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Security and predictability under WTO law

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Abstract: This article focuses on the interpretation and application of law in WTO dispute settlement from the angle of legal certainty and predictability. An analysis of the interpretation of WTO law shows that in general it does not differ from the interpretation of other public international law as interpretative rules well known in international law are applied. This together with the consistence provided by the respect of earlier panel and Appellate Body reports safeguard legal certainty. Furthermore, legal certainty and predictability requires clarity in the law applicable in WTO dispute settlement, in particular as regards non-WTO law. It will be shown that apart from peremptory norms of public international law (*ius cogens*), the relevance of international law outside WTO law is limited. Non-WTO treaty law must not be applied except if referred to by WTO law or incorporated therein. Apart from that international law of any kind can only be considered when interpreting WTO law. In certain circumstances this applies even to non-WTO treaty law to which not all WTO members are parties. Due to the as yet limited importance of non-WTO law, legal certainty and predictability also depend on the issue of conflict of norms, which also is relevant as far as the interrelationship of the different WTO agreements is concerned. In this regard predictability and legal certainty cannot be fully reached.

1. Introduction

According to Art. 3.2 Dispute Settlement Understanding (DSU), the dispute settlement system of the World Trade Organisation is a central element in providing security and predictability to the rule-oriented multilateral trading system.[1] This statement, however, can only become reality if the way panels and the Appellate Body interpret and apply law when deciding on complaints put forward by WTO members is predictable. Security and predictability of the trading system and through it that of the market place and its different operators[2] depend on to what extent legal certainty and predictability can be reached in the reports of panels and the Appellate Body.

Some issues are particularly relevant in this context. First, how is law, especially WTO law (i.e. the Agreement establishing the WTO and its Annexes) interpreted

1 See Petersmann, *The GATT/WTO Dispute Settlement System* (1997), at 64.
2 Panel, *US – Sections 301–310 of the Trade Act 1974*, WT/DS152/R, para. 7.75.

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by panels and the Appellate Body, in particular does the way these bodies apply WTO law differ from the interpretation of other public international law instruments? Only if there are certain rules of interpretation is the application of law predictable. Second, what is the law applicable in dispute settlement proceedings, in particular which role does general or special public international law apart from WTO law have to play in the eyes of panels and Appellate Body? A lack of clarity as regards what law is applicable before panels and the Appellate Body affects security and predictability. Finally, what are the rules of conflict if WTO agreements are not compatible with each other or, in case general public international law is of importance for dispute settlement procedures, with other instruments and agreements of international law? Again, a lack of clear-cut rules on conflict of norms reduces legal certainty. This question touches upon the current debate on fragmentation of public international law. This article tries to propose answers to these questions.

2. Interpretation of WTO law by panels and Appellate Body

The interpretation of WTO law must follow clear rules on treaty interpretation in order to be predictable and secure. As the WTO law does not contain independent interpretative rules, this aim is best served if interpretative rules well known from general international law are applicable.

2.1 Customary rules of treaty interpretation

Art. 3.2 of the DSU states that the dispute settlement system serves to clarify the provisions of the WTO Agreements covered by the system (see Art. 1.1 of the DSU) in accordance with the customary rules of interpretation of public international law. This refers to the rules of interpretation described in Arts. 31 to 33 of the Vienna Convention on the Law of Treaties,[3] which express customary international law on the interpretation of treaties entered into by states and therefore are binding on non-parties of the Vienna Convention as well.[4] Thus, all agreements covered by the DSU including their appendices and annexes which form an integral part thereof, such as the schedules of tariff concessions of Members[5] which constitute an integral part of GATT according to Art. II:7 GATT, have to be interpreted first of all in good faith in accordance with the ordinary meaning of the terms in their context and in the light of its object and purpose (see Art. 31 of the Vienna Convention).

3 1155 *United Nations' Treaty Series*, 331; 8 *International Legal Materials* (1969), 679.

4 ICJ, ICJ Reports 1994, 6 (21f., para. 41): *Territorial Dispute* (*Libyan Arab Jamahiriya* v. *Chad*).

5 See e.g. Appellate Body, *EC – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 84 and *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, para. 13. Regarding the Appendices and Annexes to the Agreement on Government Procurement see Panel, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, para. 7.8ff.

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'Clarification' of the provisions of the covered agreements means their interpretation. The DSU uses the term 'clarify' but this does not mean that clarification is a concept different to interpretation. Art. 3.2 of the DSU itself refers to rules of 'interpretation' and provides that the clarification of provisions has to be done in accordance with these rules. Art. 17.6 of the DSU refers to 'legal interpretations developed by the panel'. Panels and Appellate Body without hesitation use the term interpretation when clarifying the meaning of WTO provisions. Panels and Appellate Body explicitly cite Arts. 31, 32 and 33 of the Vienna Convention[6] and refer to their wording when interpreting the provisions of the agreements covered by the DSU. A panel once stated – regarding DSU provisions – that provisions must be interpreted in the light of their object and purpose and in a manner that would most effectively enhance it, i.e. the security and predictability of the multilateral trading system and through it that of the market-place and its different operators referred to by the panel as a central object and purpose of the dispute settlement system. In this respect they were referring not only to preambular language but also to positive law provisions in the DSU itself.[7] Accordingly, proper interpretation of an Article is first of all a textual interpretation.[8] Basically, irrespective of the subjective intention or will of the parties to the treaty (apart from Art. 31 (4) Vienna Convention; but even there the subjective will must be objectively expressed), the objective meaning of a text or of a term counts. This corresponds to the understanding the International Court of Justice (ICJ) gives to Art. 31 of the Vienna Convention.[9]

Very often, panels and Appellate Body have recourse to supplementary means of interpretation, in particular to the preparatory work (travaux préparatoires) according to Art. 32 Vienna Convention.[10] Negotiating/drafting history can be used to confirm a conclusion reached on the basis of a textual and contextual analysis of a treaty.[11] In the light of the central aim of providing security and predictability, this caused criticism particularly in cases where hardly accessible

6 Cf. regarding the use of Art. 31 Vienna Convention Appellate Body, *US – Standards for Reformulated and Conventional Gasoline* [35 ILM (1996) 603], WT/DS2/AB/R, para. 6.7; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 11–12; *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/AB/R, paras. 42, 47. Panel, *US – Section 301–310 of the Trade Act of 1974*, para. 7.22. Regarding Art. 32 Vienna Convention see Appellate Body, *EC – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, para. 83. Art. 33 Vienna Convention has once been used by Panel, *US – Section 110(5) of the US Copyright Act*, WT/DS160/R, para. 6.229, fn. 204. For a detailed analysis of the interpretation of WTO Law in the light of Arts. 31–33 Vienna Convention see Lennard, 'Navigating by the Stars: Interpreting the WTO-Agreements', *Journal of International Economic Law* (2002): 17.

7 *US–Sections 301–310 of the Trade Act 1974*, para. 7.75.

8 Appellate Body, *Japan–Taxes*, p. 19.

9 ICJ Reports 1994, 6 at 21f., para. 41 – *Territorial Dispute* (*Libyan Arab Jamahiriya* v. *Chad*).

10 For WTO jurisprudence on supplementary means see Lennard, 'Navigating by the Stars', 47f; Shanker, 'The Vienna Convention on the Law of Treaties, the Dispute Settlement System of the WTO and the Doha Declaration on the TRIPs Agreement', *Journal of World Trade* (2002): 721 at 731–733.

11 Panel, *US – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R, para. 8.64; see also Appellate Body, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, p. 34.

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material, e.g. material from the negotiation history and process,[12] is used against members which acceded later to the GATT or the WTO and thus neither know this material nor have easy access as they did not participate in the original negotiations.[13] Art. 32 of the Vienna Convention allows access to the preparatory work and requires that such work is accessible. Therefore one cannot blame panels and Appellate Body for acting in breach of Art. 3.2 of the DSU when referring to accessible preparatory work.

This would be different if panels and Appellate Body regarded supplementary means of interpretation no longer to be supplementary, i.e. as last resort. *Kuyper* remarked that the GATT 1947 panels showed an undue tendency to prefer the historical background of GATT articles as the first means of interpretation, or at least as being at the same level as other means of interpretation and did not regard the historical method as the secondary means according to Art. 32 of the Vienna Convention.[14] If that still were the case, this would contradict Arts. 31 and 32 of the Vienna Convention. Current jurisdiction however proves that things have changed. The Appellate Body recently rejected an interpretative view developed by a panel from the negotiating history. The Appellate Body decided the panel's interpretation to be contrary to the ordinary meaning of the terms of the relevant provisions. The Appellate Body for this reason concluded that the interpretation given by the panel was incompatible with the customary rules of interpretation prescribed in Art. 31 of the Vienna Convention.[15] This report takes care that the secondary means of interpretation remain secondary. Full orthodoxy has been restored.[16]

2.2 *General interpretative principles*

Beyond these customary rules there exist interpretative rules that are general principles of law according to Art. 38 (1) (c) of the Statute of the ICJ. Panels and the Appellate Body apply them as well.[17] The principle of effectiveness (*ut res magis valeat quam pereat*) for example has been recognized on several occasions. This principle requires that a treaty interpreter must give meaning and effect to all the terms of the treaty. All applicable provisions of a treaty have to be read in a way that gives meaning to all of them harmoniously. An important corollary of this principle is that a treaty, including its sections and parts, should be interpreted

12 See e.g. Appellate Body, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 152–157.

13 Lennard, 'Navigating by the Stars', 17 at 49ff.

14 Kuyper, 'The Law of GATT as a Special Field of International Law', 35 *Netherlands Yearbook of International Law* (1994): 227 at 229.

15 Appellate Body, *US – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, para. 339f.

16 As Kuyper, 'The Law of GATT', 232 had hoped.

17 Cameron and Gray, 'Principles of International Law in the WTO Dispute Settlement Body', *International Comparative Law Quarterly* (2001): 248; Lennard, 'Navigating by the Stars', 17 at 42; Shanker, 'The Vienna Convention on the Law of Treaties', 721 at 729.

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as a whole.[18] Another example is the interpretative principle of deference to the sovereignty of states (*in dubio mitius*). This principle was understood by the Appellate Body as being applied in interpreting treaties in deference to the sovereignty of states. 'If the meaning of a term is ambiguous, that meaning is to be preferred which is less onerous to the party assuming an obligation, or which interferes less with the territorial and personal supremacy of a party, or involves less general restrictions upon the parties.'[19] Thereby the Appellate Body again inter alia referred to jurisdiction of the ICJ.[20]

While the application of such principles is justified, one could derive an *argumentum e contrario* (i.e. a reversal conclusion) from Art. 3.2 DSU as it refers only to *customary* rules of treaty interpretation to the exclusion of other rules of interpretation. The narrow wording, however, is not a bar to the use of general interpretative principles. For, very often it is almost impossible to determine the source of law a certain interpretative principle can be assigned to. Some might see it as a result of customary law, some as a general principle of law. Some principles, like the principle of effectiveness, could be seen as embodied in Art. 31 of the Vienna Convention, as did the International Law Commission.[21] Furthermore, just like customary rules, general interpretative principles are part of general public international law. It is worth noting that the Appellate Body when determining the status of Arts. 31 and 32 of the Vienna Convention stated that these general rules of interpretation have attained the 'status of a rule of customary or general international law'.[22] The Appellate Body does not differentiate between customary and general international law as far as rules of interpretation are concerned.

2.3 *Dynamic interpretation*

Another contentious issue is the question of 'dynamic interpretation' that enables WTO rules to include advancements of concepts and of terms. From the angle of legal certainty this could cause problems if there are not clear guidelines for applying the concept. Dynamic interpretation is a valuable means to develop the meaning of law as the circumstances (both legal and factual) in which it has to be applied develop. For this reason, to a certain extent, there is a need for dynamic interpretation that also is acceptable as long as the interpreter does not take over the role of the lawmaker. The Appellate Body stated that the interpretation of the WTO rules is not so rigid or so inflexible that it could not consider to variable circumstances. WTO rules 'leave room for reasoned judgments in confronting

18 Appellate Body, *Korea – Definite Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, para. 80 with further references.

19 Appellate Body, *EC – Measures Concerning Meat and Meat Products* (*Hormones*), WT/DS26/AB/R, WT/DS48/AB/R, para. 154.

20 ICJ Reports 1974, 253 at 267, para. 44: *Nuclear Tests Case* (*Australia* v. *France*). See as well PCIJ, PCIJ Rep., Series A/B, No. 43, p. 142: *Access of Polish War Vessels to the Port of Danzig* (1931).

21 See *Yearbook of the International Law Commission* (1966) II, 219.

22 Appellate Body, *US–Standards*, p. 17; *Japan–Taxes*, p. 10.

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the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind.'[23]

Accordingly, the Appellate Body noted that 'from the perspective embodied in the preamble of the *WTO Agreement* … the generic term "natural resources" in Art. XX (g) [GATT] is not "static" in its content or reference but is rather by definition, evolutionary'.[24] The Appellate Body then made reference to the ICJ that stated that where concepts embodied in a treaty are 'by definition, evolutionary', their 'interpretation cannot remain unaffected by the subsequent development of law …. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.'[25] With this in mind, the Appellate Body looked to the way modern international conventions and declarations that make frequent references to natural resources had been interpreted. A dynamic interpretation is not incompatible with Art. 3.2 of the DSU which requires the Dispute Settlement Body (DSB), and thereby also the panels and the Appellate Body as they assist the DSB (see Art. 11 DSU), not to add to or diminish the covered agreements.

Dynamic interpretation unfolds the meaning of a broad term of a provision under current circumstances. It does not alter the provision. The distinction between dynamic interpretation and change of a treaty provision is difficult, of course. Therefore, concerns have been expressed that this approach should not yield 'European Court of Justice-type flexibility and rule making power'[26] to panels and Appellate Body. But the dispute settlement system like the whole of WTO law has to face the increasing demands for and rising requirements against dispute settlement in a world of global trade that might conflict with different needs and interests. When establishing the WTO, the Parties recognized the conflicts of different aims – expanding production and trade, optimal use of resources, sustainable development, protection of environment (see preamble of the WTO Agreement) – not to speak of such 'on the horizon' issues as trade and social standards or trade and human rights. The new dispute settlement mechanism was born into this area of conflict and its structure represents finely honed balances as a result. Panels and Appellate Body have to address each of the issues raised

23 Appellate Body, *Japan–Taxes*, p. 31. See as well Panel, *US – Sections 301–310 of the Trade Act of 1974*, para. 7.75, fn. 663.

24 Appellate Body, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, para. 130.

25 ICJ, ICJ Reports 1971, 31: *Namibia (Legal Consequences) Advisory Opinion*. The Appellate Body referred also to ICJ, ICJ Reports 1978, 3 paras. 78–80: *Aegean Sea Continental Shelf Case* and cited some scholars. See as well ICJ, ICJ Reports 1997, 7 para. 112: *Case Concerning the Gabcikovo-Nagymaros Project*: 'the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty. … Arts. 15, 19 and 20 require to take new environmental norms into consideration when agreeing upon the means to be specified … . By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law.'

26 Lennard, 'Navigating by the Stars', 17 at 75.

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(see Art. 17.12 of the DSU), which may require a careful advancement of WTO law within the limits of the existing provisions. Finally, an interpretation given by a panel or the Appellate Body is not a binding authentic interpretation of the law (see Section 2.4 below). Under these circumstances and within these limits, dynamic interpretation does not pose problems.

2.4 *Interpretation of WTO law, subsequent practice and the binding effect of reports* (*Rule of Stare Decisis*)

An important issue in the view of predictability is the question of the role of panel and Appellate Body reports.

No binding effect of adopted reports on other panels

Art. XVI:1 of the WTO Agreement provides that the WTO shall be guided by the decisions, procedures, and customary practices followed by the bodies established in the framework of GATT 1947. This provision could be understood as if adopted reports of the GATT 1947 panels have binding force so that the interpretation was binding on WTO panels and Appellate Body. As most GATT 1947 panel reports were adopted by the GATT Council they could be seen as decisions of an established body. But even if Art. XVI:1 of the WTO Agreement could be seen as a reference, inter alia, to adopted GATT 1947 panel reports; these reports nevertheless cannot attain a legal effect which they did not have before. Art. XVI:1 of the WTO Agreement does not assign a new legal quality to the decisions specified there. The WTO shall be guided and not bound by the decisions. The reference to the decisions and practices specified there only is declaratory. Art. XVI:1 prolongs the GATT 1947 acquis in the interest of continuity and consistency,[27] no more and not less. Adopted GATT 1947 panel reports delivered no authentic interpretation of GATT provisions. The generally accepted view under GATT 1947 was that the conclusions and recommendations in an adopted panel report bound the parties to that dispute, but subsequent panels did not feel legally bound by the details and reasoning of a previous panel report.[28] Only the *contracting parties* had the right to authentic interpretation. After entry into force of the WTO Agreement, the Ministerial Conference and the General Council have the exclusive right to adopt authentic interpretations (see Art. IX:2 of the WTO Agreement). It is a kind of constitutional decision and not – like a panel report – a decision on a single case.

In a language similar to Art. XVI:1 of the WTO Agreement, paragraph 1 (b) (iv) of the Introductory Note to GATT 1994 provides that the GATT 1994 consists – *inter alia* – of other decision of the *contracting parties* to GATT 1947 (other than waivers, accession protocols and tariff concessions which are listed in

27 See Appellate Body, *Japan–Taxes*, pp. 13f.

28 GATT Panel, *EEC – Restrictions on Imports of Dessert Apples*, BISD 36S/93, para. 12.1; GATT Panel, *US – Restrictions on Imports of Tuna*, WT/DS29/R, para. 3.74; Appellate Body, *Japan–Taxes*, pp. 13f.

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(i) to (iii)). This paragraph could as well be used as a starting point to give a legal status to adopted GATT 1947 panel reports. One panel indeed argued that this provision made GATT 1947 reports an integral part of GATT 1994.[29] The Appellate Body rightly rejected this view because one cannot assume that the *contracting parties*, in deciding to adopt a panel report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. The Appellate Body pointed out that the decisions to adopt panel reports under Art. XXIII of the GATT 1947 were different from joint action by the *contracting parties* under Art. XXV of the GATT 1947. The aim of joint action in the meaning of Art. XXV GATT 1947 is to facilitate the operation and further the objectives of GATT 1947.

The above considerations do not contradict Art. 31 (3) (b) of the Vienna Convention and need not be altered in the light of this rule. According to that Article, any subsequent practice in the application of a treaty shall be taken into account. This provision does not refer to any subsequent practice but only to practice that reflects an agreement of the parties regarding the interpretation of the treaty or a treaty provision. One might think – as one panel did[30] – that GATT 1947 or WTO panel reports adopted by the GATT 1947 contracting parties or the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them. It is doubtful whether a single adopted report can be seen as subsequent practice because subsequent practice requires a concordant, common and consistent sequence of acts, which an isolated act cannot do.[31] But even if that was true, Art. 31 (3) of the Vienna Convention only has limited legal consequences. In interpreting a specific provision of GATT/WTO law such practice has only to be considered. Art. 31 (3) (b) does not give binding effect to the subsequent practice. Even the aforementioned panel did not feel legally bound, noting that it did not necessarily have to follow the reasoning or results of previous panels when dealing with the same or a similar issue.[32]

In sum, adopted GATT 1947 panel reports are not legally binding on WTO panels. The same is true with WTO panel and Appellate Body reports. They are not binding precedents, as there is no point of reference in WTO law for a rule like *stare decisis*. Adopted reports are binding only on the parties to the particular dispute with respect to resolving the dispute between them. Their character and legal status have not been changed by the entry in force of the WTO Agreement.[33]

29 Appellate Body, *Japan–Taxes*, para. 6.10. This was overruled by the Appellate Body, *Japan–Taxes*, pp. 13f.

30 Appellate Body, *Japan–Taxes*, para. 6.10. This was overruled by the Appellate Body, *Japan–Taxes*, pp. 13f.

31 Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edn, 1984, 137.

32 *Japan–Taxes*, para. 6.10.

33 Appellate Body, *Japan–Taxes*, p. 14; *US – Tax Treatment for 'Foreign Sales Corporations'*, WT/DS108/AB/R, para. 108. This view was shared e.g. by Panel, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS79/AB/R, paras. 7.28–7.29.

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But persuasive power

As Art. XVI of the WTO Agreement shows, adopted reports are part of the GATT/WTO acquis so that they have to be considered. As they create legitimate expectations among the WTO members they in principle are persuasive. Their consideration by other panels takes place in the interest of the stability, legal certainty, consistency, and an increased persuasive power of the reports. This is even required by the function of the dispute settlement system to provide security and predictability (see Art. 3.2 DSU).

However, WTO panels may deviate from previous GATT/WTO panel reports or Appellate Body reports, but in this case a panel has to justify its deviation. Because of this, panels tend to follow previous reports. This means a party to a dispute should indicate reasons when asking a panel to deviate from a previous report. These reasons may be based either on different facts or on a different legal appreciation. The practical consequence is to put the burden on the party seeking a different interpretation to show the panel why it should depart from the reasoning and conclusions of the previous report.[34] Of course, panels and the Appellate Body can change the view without any initiative of parties.

The general practice for panels and the Appellate Body to follow the relevant findings of previous reports has been characterized by *Bhala* as '*de facto*' *stare decisis*, i.e. not a legal, but a factual binding effect. The absence of *stare decisis* in his opinion is a myth.[35] However, there are panels that have departed from the findings or decisions of previous panels.[36]

The same persuasive power applies to Appellate Body reports. The Appellate Body, however, is less likely to depart from previous Appellate Body reports as the Appellate Body is a standing body with seven judges only whereas panels are constituted individually (*ad hoc*) for each dispute settlement case. This forms a much better basis for the development of a consistent jurisdiction, also due to the solidarity of the seven judges.

Unadopted GATT 1947/WTO panel reports have no legal status in the GATT or WTO system. A panel can nevertheless find 'useful guidance' in the reasoning of an unadopted panel report that it considers being relevant.[37] Panels and the Appellate Body may consider unadopted reports but they are not a sound basis for the reasoning of their reports. Panels are not allowed to go beyond deriving useful guidance.[38]

34 Palmeter and Mavroidis, The WTO Legal System: Sources of Law, *American Journal of International Law* (1998): 399 at 402. A practical example for this can be seen in Panel, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R, paras. 7.166–7.179.

35 Bhala, 'The Myth About Stare Decisis and International Trade Law', 14 *American University International Law Review* (1999): 845.

36 See e.g. Panel, *Canada – Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R. paras. 10.28–10.29; WT/DS103/RW, WT/DS113/RW, paras. 2.22, 2.29, 2.32–2.35; *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*.

37 Appellate Body, *Japan–Taxes*, p. 14.

38 Appellate Body, *Argentina – Measures Affecting Imports of Footwear*, para. 43.

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2.5 *Conclusion*

This brief overview clarifies that the interpretation of WTO law by panels and the Appellate Body in general does not differ from the way of interpreting other public international law instruments. This approach fosters legal certainty and predictability, as the general interpretative rules are well known. By the way they interpret WTO law, panels and the Appellate Body contribute to the basic aims of the new dispute settlement system quite well. They diligently try to apply interpretative rules and principles of general public international law in conformity with the usual understanding of these rules. In general the application, especially of the Vienna Convention rules is coherent, irrespective of some results that rightly may be criticized.[39] The reference to, as well as respect for, earlier panel and Appellate Body reports irrespective of their lack of binding force provides additional guidance and takes care of consistent approaches.[40] Legal certainty and predictability does not require *stare decisis* (i.e. binding effect of adopted panel or Appellate Body reports), as such a concept was/is not contained in GATT/WTO law and would hinder the development of WTO law. Within certain limits (that are an expression of legal certainty) dynamic interpretation is acceptable as well. Once again, it shows WTO law to be part of public international law and not to be read or lived in clinical isolation from public international law.[41]

3. Applicable law

Predictability and legal certainty in a legal order is only safeguarded if there is clarity on the law that is applicable. This statement applies to WTO law as well. As WTO law is part of public international law, all the sources of law indicated in Art. 38 of the Statute of the ICJ in principle should be applicable. Proving this assumption requires a detailed analysis as to what kind of relationship WTO law and other public international law have and whether and how far public international law and its sources are sources of WTO law.

3.1 *International treaties and conventions*

Undoubtedly the WTO Agreement and its Annexes are international conventions.[42] Art. 3.2 of the DSU confirms that statement because the covered

39 Lennard, 'Navigating by the Stars', 17 at 87–88; Shanker, 'The Vienna Convention on the Law of Treaties', 721 at 748–751.

40 McRae, 'The WTO in International Law: Tradition Continued or New Frontier?', *Journal of International Economic Law* (2000): 27 at 39.

41 See Appellate Body, *US–Standards*, p. 17; Marceau, 'A Call for Coherence in International Law – Praises for the Prohibition Against "Clinical Isolation" in WTO Dispute Settlement', *Journal of World Trade*, **5** (1999): 87.

42 Pauwelyn, *Conflict of Norms in Public International Law*, 2003, 25. As for GATT 1947 see Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht*, 1990, 74.

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agreements have to be interpreted in accordance with the rules on treaty interpretation.[43]

In General, the terms of reference of panels as described in Art. 7 of the DSU is to examine the matter referred to the Dispute Settlement Body (DSB) in the light of the relevant provisions of the agreements covered by the DSU. However, Art. 7.1 of the DSU allows the parties to the dispute to agree otherwise. But this phrase does not leave open the possibility to parties to agree also on invoking provisions of non-WTO agreements,[44] because Art. 7.2 of the DSU limits panels to address the relevant provisions in the covered agreements. Art. 3.2 and Art. 11 of the DSU as well limit the law applicable before panels and Appellate Body to the agreements covered by the DSU. Those are listed in Appendix 1 to the DSU and consist solely of WTO agreements. Other international conventions or treaties outside the realm of WTO law are not included. Art. 3.2, Art. 7 and Art. 11 of the DSU do not only describe the jurisdiction of panels and Appellate Body (i.e. their substantive mandate to judicially enforce only covered agreements), but also indicate and by that limit the law applied by them.[45] The function of the panel, to assist the DSB in discharging its responsibilities cannot be understood to allow panels to apply public international law in general.

Therefore, in principle, international treaties outside WTO law (i.e. which are not contained in Annex 1 to the DSU) are not a source of WTO law, at least as far as dispute settlement is concerned. This might be a possible explanation why WTO law – in contrast to other international conventions like the 1982 United Nations Convention on the Law of the Sea[46] (UNCLOS), see e.g. Art. 311 of UNCLOS – does not contain a general rule of conflict regarding other international treaties. A view that understands Art. 3.2 of the DSU to be a conflict of norms rule which provides for the priority of WTO law in case WTO law conflicts with other international conventions implies that international law outside WTO law is applicable to panels and Appellate Body.[47] However, such an understanding is not compatible with Art. 7.2 DSU and therefore has to be rejected. A direct application of international treaties outside WTO law might also diminish or

43 Pauwelyn, 'The Role of Public International Law in the WTO: How Far can we Go?', *American Journal of International Law* (2001): 535 at 538, 542.

44 Contra Mattoo and Mavroidis, 'Trade, Environment and the WTO: How real is the conflict?', in Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (1997): 325 at 333.

45 Marceau, 'A Call for Coherence in International Law', 87 at 110; 'WTO Dispute Settlement and Human Rights', *European Journal of International Law* (2002): 753 at 776–777. Contra Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', *Journal of World Trade* (2001): 499 at 503, 513, 518; Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 561.

46 21 International Legal Materials (1982) 1261.

47 Bartels, 'Applicable Law in WTO Dispute Settlement Proceedings', 499 at 501. Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 564, although sharing the opinion that non-WTO law is applicable before panels and Appellate Body, as well rejects an understanding of Art. 3.2 DSU as conflict clause.

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add to the rights and obligations of the covered agreements – contrary to Art. 3.2 DSU.[48]

The view presented here does not mean, however, that such international treaties do not have a meaning to panels and the Appellate Body in dispute settlement. Panels and the Appellate Body have to consider treaties to which the WTO agreements explicitly refer. The SCM Agreement, in its Illustrative List of Export Subsidies (Annex I) refers to international undertakings on official export credits to which at least 12 original Members to this Agreement are parties as of 1 January 1979. The SPS Agreement on several occasions refers to agreements entered into by WTO members or to international instruments. Some WTO rules even incorporate pre-existing non-WTO treaty rules. For example, the TRIPS Agreement incorporates parts of certain conventions on intellectual property. Because of the reference or incorporation, they are sources of law in WTO dispute settlement. However, only non-WTO rules which are incorporated are judicially enforceable.[49] An interesting issue here is the question to which version of the treaties their reference or incorporation applies. In other words: Is the treaty incorporated in its current version or as of the date of entry into force of the WTO Agreement? This issue of intertemporality can only be mentioned here.

Furthermore, panels might be forced to examine and interpret non-WTO treaties in order to determine the scope of a waiver. When dealing with the Lomé Waiver on EC's trade preferences, the panel and the Appellate Body had to interpret the Lomé Convention.[50] Art. XXIV:4–10 GATT 1994 as well might force a panel to examine the founding treaty of a free trade area or a customs union in order to find out whether the formation of such an area or union is consistent with WTO law. In this context the primacy of WTO law has been emphasized.[51]

Another contentious issue is the relevance of non-WTO treaties which are not referred to by the WTO law, but apply between parties to a dispute. A member might try to justify a breach of WTO law by an obligation entered into by ratifying another (non-WTO) international convention. The entry into force of other conventions or treaties between WTO members could modify the rights and obligations resulting from WTO law, at least between those WTO members who are parties to the other treaty.[52] A non-WTO treaty, however, cannot alter WTO obligations (see in more detail below Section 4.3). But it can influence the interpretation of WTO law; in particular of justifications enshrined in WTO law

48 Marceau, 'WTO Dispute Settlement and Human Rights', 753 at 777.

49 Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 554f.

50 See *EC – Regime for Importation, Sale and Distribution of Bananas*, WT/DS27/R. paras. 7.95, 7.97, WT/DS27/AB/R, paras. 167, 169. 'Since the GATT CONTRACTING PARTIES incorporated a reference to the Lomé Convention into the Lomé waiver, the meaning of the Lomé Convention became a GATT/WTO issue, at least to that extent. Thus, we have no alternative but to examine the provisions of the Lomé Convention ourselves in so far as it is necessary to interpret the Lomé waiver.'

51 See Ministerial Declaration of Singapore, para. 7 and Panel, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R, para. 9.184.

52 Palmeter and Mavroidis, 'The WTO Legal System', 412.

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(like Art. XX GATT). According to Art. 31 (3) of the Vienna Convention panels and the Appellate Body when interpreting WTO Trade Agreements have to take into account any subsequent agreement between the parties regarding the interpretation or application of the treaty (Art. 31 (3) (a)) and its provisions and any relevant rules of international law applicable in the relations between the parties (Art. 31 (3) (c)). As Art. 31 (3) (a) refers to agreements that deal with the treaty that has to be interpreted it is of no help here since non-WTO treaties are not entered into to interpret WTO law, at least usually this is not the case.

Non-WTO treaties, however, are rules of international law applicable in the relations between the parties according to Art. 31 (3) (c). But what are 'parties' in the sense of that provision? Does it mean 'parties to the dispute' or does it refer to 'all parties' to the treaty that has to be interpreted? The distinction is important, as there are rules of international law that are applicable only to some WTO members but not to all. If Art. 31 (3) (c) required a rule of international law to be applicable between *all* WTO members in order to be taken into account in interpreting WTO law, this would strongly limit the amount of rules relevant for the interpretation of WTO law and would exclude bilateral and most plurilateral treaties.

A GATT 1947 panel once observed that the agreements cited by the parties to the dispute were bilateral or plurilateral agreements and were not concluded among all contracting parties to the GATT. For this reason the panel found that under the general rule contained in Art. 31 of the Vienna Convention, these treaties were not relevant as a means of interpretation of the text of the GATT.[53] Art. 31 (3) (c) of the Vienna Convention, however, contrary to Art. 31 (2) (a), does not refer to all parties to a treaty. On the other hand, Art. 31 of the Vienna Convention deals with the interpretation of an international treaty and not with the settlement of disputes between some of the parties to a treaty. Furthermore, the term 'party' is defined in Art. 2 (1) (g) of the Vienna Convention to mean a state which is bound by a treaty. For this reason, one could understand Art. 31 (3) (c) to refer solely to rules applicable to all of the parties. The omission of the word 'all' seems not to have significance.[54] This view, however, is not at all satisfactory because the WTO Membership constantly changes. Furthermore it would increase inconsistencies and incoherence between systems of law.[55] *Pauwelyn* suggested the requirement not to be that all the parties to the WTO must have formally agreed to a new WTO rule nor even that this rule must legally bind all WTO members, but rather that a new rule can be said to be at least implicitly accepted or tolerated by all WTO members.[56] In his view it must be a rule that reflects the common

53 GATT Panel, WT/DS29/R, 33 *International Legal Materials* (1994): 839, para. 5.19: *US – Restrictions on Imports of Tuna*. See also Panel, *Canada – Term of Patent Protection*, WT/DS170/R, para. 6.90, fn. 49.

54 Lennard, 'Navigating by the Stars', 17 at 36ff.

55 Marceau, 'WTO Dispute Settlement and Human Rights', 753 at 781.

56 Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 575f.

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intention of the WTO members. Unfortunately this brings even less clarity as determining which rule reflects common intentions requires an *a priori* knowledge of the common intentions of the WTO members. Only the interpretation of WTO law, however, shall bring forth an understanding of the intentions of WTO members when drafting the Marrakesh Agreement. The purpose of just treaty interpretation is to identify the common intentions of the parties to a treaty.[57] Therefore, the suggestion of *Pauwelyn* seems to lead to a vicious circle.

It seems more helpful to recall the nature of WTO obligations. WTO obligations can be seen to be reciprocal in nature. WTO law mainly is a bundle of bilateral obligations.[58] Therefore, the interpretation of Art. 31 (3) (c) of the Vienna Convention refers to bilateral treaties entered into by the parties to a dispute.[59] To consider bilateral treaties when interpreting WTO law in deciding a certain case brings in the problem of diverging interpretations of the same WTO rule. WTO law as a single undertaking is meant to be interpreted uniformly and consistently as the rights and obligations of all WTO members must be the same. Uniform interpretation furthers legal certainty. Uniform interpretation, however, refers to the application of interpretational issues and methods and requires the same interpretation of a term, but does not hinder that the same term is applied differently according to the factual or legal circumstances of a case. The same phrase can have different meanings in different circumstances. The WTO system of rights and obligations is flexible to meet the specific circumstances of WTO members.[60] In order to be able to apply a certain interpretation to another situation one has to take account of the difference of facts and of legal situations.

This does not contradict legal certainty and predictability but corresponds to a contextual interpretation of norms. Furthermore, the interpretative principle of estoppel calls for the interpretative consideration of rules and values entered into by the disputants even outside WTO law. Finally, an interpretation given by a panel or the Appellate Body is not binding on other panels and Appellate body reports. Considering a bilateral treaty in the interpretation of WTO law does not mean that other WTO members will be bound by that treaty. Therefore the consideration of bilateral or other treaties to which not all WTO members are parties in a certain dispute does not affect the rights of those who are not bound. Panel and Appellate Body reports refer to treaties that have not been entered into by all WTO members when interpreting WTO law. These treaties have been binding on the

57 Appellate Body, *EC – Customs Classification of Certain Computer Equipment*; para. 93; Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', *Journal of World Trade* (2001): 1081 at 1086.

58 Pauwelyn, *The Nature of WTO Obligations*, Jean Monnet Working Paper 01/02; Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 549.

59 See in more detail, Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen* (2002): 372–387.

60 Panel, *Turkey – Restrictions on Imports of Textile and Clothing Products*, para. 9.184.

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parties to the dispute.[61] In one report, however, the Appellate Body made reference to treaties that were not ratified by the parties but that expressed an interest acknowledged by the international community and related to an aim mentioned in WTO law.[62]

In the same report the Appellate Body – when interpreting the chapeau of Art. XX GATT 1994 – referred to an international convention that has been signed, but not ratified by the defendant so that it was even not legally binding.[63] In addition, a panel once sought contextual guidance in the WIPO Copyright Treaty (WCT) being a non-WTO treaty that was not even referred to or incorporated in WTO law when interpreting TRIPS. Yet, the panel pointed to the fact that the WCT was designed to be compatible with the Berne Convention, a treaty incorporated into WTO law, and TRIPS, incorporating or using much of the language of the Berne Convention and the TRIPS Agreement. Additionally most of the participating countries were also participants in the TRIPS negotiations and WTO Members.[64] Therefore the treaties could be used against the parties to the dispute.

In short, non-WTO treaties are relevant for WTO panels and Appellate Body when interpreting WTO law if such treaties are binding on the parties to a dispute or are relevant to them due to circumstances which suggest that the parties to a dispute, even if not formally bound, cannot oppose certain ideas or concepts of international law. Participation in negotiations, signature, the fact that certain rules reflect a fundamental interest of all states which is respected or taken up by WTO law (here the preambles are of special relevance) or the fact that a certain convention respects and emphasizes obligations of WTO law would be such circumstances. In such a context, non-WTO treaties influence the interpretation of the rules of WTO law. Insofar, panels and the Appellate Body may consult and examine non-WTO law.[65]

3.2 *Customary law*

That customary law is a source of WTO law as well cannot be doubted. There is the customary law which developed within GATT 1947.[66] This, inter alia,

61 See Panel, *EC – Measures Affecting the Importation of Certain Poultry Products*, para. 196ff.; *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, para. 539ff. There the panel also summarized the WTO panel practice on this issue. See also Appellate Body, *EC – Customs Qualification of Certain Computer Equipment*, para. 87ff., where the Appellate Body reproached the panel for not taking into account the International Convention on the Harmonized Commodity Description and Coding System and its Explanatory Notes when interpreting the tariff schedule although it was binding on the parties to the dispute.

62 Appellate Body, *US – Import Prohibition of Certain Shrimp and Shrimp Products*, para. 131.

63 *US – Import Prohibition of Certain Shrimp and Shrimp Products*, paras. 169–176.

64 Panel, *US – Section 110(5) of the US Copyright Act*, para. 6.70.

65 Marceau, 'WTO Dispute Settlement and Human Rights', 753 at 777; Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen*, p. 364; Reinisch, 'Der Streit um das Forum – oder: Was gehört eigentlich vor WTO-Panels?', *Recht der Internationalen Wirtschaft* (2002): 449 at 455.

66 Benedek, *Die Rechtsordnung des GATT aus völkerrechtlicher Sicht*, 126ff.

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is referred to by Art. XVI of the WTO Agreement which provides that the WTO is guided by the customary practices of GATT 1947. What is contested, however, is the position and meaning of the general customary law developed outside the WTO realm to the WTO law. Art. 3:2 of the DSU only refers to customary rules of treaty interpretation. As already mentioned above, this Article does not form a basis for an *e contrario* implication (i.e. a reversal conclusion) that customary rules of international law other than rules of interpretation do not apply.[67] The explicit reference to the customary rules of treaty interpretation in 3.2 of the DSU is a specific answer to a problem that had arisen under the GATT where panels utilized reliance on negotiating history or looked to other material beyond the text of the GATT 1947 in a manner inconsistent with the requirements of the customary rules of treaty interpretation.[68]

In favour of an unlimited application of general customary rules, one can point out that customary international law applies to the economic relations between the WTO members. As it generally applies, it cannot in general be replaced by the conclusion of an international agreement unless the agreement explicitly or implicitly derogates. Thus, international customary law applies to the extent that the WTO agreements do not contract out from it, i.e. to the extent there is no conflict or inconsistency.[69] Therefore, one could opine that customary law amended WTO law as long as there is no conflict. This view however would disregard Arts. 3.2, 7.2 and Art. 11 of the DSU which limit the law applicable in WTO dispute settlement to covered agreements. In line with these provisions one could think that WTO members completely contracted out from general customary law, at least insofar as its application by panels and Appellate Body is concerned. States can do so within certain limits (regarding peremptory norms [*ius cogens*] see below). Furthermore, one can differentiate between the law that applies to WTO members and the law which is applicable before panels – that is, the application of general customary law is an issue of the mandate of the panels and their terms of reference. As shown above, panels have to interpret and apply WTO law, nothing else. Non-WTO law cannot be enforced in WTO dispute settlement. It would amount to an addition or diminution of WTO law rights or obligations prohibited by Art. 3.2 of the DSU.[70]

Nevertheless it seems to be justified – in an extended understanding of Art. 3.2 of the DSU – to apply customary rules of public international law not only for the interpretation but also for the application of WTO law. WTO law like any other international law is based on fundamental rules of international law like *pacta sunt servanda* (treaties entered into have to be complied with) or the sovereign equality

67 Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 562.

68 See Cameron and Gray, 'Principles of International', 248 at 253; Panel, *Korea Measures Affecting Government Procurement*, para. 7.96, fn. 753.

69 Panel, *Korea – Measures Affecting Government Procurement*, para. 7.96, see also para. 7.101, fn. 755. See also Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 541f.

70 See Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', 1081 at 1103–1104.

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of all states. In order to function properly, even WTO law needs the system of public international law. Again Art. 31 (3) (c) of the Vienna Convention can be consulted. Relevant rules that have to be taken into account when interpreting WTO law might also be rules of customary law, which by their very nature as universal law are applicable to all WTO members. But panels and Appellate Body can only apply them in connection with the interpretation and application of WTO law.

In other words, customary law can influence the application of WTO law.[71] WTO agreements have to be interpreted and applied in the light of relevant rules of international law irrespective of their source.[72] Therefore, the application of Art. 28 of the Vienna Convention (on the non-retroactivity of treaties) is justified[73] as well as the resort to principles of state responsibility regarding the question of the attribution of a breach of WTO law.[74] Furthermore the resort to general international law rules of procedure necessary for the function of the dispute settlement system is permitted, e.g. over judicial economy or the burden of proof.[75]

In some reports, panels and the Appellate Body did not invoke general customary rules of international law to settle contentious issues although they could have done so. Instead they tried to find an answer to the problem by an interpretation of WTO law.[76] In this context the limits of the treaty making power of WTO members have to be remembered. Peremptory norms of general international law (*ius cogens*) prevail over international treaties. States cannot enter into treaties that deviate from *ius cogens*. Otherwise this treaty would be void at least insofar as it contradicts *ius cogens*, according to the at least nowadays customary rules of Arts. 53 and 64 of the Vienna Convention. For this reason, panels and the Appellate Body have to apply *ius cogens*. The possibility for WTO Members to contract out from customary law finds its limitation here. This is of particular importance for the applicability of human rights in WTO law.

71 Neumann, Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2001): 529 at 558.

72 McRae, 'The WTO in International Law', 27 at 37.

73 Appellate Body, *EC – Measures Concerning Meat and Meat Products* (*Hormones*), para. 128.

74 Panel, *Turkey – Restrictions on Imports of Textile and Clothing Products*, paras. 9.38–9.43.

75 See Panel, *US – Definitive Safeguard Measures on Imports of Wheat Gluten from the EC*, WT/DS166/R, para. 7.5; *Brazil – Export Financing Programme for Aircraft*; Appellate Body, WT/DS46/R, para. 7.47; *US – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, pp. 17ff.; *US – Antidumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, para. 54, fn. 30; Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 555f.

76 Arbitrators, *EC – Measures Concerning Meat and Meat Products* (*Hormones*), para. 51; the Arbitrators referred to Art. 30 Vienna Convention on the application of successive treaties, but they did not rely on it, but used it as a confirmation of their result which they found considering the GATT/WTO specific circumstances. Appellate Body, *EC – Measures Concerning Meat and Meat Products* (*Hormones*), para. 123 regarding the precautionary principle; the Appellate Body did not decide on whether this principle is part of customary law. Appellate Body, *EC – Measures Affecting the Importation of Certain Poultry Products*, para. 79 concerning the relationship between GATT Schedule LXXX and a bilateral agreement (the Oilseeds Agreement).

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3.3 *General principles of law and judicial decisions and teachings of publicists*

Relevant rules of international law which have to be taken into account according to Art. 31 (3) (c) of the Vienna Convention when interpreting WTO law are also general principles of public international law. Panels and Appellate Body sometimes refer to general principles like estoppel, judicial economy or the principle of effectiveness in the interpretation of treaties (*ut res magis valeat quam pereat*) which requires a treaty interpretation to give meaning and effect to all the terms of the treaty.[77] Generally, panels and the Appellate Body utilize general principles of law in order to get procedural issues and issues of burden of proof solved, rather than for questions on substantive law.[78] This can be explained by their competence to apply solely WTO law. Here the same consideration applies as with customary law: only insofar as the application of non-WTO law is necessary for the interpretation or application of WTO law, panels may resort to general principles of law being non-WTO law. In addition, WTO law consists of many multilateral agreements which regulate the contentious substantive issues. Therefore, references to general principles mainly serve to reinforce the persuasive power of the results found in interpretation of the WTO law, as is the case with customary law.[79]

Panels and the Appellate Body also occasionally quote decisions of international courts, in particular of the ICJ, and writings of international law scholars, thereby reinforcing the persuasive power of their findings, particularly since the settlement of disputes now is more rule oriented so that legal questions are the centre of attention.

3.4 *Conclusion*

Although the initial assumption that all traditional sources of international law are relevant in WTO law can be confirmed, this is true in different ways in different contexts. It conforms to the requirements of legal certainty and predictability as the analysis shows quite clearly: apart from peremptory norms of public international law (*ius cogens*) which are applicable law even in WTO law cases, the relevance of other international instruments and of international law outside WTO law is limited. Non-WTO treaty law must not be applied by panels and the Appellate Body except if referred to by WTO law or incorporated therein.

At the same time, international law of any kind has to be considered when interpreting WTO law. In certain circumstances this applies even to non-WTO treaty law to which not all WTO members are parties. To consider non-WTO law in the

77 Appellate Body, *Korea – Definite Safeguard Measure on Imports of Certain Dairy Products*, para. 80.

78 See Panel, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R, para. 7.57.

79 Weiß, 'Allgemeine Rechtsgrundsätze des Völkerrechts', *Archiv des Voelkerrechts* (2001): 394 at 418ff.

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interpretation of WTO law is not to apply non-WTO law. Both have to be differentiated. WTO law has some 'background radiation' of non-WTO law. Looking to that means giving full effect to WTO law and has nothing to do with applying non-WTO law. Panels and Appellate Body can apply customary law and general principles of international law only when necessary for the proper application of WTO law. Thus, the answer to the question whether public international law has a role to play in WTO law is not just simply Yes or No, but is Yes to some degree. The approach of panels and the Appellate Body in their reports on the issue of applicable law conforms to the view presented here. Thus, it is quite secure and predictable which law has to be applied by panels and the Appellate Body.

4. Conflict of rules

As general public international law is of (limited) importance for WTO law, it is necessary to address the question as to which are the 'rules of conflict' if WTO law is not compatible with other instruments and agreements of international law. Additionally, the WTO Agreement has several Annexes that raise the issue of their interrelationship with other WTO rules. As pointed out in the introduction, a lack of clear-cut rules on conflict of norms reduces legal certainty because a conflict cannot be solved in a predictable way. The analysis of WTO conflict rules refers to two areas. On the one hand the relationship of the different Uruguay Round agreements with each other must be clarified (below 2). On the other hand the relationship of the WTO law with the other international law, in particular international treaties (non-WTO law) requires clarification (below 3). But first, the concept of conflict in WTO law has to be explained.

4.1 Definition of conflicts

A conflict between different treaties or other norms of international law exists when rival treaties or norms contradict each other. Treaties rival each other if provisions of different treaties regulate the same subject matter and have to be consulted when an issue has to be solved.[80] Such a rivalry does not exist however, if one of the treaties foresees a set of substantive and procedural rules that forms a closed legal circuit like a self-contained regime.[81] Strictly speaking, a self-contained regime is an all-encompassing regulation which does not allow a recourse to other sources of law. In this view, WTO law is not a self-contained regime, as it is not insulated from general international law. As was seen, non-WTO law has a role to play, however limited. In a broader view, a self-contained regime is far from being

80 Concurrent treaties do not conflict if they refer to the same subject-matter but deal with it from different points of view because they may be applicable in different times or to divergent parties.

81 Concerning the slightly divergent understandings of the concept of self-contained regimes see Simma, 'Self-Contained Regimes', *Netherlands Yearbook of International Law* (1985): 111 at 115, 117. The concept of self-contained regimes has already been referred to by the Panel, *Turkey – Restrictions on Imports of Textile and Clothing Products*, para. 9.186.

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unreceptive to general international law, but contains specific rights and obligations that provide for effective remedies in case of violation.[82] Even if WTO law was a self-contained regime in the latter understanding this would not mean that there could not be a conflict with other international instruments.

A conflict develops if rival treaties cannot be complied with simultaneously because the treaties involve conflict of obligations, i.e. incompatible obligations.[83] In addition, this can also happen if one treaty permits behaviour or makes it possible whereas the other treaty forbids that behaviour (conflict of norms, not a conflict of obligation). The latter is the case for example if a WTO rule forbids the restriction of certain trade flows, but another rule of WTO-law or a non-WTO rule grants an explicit right to restrict trade, e.g. for the sake of protection of the environment or of human rights.[84] In this case one could avoid conflict by forgoing the right to restrict trade enshrined in the non-WTO rule. But nevertheless there is conflict between the obligation in the WTO and the right to restrict trade granted by the non-WTO treaty.[85]

The Appellate Body, followed by some panels,[86] once defined conflict as a situation where different provisions of WTO Trade Agreements cannot be read as complementing each other, as adherence to the one provision will lead to a violation of the other.[87] This seems to be a very narrow view about conflicts.[88] It refers only to conflict of obligations but not to conflict of norms because in this view 'there is no conflict if the obligations of one instrument are stricter than, but not

82 Marceau, 'WTO Dispute Settlement and Human Rights', 753 at 774–775.

83 See Karl, 'Treaties, Conflict between', in Bernhardt (ed.), *Encyclopedia of Public International Law*, **IV** (2000): 935 at 936.

84 Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', 1081 at 1086; WTO Dispute Settlement and Human Rights, *European Journal of International Law* (2002): 753 at 793–794 presents a different concept on conflict. In her – as well – narrow view a conflict arises only if a treaty not only gives a right to a behaviour but mandates this action. She proposes to use the rule lex specialis derogat regi generali to clear the relationship of different treaty provisions. This suggestion however fails to notice that the application of the lex specialis rule presupposes a conflict. These concepts are inseparably linked. Karl, 'Treaties, Conflict between', 935 at 937. See also Panel, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, para. 4.20.

85 Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 551.

86 Panel, *Turkey – Restrictions on Imports of Textile and Clothing Products*, para. 9.93; *Korea – Definitive Safeguard Measure on Imports of Certain Diary Products*, para. 7.38, fn. 422.

87 Appellate Body, *Guatemala – Anti Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, para. 65; *US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para. 51. See also the similar concept of panel, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, para. 14.28, fn. 649.

88 Eggers and Mackenzie, 'The Cartagena Protocol on Biosafety', *JIEL* (2000) 525 at 540; Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', 1081 at 1085; Marceau, 'WTO Dispute Settlement and Human Rights', 753 at 792–793; Montaguti and Lugard, 'The GATT 1994 and other Annex 1A Agreements: Four Different Relationships?', *Journal of International Economic Law* (2000): 473 at 476; Pauwelyn, 'Cross Agreement Complaints before the Appellate Body', *World Trade Review* (2002): 63 at 75. Contra Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen*, p. 62.

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incompatible with, those of another, or if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another'.[89] The WTO law, however, treats the latter situation as a conflict. This results from Art. 1.2 of the DSU which refers to a 'difference' between the rules and procedures of the DSU and special or additional rules on dispute settlement in other WTO agreements.[90] The term 'difference' allows the conclusion that the possible conflict encompasses conflict of norms.

The explicit rules on conflict contained in WTO law (see below 2) such as Art. XVI:3 WTO Agreement do not contradict the view presented here. These rules use the phrase 'conflict' but there is no indication for a strict definition of conflict in the wording of the norms. To the contrary, a panel once defined a conflict in the broad way presented here: it interpreted the term 'conflict' in the General Interpretative Note to Annex 1A of the WTO Agreement as dealing 'with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits'.[91] The panel then rejected the option of solving the conflict in the latter scenario by not utilizing the explicit right so that the different norms could be brought in accordance. It made reference to a conflict between the Agreement on Textiles and Clothing (ATC) and Art. XI:1 GATT 1994 which prohibits the imposition of quantitative restrictions, while Art. 2 ATC authorizes the imposition of quantitative restrictions in the textiles and clothing sector. In other words, Art. XI:1 of GATT 1994 prohibits what Art. 2 of the ATC permits in equally explicit terms. Members could theoretically comply with Art. XI:1 of GATT, as well as with Art. 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector. Art. 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions.

The panel concluded that such an interpretation would render whole Articles or sections of WTO law meaningless and would run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore the panel considered that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.[92] Thus, the panel applied the rule on conflict in a situation where there was not a conflict of obligations but a conflict of norms. This

89 Panel, *Turkey – Restrictions on Imports of Textile and Clothing Products*, para. 9.92, citing Jenks, 'The Conflict of Law-Making Treaties', *British Yearbook of International Law* (1953): at 426–427.

90 Pauwelyn, 'Cross Agreement Complaints before the Appellate Body', 63 at 75.

91 Panel, *EC – Regime for the Importation, Sale and Distribution of Bananas*, para. 7.159.

92 See ibid., para. 7.159, fn. 401.

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confirms once more that the concept of the Appellate Body and of some panels is too strict.

4.2 *Conflict of rules within WTO law*

As there is no hierarchy of norms in international law (apart from the priority of peremptory norms – *ius cogens*) solutions for conflicts usually (but see Art. 103 UN Charter) are reached by the application of general principles of law like *lex specialis derogat legi generali* (the special provision prevails over a general provision) or *lex posterior derogat legi priori* (later legislation supersedes earlier legislation).[93] The latter one is mirrored in Art. 30 (3) of the Vienna Convention and only of little help here because almost all WTO law was signed at the same point in time.[94] Furthermore, these principles are only subsidiary. If a treaty provides for the relationship between two provisions or treaties they no longer apply.[95]

In WTO law there exist some explicit rules of conflict in regard to the relationship between its agreements. The WTO Agreement contains a rule of conflict for the relationship of the WTO Agreement with any of the Multilateral Trade Agreements in Annex 1 to 3 to the WTO Agreement. According to Art. XVI:3 WTO Agreement the WTO Agreement prevails over the Multilateral Trade Agreements. Regarding the relationship of GATT 1994 with a provision of another Trade Agreement contained in Annex 1A to the WTO Agreement, the General Interpretative Note to Annex 1A provides that, in the event of conflict, the provision of the other agreement shall prevail over GATT to the extent of the conflict. In addition some of the Multilateral Trade Agreements contain rules on conflict of norms (e.g. Art. 1.5 Agreement on Technical Barriers to Trade, Arts. 13, 21 Agreement on Agriculture).[96]

There is no rule of conflict as regards the relationship between the different Multilateral Trade Agreements in Annex 1A, 1B, 1C and Annex 2, in particular between GATT 1994, GATS and TRIPS. These agreements only can conflict if they are applicable at the same time. This requires that these agreements are not closed subsystems but are able to overlap. Art. II:2 WTO Agreement provides that the agreements contained in Annex 1 to 3 of the WTO Agreement are integral parts of

93 See Karl, 'Treaties, Conflict between', 935 at 936ff.

94 The relevant date for determining the later treaty seems to be the date of adoption of the treaty text, at least in the intention of the drafters of the Vienna Convention, Michael Lennard, 'The World Trade Organization and Disputes Involving Multilateral Environment Agreements', *European Environmental Law Review* (1996): 306 at 308.

95 See Panel, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Product*, para. 4.20, referring to Sinclair, *The Vienna Convention on the Law of Treaties* (1980): 97.

96 Regarding the relationship between GATT and Agreement on Agriculture see Chambovey, 'How the Expiry of the Peace Clause Might Alter Disciplines on Agricultural Subsidies in the WTO Framework', *Journal of World Trade* (2002): 305 at 309ff; Appellate Body, *EC – Regime for the Importation, Sale and Distribution of Bananas*. The provisions of the GATT 1994, including Art. XIII, apply to market access concessions and commitments. The AA does not contain provisions dealing specifically with this matter.

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the WTO Agreement. This standard suggests all agreements are equal. Citing this provision the Appellate Body referred to the interpretive principle of effectiveness and stated that all applicable provisions of a treaty must be interpreted harmoniously and as a whole, and that, in particular, its sections and parts should be read as a whole.[97] Interestingly, the Appellate Body said so not only regarding the relationship between the Multilateral Trade Agreements but also regarding their relationship with the WTO Agreement and vice versa. It seems therefore that in the view of the Appellate Body there is a need for a harmonious application of law even in the relation of the WTO Agreement with the Trade Agreements, although Art. XVI:3 of the WTO Agreement provides for a priority of the former over the latter. In addition, the single package approach of the Uruguay Round Agreements that requires all WTO Members to be parties to all Multilateral Trade Agreements confirms that all provisions of all Multilateral Agreements have to be respected simultaneously. Thus, the different obligations e.g. of GATT 1994 and GATS co-exist and one does not override the other.[98]

For this reason, WTO agreements are interpreted as a single undertaking.[99] They have to be interpreted together in a way that makes sense of them as an integrated unit while at the same time avoiding conflict between them.[100] Overlaps are possible and duly are considered not to undermine the coherence of the WTO system.[101] In their jurisprudence, panels and the Appellate Body apply GATT 1994 and GATS at the same time.[102] Whether this applies to the TRIPS as well is doubtable. Up to now no decision exists in this regard. A panel once saw the TRIPS as a 'relatively self-contained' agreement *sui generis*,[103] i.e. a peculiar agreement of its own kind. This statement could speak in favour of the priority of TRIPS as a special provision (*lex specialis*). On the other hand, TRIPS is part of the single undertaking. And even that panel was guided by the jurisprudence established under GATT 1947 when interpreting TRIPS. For this reason, a harmonious interpretation of TRIPS, GATS and GATT is necessary.[104]

97 Appellate Body, *Korea – Definite Safeguard Measure on Imports of Certain Diary Products*, para. 81.

98 Panel, *Canada – Certain Measures Concerning Periodicals*, para. 5.17.

99 See Panel, *Turkey – Restrictions on Imports of Textile and Clothing Products*, para. 9.92.

100 McRae, 'The WTO in International Law', 27 at 37–38 with further references. This requirement might be difficult to be met given the large undertaking of WTO law, but nevertheless panel and Appellate Body must do their best to reach the ideal.

101 Panel, *Canada – Certain Measures Concerning Periodicals*, para. 5.18.

102 See e.g. Appellate Body, *Canada – Certain Measures Concerning Periodicals*, p. 19, 'The entry into force of the GATS, as Annex 1B of the *WTO Agreement*, does not diminish the scope of application of the GATT 1994.'

103 Panel, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/R, para. 7.19.

104 See Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen ordnungen*, 84–85. Regarding the limits of such a concept of harmonious interpretation see ibid., pp. 437–439; Pauwelyn, 'Cross Agreement Complaints before the Appellate Body', 63 at pp. 77–78.

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As overlaps are possible the interpretation of the WTO law by panels and the Appellate Body tries to avoid conflicts. They apply a presumption against conflict.[105] This presumption is utilized not only as far as the relationship between the different WTO agreements is concerned but also for the relationship of TRIPS with the Berne Convention and the WIPO Copyright Treaty (WCT), i.e. to treaties outside WTO law.[106] Whereas the Berne Convention is referred to in the TRIPS, there is no direct connection between WCT and TRIPS. Nevertheless, for reasons mentioned above Section 3.1, the panel sought contextual guidance also in the WCT when interpreting TRIPS.[107]

The tendency to interpret provisions of treaties in a harmonious way in order to avoid conflict is generally inherent in public international law.[108] The good faith interpretation of different treaties, not only of different norms in the same treaty, implies that states are presumed to have negotiated all their treaties taking into account their other international obligations.[109] But one can find this tendency to reconcile diverging wordings of different rules even where the WTO law makes available a conflict rule, which would permit clearly to clarify conflicts by stating the priority of one of the agreements over the other. For example, as regards the relationship of GATT 1994 with the Agreement on Safeguards, the Appellate Body has pointed out that the provisions of Art. XIX of the GATT 1994 and of the Agreement on Safeguards would apply cumulatively, except to the extent of a conflict between specific provisions,[110] in order to give meaning, by giving legal effect, to all the applicable provisions relating to safeguard measures. Although the wording of Art. XIX GATT 1994 and of Art. 2 Agreement on Safeguards diverge in that the latter expressly omits the criterion of unforeseen developments which is contained in the former, the Appellate Body did not see this as an issue involving a conflict between specific provisions of two multilateral agreements and concluded

105 Panel, *Turkey – Restrictions on Imports of Textile and Clothing Products*, para. 6.66 with further references; *Korea – Definitive Safeguard Measure on Imports of Certain Diary Products*, para. 7.38, fn. 422.

106 Panel, *US – Section 110(5) of the US Copyright Act*, para. 6.66.

107 Ibid., para. 6.70.

108 Concerning the duty to interpret a treaty as a whole see Permanent Court of International Justice, PCIJ (1922), Series B, Nos. 2 and 3, p. 23: *Competence of the I.L.O. to Regulate Agricultural Labour*. This approach has been followed by the ICJ, ICJ Rep. 1951, p. 15: *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*; ICJ Rep. 1952, pp. 196–199: *Case Concerning Rights of United States Nationals in Morocco*; ICJ Rep. 1953, p. 10: *Ambatielos Case*. See also Brownlie, *Principles of Public International Law* (5th edn, 1998), p. 634; Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951–1954: Treaty Interpretation and Other Treaty Points', 33 *British Yearbook of International Law* (1957): 211 at 220; McNair, *The Law of Treaties* (1961): 381–382; Sinclair, *The Vienna Convention on the Law of Treaties* (1984): 127–129. Regarding the interpretation of measures in accordance with international law see ICJ, ICJ Rep. 1957, 125 at 142 – *Rights of Passage* (*Preliminary Objections*).

109 Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', 1081 at 1089.

110 Appellate Body, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, para. 89.

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that any safeguard measure must comply with the provisions of both the Agreements on Safeguards and Art. XIX GATT 1994.[111]

The panel, however, had concluded differently. It gave meaning to the express omission and thereby to the difference in wording.[112] One could support the panel's view by pointing out to the General Interpretative Note that gives Agreements listed in Annex 1A priority over GATT 1994. Although the Appellate Body referred to this rule of conflict[113] it did not see a conflict due to the principle of effectiveness and due to an interpretation of the Agreement on Safeguards, which confirmed to the Appellate Body that the negotiators did not intend to replace Art. XIX GATT 1994 because the negotiators did not explicitly say that the criterion of unforeseen developments no longer should apply.[114]

One could add the consideration that the obligations of GATT had been maintained and not altered by the Uruguay Round Agreements. Annex 1A Agreements are to further the objectives of GATT.[115] For this reason, GATT forms the unchanged basis for it. The restriction of GATT obligations by Multilateral Trade Agreements must be an absolute exception. Accordingly, the panel and the Appellate Body interpreted Art. 1.3 Licensing Agreement and Art. X:3 (a) GATT 1994 to have identical coverage although they noted that there are distinctions between these two articles.[116] They attached no significance to the difference in the phrases which were held to be interchangeable.[117] Nevertheless the Appellate Body concluded that the Licensing Agreement should have been applied first, 'since this agreement deals specifically, and in detail, with the administration of import licensing procedures'.[118]

Although the Appellate Body did not see a conflict, it treated the Licensing Agreement almost like a special provision (*lex specialis*), but not completely so because in the latter case it would have meant excluding other WTO agreements. The prevailing application of a special provision is inseparably linked with the question of conflict.[119] Furthermore, the principle that a special provision prevails

111 Appellate Body, *Argentina – Safeguard Measures on Imports of Footwear*, para. 84.

112 Panel, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS31/R, para. 8.58.

113 Appellate Body, *Argentina – Safeguard Measures on Imports of Footwear*, para. 89, fn 78.

114 Ibid., paras. 88–89.

115 See Panel, *EC – Regime for the Importation, Sale and Distribution of Bananas*, para. 7.155 (regarding the Licensing Agreement). Appellate Body, *EC – Measures Affecting the Prohibition of Asbestos and Asbestos Products*, WT/DS135/AB/R, para. 80 (regarding the TBT Agreement).

116 Whereas the former provides that 'the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner', the latter provides that each Member shall 'administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions or rulings of the kind described in paragraph 1 of [Article X]'. See Appellate Body, *EC – Regime for the Importation, Sale and Distribution of Bananas*, para. 203.

117 *EC – Regime for the Importation, Sale and Distribution of Bananas*, paras. 7.161–7.162, para. 203.

118 Ibid., para. 204.

119 Karl, 'Treaties, Conflict between', 935 at 937. See also Panel, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, para. 4.20.

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(*lex specialis* rule) is only subsidiary. As the General Interpretative Note to Annex 1A provides for the relationship between two agreements listed in Annex 1A this principle no longer applies. Another example of the conflict-avoiding techniques of panel and Appellate Body is the harmonious application of Art. III GATT 1994 and the Agreement on Subsidies and Countermeasures (SCM-Agreement). In the interpretation of the SCM Agreement by the panel the SCM Agreement does not explicitly allow a WTO Member to impose discriminatory product taxes which contradict Art. III:2 GATT although Art. 27.3 SCM-Agreement could be interpreted to allow maintaining subsidies contingent on the use of domestic over imported goods.[120]

Furthermore, in the view of the panel the SCM Agreement and Art. III:2 GATT are each concerned with different aspects of the same piece of legislation so that there was no room for a conflict at all.[121] The SCM Agreement and GATT had to and could be complied with by a WTO member simultaneously. Accordingly, the General Interpretative Note to Annex 1A was seen by the panel not to relate to situations where rules contained in one of the Agreements listed in Annex 1A provide for different or complementary obligations in addition to those contained in GATT 1994. In such a case, the obligations arising from the former and GATT 1994 could both be complied with at the same time without the need to renounce explicit rights or authorizations. In this latter case, the panel saw no reason to assume that a WTO Member was not capable of, or not required to, meet the obligations of both GATT 1994 and the relevant Annex 1A Agreement at the same time.[122]

In the view of panels and the Appellate Body, therefore, the requirements for a conflict between different WTO agreements are very strict. It must be clear that the negotiators of the Uruguay Round intended to permit Members to act inconsistently with one WTO Trade Agreement while exercising privileges contained in another WTO Trade Agreement. This requires that they had said so explicitly in the latter agreement.[123] Otherwise the provisions are seen as complementary and interpreted harmoniously in order to avoid conflict.

This view might be acceptable as long as the different provisions of the WTO agreements deal with obligations of the WTO members to liberalize trade. The stronger obligation, i.e. the obligation that is put in more general terms and therefore requires more trade liberalization, prevails in application and the lower trade liberalization is not interpreted as to contradict or restrict the other

120 Pauwelyn, 'Cross Agreement Complaints before the Appellate Body', 63 at 79.

121 Panel, *Indonesia – Certain Measures Affecting the Automobile Industry*, paras. 14.97–14.99.

122 Panel, *EC – Regime for the Importation, Sale and Distribution of Bananas*, para. 7.160. For example, regarding the provisions of the Licensing Agreement, the TRIMs Agreement and Art. I, III, X, or XIII of GATT 1994 the panel could not find any conflicting obligations, see para. 7.161f.

123 Appellate Body, *EC – Regime for the Importation, Sale and Distribution of Bananas*, para. 157; *Argentina – Safeguard Measures on Imports of Footwear*, paras. 88–89.

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obligations.[124] But in case one provision explicitly grants a right to restrict trade (or to liberalize it less) whereas another provision obliges WTO members to liberalize trade, such a conflict-avoiding approach not only minimizes the scope of application of rules on conflict but also reflects the wrong narrow definition of conflict by some panels and the Appellate Body (see above 1).

This can be shown by taking, as an example, the relationship of GATT 1994 with the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) and the Agreement on Technical Barriers to Trade (TBT Agreement). The SPS Agreement contains obligations which are not already imposed by GATT 1994 and which are different from them.[125] The same applies to the TBT Agreement.[126] On the basis of the above panel and Appellate Body reports, the obligations of GATT, TBT Agreement and SPS Agreement have to be complied with simultaneously. Art. 2:4 of the SPS Agreement however prescribes that sanitary or phytosanitary measures which conform to the SPS Agreement shall be presumed to be in accordance with those provisions of GATT 1994 which relate to the use of sanitary or phytosanitary measures, in particular the provisions of Art. XX(b) GATT 1994. As a result, a possible GATT inconformity has to step back.

The TBT Agreement does not contain such a rule. Therefore, a problem arises as to which rule prevails in case a measure of a WTO member is in conformity with the TBT Agreement, but inconsistent with GATT 1994.[127] According to the view presented here, in this case there is a conflict between GATT 1994 and the TBT Agreement so that the General Interpretative Note to Annex 1A is applicable. Its application would suggest a priority of the TBT Agreement so that the measure in the end does not violate WTO law. Applying this Note in the way the panel interpreted it may lead to the same result because the Note would not relate (and therefore not apply) to situations where the TBT Agreement provides for different or complementary obligations. The latter may not be the case if the TBT Agreement grants a right to a WTO member and not a different obligation. Then even in the view of the panel the General Note should apply and give priority to the TBT Agreement. However, should the TBT Agreement not grant an explicit right but an obligation different to GATT in that the GATT 1994 obligation is broader and more general in scope, the General Note might not be applicable in the eyes of the panel. The result would be that an action of a WTO Member has to comply with

124 See also Appellate Body, *US–Tax Treatment*, para. 117 where the explicit export obligations of the Agreement on Agriculture were seen as to take precedence over the exemption of primary products in Art. XVI:4 GATT. Interestingly the Appellate Body did refer neither to Art. 21 of the Agreement on Agriculture nor to the General Interpretative Note on Annex 1A, although these provisions contain relevant rules on conflicts.

125 Panel, *EC – Measures Concerning Meat and Meat Products* (*Hormones*), para. 8.40.

126 Appellate Body, *EC–Asbestos*, para. 80.

127 On this issue see Pauwelyn, 'Cross Agreement Complaints before the Appellate Body', 63 at 75–76.

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both GATT 1994 and TBT Agreement and that the GATT 1994 inconsistency is not justified by the compliance with TBT Agreement.

This result would be a consequence of too narrow a concept on conflicts of WTO rules. A broader definition of conflict gives effect to the General Note thereby leading to the priority of the TBT Agreement over GATT 1994 and enables an equilibrium between obligations to liberalize trade and rights to restrict trade both enshrined in WTO law.[128] Panels and the Appellate Body unduly shy away from the application of the principle that a special provision prevails over a general one (*lex specialis derogat legi generali*), although this principle stands behind the rules on conflict within WTO law (the General Interpretative Note) and forms a traditional concept of public international law in general.

Even if one may welcome the efforts at harmonious interpretation of WTO law, nevertheless there are problems involving the relations of the different WTO agreements to each other. *A correct interpretation and application of the WTO rules on conflict of norms requires a clear concept of conflict.* As long as panel and Appellate Body reports show ambiguity in that regard and lack behind a proper interpretation of the rules on conflict envisaged in WTO law, legal certainty and predictability is endangered. This uncertainty is increased when the Appellate Body – as happened in the EC–Asbestos dispute – declines to complete the legal analysis for the reason that the panel did not decide and made no findings on certain WTO agreements claimed by a party. The fact that the meaning of the obligations in the TBT Agreement has not previously been the subject of any interpretation or application by either panels or the Appellate Body and that the claims had a 'novel character',[129] is not a justification in legal terms to refrain from exercising competences.

4.3 Conflict of WTO rules with non-WTO rules

Since non-WTO law is applicable to a limited extent in WTO dispute settlement proceedings, the issue of conflict rises here as well. Legal certainty and predictability are challenged much more in this case of conflict of norms, as the areas of possible conflict are in principle unlimited. Whereas the conflicts of rules within WTO law can only occur in relation to other Uruguay Round agreements (which are limited) the possibility of conflict with non-WTO law refers to all branches and all norms of international law, both present and future. There are two issues here: first, whether a conflict can occur, and second, what rules of conflict might exist.

Conflicts and conflict avoiding techniques

As shown in detail above Section 3.1 non-WTO treaties are a source of law if referred to or incorporated by WTO law. In addition, non-WTO treaties – under the circumstances outlined above, for example if non-WTO treaties are binding on

128 Ibid., 63 at 80.
129 See Appellate Body, *EC–Asbestos*, paras. 80–82.

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all disputants in a case – have to be taken into account in the interpretation of WTO law. In all other cases international treaties must not be applied by panels and the Appellate Body as they are not a source of law in dispute settlement. Panels and Appellate Body however have to respect and apply peremptory customary law as the limitations of their terms of reference by Art. 7.2 DSU does not apply due to the priority of *ius cogens* over treaties. This priority rule applies also in WTO law and does – in case of conflict of norms – solve the question as to which rule has to prevail. This could become meaningful in a dispute settlement case where human rights come into play, although not all of them are peremptory norms (*ius cogens*).[130]

Because of the very limited potential relevance of non-WTO treaties, a conflict between WTO law and other international treaties might happen very rarely. Insofar as non-WTO treaties are relevant only for the interpretation of WTO law, technically speaking a conflict can not happen at all because the only applicable law is WTO law. Non-WTO law is neither applied nor enforced but only examined and interpreted in this case. For this reason a conflict of rules in dispute settlement proceedings (apart from the already mentioned conflict with peremptory norms) can arise only when non-WTO law referred to or incorporated by WTO rules is applicable. In this case the presumption against conflict again applies. A conflict between WTO law and other international treaties or other sources of general international law outside WTO law will be avoided by an interpretation that harmonizes WTO law with non-WTO law. The general and broad terms often used in WTO provisions allow for a margin of interpretation[131] that enables to take account of other international obligations enshrined in non-WTO law. In this context such approach might be buttressed by a prohibition of international organizations (like the WTO) to interfere within other legal regimes and instruments.[132]

The harmonious interpretation not only applies regarding non-WTO law referred to or incorporated by WTO rules, but also regarding the interpretation of WTO rules in the light of other international law, although in this case theoretically there is no conflict of laws. Art. XX GATT 1994, for example, permits WTO members to respect sanitary, phytosanitary, environmental or wildlife protection obligations, at least as long as they are connected with the protection of human health and the conservation of exhaustible natural resources and other policy objectives listed there. Thus the requirements of Art. XX GATT 1994 may be clarified by resorting to international agreements. It cannot be crucial for the

130 Because of this the extreme example presented by Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 565 as further evidence that panels have to apply all international law is not an objection to the view advanced here.

131 Art. 17.6 Antidumping Agreement says that a provision can admit of more than one permissible interpretation. This applies not only to the Antidumping Agreement.

132 On this prohibition see Neumann, 'Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen', 529 at 559–563.

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application of a policy objective whether a WTO member introduces certain measures unilaterally on its own decision or due to obligations resulting from other international conventions or treaties.[133] It would be illogical if a WTO member acting in furtherance of the goals of non-WTO law or of obligations or rights of non-WTO law were to be placed in a worse position than if no such non-WTO law existed.[134]

It is also insignificant whether only one party to a dispute or all WTO members are bound by the non-WTO law.[135] Once again it must be recalled that in this case the non-WTO law is not a source of WTO law. But the considerations of for instance animal or plant protection which stand behind the non-WTO law become considerable due to Art. XX GATT 1994. Within this framework the dispute settlement organs are competent to consult and examine non-WTO law (see above Section 3.1).

Conflict rules

If a harmonizing interpretation of the different international law obligations or rights is not possible, the question of how to solve a conflict of norms arises. One has to decide which treaty (other than one reflecting peremptory norms) shall take precedence. Some provisions of WTO law contain an explicit rule on conflict of norms regarding a conflict of WTO law with non-WTO law, for example in Art. XXI (c) GATT 1994 concerning the UN Charter and in Art. 2:2 TRIPS regarding other conventions on the protection of intellectual property. The Declaration on the Relationship of the WTO with the IMF[136] in general leads to a priority of the GATT 1994 rules.

Apart from these special provisions, one could try to solve the conflict of treaties by application of the general rules of international law on the relationship of successive treaties dealing with the same subject matter laid down in Art. 30 of the Vienna Convention on the Law of Treaties.[137] According to Art. 30 (3), (4) of the Vienna Convention a later treaty has priority over an earlier treaty, if or insofar as the parties to the treaties are identical. Art. 30 of the Vienna Convention is not directly referred to by Art. 3:2 of the DSU because it does not lay down rules on the interpretation of international treaties but on their application.[138] Customary international law on the application of law[139] however can be applied in the

133 For determining whether a certain measure is an unjustifiable discrimination, however, the fact that the measure is envisaged in international conventions might be relevant.

134 Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', 1081 at 1097.

135 See Ibid., 1081 at 1099.

136 It was adopted by the Trade Negotiations Committee on 15 December 1993, reprinted in 33 International Legal Materials (1994) 1252.

137 Which again requires incompatibility between two treaties, see GATT panel, *EC Imposition of Antidumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, para. 541; Panel, *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, para. 10.65.

138 Contra Panel, *EC – Measures Affecting the Importation of Certain Poultry Products*, para. 206.

139 It shall be assumed that Art. 30 of the Vienna Convention is customary international law because it reflects the sovereignty of states to enter into subsequent treaties. As will be seen, Art. 30 is only of

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framework of WTO law according to an extended understanding of Art. 3:2 of the DSU proposed here (see above Section 3.2). In some reports, panels and the Appellate Body referred to Art. 30 of the Vienna Convention, but they did not apply it.[140] In addition, Art. 30 of the Vienna Convention expresses the principle of priority of the later treaty (*lex posterior derogat legi priori*) following from the sovereignty of the states. States that are parties to a treaty can change their contractual obligations and rights at any time by agreement.[141] Finally, the application of Art. 30 is also easily compatible with WTO law because it leads to a priority of WTO law in relation to *earlier* international contracts. This result conforms with Art. 3:2 and Art. 19:2 of the DSU. Therefore, as far as the relationship of WTO law with international treaties concluded *earlier* than the WTO Agreement is concerned, Art. 30 of the Vienna Convention in principle might be applicable.

According to Art. 30 of the Vienna Convention, the priority of a treaty (like the WTO Agreement) applies only insofar as the Contracting Parties are identical. In the relationship of a WTO member with a non-WTO member only non-WTO law that obliges both states applies; that follows from Art. 30 (4) (b) of the Vienna Convention. The applicability of non-WTO law in this relationship is not a problem because a dispute between them that has to be settled according to the DSU cannot arise.

In the relationship of one WTO member with another WTO member, only WTO law is applicable. However, the question as to which law to apply if a WTO member in fulfilling an obligation to a third state (or in exercising a right granted by non-WTO law) is forced to deviate from WTO law is not solved by Art. 30 of the Vienna Convention.[142] On the one hand, Art. 30 (4) (a) provides for the application of WTO law between WTO members whereas on the other hand Art. 30 (4) (b) at the same time provides for an application of non-WTO law in relation to third countries. As only WTO law is a source of law in the dispute settlement proceedings, it is not possible to object obligations or rights deriving from earlier international conventions to WTO law rights or obligations. A violation of WTO law cannot be justified by exercising a privilege or fulfilling an obligation enshrined in non-WTO law even if the latter still is applicable in relation to third countries.

The reason for this is twofold. First, there is the limited mandate of panel and the Appellate Body, which are allowed to apply non-WTO law only in case of its

limited help so that there is no need for a detailed analysis of the assumption. See in this regard Lennard, 'The WTO and Disputes Involving Multilateral Environment Agreements', 306 at 308.

140 Panel, *US Section 110(5) of the US Copyright Act*, para. 6.41; *Japan – Measures Affecting Consumer Photographic Film and Paper*, para. 10.65; Appellate Body, *EC – Measures Affecting the Importation of Certain Poultry Products*, para. 79. Only once the arbitrators referred to Art. 30 of the Vienna Convention in order to confirm a result they found considering the relation of bilateral with multilateral schedules, see *EC – Measures Concerning Meat and Meat Products* (*Hormones*).

141 Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 545.

142 Nor is it solved by the deliberation that in this case a state has two parallel obligations and in case of conflict the state has to decide which obligation it might fulfil and for whose breach it might take responsibility. This is a practical consequence only if there is no rule of conflict.

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reference or incorporation in WTO law. Rights or obligations resulting from non-WTO law must not be enforced in WTO dispute settlement[143] because that would lead to a diminution or addition of rights and obligations provided in the covered agreements[144] contrary to Arts. 3.2 and 7.2 of the DSU (see also above Section 3.1). Second, from a material angle, ignoring earlier treaties is acceptable because in international law parties can deviate effectively *inter partes* (i.e. within their relations) *from* earlier contracts even if the prerequisites of Art. 41 of the Vienna Convention are not met because Art. 41 distinguishes between permissibility of a treaty modification by a later-in-time agreement and the validity *inter partes*.[145] Art. 41 does not apply to the validity *inter partes* so that a bilateral treaty that does not meet the standards of Art. 41 is valid between the parties to it.[146] If the earlier treaty was a bilateral one or one with a different membership, the same applies to Art. 30 (4) of the Vienna Convention, which also does not apply to the validity *inter partes*.

Moreover, as regards non-WTO law referred to or incorporated by WTO rules, the referred to/incorporated non-WTO law and the WTO law entered into force at the same point in time so that there is no room for an application of Art. 30 as there is no follow-up relationship if one refers to the date of entry into force as did a panel[147] (although the relevant date seems to be the adoption of the text).

The panel and the Appellate Body once were faced with a claim by a WTO member that resorted to obligations entered into with the IMF in order to justify the non-compliance with the requirements of Art. VIII GATT. They could not see any binding commitment that would supersede GATT obligations. Admittedly, the panel and the Appellate Body did not *a priori* refuse to consider the arguments of that member. They did not refer to the limited terms of reference which prohibit the application of non-WTO law. Instead the panel pointed out that the party to the dispute did not successfully show that it was required by the other agreement to violate GATT law. The panel was not convinced that there was a legally binding agreement. Yet the Appellate Body found the same result by looking at GATT law and the Agreement between the IMF and the WTO which did not contain an exception of obligations enshrined in Art. VIII GATT.[148] This shows that in the case of a conflict, WTO law prevails in a WTO dispute settlement context. A derogation of obligations must be provided for by WTO law.

143 See Arbitrators, *EC – Measures Concerning Meat and Meat Products* (*Hormones*), para. 50.

144 Marceau, 'WTO Dispute Settlement and Human Rights', 753 at 778.

145 Vranes, 'Principles and Emerging Problems of WTO Cross Retaliation', *Europäische Zeitschrift für Wirtschaftsrecht* (2001): 10 at 14.

146 A state derogating from a treaty earlier entered into may be responsible for any damage resulting to the other party of the earlier treaty. The rules of the Vienna Convention apply without prejudice to that, see Art. 73 Vienna Convention.

147 Panel, *US Section 110(5) of the US Copyright Act*, para. 6.41.

148 Appellate Body, *Argentina – Measures Affecting Imports of Footwear*, paras. 67–73.

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As the application of Art. 30 of the Vienna Convention to treaties concluded *earlier* than the WTO Agreement is doubtful, the suitability of this article to clarify the relationship of successive treaties is even more doubtful as regards treaties that entered into force *after* the WTO Agreement. Art. 30 (4) of the Vienna Convention would result in the application of the new treaty over WTO law. First, Art. 30 (4) could not be applicable due to Art. 30 (5), as a modification of WTO law could be seen as affecting the rights of others and being incompatible with its object and purpose according to Art. 41 (1) Vienna Convention as it is a single undertaking. Second, an application of Art. 30 could lead to different results depending on the date of accession to the WTO on the one hand and the entry into force or adoption of a later-in-time treaty on the other hand. One could, however, argue that later-in-time treaties would alter WTO law only between disputing parties so that there is no affect to the rights of others. Nevertheless this is not convincing.[149] The coherence and consistency of WTO law would evaporate if WTO law could be changed *inter partes* by later-in-time agreements (i.e. solely in the relationship between parties to a later-in-time agreement). This would contradict the idea of WTO law being a single undertaking.[150] Therefore, with the entry into force of the WTO Agreement, the WTO members restricted their competence to enter into later-in-time treaties that alter WTO obligations. They can do so only in respect to the procedure envisaged in Art. X of the WTO-Agreement. I do not concur with the view[151] that because of a mere reciprocal nature of WTO obligations, Art. 41 of the Vienna Convention would easily enable a derogation of WTO law *inter partes*, i.e. between states entering into a later-in-time agreement. In addition, the Singapore Ministerial Declaration confirmed the primacy of WTO law over regional trade agreements entered into by WTO members.[152]

For all of these reasons, it is highly contestable whether Arts. 30 and 41 of the Vienna Conventions are applicable to multilateral conventions at all. In addition, Arts. 30 and 41 require successive treaties. Because of the continuous confirmation and implementation of multilateral conventions it does not make sense to refer to the time of conclusion of the WTO Agreement.[153] This means Arts. 30 and 41 are not applicable, at least as regards later-in-time agreements derogating from WTO law. But are there other rules that can offer a solution? It is only WTO law, in particular the DSU that can do so. Considering again the limited jurisdiction of

149 Accord Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', 1081 at 1104–1105.

150 The view advanced here is compatible with the single undertaking approach that when interpreting WTO law non-WTO law is considered even if it is not binding on all WTO members (see above Section 3.1). This is not a contradiction because the suspension or change of WTO law *inter partes* by later-in-time agreements is something totally different to a contextual interpretation that can vary according to the circumstances.

151 Proposed by Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 549. As for Art. 30 Vienna Convention he shares the view that this norm does not offer normative solutions to the problems raised here, at 545.

152 Singapore Ministerial Declaration, para. 7.

153 Pauwelyn, 'The Role of Public International Law in the WTO', 535 at 545–546.

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panels and the Appellate Body which can (apart from peremptory norms of public international law) apply non-WTO law only if referred to or incorporated in WTO law, the result can only be that in case of conflict non-WTO law cannot and has not to be considered,[154] especially since it can be argued that there is no follow-up relationship if one looks to the entry into force of the WTO law and the incorporation or reference of non-WTO law.

That situation partly corresponds to the situation in the European Union. EU members as well cannot deviate from EC law in the relationship to each other by resorting to international treaties entered into before or after the entry into force of the EC Treaty. Treaties concluded by EC members *earlier* than the EC Treaty only are respected as far as their relationship with third countries is concerned. In this regard, Art. 307 EC Treaty leads to the result that if an EU member has to deviate from EU law in order to fulfil its obligations *earlier* entered into with a third country that EU member can do so. Thus, whereas EU members successfully can claim earlier international obligations in relation to third countries before the European Court of Justice in order to derogate from EU law, WTO members will not find sympathetic consideration before panels and Appellate Body.

Conflicts and fragmentation of international law

The result presented here is not fully satisfactory because conflicting substantive obligations do exist in public international law. In addition, overlaps and conflict of jurisdiction increasingly appear on the international scene[155] and have already entered WTO dispute settlement.[156] Yet, this result is the consequence of the WTO law as it stands. The open questions as regards conflict of norms in international law result from the fragmentation of the international law and legal system in

154 Contra Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', 1081 at 1107–1108, 1129–1130. She suggests that in case a non-WTO treaty supersedes WTO law the panel has to conclude that there is no WTO law applicable so that they cannot act further on that specific claim. This view, however, will lead to an (unlawful) application of non-WTO law and thereby to an addition or diminution of rights and obligations of WTO law contrary to Art. 3.2 DSU. Marceau herself points out that her proposals are limited by the latter provision. Therefore, her suggestion seems not to be helpful.

155 In this respect see Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions', 1081 at 1108ff; Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen*, pp. 525ff.

156 In the Swordfish case, WT/DS193, a conflict of WTO law with UNCLOS appeared and was put to the WTO dispute settlement as well as to ITLOS (ITLOS case no. 7: *Case concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*). Chile prohibited unloading of swordfish in Chilean ports. In EC's sight this made transit through Chilean ports impossible for swordfish. The EC claimed that the measures are inconsistent with Art. V and XI GATT 1994. But the case was settled by arrangement between EC and Chile. They agreed to suspend the process for the constitution of the panel, see WT/DS193/3. Another example is the dispute about trade sanctions of Nicaragua which established a tax on goods and services coming from or originating in Honduras and Colombia. This case also involves dispute on the unclear maritime borders. On the complaint of Honduras, the DSB established a panel, but it has not yet been composed, see WT/DS188. The complaint of Columbia is listed as WT/DS201 with pending consultations. The dispute is also pending before the ICJ (Maritime Delimitation Between Nicaragua and Honduras in the Caribbean Sea).

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general. It is not a special problem of WTO law but exists everywhere as soon as one tries to relate different international instruments.

The view presented here can offer legal certainty only insofar as dispute settlement under DSU is concerned. The lack of legal certainty as far as the relationship of WTO law with non-WTO law is concerned is not a shortcoming of the WTO panels and the Appellate Body and does not mean that panels and the Appellate Body do not properly fulfil their tasks. One cannot expect them to solve all matters of content in public international law, particularly since the conflict of WTO law with non-WTO law is completely outside their jurisdiction. The statements and rulings of dispute settlement decisions cannot alter international responsibilities of WTO members. If compliance with WTO law requires violation of non-WTO obligations because a non-WTO obligation is not accepted as justification, the compliance with WTO law will only avoid a conflict within WTO but not before other international tribunals.

The issue might be taken to the ICJ where a third state might seek reparation and compensation of losses resulting from the violation of non-WTO law. To solve such problems one could think of a more central role of the ICJ[157] forming either an international court of competences or something like a court of appeal. Due to the domain of this article, the issue of fragmentation cannot be considered more deeply here.

The above shows that in an overall perspective the legal security and predictability that panels and the Appellate Body present is limited. Art. 3.2 of the DSU, however, requires security and predictability only insofar as the multilateral trading system is concerned and not for the whole of international law. The WTO dispute settlement system does not lay claims to more. Panels and the Appellate Body must not be blamed for failures in this regard. Their jurisprudence increased the awareness of a general problem. The lack of coordination between WTO law and other international instruments is a consequence of the given constitution of international relations where the states are their own lawmakers. A coherent international constitution which would bring the distribution of different functions to various organizations to an end is still to be found. Contrary to national law, international law does not have a single basis and a common fundament as there is no supreme legislator. The responsibility to increase legal certainty is in the hands of the international community, particularly the WTO members themselves. Accordingly, the Doha declaration mandates negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements (MEAs). The terms of reference are that the negotiations shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question, and shall not prejudice the WTO rights of

157 In this regard see Dupuy, 'The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice', 31 *New York University Journal of International Law and Policy* (1999): 791.

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any WTO member that is not a party to the MEA in question.[158] The results of these negotiations can be expected with interest.[159]

5. Conclusion

Looking at it from the perspective of security and predictability of law, the jurisprudence of panels and the Appellate Body does not pose any problems or questions that would be new to international law *as far as the interpretation of WTO law is concerned*. A closer look at the jurisprudence shows that the WTO dispute settlement in this regard can fulfil the expectations vested in it. The application of law by panels and the Appellate Body, too, is predictable and allows for legal certainty.

However, this is not the case as far as the handling of conflicts of rules is concerned. The first field of conflict relates to a conflict of rules within WTO law. Due to a too narrow, or at least unclear, concept of conflicts and due to shortcomings in the understanding and interpretation of rules on conflict enshrined in WTO law, the results of panels and the Appellate Body cannot be easily predicted whenever an obligation of one WTO rule has to be applied in a context where another WTO rule grants a right or provides for a slightly different obligation. Panels and Appellate Body still fall short of providing clear guidance as regards the relationship between the different WTO agreements.

The second field of conflict exists as far as the relationship of WTO law with non-WTO law is concerned. The expectation that the WTO should ensure an interpretation and application of WTO rules consistent with public international law outside WTO law[160] has not yet been met, and cannot be met given the current state of WTO law and the DSU in particular. Panels and the Appellate Body try to avoid conflicts by an interpretation of WTO law that harmonizes it with other international law. They are allowed, however, to apply non-WTO law only to a very limited extent due to the terms of reference and their restricted jurisdiction. For this reason one must not place too high a hope in the solution of conflicts of WTO law with non-WTO law by panel or Appellate Body reports. Due to their limited competences panels and Appellate Body cannot address this issue in a way that encompasses all issues of international law.

158 Ministerial Declaration, WT/MIN(01)/DEC/1, para. 31. A list of working documents that have been circulated in the Committee on Trade and Environment (CTE) is contained in WT/CTE/INF/5/Rev.2.

159 The CITES (Convention on International Trade in Endangered Species of wild fauna and flora) Secretariat for example proposed in a Communication to the Committee on Trade and Environment a mutual recognition of the equal status of CITES and WTO in international law, of their unique features and of their respective areas of competence. It held to be essential that the Doha negotiation process explicitly reaffirmed this principle and recognized that regulation of trade in CITES-listed species, including all measures adopted by the Conference of the Parties or its subsidiary bodies, did not fall under the mandate of the WTO, see WT/CTE/GAEN/6, para. 35.

160 Marceau, 'A Call for Coherence in International Law', 87 at 111.

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The open questions caused by the fragmentation of public international law lead to insecurities that are not typical of WTO dispute settlement but exist wherever international courts work. Contrary to the issue of conflict of norms within WTO law, the lack of legal certainty as far as the relationship of WTO law with non-WTO law is concerned is not a shortcoming of the WTO dispute settlement panels and the Appellate Body.

Security and predictability in WTO dispute settlement has increased, but only partly. Whereas the interpretation of WTO law meets the requirements of legal certainty, the issue of conflicts of laws still awaits a satisfactory level of security and predictability.

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