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Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?

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Abstract

This article focuses on the principle of mutual supportiveness as a key legal tool to address tensions between competing regimes, with specific reference to the articulation of the WTO system with other subject areas protecting essential interests of the international community, such as in particular the right to health, cultural diversity, and environmental protection. It argues that the multiple references to mutual supportiveness found in recent treaties and other legal instruments should not be briskly dismissed as mere political statements devoid of any normative significance. On the contrary, while such reiterated references are important in terms of progressive consolidation of a general principle of international law, mutual supportiveness seems to be characterized by two remarkable legal dimensions. The first is its interpretative dimension, which serves the purpose of disqualifying solutions to tensions between competing regimes involving the application of conflict rules. The second is the law-making dimension of mutual supportiveness which comes into play when efforts at reconciling competing rules have unsuccessfully been exhausted. This dimension implies a duty to pursue good faith negotiations aimed at the conclusion of law-making instruments, including treaty amendments, which clarify the relationship between the competing regimes at hand. This duty is especially important for the ongoing WTO Doha negotiations which call into question non-trade regimes and values, for instance the fair and equitable use of biological resources under the 1992 Biodiversity Convention. Most importantly, either for its nature as a general principle or for its recognition as a standard internal to the WTO, mutual supportiveness under the guise of a duty to negotiate in good faith would also bind WTO Members which are not parties to the competing treaty regime which needs accommodation in WTO law.

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1 Introduction

The purpose of this article is to discuss the emergence of ‘mutual supportiveness’ (MS) between competing regimes as a key conceptual tool generating significant consequences in terms of the interpretation and creation of international law norms.

MS has become a recurrent expression in international agreements, political declarations, and judicial/arbitral practice. For instance, WTO Director-General Pascal Lamy has most recently stated that ‘human rights and trade are mutually supportive’,¹ insofar as ‘[h]uman rights are essential to the good functioning of the multilateral trading system, and trade and WTO rules contribute to the realization of human rights’.²

Yet, I will try to show that MS is not just a catchy formula widely employed in political discourse, as it also produces significant legal implications. First, the practice examined in the following sections will make it clear that MS is a principle according to which international law rules, all being part of one and the same legal system, are to be understood and applied as reinforcing each other with a view to fostering harmonization and complementarity, as opposed to conflictual relationships. This is indeed how MS has usually been characterized, i.e., as an *interpretative principle or technique* sharing the same rationale and addressing similar concerns to those underlying the more familiar notions of systemic integration, harmonious interpretation, and presumption against conflicts.³ Secondly, MS should not be taken as a mere restatement of the just recalled well-settled principles of interpretation. There is added value in it, insofar as it is also denoted by an important *law-making dimension*, i.e., it is increasingly relied on as a reference notion requiring and orientating adjustments and changes in the law in respect of those ‘hard cases’ where all efforts at reconciling competing rules have been exhausted, thereby endangering the integrity of international law. These cases may obviously jeopardize the integrity of international law, either because states which are parties to colliding treaties will be unable fully to respect the *pacta sunt servanda* rule or because one of the colliding norms protects fundamental values of the international community and is therefore sustained by a strong claim to hierarchical superiority *vis-à-vis* lower ranking norms. In this connection, I will submit that MS translates into a specific obligation of conduct incumbent upon states, i.e., a duty to pursue good faith negotiations aimed at achieving formal modifications in the law which are necessary to restore the integrity of the international legal order.

Coined in the area of environment–WTO tensions, the principle of MS has the potential to spill over and be used in all contexts and situations characterized by a plurality

¹ See ‘Lamy Calls for Mindset Change to Align Trade and Human Rights’, available at: www.wto.org/english/news_e/sppl_e/sppl146_e.htm.

² *Ibid.*

³ See, for instance, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’, Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi, A/CN.4/L.682 (13 Apr. 2006), at 141 (para. 277), 143 (para. 281), 207 (para. 412), 210 (para. 417). For the notions of harmonization, presumption against conflicts, and systemic integration see *ibid.*, at 25–28, 206–213. See also Matz-Lück, ‘Harmonization, Systemic Integration, and “Mutual Supportiveness” as Conflict-Solution Techniques: Different Modes of Interpretation as a Challenge to Negative Effects of Fragmentation?’, 17 *Finnish Yrbk Int’lL* (2006) 39.

of equally applicable competing legal frameworks. For instance, Lady Fox considers the approach of the prevailing international and national jurisprudence on the relationship of state immunity to *jus cogens* as an expression of harmonious interpretation and MS.⁴

While these broader applications of the principle of MS are certainly worthy of further research, this article will provide an assessment of the existing practice and try to draw lessons therefrom. This practice essentially refers to the nature and role of the principle of MS in modern multilateral environmental agreements (MEAs) and its interaction with the WTO legal system. However, the relevance of the principle extends to the methods and criteria by which the WTO system accommodates so-called non-WTO law and values at large, first and foremost human rights. Actual practice is especially telling with respect to the protection of the right to health and associated public health policies pursued by WTO Members. Finally, useful insights into our problem arise from the tension between instruments and disputes concerning cultural rights and policies and WTO rules.

The foremost lesson to be drawn from such extensive practice relates to the status of MS: its constant and consistent reiteration in multilateral instruments and forums, coupled with its normative manifestations underscored in the following sections, warrants the idea of a *general principle of international law* governing the interface between economic and trade law and other rules expressing specially protected values of the international community, such as human rights and the environment. As has been said, this is not to prejudge future developments which may crystallize MS as a general principle of international law at large, a principle inescapable when dealing with any issues of interpretation, fragmentation, and competing regimes.

After an overview of the emergence of the principle of MS (section 2), the ensuing examination is organized according to the two legal dimensions of the principle sketched out above. Thus, section 3 will discuss the interpretative implications of MS and section 4 its law-making aspect. Section 5 offers some concluding remarks.

2 Genesis of the Principle of Mutual Supportiveness

A The Origins of the Principle

The baptism of MS in the international arena has to be traced to Agenda 21, the key programmatic document adopted by the 1992 UN Conference on Environment and Development. It outlines that '[t]he international economy should provide a supportive international climate for achieving environment and development goals by . . . making trade and environment *mutually supportive*';⁵ states are therefore called upon

⁴ H. Fox, *The Law of State Immunity* (2nd edn, 2008), at 155–156. See also Reinisch and Weber, 'In the Shadow of Waite and Kennedy. The Jurisdictional Immunity of International Organizations, the Individual's Right of Access to the Courts and Administrative Tribunals as Alternative Means of Dispute Settlement', 1 *Int'l Orgs L Rev* (2004) 59, at 85. Immunity versus *jus cogens* is an intriguing example of a potential application of the principle of MS. But I am not here saying that I share Lady Fox's reading of the relevant case law (which in fact I do not), nor that the same case law has indeed achieved a mutually supportive balance between immunities and other areas of the law, such as especially human rights law.

⁵ Agenda 21, at para. 2.3(b), available at: www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml, emphasis added.

to ‘promote and support policies, domestic and international, that make economic growth and environmental protection *mutually supportive*’.⁶

Crucially, two years later the same concept was restated in the WTO Decision on Trade and Environment which instructed the WTO Committee on Trade and Environment (CTE) to pursue its activities ‘with the aim of making international trade and environmental policies *mutually supportive*’.⁷ The CTE took this quite seriously and its 1996 Report to the Singapore Ministerial Conference contained telling propositions in that respect. In the CTE’s view, the WTO system and environmental protection are ‘two areas of policy-making [that] are both important and . . . should be mutually supportive in order to promote sustainable development’.⁸ Indeed, they are both ‘representative of efforts of the international community to pursue shared goals, and in the development of a mutually supportive relationship between them due respect must be afforded to both’.⁹

The point which needs to be stressed here is that its adoption by the 1994 Decision as followed up in the 1996 CTE Report turned the principle of MS into a legal standard *internal* to the WTO. This understanding is strengthened by the considerable emphasis placed upon the principle in various passages of the documents approved at the 2001 Doha Ministerial Conference. The Doha Ministerial Declaration underlines the WTO Members’ conviction ‘that the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and *must be mutually supportive*’.¹⁰ It also makes it clear that the overall rationale of the ongoing negotiations in the WTO-and-environment area, addressing *inter alia* the relationship between WTO rules and specific trade obligations set out in MEAs, is to ‘enhanc[e] the mutual supportiveness of trade and environment’.¹¹ Finally, with respect to the critical issue of the relationship between intellectual property rights (IPRs)¹² and the right to health, the Doha Declaration on the TRIPS Agreement and Public Health states that the former ‘can and should be interpreted and implemented in a manner supportive of WTO Members’ right to protect public health and, in particular, to promote access to medicines for all’.¹³ This is not a one-way

⁶ *Ibid.*, at para. 2.9(d), emphasis added. See also *ibid.*, at paras 2.19–2.22.

⁷ Decision of 14 Apr. 1994, MTN/TNC/45(MIN), emphasis added. The perspective based on MS is reflected in other parts of the decision, such as when the need to enhance the ‘positive interaction between trade and environmental measures’ is underscored, as well as that of avoiding ‘any policy contradiction’ between the multilateral trading system and the protection of the environment.

⁸ WT/CTE/1 (12 Nov. 1996), at para. 167.

⁹ *Ibid.*, at para. 171. At the institutional level, the CTE suggested that an important step for ‘creating clearer appreciation of the mutually supportive role of trade and environmental policies’ should be the serious consideration and consequent approval by WTO bodies of requests for observer status submitted by MEAs bodies; *ibid.*, at paras 175 and 217.

¹⁰ WT/MIN(01)/DEC/W/1 (14 Nov. 2001), at para. 6, emphasis added.

¹¹ *Ibid.*, at para. 31.

¹² As is well-known, IPRs are widely protected in the WTO system under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), Annex 1C to the Agreement Establishing the World Trade Organization (WTO Agreement), Marrakesh, 15 Apr. 2004. All WTO legal instruments cited throughout the article are available at: www.wto.org.

¹³ WT/MIN(01)/DEC/W/2 (14 Nov. 2001), at para. 4. See also Doha Ministerial Declaration, *supra* note 10, at para. 17.

exercise, as in the same context WTO members reiterate their commitment to the TRIPS Agreement.¹⁴ In short, a *mutually* supportive relationship between IPRs as protected in the WTO system and state obligations to secure the right to health must be devised and promoted.

Although the precise legal status of the WTO acts mentioned above may be debated, it seems safe to posit that, in the absence of any clear indication to this effect emerging from WTO practice, none of them is formally binding upon WTO dispute settlement bodies.¹⁵ They cannot in particular be considered on an equal footing with the WTO covered agreements or other binding secondary legislation, such as waiver decisions under Article IX(3) of the WTO Agreement. But this should not detract from the fact that the adoption of the principle of MS by those instruments makes it a legal standard internal to the WTO which at the very least may and should be used as appropriate context when interpreting WTO rights and obligations.¹⁶ As we shall see in section 3, this has been acknowledged by the WTO Appellate Body (AB) in its 1998 landmark decision in the *US-Shrimp* case.¹⁷ In addition, the primary relevance that the Doha instruments assign to MS makes it a critical benchmark for negotiations pursued in all those key areas which implicate non-WTO regimes and values.

B MEAs Integrating the Principle in Preambular Formulas: A Digression on the Significance of Conflict Clauses in International Law

Starting from the 1998 Rotterdam PIC Convention,¹⁸ MS has been integrated in the preambles to MEAs as a portion of a wider formula purporting to address the relationship between the MEA at hand and other international agreements and rules, trade agreements in the first place. The Preamble to the PIC Convention¹⁹ reads, so far as material:

Recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,

¹⁴ *Ibid.*

¹⁵ See, also for further references, the useful discussion in Nottage and Sebastian, 'Giving Legal Effect to the Results of WTO Trade Negotiations: An Analysis of the Methods of Changing WTO Law', 9 *J Int'l Econ L* (2006) 989, at 1003–1009.

¹⁶ *Ibid.*, at 1005. See also Bernasconi-Osterwalder, 'Interpreting WTO Law and the Relevance of Multilateral Environmental Agreements in *EC-Biotech*', Background Note to presentation at the British Institute of International and Comparative Law Seventh Annual WTO Conference (22–23 May 2007), at 5–6, available at: www.ciel.org/Publications/BIICL_ECBiotech_7Jun07.pdf.

¹⁷ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 Oct. 1998).

¹⁸ Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 10 Sept. 1998, in force 24 Feb. 2004, 38 ILM (1999) 1. For a different reconstruction of the emergence of the principle of MS in MEAs see Boisson de Chazournes and Mbengue, 'A propos du principe du soutien mutuel. Les relations entre le Protocole de Cartagena et les Accords de l'OMC', 111 *RGDIP* (2007) 829, at 832–835. This different overview is due to discrepancies between the French and English texts of the relevant provisions. For instance, the expression 'trade and environmental policies should be mutually supportive' used by the English text of the PIC Convention becomes '*les politiques commerciales et environnementales devraient être complémentaires*' in the French text.

¹⁹ Recitals 8–10.

Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection.

Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements . . .

With some terminological variation, the same three-paragraph formula has been included in the preambles to the 2000 Cartagena Protocol on Biosafety (CPB),²⁰ and the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR).²¹ In addition to the substitution of the generic term ‘policies’ with ‘agreements’ in the first recital of the formula, another notable variation affects the third recital as contained in the Preamble to CPB, which refers to the ‘non subordination’ of the Protocol to other international agreements, rather than to the ‘absence of hierarchy’ between MEAs and other agreements as in the PIC Convention and the ITPGR.

Historically, this three-paragraph formula resulted from the willingness of negotiators to supersede the approach taken in the past with respect to the relationship between MEAs and other treaties. This approach consisted in framing that relationship in terms of a self-standing ‘conflict clause’ (or ‘savings clause’) located in the operative text of the MEA, which would generally grant priority to the other agreements in case of collision. As is well-known, these conflict clauses are provided for by Article 30(2) of the Vienna Convention on the Law of Treaties (VCLT), according to which, ‘[w]hen a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail’. Relevant examples of the approach based on self-standing conflict clauses may be found in the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora²² (CITES) and, in respect of earlier treaties, in the 1994 Desertification

²⁰ Montreal, 29 Jan. 2000, in force 11 Sept. 2003, 39 ILM (2000) 1027. The relevant part of the Preamble to the CPB (Recitals 9–11) reads in full:

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

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

Understanding that the above recital is not intended to subordinate this Protocol to other international agreements . . .

²¹ Adopted by the FAO Conference on 3 Nov. 2001, in force 29 June 2004, text available at: www.planttreaty.org/texts_en.htm. Recitals 9–11 of the Preamble to the ITPGR read:

Recognizing that this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security;

Affirming that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements;

Understanding that the above recital is not intended to create a hierarchy between this Treaty and other international agreements . . .

See also Recital 12 of the same Preamble where the Contracting Parties declare that they are ‘[a]ware that questions regarding the management of plant genetic resources for food and agriculture are at the meeting point between agriculture, the environment and commerce, and convinced that there should be synergy among these sectors’.

²² Washington, 3 Mar. 1973, in force 1 July 1975, 993 UNTS 243, Art. XIV(2)(3).

Convention.²³ It is proven, however, that the newness of the scheme followed by the negotiators of the PIC Convention, the CPB, and the ITPGR resulted from dissatisfaction with the conflict clause laid down in Article 22(1) of the 1992 Convention on Biological Diversity²⁴ (CBD), a Convention fraught with implications for the WTO system. Article 22(1) ambiguously provides that the CBD 'shall not affect the rights and obligations of any Contracting Parties deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious threat or damage to biological diversity', thereby complicating the problem it set out to resolve. It makes it clear, however, that the primacy granted to other treaties (trade agreements in the first place) is *conditional* upon the absence of 'serious threat or damage to biodiversity' ensuing from their application. The issue is *inter alia* how to interpret this poorly-defined threshold.

More fundamentally, dissatisfaction with the CBD's conflict clause was linked to the perceived need of a shift in the MEAs-and-WTO debate from a theory of conflictual relationships to one of co-existence, consistency, and complementarity. First, this shift would signal the continued importance and inherent potential of rules on interpretation for avoiding and reconciling apparent conflicts. It is in this light that the introduction of the principle of MS into the preambular formula recalled above must be seen, together with the 'mutual neutralization'²⁵ of the following two paragraphs, i.e., those relating to 'non modification' of the other agreements by MEAs and 'non subordination' of the latter to the former (or 'absence of hierarchy' among themselves).

Nevertheless, it is interesting to note that certain literature has insisted on interpreting the MEAs' preambular formula at stake as retaining a conflict clause under Article 30(2) VCLT which would ensure primacy (*inter alia*) to the WTO agreements *also* as between WTO members which *are* parties to *later* non-WTO treaties. In this vein, an author²⁶ has submitted that the CPB's recital according to which the Protocol 'shall not be interpreted as implying a change in the rights and obligations . . . under any existing international agreements' amounts to a genuine savings clause which is *not* nullified by the following statement that the preceding recital 'is not intended to subordinate this Protocol to other international agreements'. In this view, the language of 'non subordination' merely underscores that the Protocol is not 'of a lower rank, class, or significance than other agreements',²⁷ thus reminding one of the absence of

²³ Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Paris, 17 June 1994, in force 26 Dec. 1996, 33 ILM (1994) 1328. Art. 8(2) of the Convention provides: 'The provisions of this Convention shall not affect the rights and obligations of any Party deriving from a bilateral, regional or international agreement into which it has entered prior to the entry into force of this Convention for it.'

²⁴ Rio de Janeiro, 5 June 1992, in force 29 Dec. 1993, 31 ILM (1992) 822.

²⁵ J. Pauwelyn, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law* (2003), at 334.

²⁶ Safrin, 'Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements', 96 *AJIL* (2002) 606, at 618–621.

²⁷ *Ibid.*, at 620. Although the thesis at hand finds better support in the preambles to the PIC Convention and ITPGR (which outline the intention of the parties not to 'create a hierarchy' between these treaties and other agreements), it may nevertheless be refuted for the reasons pointed out in the text below.

any inherent hierarchy among treaties in international law. The ‘non subordination’ paragraph would therefore be unable to neutralize the preceding savings clause, as the latter would simply dictate an empirical criterion of priority in the application of the relevant treaties, with no implication of hierarchical superiority whatsoever. I firmly disagree with this specious argument. Textually, I believe that the language of ‘non subordination’ speaks to Article 30(2) VCLT for a quite different purpose. It makes it clear that the preceding paragraph in the CPB must not be assimilated to an Article 30(2) ‘subordination clause’ which recurs when a treaty specifies that it is ‘subject’ to other treaties. The French text of this provision corroborates my position as it refers to a treaty which ‘*précise qu’il est subordonné à un traité antérieur ou postérieur*’.²⁸ True, Article 30(2) also provides for the situation where a treaty declares that ‘it is not to be considered as incompatible with’ other agreements, but this second type of conflict clause (so-called ‘compatibility clause’) is rather nebulous. First, among the plethora of treaty formulations addressing the relationship with other agreements, compatibility clauses do *not* naturally convey the meaning of a potentially conflicting relationship triggering – if need be – the legal effect established by Article 30(2) (prevalence of the saved agreements): how to conceptualize a situation as one of conflict when the pertinent treaty explicitly states that it is compatible with other treaties? This apparent contradiction was felt by several delegations at the time of final drafting of the VCLT, which objected to the inclusion of compatibility clauses in the current Article 30(2).²⁹ Secondly, and accordingly, compatibility clauses seem especially apt to operate at the interpretive level, while their conflict-resolution purpose and function must seriously be questioned.³⁰ Thirdly, there are at any rate certain treaty formulations which are far clearer than the MEAs’ preambular paragraph at stake in setting out the primacy of other agreements. This is the case with ‘without prejudice’ and ‘not affecting’ clauses, but it is *not* the case with the MEAs’ paragraph, insofar as this requires the avoidance of *interpretations* of MEAs which would imply a change in the rights and obligations arising from other agreements. Emphasis is unquestionably upon conciliatory interpretative techniques. Moreover, the paragraph may be taken as a reminder (useful, but not essential) of the need to preserve the divide between interpretation and modification of treaties. In this context, the paragraph also means that the MEAs’ negotiators did not intend to conclude derogatory *inter se* agreements under Article 41 VCLT.

Substantively, I think that the argument at stake misses the point: it unreasonably downplays the significance of the clause containing the principle of MS between MEAs and other agreements. By contrast, coming first in the three-paragraph formula, the principle should be taken to inform the meaning of the following clauses. It makes sense of the inconclusiveness of the latter by depicting the relationship between

²⁸ Emphasis added.

²⁹ See Paolillo, ‘Article 30 – Convention de 1969’, in O. Corten and P. Klein (eds.), *Les Conventions de Vienne sur le droit des traités* (2006), i, 1247, at 1270–1271; Pauwelyn, *supra* note 25, at 334–335 and n. 15.

³⁰ See E. Sciso, *Gli accordi internazionali confliggenti* (1986), at 318–319; Capotorti, ‘Il diritto dei trattati secondo la Convenzione di Vienna’, in *Convenzione di Vienna sul diritto dei trattati* (1977), 9, at 34–35.

competing regimes as one of interrelation, complementarity, and synergies geared towards achieving goals which are in the ultimate interest of the international community as a whole (such as sustainable development and food security). A mechanical resort to conflict-resolution techniques, such as conflict clauses, has no role to play in this respect.

The best evidence of the central function which MS has acquired in the most recent MEAs contemplating trade restrictions comes from the 2001 Stockholm POPs Convention.³¹ In this Convention, the three-paragraph formula discussed above is conflated into a sole preambular recital, where the parties recognize that 'th[e] Convention and other international agreements in the field of trade and the environment *are* mutually supportive'.³² As a result, the Convention does not contain any conflict clause purporting to govern its relationship with trade agreements. States are rather convinced³³ that MS is the only viable conceptual benchmark for orientating discussions and interpretations of the Convention in the light of multilateral trade obligations.

C Incorporation of the Principle in the Operative Text of the UNESCO Cultural Diversity Convention

The most interesting innovation in treaty-making and MS is to be found in the 2005 UNESCO Cultural Diversity Convention (CDC).³⁴ The heated debates during the negotiating process in respect of the relationship between the CDC and the WTO agreements³⁵ resulted in the operative clause of Article 20, significantly headed 'Relationship to other treaties: mutual supportiveness, complementarity and non-subordination', which is worth quoting in full:

1. Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty,
 - (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and
 - (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention.

³¹ Convention on Persistent Organic Pollutants, Stockholm, 22 May 2001, in force 17 May 2004, 40 ILM (2001) 532.

³² Recital 9, emphasis added.

³³ The replacement of the conditional tense 'should' as used in the previously discussed preambular formula with the present tense 'are' bears witness to this conviction. MS should thus not be viewed as a merely aspirational standard.

³⁴ Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Paris, 20 Oct. 2005, in force 18 Mar. 2007, available at: unesdoc.unesco.org/images/0014/001429/142919e.pdf.

³⁵ On which see Ruiz Fabri, 'Jeux dans la fragmentation: la Convention sur la promotion et la protection de la diversité des expressions culturelles', 111 *RGDIP* (2007) 43, at 63–66, 75–77; Wouters and De Meester, 'The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law', 42 *J World Trade* (2008) 205, at 235–238.

2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.

Although the text of the preambular formula in the PIC Convention, the CPB, and the ITPGR was the primary inspiration for the negotiators,³⁶ it is clear that Article 20 CDC deviates from that formula in several respects. Chiefly among these, Article 20 CDC is an operative clause. This means that the normative value of its stipulations is magnified as compared to preambular statements the legal significance of which is usually confined to contextual interpretation. A preamble is not *per se* a source of rights and obligations. This is all the more important in relation to Article 20 CDC which is not limited to prescribing formal rules on conflicts and interpretation, as it also contemplates substantive standards of conduct incumbent upon states parties.

In addition, Article 20 is a more elaborate provision than the preambular formula discussed above and its structure is different. However, I believe that its meaning is essentially the same. As with the MEAs' formula, Article 20 does *not* contain any self-standing conflict clause. The provision at paragraph (2) which forecloses interpretations of the CDC entailing modifications of rights and obligations under other treaties cannot be viewed in isolation.³⁷ It is qualified, *viz* neutralized, by the notion of non-subordination of the CDC to other agreements envisaged by the first paragraph of Article 20. Nevertheless, even here,³⁸ resistances to this – quite obvious – interpretation may be discerned in legal literature. An author³⁹ has in particular suggested that the non-subordination clause would affect only treaties concluded after the entry into force of the CDC, while the latter would yield to the WTO agreements as earlier treaties.⁴⁰ This reading, based on the use of the expression 'other treaties *to which they are parties*' by Article 20(2), is unsustainable. An identical expression is used throughout Article 20, thereby rendering that argument circular and clumsy: it would imply that, while CDC parties are *inter alia* obliged to take into account the CDC when interpreting and applying the WTO agreements or when entering into new WTO obligations (Article 20(1) (b)), the latter would trump the former in case of conflict as per Article 20(2). Not a straightforward legal construction!

The same author further corroborates his view by reference to the preparatory work of the CDC which would evidence that the retention of a WTO savings clause was the *conditio sine qua non* for the final almost unanimous approval of the CDC at UNESCO.⁴¹ But subsequent practice disavows this position. When ratifying the CDC, both Mexico and Australia have formulated specific reservations⁴² in respect of Article

³⁶ See Ruiz Fabri, *supra* note 35, at 77 (n. 100).

³⁷ *Ibid.*, at 77–78.

³⁸ Cf. *supra* text accompanying notes 26–31. As said in that context, the alleged capability of 'compatibility clauses', such as Art. 20(2) CDC, to resolve norm conflicts is to be rejected. The following statements in the text disavow the argument of the priority of the WTO Agreements over the CDC for additional reasons.

³⁹ Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law', 9 *J Int'l Econ L* (2006) 515, at 544–546.

⁴⁰ *Ibid.*, at 546.

⁴¹ *Ibid.*, at 543–544.

20(1) aimed at ensuring that it does not undermine WTO obligations. The Australian reservation reads: 'The Convention shall be interpreted and applied in a manner that is consistent with the rights and obligations of Australia under any other treaties to which it is a party, including the Marrakesh Agreement Establishing the World Trade Organization.' As to the Mexican reservation, it similarly provides, so far as material, that '[t]his Convention shall be implemented in a manner that is in harmony and compatible with other international treaties, especially the Marrakesh Agreement Establishing the World Trade Organization and other international trade treaties'. These reservations only require consistent and harmonious interpretation and application of the CDC and WTO rules, without claiming any priority for the latter. As such, they are entirely consistent with the true meaning and spirit of Article 20, as epitomized by the concept of MS. But the point here is that such reservations deny that the existence of a WTO savings clause constituted the essential basis for the adoption of the CDC.

It is worth outlining that the preceding considerations do not aim to affect the position of third states, i.e., states not parties to the CDC (or to the MEAs discussed above), such as for instance the United States. For the moment, I just wanted to point out that the theses according to which *later* treaties such as the CDC are trumped by WTO agreements also as between parties to *both* sets of obligations are simply untenable.

As the title of the provision suggests and although its structure may be deceiving in this respect, the essence and core element of Article 20 is again the principle of MS which demands complementarity and synergies in interpreting and implementing competing regimes. Article 20 is especially significant for the progressive clarification of the normative value of the principle. It first reminds one that it may be seen as a corollary of the general principle of good faith performance of treaty obligations (and thus of the *pacta sunt servanda* principle enshrined in Article 26 VCLT). This is rather straightforward: in its interpretative dimension, MS may well operate as an effective conflict-prevention technique capable of reconciling competing legal rules, thereby preserving their integrity and the *pacta sunt servanda* principle.

Secondly, Article 20(1)(a) conceives of MS in terms of state *obligations*. It lays down an obligation of conduct to 'foster' ('*encourager*' in the French text) MS between the CDC and other treaties. It is probably true that, as formulated, this is a soft and flexible obligation⁴³ which may end up being an 'empty box'⁴⁴ in the absence of specific duties arising therefrom. However, the structure of Article 20 notwithstanding, I believe that the normative content of this obligation to foster MS is supplied by the following paragraph of the provision at hand. Article 20(1)(b) stipulates that states parties *shall take into account* the CDC when interpreting and applying the other treaties to which they are parties, as well as *when undertaking further international obligations*. Therefore, Article 20(1)(b) sheds light into both legal dimensions of the

⁴² These reservations, respectively made on 18 Sept. 2009 (Australia) and 5 July 2006 (Mexico) upon ratification of the CDC by the two countries, are available at: portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html#RESERVES.

⁴³ Ruiz Fabri, *supra* note 35, at 76; Hahn, *supra* note 39, at 540.

⁴⁴ Or a superfluous restatement of the principle of good faith and/or the presumption against conflicts: *ibid.*

principle of MS, i.e., its unquestionable interpretive function⁴⁵ and a more ambitious law-making dimension. According to the CDC, the latter consists in restraining the contractual freedom of the parties with respect to their future law-making activities.⁴⁶ When these unfold, they are obliged to take into account the provisions of the CDC. This obligation is complemented by Article 21 which imposes on parties the undertaking ‘to promote the objectives and principles of th[e] Convention in other international forums’ and ‘to consult each other’ for this purpose.⁴⁷ Its rationale is again MS, coordination, and complementarity between competing regimes under an overarching duty of good faith. Any logic of conflict and hierarchical primacy is extraneous to this obligation. It indeed falls short of dictating that future commitments assumed by the parties must bend to the requirements of the CDC. This must only be considered in good faith in that context and weighted against competing interests in order to devise balanced solutions which safeguard the integrity of both legal systems. It is clear that this obligation applies not only when parties negotiate brand new treaties or treaty-based legislation, but also when amendments to existing treaties are contemplated.⁴⁸

In section 4, I will discuss in more detail this law-making obligation and will take a step forward by submitting that it also requires a *proactive attitude* on the part of states, according to which they are bound to promote and support negotiations aimed at amending agreements which cannot otherwise be reconciled with other regimes protecting essential values of the international community. For the time being, it is important to note that the CDC seems to endorse the latter perspective, by drawing attention to the potential inherent in ‘responsible law-making’ as a desirable and viable political option to avert treaty conflicts and facilitate the future task of treaty interpreters and enforcers.⁴⁹

⁴⁵ Which, despite the wording of the CDC on the point, should work both ways: WTO agreements have also to be taken into account when interpreting and applying the CDC. For the time being, however, WTO agreements have exerted a significant influence on the *drafting* of the CDC. Symbolic in this respect is the need perceived by negotiators to provide a definition of the term ‘protection’, which according to Art. 4(7) CDC means ‘the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions’ (not ‘protectionist’ measures in trade jargon).

⁴⁶ State resistance to these restraints is predictable and unsurprising: see Australia’s and Mexico’s reservations upon ratification of the CDC, *supra* note 42, according to which, respectively, Art. 20(1)(b) ‘shall not prejudice the ability of Australia to freely negotiate rights and obligations in other current or future treaty negotiations’ and ‘does not prejudice [Mexico’s] position in future international treaty negotiations’.

⁴⁷ According to Art. 23(6)(e), the Intergovernmental Committee (one of the main organs of the CDC) is entrusted with establishing ‘procedures and other mechanisms for consultation aimed at promoting the objectives and principles of th[e] Convention in other international forums’.

⁴⁸ Beat Graber, ‘The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?’, 9 *J Int’l Econ L* (2006) 553, at 567.

⁴⁹ On this shift from a conflict-based vision only tailored to *ex post* solutions at the time of enforcement towards an *ex ante* law-making perspective see the telling remarks by Ruiz Fabri, *supra* note 35, at 78.

3 The Alliance of Mutual Supportiveness and Sustainable Development as Principles of Interpretation and Balancing Techniques: Rethinking *US-Shrimp* and *EC-Biotech Products*

The interpretative dimension of the principle of MS is underexploited in judicial and arbitral practice, even in the area of trade and competing regimes where the principle appears well-settled by now. There exist various pertinent decisions resorting to hermeneutic techniques which have much in common with MS, such as harmonious interpretation and systemic integration. But, with the exception of the two decisions discussed below, it is difficult to come across findings which may unequivocally be traced to reliance upon MS in a self-standing fashion.

It is however important to note that, in cases involving a variety of competing environmental/social/cultural and economic concerns, the interpretative potential of MS is best grasped when one considers its solid connection with the principle of sustainable development (SD). As seen above, MS is most commonly characterized as an essential means for achieving SD.⁵⁰ This is understandable as both MS and SD are rooted in the notion of *integration*, i.e., integration between competing regimes, in the former case, and integration of all the environmental, social, cultural, human rights, and economic factors involved in a given situation, in the latter. As the Tribunal in the *Iron Rhine* dispute put it, 'Environmental law and the law on development stand not as alternatives but as *mutually reinforcing, integral concepts*'.⁵¹

Practice bears witness to a growing acknowledgement of the interpretative role of the principle of SD. *Gabčíkovo*,⁵² *Iron Rhine*,⁵³ and *Pulp Mills*⁵⁴ may persuasively be viewed as a triangle of decisions⁵⁵ whereby the International Court of Justice (ICJ) and arbitral tribunals have sanctioned the recognition of SD both as a key hermeneutic tool for modernizing 'old treaties' in line with contemporary environmental standards and a balancing technique for the equitable reconciliation of the competing interests underlying the facts of the case at hand. In all of these disputes, the significant impact

⁵⁰ This is true also with respect to the CDC, despite the absence of a link between MS and SD in its previously discussed Art. 20. The CDC affords prominent importance to SD for the realization of its primary objective, i.e., the promotion and protection of cultural diversity. SD is indeed one of its guiding principles (Art. 2(6)); see also Arts. 13 and 14.

⁵¹ *Iron Rhine ("Ijzeren Rijn") Railway (Belgium/Netherlands)*, Award of the Arbitral Tribunal, 24 May 2005, at para. 59, emphasis added. The text of the Award is available at: www.pca-cpa.org/showpage.asp?p2pag_id=1155. In the passage at hand, the Tribunal built upon Principle 4 of the 1992 Rio Declaration on Environment and Development (31 ILM (1992) 874), according to which '[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it'.

⁵² *Gabčíkovo-Nagyymaros Project (Hungary/Slovakia)* [1977] ICJ Rep 7, at paras 140–141. The paras quoted must necessarily be read jointly with the Court's evolutionary construction of the provisions of the treaty at stake: *ibid.*, at paras 111–112.

⁵³ *Supra* note 51, at paras 59, 80, 84, 221, 223, 243.

⁵⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 Apr. 2010, at paras 75–76, 177, available at: www.icj-cij.org/docket/files/135/15877.pdf. See also *ibid.*, Order on Provisional Measures of 13 July 2006 [2006] ICJ Rep 113, at para. 80.

⁵⁵ A pivotal role in this respect has also been played by the 1998 *US – Shrimp* decision of the WTO AB, *supra* note 17, which is discussed in more detail below in this section.

exercised by SD on the interpretive choices made by the adjudicatory bodies is crystal clear. Adjudicators visibly favour those hermeneutic canons, such as teleological, effective, and/or evolutionary interpretation, which are more likely to foster a reasonable accommodation of interests in accordance with the rationale of SD. Admittedly, this process is facilitated when, as in the examples at stake, the disputes and treaties involved therein are of an essentially bilateral nature.

At the interpretative level, then, SD operated in these cases in a way which is hardly distinguishable from what can be achieved by relying upon MS. There exists indeed a close alliance, as well as a certain degree of overlapping, between the two principles which, given the pervasiveness of SD in today's regulation of social activities, may be at play in a large number of disputes. Nevertheless, instead of continuing to overburden SD with contentious legal implications, it seems more appropriate to consider MS as the *interpretative pillar of the principle of SD*. Their relationship, as encapsulated by the international agreements reviewed above, is indeed that of a means to an end.

In addition, given its derivation from well-settled principles of interpretation, MS is more intuitively apt to operate at the hermeneutic level than SD. The few exceptional decisions where it has been explicitly relied upon well illustrate this potential. A first example comes from one of the awards made in the *SD Myers* case⁵⁶ by an Arbitral Tribunal established under the NAFTA investment chapter.⁵⁷ The case concerned a Canadian ban on the export of polychlorinated biphenyl (PCB) wastes allegedly enacted pursuant to various international environmental standards and rules. Thus, the case squarely involved competing economic, environmental, and health concerns. The Tribunal engaged in an extensive review of the pertinent environmental regimes, which demonstrated that MS was chief among the principles governing the interface of trade, investment, and environmental obligations. MS dictated that 'environmental protection and economic development can and should be mutually supportive'.⁵⁸ It is worth noting that this finding was most likely inspired by the NAAEC⁵⁹ which was rightly considered as relevant interpretive context.⁶⁰ Article 1(b) NAAEC includes as one of its objectives the 'promot[ion] [of] sustainable development based on cooperation and mutually supportive environmental and economic policies'. Most importantly, the Tribunal was guided by MS in devising a harmonious and consistent interpretive balance of the competing obligations at stake, which it found in the requirement to adopt the 'least-investment restrictive environmental measure' reasonably available to states.⁶¹

⁵⁶ *SD Myers, Inc v. Canada*, Partial Award, 13 Nov. 2000, 40 ILM (2001) 1408.

⁵⁷ That is, Ch. 11 of the North American Free Trade Agreement, 17 Dec. 1992, 32 ILM (1993) 289 and 605.

⁵⁸ *SD Myers*, *supra* note 56, at paras 220 and 247.

⁵⁹ North American Agreement on Environmental Cooperation, 14 Sept. 1993, 32 ILM (1993) 1480.

⁶⁰ The NAAEC is indeed to be regarded as an agreement relating to the NAFTA which was made between the US, Canada, and Mexico in connection with the conclusion of the NAFTA itself (Art. 31(2)(a) VCLT).

⁶¹ *SD Myers*, *supra* note 56, at para. 221; see also paras 195, 255, and 298. The Tribunal found that Canada had not fulfilled that requirement. For a recent reassessment of the Tribunal's reasoning and findings see Pavoni, 'Environmental Rights, Sustainable Development, and Investor-State Case Law: A Critical Appraisal', in P.-M. Dupuy, F. Francioni, and E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration* (2009), 525, at 530–534, 540–541.

The second decision pertinent in this context is the well-known 1998 Report of the WTO AB in the *US – Shrimp* case.⁶² MS between trade and environmental regimes may well be considered one of the foremost principles underlying this decision.⁶³ The AB explicitly referred to the principle of MS as enshrined in the various sources quoted above, including both non-WTO instruments (e.g., Agenda 21) and WTO acts (e.g., 1994 Decision on Trade and Environment).⁶⁴ It acknowledged the close link between MS and the goal of SD as recognized by the Preamble to the WTO Agreement. MS and SD served the purpose of guiding the AB in the formulation of a balanced and conciliatory interpretation of the *chapeau* to Article XX GATT, which provides that the measures taken by WTO members pursuant to the exceptions in Article XX must not be ‘applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade’. The AB stated that the *chapeau* is ‘but one expression of the principle of good faith’,⁶⁵ and that accordingly its fundamental purpose is the prevention of abuse of Article XX exceptions and the maintenance of the balance of rights and obligations stemming from WTO membership. On the facts of the case, this meant that the measures at stake violated the *chapeau*’s non-discrimination requirements since the US, as the country responsible for their adoption, had failed to engage in meaningful multilateral negotiations with the respondents aimed at concluding agreements for the protection of sea turtles.⁶⁶

Therefore, the AB’s approach in this case constitutes an incipient recognition of the double nature of the principle of MS: its conciliatory rationale operates at both the interpretive and law-making levels. While the latter may be less evident than the former, it remains that the duty to pursue serious negotiations in order to seek normative solutions⁶⁷ to trade and environmental issues capable of accommodating competing interests stands out as one of the essential lessons to be taken from the *US – Shrimp* decision. Finally, it is worth recalling that for our purposes what is most significant in this decision is the AB’s acknowledgement of MS (and the ensuing duties of multilateral cooperation and negotiation) as a standard internal to the WTO system, not one borrowed from outside sources: ‘[t]he need for, and the appropriateness of, such [concerted and cooperative] efforts have been recognized in the WTO itself as well as in a significant

⁶² *Supra* note 17.

⁶³ Cf. Ruiz Fabri, *supra* note 35, at 79; Bernasconi-Osterwalder, *supra* note 16, at 9, 11.

⁶⁴ *US – Shrimp*, *supra* note 17, at paras 154 and 168.

⁶⁵ *Ibid.*, at para. 158.

⁶⁶ *Ibid.*, at paras 166–172.

⁶⁷ These normative solutions, in the form of agreements or other legal instruments, need not necessarily be reached in order for a measure to be justified under Art. XX GATT. In other words, the duty is to negotiate in good faith mutually acceptable solutions, not actually to conclude agreements: AB Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Recourse to Article 21.5 of the DSU by Malaysia, WT/DS58/AB/RW (22 Oct. 2001), at paras 123–124. This is in line with the case law of the ICJ, as most recently confirmed in the *Pulp Mills on the River Uruguay* Judgment, *supra* note 54, at para. 150 (recalling *Railway Traffic between Lithuania and Poland*, Advisory Opinion, PCIJ Series A/B No. 42 (1931), at 116).

number of other international instruments and declarations'.⁶⁸ Therefore, resorting to MS in WTO dispute settlement is not *in principle* tantamount to superimposing on WTO Members legal standards which they have not accepted. It is to be recalled that *US – Shrimp* predates the Doha instruments and their emphasis on MS as a fundamental benchmark for key-negotiating areas. It seems clear that after Doha the status of MS as a WTO standard cannot but be boosted.

As has been said, reliance upon MS in *US – Shrimp* ran in parallel with the AB's vigorous endorsement of SD, something which provides evidence of the abovementioned overlapping utilization of the two principles. In light of its adoption by the Preamble to the WTO Agreement, the AB depicted SD as a standard which 'must add colour, texture and shading' to the interpretation of WTO members' rights and obligations.⁶⁹ SD was indeed a veritable driving force behind the AB's interpretive exercise, a driving force capable of dragging into this dispute any kind of environmental legal materials, including soft law and conventions unratified even by some of the disputing parties.⁷⁰ It needs to be stressed that these AB's findings are more far-reaching than the ICJ and arbitral decisions recalled above because, unlike the latter, they affected the (at least in formal terms) *multilateral* treaty framework of the WTO.

The holistic approach to the interpretation of WTO agreements in *US – Shrimp*, as supported by an evolutionary reading of Article XX GATT 'in the light of contemporary concerns of the community of nations about the protection and conservation of the environment',⁷¹ is set at naught by the 2006 Panel Report in the *EC – Biotech Products* case.⁷² This case was an exceptional opportunity to enhance the status of MS in the WTO legal system, as the EC (now EU) asked the Panel to take into account the CPB for interpretive purposes as part of its review of the disputed European measures affecting trade in biotech products. The EC recalled the inconclusiveness of the three-paragraph formula in the Preamble to the CPB as a conflict-resolution tool, while underlying that the central notion in that formula was that of MS between trade and environment agreements.⁷³ This notion would require a consistent interpretation of the CPB and the applicable WTO rules, which had indeed to be regarded as complementary.⁷⁴

The opportunity was lost. The Panel saw its mandate as essentially directed at determining whether the CPB, as well as the CBD and the precautionary principle, could enter the case via Article 31(3)(c) VCLT, i.e., as interpretive materials corresponding to 'relevant rules of international law applicable in the relations between the parties'. It favoured the narrowest reading of this provision and accordingly stated that the CPB could not be taken into account, as it was not ratified by *all the parties to the*

⁶⁸ *US – Shrimp*, *supra* note 17, at para. 168 (emphasis added).

⁶⁹ *Ibid.*, at paras 153 and 155.

⁷⁰ In this sense see, for instance, Sands, 'International Courts and the Application of the Concept of "Sustainable Development"', 3 *Max Planck UN Yrbk* (1999) 389, at 403.

⁷¹ *US – Shrimp*, *supra* note 17, at para. 129.

⁷² *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (29 Sept. 2006).

⁷³ *Ibid.*, at para. 7.54.

⁷⁴ *Ibid.*, at para. 7.55.

WTO Agreement, nor by any of the complaining parties for that matter.⁷⁵ Moreover, the Panel distinguished the *US – Shrimp* decision when it stated that the latter's use of unratified treaties merely served the purpose of Article 31(1) VCLT by shedding light into the ordinary meaning of the expression 'exhaustible natural resources' in Article XX(g) GATT.⁷⁶ In other words, reliance upon those unratified treaties was only a matter of textual interpretation insofar as they functioned as 'dictionaries',⁷⁷ not as 'legal rules',⁷⁸ and were considered for their 'informative character'.⁷⁹ In the case at hand, however, the Panel did not see fit to use the CPB even for this limited purpose.⁸⁰

The *EC – Biotech Products* Report cannot be viewed as a reliable interpretation of *US – Shrimp*.⁸¹ It is undeniably an oversimplification of the complex, sophisticated, and nuanced reasoning followed by the AB in that decision.⁸² Of course, the rationale underlying the Panel's disregard for unratified treaties such as the CPB is *in principle* fully understandable: allowing the interpretation of WTO obligations to be affected by such treaties, especially when any of the disputing parties have not accepted them,⁸³ would unreasonably encroach upon the states' right not to be held by obligations which they have not consented to.⁸⁴ However, this cannot stand for MS as long as it is (rightly) viewed as a standard internal to the WTO legal system. As such, MS should not be taken as a standard allowing non-WTO rules to enter WTO disputes through the back door. It is rather a neutral and unbiased principle assisting an interpreter to reach an equitable balance between the competing interests and values underlying a given legal situation. For this purpose, consideration of the wider normative framework pertinent to a given dispute becomes inevitable. It is simplistic to reject this exercise as tantamount to superimposing obligations against one's will. Rather, a consistent use

⁷⁵ *Ibid.*, at paras 7.68, 7.70–7.75. Argentina and Canada have only signed the CPB, while the US has neither signed nor ratified it.

⁷⁶ *Ibid.*, at para. 7.94.

⁷⁷ *Ibid.*, at para. 7.92.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*, at para. 7.95.

⁸¹ This is also due to the EC's decision not to appeal against the *Biotech Products* Report. This decision is unfortunate from our perspective, as it deprives us of the 'authoritative' view of the AB on a systemic issue the clarification of which would greatly benefit the WTO in terms of legal certainty and predictability. It would have been important to understand whether and how, in the aftermath of *US – Shrimp*, the AB is willing to play the role of 'gatekeeper of the WTO system in relation to MEAs' as thoughtfully suggested by Scott, 'International Trade and Environmental Governance: Relating Rules (and Standards) in the EU and the WTO', 15 *EJIL* (2004) 307, at 344–351.

⁸² See, for instance, Young, 'The WTO's Use of Relevant Rules of International Law: An Analysis of the *Biotech Case*', 56 *ICLQ* (2007) 907, at 919–920 (impossibility to see the use of non-WTO law in *US – Shrimp* as confined to the application of Art. 31(1) VCLT); Recanatì, 'Sul rilievo interpretativo di regole internazionali vincolanti per le parti nel sistema dell'OMC', 90 *Rivista di diritto internazionale* (2007) 773, at 774 (non-WTO law was used in *US – Shrimp* also for the interpretation of the *chapeau* to Art. XX GATT).

⁸³ The Panel, indeed, leaves the issue open whether a different outcome would be justified when non-WTO rules 'are applicable in the relations between all parties to the dispute, but not between all WTO Members, and in which all parties to the dispute argue that a multilateral WTO agreement should be interpreted in the light of these other rules of international law': *EC-Biotech Products*, *supra* note 72, at para. 7.72.

⁸⁴ The Panel is explicit about this: *ibid.*, at para. 7.71.

of the principle of MS in the WTO would witness the system's openness to the rest of international law and provide a powerful legitimizing factor therefore.

Indeed, rather than the correctness of the specific solutions retained in terms of the VCLT or general international law, the critical problem with such cases as *EC – Biotech Products* is that their disregard for the principle of MS (and thus for the pertinent non-WTO rules) risks ending up in interpretive exercises which fail to reach a desirable and legitimizing reconciliation of competing interests, a quest which is the *raison d'être* of the principle itself. It would suffice here to underscore that in *Biotech Products* the decision not to use the CPB at least for its informative character (under Article 31(1) VCLT) was unwarranted⁸⁵ and that, most importantly and conversely, the Panel did generously resort to other non-WTO standards, such as those emanating from the Codex Alimentarius Commission or the FAO, for the same purposes.⁸⁶ This was done in a quite liberal and arbitrary way, i.e., by selecting those standards which best fit with the Panel's interpretations of the relevant WTO terms, and with no reference whatsoever to the status of such organizations and instruments in terms of participation by WTO members.

4 Mutual Supportiveness as a Law-Making Principle

A Setting Out the Argument

This section discusses what I have previously referred to as the law-making element of the principle of MS. This element consists of an emerging states' duty to cooperate in good faith in order to facilitate law-making processes, including amendment procedures, in respect of agreements which may generate systemic conflicts with other regimes safeguarding essential values of the international community. Evidently, these law-making processes constitute a last resort tool to be set in motion when mutually supportive interpretive solutions cannot be achieved because the norms and principles concerned are irreconcilable.

⁸⁵ Suffice it to think of Annex III to the CPB on 'risk assessment' which might well have been used to shed light onto the corresponding poorly-defined notion in Art. 5 of and Annex A(5) to the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). The same applies to the Panel's consideration that it was not only imprudent, but also *unnecessary* to take a position on the status of the precautionary principle in international law, as the principle would have no bearing on the disposition of the claims before it: *ibid.*, at para. 7.89. This cannot be true, insofar as one is of the opinion, as I am, that the principle at hand does have a wider scope than reflected in certain WTO rules (*contra* see Gradoni and Ruiz Fabri, 'Droit de l'OMC et précaution à la lumière de l'affaire des «OGM»', 183 *Recueil Dalloz* (2007) 1532; cf. also Cheyne, 'Gateways to the Precautionary Principle in WTO Law', 19 *J Environmental L* (2007) 155).

⁸⁶ Above all, to determine the meaning of terms such as 'pests' and 'additives' in Annex A(1) to the SPS Agreement, and thus whether this Agreement was applicable to the contested measures. See especially the insightful remarks by Young, *supra* note 82, at 922–928. See also Peel, 'A GMO by Any Other Name . . . Might Be an SPS Risk!: Implications of Expanding the Scope of the WTO *Sanitary and Phytosanitary Measures Agreement*', 17 *EJIL* (2006) 1009.

This law-making aspect is what I consider the real added value that MS has to offer to the current international law system. The underlying idea is of course nothing new, as it is rooted in and builds upon the overarching principles of good faith and cooperation. However, its impact upon the debate on competing regimes and fragmentation of international law certainly deserves careful scrutiny, especially in the light of certain practical examples relating to the evolution of the relationship between the WTO and other legal systems.

When reviewing the notion of MS, the ILC Study Group's 'Fragmentation Report'⁸⁷ starts from considerations which are similar to the above perspective. It outlines that the integration of MS into the preambles to MEAs results in 'compromise formulas that push . . . the resolution of problems to the future';⁸⁸ MS would be based on the assumption 'that conflicts may and should be resolved *between the treaty partners as they arise* and with a view to mutual accommodation'.⁸⁹ However, other passages of the Report reveal that, differently from my view, the future that it foresees is one where those conflicts are bound to be resolved at the dispute settlement level.⁹⁰ As in many cases the law-applier will be institutionally linked to one of the competing regimes (say, the WTO dispute settlement bodies), the Report suggests that the open-ended nature of MS formulas 'will come to support the primacy of the treaty that is part of the law-applier's regime'.⁹¹ In other words, MS contributes to a danger of 'structural bias',⁹² as after all what is mutually supportive in a given situation is in the (biased) eye of the beholder. Hence, the Report's quest for regime-independent third party dispute settlement.⁹³

The 'structural bias' argument has the merit of singling out a crucial question: when giving effect to the principle of MS in specific disputes, which body may guarantee that the 'line of equilibrium'⁹⁴ will be objectively identified? Nevertheless, I disagree with the view that the best way forward is necessarily that of third party dispute settlement. Even if it were feasible that disputes about competing regimes be brought before (say) the ICJ, I am not persuaded that the resulting decisions would come to be universally regarded as having achieved an incontestably reasonable accommodation of interests. For instance, I am not sure that the *Pulp Mills Judgment*,⁹⁵ with its controversial treatment of scientific evidence and somewhat artificial distinction between violated procedural obligations and fully respected substantive obligations,⁹⁶ will be so regarded. Indeed, it cannot be a coincidence that ICJ decisions such as *Gabčíkovo*

⁸⁷ *Supra* note 3.

⁸⁸ *Ibid.*, at para. 276.

⁸⁹ *Ibid.*, emphasis added.

⁹⁰ *Ibid.*, at para. 277.

⁹¹ *Ibid.*, at para. 280.

⁹² *Ibid.*, at para. 282.

⁹³ *Ibid.*, at paras 277 and 280.

⁹⁴ *US – Shrimp*, *supra* note 17, at para. 159.

⁹⁵ *Supra* note 54.

⁹⁶ For telling observations in this respect see *ibid.*, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma.

acknowledge the central role of good faith negotiations by the disputing parties for settling in a mutually satisfactory way their persistent differences, while keeping in mind the *objectives* of the treaty at stake.⁹⁷

Therefore, I rather believe that the danger of structural bias constitutes an *a fortiori* argument for the treaty partners consistently to fulfil their inherent responsibility as masters of their treaties and accordingly negotiate in good faith adjustments and amendments thereof in order to resolve conflicts *before* they arise. By contrast, this should not be taken as a quest for judicial abstention while the law-making activities of treaty partners are underway or (*a fortiori*) in the event of their failure. In such cases, courts and tribunals are empowered to exercise their ordinary jurisdiction and deliver their tentative solutions to conflicts and tensions among the regimes concerned. However, while fully legitimate, these solutions will be tentative indeed, just because they will not be supported by successful law-making processes clarifying and/or changing the pertinent norms; hence, they will not make sure that they reflect a reliable and reasonable balance of interests in accordance with the intention of states parties to competing regimes.

The foremost reason for favouring such a law-making perspective is, however, of a more fundamental nature, as it has to do with the legal position of third states, i.e., states which are parties to only one of the competing treaty regimes, and precisely the treaty which needs to be changed in line with essential norms and principles safeguarded by the other. The shortcomings arising in this situation are well exemplified by the Panel's decision in *EC – Biotech Products* not to take into account treaties unratified by any of the WTO members (and, *a fortiori*, by any of the disputing parties) in its interpretation of the pertinent WTO rules. In that connection, it was previously argued⁹⁸ that it is conceivable to allow these unratified treaties to enter WTO disputes by relying on the principle of MS as a standard internal to WTO law. But of course the inherent limit to this exercise is that the 'external' treaty must operate for interpretative purposes. It cannot go beyond its role as a tool assisting the adjudicator in the interpretation of WTO law. It especially cannot imply, more or less visibly, a modification of WTO rights and obligations. Therefore, it is foreseeable that MS be perceived as just another tool to blur the distinction between interpretation and modification of treaties, and accordingly to impose 'external' obligations against one's will. To envisage a crucial role for the WTO AB as the 'gatekeeper' of the WTO system in relation to 'external' treaties⁹⁹ does not seem satisfactorily to address those concerns in the absence of definite legal criteria *agreed upon by WTO members*.

In short, it is submitted that, in those situations where tensions and incompatibilities between competing regimes are so evident and so commonly acknowledged for them to be tamed by relying upon interpretive tools, the principle of MS requires that orthodox law-making processes be promoted and supported. This duty also binds

⁹⁷ See especially *Gabčíkovo-Nagymaros Project*, *supra* note 52, at paras 139–142 and 155, point 2.B of the *dispositif*. See also *Pulp Mills on the River Uruguay*, Judgment, *supra* note 54, at paras 266 and 281.

⁹⁸ See *supra* section 3.

⁹⁹ Scott, *supra* note 81.

states which are parties to the treaty which needs to be changed, while *not being parties* to the treaty inducing those changes. In relation to the WTO system, the latter conclusion stems from the status of MS as a principle internal to the system *and* an emerging principle of international law rooted in the overarching requirements of good faith and cooperation.

B Lessons from WTO Practice

1 Securing Mutual Supportiveness between the CBD and the TRIPs Agreement: The Proposed 'Disclosure-of-Origin' Amendment to Patentability Requirements

The above perspective, based on a duty to pursue law-making processes to achieve MS between competing regimes, seems encouraged and justified by several recent manifestations of WTO practice.

In the first place, it will be convenient to set out the terms of what I consider a crucial test for the consolidation of the principle of MS, namely the relationship between the CBD and the TRIPs Agreement. On the basis of a controversial provision in the Doha Ministerial Declaration,¹⁰⁰ this issue eventually made its way into the 'broad' Doha negotiating agenda upon pressure from developing countries and for a specific purpose: devising a conciliatory solution in line with MS to the perceived conflict between TRIPs-guaranteed patentability of genetic resources¹⁰¹ (and gene products) and the CBD principles of prior informed consent (PIC) by provider countries for access to such resources¹⁰² (and/or associated traditional knowledge) and of equitable benefit-sharing between users and providers (PIC-based ABS).¹⁰³ Currently, patent protection under the TRIPs Agreement for DNA and its derivatives (especially biotechnological products) is by no means subject to evidence of observance of these principles and may thus defeat them. A wide-ranging group of developing and least-developed countries of enormous demographic importance have mounted a formidable challenge to the patent system¹⁰⁴ by asserting that the only viable way to ensure complementarity and consistency between the CBD and the TRIPs Agreement is to adopt an *amendment*

¹⁰⁰ *Supra* note 10, at para. 19.

¹⁰¹ Genetic resources and derivatives thereof are patentable subject matter as long as they result in inventions fulfilling the ordinary requirements of novelty, inventive step, and usefulness as per Art. 27(1) TRIPs. Art. 27(3) allows WTO members to exclude from patentability only plants and animals *as such* (and essentially biological processes for their production).

¹⁰² Art. 15(5) CBD. The debate does not concern human DNA, which falls outwith the scope of the CBD, but only plant and animal genetic resources.

¹⁰³ Art. 1 CBD. The benefits at stake are those 'arising out of the utilization of genetic resources': *ibid.*

¹⁰⁴ The original proposals by these countries may be read in 'The Relationship between the TRIPs Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge', Communication from Brazil, China, Cuba, Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia, and Zimbabwe to the TRIPs Council, IP/C/W/356 (24 June 2002). Cf. Pavoni, 'Biodiversity and Biotechnology: Consolidation and Strains in the Emerging International Legal Regimes', in F. Francioni and T. Scovazzi (eds), *Biotechnology and International Law* (2006), 29, at 55–56.

to the latter requiring disclosure of the provider country and evidence of compliance with PIC-based ABS national legislation as conditions of patentability of genetic inventions. The amendment would introduce a new Article 29bis into the TRIPs Agreement. According to its draft text,¹⁰⁵ it would provide that '[f]or the purposes of establishing a *mutually supportive relationship between this Agreement and the Convention on Biological Diversity*, in implementing their obligations, Members shall have regard to the objectives and principles of this Agreement and the objectives of the Convention on Biological Diversity'.¹⁰⁶ Substantively, it would essentially impose upon WTO members the obligation to require applicants for gene patents to 'disclose the country providing the resources and/or associated traditional knowledge'¹⁰⁷ and to 'provide information including evidence of compliance with the applicable legal requirements in the providing country'¹⁰⁸ for PIC-based ABS. It would further require the publication of the information disclosed jointly with the patent application or grant,¹⁰⁹ and the enactment of 'effective enforcement procedures'¹¹⁰ to ensure compliance with the above obligations, including by endowing administrative and/or judicial authorities with the power 'to prevent the further processing of an application or the grant of a patent and to revoke . . . or render unenforceable a patent when the applicant has, knowingly or with reasonable grounds to know, failed to comply'¹¹¹ with those obligations 'or provided false or fraudulent information'.¹¹²

As with any amendment to the WTO agreements, the general rules and procedures in Article X of the WTO Agreement would apply. Thus, the proposed addition of Article 29bis to the TRIPs Agreement would normally need consensus in the Ministerial Conference (or a two thirds majority in the absence thereof¹¹³) and, as it undoubtedly would alter the members' rights and obligations, it would take effect upon acceptance by two thirds of the members and *only* for those members accepting it.¹¹⁴ It is submitted

¹⁰⁵ This may be read in 'Doha Work Programme – The Outstanding Implementation Issue on the Relationship between the TRIPs Agreement and the Convention on Biological Diversity', Communication from Brazil, India, Pakistan, Peru, Thailand and Tanzania, WT/GC/W/564 (31 May 2006), at 2. Eventually, the list of WTO members co-sponsoring the amendment has dramatically expanded, with the addition of China and Cuba, WT/GC/W/564/Rev.1 (6 June 2006); Colombia, WT/GC/W/564/Rev.2 (5 July 2006); South Africa, WT/GC/W/564/Rev.2/Add.1 (12 July 2006); Ecuador, WT/GC/W/564/Rev.2/Add.2 (28 Nov. 2006); Venezuela, WT/GC/W/564/Rev.2/Add.3 (7 Mar. 2007); Uganda on behalf of the African Group, WT/GC/W/564/Rev.2/Add.4 (22 June 2007); Paraguay, WT/GC/W/564/Rev.2/Add.5 (24 July 2007); Lesotho on behalf of the LDC Group, WT/GC/W/564/Rev.2/Add.6 (16 Nov. 2007); the Dominican Republic, WT/GC/W/564/Rev.2/Add.7 (21 Dec. 2007); Mauritius on behalf of the ACP Group of States, WT/GC/W/564/Rev.2/Add.8 (6 Feb. 2008); and Sri Lanka, WT/GC/W/564/Rev.2/Add.9 (10 July 2008).

¹⁰⁶ WT/GC/W/564, *supra* note 105, at para. 1 of Draft Art. 29bis, emphasis added.

¹⁰⁷ *Ibid.*, para. 2 of Draft Art. 29bis.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, para. 4 of Draft Art. 29bis.

¹¹⁰ *Ibid.*, para. 5 of Draft Art. 29bis.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ Art. X(1) WTO Agreement.

¹¹⁴ Art. X(3) WTO Agreement.

that all WTO members, *whether parties to the CBD or not*, are under a duty to pursue good faith negotiations with a view to considering adoption of the amendment. This is what the law-making aspect of the principle of MS requires in this situation, as powerfully suggested by the introductory sentence of the proposed TRIPs Article 29*bis*. Specifically, the situation at stake triggers the law-making dimension of the principle, because: (i) reconciliation of the competing regimes by means of interpretation, if not in principle inconceivable, may at best provide unsatisfactory and partial solutions to the problem; (ii) sustainable and equitable use of biological resources is a common concern of humanity,¹¹⁵ and not merely a matter of (CBD) treaty-based obligations; (iii) support for the above proposal by the international community is impressive;¹¹⁶ and (iv) the TRIPs amendment would be in line and establish legitimizing synergies with the parallel ongoing efforts and negotiations pursued within other international institutions and bodies.

As a matter of fact, while the CBD-TRIPs negotiations at the WTO are languishing despite the important mediating role undertaken by the Director General,¹¹⁷ CBD parties have finally reached agreement on a Draft Protocol on Access and Benefit Sharing to the CBD.¹¹⁸ Notably, the Draft Protocol lays down mandatory disclosure requirements in relation to the use of genetic resources (and associated traditional knowledge) to be fulfilled by means of an *internationally recognized certificate of compliance*, which will correspond to the permit granted to users by national authorities.¹¹⁹ Intellectual property examination offices will represent one of the 'check points' for

¹¹⁵ See for instance the third preambular para. of the CBD. For reasons of space, I am not here revisiting the issue of what 'common concern of humanity' entails in terms of international law sources and relationships among them. It is, however, clear that there exists a close interaction among the notions of common concern, *erga omnes* obligations (at least, *erga omnes partes* obligations), and customary rules. For insights into the implications of common concern/*erga omnes* obligations for 'trade and environment' litigation at the WTO see, e.g., Francioni, 'La tutela dell'ambiente e la disciplina del commercio internazionale', in *Diritto e organizzazione del commercio internazionale dopo la creazione della Organizzazione Mondiale del Commercio* (1998), at 147, 172.

¹¹⁶ As impressive is the rate of ratification of the CBD for that matter. As of 4 May 2010, there are 193 parties to the CBD, making it a nearly universal treaty (the US continues to be the only notable absence from CBD parties).

¹¹⁷ The latest report of the WTO Director General on his consultations with the delegations involved in the CBD-TRIPs negotiations, dated 12 Mar. 2010, is available at: www.wto.org/english/news_e/news10_e/trip_12mar10_e.htm. His final conclusion on the state of play of the negotiations reads, 'In sum, there is general agreement on the public policy objectives, including ensuring equitable benefit sharing, but differences clearly remain on how to arrive at those goals in practice.'

¹¹⁸ Revised Draft Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, adopted at the 9th Meeting of the Ad-Hoc Open-Ended Working Group on Access and Benefit-Sharing, 22–28 Mar. 2010, Cali, Colombia, Annex I to the Report of the First Part of the Ninth Meeting of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing, UNEP/CBD/WG-ABS/9/3 (26 Apr. 2010), available at: www.cbd.int/doc/meetings/abs/abswg-09/official/abswg-09-03-en.pdf. The Draft Protocol is scheduled for adoption at the Nagoya Biodiversity Summit/Tenth Conference of the Parties to the CBD, to be held on 18–29 Oct. 2010. See 'The Draft Nagoya Protocol on Access and Benefit Sharing is Born in Cali', available at: www.cbd.int/doc/press/2010/pr-2010-03-28-abs9-en.pdf.

¹¹⁹ Art. 13 of the Draft Protocol.

ensuring compliance with such disclosure obligations by patent applicants.¹²⁰ Mutually agreed benefits, such as payment of royalties, joint ownership of IPRs, and/or transfer of knowledge and technology under fair and most favourable terms, are to be entered into by users and providers.¹²¹ The Draft Protocol addresses its relationship with other treaties by means of a sole preambular recital where the parties recognize that ‘international instruments related to access and benefit-sharing should be *mutually supportive* with a view to achieving the objectives of the [CBD]’.¹²²

Finally, extensive law-making processes relating to the issue of patentability of inventions making use of genetic resources and traditional knowledge are ongoing at the World Intellectual Property Organization (WIPO).¹²³ These include specific proposals to amend existing WIPO treaties and to adopt new instruments. The latter developments are chiefly important for the WTO membership, given the significant role accorded to WIPO treaties by the TRIPs Agreement, including the latter’s explicit mention of the need to establish a mutually supportive relationship between the WTO and the WIPO.¹²⁴

2 *Securing Mutual Supportiveness between the WTO and the Right to Health through Diverse Legal Techniques: Insights from Essential Medicines, Hormone-Treated Beef, and Tobacco Products*

One may wonder whether, in the light of the broader dynamics and underlying assumptions of the WTO, the above CBD-spurred TRIPs proposed amendment corresponds to the most suitable technique for bringing about changes in WTO law. Other manifestations of practice in the area of the WTO and competing regimes, with particular reference to trade restrictive public health measures involving human rights standards, provide assistance in addressing that question in context.

An inescapable point is that amendment to WTO treaties in general, and the TRIPs Agreement in particular, is not ‘taboo’. As is well known, the thorny issue of the relationship between TRIPs patent rules and the states’ human rights obligation to secure access to essential medicines, especially in the event of serious epidemics and similar public health emergencies, has been finally dealt with through a Protocol Amending the TRIPs Agreement adopted by consensus with a General Council Decision of 6 December 2005.¹²⁵ The Protocol is bound to introduce a new Article 31*bis* and

¹²⁰ *Ibid.*

¹²¹ Arts. 4 and 12 of, and Annex I to, the Draft Protocol.

¹²² Recital 13, emphasis added. This solution is formally identical to that retained by the Preamble to the Stockholm POPs Convention. Cf. *supra* text accompanying notes 31–33.

¹²³ For a useful overview of such developments at the WIPO, as well as in other forums, see Medaglia, ‘Study on the Relationship between the ABS International Regime and Other International Instruments which Govern the Use of Genetic Resources: The World Trade Organization (WTO); the World Intellectual Property Rights [*sic*] Organization (WIPO); and the International Union for the Protection of New Varieties of Plants (UPOV)’, UNEP/CBD/WG-ABS/7/INF/3/Part.2 (3 Mar. 2009), available at: www.cbd.int/doc/meetings/abs/abswg-09/information/abswg-09-abswg-07-inf-03-part2-en.pdf.

¹²⁴ Recital 8 of the Preamble to the TRIPs Agreement.

¹²⁵ WT/L/641 (8 Dec. 2005). At the moment of writing, the amendment is not yet in force. Being an amendment which alters WTO rights and obligations, its entry into force requires ratification by at least two thirds of WTO members as per Art. X(3) WTO Agreement. As of 4 May 2010, 29 members had accepted the amendment, including the EU.

related Annex into the TRIPs Agreement, opening up the possibility to grant compulsory licences for the production and export of pharmaceutical products to countries affected by epidemics beyond what is currently allowed by Article 31.¹²⁶ It is the result of a complex law-making process, initiated with the 2001 Doha Declaration on the TRIPs Agreement and Public Health¹²⁷ and translated into binding law with the follow-up 2003 Waiver Decision.¹²⁸ The substantive content of the 2005 Amendment is identical to that of the 2003 Waiver Decision.

The system set up by the 2003 Decision has been targeted with considerable criticism, for instance deploring its overbureaucracy and practical unworkability.¹²⁹ But what is important for our purposes is that this is an exemplary case insofar as it is characterized by resort to all of the most significant WTO law-making avenues available for establishing a mutually supportive relationship with competing obligations, i.e., interpretative declarations,¹³⁰ waiver decisions, and amendments. This allows me to clarify that the duty to pursue good faith negotiations as mandated by the principle of MS is not limited to formal amendments. Each of the above options may have a role to play and turn out as a viable outcome under the prevailing situation. Of course, their respective differences in terms of nature and scope should be borne in mind. They may also be viewed, as suggested by the essential-medicines TRIPs process, in an escalating fashion, according to which amendments would represent a last resort to be pursued when they appear indispensable or unanimously shared by the membership. Thus, binding interpretations under Article IX(2) WTO Agreement might constitute a significant dynamic element for articulating the WTO system with competing regimes,

¹²⁶ Art. 31(f) allows only compulsory licences intended 'predominantly for the supply of the domestic market' of the member granting the licence. In specific situations, the 2005 Amendment also adjusts and modifies the obligation to pay 'adequate remuneration' to the patent holder in case of compulsory licences: see *ibid.*, Art. 31bis(2)(3).

¹²⁷ *Supra* note 13, at para. 6.

¹²⁸ General Council Decision of 30 Aug. 2003, Implementation of Para. 6 of the Doha Declaration on the TRIPs Agreement and Public Health, WT/L/540 (2 Sept. 2003). On the negotiating process and for detailed analysis see Abbott, 'The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health', 99 *AJIL* (2005) 317; Abbott and Reichman, 'The Doha Round's Public Health Legacy: Strategies for the Production and Diffusion of Patented Medicines under the Amended TRIPs Provisions', 10 *J Int'l Econ L* (2007) 921; Sun, 'The Road to Doha and Beyond: Some Reflections on the TRIPs Agreement and Public Health', 15 *EJIL* (2004) 123.

¹²⁹ This finds support in the *official* practice based on the waiver system, as there exists so far only one case whereby two WTO members have notified the Council for TRIPs of their use of the system, i.e., for the export from Canada of certain patented HIV-treatment drug to Rwanda: see Notification under Para. 2(A) of the Decision of 30 Aug. 2003 on the Implementation of Para. 6 of the Doha Declaration on the TRIPs Agreement and Public Health (Rwanda), IP/N/9/RWA/1 (19 July 2007), and Notification under Para. 2(C) of the Decision of 30 Aug. 2003 on the Implementation of Para. 6 of the Doha Declaration on the TRIPs Agreement and Public Health (Canada), IP/N/10/CAN/1 (8 Oct. 2007). For a comment see Hestermeyer, 'Canadian-made Drugs for Rwanda: The First Application of the WTO Waiver on Patents and Medicines', 11 *ASIL Insights* (10 Dec. 2007), available at: www.asil.org/insights071210.cfm.

¹³⁰ The Doha Declaration on the TRIPs Agreement and Public Health is rightly viewed as a declaration interpreting WTO law, even though, unlike authoritative interpretations under Art. IX(2) WTO Agreement, it is non-binding.

and as such their use should be promoted. True, they cannot formally modify WTO law,¹³¹ but the dividing line between interpretations and modifications through subsequent practice or agreements of the parties to a given treaty may at times be difficult to draw.¹³² In such cases, the beneficial effect of a solution based on amendments or waivers is mostly appreciated in terms of legal security and predictability. Insofar as waivers are concerned, I do share Isabelle Feichtner's perspective which thoroughly demonstrates how the sustained use of this instrument by the WTO is a welcome development.¹³³ Waivers are indeed a pragmatic law-making response to unproductive theoretical debates over how to resolve tensions and conflicts between the WTO system and competing obligations. They may be the result of inclusive and flexible processes, where non-legal and non-economic arguments do have standing.¹³⁴ But I do not see why many of these attributes should not be shared by the amendment process, and the precedent of the conversion of the essential-medicines TRIPs waiver into a formal amendment is testimony thereto. Moreover, the waiver power has its own limits. First, it can in principle be used only for *temporarily* suspending WTO obligations. A long-lasting solution would need a different legal basis. Secondly, it can diminish WTO obligations, but *not directly increase* them.¹³⁵ It is thus an inherently unsuitable alternative for cases such as that involving the proposed 'disclosure-of-origin' amendment to patentability requirements under the TRIPs Agreement. In short, amendments to WTO treaties do represent a feasible last-resort option the undertaking of which is mandated by the principle of MS between the WTO and competing regimes. The scant and controversial pre-WTO amendment practice cannot stand in the way thereof,¹³⁶ if one just recalls the profound difference between the WTO and the pre-WTO GATT system, as well as the vital need for the former's legitimacy convincingly to articulate its relationship to internationally-protected basic values.

In the area of public health, another valuable WTO standard-setting exercise should address the relationship between WTO law and the World Health Organization

¹³¹ In this sense, see also for references to the diverse views expressed on the nature of authoritative interpretations, Gazzini, 'Can Authoritative Interpretation under Art. IX:2 of the Agreement Establishing the WTO Modify the Rights and Obligations of Members?', 57 *ICLQ* (2008) 169. Art. IX(2) WTO Agreement provides that authoritative interpretations 'shall not be used in a manner that would undermine the amendment provisions in Article X'.

¹³² See recently Matz-Lück, *supra* note 3, at 49.

¹³³ See Feichtner, 'The Waiver Power of the WTO: Opening the WTO for Political Debate on the Reconciliation of Competing Interests', 20 *EJIL* (2009) 615. The author's argument focuses on the 2003 TRIPs Waiver and the so-called 'Kimberley Waiver on conflict diamonds', i.e., General Council Decision of 15 May 2003, Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, WT/L/518 (27 May 2003), as subsequently extended.

¹³⁴ Feichtner, *supra* note 133, at 634–638, 642–643 (comparing these advantages *vis-à-vis* amendments and interpretations).

¹³⁵ Nottage and Sebastian, *supra* note 15, at 1002. On the nature and limits of waivers see recently Harrison, 'Legal and Political Oversight of WTO Waivers', 11 *J Int'l Econ L* (2008) 411.

¹³⁶ For this and additional reasons, scepticism of the amendment process is expressed by Nottage and Sebastian, *supra* note 15, at 991–994 (underscoring however the ability of the essential-medicines TRIPs solution, i.e., waiver plus amendment, to overcome significant shortcomings of amendments).

(WHO) Framework Convention on Tobacco Control (FCTC).¹³⁷ In order to ‘protect present and future generations from the devastating . . . consequences of tobacco consumption and exposure to tobacco smoke’,¹³⁸ the FCTC allows far-reaching restrictive measures involving trade in tobacco products and services. It indeed aims at curbing and regulating such diverse market-based mechanisms affecting the demand for tobacco products as price and tax measures, packaging and labelling, advertising and sponsorship, commercial availability and accessibility, and so on.¹³⁹ The issue of the relationship between the FCTC and the multilateral trade system has been ducked in the final text of the Convention, by eliminating certain WTO-controversial provisions as well as a conflict clause aimed at recognizing the primacy of existing treaties.¹⁴⁰ The adopted Convention, however, enshrines the parties’ determination ‘to give priority to their right to protect public health’ in accordance with international human rights obligations, and does not provide for any precedence of other regimes in the remaining conflict clause of Article 2.¹⁴¹

No doubt, a chiefly important distinguishing feature of the FCTC is that the public health problem it deals with is nowadays denoted by overwhelming scientific evidence showing the tremendously harmful effects of tobacco consumption. This will make it easier to rebut potential allegations of WTO inconsistency of measures implemented by states parties to the FCTC. But the variety of measures and legal situations provided for by the FCTC is so extensive that a WTO law-making instrument clarifying conditions and limits for such measures to be compatible with the applicable trade agreements would certainly be appropriate. In addition, it is necessary to recall that in the past the multilateral trade system has not performed satisfactorily in matters of tobacco-restrictive measures. In what Robert Howse rightly characterizes as an egregious example of ‘institutional insensitivity’ on the part of the trade system,¹⁴² a 1990 Panel Report declared that a *de facto* import ban applied by Thailand on American cigarettes breached Article XI(1) GATT and was not justified by the human health exception in

¹³⁷ Geneva, 21 May 2003, in force 27 Feb. 2005, available at: www.who.int/fctc/text_download/en/index.html. As of 4 May 2010, there were 168 parties to the Convention, including the EU. Notably, the US has so far withheld its ratification.

¹³⁸ *Ibid.*, Art. 3. The Preamble to the FCTC declares that such consequences are a ‘concern of the international community’ (Recital 2).

¹³⁹ Cf. especially Arts 6–16 FCTC.

¹⁴⁰ Cf. Art. 2(3) of the New Chair’s Text of a Framework Convention on Tobacco Control, A/FCTC/INB5/2 (25 June 2002), available at: apps.who.int/gb/fctc/PDF/inb5/einb52.pdf. See also Art. 5(5) which interestingly reads, ‘While recognizing that tobacco control and trade measures can be implemented in a mutually supportive manner, Parties agree that tobacco control measures shall be transparent, implemented in accordance with their existing international obligations, and shall not constitute a means of arbitrary or unjustifiable discrimination in international trade.’ This is one of the provisions which has disappeared from the adopted Convention.

¹⁴¹ Art. 2(1) encourages the parties to adopt stricter measures than those provided for by the Convention and states that *these* are to be consistent with the Convention itself and ‘in accordance with international law’. Conversely, Art. 2(2) grants priority to the Convention over future bilateral and multilateral agreements concluded by the parties on ‘issues relevant or additional to the Convention and its protocols’.

¹⁴² Howse, ‘Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence’, in J.H.H. Weiler (ed.), *The EU, the WTO, and the NAFTA* (2000), 35, at 63.

Article XX(b) GATT, because less restrictive measures were reasonably available to the defendant party.¹⁴³ This notwithstanding the contrary advice submitted by the WHO representatives intervening in the proceedings which essentially backed up the Thai measures given their consistency with WHO policies and instruments.¹⁴⁴

In the case at hand, an interpretative declaration along the lines of the Doha Declaration on the TRIPs Agreement and Public Health would probably be sufficient to shed light on the existence of a mutually supportive relationship between the WTO and the FCTC. This should be done rapidly, i.e., before the completion of the national FCTC implementation processes and the adoption of Protocols operationalizing the Convention will have boosted the possibilities of trade restrictions potentially leading to WTO disputes. Such a declaration would indeed avert many such disputes and, in case of litigation, authoritatively guide the task of the adjudicative bodies. The risk inherent in a 'wait-and-see' strategy is one of delegitimation of the ensuing decisions, something which may work out as a powerful disincentive for members' prompt and full compliance.

This brings me to a final discussion about WTO practice concerning cases which, unlike the FCTC, involve *precautionary* trade-restrictive health measures. In this context, I believe that the *Hormones* dispute between the EU, on the one side, and the US and Canada, on the other, stands out as the most striking example of the failures of the multilateral trade system in securing a solution to a far-reaching dispute in the absence of an agreed normative framework clarifying the conditions according to which WTO Members may resort to the precautionary principle for regulating risks to public health.

This dispute which, as is well known, involves an EU precautionary import ban on meat from cattle to which certain growth-promoting hormones have been administered traversed all avenues and stages contemplated by the WTO dispute settlement system.¹⁴⁵ The EU was (and remains) inflexible in its position that consumption of such meat involves a serious carcinogenic risk. After a host of WTO decisions, various rounds of consultations,¹⁴⁶ wide-ranging retaliatory measures by the complainants, proceedings unsuccessfully brought by companies affected by the ban before the European

¹⁴³ *Thailand – Restrictions on Importation of and Internal Taxes on Cigarettes*, DS10/R-37S/200 (5 Oct. 1990), especially at paras 72–81.

¹⁴⁴ *Ibid.*, at paras 50–57.

¹⁴⁵ *EC – Measures Concerning Meat and Meat Products (Hormones)*, AB Report, WT/DS26/AB/R, WT/DS48/AB/R (16 Jan. 1998); *ibid.*, Arbitration under Art. 21.3(c) of the DSU, WT/DS26/15, WT/DS48/15 (29 May 1998); *ibid.*, Arbitration under Article 22.6 of the DSU, WT/DS48/ARB (12 July 1999) (Complaint by Canada); *ibid.*, Recourse to Arbitration under Article 22.6 of the DSU, WT/DS26/ARB (12 July 1999) (Complaint by the United States); *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, AB Report, WT/DS320/AB/R (16 Oct. 2008). On the last inconclusive Report, directing the disputing parties to enter into further consultations (!) with respect to the conformity of EU implementing measures with prior rulings, see Böckenförde, 'Hormone Ban in Dispute Again: The WTO Refuses to Reject Either the EC Ban or Canadian/US Trade Sanctions', 12 *ASIL Insights* (18 Dec. 2008), available at: www.asil.org/insights081218.cfm.

¹⁴⁶ See most recently *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, Recourse to Article 21.5 of the DSU by the European Communities, WT/DS48/21 (8 Jan. 2009).

Court of Justice¹⁴⁷ and the European Court of Human Rights,¹⁴⁸ and the EU adoption of a new directive¹⁴⁹ allegedly in line with WTO law, the EU and the US recently reached a provisional agreement¹⁵⁰ to put a stop to this never-ending saga. Under this four-year agreement, the EU will maintain its embargo on hormone-treated beef, while *hormone-free* US beef will be granted additional duty-free access to the EU market. The US will continue to apply a reduced level of retaliatory tariffs for the first three years after the agreement takes effect, and will eventually abolish them in the fourth year. A long-lasting agreement is due to be concluded between the parties before the termination of the provisional deal.

From the point of view of WTO law, such an agreement constitutes a 'mutually agreed solution' between the parties to a dispute, an option which is clearly favoured and promoted by the WTO Dispute Settlement Understanding (DSU)¹⁵¹ in respect of all phases of a dispute, including implementation of Panels' and AB's rulings.¹⁵² In this connection, Antonello Tancredi has persuasively demonstrated the structural importance for the WTO system of negotiations regarding compliance with WTO dispute settlement decisions, and highlighted how the existing practice provides clear examples of agreements reached at the end of such negotiations which deviate from WTO law (referred to as 'agreements *contra legem*').¹⁵³ The EU-US *Hormones* deal is arguably to be included among such agreements *contra legem*, in the absence of any final determination by WTO bodies of the legality of the EU ban *vis-à-vis* prior rulings in the dispute. But what is most important for our purposes is that the 'mutually agreed solutions' at stake have also been regarded as a 'safety valve' for the reconciliation of WTO law with competing rules protecting essential interests of the international community.¹⁵⁴ This 'safety valve' function is indeed at play in the EU-US *Hormones* agreement, which sanctions the possibility for the EU to continue enforcing its precautionary measures in the name of food safety and consumers' health protection, notwithstanding their persistent dubious compatibility with *existing* WTO law.

¹⁴⁷ Case C-93/02 P, *Biret International v. Council* [2003] ECR I-10497; and Case C-94/02 P, *Établissement Biret et CIE v. Council* [2003] ECR I-10565.

¹⁴⁸ App No 13762/04, *Établissements Biret et CIE S.A. and Biret International v. 15 États membres de l'Union européenne*, Admissibility Decision of 9 Dec. 2008, available at: cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en (in French).

¹⁴⁹ Dir. 2003/74/EC of the European Parliament and of the Council of 22 Sept. 2003 amending Council Dir. 96/22/EC concerning the prohibition on the use in stockfarming of certain substances having a hormonal or thyrostatic action and of beta-agonists, OJ (2003) L 262/1.

¹⁵⁰ See 'EU and US Reach Provisional Agreement in Beef Dispute', IP/09/707 (6 May 2009), available at: europa.eu/rapid/pressReleasesAction.do?reference=IP/09/707&format=HTML&aged=0&language=EN&guiLanguage=en; 'EU, US Strike Provisional Deal to End Beef Dispute', 9 *Bridges Trade BioRes* (15 May 2009), available at: ictsd.org/i/news/biores/46670.

¹⁵¹ See, e.g., Arts 3(6)(7), 4(3), and 11 DSU.

¹⁵² Art. 22(2) and (8) DSU.

¹⁵³ Tancredi, 'EC Practice in the WTO: How Wide is the "Scope for Manoeuvre"?', 15 *EJIL* (2004) 933, especially at 955-959.

¹⁵⁴ See also for further references *ibid.*, at 961.

Two insights arise from this short account of the *Hormones* case. First, the principle of MS finds reflection in WTO practice also at the level of implementation of dispute settlement rulings, where negotiations aiming at mutually agreed solutions may result in an accommodation of competing internationally-protected interests and values underlying the case at hand. Secondly, and most importantly, the spread of allegedly *contra legem* agreements, such as the EU–US *Hormones* deal, is however a setback for the integrity and predictability of the WTO legal system. This should induce WTO members to anticipate issues of reconciliation with competing regimes, by undertaking in good faith law-making processes directed at the conclusion of specific instruments providing guidance and legal certainty. *In casu*, an instrument illustrating the scope of the precautionary principle in WTO law which would take into account non-WTO pertinent rules and treaties would be welcome. Observance of the principle of MS should be the key conceptual benchmark in respect of these negotiating processes.

5 Conclusion: Mutual Supportiveness as a Watershed for the ‘WTO-and-Competing-Regimes’ Debate?

At a time where the Doha Round of multilateral trade negotiations is bound to come to a close, it is vital for the WTO to demonstrate its willingness meaningfully to articulate its connection to competing regimes protecting essential values of the international community. The 2001 Doha documents were very encouraging in that respect as they envisaged and endorsed *mutually supportive relationships* between the WTO system and other areas of international law, such as especially the protection of public health and the environment.

In this article I have tried to demonstrate that MS should not be regarded as a mere political formula devoid of normative implications. Its support by the Doha documents is rather an important element adding up to the idea that MS is *the* key principle governing the relations between the WTO and competing regimes, a principle which finds recognition in the WTO system itself. Full awareness of such normative implications in future practice and legal instruments would shed light on the ability of the principle of MS to operate as a watershed for the ‘WTO-and-competing-regimes’ debate. By now, it already seems clear that the principle is denoted by such potentialities.

The principle of MS is characterized by an undeniable interpretative dimension inviting a conciliatory reading of potentially conflicting rules, as well as by a more ambitious law-making dimension imposing upon states a duty to pursue good faith negotiations aimed at concluding agreements capable of accommodating the different concerns underlying a given legal situation. This law-making aspect of MS is unequivocally confirmed by certain recent developments, such as the UNESCO CDC and the proposed ‘disclosure-of-origin’ amendment to TRIPs patentability requirements for inventions making use of genetic resources. The ensuing duty to negotiate should also be fulfilled by WTO members which are not parties to the competing treaty regime. I firmly believe that the only viable solution to the issue of states not accepting (almost) universally backed treaty regimes, e.g., the CBD and the FCTC, is

that of reminding them of their obligation to cooperate in the formulation of mutually supportive normative solutions capable of safeguarding the integrity of the international legal system and of averting undesirable consequences, such as everlasting commercial disputes or trade sanctions targeting the free rider in accordance with the competing treaty at stake.

Perhaps, nowhere other than in the following words of Sir Leon Brittan is my thought best encapsulated:

[W]hat we need here is a *framework* to help ensure compatibility between MEAs and WTO rules. Where an MEA commands *wide support* among WTO members, we need to be more confident than at present that WTO trade rules do accommodate the aims of the parties to the MEA, and therefore allow the necessary trade measures to be taken under such an MEA. If, to achieve that confidence, we need a *new interpretation* of, or even a *textual amendment* to, WTO rules, I believe we *should go down that route*.¹⁵⁵

Even more tellingly, Sir Leon Brittan was proposing a series of agreed WTO principles governing trade measures against non-members of MEAs as a last resort to promote the latter's objectives, and stated: 'Before taking measures against non-members, MEA members should exercise *all possible efforts to persuade non-members to cooperate with the environmental objectives of the MEA*.'¹⁵⁶

¹⁵⁵ Sir Leon Brittan's keynote address to the WTO High Level Symposium on Trade and the Environment, Geneva, Mar. 1999, emphasis added, reproduced, and commented on with approval in A.F. Lowenfeld, *International Economic Law* (2nd edn, 2008), at 413–416.

¹⁵⁶ *Ibid.*, emphasis added.