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**International Economic and Environmental Law**

Exercises in Untangling the Dogmatic Conundrum

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## A Introduction

Economic and environmental law – for years conceived as opposing concepts – are nowadays perceived as mutually supportive domains of one body of law. The laureat contributed largely to this change in paradigms. He was one of the first to speak about the stabilising function of environmental law for economic development. He thus contributed to overhaul the dichotomy between accelerating economic and inhibiting environmental regulation.<sup>1</sup> Environmental protection is now thought of as an integral part of all policies, as a cross cutting issue (e.g. Art. 6 European Community Treaty [EC]). The interdependent relationship of environmental protection and economic development has been elaborated in the concept of sustainable development<sup>2</sup>, thus becoming the Leitmotif of the UN-Conference of Environment and Development (UNCED) in Rio de Janeiro 1992. “Mutual supportiveness” has become a fixed formulation in statements like the WTO-Ministerial Declaration in Doha, November 2001 and in the Declaration of the UN-World Summit on Sustainable Development (WSSD) in Johannesburg, September 2002.<sup>3</sup>

However, whereas the concept of sustainable development aims at reconciling the inherent tensions of environmental and economic interests, traditional legal dogmatic constructions still undermine the normative claim for environmental enforcement. They tend to give economic interests priority over non-economic, social interests. Gerd Winter has always kept an open eye on these arguments in national<sup>4</sup>, European<sup>5</sup> and international economic law<sup>6</sup> – tirelessly struggling to uncover the social implications of dogmatic structures.

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- <sup>1</sup> Winter, G. (1984), *Bartering Rationality in Regulation. A Comparative Perspective*, ZERP/Diskussionspapier DP 1/1984, Bremen; Winter, G. (1991), „Entfesselungskunst. Eine Kritik des Gentechnik-Gesetzes“, *Kritische Justiz*, 18-30.
- <sup>2</sup> Reh binder (2000), „Nachhaltigkeit als Prinzip des Umweltrechts: Konzeptionelle Fragen“, in: K.-P. Dolde (ed.), *Umweltrecht im Wandel*, Berlin, E. Schmidt, 721-743.
- <sup>3</sup> WTO Ministerial Declaration in Doha, 14.11.2001: “6. We strongly reaffirm our commitment to the objective of sustainable development, as stated in the Preamble to the Marrakesh Agreement. We are convinced 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*.”, <http://www.wto.org>; WSSD-Johannesburg Declaration on Sustainable Development, 5. Sept. 2002: “5. Accordingly, we assume a collective responsibility to advance and strengthen the interdependent and *mutually reinforcing* pillars of sustainable development – economic development, social development and environmental protection – at local, national, regional and global levels.”, <http://www.johannesburgsummit.org>, (emphases added, C.G.).
- <sup>4</sup> Winter, G. (1993), „Brauchen wir das? Von der Risikominimierung zur Bedarfsprüfung“, *Kritische Justiz*, 389-404; Winter, G. (2001), „Vom Nutzen der Effizienz im öffentlichen Recht“ *Kritische Justiz*, 300-322.

A prime example for the dogmatic conundrum of international economic and environmental law can be found in patent law, a field Gerd Winter himself devoted a seminal article to.<sup>7</sup> In the following, three manifestations of the dogmatic conundrum will be addressed, illustrated with examples found in patent law and subsequently analysed for their common cause in the changing international tectonic structure.

## B Three Manifestations of the Dogmatic Conundrum

### I Finding the Applicable Law: The Lex Posterior- and the Lex Specialis-Rules

Problems in international law often begin with finding the applicable treaty, especially when treaties seem to be contradictory. International contracts rarely resolve problems of concurrence explicitly on their own.<sup>8</sup> Lacking a general concept of hierarchy<sup>9</sup>, lawyers resort to general rules as inscribed in customary law or, preferably, to the Vienna Convention on the Law of Treaties (VCLT).<sup>10</sup> There are two basic competing rules a lawyer refers to in order to decide a conflict of concurring treaties. One states that the later law overturns the former one, *lex posterior derogat legi priori*. It is rooted in customary law

- <sup>5</sup> Winter, G. (1996), „Subsidiarität und Deregulierung im Gemeinschaftsrecht“, *Europarecht*, 245-269; Winter, G. (1996), „On the Effectiveness of the EC Administration: The Case of Environmental Protection“, *Common Market Law Review*, 689-717; Winter, G. (1998), „Die Sperrwirkung von Gemeinschaftssekundärrecht für einzelstaatliche Regelungen des Binnenmarkts mit besonderer Berücksichtigung von Art. 130 t EGV“, *Die Öffentliche Verwaltung*, 377-381.
- <sup>6</sup> Winter, G. (2001), „Welthandelsrecht und Umweltschutz“, in: K.-P. Dolde (ed.), *Umweltrecht im Wandel*. Berlin, E. Schmidt Verlag, 71-98.
- <sup>7</sup> Winter, G. (1992), „Patent Law Policy in Biotechnology“, *Journal for Environmental Law*, Vol. 4, 167-187, reprinted in: Drahos, P. (ed.) (1999), *Intellectual Property*, Aldershot/Brookfield Vt., Dartmouth/Ashgate, 181-201.
- <sup>8</sup> One example is Art. 22 of the Convention on Biodiversity (CBD). It stipulates that the international law of the sea prevails over rules established by the CBD: „Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea“. Another example is Art. 3. 2 lit a and b of the Treaty on the ban of driftnets in the South-pacific region (Burhenne Nr. 989:87/1).
- <sup>9</sup> Further Verdross, A. and B. Simma (1984), *Universelles Völkerrecht. Theorie und Praxis*, Berlin, Duncker & Humblot, 328 et seq.
- <sup>10</sup> 8 ILM 679 (1980).

and included in Art. 30. 1 VCLT.<sup>11</sup> The other rule states that the more specific rule displaces the more general rule, *lex specialis derogat legi generali*. It derives equally from customary law<sup>12</sup> and is embraced by Art. 30. 3 VCLT.<sup>13</sup> Both rules have been constructed as „opponents“<sup>14</sup>, sometimes even ranked.<sup>15</sup>

A prime example of conflicting treaties is the relationship of the WTO/GATT-System and Multilateral Environmental Agreements (MEAs). Especially the relationship of GATT and CITES<sup>16</sup> has extensively been disputed in line of these rules.<sup>17</sup> Although similar and economically more important, the relationship of the WTO-Trade Related Intellectual Property-Agreement (TRIPs) and the Convention on Biodiversity (CBD) found less academic interest. As with GATT and CITES, the CBD does not provide a clear cut conflict rule vis-à-vis the patent law system<sup>18</sup>, nor does TRIPs do so with respect to environmental law. According to the point of view of the European Commission, the agreements refer to different subject matters and are mutually supportive.<sup>19</sup> In contrast, the United States and developing countries argue that the agreements are in conflict with each other. The US, which has not yet ratified the Convention<sup>20</sup>, holds, e.g.,

- <sup>11</sup> Art. 31. 1 VCLT: „Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.“ The *lex specialis*-rule is inherent in the term „same subject-matter“, cf. Ginzky, H. (1997), *Saubere Produkte, schmutzige Produktion*, Düsseldorf, Werner, 235 et seq; Zuleeg, M. (1977), „Vertragskonkurrenz im Völkerrecht, Teil I: Verträge zwischen souveränen Staaten“, *German Yearbook of International Law*, Vol. 20, 246-276, at 257.
- <sup>12</sup> Wilting (1996), *Vertragskonkurrenzen im Völkerrecht*, Köln, Heymann, at 87.
- <sup>13</sup> Art. 30. 3 VCLT: „When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.“
- <sup>14</sup> Zuleeg, note 11, at 257.
- <sup>15</sup> Zuleeg, note 11; Ginzky, note 11, at 131; Hohmann, H. (2000), „Der Konflikt zwischen Freiem Handel und Umweltschutz in WTO und EG“, *Recht der Internationalen Wirtschaft*: 88-99, at 96.
- <sup>16</sup> Convention on International Trade in Endangered Species of Wild Fauna and Flora from 1973.
- <sup>17</sup> Ginzky, note 11, at 236; Winter, note 6.
- <sup>18</sup> In contrast to Art. 22. 2, see note 8; Art. 22. 1 only stipulates: „The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity.“
- <sup>19</sup> European Commission (2002), „Art. 27.3 (B) of the TRIPs Agreement and the Relationship between the TRIPs Agreement and the Convention on Biological Diversity (CBD) and the Protection of Traditional Knowledge“, (8. July 2002) to be submitted to the TRIPs Council; European Commission (2001), „Review of the Provisions of Article 27.3 (b) of the TRIPs Agreement – Communication by the European Communities and their Member States on the Relationship between the Convention of Biodiversity and the TRIPs Agreement“, submitted to the TRIPs Council on 3 April 2001.
- <sup>20</sup> In detail Henne, G. (1998), *Genetische Vielfalt als Ressource*, Baden-Baden, Nomos-Verl., at 135.

that Art. 16. 3 CBD<sup>21</sup> contradicts patent law principles, as it arguably allows cuts on patent profits.<sup>22</sup> Insofar, the CBD of 1992 would violate the minimum standard of the TRIPs-Agreement of 1994 that prevails due to the *lex posterior*-rule. The Developing Countries oppose this view. They argue that the TRIPs-Agreement is inconsistent with the CBD<sup>23</sup>, as it undermines the obligation under CBD to share benefits from using genetic resources. According to them, the CBD prevails over TRIPs due to the *lex specialis*-rule. Therefore, they lobby for an amendment of TRIPs.

In fact, both arguments do not go very far. As early as in 1977, Zuleeg illustrated the complex relationship of both principles.<sup>24</sup> Hilf calls them „hausbackene Regeln“ (home-made rules)<sup>25</sup> that are used in political contests covering up disputed issues of value judgements.<sup>26</sup> Hilf stresses that the *lex posterior* is dependent on historical contingencies whereas the *lex specialis*-rule could be claimed by each treaty. Concurring with Howse/Regan<sup>27</sup>, they put forward multilateralism as an argument to determine the relationship of economic and environmental law, an argument that has become a leading one in the reasoning of the WTO-Appellate Body in the famous Shrimps-Decision in 1998.<sup>28</sup>

In this decision, the WTO-Appellate Body<sup>29</sup> gave some guidance on the question when a rule of environmental law prevails over international economic law. The case to decide touched primarily on the sensitive issue of the extra-

<sup>21</sup> Art. 16. 3 CBD reads: "Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, with the aim that Contracting Parties, in particular those that are developing countries, which provide genetic resources are provided access to and transfer of technology which makes use of those resources, on mutually agreed terms, including technology protected by patents and other intellectual property rights, where necessary, through the provisions of Articles 20 and 21 and in accordance with international law and consistent with paragraphs 4 and 5 below."

<sup>22</sup> Spranger, T. M. (2002), „Der Zugriff auf pflanzliche Genressourcen im internationalen Regelungsgeflecht“, Archiv des Völkerrechts Vol. 40, 64-89, 75 et seq.

<sup>23</sup> E.g. Brasil, China, Dominican Republic, Ecuador, India, Pakistan, Thailand, Venezuela, Zambia, Zimbabwe (2002), "The Relationship between the TRIPs-Agreement and the Convention on Biological Diversity and the Protection of Traditional Knowledge", submitted to the TRIPs Council 24.6.2002. IP/C/W/356, <http://www.wto.org>.

<sup>24</sup> Zuleeg note 11, at 257, showing that later general rules can also wish to substitute former specific rules.

<sup>25</sup> Hilf, M. (2000), „Freiheit des Welthandels contra Umweltschutz?“, Neue Zeitschrift für Verwaltungsrecht, 481-490, at 481.

<sup>26</sup> So does Hohmann, note 15, at 96.

<sup>27</sup> Howse, R. and D. Regan (2000), "The Product/Process Distinction. An Illusionary Basis for Disciplining "Unilateralism" in Trade Policy", European Journal of International Law, 249-289.

<sup>28</sup> United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (12. Oct. 1998), <http://www.wto.org>.

<sup>29</sup> Understanding that a decision made by the International Arbitration Court in Den Haag might deliver a different reasoning, Winter, note 6, at 95.

territorial impact of national rule making. At issue was a US-american import ban on shrimps that had not been harvested by approved methods that protect turtles. Before issuing the measure, the US had undertaken intensive negotiations, especially with countries in the wider Caribbean/western Atlantic region, during which the latter agreed to comply with the US standards. Other countries (including the appellees India, Malaysia, Pakistan, and Thailand) were left out, so that they had significantly less time to adjust. The Appellate Body ruled that, in principle, environmental rules that both restrict free trade and have extraterritorial effects can be compatible with the international trade system, if serious, non-discriminatory and problem-oriented negotiations preceded them. Insofar the case differs from the question at the center of this article.

However, the ruling also addressed the question on how to determine which rule prevails. The Appellate Body explicitly rejected the Panel report that says: "Art. XX GATT only allows Members to derogate from GATT provisions so long as, in doing so, they do not undermine the WTO multilatering trading system"<sup>30</sup>, thus claiming the unconditional priority of international economic law over environmental law. In contrast, the Appellate Body interpreted the chapeau of Art. XX GATT as a clause integrating environmental protection into the international trade system and thus "striking a balance between the right of a Member to invoke the exception under Article XX and the right of other Members under varying substantive provisions of GATT 1994, so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves in that Agreement"<sup>31</sup>. It rejected a decision on the line of "either or". The Appellate Body continued: "The location of the line of equilibrium, as expressed in the chapeau, is not fixed and unchanging; the line moves as the kind and the shape of the measure at stake vary and as the facts making up specific cases differ." Thus, the Appellate Body ultimately opposed an antagonistic conceptualisation of environmental versus economic goals in the context of the WTO-framework. The relationship is one of an ever changing balance, that cannot be struck by one-dimensional rules of an either-or. Transposed to the relationship of TRIPs and the CBD – the latter a multilateral environmental agreement –, one can expect that the Appellate Body will find similar solomonic terms aiming at balancing competing interests "so that neither of the competing rights will cancel out the other".

In addition, with respect to the relationship of TRIPs and CBD the Dispute Settlement Bodies will have to take another aspect into consideration. In the realm of economic law, intellectual property rights are an exception to the principle of free trade. Only in the last 20 years has economic theory developed an

<sup>30</sup> Panel Report, para. 7.44.

<sup>31</sup> Appellate Body, WT/DS58/AB/R, supra note 28, para. 156, para. 159.

understanding that free trade and the patent system are mutually supporting. For long, they have been conceived as antagonistic rivals as the patent monopoly restricts free market access, distorting the price mechanism. Only since the Chicago School rehabilitated monopolies as efficient under certain conditions<sup>32</sup> has competition policy made its peace with patents.<sup>33</sup> Yet, TRIPs enjoys a special position in the WTO-framework as it restricts the sovereign rights of member states regarding their developmental preferences. In a balanced value judgment between economic and environmental interests the patent system cannot claim the same normative position compared to other economic rights inscribed in Art. I, III and XI GATT, thus relatively (!) strengthening the normative value of environmental protection.

Transposing these arguments to the CBD-TRIPs relationship results in the following reasoning: Although particular rules are not easy to reconcile like Art. 16. 3 CBD and Art. 27. 1 TRIPs, the conflict cannot be resolved by priority rules like *lex posterior* or *lex specialis*. These rules are not applicable. Measures implementing the treaties have to be devised in a way that both the rights of the patent holders and the autonomous right of states to regulate health and environment are respected.

## II Interpreting the Applicable Law: Rule and Exception

Another problem of determining the law arises from conflicting preferences inside one single treaty. A customary legal instrument to resolve the conflict is reasoning by rule and exception. It is supposed to be a matter of logic that rules are to be broadly interpreted whereas exceptions are to be narrowly construed. In the conflict of trade and environmental law it has been argued that the general principles inscribed in Art. I, III and XI GATT deserve an extensive interpretation, whereas Art. XX GATT deserves a narrow one.<sup>34</sup> The parallel argument was made in the context of patent law. The basic rule for patentability of Art. 27.1 TRIPs is broadly interpreted, while exemptions like Art.

<sup>32</sup> Bowman, W. S. (1973), *Patent and Antitrust Law: A Legal and Economic Appraisal*, Chicago, Univ. Chicago Press.

<sup>33</sup> Merges, R. P./ P. S. Menell, et al. (1997), *Intellectual Property in the New Technological Age*, New York, N.Y., Aspen Law & Business, 1041 et seq; Ullrich, H. (2001), "Intellectual Property, Access to Information, and Antitrust: Harmony, Disharmony, and International Harmonization", in: R. Dreyfuss/ D. L. Zimmerman/H. First (eds.), *Expanding the Boundaries of Intellectual Property*, New York, Oxford Univ. Press, 365-402.

<sup>34</sup> Panel Report in *Tuna-Dolphin, consenting v. Bogdandy* (1992), „Internationaler Handel und nationaler Umweltschutz: Eine Abgrenzung im Lichte des GATT“, *Europäische Zeitschrift für Wirtschaftsrecht*, 243-247.

27.2 TRIPs<sup>35</sup>, Art. 27.3 TRIPs<sup>36</sup> and restrictions like Art. 30 TRIPs<sup>37</sup> are narrowly interpreted.

However, the interpretation in terms of rule and exception has been criticised on various grounds. Legal theorists question the reasoning on the ground of logic. While recognising the rule "*singularia non sunt extendenda*", they point out that every rule depends on its context. Neither is the rule cogent according to the laws of logic<sup>38</sup>, nor is it always applicable. An important precedent is the disputed construction of Art. 28 and 30 EC, formerly Art. 30/36 EC, as rule and exception. Both norms are modeled upon corresponding GATT-provisions. It has long been argued that Art. 30 (ex Art. 36) EC is to be construed as an exception to the rule of Art. 28 (ex Art. 30) EC. Therefore, two levels were to be conceived, a primary level of economic freedoms (Art. 28 EC) and a secondary level of justification (Art. 30 EC).<sup>39</sup> Today however, it is commonly agreed to construe Art. 30 EC as an immanent barrier to Art. 28 EC that already restricts economic freedoms on the level of primary norms. Consequently, the restriction of economic freedoms and its justification are to be precisely determined.<sup>40</sup> For the context of international trade law, Meinhard Hilf dismisses the interpretation in terms of rule and exception also as „hausbackene Regel“<sup>41</sup> as it could be claimed by each matter. Gerd Winter questions its adequateness on the ground that the rule of wide interpretation of freedoms is embedded in the concept of human rights.<sup>42</sup> Only their dignity legitimises broad interpretation frames. In carving

<sup>35</sup> Straus, J. (1996), "Bedeutung des TRIPs-Abkommens für das Patentrecht", *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil*: 179-205; Straus, J. (2000), "Reversal of the Burden of Proof, the Principle of "Fair and Equitable Procedures" and Preliminary Injunctions under the TRIPs Agreement", *Journal of World Intellectual Property*, Vol. 3, 807-823.

<sup>36</sup> Gervais, D. J. (1998), *The TRIPs Agreement: drafting history and analysis*, London, Sweet & Maxwell, at 151.

<sup>37</sup> Position of the EC in *Canada – Protection of Pharmaceutical Protection*, WT/DS114/R, para. 4.27.

<sup>38</sup> Larenz, K. (1995), *Methodenlehre*, München, Beck, 175 et seq; Pawlowski, H.-M. (1999), *Methodenlehre*, Heidelberg, Müller-Verl., para. 498; Säcker, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch* (2001), Vol. 1, München, Beck, Einl., para. 102.

<sup>39</sup> Ahlfeld, M. (1997), *Zwingende Erfordernisse im Sinne der Cassis- Rechtsprechung des Europäischen Gerichtshofs zu Art. 30 EGV: Anwendungsbereiche – einzelstaatliche Regelungsspielräume – Quellen*, Baden-Baden, Nomos Verl.

<sup>40</sup> Leible, in: Grabitz, E./M. Hilf (eds.) (2000), *Recht der Europäischen Union – Kommentar*, Vol. 1, Art. 28, para. 20, Jan. 2000.

<sup>41</sup> *Supra* note 25, *ibid*, at 481.

<sup>42</sup> *Supra* note 6, at 73.

out the principle in the latest developments of DSU<sup>43</sup>-judication<sup>44</sup> he formulates a different set of rules of interpretation and, consequentially, *non-liquet* rules. Resuming the modern EC-interpretation he argues that basic norms of GATT are not broadly but precisely construed, and that exceptions are not to be narrowed down. The burden of proof for the legitimate exercise of exceptions is already met by showing a *prima facie* case. If established, the burden shifts back to the opposing party that can rebut the given *prima facie* case.<sup>45</sup>

Again, one must turn to the jurisprudence of the Appellate Body. A close look at the cases suggests that the Dispute Settlement Bodies differentiate between competing regulatory regimes where the trade regime is clearly one of others and a hierarchy of measures in one single regime of economic law. Only in the latter are the Bodies inclined to argue in strict terms of broad rules and narrow exceptions. In the *Hormone*-case, e.g., the Appellate Body explicitly rebutted the analysis of the Panel that the Agreement on Sanitary and Phytosanitary Measures (SPS-Agreement) was to be conceived as an exception to the GATT-principles.<sup>46</sup> The SPS-Agreement in Art. 3.3. establishes an autonomous right to sanitary protection and is not an "exception" from a "general obligation" under Art. 3.1. SPS. Consequently, the rules for the burden of proof cannot follow the scheme of rule and exception. This course was set by the Appellate Body in *Japan – Taxes on Alcoholic Beverages*<sup>47</sup> dealing with the relationship of International Trade rules and national tax policy: "Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any other commitments they have made in the WTO Agreement."<sup>48</sup> The Appellate Body resumed the GATT/SPS-reasoning developed in the *Hormone*-case in *Canada – EC Asbestos*<sup>49</sup> in determining the relationship between Art. III GATT and the WTO- Technical Barriers to Trade (TBT)- Agreement.

In contrast, in *Canada – Patent protection for Pharmaceutical Products*<sup>50</sup> the Panel strongly reiterated the relationship between Art. 27 and 30 TRIPs in terms

<sup>43</sup> WTO-Dispute Settlement Understanding.

<sup>44</sup> From the *Tuna-Dolphin* adjudication to the Appellate Body Report in *US-Gasoline*, WT/DS2/AB/R (29. April 1996), Kap. III B and the (then latest) Panel-Report in *EC-Asbestos*, WT/DS 135/R (18. Sept. 2000), Winter supra note 6, at 74.

<sup>45</sup> Panel Report in *Asbestos*, WT/DS135/R (18. Sept. 2000), para. 8.1777.

<sup>46</sup> WT/DS 26 und 48/AB/R, 64 et seq; see Godt, C. (1998), „Der Bericht des Appellate Body der WTO zum EC-Einfuhrverbot von Hormonfleisch-Regulierung im Weltmarkt“, Europäisches Wirtschafts- und Steuerrecht, 202-209.

<sup>47</sup> WT/DS 8, 10, 11/AB/R (4. Oct. 1996).

<sup>48</sup> *Japan – Taxes on Alcoholic Beverages*, WT/DS 8, 10, 11/AB/R, supra note 47, at 16.

<sup>49</sup> European Communities – Measures Affecting Asbestos and Asbestos – Containing Products, WT/DS125/AB/R (12. March 2001).

<sup>50</sup> WT/DS 114/R (17. March 2000), <http://www.wto.org>.

of rule and exception.<sup>51</sup> The case deals with a complaint of the EC against a Canadian patent law provision allowing generic pharmaceutical manufacturers to start the production six months before the patent actually expires. Selling was only allowed after the patent had expired. The Panel<sup>52</sup> held the provision incompatible with Art. 28 and 30 TRIPs.<sup>53</sup> Similarly, the Appellate Body argued in *US – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*.<sup>54</sup>

Transposing this rationale to the relationship of Art. 27. 1 and Art. 27.2 TRIPs, the first task is to determine the regulatory purpose of Art. 27. 2 TRIPs. It safeguards regulatory authority of member states in public policies like health and environmental protection. The national regulatory autonomy in policy domains not adjudicated by the WTO-system is safeguarded in Art. 7 and 8 TRIPs. Lacking the regulatory competence for positive integration<sup>55</sup>, the respect for national regulatory autonomy in the framework of the WTO-system serves the external and internal legitimacy of the WTO.<sup>56</sup> Although the sections mirror conceptions and wordings of national patent systems<sup>57</sup>, which in their national framework are interpreted in terms of rule and exception, TRIPs has to be construed independently as an international treaty in respect to its unique content and the agenda of its signatories.<sup>58</sup> Thus, the relationship has to be interpreted in line of the cases *Hormones* and *Asbestos*.<sup>59</sup> The norms are therefore not to be conceived as rule and exception.

<sup>51</sup> WT/DS 114/R, at 170, para. 7.91 et seq.

<sup>52</sup> Concurring with academics like Straus, J. (2000), „Der Schutz des geistigen Eigentums in der Welthandelsorganisation: Konsequenzen des TRIPs für die Europäische Gemeinschaft und ihre Mitgliedstaaten“, in: Müller-Graff, P.-C., Die Europäische Gemeinschaft in der Welthandelsorganisation, Baden-Baden, Nomos Verl., 157-176, at 163.

<sup>53</sup> This provision is to be distinguished from provisions that back the experimental use exemption (for Germany: "clinical experiments I and II", BGHZ 130, 259, BGHZ 135, 217; BVerfG, 1 BvR 1864/95 from 10. May 2000; narrower for the US: the so called Bolar exemption, amendment to the Patent Act in 1988).

<sup>54</sup> WT/DS 33/AB/R (6. January 1997).

<sup>55</sup> Winter 2001, supra note 6, at 73.

<sup>56</sup> Weiler, J. H. H. (2001), "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement", Journal of World Trade, Vol. 35(2), 191-207.

<sup>57</sup> Art. 27. 2 and 3 mirror Art. 53 lit a) and b) European Patent Treaty (EPT).

<sup>58</sup> Concurring Schiuma, D. (1998), „TRIPs und das Patentierungsverbot von Software „als solcher“. Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil, 852-858, at 855; Rott, P. (2002), Patentrecht und Sozialpolitik unter dem TRIPs-Abkommen, Baden-Baden, Nomos Verl.-Ges., at 178.

<sup>59</sup> For a comparative analysis of both cases see Howse, R. and E. Tuerk (2001), "The WTO-Impact on Internal Regulations – A Case Study on *Canada – EC Asbestos Dispute*", in: G. de Búrca/J. Scott (eds.), The EU and the WTO, Oxford, Portland, Or., Hart, 283-328.

### III Determining the Legal Obligation: Soft Law and Territoriality

A third difficulty is determining, what „the law is“ in international law, if vague language obscures the content of the treaty. Two examples from the CBD may illustrate the problem:

#### Art. 5

“Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.”

#### Art. 15.7

“Each Contracting Party shall take legislative, administrative or policy measures, *as appropriate*, and in accordance with Articles 16 and 19 and, *where necessary*, through the financial mechanism established by Articles 20 and 21 with the aim of sharing *in a fair and equitable way* the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.” (emphases added, C.G.)

Usually, when a lawyer tries to determine the legal obligation arising from a treaty he/she takes resort to two principles, first, the interpretation of the treaty's wording<sup>60</sup> and second, to the principle of territoriality. In applying these principles, the practitioner comes to the following conclusion. If a wording is “soft”, unprecise and does not formulate a specific obligation<sup>61</sup>, one concludes that the treaty wants to leave ample discretion to the member states and does not oblige them to specific action. In then referring to the territoriality principle it is argued that the primary obligation under the treaty falls on those countries where the problem occurs. In the context of the CBD the two arguments taken together lead to the following conclusion: As the primary problem of vanishing biological diversity is located in the so called “centers of biodiversity” (primarily situated in the developing countries), the states hosting the biological wealth are primarily obliged to promulgate conservation measures under the CBD.<sup>62</sup>

<sup>60</sup> Art. 31. 1 VCLT: „A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

<sup>61</sup> Often portrayed in contrast to „hard“ and precise obligations in international economic law. In respect to a parallel shisma of internationalised economic law versus nationalised social regulation, Winter, G. (1996), “Subsidiarität und Deregulierung im Gemeinschaftsrecht”, *Europarecht*, 245-269.

<sup>62</sup> Spranger, note 22, at 72 and 78.

Countries poor in genetic resources (primarily the industrialised countries) are at most called upon to support resource countries' activities, namely by financial means through the Global Environmental Facility (GEF) and by conceptional support through the biannual Conference of Parties. The latter, *e.g.*, issued guidelines in April 2002<sup>63</sup> to support resource providing countries in formulating access regulation and benefit sharing treaties. Other duties do not arise. In support of this line of argument, Art. 3 CBD<sup>64</sup> is cited, stressing the weight of the sovereignty principle that has been pronounced in the drafting process. In this sense the CBD-preamble with its reference to biological diversity as a “common concern of humankind”<sup>65</sup> is interpreted: States have turned away from the notion of “common heritage of mankind”<sup>66</sup> thus underlining their claim for sovereignty.<sup>67</sup>

This argumentation is deeply rooted in traditional interpretation of international treaties. International treaties need to leave ample room for the various possibilities of national implementation measures as to fit the national needs and the preferences of the nationally legitimised legislatures. But they are still binding. The territoriality principle secures international peace and, today, has its primary function in safeguarding democratically legitimised decision-making, thus setting boundaries to internationally generated decisions. However, the argumentation neglects that both principles have evolved over time. The vague wording does not lift any obligation to implement the treaty: member states are still bound to efficiently pursue the treaty's goal. The vague wording must be interpreted in light of the proportionality rationale. If the goal of the treaty can be reached with less invasive measures, the treaty is successfully implemented. If the goal is not met, more stringent measures are to be conceived. Thus, the duty under the treaty may change over time. The traditional territoriality principle as the fundamental reasoning in the cause of international peace has been complemented by the principle of *joint and*

<sup>63</sup> So called “Bonn-Guidelines”, <http://www.biodiv.org>.

<sup>64</sup> Art. 3 CBD: “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

<sup>65</sup> Preamble, para. 3 CBD.

<sup>66</sup> Baslar, K. (1998), *The Concept of Common Heritage of Mankind*, The Hague, London, Boston, Martinus Nijhoff Publishers; Jagels-Sprenger, M. (1991), *Der Grundsatz „gemeinsames Erbe der Menschheit“ im internationalen Vertragsrecht zum Schutz der natürlichen Ressourcen*, Bremen, ZERP-DP.

<sup>67</sup> Spranger, note 22, at 78; however, the complex relationship between sovereignty and the principle of common heritage is shown by contradictory policy statements especially of developing countries, see Baslar, note 66, 129 et seq.

*differential responsibility*.<sup>68</sup> It has been adopted in particular in the domain of international environmental law when it has become evident that international environmental degradation cannot be resolved by single state action and has come to threaten world peace. It says that all countries are principally obliged to contribute according to their capacities and means. The exact geographical area where the problem occurs plays a secondary role. The inherent tension between the sovereignty principle on the one hand and the principle of joint and differential responsibility on the other hand has to be dealt with in the design of implementation measures.

With these developments in mind, the CBD is to be read as a modern, multilateral environmental agreement. As its goal, halting biodiversity loss, is unarguably complex, the convention necessarily leaves ample discretion to the member countries. What the exact obligations are is bound to change over time. In contrast to the often emphasised sovereignty principle, the Convention explicitly binds it to the principle of joint and differential responsibility: Art. 3 CBD reads: "States have, in accordance with the Charter of the United Nations and the principles of international law, *the sovereign right* to exploit their own resources pursuant to their own environmental policies, *and the responsibility* to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction." The principle has been casted in the terms of the customary law *neminem laedere*-principle. Thus, the CBD gives tribute to the resource countries claim to sovereignty *and* holds countries, developing and industrialised ones alike, responsible for securing biodiversity.

What are the consequences of this theory? If it is true that the loss of biodiversity has not been put on hold, then the community of states has to realise that the CBD's goal has not been met. Implementation measures have to be revised and improvements are to be devised. Industrialised countries may not simply point to the resource countries to implement the CBD through access regulation. They themselves are also obliged to implement measures that aim at the protection of these resources and, at the same time, to respect the resource countries' sovereignty. It is not only the provider countries' economic and demographic situation that puts pressure on natural environments. Legal incentives and consumption patterns in the industrialised world have had considerable impact on the loss of biodiversity in developing countries. In addition, the developed world has its own vital economic interest in conserving the biological richness as a source for chemical and technical innovation.

<sup>68</sup> French, D. (2000), „Developing States and International Environmental Law: The Importance of Differentiated Responsibilities“, *International and Comparative Law Quarterly*, 35-60; Kellersmann, B. (2000), *Die gemeinsame, aber differenzierte Verantwortlichkeit von Industrienationen und Entwicklungsländern für den Schutz der globalen Umwelt*, Berlin, Springer.

Traditional legal thinking seems to be stuck in a narrow dichotomy of measures protecting domestic resources and measures with disputed extraterritorial effects, *tertium non datur*. However, measures are conceivable that have exclusively internal effects, *and* support the implementation of conservation measures in resource countries. Those means aim at establishing the structural mechanisms envisioned by the Convention. The central mechanism envisioned by the CBD is a contractual system of *do-ut-des* for genetic resources. The idea has been twofold. The colonial system of exploitation was to be overcome, and an economic incentive for resource conservation should be set. The resource countries' attempts to set up such a system, however, will be ineffective as long as those regulations can be easily bypassed. Supporting implementation measures in the user countries are missing. An example of such a supporting measure would be the obligatory disclosure of the resource's country of origin in industrialised countries patent application procedures for those inventions that are based on genetic resources, and the evidence of compliance with the resource countries access regulations.<sup>69</sup> Compliance with international economic law (TRIPs) depends on the actual design.<sup>70</sup>

### C Analysis – A non-resignatory perspective

Where do these tensions refer to? Are they pieces of a larger picture? All of the illustrated rules of interpretation serve as "quick and dirty" guides to reduce complexity. They cut the real world into small, digestible pieces. They developed in a social environment with clear boundaries, where rules only claimed validity within clear territorial boundaries, where policy areas were neatly fenced off from each other and political decisionmaking was hierarchically conceived. The dogmatic instruments were an integral part of this orderly structure, fit to resolve conflicts in this well organised system.

With the blurring of these boundaries, the ability to solve occurring conflicts, and thus their persuasiveness, fade away. The *lex posterior*-, the *lex specialis*-rule and the interpretation in terms of rule and exception presuppose a closed system, where one single lawmaker carefully decides upon preferences in one given text or between various legal texts in time. This system is secured by the territoriality principle. These rules take a systematic order for granted.

The current political structures, however, have undergone fundamental changes. International regulation has evolved with no single body deliberat-

<sup>69</sup> As it has been demanded by developing countries led by Brasil, China and India (2002), note 23.

<sup>70</sup> Further reading Godt, C. (2004), *Innovation und Technologietransfer – Patentrecht im Spannungsfeld von Eigentum und Austausch. Eine theoretische Neuorientierung am Beispiel biotechnologischer Erfindungen*, forthcoming.



ing authoritatively on competing interests, nor weighing them to formulate a single text that reflects the agreed upon preferences. In contrast to the idea of a central and democratically legitimised legislature, international rule making is *sectorally differentiated*.<sup>71</sup> Rules are negotiated in *different fora* pursuing the mission entrusted to them. The deliberation inside these fora theoretically is performed by voicing the nationally aggregated preferences. The central, all encompassing institution is substituted by a network of negotiating bodies.<sup>72</sup> In each participate different stakeholders – variant contracting states and multiple NGOs with varying influence. The idea of building consent and generating decisions in networks contrasts with the idea of hierarchy, both in respect to political accountability and to norm generation. Territorially enclosed domains of control give way to systems of interdependence. Two of these fora are the CBD, embedded in the Framework of UN-Institutions, and the WTO, institutionally independent from the UN-System.

The blurring boundaries expose the legal profession to a new challenge. In the modern unfenced environment the traditional dogmatic rules do not deliver appropriate solutions. They do not reduce complexity, because they are under-complex. They undermine preferences of the international community and obstruct proper, balanced reasoning. After pioneering political scientists have described and analysed the shifting tectonic structure of intertwined international and national deliberation, it is up to the legal profession to find appropriate argumentative structures that are appropriate for the evolving new system. The system of segregated decision making in international fora once functioned to safeguard the legitimacy of international decision making. However, as decisions are more often (only) deliberated internationally, and as the juridification increasingly restricts the discretion left to national, democratically legitimised legislatures, it becomes even more important to reflect on ways to cautiously respond to fragile international networks in legal reasoning and how to uphold as much democratic legitimacy as possible. Thus, the Appellate Body has wisely departed from a narrow interpretation of economic freedoms as rules and regulation as exception.<sup>73</sup> This turn demarks a growing understanding that regulatory policy goals have to be integrated into the trade system as equal principles.

What is the road ahead? In principle, two steps are to be envisioned. The first step is a thorough analysis of those general concepts underlying our legal dogmatic rules that are prone to change. Much of this ground work has already

<sup>71</sup> Principle of sectoral segregation, Gehring, T. (2002), „Schutzstandards in der WTO“, in: M. Jachtenfuchs/M. Knodt (eds.), *Regieren in internationalen Institutionen*, Opladen, Leske + Budrich, 111-139.

<sup>72</sup> For an overview of literature see Jachtenfuchs, M./M. Knodt (eds.) (2002), *Regieren in internationalen Institutionen*, Opladen, Leske + Budrich.

<sup>73</sup> *Supra* notes 46 and 49.

been carried out. Central concepts like territoriality<sup>74</sup>, sovereignty<sup>75</sup>, democratic deliberation<sup>76</sup> and the status of non-state actors in international law<sup>77</sup> have been scrutinised.

The second step is the redefinition of legal argumentative structures that lead the decision making between competing interests in the international domain. Three examples have been discussed above, much remains to be done. The dogmatic structure of how to structure value decisions in a formal environment of differentiated fora and multiple international treaties so as to render the decision making process transparent is of utmost importance. This is particularly true for the enforcement of environmental goals. They are said to be integrated in the work programme of various other fora. The dedication of the states to efficiently integrate social goals into economic regulation has been renewed in the WTO-Ministerial Declaration in Doha, in November 2001 and in Johannesburg, in September 2002. Both stipulate that the world trade and environmental regimes are to be understood as “mutually supportive”.<sup>78</sup> However, whenever tensions between environmental and economic interests pop up, it is the primary mission of the given forum that prevails, *e.g.*, by arguing in terms of rule and exception. Legal thinking is yet absorbed by the conceptual dichotomy of international economic versus national regulatory, democratic

<sup>74</sup> Zürn, M. (1998), *Regieren jenseits des Nationalstaates*, Frankfurt a.M., Suhrkamp; Ullrich, H. (1995), „Technologieschutz nach TRIPS: Prinzipien und Probleme“, *Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil*, 623-641.

<sup>75</sup> Tietje, C. (1999), „The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Structure“, *German Yearbook of International Law*, Vol. 42, 26-55; Tietje, C. (2000), „Die völkerrechtliche Kooperationspflicht im Spannungsverhältnis Welthandel/Umweltschutz und ihre Bedeutung für die europäische Umweltblume“, *Europarecht*, 285-296.

<sup>76</sup> Joerges, C. and J. Neyer (1997), „From Intergovernmental Bargaining to Deliberative Political Process. The Constitutionalisation of Comitology“, *Journal of European Policy*, Vol. 3, 273-299; Howse, R. and K. Nicolaidis (2000), „Legitimacy and Global Governance: Why Constitutionalizing the WTO is a Step too Far“, in: Porter, R. B. et al., *Efficiency, Equity and Legitimacy: The Multilateral Trading System at the Millennium*, Washington, DC, Brookings Institution Press, 227-252.

<sup>77</sup> Wahl, R. (2001), „Der Einzelne in der Welt jenseits des Staates“, *Der Staat*, Vol. 40, 45-72; Hummer, W. (2000), „Internationale nichtstaatliche Organisationen im Zeitalter der Globalisierung – Abgrenzung, Handlungsbefugnisse, Rechtsnatur“, in: *Berichte der Deutschen Gesellschaft für Völkerrecht*, Vol. 39, *Völkerrecht und Internationales Privatrecht in einem sich globalisierenden internationalen System: Auswirkungen der Entstaatlichung transnationaler Rechtsbeziehungen*, Heidelberg, F.C. Müller, 45-199; Hofmann, R. (ed.) (1999), *Non-State Actors as New Subjects of International Law*, Berlin, Duncker & Humblot; Hobe, S. (1999), „Der Rechtsstatus der Nichtregierungsorganisationen nach gegenwärtigem Völkerrecht“, *Archiv des Völkerrechts*, 152-176.

<sup>78</sup> *Supra* note 3.

legitimized rulemaking.<sup>79</sup> Little has been done yet in legal reasoning to conceive argumentatively the integration of various policies in different fora and different levels. Both, procedural as well as substantive requirements need to be normatively conceived. In respect to procedural requirements, pioneering proposals have been made by Drahos<sup>80</sup> and Tietje<sup>81</sup>, now adopted by the WTO- Ministerial Declaration in Art. 31 and waiting for implementation.<sup>82</sup> Pioneering proposals in respect to material requirements are forwarded by Hilf and Puth<sup>83</sup> and Gerd Winter<sup>84</sup> focussing on the proportionality test. This road is to be followed.

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<sup>79</sup> Howse, R./K. Nicolaidis (2000), note 76; Weiler, J. H. H. (2001), supra note 56.

<sup>80</sup> Drahos, P. (2001), *Negotiating Intellectual Property Rights: Between Coercion and Dialogue*. Paper presented at the Oxfam-International seminar on "Intellectual Property and Development: What Future for the WTO-TRIPs Agreement?", Brussels, 20. March 2001, BIO-IPR-Docserver.

<sup>81</sup> Tietje, C. (2000), „Die völkerrechtliche Kooperationspflicht im Spannungsverhältnis Welthandel/ Umweltschutz und ihre Bedeutung für die europäische Umweltblume.“ *Europarecht* 35: 285-296.

<sup>82</sup> No. 31 (ii) "Regular information exchange between MEA Secretariats and the relevant WTO committees, and the criteria for the granting of observer status".

<sup>83</sup> Hilf, M. and S. Puth (2002), "The Principle of Proportionality on its Way into WTO/GATT law. European Integration and International Cooperation", in: A. v. Bogdandy/P. Mavroidis/Y. Mény (eds.), *Studies in Honour of Claus-Peter Ehlermann*, Den Haag, Kluwer International Law, 199-238.

<sup>84</sup> Winter 2001, supra note 6, at 75; Winter 2001, supra note 4.