THE DEFINITION OF NORM CONFLICT
IN PUBLIC INTERNATIONAL LAW: THE CASE OF WORLD TRADE ORGANIZATION LAW

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Abstract

Conflict of norms is an essential concept in public international law. In today’s world, where the international legal system is made up of a complex network of international norms, often interfering with each other, the conflict of norms is increasingly becoming a real and inevitable concept. In this context, having an appropriate definition of conflict becomes critical in order to clearly identify the rights and obligations of the respective parties. This article reviews different views on a proper definition of conflict in doctrine and the jurisprudence of international bodies. While doing this, we will put a special emphasis on World Trade Organization (WTO) jurisprudence which is increasingly becoming a recognized authority in contributing to public international law.

Öz

Norm çatışması, uluslararası kamu hukukunun en önemli konularından biri olarak görülmektedir. Norm çatışması, uluslar arası hukuk sisteminin günümüzde, sıklıkla birbirinin alanına giren karmaşık bir normlar ağından oluşturduğu dikkate alındığında, norm çatışması giderek gerçek ve önlenemez bir kavram haline gelmektedir. Bu çerçevede, doğru bir çatışma tanımı sahip olmak, tarafların hak ve yükümlülüklerinin açıka tanımlanabilmesi açısından kritik önemine sahiptir. Bu çalışmada, doğru bir çatışma tanının ne olması gerekiğine dair doktrinde ve uluslararası organların içtihatlarındaki farklı

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

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

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

The aim of this article is to explore the definition of conflict in both the practice (case law) and in the theory (doctrine) of public international law. While doing this, we will put a special emphasis on a particular branch of public international law, World Trade Organization (WTO) law. After briefly reviewing the functions of norms in public international law, the article will focus on the textual definition of the word ‘conflict’ to be applied in international law. Next will be a look at the views of the scholarship on the definition of a conflict. Finally, the article will review the case law of appropriate international bodies in order to understand how different legal bodies actually have interpreted conflict situations. As already mentioned, special weight is going to be given to WTO law and on how a definition of conflict can be applied to this body of law.
1. THE FUNCTIONS OF NORMS IN PUBLIC INTERNATIONAL LAW

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

Generally, there are four types of norms in public international law:

   Command: These are norms that impose an obligation to do something, i.e. prescriptive norms, “must do” or “shall” norms or norms imposing a positive obligation. In the WTO context, examples of commands are relatively rare.\(^1\) Indeed, some most important articles of the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS) are of a prohibitive nature.\(^2\) However, there are clear commands in the GATT, such as Article X, and in GATS, such as Article III. Many articles in the TRIPS Agreement that determine the required level of protection for intellectual property rights are also commands.

   Prohibition: These are norms that impose an obligation not to do something, i.e, prohibitive norms, “must not do” or “shall not” norms or norms imposing a negative obligation.\(^3\)

   Exemption: These are norms that grant a right not to do something, i.e, exempting norms or “need not do” norms. The exception articles of GATT – Article XX and XXI\(^4\) – and GATS – Article XIV—are examples of exemptions.

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\(^2\) In the GATT context, articles constituting the “backbone” of GATT such as Article I (Most Favored Nation (MFN) Treatment), Article II (Schedule of Concessions) and Article III (National Treatment) are of a prohibitive nature. Likewise, the most important obligations in GATS such as Article II (MFN Treatment), Article XVI (Market Access) and Article XVII (National Treatment) are also of a prohibitive nature.

\(^3\) See supra note 2 for GATT and GATS examples of prohibitions.

\(^4\) GATT Article XX lays down the general exceptions to the GATT provisions such as protection of human, animal and plant life and preservation of exhaustible natural resources while GATT Article XXI lays down the security exceptions to the GATT which are rarely invoked.
Permission: These are norms that grant a right to do something, i.e., permissive norms or “may do” norms. For example, Article XXIV of GATT explicitly allows members to form a customs union or a free trade area which is a derogation from the MFN principle. In addition, provisions of some Annex IA Agreements, such as Agreement on the Application of Sanitary and Phytosanitary Measures (SPS), Agreement on Pre-Shipment Inspection explicitly allows members to take some precautionary measures which may be trade-restrictive under some pre-defined conditions and thus are of the nature of permission.5

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

II. CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW

Before going further, it is crucial that we clearly define what we understand from the term ‘conflict of norms.’ At the most basic level, a general idea comes from looking at dictionary definitions. For instance, Webster’s New World Law Dictionary defines “the conflict of law(s)” as a “conflict between the laws of two or more states or countries that would apply to a legal action in which the underlying dispute, transaction, or event affects or has a connection to those jurisdictions.”6

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

5 See, e.g., Article 2.1 of the SPS Agreement which allows Members to take SPS measures under the conditions laid down in the Agreement.
6 WEBSTER’S NEW WORLD LAW DICTIONARY 88 (2006).
Neither are conflicts between norms confined to international law, but they are more frequent and more difficult to solve here on the account the decentralized law-making structure and in the absence of common norm-setting agencies which are characteristic of the international legal order.\(^7\)

Similarly, Jenks describes conflict of norms in international law as an inevitable consequence:

In the absence of a world legislature with a general mandate, law-making treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law. These instruments inevitably react upon each other and their co-existence accordingly gives rise to problems which can be conveniently described, on the analogy of the conflict of laws, as the conflict of law-making treaties.\(^8\)

While both Karl’s and Jenks’ arguments are right in understanding the peculiar nature of conflict in public international law, it should also be underlined that international law does not have some of tools that municipal law has to prevent and resolve conflict; in municipal law, a strict hierarchy among norms is usually defined and, in most cases, a division of work between different norms at the same level, as well the judicial body that is authorized to resolve conflicts, is codified.

Besides the abovementioned difficulties regarding conflict of norms in international law, there is no written definition of conflict in any legal text that may shed light on other cases in international law. Even though there are provisions dealing with the cases of conflict, such as Article 103 of the UN Charter,\(^9\) or Articles 30 and 31 of the Vienna Convention on the Law of Treaties (hereinafter VCLT), in none of these legal texts is there a definition a conflict of norms.

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\(^9\) “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”
Under these circumstances, in our search for an appropriate definition of conflict for our work, it will be proper to have a look at two sources – one is the doctrine and the other one is the jurisprudence (case law) of the international legal bodies regarding the definition of conflict.

III. THE CONFLICT OF NORMS IN DOCTRINE

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

A. A Strict Definition of Conflict

Wilfred Jenks pioneered the literature on conflict of norms in international law in his seminal work *Conflict of Law Making Treaties* in 1953. His approach in this work laid down the fundamentals of the prevailing “narrow definition of conflict” in public international law and the definition of conflict in his work has been cited numerous times including judicial decisions of adjudicating bodies of international organizations.

As mentioned above, Jenks saw the potential conflict of norms in international law as an inevitable phenomenon. Nevertheless, the fact that conflicts are inevitable does not mean that they are to be seen as normal. On the contrary, conflict is something to be avoided. He gave examples from “the presumption against conflict” as a principle of statutory interpretation in national law and contract law. While admitting that the presumption against conflict is less strong with respect to lawmaking treaties than in the case of national legislation, he argued that the presumption against conflict also applies to treaty law and conflicts should be avoided in public international law, too. In line with this approach, he offered the following definition of conflict:

A divergence between treaty provisions dealing with the same subject or related subjects does not in itself constitute a conflict.

Two law-making treaties with a number of common parties may deal with the same subject with different points of view or be applicable in different circumstances or one of the treaties may

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10 See Jenks, *supra* note 8.
11 Such as successive versions of the same document replacing earlier versions. *Id.* at 428-429.
12 *Id.*
embody obligations more far reaching than, but not inconsistent with, those of the other. A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.13

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

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

A divergence which does not constitute a conflict may nevertheless defeat the object of one or both of the divergent instruments. Such a divergence may, for instance, prevent a party to both of the divergent instruments from taking advantage of certain provisions of one of them recourse to which would involve a violation of, or failure to comply with, certain requirements of each other. A divergence of this kind may in some cases, from a practical point of view, be as serious as a conflict; it may, for instance, render inapplicable provisions designed to give one of the divergent instruments a measure of flexibility of operation which was thought necessary to its practicability. Thus, while a conflict in the strict sense of direct incompatibility is not necessarily involved when one instrument eliminates exceptions provided for in another instrument or, conversely, relaxes the requirements of another instrument, the practical effect of the co-existence of the two instruments may be that one of them loses much or most of its practical importance.14

This long citation, beyond doubt, reveals that Jenks’s definition ignores situations which are “as serious as conflict” and allows the cases where “one of the instruments loses much or most of its practical

13 Id. at 426.
14 Id. at 428.
importance” by not recognizing such cases as conflicts.15 This can be regarded as another way of stating that the definition systematically ignores certain types of conflict.

After Jenks, there have been a number of influential figures who adopted a similar approach to the definition of conflict. For instance, Wolfram Karl, under the “Conflict between Treaties” entry of the Encyclopedia of Public International Law, goes along the same line by stating that “technically speaking, there is a conflict between treaties when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously.”16

Similarly, Friedrich Klein followed the strict definition approach in Wörterbuch des Völkerrechts17 by acknowledging that situations of treaty conflict are only practically relevant when the two provisions, in particular obligations, existing in two international treaties, contradict each other in a manner which cannot be resolved.18

More recently, Marceau, who wrote on the conflicts between WTO Agreements and Multilateral Environment Agreements, after admitting that a conflict can be defined narrowly or broadly, continued her analysis with a narrow definition based on the apparent reason that the WTO adjudicating bodies have preferred such a definition.19

The underlying argument of the advocates of a narrow definition of conflict is, as Jenks argued, “the presumption against conflict” and the need to “promote the coherence of international legal order.”20 Often in analogy with the municipal law, conflict between norms is seen as an abnormal situation that is to be avoided with the presumption that the will of sovereign states cannot be in different directions when signing different treaties. This aspect will be addressed in a forthcoming section.

15 Id, at 426-427.
16 Karl, supra note 7, at 935-941.
17 Dictionary of international law.
19 See Gabrielle Marceau, Conflict of Norms and Conflict of Jurisdictions: The Relationship between the WTO Agreement and MEAs and Other Treaties, 35 JOURNAL OF WORLD TRADE 1081 (2001).
20 Jenks, supra note 8, at 428.
B. A Broader Definition of Conflict

The eminent German legal theorist, Karl Engisch, although not writing on international law, had been one of the earliest contributors to the broader definition which inspired the later advocates of this approach. When defining conflict, Engisch referred to cases where “a given type is at the same time prohibited and permitted, or prohibited and prescribed, or prescribed and not prescribed [o]r if incompatible ways of conduct are prescribed at the same time.”21 He also included in his definition cases where a conduct appears to be prohibited and permitted at the same time.22

Hans Kelsen, who is one of the most influential legal scholars of the 20th century, also adopted a more flexible approach to the definition of conflict, especially in his more recent writings.23 In one of his later essays, he defined the norm conflict as a “conflict between two norms occurs if in obeying and applying one norm, the other one is necessarily or possibly violated.”24 Again, in his General Theory of Norms from 1979, he further clarified that: “If one has to recognize that ‘prescribing’ and ‘permitting’ constitute two different normative functions, one cannot deny that a permission and a prescription mutually exclude each other.”25

22 Id.
23 Kelsen, through his earlier writings, was influential in the setting down of a narrow definition. However, in the 1960s, Kelsen gave up the idea that pure logical principles (such as the basic principles of non-contradiction or deductive inference) cannot be applied directly to norms. An important result of this admittance for conflicts of norms is that there is no need to be a “logical contradiction” between two norms for us to accept that they are conflicting. In other words, the two norms do not have to be “mutually exclusive” in order to constitute a case of conflict. Vranes (see below) starts from this later point of stance of Kelsen to assert that not only conflicts between obligations but also between obligations and permissions are possible. See also Bruno Celano, Norm Conflicts: Kelsen’s View in the Late Period and a Rejoinder, in NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES 343-359 (Stanley L. Paulson & Bonnie Litschewski Paulson, eds., Oxford University Press, 2001)(providing a critical assessment of Kelsen’s views on this subject).
25 Vranes, supra note 21, at 402 (quoting Hans Kelsen, ALLGEMEINE THEORIE DER NORMEN [GENERAL THEORY OF NORMS] (1979)).
Similarly, although not explicitly writing on the “permission-prohibition” aspect, Sir Hersch Lauterpacht\textsuperscript{26} and Sir Humphrey Waldock\textsuperscript{27} also apparently had a rather broader definition of conflict in their minds.

More recently, Pauwelyn\textsuperscript{28} and Vranes made significant contributions to the issue of norm conflict in public international law, both being strong advocates of a broader definition of conflict. Pauwelyn argued that all types of inconsistencies should be regarded as conflict:

Notwithstanding the varying definitions of conflict set out earlier, adopted by different authors, it is difficult to find reasons why a conflict or inconsistency of one norm with another norm ought to be defined differently from a conflict or inconsistency of one norm with other types of state conduct (e.g., wrongful conduct not in the form of another norm) Essentially, two norms are, therefore, in a relationship of conflict if one constitutes has led to, or may lead to a breach of the other.\textsuperscript{29}

In other words, if obedience to or application of one norm leads to or may lead to a breach of the other, then there is a conflict between these two norms.

Vranes also followed a similar path and focused on the breach of norms which was, he argued, originally introduced by Kelsen. After having extensively discussed the arguments for a wider definition by both referring to the legal theory and philosophical background, Vranes’s final definition of conflict of norms is as follows: “There is a conflict between two norms, one of

\textsuperscript{26} Lauterpacht, commenting on Article 20 of the Covenant of the League of Nations which mandated that “the Covenant abrogates all obligations and understandings which are inconsistent with the terms of ‘[it]’ included “not only patent inconsistency appearing on the face of the treaty . . . but also what maybe called potential or latent inconsistencies” in his definition of the word “inconsistency,” Hersch Lauterpacht, The Covenant as the ‘Higher Law,’ 13 British Yearbook of International Law 54, 58 (1936).

\textsuperscript{27} During the work of the International Law Commission on drafting the VCLT, Waldock, speaking on the term ‘conflict’ held that “[t]he idea conveyed by that term was that of a comparison between two treaties which revealed that their clauses, or some of them, could not be reconciled with one another.” United Nations, Yearbook of the International Law Commission (Vol. I) 125 (1964).


\textsuperscript{29} “The word breach is used here interchangeably with ‘violation’, ‘incompatibility’ or ‘inconsistency’” (footnote in original; italics removed).
which may be permissive, if in obeying or applying the norm, the other one is necessarily or possibly violated.”

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

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

IV. CONFLICTS IN THE JURISPRUDENCE OF INTERNATIONAL BODIES

A comprehensive analysis of conflict definition necessitates a review of the decisions of international bodies as well as international conventions addressing the issue. In this section, the approach of the UN Charter and the ICJ is reviewed. The Lockerbie case is a representative example to exhibit the ICJ approach to the definition of norm conflict. Finally, we will review the approach taken in the VCLT.

A. The UN Charter and ICJ Case Law

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

30 Vranes, supra note 21, at 415 (italics removed).
31 Id. at 404.
32 Id. at 416.
obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

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

In fact, there have not been many cases which would satisfactorily shed light on the definition of conflict. The often-cited ICJ cases which were concluded before the finalization of the VCLT, such as the Oscar Schinn case\(^{34}\) or the Austro-German Customs Union cases,\(^{35}\) are far from successful in shedding light on the problem of defining conflict. However, one relatively recent case – the Lockerie case – offers some important insights.

**B. The Lockerbie Case**

The Lockerbie case is interesting in the sense that, at least based on the allegations, it was a case of a contradiction between an explicit right and an obligation. While one side of the dispute claimed that it had an explicit right to certain conduct under an international convention to which both sides were parties to, the other side claimed that a UN Security Council Resolution obliged the other side to conduct that mutually excluded the first one.

The Lockerbie case was about the destruction of Pan American Airways Flight 103 that took place on 21 December 1988 near the Scottish town of Lockerbie, where all 243 passengers and 16 crew members died. The investigations into the matter revealed that the reason for the destruction was a criminal act, namely a bomb that was placed inside the plane before it took off. The United States (US) and the United Kingdom (UK) alleged that it was two Libyan nationals who were responsible for the crime and they put pressure on Libya to surrender these two Libyan nationals to allow prosecution in the UK. Libya took the case to the ICJ with the request that the Court should find that the UK had breached its obligations under international law and should cease its threats to Libya, in addition to other violations of the sovereignty and territorial integrity of Libya.\(^{36}\)


\(^{35}\) Customs Regime between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41 (Sept. 5, 1931).

\(^{36}\) ICJ, *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, Libyan Arab Jamariya v. United Kingdom, Request for the Indication of Provisional Measures, *at* 7.
After unilateral US and UK efforts to seize the Libyan nationals for trial failed, they took the matter to the UN Security Council and obtained Resolution 731 (1992). After referring to the US and UK requests addressed to Libya “in connection with the legal procedures related to the attacks,” the Resolution urged “the Libyan government immediately to provide a full and effective response to those requests to as to contribute to the elimination of international terrorism.” 37

The UK and the US managed to obtain two more resolutions from the Security Council, which both made reference to the Resolution 731, namely Resolutions 748 and 883. However, unlike Resolution 731, these Resolutions were taken within Chapter VII of the UN Charter, making them compulsory.

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

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

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

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

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

Based on this legal background, Libya claimed that it had an “explicit right” not to extradite any accused Libyan nationals found in its territory and to pursue

prosecution in Libya. Libya also asserted that the Montreal Convention was *lex posterior* and *lex specialis* vis-a-vis the UN Charter, asserting that the UK and US efforts in the Security Council were designed to circumvent Libyan rights under the Convention.

Libya’s argument that Article 5.2 and Article 7 constitute an explicit right, which was also accepted by the UK, is true. Although these Articles do not have “mays,” it should be underlined that they have “if clauses.” In other words, they give the Party State discretion as to whether to extradite the alleged offender or not but sets out an obligation if the Party State chooses to extradite him.

The UK first based its defense on the argument that the “rights” claimed by Libya under the Montreal Convention actually did not exist. Second, the UK argued, if those rights existed at all, they would be subordinate to UNSC Resolution 731 and others. In the UK’s defense, there is a section entitled “The Obligations Imposed by the Security Council Prevail over any other Rights and Obligations of the Parties.”

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

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

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38 The Verbatim Record of the Oral Presentation made by the Libyan Arab Jamahiriyah, 35-44 (17 October 1997).
39 *Id.*
40 The Verbatim Record of the Oral Presentation made by the United Kingdom 18 (14 October 1997).
41 *Id.*
42 *Id.*, at 76.
The final judgment by the Court did not get into the discussion on whether there was a conflict between the resolutions and the relevant provisions of the Montreal Convention as its judgment was totally in a different direction. The Court took into account that the latter two resolutions of the Security Council were decided after Libya’s application and it ruled that the earlier resolution did not have binding effect. As such, there was then no actual legal conflict to be decided upon.

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

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

An objective evaluation of the Lockerbie case reveals that it has a significant ability to explain the ICJ’s understanding of conflict between norms. Leaving aside other technical issues, the case includes a genuine conflict between an obligation and an explicit right. As both sides of the dispute accepted, the relevant provision of the Convention gave the State certain rights to Libya whereas UN Resolutions create obligations for both sides. As such, the Court acknowledged that Article 103 of the Charter can be applicable to this case.

C. The Vienna Convention on Law of Treaties

On the other hand, the VCLT governs cases of conflict between two successive treaties on the same subject matter. “Subject to the Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs.”

43 Id.
45 VCLT, art. 30.1.
Article 30.1 defines the scope of Article 30. It should be recalled that Article 103 of the UN Charter relates to conflicts between the obligations of Members under that Charter and their obligations under any other agreement. Thus, Article 103 only speaks about obligations; Article 30 of the VCLT explicitly mentions rights as well as obligations. As the aim of this article is to determine which treaty would prevail in the event of a conflict, it is logical to conclude that both rights and obligations are included in this conflict analysis.

The same phrase, “rights and obligations” is iterated in Article 30.4(b):

4. When the parties to the later treaty do not include all the parties to the earlier one:

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

In line with Article 30.1, Article 30.4 (b), which deals with cases when the parties to the two conflicting treaties are not identical, mentions both rights and obligations. Thus, it would be safe to conclude that the VCLT admits the possibility of a conflict between two provisions where one side is a “right” by referring to “rights and obligations” in a provision drafted to deal with cases of conflict.

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

V. CONFLICTS IN WTO LAW

The notion of conflict and its resolution in WTO law will be elaborated in detail in later sections. In this section, however, our focus will be on how

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46 See text, supra note 9.
conflict in general is defined in WTO case law. As we have mentioned before, although there are provisions to deal with the potential cases of conflict in WTO Agreements, there is no explicit definition of a conflict in any of the WTO legal texts. Nevertheless, there are some dispute cases where we can perhaps derive a definition.

A. EC – Bananas

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

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

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

For instance, Article XI:1 of GATT 1994 prohibits the imposition of quantitative restrictions, while Article XI:2 of GATT 1994 contains a rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing ("ATC") authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified in Article 2:1-21 of the ATC. In other words, Article XI:1 of GATT 1994 prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI:1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the imposition of quantitative restrictions. However, such

50 Id. at 338.
an interpretation would render whole Articles or sections of Agreements covered by the WTO meaningless and run counter to the object and purpose of many agreements listed in Annex 1A which were negotiated with the intent to create rights and obligations which in parts differ substantially from those of the GATT 1994. Therefore, in the case described above, we consider that the General Interpretative Note stipulates that an obligation or authorization embodied in the ATC or any other of the agreements listed in Annex 1A prevails over the conflicting obligation provided for by GATT 1994.51

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

B. Indonesia – Autos

In Indonesia – Autos,52 the Panel followed a totally different approach and opted for a strict definition of conflict. One measure in consideration was a local content subsidy program offered by Indonesia to its automobile industry. The complaining parties (US, EU and Japan) claimed that the measure was inconsistent with Article III of GATT, as well as the TRIMS Agreement, as it accorded treatment less favorable to imported products than that to domestically produced ones. In its defense, Indonesia stated that Article 27.3 of the SCM Agreement had given developing members (including Indonesia) an explicit right to maintain local content subsidies (as long as they do not cause adverse effects) and the measure in hand, as a subsidy, should be exclusively examined under the SCM Agreement as it constitutes *lex specialis* vis-a-vis GATT Article III.

The Panel, in response, reminded that there was a general presumption against conflicts in public international law by referring to Jenks and Karl. The Panel then made clear that the issue of conflict had to be examined “in the light

51 *Id*, fn 401.
of the general international law presumption against conflicts and the fact that under public international law a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter.”

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

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

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

C. Guatemala – Cement

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

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53 Id., at 334.
54 Id., at 347.
Accordingly, if there is no "difference," then the rules and procedures of the DSU apply together with the special or additional provisions of the covered agreement. In our view, it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other that the special or additional provisions are to prevail. A special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to the one provision will lead to a violation of the other provision, that is, in the case of a conflict between them. An interpreter must, therefore, identify an inconsistency or a difference between a provision of the DSU and a special or additional provision of a covered agreement before concluding that the latter prevails and that the provision of the DSU does not apply.

This paragraph has often been cited as evidence that the AB confirmed a narrow definition of conflict. However, two main reasons exist why this is a false interpretation. First, the key sentence does not reveal any clear position that a conflict is possible only between obligations. Indeed, when we examine the dictionary meaning of the word ‘adherence,’ we can easily see that ‘adherence’ to a provision that involves an obligation is as meaningful as ‘adherence’ to a provision that involves a right or permission. In this sense, the key sentence can be reasonably read to cover cases of conflict where one side has an explicit right or permission.

Second, a careful reading of the abovementioned judgment of the AB reveals that the AB used the terms ‘difference’ and ‘conflict’ between two provisions interchangeably as opposed to ‘complementing’ provisions. Two provisions, where one of them prohibits a certain conduct and the other one explicitly permits it, cannot be regarded as “complementing each other” just for the fact they are not mutually exclusive.

Moreover, as Pauwelyn elegantly shows us, the AB, in its former decisions, openly included the cases, where there was no mutual exclusivity between the provisions, into its definition of difference. In Brazil – Aircraft, the AB recognized that relevant provisions of the SCM Agreement had certain

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56 See e.g., Marceau, supra note 19.
57 Adherence is “1. The action of sticking or holding fast (to anything or together, 2. Attachment to a person or party (adhesion) 3. Persistence in practice or tenet; steady observance or maintenance. THE OXFORD ENGLISH DICTIONARY (1989).
58 Pauwelyn, supra note 1, at 195-197.
elements which were different than the provisions of DSU in the sense that often one of them was stricter than the other. Similarly, in *US-FSC* case, the AB noted that Article XVI:4 of GATT differs very substantially from the export subsidy provisions of the SCM Agreement and the Agreement on Agriculture and thus the explicit subsidy disciplines in the Agreement on Agriculture clearly take precedence over the exemption of primary products from the export subsidy disciplines in Article XVI:4.

These examples show us that the AB, which used the word ‘different’ as almost the equivalent of the word ‘conflict,’ and with the meaning “not complementing with each other,” at least implicitly accepted that a conflict may occur between two provisions which are not mutually exclusive. In this sense, there is sufficient leeway for the AB to explicitly recognize cases of conflict between rights and obligation in the forthcoming cases.

### D. Turkey - Textiles

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

In assessing this case by initially making a clear reference to Jenks’ definition of conflict and the Panel Report on *Indonesia – Autos*, the panel gave the impression that it would follow exactly the reasoning laid down in *Indonesia – Autos*. It then comments that: “In view of the presumption against conflicts, as recognized by panels and the Appellate Body, we bear in mind that to the extent possible, any interpretation of these provisions that would lead to a conflict between them should be avoided.” and that: “We understand that this principle of [effective] interpretation prevents us from reaching a conclusion on

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60 *Id.* at 57.
63 *Id.* at 124.
the claims of India or the defense of Turkey, or on the related provisions invoked by the parties, that would lead to a denial of either party's rights or obligations.\footnote{Id. at 125.}

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

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

\section*{VI. AN APPROPRIATE DEFINITION OF CONFLICT TO BE USED IN ASSESSING THE RELATIONSHIP BETWEEN WTO AGREEMENTS}

As the reader might have guessed, the definition of conflict preferred as a result of this study is for a broad and inclusive definition – this is to say that conflicts cannot be reduced to only cases between mutually exclusive provisions. We have to recognize cases of inconsistency, not only between obligations but also between obligations and rights, as proper conflicts to be dealt with. As we have tried to show, this approach does not contradict with the ICJ’s or the WTO AB’s approach to the matter as revealed in their decisions on this subject. While most of the views of the advocates of a broader definition expressed above support this position, there are two main points to be made to further support this position.

First, there is a logical imperative for a broader definition of conflict. A logical analysis of the types of norms described in Section I reveals that every type of norm creates a corresponding duty or right to the other parties related to that norm.\footnote{Vranes, \textit{supra} note 21, at 407-412 (providing a detailed explanation of the norms establishing “relational rights” by using a deontic square).} In the case of public international law, this would be other states (in the case of a bilateral treaty the other party state and in the case of a multilateral
treaty a group of state) being party to a treaty. If, for instance, State A is obliged to adopt a certain conduct X, then there is a corresponding right of the representative State B *vis-a-vis* State A to legitimately expect that State A adopts conduct X. Similarly, if there is a prohibition on State A to follow a certain conduct X, there is a corresponding right of State B to expect that State A refrains from following conduct X. On the other hand, it should be underlined that an explicit right given to State A to adapt a certain conduct X also creates an obligation on State B that it does not claim conduct X from State A.

<table>
<thead>
<tr>
<th>Type of Norm on State A</th>
<th>The Corresponding Relational Right on State B</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positive Obligation (State A is obliged to adopt conduct X)</td>
<td>A positive right of State B that State A adopts conduct X.</td>
</tr>
<tr>
<td>Negative Obligation (State A is obliged not to adopt conduct X)</td>
<td>A positive right of State B that State A does not adopt conduct X.</td>
</tr>
<tr>
<td>Positive Right (State A may adopt conduct X)</td>
<td>No right of State B to claim that State A do not adopt conduct X.</td>
</tr>
<tr>
<td>Negative Right (State A may not adopt conduct X)</td>
<td>No right of State B to claim that State A adopt conduct X.</td>
</tr>
</tbody>
</table>

Table 1. Norms and Relational Norms

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

The other point to be made is on the often-pronounced presumption against conflict in public international law. The advocates of this view seem to perceive a narrow definition as a somewhat functional tool to preserve the coherence of the international legal system. As we have already discussed, for most of these authors, conflicts between norms is seen as an anomaly which is to be avoided.

The following comment by the Panel in *Indonesia – Autos* is a perfect example of such arguments:

In considering Indonesia’s defence... we recall first that in public international law there is a presumption against conflict. This presumption is especially relevant in the WTO context since all WTO agreements, including GATT 1994 which was modified by Understandings when judged necessary, were negotiated at the
same time, by the same Members and in the same forum. In this context we recall the principle of effective interpretation pursuant to which all provisions of a treaty (and in the WTO system all agreements) must be given meaning, using the ordinary meaning of words.66

We should make it clear that we not only fail to share these views but also see some elements in such argument that are significantly flawed. First, we fail to understand why the principle of effective interpretation is especially relevant when it comes to defending certain obligations or prohibitions but not mentioned regarding the explicit rights or permissions. Indeed, it is the principle of effective interpretation that requires that explicit rights given to states as a result of a negotiation process have to taken seriously and as seriously as an obligation or a prohibition.

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

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

CONCLUSION

Having exhibited a preference for a broader definition, it can be seen that this broader definition is not without limits. While in principle we recognize cases of conflict between explicit rights and obligation or prohibitions, this naturally applies to two provisions which are at the same level of generality. In other words, it is questionable whether there is a genuine conflict between a very specific prohibition and a very general right which broadly covers the conduct that is specifically prohibited. A broad definition of conflict should not be exploited to circumvent some obligation or prohibition faced by a party. No doubt that a case-by-case analysis is needed to actually decide whether there is a genuine conflict or not.
BIBLIOGRAPHY


