

ownership and internal self-determination, and also private and public law and domestic and international regimes (ch. 7).

Title to Territory in International Law could end on a more positive note, for example by analysing the removal of the sacred aura of territoriality through regionalization and globalization. Distefano offers a more static vision. It is nevertheless a very useful one, which can theoretically explain almost all territorial situations. Its shortcoming is that, being more classical, it fails to take into account new challenges. Finally, these two books complement each other, one being theoretical the other more anchored in today's concrete reality.

Centre d'Etudes et de Recherches Internationales et Communautaires (CERIC), Aix-en-Provence

Laurence Henry⁸,

doi: 10.1093/ejil/chh512

Sadat-Akhavi, Seyed-Ali. ***Methods of Resolving Conflicts between Treaties.***

Graduate Institute of International Studies (Series), Vol. 3. Leiden: Brill Academic Publishers, 2003. Pp. 228. EUR 107. ISBN: 9041120319

Wolfrum, Rüdiger and Nele Matz.

Conflicts in International Environmental Law. Berlin/London:

Springer, 2003. Pp. xi + 213.

ISBN 3-540-40520-8.

These two recently published books provide a thoughtful vision of the body of law that deals with resolving conflicts between international agreements and thus give an important impulse to new thinking in this field of international law.¹ In this regard, both books are very timely and constructive contributions.

Conflicting regulations in any legal system are problematic because they are a threat to the coherence and effectiveness of the law. In the field of international law, however, normative conflicts are more likely to occur than in national legal orders because of the absence of a well-established hierarchical normative structure. Particularly because treaty law has developed in an *ad hoc* and fragmented manner, parallel and in some cases overlapping and contradictory obligations can be created. The situation is made even more complicated by the formally equal validity of all international norms (save *jus cogens*). This situation poses a danger of uncertainty as to the interpretation and application of overlapping treaty provisions. Meanwhile, the issue of resolving conflicts between conflicting treaty norms in international law has not been dealt with satisfactorily. The two studies therefore are valuable in that they provide insights into the drawbacks of the current structure of international law, while suggesting possible ways to adapt to the abovementioned challenges.

Each publication deals with the subject of conflicting rules, although from slightly different angles. In terms of the precise subject, Sadat-Akhavi's framework is broader since he envisages the body of public international law in general. By contrast, Wolfrum and Matz's focus is confined to the body of international *environmental* law, as a special area of public international law. This is a useful choice of a special case because the field of international environmental law is particularly prone to conflicting regulation. Several factors account for this. First, much existing environmental regulation was adopted in a reactive manner in the aftermath of environmental disasters, therefore dealing only with a

⁸ I am grateful to Professor Francis Snyder for his kind help.

¹ Earlier contributions include Jenks, 'Conflict of Law-Making Treaties', 30 *BYbIL* (1953) 401. Zuleeg, 'Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten, 1977', 20 *GYIL* 246. Akehurst, 'The Hierarchy

of the Sources of International Law, 47 *BYbIL* (1974–1975) 273. Bos, 'The Hierarchy among the Recognized Manifestations ("Sources") of International Law', 25 *NILR* (1978) 334 and J. Pauwelyn, *Conflict of Norms in Public International Law* (2003), a recent publication which also addresses norms produced by sources other than treaties.

specific sector, area or environmental medium. Second, the inherent complexity of the field and its sometimes conflicting goals (in particular, the tension between the exploitation and preservation of resources) by itself creates a potential for conflict. Third, separate regulatory devices only inadequately mirror the interdependence of ecological processes and increase the likelihood of tensions. The result is a global legislative structure that does not deal with environmental problems in a sufficiently integrated manner.

The perspectives of the books also differ slightly. Sadat-Akhavi regards the presence of conflicting rules in a legal order as an 'embarrassing situation' (at 1), which needs to be remedied by law. His study, in a classical positivistic vein, is confined to identifying and analysing the body of law applicable to that matter: existing conventional and customary rules which provide for the resolution of conflicts between treaty obligations. Wolfrum and Matz's book, although it also deals with rules of conflict, is more 'policy oriented' in that it investigates the potential for solving treaty conflicts of international environmental governance and cooperation between states, treaty bodies, organizations and so on.

Broadly, two types of issues can be seen as being addressed in both books: first, the question of when conflicts of treaties actually arise; second, how those conflicts have been or should be solved. The first question is more problematic than it seems and there is in fact a fair amount of disagreement as to what exactly constitutes a conflict of norms. All authors seem to agree on a minimal definition. According to Wolfrum and Matz, a conflict is defined *stricto sensu* as two or more obligations that cannot be simultaneously fulfilled without necessarily violating one another. Sadat-Akhavi's definition is slightly more sophisticated in juridical terms, but essentially the same: a conflict arises in a situation where two norms cannot be complied with (including making use of a permission) by all addressees of the norm, at all times and in all spaces covered by the norm, with regard to all objects of the norm, and under all conditions specified by the norm. Such narrow definitions

at least have the merit of certainty and provide a convenient starting point to then move on to rules of conflict resolution.

It seems that the issue of conflict resolution only arises once real conflicts have been successfully distinguished from false ones. In order to ascertain whether there is such a real conflict between treaties, Sadat-Akhavi emphasizes the role of 'interpretation' and 'reconciliation'. Interpretation as a means of clarifying the meaning and scope of a norm and removing ambiguity may already resolve a number of apparent conflicts. Reconciliation, on the other hand, is a 'compatibility proof'. Sadat-Akhavi argues that an apparent conflict is excluded when there is at least *one* way of complying with all the requirements of two norms. Only if these two methods cannot establish clarity does an actual conflict exist to which the rules of international law on conflict of treaties are applicable.

Helpful in this respect are efforts by Wolfrum and Matz to suggest various methods of interpretation in reconciling seemingly conflicting obligations and therefore avoiding actual conflicts. For example, the authors explore some more recent developments, such as the concept of sustainable development as a guideline for interpretation of the object and purpose of modern environmental treaties. Another interesting point is their assessment of a *dynamic* form of interpretation with regard to other relevant rules of international law, as indicated by Article 31, para 3 lit. (c) of the Vienna Convention. Dynamic interpretation allows the treaty to change over time in accordance with new relevant rules of international law. Such a form of interpretation, they argue, can lead to the harmonization of environmental treaties by adapting to new approaches and principles. Wolfrum and Matz acknowledge this approach as being extremely relevant when it comes to international environmental rules because of the importance of new developments, concepts, approaches and principles brought about by new scientific insights and changing political paradigms. Unfortunately, this innovative idea is not pursued any further with respect to *which terms* can be interpreted dynamically

and which rules of international law or new approaches could be applied. A more fundamental elaboration of this argument would have been desirable.

Another sensitive question is whether the concept of a 'conflict of norms' extends beyond strictly incompatible obligations to situations of collision and overlap of treaty provisions. This is what Wolfrum and Matz suggest in their definition when they include divergences and inconsistencies that do not necessarily create contradicting obligations (i.e. conflicts in a 'broader sense').

Wolfrum and Matz argue that although these divergences could be made compatible without abolishing the substantive content of either regulation, they nevertheless have the same negative effect of weakening international environmental law as those which fall within the scope of the more narrow definition of genuine treaty conflicts. Examples given for this broader type of conflicts include conceptual differences between different approaches and distinct objectives of various agreements. These conflicts, however, are said to be more of a political kind and do not create incompatible duties and obligations. It is therefore not absolutely clear what these 'conflicts' are, and whether they are not simply a catch word for tension between policy goals that all norms inevitably embody.

What is and what is not a conflict, therefore, can be problematic in practice, as shown by the work of Wolfrum and Matz in the field of the environment. The relationship between the UN Convention on the Law of the Sea (UNCLOS) and the Convention on Biological Diversity (CBD), for example, is an interesting case. A broad variety of human uses and respective interests are reflected within the legal regulation of the marine environment, which mainly consists of regional international treaties and UNCLOS. At the same time, the CBD is also applicable to the protection of marine life.

With respect to the protection and management of biological resources and ecosystems, the relationship between UNCLOS and the CBD can be conflicting, due to differing approaches of the two agreements towards the protection and use of marine living and genetic resources.

Some *prima facie* tensions exist with regard to the management and sustainable use of marine living resources based on a maximum sustainable yield of populations of certain species (UNCLOS), and approaches required under the CBD towards an ecosystem-based protection of marine biological diversity. However, the terms of both agreements are relatively general and do not create absolute or incompatible obligations. To the extent that both are framework agreements, they leave great discretion to the parties in the course of their implementation. Phrases such as 'according to their capabilities' and 'as far as possible and as appropriate' make that clear. The same is true for other potential areas of conflict such as the relationship between various agreements concerned with the management of waste and the rules adopted for the protection of the Polar Regions – including their marine living resources – under various environmental agreements and UNCLOS rules.

One area where legal conflicts are very likely to arise, conversely, is that between environmental treaties that regulate environmental as well as economic or developmental issues or which encompass economic instruments. Probably the most specific example is the relationship between the CBD and the Kyoto Protocol to the UN Convention on Climate Change, in particular as regards forestry activities under the Protocol (e.g. under domestic sinks, land use activities or the Clean Development Mechanism). Some of the climate change mitigation activities aiming at CO₂ sequestration, for example, can have adverse effects on the conservation of biological diversity by promoting mono-cultural plantations, eliminating incentives to maintain primary forests, or encouraging reforestation without explicit guidelines for sustainable forestry.

There is therefore no shortage of shades and types of normative conflicts. The second and probably most important issue dealt with in both books is how to actually solve such conflicts. All authors acknowledge the key role of the Vienna Convention on the Law of Treaties in informing this central issue.

It is perhaps Sadat-Akhavi, however, to whom we should look for a more thorough

discussion of positive norms when it comes to actually dealing with existing conflicts. In spite of the fact that his study does not draw any fundamentally new conclusions, it is valuable for its clear, systematic approach and its use of concrete examples to illustrate conflicting treaty norms. Sadat-Akhavi acknowledges the central role of Article 30 of the Vienna Convention (*lex posterior derogat legi priori*), for example, but suggests certain modifications of Article 30 paragraphs 2 and 3 in order to minimize the ambiguity in the words 'later treaty' and 'incompatible with', and to take account of all the possible manifestations of the intentions of the parties (although these suggested modifications are said to be consonant with customary international law on the subject).

But are there rules of norm conflict resolution outside the Vienna Convention and, if so, do they have the status of customary international law? Sadat-Akhavi's investigations have the merit of going beyond conventional law and envisaging the customary status of the *lex specialis* rule, the question of hierarchy between norms (*jus cogens*) and some more recent developments, such as the principle of legislative intent and the principle of maximum effectiveness. The results, however, suggest that no such customary international law rules have yet emerged. Although there are certain common patterns to conflict resolution, such as the use of similar conflict clauses in treaties and in judicial decisions of municipal courts, these do not add up to the extensive and uniform practice required to form a rule of customary law. The material on municipal decisions, on the one hand, is too scant, while treaty practice, on the other, even when extensive, cannot be said to give rise to rules of general validity or enjoying general recognition.

One question that, interestingly, neither of the authors examine, is whether there might be any *general principles of international law* that could contribute solutions. Another inviting question is the existence of principles of conflict resolution that are specific to certain branches of the law. Sadat-Akhavi provides an interesting opportunity to examine

such principles by investigating the potential of the 'priority of the more favourable provision' rule in the field of human rights. According to this rule, in case of conflict the provision giving the maximum protection for human rights should prevail, given the interest of the society as a whole in the protection of human rights.

Perhaps more could have been made of that rule to understand the fundamental nature of norm conflict resolution. Indeed, perhaps Wolfrum and Matz could have drawn inspiration from the idea and transferred some of its spirit to other areas of collective interests, e.g. environmental protection. A modification of the principle could, for example, mean that in case of conflict of environmental treaties, the provision giving the maximum protection to the environment should apply.

It may be however, that traditional rules of treaty conflict resolution are simply insufficient and that something more is needed. This is the conclusion that Wolfrum and Matz seem to reach. These authors argue in favour of increased cooperation between state parties to the various agreements, under the guidance of environmental governance structures. Harmonization of the content of treaties should be facilitated by the creation of mechanisms for cooperation and coordination between treaty regimes. In addition, these authors envisage a decision-making procedure not based on the principle of consensus that would allow for binding majority decisions and for the transfer of sovereignty to the necessary extent. Cooperation can lead to the establishment of fora in which a significant number of environmental players can meet and coordinate their activities and interests. Such fora could contribute to the progressive development of international law and to the harmonization of agreements. Another option would be to set-up Memoranda of Understanding to clarify and coordinate the relationships between agreements.

The drawback of Wolfrum and Matz's approach is that this solution to tensions will depend on political goodwill rather than legal

reasoning. While the policy- and institution-oriented option may be an important tool for avoiding future conflicts, it does not address the challenge that current institutions may be too weak to offer a satisfactory solution to existing conflicts between agreements. Furthermore, state sovereignty and the independence of international agreements present obstacles to streamlining and harmonizing conflicting agreements by using only political tools.

This may hold particularly true in areas of international regulation where there are limited prospects for cooperation and coordination. The probability of reconciling and 'streamlining' via institutional governance may be limited when it comes to the relationship between environmental and non-environmental agreements, the area most prone to legal conflicts. Environmental treaties that encompass economic instruments as a means to facilitate compliance at lower costs have a high potential for conflict with treaties dealing with global economic issues, particularly international trade law of the WTO agreements, investment law in bilateral investment agreements and intellectual property law. Thus, an essential question, which unfortunately falls outside the focus of Wolfrum and Matz's study, is the applicability of the assessed approaches to the coordination of multilateral agreements in general, particu-

larly coordination between trade and environmental agreements.

In short, in situations where there is a limited political will to cooperate, recourse to the law of treaties may well be the *only* choice for solving treaty conflicts, whether they occur in general public international law or particular areas, or across regimes. Unfortunately, in this regard, a number of points raised in the studies do not lead to conclusive answers. The question of determining the chronological order of modern, evolving treaty regimes, for example, has not been fully settled, thus the remaining uncertainty may still lead to inappropriate results. The solutions to this situation range from Sadat-Akhavi's moderate suggestion of certain modifications to the Vienna Convention to the supplementation of the law of treaties by new governance structures called for by Wolfrum and Matz. Innovative thinking is certainly necessary in order to provide for more dynamic interpretation and for the development and inclusion of new rules in international law if treaty law is to keep up with the general tendency for more flexible structures in international law. Both studies, however, can only be regarded as approaches to this task that need to be elaborated further.

*University of Oslo
Department of Public
and International Law*

Christina Voigt

doi: 10.1093/ejil/chh513

