

Conflicts and Convergence in Climate Change and Trade Law: The Role of the Principle of Sustainable Development

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Hypothesis:

- (i) General Principles have the potential of being ‘arbiters’ of normative conflicts in international law, such as those between climate and trade rules.
- (ii) The possible reconciliation of these two conflicting regimes by the application of the principle of Sustainable Development also influences the general structure of international law by making it more coherent and introducing a certain hierarchical systematization of values.

1. Introduction

If pieces of a puzzle are set together, the result - given the necessary patience, imagination and the right pieces - will most likely be a cohesive picture. The pieces will ‘fall into place’ and build one single whole. The reason why a puzzle creates this final picture is that it originally started out as a whole, which then was divided into smaller fragments whose sum will always remain the ‘whole’.

Unlike a puzzle, Public International Law starts in pieces, usually without a final ‘plan’ against which it is set. It consists of numerous fragmented and separate treaties, different customary norms and general principles. This, in itself, is not a bad thing. It probably is necessary to take into account all the different interests and areas to be dealt with in international law – and might even be its best justification.¹

A challenge, however, arises when the different parts do not fit together due to regulatory overlaps or gaps. In this situation, I believe, it is necessary to *envisage* international law as a whole.

The problem then is how, and by what means, seemingly incoherent rules of international law nevertheless can be harmonized to make up a coherent whole.

This paper puts forward a *principle-based* approach to solving conflicts between norms. I will suggest that a principle-based approach not only provides for the reconciliation of conflicting norms, but sets out the framework for how different ‘pieces’ of international law can be put together to form one coherent system.

This paper starts out from the specific case of interplay between WTO rules and climate change law (United Nations Framework Convention on Climate Change, UNFCCC, and its Kyoto Protocol, KP). I believe this example can be linked to a broader conceptual framework, within which the interplay between norms can be examined. It is hoped that this framework also

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¹ Koskeniemi, Martti and Paevi, Leino, “Fragmentation of International Law? Postmodern Anxieties”, 15 *Leiden Journal of International Law* 553-579 (2002), 579.

will be useful for the resolution of conflicts in general, not only those involving WTO or climate law rules. Such an understanding is eventually based on the assumption that there is an emerging hierarchy of values in international law, already aptly expressed in the concept of *jus cogens*, where particular importance and weight is attached to obligations to protect certain collective interests.

I will argue that the application of certain general principles of international law, in particular the principle of sustainable development, necessarily leads to a differentiation between various, in principal, equal norms. As a consequence, such norms, which seek to protect fundamental collective interests, such as the functioning of essential life-sustaining natural processes that are a prerequisite for human activity, incl. economic activity, come to have a higher hierarchical standing than other norms.

This simply means that in case of conflict, not all norms can and should have the same status. This recognition can offer new solutions to conflicting norms in international law and can introduce a “certain normative order in the often chaotic world resulting from the contractual freedom of states”.²

2. Climate and Trade Law – An Example of Conflict

If, as appears likely, the Kyoto Protocol is ratified by Russia, the effect would be to finally bring it into force in 2005. Clearly this is the most significant development since the Protocol was agreed in 1997. From the point of novelty alone it appears particularly opportune to explore the relationship between international law on climate change and other areas of international law. However, the case example of the relationship between WTO rules and climate change law is chosen for a wider spectrum of specific reasons.

Global climate change has been acknowledged as one of the most significant global challenges; its impacts will adversely affect human life and the natural environment alike by, *inter alia*, increasing sea levels and more violent weather causing floods and storms that are a threat to human life and health, longer drought periods in already arid regions threatening food security as well as, arguably, global security, rapid changes in weather pattern that pose extinction risks to a wide variety of species and have the challenge of being potentially catastrophic in both human and economic terms. Against this background the statement by the British Prime Minister that “[t]here is no bigger long-term question facing the global community than the threat of climate change” seems comprehensible.³

The measures envisaged under the UNFCCC and the KP to mitigate climate change will go to the very heart of contemporary human activity and life-style, e.g. by targeting industrial processes based on fossil fuel combustion, energy intensive production and consumption practices, global deforestation, transport and travel modalities. The Parties included in Annex B of the Protocol have committed themselves to quantified emissions reduction targets. They now have to adopt national policies and measures (PAMs) that limit their anthropogenic emissions greenhouse gases in order to mitigate climate change. The Kyoto Protocol envisages PAMs such as the enhancement of energy efficiency, development and increased use of new or renewable forms of energy, of CO₂ sequestration technologies and of advancing innovative environmentally

² Pauwelyn, Joost, *Conflict of Norms in Public International Law*, Cambridge University Press, 2003, 22.

³ Tony Blair, April 26, 2004, <http://news.bbc.co.uk/1/hi/uk/3662303.stm>

sound technologies and reforms in relevant market sectors. (see Art 2.1(a) i, iv, vi KP). However, the mitigation costs of these measures are estimated to be high.

For this reason a number of market-based or economic mechanisms (trade-related environmental measures, TREMs) have been introduced into the climate regime. These mechanisms constitute the area most prone for conflicts with other areas of multilateral regulation, especially WTO rules, because of their potential to distort free trade by being potentially discriminatory. The means of distortion range from:

- providing comparative advantages to national companies (e.g. subsidies, border tax exemptions and adjustments for carbon taxes) that are prohibited under the Agreement on Subsidies and Countervailing Measures (SCM),
- treating imported goods and services less favorably than national ones, thus potentially violating the national treatment rule, Art. III GATT (e.g. technical regulations and standards on (non-) product related production and processing methods (PPMs) such as greenhouse gas emissions during the production processes; energy efficiency, eco-labelling and other PPMs, carbon and energy intensity), or potentially conflicting with the Agreement on Technical Barriers to Trade (TBT),
- restricting access to markets (by regulations and standards such as the carbon content of a certain product (e.g. energy based on burning of fossil fuels or based on renewable energy sources) to ensure and enhance the development and use of renewable forms of energy, carbon dioxide sequestration technologies, energy efficiency, and other environmentally sound technologies, according to Art. 2 I (a) KP),
- making use of so-called flexibility mechanisms (Emission Trading Art. 17, Clean Development Mechanism Art 12 and Joint Implementation Art. 6 KP) that are potentially conflicting with provisions of the GATS, GATT, SCM Agreement,
- favouring services or goods from specific countries (e.g. those that have commitments under the Kyoto Protocol) thus potentially violating the Most-Favoured-Nation rule Art. I GATT, Art II GATS
- discriminating between countries on the basis of their membership to the UNFCCC and the Kyoto Protocol, their compliance with these agreements or on the basis of their environmental performance with the aim of increasing the effectiveness of the climate regime by reducing compliance costs, preventing 'free-riders' and ensuring the environmental integrity of the MEA in pursuance of the object and purpose of the UNFCCC.⁴

No other separate areas of international law bear such a high potential for normative conflicts. At the same time, international trading regime is constantly developing and is an essential part of public international law, and it is perceived as a 'strong' system due to its dispute settlement and enforcement mechanisms.

The potential for conflict in the abovementioned context is twofold: There is a potential for 'vertical' conflicts as between domestic climate mitigation measures and international trade

⁴ For details and examples see: *Climate and Trade Rules – Harmony or Conflict?*, 2004, National Board of Trade, Sweden; Charnovitz, S. "Trade and Climate: Potential Conflicts and Synergies" in *Beyond Kyoto – Advancing the international effort against climate change*, PEW Center on Global Studies, 2003, 141-170.

provisions and there is the potential for ‘horizontal’ conflicts between international climate mitigation measures and international trade. This study will focus on the latter one – but the answers to be found to solve conflicting international law norms hold the potential to also inform the ‘vertical’ trade and environment (climate) debate as well as other areas of conflicts of norms.

3. Normative Conflicts and The Role of Interpretation

With regard to the objective of this paper the central question is: what happens if measures taken to pursue the objective and purpose of the climate convention and its protocols conflict with rules governing free trade?

At a preliminary stage it is necessary to ascertain whether there is a *real* conflict. A conflict in a narrower sense is generally defined as the incompatibility of two legal norms.⁵ There is, however, general recognition of a wider definition of conflicts according to which a conflict arises when two or more norms containing obligations, prohibitions or permissions cannot simultaneously be complied with without necessarily violating one another.⁶

In this context, the role of interpretation as a means of clarifying the meaning and scope of a norm and removing ambiguity has to be emphasized. This may already resolve a number of *apparent* conflicts. Interpretation can therefore be seen as a ‘conflict *avoidance* tool’⁷, it is, however, *not* a tool to solve conflicts between treaty norms.

The specific question with regard to the relation of climate and trade rules is to what extent the interpretation of the WTO Agreements’ rules and exceptions, such as GATT Art. XX , GATS Art. XIV, Art. 2.2. TBT Agreement, can already solve apparent conflicts. Albeit the centrality of this question, the spatial limitations and the confined context of this paper make it necessary to start from the assumption that even after the course of interpretation a certain friction between the two sets of norms remains; that apparent conflicts cannot simply be ‘interpreted away’. The reason for this assumption lies within the inherent limitations that apply to interpretation.

First, there is a general conceptual inadequacy. By approaching the tension between climate measures and trade provisions via interpretation of trade law exceptions, environmental issues are tried to make fit into the framework of trade law.

The traditional approach leads to viewing the relationship through a ‘*trade lens*’. As a result, environmental concerns are not given comparable weight to those of trade. Under trade rules, environmental concerns are only recognized under a confined set of conditions, such as ‘necessary to protect human, animal or plant life or health’ (GATT, Art XX (b)), ‘relating to the conservation of exhaustible natural resources’ (GATT, Art, XX (g)), ‘non-arbitrary and justified discrimination’, ‘no disguised restriction’ etc. What is needed to give adequate weight to environmental concerns is a *neutral* perspective where both, environmental norms and international trade norms are equal and integrated parts.

Second, interpretation in its traditional, positivistic sense is about giving meaning to the terms of a treaty. It means that in the course of interpreting WTO exception clauses, other rules cannot add meaning to WTO rules that goes beyond or against the ‘clear meaning of the terms’. Therefore, terms cannot be interpreted ‘*out of*’ WTO provisions; neither can new words

⁵ H. Kelsen, *General Theory of Norms*, 1991, 123.

⁶ See Neumann, Jan, *Die Koordinierung des WTO-Rechts mit anderen völkerrechtlichen Ordnungen*, Duncker-Humblot, 2001, 142; Pauwelyn, *Conflicts*, 2003, 176.

⁷ Pauwelyn, *Conflicts*, 2003, 244.

interpreted ‘into it’. Also ‘evolutionary’ or ‘inter-contemporaneous’ interpretation according to Art. 31.3(c) of the VCLT, where account shall be taken of ‘any relevant rules of international law applicable in the relations between the parties, is bound by this inherent limitation of treaty interpretation. According to Art. 31.3(c) VCLT relevant ‘outside’ rules only assist in giving meaning to the terms of the WTO treaty; they cannot change or overrule those terms.⁸

Interpretation, nevertheless, can clarify the *existence* of ‘real’ (genuine) normative conflicts.

4. Application of General Principles

Given the limitations of interpretation the question of how to deal with genuine conflicts remains a crucial issue. This question relates to the law *applicable* to such a conflict. It is of significant importance to distinguish between two types of inclusion of ‘outside’ rules: interpretation with reference to other law and the actual application (or ‘fall-back’) of the treaty in a broader legal context.

By assessing the possibilities for conflict resolution, the option needs to be considered, whether a ‘fall-back’ to other rules of international law could provide for a possible means for harmonizing conflicting norms.⁹

The application of general international law is possible because of the presumption that international law continues to apply to a treaty unless explicitly or implicitly contracted out. Although the WTO treaty has contracted out some parts of international law, it arguably could not and apparently has not contracted out *all* of them, thus it cannot be considered a ‘self-contained regime’. After all, the presumption of applicability of general international law also means that ‘the burden of proving the self-contained’ character of a subsystem lies with those who allege such a detachment of primary rules from the normal regime’.¹⁰

The application of general international law rules to a conflict between norms is significantly different from interpretation by not being limited to giving meaning to explicit terms in a given treaty. The other norms fill the ‘gaps’ that are left open by interpretation. They add to the treaty terms as a part of the applicable law in judicial disputes. The issue of applicability (or applicable law) is not about enforcing claims or giving meaning to WTO norms, but about the independent reference to non-WTO law to decide on the validity of non-WTO claims before WTO dispute settlement panels.

What then is the applicable law?

The applicable law, in general, includes all relevant norms of international law binding on the disputing parties, even if the jurisdiction of panels is limited to claims under the WTO covered agreements. In this sense, general international law rules play a role in creating an international legal *system*. As noted by Vaughan:

⁸Philippe Sands, “Treaty, Custom and the Cross-fertilization of International Law”, *10 Yale Human Rights and Development Law Journal* 3 (1998), 12.

⁹ In the context of this paper the discussion of so-called ‘priority rules’, such as explicit conflict clauses or the principles of *lex posterior and lex specialis* has deliberately been omitted. Apart from spatial limitations, the reason lies within the preliminary assumption that no such conflict clauses exist between the WTO covered agreements and the climate agreements. Furthermore, both regimes are evolving in their particular field, thus neither one can be deemed *lex specialis* or *lex posterior* in relation to the other.

¹⁰ Simma, B. “Self-Contained Regimes” (1985), 16 *NYIL* 115, 135.

Cases cannot always be decided by the mechanical application of syllogistic logic, herding the facts inevitably into the one and only legal fold in which they belong....Rather the preferred outcome is chosen in the light of estimates of the degree of conformity of the outcome with ideas of *justice*, precedent, and so on (what might be termed the ‘coherence of the legal system’)...¹¹

After all, there are, as Rosalyn Higgins observed, uncertainties about the identification of norms and of their provenance at the heart of the international legal system.¹² These uncertainties, dangerous as they might be, also open for the search and identification of those rules that *best* serve the purpose of international law. The primary role of international law is to secure values for the common good. “International law is not rules. It is a normative system.”¹³ Thus, the function of norms is the achievement of common values. If norms that serve this role cannot sufficiently be found in certain treaties and an inadequacy remains, then the search needs to continue and it has to include a wider array of sources.

The ‘source’ most relevant for such ‘gap’ filling functions is by its very understanding the field of general principles of international law. This assumption is based on their general character and their reconciliatory function.¹⁴ General principles have symbolically been described in this regard as the ‘glue between different treaties’ based on their broad and open-textured character. They extend the ‘concept of the sources of international law beyond the limit of legal positivism according to which, the States being bound only by their own will, international law is nothing but the law of consent and auto-limitation of States’.¹⁵ Thus, they provide ‘international law with a most welcome possibility for growth’.¹⁶ Brierly referred to general principles as ‘an authoritative recognition of a dynamic element in international law, and of the creative function of the courts which may administer it’.¹⁷

In disputes involving WTO law and other branches of law, they serve a twofold role:

(i) they are a ‘go-between’ and converging factor between the particular branch of law (WTO) and the wider corpus of public international law and they are (ii) a tool for the judicial function to construe the law in a dynamic fashion responsive to today’s problems.¹⁸

A logical question, succeeding the assumption that general principles can be applied to resolution of conflicts, is *which* principles have the potential and power to serve the function of reconciliation. In order to be relevant to the resolution of normative conflicts, the principle (i) needs to be of normative value, (ii) must represent the collective interest of the whole international community and (iii) needs to encompass interaction between a set of diverse factors (i.e. economic, environmental, social).

¹¹ Vaughan Lowe, “Sustainable Development and Unsustainable Arguments” in Boyle and Freestone, *International Law and Sustainable Development*, 1999, 32.

¹² Rosalyn Higgins, *Problems and Process*, Oxford University Press, 1994, 17.

¹³ *Ibid*, 1.

¹⁴ See Cheng, B. *General Principles of Law as Applied by International Courts and Tribunals*, 1953, 393.

¹⁵ Dissenting Opinion, Judge Tanaka, *South West African cases* (Second Phase), ICJ Reports, 1966, 63.

¹⁶ Bos, M. “The Recognized Manifestations of International Law”, 1977, 20 *GYIL* 9, 42.

¹⁷ Brierly, J.L., *The Law of Nations*, 1963, 63.

¹⁸ Pauwelyn, *Conflicts*, 130.

5. Sustainable Development as a General Principle

In the trade and environment nexus the most significant principle in this regard is the concept of sustainable development, which seeks to link and balance environmental protection with economic interests and encompasses the concepts of intra- and intergenerational equity and sustainable use of natural resources. This principle serves a twofold aim:

First: any development measures must be sustainable *in itself*, in other words, it has to promote development in such a way that developmental needs of present and future generations are duly met¹⁹ In addition, any developmental measure must not simply meet individual state interest, but the interest of the whole international community.²⁰

Secondly – and very crucially - the principle recognizes the close interrelation between sustainability and *ecology*. It can be safely stated that sustainable development also means ‘environmentally’ or ‘ecologically’ sustainable development.²¹ Development becomes necessarily counter-productive if it puts certain essential ecological functions at risk. The developmental goal of achieving a ‘better life for all people’, which lies at the heart of the objective of the international trading system²², presupposes a certain standard of environmental protection and a certain quality of natural processes.

That means, at least the *essentials* of environmental protection are *prerequisites* for achieving any lasting developmental progress. In sum, developmental (including trade) measures and norms which disregard fundamental environmental needs simply lack the required ‘sustainability’ criterion. This is the core of the principle of sustainable development to which the international community has committed itself. For example, the principle is enshrined in the Preamble of the WTO Agreements and was recognized in the Doha Ministerial Declaration (2001). Also Art 2.4 UNFCCC and the Kyoto Protocol embrace the principle. In addition it is encompassed by numerous international agreements, national constitutions and secondary. It is a central principle of the law of the EU, manifested in Art. 6 EC Treaty. State practice and *opinio juris* would most likely allow claiming a customary manifestation of the principle. However, the application of the general principle of Sustainable Development as an ‘arbiter’ in gaps between treaties is (widely) independent from a customary status.

By serving the function of an arbiter it is applied as a rule for *decision*, rather than a rule for conduct. As Lowe claims:

Sustainable development can properly claim a normative status as an element of the process of judicial reasoning. It is a *meta-principle*, acting upon other legal

¹⁹ Beyerlin, U., “The Concept of Sustainable Development” in Wolfrum (ed.) *Enforcing Environmental Standards*, 1996, 102

²⁰ Handl, G., *Environmental Security and Global Change: The Challenge to International Law*, in: G. Handl (ed.), *YbIEL* 1 (1990), 24.

²¹ Brown-Weiss, E., *Introductory Note*, ILM 31 (1992), 814.

²² Preamble to Marrakesh Agreement: Raise living standards, ensure full employment and a large steadily growing volume of real income and effective demand, expand the production of trade in goods and services, while allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

rules and principles – a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other.²³

In the context of climate versus trade rules, the application of the principle can potentially entail a balancing of interests independently of WTO exceptions.²⁴ The principle of Sustainable Development could function as a rule for balanced judgments when faced with conflicting norms. The application of the principle requires a ‘holistic’ approach to the resolution of conflicts by taking into account the ‘mass of matters’ and recognizing their integrated function rather than focusing on isolated narrow legal issues.

This holistic approach needs to take into account (i) the objective and purpose of the climate regime: to prevent dangerous anthropogenic interference with the climate system (Art. 2 UNFCCC) and (ii) the commitments under the Kyoto Protocol, which in this concrete setting can be considered a manifestation of the principle of Sustainable development.

A stable global climate is such a fundamental ecological function as mentioned above. It may well be the most important one, because a virulent, unstable climate will necessarily enhance the disruption of other essential ecological premises: e.g. global natural carbon cycle, global water and air temperature, oceanic currents, biological diversity etc.

I therefore propose that the understanding of sustainable development in a climate-trade context means the following:

The protection of the global climate system is a precondition for any development to be carried out in a sustainable manner. In case of conflict between climate and trade rules, the rule more favourable to the protection of the global climate, given its environmental integrity, shall prevail.

This argumentation is subject to a number of substantive criteria:

- (i) A normative conflict
- (ii) The climate mitigation measure pursues the objective and purpose of the UNFCCC (‘primary environmental integrity’)
- (iii) The measure does not cause damage to the environment otherwise (biodiversity etc., ‘secondary environmental integrity’)

The reasons for such an argumentation are based on the integral, non-reciprocal nature of climate obligations, which reflect a global responsibility for the protection of the climate system. Warming up of the atmosphere will adversely affect the global community of *all* states. It can therefore be assumed that taking measures to protect the global climate system is of the common interest of all states.

Summarizing I suggest that in case of clear conflict between climate and trade rules, the application of the principle of Sustainable Development allows for a legal argumentation that the community interest in a stable global climate prevails over the economic and welfare interests

²³ Lowe, V. “Sustainable Development and Unsustainable Arguments” in Boyle and Freestone, *International Law and Sustainable Development*, 1999, 31.

²⁴ For a similar approach see Esty, D. *Greening the GATT*, 1994, 115. He suggests an ‘environmental legitimacy’ test that should be employed to assess the underlying environmental injury or interest of the jurisdiction whose standards and regulations are in question and whose use of trade measures in support of its environmental policy has been challenged.

protected by the international trade regime on the grounds of ‘inescapable logical necessity’²⁵ and the urgent need to act²⁶.

6. Concluding Remarks

The application of the principle of Sustainable Development in this context can also work as a *corrective* to unsustainable trade practices. Trygve Haalmo, Norwegian Economist and Nobel Laureate put the nexus between international trade and sustainable development in more descriptive terms by stating, that “...while many nice things can be said about liberalizing trade and thus increasing trade, the structure of trade, as we know it at present, is a curse from the perspective of sustainable development.”²⁷ Thus, the relevance and potential of the principle exceeds the trade and environment agenda.

Finally, the application of the principle of sustainable development as a principle of ‘resolution’ would have a harmonizing impact on the effects of fragmentation of international law, as exemplified here by climate rules and international trade norms.

The principle of sustainable development needs first and foremost be understood as *environmentally* sustainable development in the sense of giving priority to the protection fundamental life-sustaining natural processes, such as those supporting a stable global climate system. When applied accordingly to dispute resolution, such a principle-based approach will introduce a certain *value* aspect into the issue of resolving conflicts between treaties. The value aspect lies in respecting essential natural functions as preconditions for economic development in particular and human activity in general.

If viewed from this angle, the application of the principle entails a certain hierarchical systematization of the mentioned values, with supremacy of protecting fundamental natural processes.

In a more systematic perspective, such value hierarchy approach can be seen as a countertendency to fragmentation and as a modality to ensure systematic coherence in accordance with those same values.

The principle, applied in this sense to the resolution of conflicts, would enhance the capacity of international law of becoming a coherent *system*, a ‘whole’.

²⁵ Separate opinion, Judge Weeramantry, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Judgment, September 25, 1997, pg. 4.

²⁶ D. Shelton: “The international community cannot afford a consensual regime to address many modern problems.... The urgent need to act [...] fundamentally challenges the consensual framework of the international system by seeking to impose on dissenting states obligations that the ‘international community’ deems fundamental. State practice has yet to catch up with this plea of necessity.” *International Law and Relative Normativity in* Evans M. D. (ed.), *International Law* 145 (2003), 159.

²⁷ T. Haavelmo and S. Hansen, *On the Strategy of Trying to reduce Economic Inequality by Expanding the Scale of Human Activity*, in R. Goodland, H. Daly and S. El Serafy (eds.), *Environmentally Sustainable Economic Development: Building on Brundtland* (World Bank), 1991, 34.