there is a risk for that the objectives of MEAs may be neglected.

No formal dispute involving a measure under a MEA has yet been brought to the WTO. Nevertheless, the complexity of the relationship between environmental and trade rules has been highlighted.⁸ However, several disputes concerning environmental issues have been brought before the WTO dispute-settling mechanism, which over time has opened up to demands relating to environmental protection.⁹ Consequently, the last years' decisions from the WTO dispute-settling mechanisms show a higher acceptance for international environmental agreements when deciding measures acceptability according to WTO rules. This

⁴ Busse, M, *Trade, Environmental Regulations and the World Trade Organization: New Empirical Evidence*, page 299.

⁵ Ekelöf, G, *Miljön på undantag - de internationella miljöavtalen och WTO*, page 7.

⁶ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 71.

⁷ Ekelöf, G, *Miljön på undantag - de internationella miljöavtalen och WTO*, page 7.

⁸ See *Chile - Measures affecting the Transit and Importing of Swordfish and European Communities - Trade Description of Sardines*.

⁹ *The Doha mandate on multilateral environmental agreements (MEAs)*, and Busse, M, *Trade, Environmental Regulations and the World Trade Organization: New Empirical Evidence*, page 299.

development is positive from an environmental perspective. At the same time it is, however, problematic that the relationship between the respective rules and regulations of the WTO and MEAs is not clarified in a more defining way.¹⁰

The relationship between existing WTO rules and specific trade obligations set out in MEAs is one topic that is aimed to be explicitly treated during the Doha round.¹¹ Even though this tense relationship, for many years now, has been subject to discussions in several forums, such as the WTO and FN, no acceptable solution has been found. As an example the WTO Committee on Trade and Environment (CTE) has examined the relationship since 1995, yet without any real result. Even though the Doha Round explicitly is meant to deal with this relationship their mandate is limited as to some specific MEAs and even to specific measures. Another important limitation is that only the parties of a specific MEA are concerned. In addition, the negotiations are complicated by developing countries' fear for that the introduction of environmental provisions into the WTO system is grounded in protectionist purposes for the developed countries.¹² In theory, this relationship should not really be as problematic, as MEAs regulate multilateral measures and not unilateral ones, just like the WTO. Therefore, arbitrary and discriminatory behaviour should be avoided to a greater extent.¹³ Additionally, it could be of interest to mention that conflicts of norms have been subject to rather extensive discussions while conflicts of jurisdictional matters only have been debated to a rather limited extent.¹⁴

1.2 Purpose and Demarcation

The purpose of this paper is to deal with the problematic and tense relationship between the WTO system and MEAs. Even though, as mentioned, no factual dispute yet has been brought before the WTO dispute-settling mechanisms this relationship is of great importance as there is a significant risk for future conflicts. As a consequence, of the absence of a factual conflict, the discussion concerning how such conflicts shall be resolved becomes speculative. Nevertheless, the discussion is essential as parties as well as non-parties to the agreements need the relationship to be foreseeable. For this purpose they need to know how the agreements should

¹⁰ Ekelöf, G, *Miljön på undantag - de internationella miljöavtalen och WTO*, page 7f.

¹¹ WTO Doha Ministerial Declaration, paragraph 31.

¹² Ekelöf, G, *Miljön på undantag - de internationella miljöavtalen och WTO*, page 8.

¹³ Brack, D and Gray, K, *Multilateral Environmental Agreements and the WTO*, page 7.

¹⁴ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 71.

be interpreted as to not cause negative affects on for example the effectiveness with the objectives of a specific MEA. Besides conflicts of norms also jurisdictional conflicts are meant to be treated within the purpose of this paper. To illustrate the practical effects of factual and possible conflicts this study will involve case-studies of two MEAs, namely the Convention of International Trade in Endangered Species of Wild Fauna and Flora (CITES) and the Kyoto Protocol. However, this study is not meant to treat all kinds of possible conflicts why only some examples are presented.

To fulfil the stated purpose of this paper the following questions will be analyzed:

- ✓ Which conflicts of norms may arise between the WTO system and provisions set out in MEAs?
- ✓ Which conflicts of jurisdictions may arise between the dispute settlement mechanisms of the WTO and those of MEAs?
- ✓ How should these conflicts be solved and which rules of international law, other than WTO law, should be considered?
- ✓ How should the relationship between the WTO and MEAs be clarified?
- ✓ Concerning the case-studies; which conflicts may arise between CITES/the Kyoto Protocol and the rules of the WTO? How should these conflicts be solved and which rules of international law, other than WTO law, should be considered?

CITES and the Kyoto Protocol have been chosen as they may conflict with the WTO regime in different ways. Moreover, they are because of their environmental connection of immediate interest to the ongoing environmental debate. CITES conflicts directly with the provisions of the WTO, thereby it can illustrate an example of factual conflicts which may arise between the WTO system and a MEA. Regarding the Kyoto Protocol it is of great relevance as the current one expires by 2012 and discussions are being held in order to conclude a new protocol. The Kyoto Protocol may conflict with the WTO system in several ways and therefore it can make a valid contribution to this paper showing examples of potential conflicts that may arise between the WTO rules and a MEA.

1.3 Method

To fulfil the indicated purpose of this paper material in form of primary sources in form of conventions and treaties have been treated. Additionally, secondary sources such as books,

articles and reports have been used. The majority of these sources constitute of articles and of those the majority are collected from the Journal of World Trade. Moreover, the homepage of the WTO and other international internet sites have been of importance. However, some books, such as Pauwelyn's *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, have made an important contribution to this paper. The material has been used to illustrate the line of reasoning and to support the arguments handled in this paper. The material has been tried to be approached critically in order to decrease the risk of presenting personal pre-understandings and the like.

1.4 Disposition

Initially, the core principles of the WTO, environmental issues within the WTO system and some general statements concerning MEAs will be presented. In addition, the definition of conflict and possible conflicts that may arise between the WTO agreements and MEAs will be treated. Moreover, possible jurisdictional conflicts will be treated why the dispute-settling systems of the WTO as well as those of MEAs' will be examined. Additionally, common principles of international law, on how the WTO agreements should be interpreted, will be presented. Later on case-studies of CITES and the Kyoto Protocol will follow. Furthermore, approaches on how to clarify this tense relationship and how to develop the dispute resolution of the WTO as well as MEAs as to better handle disputes involving environmental issues, will be studied. Finally, certain conclusions will be drawn.

2 Background

2.1 Core Principles of the WTO

The primary aim with the WTO system is to liberalize international trade.¹⁵ Apart from providing a common set of international trade rules, the WTO system is meant to offer an effective dispute-settling system facilitating the settlement of trade disputes among its member nations.¹⁶

The core principles of the WTO system are expressed in the original General Agreement on Tariffs and Trade (GATT) of 1947. Of those the most vital ones include the Most-Favoured-Nation (MFN) principle, expressed in article I of the GATT, requiring the members to treat products from other members in the same way. Moreover, the principle on national treatment in article III requires members to treat any imported product in the same way as domestic “like products” would be treated. This principle shall prevent that domestic products will secure market advantages through imposing discriminatory measures on imported products. Additionally, article XI, involves a prohibition on quantitative restrictions, aiming at prohibiting quotas, embargoes, and licensing schemes on imported as well as exported products. If any of the core principles, like the ones mentioned, is violated a claim of any WTO member could be justified through a general exception under article XX. These exceptions are only permitted when the measures are shown not to be applied in a manner constituting means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade. However, articles XX (b) and XX (g), which are the ones with relevance for an environmental perspective, do only apply to violations of general WTO obligations and not to every measure imposed for environmental protection.¹⁷ These exceptions will be further treated below.

2.2 Environmental Issues within the WTO

Even though the foremost aim of the WTO is to liberalize trade the WTO agreements contain measures making environmental considerations possible, as the exceptions in article XX of the GATT. The commitment to the objective of sustainable development, which was recognised already in the Preamble to the Marrakesh Agreement, signed in 1994, was reaffirmed through the Doha Declaration in 2001. Moreover, it was stated in the Doha

¹⁵ Preamble to the Marrakesh Agreement Establishing the WTO.

¹⁶ Caldwell, J, *Multilateral Environmental Agreements and the GATT/WTO Regime*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 41.

¹⁷ *Ibid.*, page 41f.

Declaration “*that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be mutually supportive*”.¹⁸ Consequently, as long as certain requirements are fulfilled, national measures for the protection of human, animal or plant life or health, or of the environment, will be respected.¹⁹ Moreover, the CTE discusses trade and environmental issues and has so far fulfilled more than hundred reports.²⁰ However, none of these reports has been pursued by the WTO itself.²¹

Environmental issues as well as other non-economic issues have naturally in some aspects become regulated within the WTO system. The general exceptions of article XX of the GATT allows members to take non-economic values and interests, that compete or conflict with free trade, into account. Through this possibility WTO members could be allowed to deviate from basic rules and disciplines of the WTO regarded that certain conditions are met.²² According to article XX “*the commitments entered into by the Contracting Parties were not meant to prevent them from adopting measures... (b) necessary to protect human, animal or plant life or health; ... (g) relating to the conservation of exhaustible natural resources ...*”, (for example endangered species of animals or plants)²³. The WTO provisions for environmental protection cover only product-related measures why process-related requirements are to be left outside the scope of the WTO.²⁴ Nevertheless, such requirements have been considered before the WTO dispute-settling mechanisms.

Article XX provides exceptions from violations of all GATT obligations why the measures that can be subject to a dispute may vary greatly. The adjudicating bodies of the WTO have established a “necessity test” for their decisions on whether a general exception in article XX shall justify an infringement of any of the GATT obligations. This decision involves a process of weighing and balancing of the following factors; the importance of the common interests or values that the measure aim to protect, the effectiveness of the measure in pursuing the aimed policies and the following impact of the regulation on imports or exports. Naturally, the “necessity” requirement will be easier fulfilled the more essential the aimed polices are and

¹⁸ WTO Doha Ministerial Declaration, paragraph 6.

¹⁹ Emmert, F, *Labor, Environmental Standards and World Trade Law*, page 127.

²⁰ See for instance WT/CTE/WI-100 and WT/CTE/I-3.

²¹ Wiers, J, *Trade and Environment in the EC and the WTO, A Legal Analysis*, page 15.

²² Van den Bossche, P, *The Law and Policy of the World Trade Organization*, page 43 and Wiers, J, *Trade and Environment in The EC and the WTO, A Legal Analysis*, page 178.

²³ *United States - Import Prohibition on Certain Shrimp and Shrimp Turtle Products*.

²⁴ Georgieva, K and Mani, M, *Trade and the Environment Debate: WTO, Kyoto and Beyond*, page 3.

the more appropriate the measure applied is in fulfilling that purpose.²⁵ The measure shall, according to the panels, be the “*least GATT-inconsistent measure reasonably available*”. As a measure is either GATT-consistent or GATT-inconsistent, it has been promoted that this statement should be equivalent to the “*least trade restrictive*” measure, then enabling a further consideration of the GATT objectives. Additionally, the necessity test could be said to appear as a strict proportionality test because of the weighing and balancing included in the test.²⁶

In the *Tuna-Dolphin*²⁷ dispute between the US and Mexico, tuna caught with a certain method causing unnecessary harm on dolphins, was embargoed with reference to the Marine Mammal Protection Act. This embargo was seen by Mexico as conflicting with the prohibition on quantitative restrictions in article XI of the GATT. The panel suggested that the general exceptions were to be applicable only to measures protecting resources within the territorial jurisdiction of the enacting state. The panel concluded that trade affecting measures for environmental purposes would threaten the furtherance of free trade liberalization, constituting the foremost aim of the WTO regime, through giving incitements for green protectionism. However, the ruling was never adopted. Another *Tuna-Dolphin* panel was established. Neither this ruling was adopted as a legally binding dispute settlement.

Initially, article XX of the GATT was understood as deciding any conflicts between free-trade rules and environmental norms in favor of the former. The *Tuna-Dolphin* panels tried to enhance this view, even though it conflicted with the wording of the GATT treaty. However, these concerns were taken into account only concerning the effects from a free trade perspective. Consequently, this ruling raised concerns about the balancing of competing values in the trading system and a view of the GATT as putting the interest of trade liberalization above all other human concerns.²⁸

In contrast to the *Tuna-Dolphin* panel the Appellate Body stated in the *Shrimp-Turtle*²⁹ ruling that the wording of article XX did not by itself mean impermissibility in the content of allowing trade measures to protect the global environment. Two requirements have to be

²⁵ Marceau, G, and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO and MEAs*, page 72.

²⁶ Wiers, J, *Trade and Environment in the EC and the WTO, A Legal Analysis*, page 240f and *Canada - Measures Affecting Exports of Unprocessed Salmon and Herring*, 35th Supp. 98.

²⁷ *United States - Restrictions on Imports of Tuna*, Report of the Panel.

²⁸ Howse, R, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, page 2.

²⁹ *United States - Import Prohibition on Certain Shrimp and Shrimp Turtle Products*.

fulfilled, namely the measure must be covered by one of the exceptions set out in article XX and be applied consistently with the preamble to article XX. The latter requirement involves an application neither giving rise to unjustified or arbitrary discrimination between countries where the same conditions prevail, nor creating a disguised restriction on international trade.

In the *Shrimp-Turtle* ruling a complaint against the United States was filed by India, Malaysia, Pakistan and Thailand in 1996. In this case it was required, through a US court decision, to enforce guidelines under Section 609 without geographical limitation. This were to result in an import ban on shrimp or products of shrimp if harvested, irrespectively of where, with commercial fishing technology risking to affect adversely some species of sea turtles. Sea turtles were, through Section 609, aimed to be protected and conserved by initiating negotiations for the development of bilateral as well as multilateral agreements for that purpose. Additionally, so called Turtle Excluder Devices were required to be used by shrimp trawlers. If foreign governments met these conditions, the import ban could be escaped by gaining a certificate on an annual basis.

When questioned before the Appellate Body it was concluded that these measures constituted an unjustifiably and arbitrarily discrimination between countries where the same conditions prevail as certain Asian countries had been treated differently. Accordingly, it was found inconsistent with article XX of the GATT. Even though the result was favoured, the reasoning of the Appellate Body, as to include issues of non-product-related process and production methods (PPMs), was considered to go beyond the judiciary body's mandate.³⁰ However, turtles were found to constitute an "*exhaustible nature recourse*". The particular turtle species were listed in CITES and it was further promoted that the wording "*exhaustible nature recourse*" is to be interpreted in an evolutionary way, in the context of the objective of sustainable development, as referred to in the Preamble to the Marrakesh Agreement.

The Appellate Body stated, concerning the requirements for import/export ban applied by the US, that the overall structure of article XX would not prevent a member from conditioning imports on whether members comply with or adopt a policy or policies unilaterally prescribed by the importing member. Process-but-not-policy based measures do not violate any operative provision of the GATT why article XX is not necessary to justify them. Regulations treating

³⁰ Shaw, S and Schwartz, R, *Trade and Environment in the WTO, State of Play*, page 146f.

products differently because of differences in their process of production are generally understood to be per se violations of the GATT and not possible to justify under article XX.³¹ Additionally, no ruling has explicitly treated a process-based measure as consistent with the principle of national treatment. However, it can be added that the Appellate Body, through its *EC - Asbestos*³² ruling, has enabled process-based measures, as long as applied in a non-discriminatory manner, to be in consistence with article III:4 of the GATT.³³

The involvement of goals of sustainable development and environmental protection in the Preamble to the Marrakesh Agreement made the outcome in the *Shrimp-Turtle* case possible. Through this ruling new possibilities have emerged. However, the scope of the exceptions contained in article XX (b) and (g) of the GATT will continue to be controversial and problematic for the WTO dispute-settling mechanisms.³⁴ Conclusively, the *Shrimp-Turtle* ruling can be said to provide “a principled basis for upholding multilateral and bilateral environmental agreements under article XX (b) and (g)”.³⁵ If interpreted in a pro-environmental manner the requirements of these exceptions can be argued to uphold multi-lateral as well as bilateral environmental agreements. As long as the agreements do not contain “substantial flaws or disguised protectionist measure” the requirements of the preamble would be met.³⁶

Conclusively, measures conflicting with the core principles of the WTO can be justified with reference to the general exceptions in article XX of the GATT. Those exceptions are normally determined on a case-by-case basis by a WTO panel but there is a possibility for the WTO Secretariat to submit interpretations of standards. However, the range of interpretations made by WTO panels concerning the exceptions contained in article XX further complicates the relationship between the WTO and MEAs why an immediate clarification of the scope of the exceptions included in article XX is of great importance.³⁷ Furthermore, a measure’s justification under article XX of the GATT could be influenced on whether the measure is applied

³¹ However, different views have been expressed.

³² *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*.

³³ Howse, R, *The Appellate Body Rulings in the Shrimp/Turtle Case: A New Legal Baseline for the Trade and Environment Debate*, page 14f, with reference to *European Communities - Measures Affecting Asbestos and Products Containing Asbestos*, Supra note 29.

³⁴ Emmert, F, *Labor, Environmental Standards and World Trade Law*, page 125.

³⁵ Birnie, P and Boyle, A, *International Law & the Environment*, page 712.

³⁶ *Ibid.*, page 712.

³⁷ Caldwell, J, *Multilateral Environmental Agreements and the GATT/WTO Regime*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 47f.

in accordance with a MEA. However, the measure can never be applied if not aiming at protecting essential environmental concerns and constituting any disguised protectionist measure. Furthermore, the justification of article XX may depend on how the MEA in question is participated and complied with as it could influence the judging of the good faith principle. Also some unilateral actions can, however, be justified according to the general exceptions, even in the absence of an applicable MEA.³⁸

2.3 Multilateral Environmental Agreements

Currently more than 250 MEAs are in force regulating different environmental issues. The memberships' of these MEAs vary from relatively small groups to up to more than 180 countries. Therefore, the impact of these MEAs is rather big and worldwide.³⁹ Of these MEAs thirty-one are listed by the WTO Secretariat as containing potential trade measures. Some of these are regional and protocols are included along with their parent conventions under single headings.⁴⁰ Despite the fact that international environmental agreements, involving trade affecting measures, have existed since 1870, the majority of the MEAs have been negotiated during the last decades. This increase in MEAs is a result of the development of environmental problems with global implications over the last years as well as the following urgent need for multilateral solutions among sovereign nations to address such threats to the global environment. Another cause for this development is the realization of the fact that environmental problems do not solely concern environmental issues, but interact with other issues such as trade.⁴¹

2.3.1 Trade Affecting Measures

In the following some examples of trade affecting measures that could be included in MEAs will be presented. Trade affecting provisions aim at regulating and controlling or prohibiting environmentally harmful trade.⁴² Such measures can be of widely varieties in forms of for example bans or embargoes. Furthermore, they could include reporting requirements,

³⁸ Marceau, G, and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 72.

³⁹ Brack, D and Gray, K, *Multilateral Environmental Agreements and the WTO*, page 4f.

⁴⁰ *Matrix on Trade Measures Pursuant to Selected Multilateral Environmental Agreements*.

⁴¹ Caldwell, J, *Multilateral Environmental Agreements and the GATT/WTO Regime*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 39ff.

⁴² Alam, S, *Trade Restrictions Pursuant to Multilateral Environmental Agreements: Developmental Implications for Developing Countries*, page 1008 .

labelling or other identification requirement, requirement for movement documents, targeted and general export and/or import bans as well as market transformation measures.⁴³

These measures can be either explicitly set out in the MEA or derive from a decision of the parties after the MEA has entered into force. Additionally, a measure can be either specific or non-specific. A specific measure is normally described in the MEA itself and constitutes normally of mandatory obligations.⁴⁴ The categories of product-specific measures in MEAs are in general designed to fulfill one of the three following aims. One category aims at prohibiting or limiting the trade in a “target” product or substance of the MEA in question. Secondly, a measure could aim at establishing a regulatory framework in order to regulate trade in the specifically targeted product or substance covered by the MEA. Lastly, the measure could be imposed as to limiting markets in goods contributing to the environmental problem. This could be done through allowing trade restrictions, thus, reducing the international market demand for these products.⁴⁵

On the other hand, non-specific measures are not explicitly described in the MEAs. Such measures are applied even alongside other measures as to comply with obligations or fulfil MEA objectives.⁴⁶ Another category of measures aims at creating incentives to encourage participation in the MEA. This is made though the creation of incentives for non-parties to become parties to an agreement. The same concerns the achievement of full implementation of the agreement’s obligations. Additionally, a measure imposed through a MEA may aim at discouraging “free-riders” of the MEA as those non-members cause several different problems for the members of the agreement. Such free-riders could gain from MEAs’ environmental benefits without having to pay any of the costs. Naturally, MEA memberships will be less sought for if non-compliance of free-riders is shown to be beneficial. On the contrary, these memberships have to be strengthened by eliminating free-riders as to benefit the international work with improving the environment.⁴⁷

⁴³ Brack, D and Gray, K, *Multilateral Environmental Agreements and the WTO*, page 5f.

⁴⁴ *Ibid.*, page 6.

⁴⁵ Caldwell, J, *Multilateral Environmental Agreements and the GATT/WTO Regime*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 43f.

⁴⁶ Brack, D and Gray, K, *Multilateral Environmental Agreements and the WTO*, page 6.

⁴⁷ Caldwell, J, *Multilateral Environmental Agreements and the GATT/WTO Regime*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 45.

3 Conflicts of Norms and Jurisdictions

Conflicts may arise where WTO rules conflict with other provisions of public international law and where other tribunals make concurring claims. The need for a clarification of the relationship between these set of rules of international law and these international tribunals is evident due to the increased interaction between WTO law and other sources of international law as well as the increased reluctance to invoke non-WTO law before the WTO adjudicating bodies. In the following the diversities of this relationship will be treated. It is vital to bear in mind that the jurisdictional limitation, regarding which disputes that can be drawn under the dispute settlement of the covered agreements, accounted for in article 1.1 of the DSU, has to be separated from the matter of which law that could be applicable under the DSU.⁴⁸

3.1 Definition of Conflict

Initially, the definition of conflict shall be examined. What constitutes a conflict is naturally of relevance for the discussion concerning the relationship between the WTO system and MEAs. A supposed conflict may only constitute a divergence that can be streamlined through treaty interpretation.⁴⁹ On the other hand, factual conflicts between two provisions have to be solved through that one of them has to be set aside, either through suspension or arrogation. However, if no conflict is at hand it can be concluded that the provisions are cumulative and shall be applied simultaneously. This can be done as a result of the presumption of the principle of good faith and the fact that states are obliged to implement their international obligations accordingly. Furthermore, the risk for a conflict over a specific provision seems more likely than a general conflict. A general conflict is at hand when a party can not comply with two treaties simultaneously, as one treaty prohibits what is allowed in the other or requires an opposite course of action.⁵⁰ On the contrary, a specific conflict would probably not cause an entire conflicting treaty to be null and void, but instead bring about a suspension or extinction of a particular set of obligations thereunder or even an engagement of the state responsibility of those states setting aside provisions of a multilateral agreement. International law sets out some criteria that shall be met for a conflict to be at hand. Firstly, two states have to be bound by either two treaties or different obligations which must cover the same substan-

⁴⁸ Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 502f.

⁴⁹ Pauwelyn, J, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, page 6.

⁵⁰ Jenks, W, *The Conflict of Law-Making Treaties*, page 426.

tive issue. Additionally, these provisions must conflict, as imposing mutually exclusive obligations.⁵¹

According to Pauwelyn there are two conditions of conflict that have to be fulfilled before looking at the identification of conflicts. Initially, the bound parties as well as the subject matter cannot be completely different; some overlap must exist regarding some of these two matters. Thus, it is enough that one part is bound by both rules. The rules have to interact as to be applicable concerning a special matter at the same time. It is not relevant whether the interaction of the rules is at hand for a long or short period. Even though there is no interaction of rules at the same time queries can arise concerning “*which of several norms prevailing at different moments in time should apply to a particular case*”. However, no factual conflict is at hand in such cases as the provisions scope differ.⁵²

A narrow as well as a wider definition of conflict has been proposed. The former was confirmed by the Appellate Body, in the *Guatemala-Cement* case, concerning an internal conflict between the rules of Understanding on Rules and Procedures Governing the Settlement of Disputes for antidumping disputes and the general provisions of the DSU. In this case the Appellate Body stated that conflicts between the DSU and these “*special or additional rules,*” shall be interpreted narrowly. Additionally, both should be complied with wherever possible.⁵³ This reasoning was expressed by the Appellate Body with reference to the following; *The DSU provides that certain listed provisions of various WTO agreements shall prevail over the DSU to the extent that “there is a difference” between them. According to the Appellate Body, conflicts between the DSU and these “special or additional rules” are to be construed narrowly, and both should be complied with wherever possible.*⁵⁴ *Article 17.4 of the Antidumping Agreement but not Article 17.3 is listed as such a “special or additional rule”.*⁵⁵ Conclusively, the Appellate body found that “*the general DSU requirement to state with specificity the “measures at issue” as well as “the legal basis of the complaint” must*

⁵¹ Marceau, G, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other treaties*, page 1083ff.

⁵² Pauwelyn, J, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, page 165f.

⁵³ *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, note 65.

⁵⁴ *Ibid.*, supra note 18, paragraph 65.

⁵⁵ *Ibid.*, supra note 18, paragraph 75.

apply along with the provisions of Article 17.4, since both can be complied with simultaneously".⁵⁶

According to Jenks a state, which is party to two treaties, must comply with both of them at the same time as he promotes a conflict to be at hand when the party do not comply with the provisions of the two treaties simultaneously. Moreover, a presumption against conflict can be presumed when several agreements are concluded between the same parties. This as a result of that the agreements are intended to be consistent with each other.⁵⁷ As Jenks argues no conflict is at hand when "*it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another*".⁵⁸ If using Jenks' definition of conflicts, a factual conflict would not be faced if a MEA authorizes, and not obliges, the usage of trade restrictions, otherwise prohibited by GATT.⁵⁹ Jenks' definition of conflict can be seen as rather strict and technical and a similar definition has also been expressed by other promoters.⁶⁰

The wider definition can be supported by an interpretation of articles 8 and 41 of the Vienna Convention on the Law of Treaties of 1969 (Vienna Convention), as promoted by among others Bartels and the panel in the *EC-Bananas III*⁶¹ case. Bartels suggests that a "*treaty which defeated the object and purpose of the earlier treaty should be seen as conflicting with this earlier treaty*".⁶² The *EC-Bananas III* case regards a factual conflict, as a provision in an agreement permitted what a provision in another agreement explicitly prohibited. As the panel only dealt with one agreement it could, therefore without using a wider definition of conflict, come to the same conclusion. This could be done by using the rule "*for an effective interpretation*" to ensure that the explicit rights, provided for in another part of the WTO Agreement, are respected".⁶³ While a wider definition like Bartels' covers "*possibilities, privileges and*

⁵⁶ *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, supra note 18, paragraph 75.

⁵⁷ Jenks, W, *The Conflict of Law-Making Treaties*, page 425ff.

⁵⁸ Marceau, G, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other treaties*, page 1086.

⁵⁹ *Ibid.*, page 1086.

⁶⁰ For more promoters of a strict interpretation of the definition of conflict see among others Karl, Kelsen and Wilting.

⁶¹ *European Communities - Regime for the Importation, Sale and Distribution of Bananas*.

⁶² Bartels, L, cited by Marceau, G, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other treaties*, page 1085.

⁶³ Marceau, G, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other treaties*, page 1085f.

rights”, the narrow definition only includes conflicts of obligations. Consequently, the latter view “favours the most stringent obligations”.⁶⁴

A rather wide proposal on the definition of conflict was already proposed in 1932 by Rousseau and has later on been promoted by several authors.⁶⁵ Additionally, Sir Humphrey Waldock has expressed the term of conflict to include “*a comparison between two treaties which revealed that their clauses, or some of them, could not reconcile with another*”.⁶⁶ Another proposal of a wide definition is suggested by Krajewski, who means that a conflict is at hand when “*MEA and WTO law equally applies and where the implementation of one set of rules at least reduces the effective implementation of the other set of rules*”.⁶⁷ Such a wide definition involves cases where an effective implementation of a MEA will not be possible because of already implemented WTO law. Even a situation where the furtherance of the objectives of a MEA is complicated by existing WTO law a conflict may, in accordance with this definition, be at hand.⁶⁸

Nevertheless, Marceau argues, with reference to that the main objective of treaty interpretation is to identify the parties’ intention, that the definition of conflicts is proposed to be interpreted narrowly. This should be done to cover as much as possible of the agreement of the parties. Moreover, accepting a wider definition may provide a third party, for example an interpreter or an adjudication body, with the power to set aside voluntarily negotiated provisions that states have agreed upon.⁶⁹

As described by Pauwelyn conflicts can be either “*inherent normative*” or “*necessary/potential*”. The former group constitutes of a breakage “*in and of itself*” and could be described as conflicts depending “*solely on the conditions for breach of the particular norm in question*”. For the latter group a breach is at hand whenever the grating of certain rights or the imposition

⁶⁴ Marceau, G, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other treaties*, page 1085f.

⁶⁵ For promoters of a wider definition of conflict see among others Aufricht, Capotorti, Czaplinski, Danielenko, Kelly, Lauterpacht, Neumann, Perelman and Sir Humphrey Waldock.

⁶⁶ Sir Humphrey Waldock cited by Pauwelyn, J, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, page 168.

⁶⁷ Krajewski, M, *The Dispute Settlement “Chill Factor” and Conflicts of Jurisdiction - Dispute Settlement in MEAs and in the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 95.

⁶⁸ *Ibid.*, page 95f.

⁶⁹ Marceau, G, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other treaties*, page 1085f.

of certain obligations, “*once exercised or complied with*”, constitute a breach of the other norm. While necessary conflicts include that one norm either will or may lead to a breach of the other “*whenever either of the two norms is complied with as required*”, there is for potential conflicts a “*margin of discretion*” and the breach will be materialised only if a right actually has been decided to be exercised by a state. The category of conflict involving necessary and potential conflicts can be described as conflicts in applicable law and is by far the most common before international tribunals.⁷⁰

Regarding the definition of conflict the WTO agreement does not include any definition. Not even article 31.4 of the Vienna Convention stating that “*a special meaning should be given to a term if it is established that the parties so intended*” gives any further assistance as the WTO agreement does not confirm any meaning of “conflict”. However, the panel in the *EC-Bananas*⁷¹ ruling defined conflicts as “(i) *clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in a sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits*”.⁷² This definition is broader than the one promoted by Jenks, as including conflicts between obligations and rights. Furthermore, the panel in the *EC-Bananas* case stipulated that an obligation or authorization embodied in any of the listed agreements in Annex 1A prevails over conflicting obligations provided for by GATT 1994.⁷³ On the contrary, the panel in the *Guatemala-Cement*⁷⁴ and *Indonesian-Autos*⁷⁵ cases adopted a stricter definition in line with the ones promoted by Jenks resulting in that the stricter rule prevailed.⁷⁶ However, it can be argued that the WTO adjudicating bodies should apply a broader definition of conflicts. One reason for such a wider approach is that the strict definition, including only mutually exclusive obligations, would involve a systematic evaluation of the WTO members’ obligations outside the members’ rights. Moreover, the promotion of trade liberalization cannot always override the WTO member’s trade restrictive rights. It is

⁷⁰ Pauwelyn, J, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, page 176f.

⁷¹ *European Communities - Regime for the Importation, Sale and Distribution of Bananas*.

⁷² *Ibid.*, paragraph 7.159.

⁷³ *Ibid.*, footnote 728.

⁷⁴ *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*.

⁷⁵ *Indonesia - Certain Measures Affecting the Automobile Industry*.

⁷⁶ Pauwelyn, J, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law*, page 193ff.

rather vital which definition of conflicts that the WTO adjudicating bodies apply as it may influence the outcome of a dispute.

3.2 Conflicts of Norms

Conflicts of different and distinct legal issues may arise between the WTO and MEAs. Firstly; there could be conflicts between the rights and obligations contained in two different treaties that apply between the same states, who are members of the WTO as well as parties to a specific MEA. For example a MEA authorizing the imposition of measures restricting imports and exports can be challenged before the WTO system as conflicting with the MFN-principle in article I of the GATT, as not fulfilling the requirements for equal treatment of like products between the WTO members. Additionally, the principle of national treatment, article III, could be infringed where import restrictions in MEAs restrict the use of certain substances in products which could be challenged as violations of national treatment due to their PPM-based distinction of like products. Moreover, any trade affecting measure in form of a ban, embargo and prohibition etcetera could be challenged before the WTO as conflicting with the prohibition on quantitative restrictions in article XI of the GATT.⁷⁷

Moreover, two parties to a MEA could disagree on how to interpret a specific MEA provision, or one party could even challenge an imposed measure, related to a specific part of a MEA that it has not signed itself. Additionally, disputes concerning imposed trade measures which are affecting non-parties may arise between two WTO members, who are not both parties to the relevant MEA. Furthermore, parties to a MEA could use trade measures as to put pressure on a non-party to force this country to join, which may violate the WTO principle of non-discrimination.⁷⁸

Concerning different types of potential conflicts, the most common type are those raised by non-members of a MEA concerning trade measures imposed according to these MEAs. This as it is more unlikely for a WTO member, which has voluntarily joined the MEA, to later challenge the same before the adjudicating bodies of the WTO. Additionally, a country, which is a member to the WTO as well as to the MEA, has basically waived their WTO rights in the

⁷⁷ Caldwell, J, *Multilateral Environmental Agreements and the GATT/WTO Regime*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 45ff.

⁷⁸ Van den Bossche, P, *The Law and Policy of the World Trade Organization*, page 298.

areas where the MEA applies. Furthermore, the majority of the trade affecting measures contained in MEAs are directed at non-parties.⁷⁹

3.3 Conflicts of Jurisdictions

Conflicts of jurisdictions occur when “*two institutions or adjudicating bodies may claim to have exclusive or permissive jurisdiction to address the factual or legal aspects of a matter having trade and environment dimension*”.⁸⁰ The effectiveness and powerfulness of the WTO dispute mechanism may attract disputes concerning conflicts of different kinds. Even disputes between WTO members who are not both parties to a specific MEA have been argued to be possible to bring before the WTO. This as the MEA’s dispute settlement provisions would not be available to non-parties why these would have no other alternative than to bring the dispute to the WTO.⁸¹

If a wide definition of conflict, like the one Krajewski promotes, is applied to the relationship between the dispute settlement mechanisms of MEAs and those of the WTO it can be argued that a conflict is at hand “*where the issue at stake could be subject of both mechanisms and when submitting this issue to one mechanism reduces the effectiveness of the other mechanism*”.⁸² Jurisdictional conflicts constitute an important matter as such disputes may seriously affect the effectiveness of dispute-settling mechanisms. As an example of reasons weakening the dispute-settling mechanisms of MEAs, Krajewski mentions the fixed time-tables included in the WTO system. This feature creates a system that more quickly can provide a solution of a dispute, constituting in either a legally binding decision or the allowance of the enforcement of unilateral trade measures. This possibility provides the WTO system with a higher degree of effectiveness.⁸³

Regarding conflicts of jurisdictions between the dispute settlement mechanisms of MEAs and those of the WTO a dispute may only be at hand when both of two bodies exercise de facto jurisdiction. The question of jurisdiction can, as mentioned, be seen as a question of the

⁷⁹ Caldwell, J, *Multilateral Environmental Agreements and the GATT/WTO Regime*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 46.

⁸⁰ Van den Bossche, P, *The Law and Policy of the World Trade Organization*, page 298.

⁸¹ *Ibid.*, page 298.

⁸² Krajewski, M, *The Dispute Settlement “Chill Factor” and Conflicts of Jurisdiction - Dispute Settlement in MEAs and in the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 96.

⁸³ *Ibid.*, page 96f.

applicable law. Therefore, simply the dispute-settling mechanisms that make decisions based on law, and not non-legal issues, can execute jurisdiction in a legal sense. Concerning the meaning of jurisdiction, it is about “*the competence of a body to decide an issue*”.⁸⁴ If a body makes a decision without legal support it would not be legally valid, and therefore, if conflicting, not constitute a jurisdictional conflict. Therefore, the variety of different dispute settlement mechanisms in MEAs means that jurisdictional conflicts are seldom at hand. Just some organs, such as courts, tribunals and some kinds of arbitration bodies, can exercise jurisdiction. For example a conflict may arise between two countries concerning provisions of a MEA and the WTO. If it is agreed to negotiate according to the provisions of the MEA and one of the parties later on additionally requests for a panel to be established, it is not a question of conflict of jurisdictions but, nevertheless, the effects of the “chill” factor constitute a risk.⁸⁵ This “chill” factor means a risk for that existing WTO rules will negatively affect or even thwart the possibility for new agreements to be concluded, which is seen as a rather common implication which has affected for example the Kyoto Protocol.⁸⁶

The mandate of jurisdiction in a specific case is determined by the relevant procedural rules, as for example the DSU. A jurisdictional conflict, in the meaning of overlapping jurisdiction, is though at hand when a MEA explicitly calls for an international court or tribunal to solve a dispute. To give an example of this the *Swordfish*⁸⁷ dispute can be mentioned. The dispute was between Chile and the EU and the International Tribunal for the Law of the Sea as well as the WTO exercised jurisdiction. However, the jurisdictional conflict was avoided in this case as the parties came to an agreement outside both forums that involved the promotion of developing the multilateral framework for the conservation and management of swordfish in the South-Eastern Pacific.⁸⁸

⁸⁴ Krajewski, M, *The Dispute Settlement “Chill Factor” and Conflicts of Jurisdiction - Dispute Settlement in MEAs and in the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 99.

⁸⁵ *Ibid.*, page 98.

⁸⁶ UNEP and IISD, *Environment and Trade - A Handbook*, page 57f.

⁸⁷ *Chile - Measures affecting the Transit and Importing of Swordfish*.

⁸⁸ Krajewski, M, *The Dispute Settlement “Chill Factor” and Conflicts of Jurisdiction - Dispute Settlement in MEAs and in the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 98.

4 Common Principles of International Law on Conflicts

In recent years it has become generally known that the WTO adjudicating bodies consider non-WTO law when interpreting the rights and obligations under the WTO covered agreements.⁸⁹ Non-WTO law could for example be used when WTO law leaves a question unanswered, as to fill gaps within the WTO system. Consequently, procedural rules of international law could have a decisive influence on the outcome of a WTO dispute.⁹⁰ In the following chapter the jurisdiction under DSU and MEAs will be treated as well as which law that is to be applicable before the WTO adjudicating bodies. Furthermore, relevant principles of international law on which law that should be considered before the WTO and how conflicts of both norms and jurisdictions should be solved will be treated.

4.1 Jurisdiction under the DSU

The WTO dispute settlement system, which has been operational since 1995, is the result of fifty years of experience from the settlement of disputes of its predecessor, GATT 1947. Therefore, the current DSU has been subject to quite extensive changes in comparison with the one existing under the GATT 1947.⁹¹ The current one includes for example fixed time-tables and a more structured process. The main objective with the WTO dispute settlement system is to promptly settle disputes between its members concerning their respective rights and obligations under WTO law, as also expressed in article 3.3 of the DSU. Moreover, the WTO dispute settlement mechanism is held to provide “*security and predictability to the multilateral trading system*”, as stated in article 3.2 of the DSU.⁹²

The WTO system intends to settle disputes through bilateral negotiations between the disputing parties and unilateral actions are intended to be avoided. Moreover, any agreed solution must be consistent with the WTO rules.⁹³ The recommendations as well as rulings of the Dispute Settlement Body (DSB) can neither add nor diminish the rights and obligations provided in the covered agreements.⁹⁴ Additionally, the WTO members, in form of a comp-

⁸⁹ See for example the *United States - Import Prohibition on Certain Shrimp and Shrimp Turtle Products* and the *ICJ Case Concerning Oil Platforms*.

⁹⁰ Pauwelyn, J, *How to Win a World Trade Organization Dispute based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits*, page 998.

⁹¹ Van den Bossche, P, *The Law and Policy of the World Trade Organization*, page 173 and 182f.

⁹² Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 73.

⁹³ DSU articles 3.7 and 23.1.

⁹⁴ DSU articles 3.2 and 19.2.

lainant as well as a respondent, are obliged to bring or accept the jurisdiction of the DSU, as long as the covered agreements are concerned. In other words, the DSU is compulsory for its members.⁹⁵ To be entitled to initiate dispute settlement proceedings before the WTO there is firstly the requirement for a WTO membership, which only governments/states can obtain. Furthermore, a benefit accruing to a member, either directly or indirectly under any agreements, shall be impaired by measures taken by another member.⁹⁶

4.1.1 Article 1.1 of the DSU

The jurisdiction of the panels and the Appellate Body of the WTO are regulated in article 1.1 of the DSU. This provision states that “*The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultations and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding*”. These agreements are hereinafter referred to as the “covered agreements”. Therefore, any WTO member may raise claims before the WTO concerning any infringement of the WTO rights and obligations or, in other words, where a benefit accruing to a WTO member directly or indirectly under an agreement is considered to be either nullified or impaired. In general such an infringement is based on a contracting party’s failure of fulfilling their obligations according to the agreement. Such claims are most common but it is, however, also possible to settle a dispute concerning non-violation and “situation” complaints.⁹⁷

4.1.2 Article 23 of the DSU

An important provision regarding the relationship between the WTO system and MEAs is article 23 of the DSU stating in the first paragraph that “*When Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreements, they shall have recourse to, and abide by, the rules and procedures of this Understanding*”. From the second paragraph it follows that “*In such cases, Members shall: (a) not make a determination to the effect that a violation has occurred, that benefits have been nullified or impaired or that the attainment of any objective of the covered agreements has been impeded, except through recourse to dispute settlement in accordance with the rules and procedures of*

⁹⁵ Van den Bossche, P, *The Law and Policy of the World Trade Organization*, page 189.

⁹⁶ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 73.

⁹⁷ Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 502f.

this Understanding, and shall make any such determination consistent with the findings contained in the panel or Appellate Body report adopted by the DSB or an arbitration award rendered under this Understanding”.

Judging from the wording of article 23 of the DSU it seems, consequentially, as the prior accepted obligatory dispute settlement mechanisms of the WTO results in that the members have given exclusive jurisdiction to address violations of WTO provisions to the adjudicating bodies of the WTO. Nevertheless, the opinions on this matter are divided. Conversely, some authors suggest that there is an opportunity, though limited, to “escape” the WTO jurisdiction through an application of article 25 of the DSU, authorizing the usage of arbitration rules, as an alternative mean of settling disputes for WTO members.⁹⁸ Pauwelyn argues that it is hard to imagine that the decision of the WTO members to provide the WTO adjudicating bodies with exclusive jurisdiction regarding the covered agreements, shall involve that all disputes regarding any trade affecting measure between the members have to be solved within the WTO dispute-settling system. For example another kind of forum could be desired or found to be more suitable to handle the complexity of a disputed issue.⁹⁹

However, a possibility to in parallel with the WTO dispute-settling mechanisms use other such mechanisms under other international agreements is, according to Marceau and González-Calatayud, possible through the wording of article 11.3 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS). This article states that “*Nothing in this Agreement shall impair the rights of Members under other international agreements, including the right to resort to the good offices or dispute settlement mechanisms of other international organizations or established under any international agreement*”.¹⁰⁰

4.2 Jurisdiction under MEAs

The majority of MEAs include provisions concerning dispute settlement. Such provisions are more or less detailed and are normally optional, and not binding, for the parties. The dispute-

⁹⁸ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 75.

⁹⁹ Pauwelyn, J, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law?, Questions of Jurisdiction and Merits*, page 1005.

¹⁰⁰ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 75.

settling mechanisms of these agreements vary greatly in character and can constitute everything from adjudication by the International Court of Justice (ICJ) to arbitration or even conciliation, if requested by a party. The jurisdictional mandate of these mechanisms is normally limited to the issues covered by the MEA in question. It is common that a step of negotiations is followed by intervention of a third party to solve the disputed issue. However, most of these mechanisms do not involve any binding resolution of conflicts but some MEAs do at least establish that the parties must consider the decisions in good faith. Furthermore, some MEAs include non-compliance procedures, which aim at avoiding disputes.¹⁰¹

Conclusively, MEAs do not normally contain compulsory dispute-settling mechanisms, binding dispute resolutions or reference to any exclusive jurisdiction. On the contrary, the WTO regime has, as mentioned, exclusive jurisdiction according to article 23 of the DSU on WTO related disputes. Another more progressive feature of the WTO regime is the system of quasi-automatic adoption of the WTO adjudicating bodies' recommendations by the DSB, meaning that these are binding and if not respected, it may result in sanctions. However, situations, where the same matter may be subject to jurisdiction under article 23 of the DSU as well as some non-compliance or dispute-settling mechanism of a MEA, may arise. With reference to the wording of article 23 of the DSU it is not probable that the WTO bodies, unless the disputing parties agree so, would decline jurisdiction with reference to any voluntary mechanism of a MEA. Factual conflicts of dispute-forums may because of the exclusive jurisdiction of the WTO be hard to find, especially when the objectives and purposes with the dispute-settling mechanisms of MEAs and the WTO differ.¹⁰²

Regarding situations of parallel jurisdiction, the WTO adjudicating bodies may be preferred to those of MEAs. An expansion of the existing WTO institution could contribute with some valuable pros such as an effective dispute settlement system and a way to easier gain recognition. However, there is a risk for that the WTO regime including its dispute settlement mechanisms would be overburden. Such a development can not seem desirable and maybe an extension of the existing WTO would be needed to be able to handle also the issues of MEAs. In turn this could lead to a legitimacy crisis and the WTO system's transparency could get

¹⁰¹ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 75ff.

¹⁰² *Ibid.*, page 77f.

negatively affected.¹⁰³ Additionally, such a development could further weaken the dispute settlement of MEAs. Moreover, it can, as mentioned, be argued that the WTO system could be said to have a “chill” effect on MEAs’ dispute settlement, like potential conflicts between WTO law and trade measures in MEAs has on MEA negotiations.¹⁰⁴

As states are bound by numerous obligations that apply in a parallel manner and offer parallel jurisdiction, it seems possible that situations of parallelism might arise. Parallel jurisdiction is at hand even in situations where two treaties provide for their exclusive jurisdiction over a specific matter, as long as no international authority exists to access such conflicts. In cases of parallel jurisdiction there is a risk for different or inconsistent conclusions on both factual aspects and implementation of provisions of a MEA. To date it is unclear how such a situation shall be treated. Further implications of parallel jurisdiction may be, even though no factual conflict between the dispute settlement of the WTO and MEAs is at hand, tensions regarding sequence and timing.¹⁰⁵

The CTE recommends in its report from 1996 that “*if a dispute arises between WTO Members, Parties to an MEA, over the use of trade measures they are applying between themselves pursuant to the MEA, they should consider trying to resolve it through the dispute settlement mechanisms available under the MEA*”.¹⁰⁶ Legally this statement can only be seen as a recommendation and not as it would amend the mandate according to article 23 of the DSU. On the other hand, a violation of a MEA may be at hand if an obligation to use the dispute-settling mechanism of that MEA, in event of disagreements, is denied. However, it is uncertain if the dispute-settling possibilities within the MEA should be exhausted before the mechanisms of the WTO are used by the parties. Practically, no such obligation seems to exist, foremost due to the non-compulsory nature of MEAs. Once again, it seems unlikely that

¹⁰³ Dunoff, J, *International Dispute Resolution: Can the WTO Learn from MEAs?*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 69 and Emmert, F, *Labor, Environmental Standards and World Trade Law*, page 131f.

¹⁰⁴ Krajewski, M, *The Dispute Settlement “Chill Factor” and Conflicts of Jurisdiction - Dispute Settlement in MEAs and in the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 96f.

¹⁰⁵ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 78ff.

¹⁰⁶ *Trade and Environment in the WTO*, paragraph 178.

the WTO would decline jurisdiction as a result of alternative dispute settlements provided for in MEAs.¹⁰⁷

4.3 Applicable Law in the WTO Dispute Settlement Proceedings

The substantive jurisdiction of the adjudicating bodies of the WTO covers claims under the WTO covered agreements, including only a number of the WTO agreements. Consequently, non-WTO rules as well as WTO rules, not deriving from the WTO treaty itself, do not fall within the same jurisdiction. The main source of WTO law is the WTO treaty's provisions. The so called Final Act, concluded in 1994 during the so called Uruguay Round, involves around sixty treaties. Of these treaties the most important ones, among thirty of them, are included in the Marrakesh Agreement establishing the WTO. One vital feature for the effects of a WTO treaty is whether it is listed in Appendix 1 to the DSU or not, as then being a part of the covered agreements. If so a treaty can be subject to as well as invoked before the adjudicating bodies of the WTO. Consequently, non-covered treaties cannot be enforced, at least not directly, under the DSU.¹⁰⁸

The covered agreements include apart from the treaty provisions some annexes setting out member-specific schedules including so called trade concessions or specific commitments. Such concessions are mainly grounded in bilateral agreements but are, due to the MFN-principle, multilateral in that way that they are verified and accepted by every WTO member.¹⁰⁹ These concessions should be interpreted in the same way as the covered treaty provisions.¹¹⁰ Both amendments concerning the covered agreements and additions of new members can change the coverage of the covered agreements. The same concerns the possibility for conclusions on new agreements and protocols.¹¹¹

4.3.1 Articles 3.2 and 19.2 of the DSU

The foremost purpose of the dispute-settling system of the WTO is described in article 3.2 of the DSU stating that “*The dispute settlement system of the WTO is a central element in*

¹⁰⁷ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 80f.

¹⁰⁸ Pauwelyn, J, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, page 40f.

¹⁰⁹ *Ibid.*, page 42.

¹¹⁰ *EC - Computer Equipment*, paragraph 84.

¹¹¹ Pauwelyn, J, *Conflicts of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, page 43.

providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements". Especially the last sentence is vital for the discussion concerning which law that shall be interpreted by the adjudicating bodies of the WTO and can be understood as an important limitation of the scope of applicable law before the WTO, thus, covering only the covered agreements. However, the panel in the *Korea-Government Procurement* uttered that article 3.2 does not limit the application of sources of international law through stating that "we can see no basis here for an a contrario implication that rules of international law other than rules of interpretation do not apply".¹¹²

The DSU does not explicitly state any limitation concerning the scope of international law applicable before the WTO. Nonetheless, the last sentence of article 3.2 restricts the application of international law in any given case. Article 19.2 of the DSU repeats the content of article 3.2 when referring to the panels and the Appellate Body. Apart from limiting a too broad interpretation of the covered agreements, article 3.2 also ensures that the provisions of the covered agreement shall prevail over other applicable provisions in the event of a conflict.¹¹³ However, international law should be considered as long as it is not incompatible with the covered agreements.¹¹⁴ Nonetheless, it is important to bear in mind that the DSU is not meant to handle disputes between WTO law and other international law but to limiting the powers of the WTO adjudicating bodies. Even though the General Interpretative Note, part of Annex 1, handles such disputes also the DSU ensures the primacy of the provisions contained in the covered agreements.

Articles 3.2 and 19.2 of the DSU have been subject to several WTO disputes. Two examples of cases involving a potential conflict between a covered agreement and other international law are the *EC-Hormones*¹¹⁵ case and the *Guatemala-Antidumping*¹¹⁶ ruling. The former

¹¹² *Korea - Measures Affecting Government Procurement*, paragraph 7.96, n. 753.

¹¹³ Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 506f.

¹¹⁴ See article 293(1) of the United Nations Convention on the Law of the Sea (UNCLOS) for a similar interpretation made by the International Tribunal on the Law of the Sea.

¹¹⁵ *European Communities - Measures Concerning Meat and Meat Products (Hormones) - Original Complaint by the United States*.

¹¹⁶ *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*.

concerned the principle of precaution, which was said to be a principle of international law enabling a prohibition on beef imports. Nevertheless, the Appellate Body let articles 5.1 and 5.2 of the SPS agreement prevail over this principle. A similar decision was drawn in the latter case with reference to article 5.5 of the Anti-Dumping Practices Agreement, as the panel did not decide for an infringement of international law as the source of law was found to be illegitimate in WTO context due to a relief for notification delays in article 3.8 of the DSU.¹¹⁷

Interestingly, the panel as well as the Appellate Body found in the *Argentina-Footwear*¹¹⁸ case, regarding a dispute between covered agreements and other international agreements, that other international agreements can modify a WTO member's obligations under a covered agreement through stating that instruments not covered by WTO law may have some effect within the WTO legal system. However, this can, as Bartels argues, be a questionable interpretation as articles 3.2 and 19.2 of the DSU only should be used as to exclude the application of these rights and obligations with exception from when giving guidance to the scope of the WTO members' WTO obligations.¹¹⁹

In another interpretation, made by the Appellate Body in the *EC-Hormones*¹²⁰ ruling, article 30 of the Vienna Convention was referred to when suggested that articles 3.2 and 19.2 could be used instead of superseding the bilateral agreement in question. Along similar lines the *EC-Poultry*¹²¹ case can be questioned as excluding a bilateral agreement as not constituting one of the covered agreements. However, it should, as Bartels argues, be stressed out that the bilateral agreement, as a non-covered agreement, could not be applied to the disadvantage of the rights and obligations contained in a covered agreement.¹²²

Conclusively, the presented interpretations show implications. While in some cases international law, not covered by the covered agreements, is left without consideration with reference to not constituting a covered agreement, non-covered international law is excluded in other rulings as a result of an application of the Vienna Convention. Additionally, the limitation to

¹¹⁷ *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, paragraphs 7.40-7.41.

¹¹⁸ *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*.

¹¹⁹ Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 508f.

¹²⁰ *European Communities - Measures Concerning Meat and Meat Products (Hormones) - Original Complaint by the United States*.

¹²¹ *European Communities - Measures Affecting Importation of Certain Poultry Products*.

¹²² Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 509.

the covered agreements, in articles 3.2 and 19.2 of the DSU, has been used by the WTO adjudicating bodies as to simply override non-covered international law.¹²³

4.3.2 Article 7 of the DSU

Article 7 of the DSU addresses the question of applicable law before the WTO. In its first paragraph it states that the disputed issue shall be examined “*in the light of the relevant provisions*” relating to the covered agreements. Moreover, article 7.2 of the DSU states that the standards terms of reference are based on the panel request made by the disputing parties, which shall be addressed by the panel.¹²⁴ This obligation includes the application as well as the addressing of certain WTO provisions. Concerning the scope of the applicable law, it could be argued that this reference should be seen as exhaustive. On the contrary, it can be suggested that the reference only mentions the significance of some rules, leaving room for also other provisions to be considered. Which view that should be promoted is not commonly agreed but the latter view can be preferred with reference to the WTO case law, the wording of article 3.2 of the DSU in combination with article 31.3 of the Vienna Convention as well as the fact that the WTO agreement constitutes a part of public international law. These arguments imply that the WTO bodies exist in a wider context of public international law why they cannot limit their scope to solely WTO law but also have to consider non-WTO law. A further argument for not limiting the scope of the applicable law before the WTO is that other international law exists alongside with the WTO law why no explicit exception in article 7 of the DSU is needed as long as WTO law does not deviate from that international law. Concerning article 3.2 of the DSU it can, as Pauwelyn argues, be seen as not limiting the scope of the applicable law but to only state a rather obvious limitation. It is here important to make a distinction between interpretations of WTO rules and examinations of WTO claims in the context of other international law.¹²⁵ Accordingly, it was announced, in the *Korea-Government Procurement* ruling, that the reference under article 7.1 of the DSU should not “*exclude reference to the broader rules of customary international in interpreting a claim before the Panel*”.¹²⁶

¹²³ Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 509.

¹²⁴ According to article 6.2 of the DSU the panels may request information concerning the identification of specific measures at issue and concerning on which grounds a claim is based.

¹²⁵ Pauwelyn, J, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits*, page 1000ff.

¹²⁶ *Korea - Measures Affecting Government Procurement*, paragraph 7.101 and footnote 755.

To the contrary, some argue that article 7 of the DSU could be interpreted as to limit the scope of law that could be applied before the WTO dispute-settling bodies. This view can be supported by an assumption that article 7 of the DSU corresponds to article 38 of the ICJ Statue.¹²⁷ But the same provision has been used for the promotion of an opposite view why doubts concerning the article's interpretation remains.¹²⁸

The wording of article 7 does not leave any clear guidance concerning the mentioned implications. The article does not explicitly state that the applicable law before the WTO is limited to that contained in the covered agreements. Nonetheless, the article states that the panels shall examine the disputed matter “*in the light of the relevant provisions*” in the covered agreements. According to Bartels this expression does not involve a limitation of the applicable law. A similar approach can be found in article 7.2 and its wording in form of that the relevant provisions in any covered or, by the parties of the dispute, cited agreements shall be considered. No limitation is expressed why the scope of applicable law can be interpreted in a broader manner. The additional possibility for the creation of a panel with non-standards reference may be interpreted as to open up for possibilities for the DSB to mandate the panels to consider sources of law not included in the covered agreements.¹²⁹

4.3.3 Articles 31 and 32 of the Vienna Convention

The general rule of interpretation in article 31 of the Vienna Convention states in its first paragraph that; *a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*. Accordingly, the wording of the provision read in its context shall at first be examined as to find the object and purpose of the provision. If no satisfactory outcome is given, the treaty as a whole shall be looked upon, including besides the text, its preamble and annexes, “*...any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty, any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*”¹³⁰ Additionally, “(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any

¹²⁷ Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 504.

¹²⁸ See for example Marceau, G, *A Call for Coherence in International Law: Praises for the Prohibition Against “Clinical Isolation” in WTO Dispute Settlement*, page 87ff and Trachtman, J.P., *The Domain of WTO Dispute Resolution*, page 342.

¹²⁹ DSU articles 7.1 and 7.3 and Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 505.

¹³⁰ Vienna Convention article 31.2.

subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation... (c) any relevant rules of international law applicable in the relations between the parties...” shall be considered.¹³¹ In the *US-Shrimp* case, the United Nations Convention on the Law of the Sea, the Convention on Biological Diversity, and the Convention on the Conservation of Migratory Species of Wild Animals are examples of MEAs which the Appellate Body applied when interpreting article XX of the GATT. But this approach has been criticised. Also in the *US-Gasoline* case the Appellate Body ruled, with reference to the mentioned article 3.2 of the DSU, that it has to consider a wide range of norms and principles etcetera of international law when interpreting provisions under the WTO. If a MEA provides for dispute-settling mechanisms it would, according to article 31.3 (c) of the Vienna Convention, constitute a part of the applicable law between the parties, necessary when interpreting their WTO obligations.¹³² Finally, *a special meaning shall be given to a term if it is established that the parties so intended.*¹³³ Relevant rules of international law may, at least, be considered when interpreting WTO law, according to article 31.2 (c). Regarding the scope of the third paragraph, earlier rulings made by the WTO adjudicating bodies is not covered within the wording of article 31.3 (b), even when adopted. However, adopted panel reports are usually considered when resolving WTO disputes as seen as creating legitimate expectations among WTO members and therefore should be considered where relevant. Conclusively, panel as well as Appellate Body reports have a vital impact on the interpretation of WTO law.¹³⁴

If a further examination is needed article 32 of the Vienna Convention constitutes a ground for an interpretative process involving that the text of the treaty’s provisions and its object and purpose shall be considered when finding out their meaning. Through an interpretation according to article 32 the object and purpose is used as to determine “*the terms of the treaty*”, instead as an independent basis for interpretation.¹³⁵

¹³¹ Vienna Convention article 31.3.

¹³² Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 82.

¹³³ Vienna Convention article 31.4.

¹³⁴ Wiers, J, *Trade and Environment in the EC and the WTO, A Legal Analysis*, page 152f.

¹³⁵ *Ibid.*, page 150f.

4.4 Conflicts of Substantive Provisions

As mentioned, the WTO adjudicating bodies quite commonly refer to and adopt other sources of international law than WTO law in their rulings. This regards disputes concerning resolutions of conflicting obligations as well as adoptions of rules, when the covered agreements do not provide an answer. Where the WTO law leaves questions unanswered the adjudicating bodies have adopted rules without any prior establishment of the absence of any relevant prohibition. In such cases the Appellate Body has first examined whether a prohibition on a specific rule exist before adopting a new rule. It can be argued that the WTO adjudicating bodies under such circumstances should be bound by any settled law on the matter even though it would not have the status of customary international law.¹³⁶ A similar approach has been promoted by the Appellate Body in the *Korea-Government Procurement* ruling where it was stated that customary international law “*applies to the extent that the WTO agreements do not contract out from it*”. As long as “*no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently*” exists, the Appellate Body holds for that “*the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO*”.¹³⁷

Regarding the complicated issue on how potential conflicts before the WTO should be treated the adjudicating bodies of the WTO have uttered suggestions regarding article 1.2 of the DSU as well as the General Interpretative Note of Annex 1A. The General Interpretative Note regulates that “*In the event of a conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A to the Marrakesh Agreement, the provision of the other agreement shall prevail to the extent of the conflict*”. Moreover, article 1.2 of the DSU states; “*To the extent that there is a difference between the rules and procedures of this Understanding and the special and additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures set forth in Appendix 2 shall prevail*”. Additionally, if there is a conflict between special or additional rules and procedures set out in different covered agreement the DSB Chairman “*...shall be guided by the principle that special or additional rules and procedures should be used wherever possible, and the rules*

¹³⁶ Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 513 and 516.

¹³⁷ *Korea - Measures Affecting Government Procurement*, paragraph 7.96.

and procedures set out in this Understanding should be used to the extent necessary to avoid conflict.”¹³⁸

Additionally, principles of equity to condition the application of expressed treaty rights are used before the WTO adjudicating bodies. However, such principles normally are just referred to but not applied. As an example obligations can be claimed to have to be performed in good faith according to article 26 of the Vienna Convention. Furthermore, the principle of the abuse of rights and the principles of estoppel and acquiescence could be mentioned. These constitute principles under which the ability of a disputing party to rely on an expressed treaty right is conditioned on the party’s conduct. However, it could be questioned whether the application of such principles could contravene articles 3.2 and 19.2 of the DSU. Nevertheless, an application of such principles could be defended with that such principles constitute a “*part of the law necessary to the predictability and security of the multilateral trading system, and to maintaining of the balance of rights and obligations for which the parties negotiated*”.¹³⁹

4.5 The General Principle against Conflicting Interpretation

According to the general principle against conflicting interpretation the rules of the WTO should be interpreted as to not conflict with other rules of international law. This principle is explained by that it is presumed that every new international norm, as created within the context of pre-existing international law, builds upon as well as further develops the already existing international law. This principle entails that an explicit language must be found for a conflict between a new norm and earlier existing law to be at hand. Moreover, the state relying on a conflict of norms has to prove it and where several possible interpretations exist the one avoiding conflicts should be chosen.¹⁴⁰ Treaty interpretation can be used as a way of avoiding conflicts and involves the giving of a meaning to the terms of a treaty. This could, as described, be done through an application of articles 31 and 32 of the Vienna Convention.

This view is for instance accepted by Marceau, who means that panels and the Appellate Body have such an obligation to avoid conflicts. In many cases, though not in all, a cleverly

¹³⁸ DSU article 1.2.

¹³⁹ Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 517f.

¹⁴⁰ Pauwelyn, J, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law*, page 240f.

made interpretation would probably result in that such conflicts could be avoided.¹⁴¹ Marceau argues that when a MEA is used to base a justification through article XX of GATT, the same article should be interpreted and applied as to ensure the avoidance of conflict as well as the effectiveness of the relevant MEA. This should be the case as article XX of GATT already permits the imposition of some unilateral measures as a way to protect the environment, even in the absence of a MEA. Therefore, any other solution would be illogical as it would treat parties to a MEA less-favourable than members not party to a MEA.¹⁴²

4.5.1 The Good Faith Principle

Additionally, the principle of good faith presumes that states negotiate and enforce their international obligations in a non-conflicting manner.¹⁴³ Therefore, as a way of avoiding conflicts, it will often be of importance to consider MEAs when interpreting article XX of the GATT.¹⁴⁴ If the usage of a MEA dispute settlement mechanism is refused it could constitute a violation of the MEA. On the other hand, such a refusal cannot constitute a violation of the WTO itself. However, it could be used as an argument when assessing the good faith of a party to the WTO dispute. Such an approach has been promoted by the Appellate Body in the *US-Shrimp* case where the US had failed, contrary to Section 609, to undertake “*serious across-the-board negotiations*” and this failure constituted one of the elements used to conclude that the US had applied its measures in a discriminatory manner. Consequently, it could be argued that the obligation to use consultations before imposing unilateral measures has gained recognition as a general principle of law. Furthermore, a negligence to pursue such consultations aiming at reaching a cooperation agreement within the MEA is seen as “*evidence of bad faith*”, as well as a “*violation of due process*”, contrary to article XX. However, it is doubtful whether the principle of good faith imposes an obligation for a state which is member, to the WTO as well as a MEA, to first use and exhaust provided dispute settling mechanisms in the MEA, also in cases of overlapping jurisdiction with the WTO.¹⁴⁵

¹⁴¹ Van den Bossche, P, *The Law and Policy of the World Trade Organization*, page 63.

¹⁴² Marceau, G, *Conflicts of Norms and Conflicts of Jurisdictions The Relationship between the WTO Agreement and MEAs and other Treaties*, page 1096f.

¹⁴³ Wiers, J, *Trade and Environment in The EC and the WTO, A Legal Analysis*, page 151.

¹⁴⁴ Marceau, G, *Conflicts of Norms and Conflicts of Jurisdictions The Relationship between the WTO Agreement and MEAs and other Treaties*, page 1107.

¹⁴⁵ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 81.

4.6 The Usage of Non-WTO Law in WTO Proceedings

One core provision of international law on the matter of the usage of non-WTO law in WTO proceedings is the mentioned limitation for the panels and the Appellate Body of the WTO to neither add nor diminish the rights and obligations of members contained in the covered agreements, as stated in articles 3.2 and 19.1 of the DSU. While some argue that claims before the WTO may only be based in the covered agreements, some promote that also rules not explicitly set out in the covered agreements should be considered. The promoters of the first limited view mean that such an approach seems natural as the panels and the Appellate Body must, in event of a conflict between rights and obligations in the covered agreements and other norms, be given priority to the former ones. If this approach is applied to the concerns drawn concerning the relationship between the WTO and MEAs the panels and the Appellate Body will not be able to consider a MEA where it would add or diminish the rights and obligations of the WTO members. Nevertheless, the provisions of a MEA, when relevant to the matter at subject, could be considered by the adjudicating bodies of the WTO in a WTO dispute without having to be justified in terms of an interpretation of a covered agreement.¹⁴⁶ How this can be possible will be examined in the following.

As a consequence of the wording of article 3.2 of the DSU, international law may be used when interpreting provisions under the covered agreements. Such interpretations have been done in several disputes brought before the WTO.¹⁴⁷ For example the *EC-Bananas* ruling included an interpretation of a waiver made in the light of the Lomé Convention. As to not cause any amendments to the obligations and rights under the covered agreements the Lomé Convention was not directly applied but only referred to.¹⁴⁸

Non-WTO law may, without having to be justified in terms of an interpretation of the covered agreements, be considered as evidence of compliance or constitute a part of the applicable law before the WTO. Regarding the former possibility, a MEA may be considered when a member's compliance under the covered agreements is examined.¹⁴⁹ The latter possibility, namely to apply for instance a MEA as a part of the applicable law, could be used as in the

¹⁴⁶ Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 499f.

¹⁴⁷ See for example *United States - Import Prohibition on Certain Shrimp and Shrimp Turtle Products* and *European Communities - Regime for the Importation, Sale and Distribution of Bananas*.

¹⁴⁸ Bartels, L, *Applicable Law in WTO Dispute Settlement Proceedings*, page 510.

¹⁴⁹ *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, paragraphs 169-176.

line of legal reasoning, even though, the MEA is left without the jurisdiction of the WTO. If the answer of a question is depending on the answer of another question, the latter is of secondary importance to the chain of reasoning, but is, however, applied as law to the extent essential for that reasoning.

4.6.1 Decline in WTO Jurisdiction Based on Non-WTO Law

The adjudicating bodies of the WTO have, as mentioned, compulsory jurisdiction concerning claims under the covered agreements. However, such disputes could be won by the imposition of non-WTO law resulting in a decline of WTO jurisdiction. Nevertheless, the WTO dispute-settling mechanisms have a quite decisive power as they have the mandate to decide the question of its own jurisdiction. However, these bodies have also an obligation to examine the question of jurisdiction on its own initiative. Jurisdiction is to be declined when the WTO jurisdiction is undermined by any other agreement applicable between the disputing parties. As a result of an application of international rules on conflict it can be argued that the WTO shall decline jurisdiction in cases where the disputing parties have made an agreement to either not bring a claim before the WTO or submit a claim to a specific dispute resolving/avoiding mechanism. Even though a decision on declining WTO jurisdiction could include considerations taken to for example bilateral agreements, this solely influences the scope of the applicable law before the WTO, yet, not expanding the WTO jurisdiction beyond WTO claims. Additionally, jurisdiction can be declined if a dispute not solely regards WTO issues but instead is intricately linked with non-WTO law, as such claims does not fall within the jurisdiction of the WTO.¹⁵⁰

However, a principle like the one of *res judicata* is rather unlikely to influence a conflict on jurisdictional matters between WTO and MEAs. This as this principle would probably not create implications between two different dispute-settling mechanisms, even though, the same parties are concerned and the subject matter may be related. This as a result of that the applicable law, although containing similar provisions, would differ.¹⁵¹

¹⁵⁰ Pauwelyn, J, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits*, page 1005ff and 1029.

¹⁵¹ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 82.

4.6.2 Justification of WTO Violations Based on Non-WTO Law

In the following situations where non-WTO law may justify a violation of WTO law will be treated. Some authors mean that members of the WTO cannot base claims before the WTO on non-WTO agreements but that such agreements may be invoked in a dispute between two parties to a MEA to defend themselves against a claim of violation of provisions under the WTO. This view is controversial and others mean that non-WTO agreements could not even be invoked as a defence claim before the WTO dispute-settling mechanism as the panels' jurisdiction is limited to only cover the WTO covered agreements.¹⁵²

Non-WTO law is only applicable where both disputing parties are bound by that non-WTO law and it has been invoked by one of them. Such non-WTO law may be argued to be applicable before the WTO as constituting a part of the applicable law with reference to the fact that the WTO agreement is only a part of public international law why also other treaties must be considered. Alternatively, article 31.3 (c) of the Vienna Convention can be used as facilitating an interpretation in the context of other relevant rules of international law. Furthermore, the non-WTO law has to be legal as well as valid to be applied before the WTO. Conclusively, WTO law cannot prohibit what is stated in the non-WTO law as well as the rights and obligations of third parties may not be affected. Finally, the relevant WTO law has to be prevailed by the non-WTO law justifying an otherwise inconsistent WTO measure. This could be done through the application of international principles such as *lex specialis* or *lex posterior*.¹⁵³

Articles 7.2 and 11 of the DSU regulate how substantive evaluations of WTO claims shall be assessed. WTO panels are, according to the former provision, obliged to make an “*objective assessment of ... the applicability of ... the relevant covered agreements*”. This obligation may include that other rules of international law are referred to and applied, which may lead to that the relevant WTO rules are not found to be applicable and then no violation of WTO law is at hand. Regarding the mentioned article 7.2 of the DSU, it also indicates an obligation for the WTO adjudicating bodies to consider other rules of international law when resolving WTO claims. Pauwelyn has made a distinction between four types of conflicts where non-WTO law could be used as to justify a WTO violation. Firstly, defences under non-WTO law

¹⁵² Van den Bossche, P, *The Law and Policy of the World Trade Organization*, page 59.

¹⁵³ Pauwelyn, J, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits*, page 1004f.

could be explicitly incorporated into WTO law, either as made in the SPS and TBT agreements with references to other international rules or as waivers, explicitly allowing exceptions for otherwise WTO inconsistent measures with reference to non-WTO law. As other international rules are explicitly regulated within WTO law in these agreements, the WTO adjudicating bodies are rather comfortable in applying these rules.¹⁵⁴ However, it can be added that it seems questionable that the application of other international rules shall differ due to if they are explicitly referred to in WTO law or not, especially as both situations otherwise would constitute WTO violations.¹⁵⁵

The second category includes measures allegedly violating the WTO treaty but that are specifically permitted or imposed according to another treaty's dispute settlement provisions. Pauwelyn means that a justification grounded in non-WTO law could be possible also in such disputes. As an example a dispute between the International Labour Organization (ILO) and WTO could be mentioned, resulting in that the ILO norm was found to prevail as it is more specific and later.¹⁵⁶

Thirdly, non-WTO law could be used as to justify a WTO violation regarding measures that a WTO member must enact pursuant to the provisions of another treaty. If another dispute-settling mechanism has found a measure to be justified under another treaty such a "ruling" could be given effect by the WTO adjudicating bodies. Conclusively, it could be seen as it is the disputing parties that have justified the WTO violation based on non-WTO law and not the WTO bodies. However, if no such earlier finding exists the matter becomes more complicated. An interpretation of non-WTO law, by the WTO adjudicating bodies, would then be necessary to enable a decision whether a measure should be justified with reference to the relevant non-WTO law. Regarding this third category, it can be emphasised that measures under such other conventions will in most cases be justified also with reference to the general exceptions in article XX of the GATT. Yet genuine conflicts may arise in exceptional situations and then these other international sources of law have to be interpreted as to conclude which norms that shall prevail.¹⁵⁷

¹⁵⁴ *European Communities - Regime for the Importation, Sale and Distribution of Bananas.*

¹⁵⁵ Pauwelyn, J, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits*, page 1020ff.

¹⁵⁶ *Ibid.*, page 1022f.

¹⁵⁷ *Ibid.*, page 1023f.

The fourth category includes measures, normally WTO inconsistent, that are permitted under another treaty where a WTO panel finds that this other treaty is respected/violated. Such cases require not only an interpretation of other international law but also a decision on whether these other rules are infringed or not. It is then vital to consider the limitation of the WTO dispute-settling mechanisms' jurisdiction, to only involve claims under the covered agreements. With that limitation in mind it can thus be questioned whether the WTO is permitted to conclude such decisions. Pauwelyn argues that such a power for the panels should not be easily accepted and should depend on the circumstances in every specific case. In such situations it is rather complicated to uphold the distinction between the questions of jurisdiction and the scope of the applicable law before the WTO. Regarding these disputes the acting of the WTO adjudicating bodies may depend on whether there exists any compulsory dispute mechanism under another treaty and whether the issues are inextricably linked. If so it seems rather likely that a panel would suspend its proceeding, giving the disputing parties a chance to first obtain a ruling under the other treaty. If no such compulsory mechanism exists there is more likely that a panel would decide the issue itself. However, such a solution would include a finding of a violation under the other treaty.¹⁵⁸

In addition, non-WTO law, in form of a MEA, may also be considered in situations where measures are applied as to justify the furtherance of an environmental goal of the MEA, when deciding on the applicability of article XX of the GATT for the benefit of a particular WTO member. However, a MEA cannot constitute a relevant rule applicable to the relation between the parties, when both disputants are not parties to the MEA. Nevertheless, such a MEA may be used as part of a factual analysis of the circumstances of a dispute and be the reason why a member adopted that particular trade measure and applied it in that manner.¹⁵⁹

Some cases may take the panel outside its limited jurisdiction. If a defense is based on non-WTO law the panel may decide either that the defense shall be disregarded as a violation of the WTO treaty is at hand or to decline jurisdiction as the dispute concerns claims under another treaty, which are inextricably linked with the WTO claims but does not solely concern WTO claims. As a consequence, the panel could reject the WTO complaint which seems to be a preferred solution as long as the dispute concerns a rather serious defense under non-WTO

¹⁵⁸ Pauwelyn, J, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits*, page 1027.

¹⁵⁹ Marceau, G, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties*, page 1097ff.

law. Such an approach encourages the disputing parties to resolve matters of non-WTO law amicably. Moreover, conflicting rulings are avoided and a fragmentation of international regimes counteracted. However, the parties could still return to the WTO for a resolution of the remaining disputed issues after the matters of non-WTO law have been resolved outside the WTO system.¹⁶⁰

Finally, it is vital to bear in mind that a consideration of a defence under non-WTO law is not synonymous with an acceptance of such a defence. Still the dispute-settling mechanisms may find that the other international law does neither require nor permit the challenged measures. Moreover, a conflict could also be resolved in favour of WTO law. Even if the other source of international law would prevail it would just result in that no violation under the WTO could be concluded.¹⁶¹

Additionally, it could be stated regarding the application of non-WTO law that the WTO adjudicating bodies have two alternatives; either to ignore non-WTO law or to consider it with risk for misinterpretation or weakening the other treaty. However, the latter alternative seems to be the best, especially as those risks can be attended quite easily. Advice from non-WTO expertise as well as additional expertise within the WTO could help to minimize or even prevent such implications.¹⁶² Furthermore, article 13 of the DSU, authorizing the WTO adjudicating bodies to search for information, irrespectively from where, could be applied as to use evidence and facts, presented under MEAs, before the WTO.¹⁶³

4.7 Irreconcilable Conflicts

When a conflict is irreconcilable a specific rule under the WTO may be superseded by a rule of a MEA. Article 30 of the Vienna Convention is relevant when deciding which of the norms that shall prevail in the event of a conflict. According to this article, specific provisions in treaties governing conflicts with other treaties must be respected. Moreover, a treaty later in time shall prevail over an older one on the same subject matter. A principle not covered by the

¹⁶⁰ Pauwelyn, J, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits*, page 1027f.

¹⁶¹ Pauwelyn, J, *How to Win a World Trade Organization Dispute Based on Non-World Trade Organization Law? Questions of Jurisdiction and Merits*, page 1029.

¹⁶² *Ibid.*, page 1030.

¹⁶³ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 82.

Vienna Convention but although seen as a principle of international law is the principle of *lex specialis*. This principle means that when the same subject matter is dealt with in several provisions the specific one shall prevail over the general.

In the majority of conflict situations between the WTO agreements and MEAs the WTO has to give way because of its reciprocal nature. As many MEAs constitute norms of integral type, while most WTO provisions constitute norms of reciprocal type, the WTO provisions, when later in time, can be seen as modifying earlier obligations contained in MEAs. Such an approach results in, when conflicting with the MEA, to affect WTO members as well as non-members and third parties. The conflicting WTO provision could then be seen as illegal regarding the disputed issue with reference to articles 41 and 58 of the Vienna Convention, as incompatible with the object and purpose of the MEA. Consequently, the MEA would prevail in such a conflict despite the fact that the WTO provision is later in time. In situations where the MEA instead is later in time, it can be argued that provisions of MEAs, are easily accepted to modify agreements as the WTO agreement because of its reciprocal nature, with reference to articles 41 and 58 of the Vienna Convention. The MEA could then prevail as *lex posterior* according to article 30.4 of the Vienna Convention. However, the WTO provision is not seen as illegal in such cases seen, but has only as the earlier provision to give way to the later created MEA. Conclusively, the MEA shall as a consequence of its integral nature prevail between two parties bound by both relevant norms, either with reference to articles 41 and 58 of the Vienna Convention or article 30.4 of the Vienna Convention.¹⁶⁴

¹⁶⁴ Pauwelyn, J, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law*, page 322f.

5 Case-Studies

5.1 CITES

5.1.1 General Description

CITES, entered into force in 1975, and constitutes, with its 175 parties, the conservation agreement with most members. It includes varying degrees of protection to more than 30,000 species of animals and plants, irrespectively of traded as live specimens, fur coats or other products. The international trade in such products amounts annually to approximately billions of dollars. Around hundreds of millions of plant and animal specimens are estimated to be affected and for some of these the trade together with other factors such as habitat loss can even lead to their extinction. However, numerous wildlife species in trade are not endangered, but even though protected through CITES as enabling to safeguard these resources for the future.¹⁶⁵

Moreover, CITES aims foremost at ensuring “*the international co-operation of Parties to prevent international trade in specimens of wild animals and plants from threatening their survival*”.¹⁶⁶ Furthermore, CITES could be said to enforce secondary objectives as to encourage non-parties to join the convention, to maintain species’ role in their ecosystem and to monitor trade.¹⁶⁷

5.1.2 Trade Affecting Measures

If the rules of the WTO would be directly and solely applied to the provisions of CITES the most of these MEA provisions would probably be found violating WTO law. The risk for conflicts may be explained by the differences in objectives of the agreements, which obviously complicates a simultaneous promotion of the agreements. While the WTO aims at promoting free trade, CITES aims at protecting species from overexploitation due to trade. Additionally, CITES measures, on the contrary to GATT measures, are not simply grounded in consideration of characteristics of a “product”. Furthermore, the measures included in CITES require to be discriminating as the solely possible solution otherwise would be to impose a global prohibition on trade even in situations where only an isolated population is in need of protection.

¹⁶⁵ CITES homepage, *What is CITES?*.

¹⁶⁶ CITES Secretariat, *A brief introduction to CITES*.

¹⁶⁷ OECD, *Trade Measures in Multilateral Environmental Agreements*, page 29f.

The Secretariat of CITES adopts a strategic plan every fifth year as to try to enhance for a mutual supportiveness with the WTO. This plan aims at establishing continuing recognition and acceptance of CITES measures by the WTO and at ensuring the mutual supportiveness of the decision-making process between CITES and the WTO.¹⁶⁸ Furthermore, article XIV (2) of CITES states that: “*the provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to **other** aspects of trade, taking, possession or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the customs, public health, veterinary or plant quarantine fields*”. Consequently, CITES shall not affect either national or international legislations regarding other aspects than the protection of species of trade etcetera.¹⁶⁹ Nevertheless, factual conflicts between the WTO and CITES may arise concerning aspects of the protection of species. In the following some examples of such conflicts will be studied.

5.1.2.1 Measures Directly Affecting Trade

CITES invokes trade restrictions against parties and non-parties to protect listed species of animals and plants threatened with extinction and endangerment.¹⁷⁰ The species that are regulated in CITES are listed in three appendices to the agreement and trade is permitted to different extents depending on in which of the three appendices particular species are listed. Articles III, IV, V and VI of CITES regulate import and export permits and re-exports certificates. Additionally, article VIII.1 of CITES states that its members individually shall impose “*appropriate measures to enforce the provisions of the present Convention*”. Furthermore, article XIV provides that the parties are not limited by the Convention to adopt stricter measures. In such situations the measure is taken pursuant to CITES, although not explicitly required.¹⁷¹

The trade affecting provisions contained in CITES, are designed to severely constrict the market demand for the involved products, through demanding trade restrictions, thus, reducing the international market demand for these products.¹⁷² To give an example CITES allows the usage of quotas to regulate leopard trade. However, such quantitative restrictions

¹⁶⁸ CITES, *Strategic Vision Through 2005*.

¹⁶⁹ Favre, D, *International Trade in Endangered Species, A Guide to CITES*, page 300.

¹⁷⁰ CITES Appendix I and II.

¹⁷¹ OECD, *Trade Measures in Multilateral Environmental Agreements*, page 195.

¹⁷² Caldwell, J, *Multilateral Environmental Agreements and the GATT/WTO Regime*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 43f.

may, even though conflicting with the wording of article XI.1 of the GATT, increase trade in the targeted product as some countries otherwise may prohibit all trade in the targeted product.¹⁷³

5.1.2.2 Permit and Listing System

CITES utilizes a permit and listing system to facilitate prohibitions on imports or exports of listed wildlife and wildlife products, except if scientific finding is made showing that the trade in question will not threaten the existence of the species.¹⁷⁴ Consequently, there is a possibility to circumvent a prohibition on trade in specific species through the obtainment of a licence authorizing imports, exports and re-exports as well as introductions from the sea of the listed species.¹⁷⁵ Through this license system trade in some species is aimed to be allowed to an extent not reducing the chances of their survival.¹⁷⁶

5.1.2.3 Humane Transport Regulations

If humane transport regulations violate the WTO and have been justified according to article XX the regulations also must be consistent with the TBT agreement.¹⁷⁷ If the trade measure constitutes a national technical regulation to protect animal or plant life or health the measure must also meet the MFN-principle and the national treatment requirements.¹⁷⁸ Where a party applies a measure pursuant to CITES it can be suggested that a rebuttable presumption exists including that CITES measures, as included under a convention of international standards, do not create unnecessary obstacles to international trade.¹⁷⁹ However, it is not commonly accepted that such an approach should be used.¹⁸⁰ Additionally, the humane transport

¹⁷³ Wold, C, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, Chapter V.A paragraph 2.

¹⁷⁴ CITES articles III.2 (a), 3 (a) and IV.2 (a).

¹⁷⁵ CITES homepage, *How CITES works*.

¹⁷⁶ OECD, *Trade Measures in Multilateral Environmental Agreements*, page 11.

¹⁷⁷ TBT Agreement, supra note 33. (Humane transport regulations are contained in for example CITES articles III.2 (c), IV.2 (c), IV.6 (b) and V.2 (b).)

¹⁷⁸ TBT Agreement article 2.1.

¹⁷⁹ TBT Agreement articles 2.2 and 2.5 “A CITES requirement might not be an international standard under the TBT Agreement, which defines standards as voluntary measures...On the other hand, it would seem more logical to give even greater deference to a national technical regulation adopted pursuant to an international mandate.” as stated in Wold, C, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, footnote 278 with reference to Housman & Van Dyke.

¹⁸⁰ See Wold, C, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, Chapter IV.A.2.c paragraph 5, stating that: “...the application of this protective presumption to multilateral environmental agreements is unclear because the provisions of environmental agreements are mandatory, not voluntary, and because the conventions and their secretariats are not designated standards bodies-two conditions of the TBT Agreement. If this is the case, the nondiscrimination provisions of the TBT Agreement may prove problematic”.

standards might not be the least trade restrictive as trade that does not meet these standards must be prohibited.

5.1.2.4 Measures Applied at Non-parties

CITES also contains measures directed at non-parties. Regarding such measures, inconsistencies may arise in situations where a WTO member, when implementing the MEA obligations, may find itself unable to respect certain obligations to such non-parties. The same regards amendments, which only one party has accepted.¹⁸¹

Moreover, CITES aims at encouraging participation in itself through allowing trade in listed species with non-parties under condition that a non-party provides documentation conforming to the provisions of the agreement.¹⁸² In addition, CITES has enabled numerous trade measures of enforcing nature to be imposed on non-parties as well as non-complying parties.¹⁸³ What concerns measures applied to implement CITES, articles I and XIII of the GATT could be violated. As an example the same treatment has to be applied to every “like” product if measures according to article XIII of the GATT shall be allowed.

The documentation required of non-parties is accepted only where information about the non-party’s competent authorities and scientific institutions are provided to the Secretariat. Additionally, trade with non-parties in Appendix I specimens are allowed only in special cases and only after consultation with the Secretariat. On the contrary, parties are not burdened with such demands. Trade restrictions on non-parties constitute *prima facie* quantitative restrictions which also might violate the MFN and national treatment principles. However, discrimination of non-parties regarding trade in otherwise like products might be allowed. The panel in the *Auto Taxes*¹⁸⁴ case stated that Article III does not prohibit valid government policy options where based on products and not taken as to afford domestic production protection.¹⁸⁵ Consequently, CITES policies, not based in protectionism considerations, might be allowed even where the measures differ with reference to whether a country is party or not.

¹⁸¹ OECD, *Trade Measures in Multilateral Environmental Agreements*, page 193.

¹⁸² CITES article X.

¹⁸³ Hoffmann, U, *Promoting Synergies and Avoiding Conflicts Between Trade-Related MEAs and WTO Rules, A Practical Way Forward For Implementing Para 31(i) of the Doha MD*, page 17.

¹⁸⁴ *Indonesia - Certain Measures Affecting the Automobile Industry*.

¹⁸⁵ *Ibid.*, paragraph 5.7.

5.1.3 Jurisdiction under CITES

Concerning the jurisdiction under CITES, the Convention states in its article XVIII regarding resolution of disputes that “*Any dispute which may arise between two or more Parties with respect to the interpretation or application of the provisions of the present Convention shall be subject to negotiation between the Parties involved in the dispute*”. Consequently, the first step should be to find a solution through negotiations between the disputing parties. Furthermore, it is regulated in the second paragraph that if a solution according to the first paragraph is not found “*the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the Parties submitting the dispute shall be bound by the arbitral decision*”. Hence, if negotiations fail, the Permanent Court of Arbitration at The Hague should try to settle the dispute under condition that the parties agree to let that forum settle their dispute. Subsequently, CITES does not establish any compulsory dispute settling mechanism.

As the CTE suggests that WTO members, also members of the MEA, should consider trying to resolve disputes regarding the use of trade measures applied pursuant to the MEA between themselves through the dispute-settling mechanism available under the MEA, it implies that the disputing countries, where both are WTO members as well as parties to CITES, even though, shall try to resolve it according to the mentioned CITES provisions regarding dispute resolution. However, the compulsory jurisdiction under the WTO may give rise to tensions.

5.2 The Kyoto Protocol

5.2.1 General Description

The Kyoto Protocol was adopted in 1997 after negotiations between 160 countries aiming at binding limitations on greenhouse gases for the developed nations, in accordance with the objectives of the Framework Convention on Climate Change (UNFCCC) of 1992. The Kyoto Protocol came into force in 2005 after it had been ratified by more than 55 per cent of the parties of the UNFCCC and includes binding targets for the reduction of greenhouse gas emissions for 37 industrialized countries and the European community. These targets amount to an average of five percent against 1990 levels over the five-year period between 2008 and 2012.¹⁸⁶ However, the responsibility commitments differ. The developed countries have taken

¹⁸⁶ The Kyoto Protocol article 3.

a bigger responsibility as responsible for the current high levels of greenhouse gas emissions in the atmosphere due to their participation during 150 years of industrialism.¹⁸⁷

The tradable units covered by the Protocol are created by an act of international law putting obligations upon the Protocols' member parties why the obligations included in the Protocol only relate to governments. Furthermore, the "*Protocol has not created or bestowed any right title or entitlement to emissions of any kind on Parties included in Annex I*".¹⁸⁸ Moreover, the protocol can be said to only create "*the right to a limited pollution in a defined time frame*".¹⁸⁹ As the Protocol implies other entities than its parties to participate in the Kyoto mechanisms there is a need for the creation of such rights through rules on implementation or single government acts.¹⁹⁰

5.2.2 Trade Affecting Measures

The Kyoto Protocol does not contain any measures directly affecting trade. However, potential conflicts may arise between the Kyoto Protocol and the WTO. While the parties to the Protocol should "*strive to implement policies and measures ...in such a way as to minimize adverse effects...on international trade*", the WTO regime recognizes the importance of to "*protect and preserve the environment*".¹⁹¹ As both treaties support some mutual interests, some measures imposed with reference to the Kyoto Protocol may be consistent also with the objectives of the WTO and other multilateral trading agreements.¹⁹² In the following some examples of potential conflicts that may arise between the Kyoto Protocol and the WTO will be examined.

5.2.2.1 Flexible Mechanisms

The parties to the Kyoto Protocol must meet their targets primarily through national measures but the Protocol includes three flexibility mechanisms that may be imposed by the parties to the Protocol as to meet their commitments under the Protocol. The first mechanism, referred to in article 6 of the Kyoto Protocol, Joint Implementation (JI) allows Annex B parties, namely the parties with an emissions reduction or limitation commitment under the Protocol,

¹⁸⁷ UNFCCC, *Kyoto Protocol*.

¹⁸⁸ UNFCCC, *Principles, nature and scope of the mechanisms pursuant to Arts 6, 12 and 17 of the Kyoto Protocol*.

¹⁸⁹ Freestone, D and Streck, C, *Legal Aspects of Implementing the Kyoto Protocol Mechanisms, Making Kyoto Work*, page 45.

¹⁹⁰ *Ibid.*, page 45.

¹⁹¹ Kyoto Protocol article 2.3 and Preamble to the Marrakesh Agreement Establishing the WTO.

¹⁹² Georgieva, K and Mani, M, *Trade and the Environment Debate: WTO, Kyoto and Beyond*, page 6.

to earn emission reduction units from emission-reductions or emission removal projects in other Annex B parties. Such earned units can be used by the parties to meet their Kyoto targets. The second mechanism, Clean Development Mechanism (CDM), regulated in article 12 of the Protocol, allows the Annex B parties to implement emission-reduction projects in developing countries as a way to earn saleable Certified Emission Reduction (CER) credits. Also these credits can be counted towards meeting a party's Kyoto targets. The third mechanism, "emissions trading" is treated in article 17 of the Protocol and involves the allowance of countries that have emission units, not used but permitted them, to sell this excess capacity to countries exceeding their targets. However, each party has to hold a minimum level of these units. Moreover, governments may set emissions obligations to be reached by participating entities through so called emissions trading schemes, establishing climate policy instruments at a national as well as a regional level.¹⁹³

Only parties to the Kyoto Protocol are able to participate in the Kyoto mechanisms. Consequently, non-parties are excluded from the markets in emissions trading and the certified emissions reductions at least to the extent that concerns the earning of credits for greenhouse gas emissions. Where two WTO members trade in emission permits, exclusivity may violate the MFN-principle in article I of the GATT. However, it is doubtful whether these permits and licenses should be classified as either goods or services as a consequence of the elements of government regulatory activity. The opinions differ and some argue that conflicts may arise between the Kyoto Protocol and the General Agreement on Trade in Services (GATS).¹⁹⁴ This concerns for example the application of the CDM criteria, to determine whether credits can be obtained under the Protocol. These criteria may be regarded burdensome and as neither transparent nor generally incompatible with the GATS requirements. However, the scope of the GATS is limited but at least some Kyoto mechanism aspects, for example brokerage of consulting services, could entail "*service or service-related functions*" and thus be covered by the GATS.¹⁹⁵

¹⁹³ UNFCCC homepage.

¹⁹⁴ See among others Wisner, *The Clean Development Mechanism Versus the World Trade Organization: Can Free-Market Greenhouse Gas Emissions Abatement Survive Free Trade?*, Georgetown International Environmental Law Review, 11, 3:531-598.

¹⁹⁵ Brack, D and Gray, K, *Multilateral Environmental Agreements and the WTO*, page 21f.

5.2.2.2 Justification of WTO Violations with Reference to the Kyoto Protocol

Even though the Kyoto Protocol does not explicitly provide for any trade-affecting rules, the parties to the Protocol may refer to the Protocol when imposing trade-affecting measures as to fulfil their commitments under it.¹⁹⁶ For instance it is stated in article 2.1 (a) of the Protocol that each Annex I party, involving essentially industrialised countries, shall “*implement and/or further elaborate policies and measures in accordance with its national circumstances*”. For this purpose a wide range of potential areas for action, such as energy efficiency, renewable energy sources, removal of market distortions such as subsidies and transport, are listed. At least some of these measures will affect trade as for example energy taxes that will probably affect numerous of products’ prices and competitiveness. Consequently, there is a risk for that parties, despite that no further details are stated, may claim justification of WTO violations from the Kyoto Protocol. This could result in the imposition of measures restraining greenhouse gas emissions from the claiming parties own territories through methods protecting their own industries at expense of importers.¹⁹⁷

It is rather likely that conflicts arise where a country adopt, as part of its climate change policy, tariffs or other measures discriminating against producers in some trading partners, either in favour of other trading partners then potentially violating the MFN-principle or in favour of “like products” from domestic producers thus potentially violating the national treatment principle. Consequently, a potential claim brought before the WTO would be about whether the questioned measure should be justified under Article XX of the GATT or in case of services under article XIV of the GATS.¹⁹⁸ It is not commonly agreed upon whether “emissions trading” is at all covered by WTO rules. Marketable rights created via an emissions trading regime are unlikely to be covered by either the GATT or the GATS, not constituting either “goods” or “services”.¹⁹⁹ Moreover, trade in rights created by a government has until now not been argued to fall within the ambit of the WTO, as also regard license, patent, currency etcetera. However, “emission trading” may be argued to fall within article XVIII of the GATS, as regulating the possibility for governments to make commitments on government-created rights.

¹⁹⁶ Eklöf, G, *Miljön på undantag - de internationella miljöavtalen och WTO*, page 18.

¹⁹⁷ Brack, D and Gray, K, *Multilateral Environmental Agreements and the WTO*, page 10.

¹⁹⁸ Frankel, J, *Kyoto and Geneva: Linkage of the Climate Change Regime and the Trade Regime*, page 6.

¹⁹⁹ Charnovitz, S, *Trade and Climate: Potential Conflicts and Synergies*, in *Beyond Kyoto: Advancing the International Effort Against Climate Change*, page 152.

Even if “emission trading” should be argued to fall outside the scope of the WTO there might still be a possibility for indirect WTO violations where a government is involved in the emission trading system and the flow of trade in goods and services is affected.²⁰⁰ Consequently, article III of the GATT could be violated where the competition between imported and domestic products are disturbed. Additionally, an infringement under article I of the GATT could be at hand if products from parties to the Protocol would be easier to import than product from non-parties. Regarding both of the mentioned situations a justification according to article XX of the GATT may be claimed.

As an example so called border tax adjustments could be used as to adjust border taxes for countries that impose high taxes on a national level. Article II.2 (a) of the GATT permits border tax adjustments on articles from which the imported product has been manufactured in whole or in part, which by a WTO panel has been interpreted as to be understood as covering taxes on inputs used as material in the manufacture or production of the imported product.²⁰¹ Such border tax adjustments may, if explicitly discriminating against non-members’ exports, be seen as a punishment thus encouraging non-parties to join in the future. However, the acceptance of border tax adjustments will depend on whether the discrimination is explicitly against non-members of the Protocol and on the product in question.²⁰² Such adjustments may be unwanted as they assess domestic producers, facing imports and not paying such tax, to compete with similar untaxed goods on the international market. Furthermore, there is a risk for that such schemes are found to be inconsistent with the GATT as indirectly directed at the production method instead of at the particular product itself.²⁰³ It is debated whether such border measures when discriminating in nature should be justified by GATT article XX and/or GATS article XIV. Such conflicts are probable to arise and the distinction between products and production methods will greatly influence the acceptance of such measures.²⁰⁴

²⁰⁰ Werksman, *Greenhouse-Gas Emissions Trading and the WTO*, in *Inter-linkages. The Kyoto Protocol and the International Trade and Investment Regime*, page 156, cited by Charnovitz, S, *Trade and Climate: Potential Conflicts and Synergies*, in *Beyond Kyoto: Advancing the International Effort Against Climate Change*, page 152.

²⁰¹ Wold, C, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, Chapter IX.A paragraph 4.

²⁰² Frankel, J, *Kyoto and Geneva: Linkage of the Climate Change Regime and the Trade Regime*, page 9.

²⁰³ Cameron, J and Cosbey, A, *Trade implications of the Kyoto Protocol*, page 22.

²⁰⁴ Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, page 4.

5.2.2.3 To Put Pressure on Non-parties

It is suggested that the Kyoto Protocol could be used as to put pressure on countries not party to the Protocol.²⁰⁵ However, the Kyoto Protocol does not involve trade sanctions against non-participating countries. Furthermore, it is not commonly agreed upon whether trade measures imposed on non-parties, with reference to a MEA, imposes obligations to non-parties or whether such measures just condition access to domestic markets on compliance with those obligations. As subsequent instruments as well as annexes, amendments and protocols to the original MEAs are added gradually, potential conflicts may arise where parties to a MEA may not be parties to future instruments. Consequently, non-parties may be engaged to withhold their non-party status and memberships of MEAs would not be further engaged. Additionally, non-parties may gain advantages from either free-riding without bearing any of the costs or subsidising environmentally unsustainable activity defeating the objectives of MEAs. Greenpeace has proposed that the US refusal to ratify the Kyoto Protocol should make it possible for WTO members who support the Protocol to base a claim that can be brought before a WTO panel. This as a consequence of that the US position on the Protocol is argued to be equivalent to a hidden subsidy for its domestic industry and thereby inconsistent with WTO rules.²⁰⁶

The Protocol is argued to could have been more effective if triggering trade sanctions as means of encouraging participation or enforcing compliance and even such measures could be found to be in accordance with the WTO. This seems as a rather serious shortcoming of the Protocol since some of the largest and fastest-growing emitters are not members. Nevertheless, there is a risk for that potential conflicts may arise. The WTO rule on non-discrimination could for example be violated where a WTO member seeks to impose border tax adjustments to offset the effects of specific domestic greenhouse gas taxes on the competitiveness of its own industry against foreigners.²⁰⁷

Additionally, a development including that carbon-intensive industries aimed to be targeted by the Kyoto Protocol are relocated to non-member countries may undermine the foremost aim with the Protocol. It is commonly known that the WTO regime may enable for a WTO member to target export products for environmental purposes but to target products because

²⁰⁵ Eklöf, G, *Miljön på undantag - de internationella miljöavtalen och WTO*, page 20.

²⁰⁶ Greenpeace, *Safe Trade in the 21st Century*, page 10.

²⁰⁷ Georgieva, K and Mani, M, *Trade and the Environment Debate: WTO, Kyoto and Beyond*, page 6.

of the way they are made is still uncertain. However, the *Shrimp-Turtle* ruling may, as mentioned, have opened up for such a development. Consequently, in situations where PPMs create global externalities, such as greenhouse gases, as to discourage leakage of emissions to non-members, the WTO could recognize the legitimacy of such vital goals to the Kyoto Protocol.²⁰⁸

Even though some favour that trade sanctions should be used against non-joiners as a mechanism to encourage participation as allowed under the WTO, there is a resistance to solve the free-rider problem in MEAs, arguing that even multilateral sanctions against non-parties would violate the WTO. It is argued that the free-rider problems could be solved through an imposition of off-setting border measures. The Montreal Protocol on Substances that Deplete the Ozone Layer has been mentioned as a successful example but at the same time it is stated that the possibilities to do the same with another MEA are rather restricted. However, CDM projects have been proposed as a way of tackling the free rider problem. To achieve this effect emission reductions should only be certified where their technical terms of production are manufactured in countries that have ratified the Protocol.²⁰⁹

Not even any specific mechanism enforcing compliance of members is included in the Kyoto Protocol which could weaken members' will to adhere honestly to their targets grounded in a fear of losing competitiveness to free-riders. Trade sanctions could constitute compliance-enforcing mechanism but once again WTO violations may then occur. Additionally, it seems rather unlikely that such sanctions will be added to the Kyoto Protocol. Instead emission gaps will probably be filled with such as generously accounted interpretations of JI and CDM projects. Moreover, it seems unlikely that the Kyoto parties would respond with aggressive sanctions, particularly with regards to that non-members, such as the US, "*are getting off scot free*".²¹⁰

5.2.2.4 Subsidies

Moreover, potential conflicts may arise between the Kyoto Protocol and the WTO Agreement on Subsidies and Countervailing Measures (SCM), which entered into force in 1995. The agreement covers only the goods sector and non-specific, but not specific, subsidies are

²⁰⁸ Georgieva, K and Mani, M, *Trade and the Environment Debate: WTO, Kyoto and Beyond*, page 7.

²⁰⁹ Müller, B, *The Kyoto Mechanisms: Linking Technology to Ratification*, page 58 as described in Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, page 7.

²¹⁰ Frankel, J, *Kyoto and Geneva: Linkage of the Climate Change Regime and the Trade Regime*, page 8.

allowed as the specific ones assume to be discriminatory and distorting in nature. This could be the case when parties to the Kyoto Protocol “*exempt particular favored industries from an energy tax, or give out domestic emission permits in a non-neutral way, or reward their companies with credits for CDM and JI projects*”.²¹¹ This as a consequence of that permits and credits could be virtually equivalent to money.²¹² Moreover, a WTO panel stated in the *Lumber case* that a financial contribution, thus constituting a subsidy, is not limited to a money-transferring action why the giveaway of a valuable emission right by a government was found to constitute a subsidy. However, the lumber precedent should be separated from a greenhouse gas emission as lumber constitute a good while an emission does not.²¹³ However, it has been proposed that the initial allocation of permits will fall under the SCM agreement. The allocation process’ design and not the character of a subsidy would be of interest when deciding whether it would fall within scope of the GATS. Furthermore, GATS might involve *services employed in the development and management of clean development mechanism projects and the financial services related to trade in certified emissions reductions*.²¹⁴

Nevertheless, restrictions on subsidies concerning payments under environmental programs are allowed in the area of agriculture why subsidies on agriculture projects could be argued to be permitted also under the WTO.²¹⁵ However, some argue that some sectors such as ethanol subsidies should not be permitted if not scientifically found to be environmentally beneficial.²¹⁶

If a subsidy shall qualify to be inconsistent with the GATT some requirements shall be met. Firstly, a particular industry or sector has to be granted specifically. Secondly, the subsidy has to be linked to exports of the subsidized good, conditional on the use of domestic inputs or found to cause adverse effects to foreign competitors meaning that the market share of a competing producer shall be impaired. However, some subsidies to facilitate domestic industry to adjust to its Kyoto commitments are in line with the GATT, where constituting a

²¹¹ Frankel, J, *Kyoto and Geneva: Linkage of the Climate Change Regime and the Trade Regime*, page 12.

²¹² *Ibid.*, page 12.

²¹³ Charnovitz, S, *Trade and Climate: Potential Conflicts and Synergies*, in *Beyond Kyoto: Advancing the International Effort Against Climate Change*, page 153.

²¹⁴ Brack, D and Gray, K, *Multilateral Environmental Agreements and the WTO*, page 22.

²¹⁵ Georgieva, K and Mani, M, *Trade and the Environment Debate: WTO, Kyoto and Beyond*, page 7.

²¹⁶ Frankel, J, *Kyoto and Geneva: Linkage of the Climate Change Regime and the Trade Regime*, page 12.

one-time cost of firms adjusting to new environmental regulations and where the subsidy does not exceed 20 % of the costs incurred.²¹⁷

Regarding border tax adjustments it is important to separate those on exports from those on imports. While border tax adjustments on imports fall under the GATT, those on exports fall under the SCM agreement. In general, border tax adjustments on exports are allowed with respect to taxes on consumption under the SCM agreement, although the design of climate taxes and accompanying border tax adjustments should be considered. However, such adjustments may not be allowed under the agreement when directed at inputs not physically present in the final product.²¹⁸

5.2.2.5 TBT Agreement

Additionally, potential conflicts may arise between the Kyoto Protocol and the Agreement on Technical Barriers to Trade (TBT). The TBT agreement allows non-discriminatory labelling of products. In other words, labels describing characteristics of a good should be allowed where equally applied to domestic as well as imported samples of the relevant product. For example labelling requirements concerning for example energy efficiency could be accepted. However, compulsory labelling requirements concerning the production process may constitute a potential conflict. To give an example such conflicts could be argued to arise where labels specifying greenhouse gas content in the production process are required.²¹⁹ However, it is not commonly agreed upon how the TBT agreement would apply to such situations. Unrelated processes, such as the last mentioned, could be argued to fall outside the scope of the TBT agreement as limited to product characteristics regulations and standards and their related processes.²²⁰ Conclusively, labelling requirements concerning specification of the level of greenhouse gas emitted in the production process would almost certainly be prohibited by WTO law.²²¹ As long as labelling requirements remain voluntary they fall outside the scope of article III of the GATT. Additionally, also mandatory labelling requirements may not violate the national treatment principle, if the difference in treatment between

²¹⁷ Cameron, J and Coesby, A, *Trade Implications of the Kyoto Protocol*, page 23.

²¹⁸ Ibid., page 36 and 39.

²¹⁹ Appleton, cited by Charnovitz, S, *Trade and Climate: Potential Conflicts and Synergies*, in *Beyond Kyoto: Advancing the International Effort Against Climate Change*, page 151.

²²⁰ Petersmann, E, *International and European Trade and Environmental Law after the Uruguay Round*, page 46.

²²¹ See for example Appleton, Arthur E., *The World Trade Organisation's View: Emissions Reduction in a Free Trade World*, *Swiss Re Centre for Global Dialogue*, October 2001, page 17.

products with reference to environmental characteristics does not discriminate against imported “like” products.²²²

However, energy efficiency standards, which are developed and applied in a transparent, cooperative and non-discriminatory manner, might probably be found compatible with the national treatment principle as well as the exceptions under article XX of the GATT, where a clear link can be established between a measure and the pursuit of climate policy objectives.²²³ Nonetheless, there may be a violation of the TBT agreement, for example regarding that any national standards have to be based on widely accepted international standards.²²⁴ However, the various requirements of the TBT agreement will most certainly have a constraining effect for the application and design of eco-labels. Once again, a government requiring a specification of the level of greenhouse gas emitted in the production process is suggested to be prohibited by WTO law.²²⁵

These issues have been treated in a case where fuel efficiency standards for motor vehicles were proposed and later also notified to be introduced by the Japanese government as to reduce carbon dioxide emissions as to meet their Kyoto targets. A claim was brought before the WTO by the EU based on that these standards would discriminate against imports of the generally large European cars in favour of the generally small domestically made Japanese models.²²⁶ It has been indicated that fuel efficiency standards are not likely to raise WTO concerns when crafted in a manner not discriminating against imported products. Nevertheless, the panel in the *US-Taxes on Automobiles* case stated that a regulation discriminating between imported and domestic vehicles was acceptable.²²⁷ On the contrary, an explicit provision for separate calculations for imported and domestic fleet averages was not found acceptable where clearly based on a foreign-domestic distinction.²²⁸ Conclusively, efficiency standards are certainly not inherently problematic in relationship to WTO rules, including those in

²²² Petersmann, E, *International and European Trade and Environmental Law after the Uruguay Round*, page 46.

²²³ Buck, M and Verheyen, R, *International Trade Law and Climate Change – A Positive Way Forward*, page 10 cited by Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, page 13.

²²⁴ Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, page 14.

²²⁵ Charnovitz, S, *Trade and Climate: Potential Conflicts and Synergies*, in *Beyond Kyoto: Advancing the International Effort Against Climate Change*, page 151.

²²⁶ Assuncao, L, and Zhang, Z, *Domestic Climate Change Policies and the WTO*, page 11f cited by Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, page 14.

²²⁷ *United States - Taxes on Automobiles*, Report of the Panel, cited by Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, page 14.

²²⁸ Parker, R, *Designs for Domestic Carbon Emissions Trading: Comments on WTO Aspects*, page 14 cited by Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, footnote 5.

the TBT agreement, even if they apply to imports and reduce import sales. However, a consideration has to be made on a case-by-case basis.²²⁹

5.2.2.6 Government Procurement

Another discussed issue on potential conflicts is whether government mitigation policies violate WTO law. Government procurement is not covered by the GATT, but under the WTO Agreement on Government Procurement (AGP), which contrary to the GATT is argued to allow discrimination grounded in PPMs that does not constitute unnecessary barriers to trade.²³⁰ It has been argued that procurement programmes which consider “*the direct energy performance of procured products or services are well within the scope of technical specifications allowed under the AGP*”.²³¹ Nevertheless, problems may arise concerning such programmes referring to the non-product related climate change impacts of products and services.²³² Additionally, the national treatment principle could be infringed where for example a government would treat electricity generated from hydropower differently than electricity generated from coal-fired power.²³³ This would especially be relevant where the former is local and the latter foreign. However, the AGP is a plurilateral agreement why only a limited number of the WTO members are parties to the agreement. Therefore, potential conflicts with the AGP do not constitute the conflict category requiring the foremost attention.²³⁴

5.2.3 Jurisdiction under the Kyoto Protocol

It is not commonly agreed upon which dispute-settling mechanism conflicts between the WTO and the Kyoto Protocol should be brought before.²³⁵ In contrast to the WTO the Kyoto Protocol does not establish any compulsory dispute-settling mechanism. However, the Protocol in article 19 states that the provisions of article 14 of the UNFCCC on settlement of disputes shall apply *mutatis mutandis* to the Protocol. Article 14 of the UNFCCC states in its first paragraph that; “*In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a*

²²⁹ Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, page 14.

²³⁰ Cameron, J and Cosbey, A, *Trade Implications of the Kyoto Protocol*, page 23.

²³¹ Buck, M and Verheyen, R, *International Trade Law and Climate Change – A Positive Way Forward*, page 19 cited by Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, page 16.

²³² *Ibid.*, page 16.

²³³ Assuncao, L, and Zhang, Z, *Domestic Climate Change Policies and the WTO*, page 11f cited by Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, page 15.

²³⁴ Brewer, T, *The WTO and the Kyoto Protocol: Interaction Issues*, page 15 and 17.

²³⁵ Georgieva, K and Mani, M, *Trade and the Environment Debate: WTO, Kyoto and Beyond*, page 7.

settlement of the dispute through negotiation or any other peaceful means of their own choice". Additionally, its second paragraph regulates that; "When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation: (a) Submission of the dispute to the International Court of Justice; and/or (b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration". Additionally, articles 14.5-14.8 of the UNFCCC regulate compulsory conciliation of a dispute between parties after one year from that a notification of the dispute by one of the parties has elapsed. Moreover, the Kyoto Protocol provides for the establishment of expert review teams reporting to the Conference of the parties and which are coordinated by the Secretariat. According to article 8.3 of the Kyoto Protocol the reviews provided by these teams "shall provide a thorough and comprehensive technical assessment of all aspects of the implementation by a Party of this Protocol". Additionally, the Protocol in article 8 establishes a non-compliance procedure, including an evaluation of listed non-compliance factors on a case-by-case basis.

Conclusively, the UNFCCC provides for dispute resolution in form of standard international settlement provisions as well as possibilities to develop additional mechanisms. Concerning the reference to the ICJ, it is only a voluntary dispute settling possibility and only states may bring claims before it. However, the ICJ may provide with necessary uniformity but its time frames as well as its expertise may seem insufficient. Moreover, parties not suffering from a direct injury may have difficulties in showing an injury in cases regarding non-compliance. On the contrary, a dispute resolution through arbitration or conciliation may seem more appropriate, contributing with valuable pros such as flexibility, speed and better possibilities of choosing judges. However, these forums only provide with a resolution that binds only the disputing parties. Additionally, the lack of creating uniformity is negative.²³⁶ Arbitration has been suggested to be the best solution for how conflicts between the Kyoto Protocol and the WTO should be solved. This could be true as such conflicts regard complex matters and require knowledge in complicated environmental issues as well as concerning the Kyoto

²³⁶ Kalas, P and Herwig, A, *Dispute Resolution under the Kyoto Protocol*, page 64f.

Protocol and its regulated mechanisms, which an arbitration process could provide with.²³⁷ Additionally, both the Kyoto Protocol and the UNFCCC allow flexibility regarding dispute settling mechanisms and as their relationship to each other is not decided it is uncertain how these disputes shall be settled.²³⁸

²³⁷ Brown, Chester, *The Settlement of Disputes Arising in Flexibility Mechanism Transactions under the Kyoto Protocol*, page 384f.

²³⁸ Kalas, P and Herwig, A, *Dispute Resolution under the Kyoto Protocol*, page 67f.

6 Approaches for the Future

6.1 Proposals Regarding How to Clarify the WTO-MEA Relationship

A discussion concerning how the relationship between the WTO and MEAs should be clarified has evolved with different views. By a Ministerial Decision at the Uruguay Round the CTE was established as to identify the relationship between trade and environmental measures, to promote sustainable development as well as to make recommendations on whether any modifications of WTO provisions are required in any of the pillars: goods, services and intellectual property rights.²³⁹ Regarding the future development, the CTE has recommended that the WTO Secretariat also in the future should cooperate with the MEAs' secretariats and provide the WTO members with information on trade-related developments in MEAs. Moreover, several proposals on how to clarify the relationship between trade restrictive MEAs and the agreements under the WTO have been put forward to the CTE. There has been a desire for a legal clarification of the relationship between the WTO and MEAs as well as for a stronger dispute settlement mechanism within the MEAs.²⁴⁰ However, a majority of the members consider that the WTO law should not be amended as to include trade measures of MEAs.

A clarification of the relationship between the WTO and MEAs may be vital not only to prevent potential conflicts and to increase the attractiveness of multilateralism but also to create a clearer policy-making environment, especially for MEA negotiators, and to provide greater legal certainty for MEAs as well as the WTO.²⁴¹ On the contrary, an absence of a clarification of the relationship may bring “a chilling effect” of WTO provisions on the negotiation as well as the implementation of MEAs why such a development may restrict the furtherance of such agreements.²⁴² Moreover, the WTO is even seen by environmental activists as undermining necessary environmental legislation.²⁴³

Some advocate that the equality of the WTO and MEAs needs to be acknowledged. Such equality is argued to be supported by a coherent policy development at a national level to

²³⁹ Shaw, S and Schwartz, R, *Trade and Environment in the WTO, State of Play*, page 130.

²⁴⁰ *Ibid.*, page 133.

²⁴¹ *Ibid.*, page 152.

²⁴² *Ibid.*, page 146.

²⁴³ Van den Bossche, P, *The Law and Policy of the World Trade Organization*, page 623f.

ensure that these agreements are mutually supportive.²⁴⁴ As most environmental policies are implemented at a national level, it may also seem important to maintain national authority to enforce such standards.²⁴⁵ Moreover, the question on how to clarify this relationship would probably be best dealt with if it would not be addressed only within the WTO, but also within MEAs. This may seem natural as a formal WTO dispute, involving MEA rules, probably would have serious implications for both systems of governance.²⁴⁶

Additionally, some argue that the creation of a linkage between trade and environmental issues is a way for the developed countries to introduce higher standards for the protection of the environment and to impose protectionist measures against cheaper imports from developing countries thus maintaining their dominant position in the international trading regime.²⁴⁷ On the contrary, developed countries fear that their competitive position would be eroded in the absence of such a link as pollution intensive industries then would move to countries with lower standards. This view is shared by environmentalists, who envisage that a race to the bottom would follow due to increasing trade integration and competition for investment and jobs. By ensuring a level playing field for all exporters and by introducing binding environmental standards, preferably within the WTO system, it can be avoided that developed countries would desire to open up additional avenues for unilateral actions.²⁴⁸ Additionally, it is striking that article XX of the GATT leaves room for interpretation and arbitrariness, which may explain the reactions to the increasing consideration of environmental interests as conflicting with the interest of trade liberalization.

In the following some proposals on how to clarify the WTO-MEA relationship will be presented. These proposals have in common that they, even though they differ in various aspects, all support the WTO as acting on a multilateral level for the protection of the environment.²⁴⁹

²⁴⁴ *The relationship between MEAs and the WTO: Where are the negotiations heading? WTO Symposium: Challenges ahead on the road to Cancún, Summary Report.*

²⁴⁵ Harris, J, *Trade and the Environment.*

²⁴⁶ *The relationship between MEAs and the WTO: Where are the negotiations heading? WTO Symposium: Challenges ahead on the road to Cancún, Summary Report.*

²⁴⁷ Emmert, F, *Labor, Environmental Standards and World Trade Law*, page 77.

²⁴⁸ Brack, D and Gray, K, *Multilateral Environmental Agreements and the WTO*, page 29 and Busse, M, *Trade, Environmental Regulations and the World Trade Organization: New Empirical Evidence*, page 285 and 297.

²⁴⁹ See also Abdel Motaal, D, *Multilateral Environmental Agreements (MEAs) and WTO Rules, Why the "Burden of Accommodation" Should Shift to MEAs*, page 1218ff, for a similar classification.

6.1.1 The Status Quo Approach

Firstly, the so-called “status quo” approach, which is generally accepted among developing countries and the United States, advocates that the relationship between the WTO and MEAs should be clarified without any amendments to WTO law. The advocates of this approach consider that article XX of the GATT already gives sufficient space for interaction between WTO and MEA rules and that no further consideration of environmental concerns is needed. Moreover, they think that the so far absence of disputes concerning trade measures applied pursuant to a MEA suggests that there is no such need. Moreover, it is considered that if such a conflict would be brought before the WTO its’ dispute settlement mechanisms would be capable of settling that dispute. Furthermore, the position taken by the US could be explained by the fact that the US is not party to several MEAs why the US does not want to legitimate such MEAs under the WTO.²⁵⁰

6.1.2 The Waiver Approach

The second so called “waiver” approach suggests that members could get authorized to deviate from their WTO obligations under a limited period of time through a decision taken by the WTO members. Any compatibility problems would be best dealt with on a case-by-case basis as trade restrictive measures for the protection of the environment could already be imposed in accordance with the rules under the WTO. Such a waiver is suggested to be adopted by consensus but without any need for ratification by each WTO member. Examples of countries supporting this view are ASEAN, Canada, Japan and New Zealand.²⁵¹

6.1.3 Clarification of WTO Rules

Thirdly, an approach advocating a “clarification of WTO rules” has been proposed. This is suggested to be done through either the adoption of general guidelines on how the relationship should be understood or the amendment to WTO rules. Regarding an amendment, the parties to MEAs are politically more likely to have a better opportunity to amend their agreements. Nevertheless, such an amendment would only benefit relations between parties to that agreement. On the contrary, an amendment to the WTO is a more powerful alternative, which also regards if another of the WTO’s binding mechanisms, such as a waiver, would be used.

²⁵⁰ Abdel Motaal, D, *Multilateral Environmental Agreements (MEAs) and WTO Rules, Why the “Burden of Accommodation” Should Shift to MEAs*, page 1218f and Shaw, S and Schwartz, R, *Trade and Environment in the WTO, State of Play*, page 134.

²⁵¹ Abdel Motaal, D, *Multilateral Environmental Agreements (MEAs) and WTO Rules, Why the “Burden of Accommodation” Should Shift to MEAs*, page 1221 ff and Shaw, S and Schwartz, R, *Trade and Environment in the WTO, State of Play*, page 134f.

To date, it seems unlikely that the WTO members would be ready to take such actions.²⁵² Additionally, criteria of different kinds have been proposed for enabling predictability of guidelines. For instance, it has been proposed to clarify the relationship through the development of specific criteria or a list of attributes to be used when deciding whether trade measures of MEAs shall be justified under article XX of the GATT. According to this proposal, a measure would be justified where these criteria are fulfilled and do not conflict with the preamble to article XX.²⁵³

6.1.4 Clarifying the WTO–MEA Relationship along the Lines of Co-operation

Finally, the fourth approach contains the idea of “clarifying the WTO–MEA relationship along the lines of co-operation”. This approach has been supported by several members and could, as suggested by Switzerland, be possible through a “*general approach of mutual supportiveness and deference*”.²⁵⁴ This view could be interpreted as advocating a lack of hierarchy between the WTO and MEAs why unnecessary conflicts could be avoided as a consequence of an increasing predictability and legal certainty. Therefore, an amendment to WTO rules deems unnecessary and a clarification seems sufficient. Such an approach involves that the respective agreements (the WTO and MEAs) should concentrate on its competence and not on the competence of the others.²⁵⁵

Also the EC has expressed a similar approach by noting that “*the most effective way to tackle global environmental issues is through a negotiated agreement which includes concerted and multilaterally agreed solutions*”.²⁵⁶ All countries are proposed to be included from the establishment of such a multilateral agreement as a way to create an agreement only containing trade measures, which have been negotiated and agreed by consensus. The EC finds this alternative to best guarantee against discriminatory as well as protectionist actions.²⁵⁷

²⁵² Wold, C, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, Chapter XI paragraph 2.

²⁵³ Caldwell, J, *Multilateral Environmental Agreements and the GATT/WTO Regime*, in *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 49.

²⁵⁴ Shaw, S and Schwartz, R, *Trade and Environment in the WTO, State of Play*, page 135.

²⁵⁵ *Ibid.*, page 134ff.

²⁵⁶ *EU and Chile settle WTO/ITLOS swordfish dispute.*

²⁵⁷ *Ibid.*

6.1.5 The Development of a Voluntary Consultative Mechanism

In addition, it has been proposed to develop a voluntary consultative mechanism, which would examine if a measure is the most effective one to fulfil the specific aim of environmental protection. This determination would be made before a trade measure is applied or negotiated. Such a mechanism could facilitate mutual as well as policy understanding.²⁵⁸

6.2 Proposals Regarding Dispute Resolution

6.2.1 Increased Influence for MEA Secretariats

Regarding conflicts of jurisdictions, there is no consensus on how to handle such situations. However, several proposals have been made on how to solve such conflicts as well as how to improve the WTO dispute-settling mechanisms to better tackle disputes regarding environmental issues.²⁵⁹ Firstly, the influence of MEA Secretariats has been proposed to increase, which could be done through inviting them to send comments and to participate on consultations.²⁶⁰ Moreover, the mentioned article 13 of the DSU could be used as to request information from MEA Secretariats. This was done in the *Shrimp-Turtle* case where the Appellate Body interpreted article 13 of the DSU as to allow panels to consider also non-requested submission from non-members.²⁶¹ This proposal may, with reference to the MEAs' expertise, involve better possibilities in assessing compliance with a MEA, which in turn may facilitate the panel process.

6.2.2 Environmental Experts

Additionally, environmental experts could be used in other environmental related disputes, even where not covered by a specific MEA, as to on an early stage gather evidence facilitating the later process. This could be seen as a way to settle disputes in a mutually agreed manner. It has also been proposed to settle an agreement on environment including specific provisions regarding the selection of experts and panellists for the panel process.²⁶²

²⁵⁸ Shaw, S and Schwartz, R, *Trade and Environment in the WTO, State of Play*, page 133.

²⁵⁹ For a more exhaustive list of suggestions see for example Marceau, G, *Praise for the Prohibition Against Clinical Isolation in WTO Dispute Settlement*, 1999, *Journal of World Trade*, 33(5), page 87.

²⁶⁰ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 82f.

²⁶¹ *United States - Import Prohibition on Certain Shrimp and Shrimp Turtle Products*, paragraphs 79-91 and 99-110.

²⁶² Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 83.

6.2.3 The ICJ

Moreover, the ICJ has been proposed to review disputes regarding a predetermined list of environmental treaties, as in CITES. This as the WTO dispute settlement mechanisms only may enforce WTO law. Consequently, the ICJ might be a suitable forum to decide on certain matters of non-WTO law. Furthermore, the ICJ could provide a non-binding opinion on the relationship between the WTO and MEAs. However, some argue that this would necessitate an amendment to article 23 of the DSU obliging WTO members to file any dispute relating to the WTO provisions to the WTO.²⁶³ On the contrary, some argue that an amendment to article 23.1 of the DSU would not be necessary as such a situation would not involve “*a violation of obligations or other nullification or impairment of ... the attainment of any objective of the covered agreements*”. Additionally, an ICJ ruling could be based on an adversarial proceeding, article 36:1 of the ICJ Statute, or on an advisory opinion, article 65:1 of the ICJ Statute. Regarding the former, it could only be initiated by states as only they can be parties to such proceedings. Therefore, it would be necessary to establish a general rule of international law stating that matters of conflicting jurisdiction shall be brought to the ICJ.²⁶⁴

6.2.4 Article 5 of the DSU

Article 5 of the DSU has been argued to be furthered as to prevent trade and environment disputes from turning into formal WTO trade disputes. This could be done through a WTO instrument recalling article 5 of the DSU regarding mediation, conciliation and good offices as to encourage the members to exhaust all non-binding WTO remedies before invoking their right to formal dispute settlement proceedings. To date, article 5 has not been used why amendments to the available mechanism should be considered. However, as it concerns an informal process no changes of WTO law are required as operating outside the formal WTO structure. Subsequently, this proposal could provide the parties with a negotiated informal settlement to a lesser expense.²⁶⁵

²⁶³ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 83f.

²⁶⁴ Krajewski, M, *The Dispute Settlement “Chill Factor” and Conflicts of Jurisdiction - Dispute Settlement in MEAs and in the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 99f.

²⁶⁵ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 84f.

6.2.5 Environment Advisory Board

In addition, an Environment Advisory Board has been proposed to be established within the WTO regime, similar to the Textile Monitoring Body. Accordingly, the parties to a dispute could be obliged to expose their complaint to a specialist body that makes a recommendation about the dispute, before a party not satisfied with the recommendation could pursue formal dispute settlement proceedings.²⁶⁶

6.2.6 Expansion of the WTO Provisions in Parallel with MEAs' Mechanisms

Furthermore, the non-compliance and dispute settling mechanisms of MEAs have been proposed to be strengthened as to enhance their effective implementation through an expansion of the WTO dispute avoidance provisions in parallel with the non-compliance mechanisms of MEAs. This should be done in order to reinforce the dispute settlement mechanisms of other treaties and to not cause the objectives of MEAs negative effects. However, such a development demands the WTO members to provide for treaties dealing with non-economic issues to establish dispute-settling mechanisms as powerful as the WTO mechanisms.²⁶⁷

²⁶⁶ Marceau, G and González-Calatayud, A, *The Relationship Between the Dispute Settlement Mechanisms of MEAs and those of the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 85.

²⁶⁷ Marceau, G, *Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties*, page 1131 and Krajewski, M, *The Dispute Settlement "Chill Factor" and Conflicts of Jurisdiction - Dispute Settlement in MEAs and in the WTO*, in Schalatek, L, *Trade and Environment, the WTO, and MEAs, Facets of a Complex Relationship*, page 96f.

7 Conclusions

With regard to the absence of explicit regulations and a formal WTO dispute involving trade measures set out in a MEA, the question of how conflicts between the WTO and MEAs should be resolved is mainly left unanswered. However, norms and principles of international law have undoubtedly to be considered in most cases when interpreting WTO rules. The general principle against conflicting interpretation, the principle of good faith as well as the fact that the covered agreements could not be read in clinical isolation from other international law speaks for that MEAs in most cases will affect the content of WTO law. Regarding allegations of conflict between substantive norms of the WTO agreements and other treaties, the adjudicating bodies of the WTO have the obligation to consider all relevant rules of international law that are applicable between the disputing WTO members when interpreting WTO provisions. As WTO law constitutes nothing but a part of international law, it may seem logical to interpret WTO law in a wider context of international law. This should at least be the case for such norms representing the common intentions of all WTO members. Therefore, for example the principle against conflicting interpretation should be considered why WTO law normally should be read as to avoid conflict with other treaty provisions.²⁶⁸ As the WTO treaty is of “living” nature, evolutionary interpretations may seem possible. However, the general limitations on treaty interpretation apply.

To give an example, the outcome of WTO disputes can be significantly influenced by the decision-making mechanisms of MEAs as through an interpretation of a decision taken by a MEA body as evidence of a justification under article XX of the GATT. The same regards an application of article 13 of the DSU, involving a request by the WTO dispute-settling mechanisms for information from a MEA secretariat on relevant matters. Additionally, MEAs’ provisions may be used as to base a defence under article XX of the GATT or likely before the WTO dispute-settling mechanism. Hence, a WTO member’s participation in a MEA might become relevant when the WTO adjudicating bodies decide whether compliance with Article XX of GATT is assessed or not. Furthermore, provisions of a MEA may be invoked as a justification for not complying with WTO obligations.

Despite that the jurisdiction of the WTO is limited to the covered agreements, other rules of international law, where binding between the disputing parties, might not only be considered

²⁶⁸ Vienna Convention articles 30 and 31.3 (c).

for treaty interpretation but also as applicable law before the WTO. As the WTO provisions are reciprocal, a deviation is possible as long as third parties' rights are not breached. Therefore, non-WTO law, involving for instance environmental concerns, may prevail over WTO provisions as the diversity of WTO members' interests and needs shall be accounted for with reference to the nature of the WTO provisions. Additionally, provisions of MEAs like CITES may prevail with reference to the principles of *lex specialis* and *lex posterior*. However, a decision on letting a MEA provision prevail over WTO law does not involve to judicially enforce compliance with such non-WTO law. Subsequently, non-WTO law could be used as a valid legal defence as part of the applicable law but could never be used as to base claims before the WTO as not constituting a covered agreement.

Furthermore, the limitation of the WTO dispute-settling mechanisms to not "*add to or diminish rights and obligations of the WTO*" may result in a decision that no WTO law is applicable between the parties. Accordingly, a MEA may supersede the relevant WTO provision why the WTO dispute-settling mechanism may decline jurisdiction. On the contrary, it may be concluded that jurisdiction is not declined but that a claim concerning a WTO violation instead is rejected, where not involving either an amendment to the limitation in articles 3.2 and 19.2 of the DSU or a breach of the rights of third WTO members.

Concerning overlaps or conflicts of jurisdictions, no agreed solution exists on how such situations should be solved. The same holds true for the availability of different dispute avoidance mechanisms. Furthermore, counter-measures applied as punishment to parties of a MEA that refuses to respect the conclusion of a MEA dispute settlement report may be found violating article 23 of the DSU as constituting a trade restriction applied outside the WTO institutional framework. Due to the extensive reach of article 23 of the DSU, and the character of the DSU process, WTO members would most probably have to negotiate and agree on the circumstances in which disputing parties would be obliged to exhaust the prior mechanisms of for instance MEAs before they are allowed to trigger the WTO dispute mechanisms.

7.1 CITES

Obviously, factual conflicts may arise between the WTO regime and trade-affecting measures set out in CITES, which partly may be explained by the agreements' differing objectives. Regarding the trade affecting measures in CITES, which may violate the WTO in form of an infringement of for example GATT article I (the MFN-principle), article III (the national

treatment principle), article XI (the prohibition on quantitative restrictions) or article XIII (non-discriminatory administration of quantitative restrictions), they may be justified with reference to the general exceptions under article XX of the GATT. To give an example the mentioned usage of quantitative restrictions to regulate leopard trade could be mentioned. Such a WTO violation may be justified with reference to article XX (b) of the GATT as “*necessary to protect human, animal or plant life or health*”, as neither disguised because of the clear purpose of the measure nor appeared to be unjustified or arbitrary. Additionally, the measure can be seen as necessary as a quantitative restriction in comparison with a complete prohibition according to the necessity test would turn out to be the least GATT inconsistent measure available.²⁶⁹ Additionally, articles III-VI as well as articles XIV and XVIII.1 of CITES may be justified with reference to similar justifications under article XX of the GATT.

The outcome of disputes involving the question of whether a justification based in CITES is possible under article XX of the GATT is uncertain. Firstly, it is unclear how far the WTO dispute-settling mechanisms would go in examining the criteria of article XX. A presumption may be made including that an international consensus exists on the validity and necessity of the instruments contained in CITES. Regarding CITES, foremost the extensive membership of the convention makes it accurate to argue that the convention is based on an international consensus why such a justification in CITES should be found valid. However, the panel may also consider its mandate limited to only examine WTO provisions thus excluding other international agreements from their jurisdiction. Additionally, the variation of differing outcomes in such disputes have complicated the application of environmentally friendly trade measures and few such measures are likely to fulfil the requirements set out by the panels.²⁷⁰

Also trade restrictive measures directed at non-complying parties may be justified under article XX of the GATT. This as a result of that the provisions could not be seen as arbitrary or unjustifiable as they apply only to countries not complying with the substantive CITES provisions and do not depend on their status as parties or non-parties. However, measures automatically prohibiting non-complying parties to trade with parties might be argued as

²⁶⁹ Compare Wold, C, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, Chapter V.A paragraph 2.

²⁷⁰ See for example Charnovitz, S, *Exploring the Environmental Exceptions in GATT Article XX*, Journal of World Trade, October 1991, page 37.

discriminatory.²⁷¹ Additionally, such measures might not constitute “*disguised restrictions on international trade*” prohibited by the preamble to article XX where there is a clear link between the realization of the goals of CITES and the use of trade measures. Furthermore, the necessity test might involve difficult requirements as other reasonably available options might exist. Since CITES recommends trade, with non-parties in Appendix I specimens, only in special cases after consultation with the Secretariat and as parties are treated differently without any satisfactory explanation, these provisions may not be seen as necessary within the meaning of article XX (b). Concerning provisions designed to change the practices and policies of non-parties, the *Tuna/Dolphin* panel ruled that measures designed to achieve their goals only through changes in another country’s jurisdiction could not be seen as “*necessary to protect human, animal, or plant life or health*”.²⁷² Additionally, provisions that are designed as to increase the MEA’s membership, and not to protect species, should not be covered by the general exceptions in article XX.

Anyhow, the participation in CITES is widespread and to be able to provide an effective protection, trade with non-complying non-parties needs to be possible. Consequently, it seems natural to argue that the trade restrictive measures contained in CITES, which are directed at non-parties, should be given greater deference than unilateral measures. Similar provisions in the Montreal Protocol have, by the GATT Secretariat, been found consistent with article XX of the GATT.²⁷³ Additionally, it seems unlikely that measures authorized by a MEA would be challenged before the WTO in situations where measures, strictly based on the text of the Convention or on the consensus of the parties to CITES, are applied by and among its parties. It may also be argued that conflicts between the WTO and CITES probably will be solved in a satisfactory manner, as it, because of the extensive membership of CITES, might seem accurate to assume that disputed matters will be worked out within CITES.²⁷⁴

In situations of irreconcilable conflicts and where both disputing parties are members of CITES as well as the WTO, CITES may prevail with reference to principles of customary international law. As the conflicting agreements cover the same subject matter, CITES should, according to the principle of *lex posterior*, prevail as constituting the agreement later in

²⁷¹ See *Reformulated Gasoline Appellate Decision*, supra note 20, page 28f and Goldberg, both as cited by Wold, C, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, Chapter VII.D paragraph 2.

²⁷² *United States - Restrictions on Imports of Tuna*, supra note 19, paragraphs 5.27 and 5.39.

²⁷³ Goldberg as cited by Wold, C, *Multilateral Environmental Agreements and the GATT: Conflict and Resolution?*, Chapter VII.B.

²⁷⁴ Compare OECD, *Trade Measures in Multilateral Environmental Agreements*, page 55f.

time.²⁷⁵ However, GATT 1947 clearly postdates CITES while GATT 1994 does not. Nevertheless, CITES could be argued to prevail over GATT 1994 with reference to the principle of *lex specialis*, as constituting the more specific agreement.²⁷⁶ On the contrary, it seems regarding conflicts between WTO members, where both are not members of CITES, not accurate to apply the principles of *lex posterior* and *lex specialis*, as not constituting a part of the applicable law between the parties. However, the fact that non-WTO law prevails over WTO law, does not imply that the WTO law has to judicially enforce compliance with those non-WTO rules. Conclusively, it seems possible to use non-WTO rules as CITES as a valid legal defence against WTO violations but not as to base legal claims before the WTO because of that the jurisdiction of the WTO is limited to the covered agreements.

7.2 The Kyoto Protocol

As the Kyoto Protocol does not explicitly impose any trade affecting measures, conflicts are not as obvious as regarding CITES. However, this paper has shown examples of potential conflicts that may arise between the Protocol and the WTO system. It is for instance doubtful whether protectionist measures imposed against non-parties with reference to the Kyoto Protocol, for either not being a party or for not applying the treaty correctly or in order to prevent the existence of free-riders, as to implement the Protocol would be found violating the WTO.

As the grounds to which the WTO dispute-settling mechanisms refer to when deciding whether a measure violating the WTO shall be justified under article XX of the GATT vary, it remains uncertain how several of the mentioned conflicts in this paper should be resolved. Furthermore, the outcome of such disputes is depending on the interpretation of several factors. It would, for example, probably matter whether a trade measure is grounded in a treaty obligation or a national policy. Regarding trade measures grounded in the Kyoto Protocol, such measures would probably be seen as actions on a national level. This as the Protocol's language suggests that its trade measures only are required or authorized to promote membership, enforce the treaty or make the climate regime itself more effective.

²⁷⁵ Vienna Convention articles 30.3 and 30.4.

²⁷⁶ Compare Hudec, R, *GATT Legal Restraints in the Use of Trade Measures against Foreign Environmental Practices* in Hudec, R, *Fair Trade and Harmonization: prerequisites for Free Trade?*, page 121.

Additionally, it seems doubtful that the WTO regime would address climate change issues to a further extent than the Protocol itself.²⁷⁷

Nevertheless, the Kyoto Protocol may without having to be justified in terms of an interpretation of the covered agreement be considered as applicable law or evidence of compliance.²⁷⁸ This could be the case where a party to the Kyoto Protocol refer to fulfilments of its commitments under the Protocol. To give an example, justifications based in the Protocol in cases regarding non-party participation should be found valid with reference to article 18 of the Vienna Convention as the signatories of UNFCCC or the Protocol that have not ratified one or both of them are obliged to act in a way not defeating their object and purpose. Moreover, measures directed at non-parties may not constitute part of the applicable law, as both parties are not bound by it, but may be invoked as a part of the factual analysis of the circumstances of a dispute. However, it is not possible to base a claim on non-WTO law with reference foremost to the limited jurisdiction of the WTO and articles 3.2 and 19.2 of the DSU. Nonetheless, it seems logical to consider provisions of the Protocol to some extent regarding justifications under article XX of the GATT as these exceptions might permit the imposition of some trade-affecting measures even in the absence of a MEA.

7.3 The Future

Regarding how the WTO-MEA relationship should be clarified, the “status-quo” approach may not constitute an accurate solution as it seems insufficient to not create a link between trade and environmental issues. The relationship between WTO rules and trade-restrictive MEAs has to be clarified. If this should be done through the implementation of a waiver or by the establishment of a voluntary consultative mechanism etcetera is hard to decide. But it would probably be appropriate if an environmental specialised body would deal with the creation of environmental standards. The approach involving a clarification of the WTO-MEA relationship along the lines of co-operation and not through an amendment to the WTO rules seems very satisfying. Nevertheless, it is important to bear in mind that such a development relies on mutual trust and the outcome may depend on the strengths of the respective countries, which may be disadvantageous for developing countries. Additionally, it seems to be a urgent need for an adoption of guidelines, preferably binding ones, on how

²⁷⁷ Compare Charnovitz, S, *Trade and Climate: Potential Conflicts and Synergies*, in *Beyond Kyoto: Advancing the International Effort Against Climate Change*, page 153f.

²⁷⁸ See Chapter 4.6.2 of this paper.

especially the Kyoto Protocol should be interpreted and implemented as to strengthen its covered issues. For instance a uniform approach to the taxation of energy and greenhouse gas emissions would be of importance as to avoid the use of climate measures for protectionist purposes. This regards especially border adjustments of exports and imports.²⁷⁹

Concerning the dispute-settling mechanisms of the WTO, they are clearly the most effective and well developed. However, the areas of competence of the WTO are naturally limited. When it comes to questions of, for example, complex environmental issues, the WTO system is not equipped with enough resources to solve such matters in a satisfactory manner. At the same time, the adjudicating bodies of the WTO could be overburdened if they should handle also such matters, which in turn could undermine the whole system. Such a development could not be desirable as the current strengths of the WTO dispute-settling system could get badly affected. Instead it seems accurate to strengthen the compliance and dispute settlement mechanisms of MEAs as to enhance the effective implementation of MEAs. Moreover, the possibilities for mutual supportiveness would then increase as the risk for challenges before the WTO would decline. Furthermore, the WTO mechanisms should be improved as to ensure considerations of the MEAs' expertise. Consequently, it seems logical that the WTO regime should stay within its mandate and that it should not be extended to also cover other non-trade related issues. Instead, the different international organizations shall continue to work within their respective field of competence.

Furthermore, environmental issues should be given the highest priority and violations of the Kyoto Protocol should be fully sanctioned. Therefore, provisions on sanctions against wrongdoing parties have to be included in the Protocol as a complex arbitration or court process otherwise seems less meaningful. Regarding the proposals on arbitration, I personally believe with reference to how the judges are chosen that such a process would result in a compromise of the disputing matters not completely appropriate for the issues covered by the Kyoto Protocol. However, irrespectively of which forum that settles a dispute, all relevant international rules applicable between the disputing parties should be considered as to settle the dispute in accordance with international law. Therefore, provisions set out in for instance CITES or the Kyoto Protocol should be considered where appropriate.

²⁷⁹ Compare Charnovitz, S, *Trade and Climate: Potential Conflicts and Synergies*, in *Beyond Kyoto: Advancing the International Effort Against Climate Change*, page 160.

Concerning the case-studies, it is important to recognize that while CITES violations could constitute criminal acts, the environmental issues covered by the Kyoto Protocol are neither sanctioned nor acknowledged to the same extent. As endangerment and extinction constitute apparent problems, it is certainly easier to put effort on solving such problems as it is easier to find a suitable and effective solution to them as well as it would not demand immense efforts. The matters included in the Kyoto Protocol are rather diffuse what concerns their cause as well as their effects why a solution or at least a powerful protection from the threats with the current very high levels of greenhouse gas emissions has not been furthered in the same way. Additionally, the difficulties in locating the sources of the threats regarding greenhouse gas emissions worsen the problem. Moreover, the problems with the current levels of greenhouse gases and their consequences for the future are not even commonly agreed upon. However, none of these arguments speaks for that the Kyoto Protocol issues should not be given the highest priority.

The future of the Kyoto Protocol will most likely be vitally influenced by the results of the United Nations Climate Change Conference that will be held in Copenhagen in December this year in order to conclude the “new” Kyoto protocol. With reference to the newly published negotiating texts it seems as the flexible mechanisms under the current protocol will be further standardized and that different guidelines and criteria regarding the implementation of these mechanisms will be introduced. Moreover, the Subsidiary Body for Scientific and Technological Advice is requested to present recommendations regarding numerous issues covered by the Protocol.²⁸⁰ These negotiating texts constitute a valuable tool for the coming discussions and contain several proposals for the “new” Kyoto Protocol. However, these negotiating texts seem very speculative as the parties’ intentions seem to differ and as the content of these texts will be further discussed at sessions of negotiations before the Copenhagen Conference. Consequently, the future will have to show how far the Protocol’s parties are prepared to go.

²⁸⁰ UNFCCC, *A proposal for amendments to the Kyoto Protocol pursuant to its Article 3, paragraph 9. Note by the Chair.*, *A text on other issues outlined in document FCCC/KP/AWG/2008/8. Note by the Chair.* and *Negotiating text. Note by the Chair.*

Last but not least it is important to be aware of that the struggle for the protection of the environment may first negatively effect trade liberalisation. Nevertheless, the effects may be the opposite in the long run as a healthy environment is a necessity for a healthy world economy and a prerequisite for a further liberalisation of world trade. If no actions are taken to deal with the environmental problems, increased tensions would be caused between nations as a result of for example drought, lack of water and food and other related concerns. Such problems would most probably strike harder on developing countries. Therefore, developing countries will need to be supported by the more developed and financially stronger countries in the fight against environmental destruction.

Conclusively, it should be stated that there is no time to lose in the “battle” of our environment. The increasing divides between the WTO members make a solution to seem far away. As the dividing line between environmental protection and protectionism may be hard to discern, a consensus on how to handle the issues presented in this paper has to be reached to at least prevent an increase in unilateral actions which in turn may undermine the WTO system. As the protection of the environment concerns a global problem, it has to be dealt with at a global level. Additionally, the furtherance of environmental standards primarily takes place at a national level why the clarification of the relationship must be supported internationally as well as nationally. The relationship between the WTO and MEAs needs to be clarified, not through the creation of a hierarchy between them as it could undermine vital environmental legislation but through multilateral negotiations. Such negotiations are probably best solved outside the WTO system, not only as the WTO dispute settlement bodies are restricted in their jurisdictional power in several ways but also as these issues have to be solved taking into account further interests than trade liberalization.

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