Governing Conflicts of Law: Lex Posterior, Lex Specialis and the Swordfish Case

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Abstract

This article is a contribution to the current discussion on how to resolve conflicts of law in public international law. Such conflicts may arise between the jurisdiction of courts, between substantive norms and between the jurisprudence of courts. In the introduction a brief presentation of the background and reasons for conflicts of law in public international law is given in A. Then the principles of *lex posterior* and *lex specialis* are presented as potential tools to solve conflicts of law in public international law in B. It is argued that both principles, as expressions of state intent, may serve as useful tools to solve conflicts of law in public international law.

The significance of the principles should not be diminished by advocating a narrow understanding of conflict. Furthermore, no strict hierarchy exists between the principles. The priority between the principles should be given to the principle that best expresses state intent. This is achieved, in a concrete case, by first trying to resolve the conflict through the principle of *lex specialis*. The principle of *lex posterior* only applies to two treaties that relate to the same subject-matter. No such requirement applies for the principle of *lex specialis*. The principle of *lex specialis* is furthermore applicable between norms from highly independent and autonomous regimes, whereas the principle of *lex posterior* is not. For the principle of *lex specialis* to apply on norms from such regimes, a high degree of specialty would, however, have to be demanded.

These results are then applied on a concrete case, the *Swordfish Case*, in which a conflict between the regime of the United Nations Convention on the Law of the Sea (UNCLOS) and the General Agreement on Tariffs and Trade (GATT 1994) was and is foreseeable (C.). It is concluded that neither the principle of *lex posterior*, nor the principle of *lex specialis*, may solve the conflict. The principles of *lex posterior* and *lex specialis* are thus only part of the munition courts and other legal interpreters, needed in order to overcome conflicts of law in public international law.

A. Introduction

Public international law is fragmented and has always been so. This derives from the lack of a central legislator. The law is on the contrary based on the common will of sovereign states,[1] and is expressed through either international custom or international treaties.[2] In that regard, public international law has more in common with contract law than statutory law. The law-making in public international law, and in particular with regard to treaties, takes place in a variety of different fora and often between different parties. Treaties also tend to be negotiated by different representatives of these parties, which may or may not have a complete and necessary overview of the international obligations entered into between states. In such an environment, it is evident that conflicts or incompatibility between norms may arise.[3] Conflicts could be avoided through proper prudence in the law-making, taking already existing law into account. This is, however, not always done, for reasons that could be more or less deliberate on the part of states. Conflicts could furthermore be avoided through interpreting the norms of one instrument in harmony with those of another instrument.[4] However, with the ever expanding size of international law, not even the best will of law interpreters can

1 See e.g. the Charta of the United Nations (UNC), signed on 26 June 1945, entry into force on 24 October 1945, with later amendments, Art. 2(1).

2 See e.g. the Statute of the International Court of Justice (Statute ICJ), which forms an integral part of the UNC, Art. 38(1) lit. a and b.

3 The first to investigate the question of conflict of norms in public international law in some detail, at least in modern time, was *Jenks*, Conflict of Law-Making Treaties, XXX BYIL (1953) 401-453.

4 The rules of interpretation in the Vienna Convention on the law of treaties (VCLT), adopted on 22 May 1969, entry into force on 27 January 1980, provide opportunities for harmonious interpretation of treaties, see in particular Art. 31(3) lit. c. A famous example, in which the Appellate Body of the WTO interpreted "exhaustible natural resources" in Art. XX lit. g GATT 1994 in harmony with the development of international environmental law, is the *Shrimp-Turtle Case*, AB *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, 6 November 1998, WT/DS58/AB/R, see particularly in paras. 127-133.

avoid conflicts between norms from different sources and instruments of public international law.[5] Conflict of norms seems to be unavoidable in any legal system – national as well as international.

As long as the surveillance of the law is left in the hands of states, they stand free to negotiate a solution or in other ways reconcile conflicts between norms of public international law. It can even be argued, that states are obliged to reconcile a conflict as they are obligated to comply with all their contractual and customary obligations at the same time in good faith.[6] In recent years such a tacit solution has become difficult because of the rise of international regimes with a high degree of legal autonomy. The European Community (EC), the North-American Free Trade Association (NAFTA), the European Convention on Human Rights (ECHR), the United Nations Convention on the Law of the Sea (UNCLOS),[7] and the World Trade Organization (WTO)[8] are some of the most prominent. The debate on conflicts between norms in public international law has thereto blossomed.[9] The rise of these regimes has made the debate on conflict of norms in public international law imminent for at least two reasons. First, because such regimes often seek to exhaustively regulate one subject-matter from one perspective only. However, this approach is necessarily too simplistic, as the subject-matter of e.g. trade is inextricably linked to a number of so called non-trade issues or values such as environment, labor rights and human rights. The linkage between different issues and values may cause treaties to overlap in coverage, although from different perspectives.[10] The more extensively such regimes regulate one issue

5 It is especially treaty-based international law which has expanded in the last decades. In this article, the main focus will be on conflict between treaty-based norms, see infra in section C. This is also reflected in the general analysis made in section B. This does, however, not mean that the conclusions of this work are not applicable on conflicts between custom-based law or between custom-based law and treaty-based law.

6 Compare Art. 26 VCLT, which expresses the principle of *pacta sunt servanda*.

7 Opened for signature on 10 December 1982 and entry into force on 16 November 1994.

8 The WTO was established by the Agreement establishing the World Trade Organization (WTO-Agreement), adopted on 15 April 1994 and entry into force on 1 January 1995.

9 The most recent and thorough work on conflicts of norms in public international law is *Pauwelyn*, Conflict of Norms in Public International Law (hereinafter Conflicts), Cambridge University Press (2003).

10 The WTO is e.g. the leading international institution responsible for liberalizing trade between nations. The backbone of the WTO are the WTO agreements which place various rights and obligations upon the member states with regard to trade. Other treaties of public international law address non-trade issues more specifically. The problematic of overlaps of issues and values with particular regard to the WTO is described on a general level by e.g. *Dunhof*, The Death of the Trade Regime, 10 EJIL (1999) No. 4 733-762; *Trachtman*, Trade and […] Problems. Cost-benefit Analysis and Subsidiarity, 9 EJIL (1998) No. 1 32-85 and in: Institutional Linkage: Transcending "Trade and […]", 96 AJIL (2002) No. 1 77-93 and by *Leebron*, Linkages, 96 AJIL (2002) No. 1 5-27.

from one perspective only, e.g. trade, the more imminent a conflict between rules from other regimes and in particular highly developed regimes, becomes. Second, these new regimes, in addition to extensive substantive regulation, tend to have a high degree of institutional autonomy. This gives rise not only to fragmentation of the substantive law, but is also accompanied by institutional fragmentation, which may be more problematic. In particular the merits of the proliferation of international courts and court-like bodies (hereinafter "courts")[11] have given rise to a vivid discussion among scholars.[12] For the purpose of this article, the interesting feature of this debate is that the substantive conflicts gain momentum through potentially conflicting judicial decisions, giving rise not only to conflicts of norms, but also to conflicting jurisprudence.[13] This momentum is emphasized if courts have mandatory and exclusive jurisdiction to solve a case arising under their regime, e.g. the WTO dispute settlement bodies for claims arising under the WTO-Agreements.[14] The WTO also has its own system of sanctions, giving a decision from a WTO dispute settlement body a particular force.[15]

Fortunately, the *ultima-ratio* scenario of two such conflicting decisions has never seen the light of day. However, with the growing number of specialized courts set up to rule on the merits of different regimes, conflict is deemed to arise. The so-called *Swordfish Case* is an example where such a conflict was in the offing: The EC initiated proceedings before the WTO, claiming that the denial of access to Chilean ports was unlawful under WTO law. Chile, on the other hand, regarded The International Tribunal for the Law of the Sea (ITLOS) as the appropriate forum to solve the dispute and seized the ITLOS and claimed that the denial of access to port was to be declared lawful under the UNCLOS.[16]

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11 In this article it is not differentiated between different types of courts and court-like bodies.

12 See e.g. *Romano*, The Proliferation of international judicial Bodies: The pieces of the puzzle, 31 NYU JIL (1999) No. 4 709-752, with further references in note 2; *Guillaume*, The Future of International Judicial Institutions, 44 Int'l & Comp. L.Q. (1995) 848-862; *Charney*, Is International Law Threatened by Multiple International Tribunals?, 271 Recueil des Cours (1998) 101-382 and *Dupuy*, The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice, 31 NYU JIL (1999) No. 4 791-808.

13 Jurisprudence is in this article understood as decisions from international courts.

14 See the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) of the WTO, Annex 2 to the WTO-Agreement, Art. 23(1).

15 See Articles 21-22 DSU.

16 See infra in section C. Another case, in which conflicting jurisprudence was foreseeable, was the *US – EC GMO Case*, *EC – Measures Affecting the Approval and Marketing of Biotech Products*, 7 February 2006, WT/DS291-293/INTERIM. The case was brought to the WTO and settled after the SPS Agreement. The case did, however, cover similar subject-matters as the 1992 Convention on Biological Diversity and the 2000 Cartagena Protocol on Biosafety. The regime of the Biosafety Protocol may be subject to obligatory dispute settlement, see Art. 27 of the Protocol. Conflicting jurisprudence did, however, not arise in the case, as the Biosafety Protocol had not

In national law, conflicts of jurisdiction, norms and jurisprudence are handled through a centralized legal system in which the creation, application and implementation of norms is kept coherent. In public international law, there is no systemic relationship between different sources and norms. In particular, there is no formal inherent hierarchy between norms, be they related to the jurisdiction of courts, substantive law or jurisprudence.[17] States are thus in principle obliged to comply with all their obligations at the same time.[18] The lack of systemic relationship does, however, not mean that conflicts cannot be avoided or solved. Conflict principles need be inherent of any legal system – since the very purpose of the system is to give answers to legal questions. Hence, in all systems of law, there are inherent tools that can solve conflicts.[19] It is particularly important that international courts use such tools in a coherent way. If not, the fragmentation of international law might not only prove dangerous for the unity and coherence of international law, but could lead to serious problems of unpredictability, as well as facilitating forum and treaty shopping. This could lead to conflicting jurisprudence and severely weaken the ability of the international community to regulate through norms.

The former Presidents of the International Court of Justice, *Stephen M. Schwebel* and *Gilbert Guillaume*, have pointed out the difficulties arising from the incongruities and fragmentation of international law and have made a call for order and coherence in international law.[20] These difficulties have also attracted the attention of the International Law Commission (ILC), who included the topic in its long term working program at its fifty-second session in 2000.[21] The working-title

entered into force at the time of the dispute. Another issue which could lead to conflicting jurisprudence is the stand of the so-called precautionary principle under WTO law and environmental law. The Appellate Body of the WTO concluded in the *Beef Hormones* case that whatever status of that principle "under international environmental law" it has not become binding for the WTO, see WT/DS26/AB/R, 13 February 1998, in para. 125. In connection to this, see *Marr*, The Southern Bluefin Tuna Cases: The Precautionary Approach and Management of Fish Resources, 11 EJIL (2000), No. 4 815-831, who argues that the ITLOS made use of the precautionary principle in the *Southern Bluefin Tuna Cases*, although not explicitly pronounced.

17 See e.g. *Study Group Final Report*, infra note 27, para. 324 and most recently, *Shelton*, Normative Hierarchy in International Law, 100 AJIL (2006) 291. See also infra in notes 37 and 41.

18 Compare Art. 26 VCLT. A formal hierarchical relation could be said to be established by Art. 103 UNC and the notion of *jus cogens*. The scope Art. 103 UNC is, however, highly contested. The notion of *jus cogens* is furthermore unclear, and in any case limited to a few number of norms.

19 See infra in C.II. See also infra in notes 30 and 37.

20 See Address to the Plenary Session of the General Assembly of the United Nations made by *Schwebel* on 26 October 1999, to be found at www.icj-cij.org and Note by *Guillaume*, La Mondialisation et la Cour internationale de justice, 2 Forum ILA (2000) 242.

21 See e.g. Official Records of the General Assembly, Fifty-fifth session (2000), Supplement No. 10 (A/55/10), Chap. IX.A.1, para. 729.

was "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". A study group was thereto established in 2002. The study group discussed and prepared specific studies on five topics:[22]

1.) The function and scope of the *lex specialis* rule and the question of "self-contained regimes";[23]

2.) The interpretation of treaties in the light of "any relevant rules of international law applicable in the relations between the parties" (Article 31(3)(c) VCLT);

3.) The application of successive treaties relating to the same subject-matter (Article 30 VCLT);[24]

4.) The modification of multilateral treaties between certain parties only (Article 41 VCLT); and

5.) Hierarchy in international law: *jus cogens*, obligations *erga omnes* and Article 103 of the Charter of the United Nations, as conflict rules.

The purpose of the studies was to provide a "toolbox" that could assist in solving practical problems arising from incongruities and conflicts between existing legal norms and regimes.[25] The question of the creation or relationship among international judicial institutions was explicitly left outside the scope of the work of the study group. It was, however, considered, that to the extent that the same or similar rules of international law could be applied differently by judicial institutions, problems that may arise from such divergences should be addressed.[26] A final report from the study group, finalized by the Chairman *Martti Koskenniemi*, was presented to the ILC at its fifty-eight session in 2006.[27] Following the report were 42 conclusions, collectively adopted by the study group and taken note of

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22 See e.g. Report of the Study Group of the ILC, UN Doc. A/CN.4/L.628, 1 August 2002 (hereinafter *Study Group Report 2002*), in paras. 3 and 21.

23 See Preliminary report by *Koskenniemi*, Chairman of the Study Group, Study on the Function and scope of the lex specialis rule and the question of "self-contained regimes", UN Doc. ILC(LVI)/SG/FIL/CRD.1, (hereinafter *Koskenniemi*, lex specialis), and UN Doc. ILC(LVI)/SG/FIL/CRD.1/Add.1 (hereinafter *Koskenniemi*, self-contained regimes), both from 4 May 2004, and UN Doc. ILC(LVII)/SG/FIL/CRD.1, 11 May 2005 (hereinafter *Koskenniemi*, Regionalism).

24 UN Doc. ILC(LVI)/SG/FIL/CRD.2, 13 May 2004.

25 *Study Group Report 2002*, supra note 22, para. 21.

26 Ibid. para. 14.

27 UN Doc. A/CN.4/L.676 13 April 2006 (hereinafter *Study Group Final Report*). It is important to note, that the "final report" expresses no common opinion of the ILC as such. Nor could it be said to express a common opinion of the study group as a whole, as the report only is "finalized" by the chairman and not e.g. presented or adopted by the group as a whole. The final report builds on the individual studies and discussions within the study group.

and commended by the ILC to the General Assembly.[28] The final report and the following conclusions were taken note of by the General Assembly in December 2006.[29]

B. The Principles of Lex Posterior and Lex Specialis as Conflict Principles in Public International Law

I. General

The principles of *lex posterior derogat legi priori* (a later law prevails over an older law) and *lex specialis derogat legi generali* (a more special law prevails over a general law) are recognized conflict rules in most systems of law.[30] They are thus "general principles of law" in the meaning of Article 38(1) lit. c Statute ICJ. In public international law, both principles must moreover be considered customary law of universal scope. The principle of *lex posterior* has found its expression in the "treaty governing treaties" – the VCLT – Articles 30 and 59.[31] The principle of *lex specialis* is given no direct expression in the VCLT. The status of the principle as customary international law is, however, recognized by doctrine and it has been applied numerous times by the ICJ and other international courts.[32]

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28 See Report of the Study Group of the ILC, UNA/CN.4/L.702, 18 July 2006 (hereinafter *Study Group Conclusions*) in paras. 3 and 14 and Report of the ILC on the work of its' fifty-eight session (2006), UN Doc. A/61/10, (hereinafter *Study Group Report 2006*), in paras. 237-239.

29 See General Assembly Res. 61/34 of 4 December 2006.

30 Every system of law needs tools to deal with conflicts of law. The principle of *lex specialis* is also used to express that a general law is interpreted under influence of the special law in such a way that conflict is avoided. In this article, only the principle of lex specialis as a conflict resolution tool is dealt with. However, there is a fine line between using the principle as a tool of interpretation and as a conflict rule: "The Study Group agreed, however, that there was no reason – indeed no possibility – to lay down strict or formal rules for the use of the maxim [the *lex specialis*]. Sometimes the maxim operated as an interpretative device, sometimes as a conflict-solution technique", see e.g. UN Doc. A/CN.4/L.663/Rev.1 (hereinafter *Study Group Report 2004*) in para. 16. See also *Koskenniemi*, lex specialis, supra note 23 para. 22. Thereto comes, that although there may seem to be a conceptual difference between using the principle of *lex specialis* as an interpretive device and a collision device, the result is the same: the more special provision prevails over the more general.

31 Although not every country has ratified the VCLT, most of the convention expresses international customary law or has crystallized the norms into customary law.

32 See e.g. *Fitsmaurice*, The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points, 33 BYIL (1957) at 236 ff.; Jennings/Watts (eds.), Oppenheim's International Law, 9th ed. (1992) at 1280; *Marceau*, Conflicts of Norms and Conflicts of

The *raison d'etrê* for the principles seems at a first glance to be partly different. In public international law, the principle of *lex posterior* is a confirmation of the principle of the sovereignty and contractual freedom of states, according to which the latest expression of intent applies. The principle of *lex specialis*, on the other hand, seemingly aims at enhancing the efficacy of rules, as the more special rule regulates the facts more precisely and thus allows fewer exceptions. An early expression of this reasoning could be found in the works of *Emer de Vattel*:

> "*De deux Loix, ou de deux Conventions, toutes choses d'ailleurs égales, on doit préférer celle qui est la moins générale,* & *qui approche le plus de l'affaire dont il s'agit. Parceque ce qui est spécial souffre moins d'exceptions que ce qui est général; il est ordonné plus précisément,* & *il paroît qu'on l'a voulu plus fortement.*"[33]

It should, however, be noted, that *de Vattel* also assumes that the more special law is, at the same time, a stronger expression of intent than the general law, thus giving support to the thesis *lex posterior generalis non derogat priori specialis* (a later general law does not prevail over an older law being more special), meaning that the principle of *lex specialis* prevails over the principle of *lex posterior*. This proposition has won relatively broad support among scholars.[34]

Both the principle of *lex posterior* and the principle of *lex specialis* could thus be seen as "practical methods in the search for the current expression of state consent".[35] The principle would then be the contractual freedom of states and the principles of *lex specialis* and *lex posterior* methods for clarifying the will of the states. In that context, when considering if the principles should apply, and also which principle should apply if they offer contradictory solutions, the principle which best clarifies the will of the states concerned should prevail.[36]

Jurisdiction, 35 JWT (2001) at 1092 and with further references in note 27. See also infra in B.V.3.

33 *De Vattel*, Les droit des gens ou principes de la loi naturelle, Washington: Carnegie Institution, (1916) Liv. VII, Ch. XVII, §316, reproduction of the original edition from 1758.

34 See e.g. *Neumann*, Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen, Duncker & Humblot, Berlin (2002) (hereinafter Die Koordination) at 90; *Schilling*, Rang und Geltung von Normen in gestuften Rechtsordnungen, Berlin, 1994, at 455-458; *Aufricht*, Suspension of Treaties in International Law, 37 Cornell Law Quarterly (1952) 655 at 698; *Wolfrum/Matz*, The Interplay of the United Nations Convention on the Law of the Sea and the Convention on Biological Diversity, 4 Max Planck Yearbook on the United Nations Law (2000) 445 at 445-480. However, *Pauwelyn*, Conflicts, supra note 9, is of the opinion that the thesis *lex posterior generalis non derogat priori specialis* does not have a general scope and that the principle of *lex posterior* should prevail over the principle of *lex specialis*. *Pauwelyn* is, however, approaching the question pragmatically, and concludes that in many cases the principle of *lex posterior* will not be applicable, thus often making the principle of *lex specialis* the decisive tool, see in particular at 405-409, and compare infra in B.IV.

35 *Pauwelyn*, Conflicts, supra note 9, at 388.

36 See infra *i*n B.IV.

The principles of *lex specialis* and *lex posterior* are secondary norms. Primary norms regulate the facts or the substantive aspects of a case directly, whereas secondary norms regulate the relationship between primary norms. Such secondary norms could serve as tools to avoid or solve conflict of norms. There are other secondary norms in public international law.[37] Specific conflict-clauses are important in the context of this article: "When 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".[38] An example of a specific conflict clause is Article 103 UNC: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail".[39] Also the general principle of *lex specialis* must yield to specific conflict clauses, but only to the extent that the specific conflict clause could be seen as a more specific or particular expressions of state intent than that provided for by the general principle of *lex specialis*. Both the principle of *lex specialis* and the principle of *lex posterior* do therefore have a residuary character.[40]

Although it appears that no formal hierarchy of norms exists in public international law, most scholars agree that a very limited number of fundamental norms have the status of *jus cogens*, even though there are different views on which norms qualify as *jus cogens*.[41] The *sine qua non* in the context of this article, is that the principles of *lex posterior* and *lex specialis* bear no relevance for a conflict between a rule

37 The principle of *lex superior* is in national law an important conflict resolution tool. In public international law this principle has limited significance, see supra in notes 17 and 18 and infra in note 41 with corresponding text. See furthermore supra in notes 21-29 for references to the work done by the ILC Study Group on the Fragmentation of International Law in the field of secondary norms. Other principles such as e.g. *good faith* and *best law* deserve further investigation as possible conflict resolution tools in public international law. This article limits itself to the potential use of the principles of *lex posterior* and *lex specialis*.

38 See Art. 30(2) VCLT. Specific conflict clauses could be seen as particular expressions of the principle of *lex specialis*. The reference to specific conflict clauses in Art. 30(2) VCLT could therefore be seen as evidence to the fact that the founding fathers of the VCLT foresaw that the principle of *lex specialis* should prevail over the principle of *lex posterior*, see *supra* in note 34 and infra in notes 67, 68 and 80 with corresponding text.

39 See also Art. 30(1) VCLT, which explicitly states that the *lex posterior* principle cannot be used between the UNC and any later international agreement.

40 It could be that two specific conflict clauses are incompatible. In this situation the adjudicator or law interpreter must resort to the general principles. Specific conflict clauses may of course be more or less specific or general, and come later or earlier in time, which would be decisive factors when using the general principles of *lex posterior* or *lex specialis* on a conflict between two such clauses, see infra in B.V. and B.VI.

41 Some fundamental human rights, and the prohibition against aggression in the UNC Art. 2(4), certainly fall in this category. The notion of *jus cogens* is not further treated in this article.

of *jus cogens* and other inferior norms. In such cases, the norm of *jus cogens* prevails as *lex superior*.

Furthermore, an absolute requirement for the use of the principles of *lex posterior* and *lex specialis* is that both parties wishing to enforce rights or obligations under different regimes, treaties or customs must be signatories or in other ways bound by both regimes. Only then can the principle of *pacta tertiis nec nocent nec prosunt* be respected.[42]

It is in that regard of lesser importance if the two conflicting norms belong to different multilateral or bilateral regimes, as it is not necessary for all of the parties to the agreements to agree upon the use of the principles of *lex posterior* and *lex specialis* in a specific case. As long as both parties are bound by both regimes and as long as both regimes accept the use of conflict principles such as the *lex posterior* and the *lex specialis*, the principle of *pacta tertiis nec nocent nec prosunt* is respected. The principles of *lex specialis* and *lex posterior* only let one norm prevail over another for one set of specific factual circumstances, and does not amend, modify, invalidate, suspend or terminate a regime or any of its provisions. The enjoyment of other parties' rights or obligations is not directly affected.[43] The principle of *pacta tertiis nec nocent nec prosunt* is thus respected.

II. Definition of Conflict

The principles of *lex specialis* and *lex posterior* are conflict principles. They find use when a conflict between two or more norms has been identified. Most authors in public international law argue that the notion of conflict has to be construed narrowly. These authors generally want to reserve the notion of conflict, and thus the use of secondary norms, for mutually exclusive obligations, in the sense that they cannot be complied with simultaneously.[44] This strict definition of conflict has

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42 The principle of *pacta tertiis nec nocent nec prosunt* has e.g. found its expression in the VCLT Art. 30(4) lit. b.

43 See Part IV and V VCLT, in particular Art. 41(1) lit. b (i). However, the use of the principles may indirectly have significant consequences for rights and obligations of third parties, e.g. for treaties that contain most favoured nation (MFN) clauses, see e.g. Art. 1 GATT 1994.

44 The first to adopt this narrow interpretation of conflict in public international law was *Jenks*, Conflict of Law-Making Treaties, supra note 3, at 426 and 451. This narrow interpretation has been followed up by e.g. *Fitzmaurice*, The Law and Procedure of the International Court of Justice, 33 BYIL (1957) 211 at 237; *Karl*, Conflict between treaties, in: Bernhardt (ed.), Encyclopedia of Public International Law, Vol. 7 (1984) 468-473 at 468; *Sinclair*, The Vienna Convention on the Law of Treaties, 2nd ed. (1984) at 97; *Vierdag*, The Time of the "Conclusion" of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions, 64 BYIL (1988) at 100; Jenning/Watts (eds.), Oppenheim's International Law, Vol. I, Parts 2-4 (1992) at 1280; *Kelsen*, Théorie générale des normes (trans. O. Beaud, 1996) at 161; *Wilting*, Vertragskonkurrenz im Völkerrecht, Köln, Heymanns Verlag, (1996) at 4; *Klein*, Ver-

also been found in newer decision of the WTO dispute settlement bodies.[45] The problem with this narrow interpretation is that it excludes a permissive norm from being in conflict with a prescriptive norm. Incompatibilities between permissions and obligations, permissions and prohibitions and obligations and prohibitions would thus be excluded from the scope of application of collision norms.

The classical narrow interpretation of conflict has been criticized in newer legal theory.[46] *Pauwelyn* argues that incompatibilities between permissive norms and obligations have to be covered, although he is not explicitly offering a definition of conflict.[47] The Study Group on the Fragmentation of International Law classifies a conflict as "a situation where two rules or principles suggest different ways of dealing with a problem".[48] Most recently, *Vranes*, basing himself on the works of *Kelsen*, proposes that the definition of conflict should read: "There is a conflict between two norms, *one of which may be permissive*, if in obeying or applying one norm, the other norm is necessarily or possibly violated".[49]

In this article a broader definition of conflict is argued for. This definition should include incompatibilities between a permissive norm and a prescriptive norm, permissions and obligations, permissions and prohibitions, and obligations and prohibitions.[50] A broader definition of conflict is supported by the wording, context and object and purpose of the VCLT, the absurdity of the results achieved by a narrow interpretation of conflict and the fact that a broader definition of conflict offers good and viable results, that are in accordance with the will of states – the subjects of public international law.

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tragskonkurrenz, in: Strupp/Schlochauer (eds.), Wörterbuch des Völkerrechts (1962) at 555; *Marceau*, Conflicts of Norms and Conflicts of Jurisdiction, supra note 32, at 1084 and also in WTO Dispute Settlement and Human Rights, 13 EJIL (2002) 753-814 at 792.

45 See e.g. WTO Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54R. WT/DS59/R. WT/DS64R, adopted on 23 July 1998, in note 649; WTO Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R., adopted on 19 November 1999, in para. 9.92.

46 A broader definition of conflict has been argued by *Pauwelyn*, Conflicts, supra note 9, see particularly at 169-188; *Neumann*, Die Koordination, supra note 34, at 60-61; *Study Group Final Report*, supra note 27, in para. 25, and most recently *Vranes*, The Definition of 'Norm Conflict' in International Law and Legal Theory (hereinafter Norm Conflict) 17 EJIL (2006), No. 2 395-418.

47 See *Pauwelyn*, Conflicts, supra note 9, at 176 ff.

48 *Study Group Final Report*, supra note 27, in para. 25.

49 *Vranes*, Norm Conflict, supra note 46, at 415 and 418.

50 Compare *Vranes*, Norm Conflict, supra note 46, at 407-415.

51 See e.g. *Pauwelyn*, The Role of Public International Law in the WTO: How far can we go?, 95 AJIL 535 at 551 and *Pauwelyn*, Conflicts, supra note 9, at 184-188. Particularly thought-pro-

In Article 30(3) VCLT the notion of conflict is expressed so: "the earlier treaty applies only to the extent that its provisions are *compatible* with those of the latter treaty" (emphasis added). The wording of the VCLT represents no hindrance for a broad understanding of conflict. In fact, the ordinary meaning of the terms "compatibility" and "incompatibility", as used in Articles 30(2) and 30(3) VCLT, includes inconsistency between rights, prohibitions and obligations. It is not limited to mutually exclusive obligations. Furthermore, the context of the VCLT speaks for a broad understanding of conflict. Article 30(2) and 30(3) make reference to "provisions" generally, and not only mutually exclusive provisions. Article 30(4) lit. b furthermore makes reference to, "mutual rights and obligations", and not only mutually exclusive obligations. Article 59(1) lit. b also positively makes it a condition for the termination of an earlier treaty as a whole that "the two treaties are not capable of being applied at the same time". No such positive reference of incapability or mutual exclusion is taken into Article 30. When looking at the context of the VCLT, it should also be added, that the wording "conflict" is used in three Articles of the VCLT: Article 53, Article 63 and Article 71. In these Articles "conflict" is a pre-condition for the use of the principle of *jus cogens*. The ordinary meaning of "incompatibility" is broader than the ordinary meaning of "conflict". In case of the principle of *lex posterior* "incompatibility" is used. The object and purpose of Article 30 and 59 is to solve incompatibility between successive treaties relating to the same "subject-matter". Article 30 seeks to solve incompatibility between partly incompatible treaties, whereas Article 59 seeks to solve incompatibility between fully incompatible treaties. This object and purpose is best, and in most cases, only solved when adopting a broad understanding of conflict or "incompatibility". A narrow interpretation leaves the incompatibility unanswered in most cases, thus leaving the legal problem in a state of uncertainty and non-transparency – a solution that is not coherent with the object and purpose of Articles 30 and 59.

Moreover, a narrow definition of conflict leads to absurd results. In cases of incompatibility between two rights, the stronger party can impose his right on the weaker party so that the weaker party's right is suppressed, even though this was originally not intended by the parties. Furthermore, if e.g. a WTO rule imposes an obligation not to restrict trade and a later treaty explicitly grants a permission to restrict trade in a specific good in cases of e.g. repeated violations of fundamental human rights; this would not amount to a conflict. As a result, the latest, strongest and clearest expression of state intent would not be allowed to impinge on the earlier and less specific intent. Further examples of absurd results are given by *Pauwelyn*.[51] These two simple scenarios show that a narrow interpretation of con-

voking for some is that provisions in e.g. environmental treaties and human rights treaties tend to be shaped as permissive (or right-based). These areas of tremendous importance for public international law would thus be excluded from the use of conflict principles. Provisions in trade treaties, on the other hand, tend to be shaped as obligatory.

flict offers no viable and good solution to incompatibility between norms in public international law. By adopting a narrow definition of conflict, the use of the principles of *lex posterior* and *lex specialis* is in most cases excluded, as the very use of the principles is denied by the definition of conflict. The principles generally let the strongest expression of intent prevail.[52] They also offer a relatively high degree of legal certainty and transparency and may bring viable and fair solutions to incompatibility between norms. All this speaks for a broader definition of conflict.

The reasoning of the authors who promote a narrow interpretation of conflict deserves a brief comment. *Marceau* is the most recent representative of these authors.[53] Her starting point is the strict definition of conflict presented by *Jenks*.[54] *Marceau* finds support for her reasoning mainly on two grounds. Firstly, she bases her reasoning on a said presumption against conflict in public international law.[55] This presumption is based upon the missing hierarchy of norms in public international law. As a consequence, states are in principle obliged to comply with all their contractual obligations at the same time in good faith.[56] It is said that adopting a narrow interpretation of conflict and a limited use of conflict norms fulfills this obligation because international courts generally try to use all interpretive means in order to reconcile different norms from different regimes.[57] However, there are limits to all interpretive methods, also those used in public international law. Even the best intent cannot reconcile all incompatibility between different norms. Indeed, such reconciliation may not even be desirable. Furthermore, a presumption against conflict only has relevance when interpreting the law, and not when applying conflict principles in a post interpretation phase. In any system of law, interpreting the rules comes as a logical step before identifying a conflict. In fact, a conflict cannot be identified before the rules have been interpreted. Conflict rules such as the *lex posterior* and the *lex specialis* do not have influence on the interpretation.[58] They offer solutions and may find applicability, in a post interpretation phase. In this phase, the *raison d'être* for the presump-

52 See supra in B.I.

53 See e.g. *Marceau*, Conflicts of Norms and Conflicts of Jurisdiction, supra note 32, and WTO Dispute Settlement and Human Rights, supra note 44.

54 See e.g. *Marceau*, WTO Dispute Settlement and Human Rights, supra note 44 at 793.

55 Ibid. at 794-796.

56 See Art. 26 VCLT.

57 See Art. 31 VCLT and supra in note 4 with corresponding text.

58 The principle of *lex specialis* as a conflict rule must not be confused with the principle of *lex specialis* as mean of interpretation. In this article it is only referred to the principle of *lex specialis* as a conflict rule, see supra in note 30.

tion against conflict, namely the missing hierarchy in public international law and the obligation on states to comply with all their contractual obligations at the same time, does not justify a narrow interpretation of conflict. At this stage, the incompatibility has to be solved through other means than interpretation. Conflict rules could be such a means. Secondly, it is argued that a broad definition of conflict would provide a third party (an adjudicator or an interpreter) with the power to set aside provisions that have been voluntarily negotiated by states.[59] Two things shall be noted in that regard. Firstly, the *raison d'être* for the principles of *lex posterior* and *lex specialis* is that they let the norm, which has the strongest and clearest expression of state intent, prevail. When a court or interpreter uses the principles, they do not *per se* set aside provisions voluntarily negotiated by states; they do in fact follow the will of states. Secondly, states can voluntarily opt out of the general rules of public international law, including the principles of *lex posterior* and *lex specialis*, thus forbidding, either expressly or indirectly, a third party from making use of collision principles.[60] On the other hand, lack of such opting out would mean an acceptance by states for a third party to use such principles.

The classical narrow understanding of conflict in public international law is thus unjustified, whether one argues *de lege lata* or *de lege ferenda*. At present, based on the scarce amount of both state practice and jurisprudence on the matter, it is harder to adopt a stringent definition of conflict. In this article, similarly to the Study Group on the Fragmentation of International law, it is argued that a definition adequately could read: In cases where two norms offer different solutions to the same set of facts, we are faced with a conflict or incompatibility between norms.

III. The Notion of Same Subject-Matter

The principle of *lex posterior* only applies to treaties that relate to the "same subject-matter".[61] Two questions arise in this context. Firstly, is this a separate precondition in addition to the requirement of a conflict, and if so, what is the purpose and content of this condition? Secondly, does a similar condition apply to the principle of *lex specialis*?

Pauwelyn is of the opinion that if there is a conflict between two norms in different treaties, the two treaties necessarily relate to the "same subject-matter".[62] The

59 See e.g. *Marceau*, Conflicts of Norms and Conflicts of Jurisdiction, supra note 32, at 1086 and in WTO Dispute Settlement and Human Rights, supra note 44, at 793-794.

60 See infra in C.II.

61 See Art. 30(1) VCLT.

62 *Pauwelyn*, Conflicts, supra note 9, at 364-367. See also *Vierdag*, The Time of the "Conclusion", supra note 44, at 100.

ILC Study Group on the Fragmentation of International Law is of the same opinion.[63] Other authors express doubts about the content of the term, without really proposing a solution one way or the other,[64] while others again want to construe the term narrowly, without further commenting on either consequences or reasoning for this narrow interpretation.[65]

In this article it is argued that two treaties as a whole, and not only conflicting provisions within those treaties, have to relate to the "same subject-matter" in order for the principle of *lex posterior* to apply. The requirement that two treaties relate to the same subject-matter is not the same as the requirement of conflict between two specific provisions of those treaties. No such requirement can, however, be demanded in order for the principle of *lex specialis* to apply.

There are three main arguments in support of this reasoning. Firstly, the wording and context of the VCLT speak for a separate requirement that two treaties relate to the "same subject-matter" for the principle of *lex posterior*. Secondly, the discussions at the Vienna Conference speak for demanding that the treaties relate to the "same subject-matter" in order for the principle of *lex posterior* to apply. Thirdly, and most importantly, demanding that the treaties relate to the same subject-matter has a rationale in the case of the principle of *lex posterior*, whereas this rationale is not present in the case of the principle of *lex specialis*.

Firstly, looking at the wording and context of the VCLT Article 30, the term "same subject-matter" appears two times in Article 30; once in the heading, "[a]pplication of successive *treaties* relating to the same *subject-matter*" (emphasis added), and once in Article 30(1), "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" (emphasis added). A normal understanding of the wording in Article 30 indicates that the following provisions of the article only apply to the extent that two successive treaties as a whole relate to the "same subject-matter". Successive treaties that do not relate to the "same subject-matter" are excluded from the scope of Article 30. The ordinary meaning of "same subject-matter" in Article 30(1) is thus to announce a pre-condition for the applicability of the *lex posterior* principle, as regulated in the following paragraphs of the Article.

Pauwelyn promotes a contextual argument, saying that the phrase "relating to the same subject-matter" in Article 30(1) is a substitute for "incompatible" in Articles 30(2) and 30(5) and for "compatible" in Article 30(3). For *Pauwelyn*, the meaning

63 See *Study Group Final Report*, supra note 27, paras. 21-26, 116-118 and 253-256.

64 See e.g. Jennings/Watts (eds.), Oppenheim's International Law parts 2-4, supra note 32, at 1212 in note 2 and *Simma/Pulkowski*, Of Planets and the Universe: Self-contained Regimes in International Law, 17 EJIL (2006) no. 3, 483 at 488-489.

65 See e.g. *Sinclair*, The Vienna Convention, supra note 44, at 98.

of "same subject-matter", as read in context, is thus the requirement of a conflict between two provisions in the treaties. No separate meaning should in his opinion be given to the term.[66] Against this contextual argument it must, however, be added that if the meaning of the term "same subject-matter" was to indicate a conflict as made reference to in Articles 30(2), 30(3) and 30(5), reference should have been made to "compatible" or "incompatible", and not "same subject-matter". Reference should further have been made to provisions relating to the same subject-matter, and not treaties relating to the same subject-matter.

Secondly, at the Vienna Conference, *Sir Ian Sinclair* raised the question whether the United Nations Covenants on Human Rights relates to the same subject-matter as the ILO and UNESCO Conventions on certain specific aspects of human rights. He later concluded that the phrase must be construed strictly and, more specifically, that "[i]t will not cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty". In such cases the maxim *generalia specialibus non derogant* should apply.[67] The phrase "same subject-matter" could thus be seen as an indication of the superiority of the principle of *lex specialis*. That the principle of *lex specialis* should prevail over the principle of *lex posterior* also finds support in Article 30(2) VCLT.[68] This superiority could, however, only be upheld to the extent that the *lex specialis* actually is a stronger expression of intent than the *lex posterior*.[69]

Thirdly, and also in connection to the foregoing, a requirement that two treaties as a whole relate to the "same subject-matter" is necessary to secure that the rationale behind the principle of *lex posterior* – to determine state intent – is fulfilled. This is not necessary for the principle of *lex specialis*. When applying the principle of *lex posterior*, the decisive factor is time – and time only.[70] This factor allows for little flexibility and could, in combination with the wide definition of conflict argued for above, let the weaker intent of the parties prevail. In the fragmented world of international law, states could unintentionally enact treaty provisions that are in conflict. The further the main *foci* of treaties are apart, the easier it could be to unintentionally produce treaties in which norms enter into conflict. On the other hand, the closer the main *foci* of treaties are, the more it could be expected that states are aware of the treaty entered into on an earlier stage. A requirement that the treaties relate to the "same subject-matter" is thus needed in order for the principle of *lex posterior* to apply. If not, the principle of *lex posterior*

66 *Pauwelyn*, Conflicts, supra note 9, at 365.

67 See *Sinclair*, The Vienna Convention, supra note 44, at 98 and *Official Records of the Vienna Conference*, Vol. 2, at 222 and 253.

68 See supra in note 38.

69 See infra in B.IV.

70 See infra in B.VI.

may, in public international law, function as a tool for unlawfully derogating from obligations lawfully entered into between states. As for the principle of *lex specialis*, the requirement of specialty allows for flexibility when trying to determine the strongest intent of the parties.[71] Within this flexibility, the relationship and proximity between the norms relating to different treaties should be one central factor. A strict requirement of "same subject-matter" should, however, not stand by itself and block the use of the principle as a conflict resolution tool. The rationale of determining the strongest intent of the parties does not demand this. It should be added that it is claimed in legal theory that also the principle of *lex specialis* only applies to treaties that relate to the same subject-matter.[72] None of these authors do, however, provide any real rationale for such a requirement in case of the principle of *lex specialis*.

The exact meaning of the term "same subject-matter" is more difficult to determine. There must at least be some overlap in the *foci* of the two treaties to regard them as relating to the "same subject-matter". The authors arguing that the term is equivalent to the notion of conflict in general tend to be of the opinion that the term is too unspecific to be useful.

> "[…] the criterion of the "same subject-matter" as a condition for applying a conflict rule is too unspecific to be useful. Different situations may be characterized differently depending on what regulatory purpose one has in mind. In a sense, most activities in the international world relate to the "environment" – so is every issue an "environmental" issue to [be] dealt with by environmental rules? But most forms of international behaviour also have some bearing on "human rights" or "security". These denominations are not about what rules should apply but how to characterize the relevant features of a state of affairs."[73]

This may to a certain extent be correct. However, refusing to accept that there is a requirement that two treaties must relate to the "same subject-matter" as for the principle of *lex posterior* could, as mentioned above, lead to absurd and unjustified results.

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71 See in more detail infra in B.V., particularly in sections 2 and 4, and also in C.III.2.

72 See e.g. *Lindroos*, Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis, 74 NJIL (2005), 27-66 at 44-45, with reference to *Larenz*, Methodenlehre der Rechtswissenschaft, Springer, Berlin (1979) at 251-252, *Fitsmaurice*, supra note 44, at 236, and *Karl*, "Treaties, Conflicts between", IV Encyclopedia of Public International Law, Elsevier, Amsterdam (2000) at 937. See also the ILC Commentaries on the Draft Articles on Responsibility of States for Internationally Wrongful Acts, Official Records of the General Assembly (2001), UN Doc. A/56/10 Supplement 10 at 358.

73 *Study Group Final Report*, supra note 27, para. 117.

A distinction could be made between treaties that have the same main *foci* (subject-matter) and treaties that have different main *foci*, but overlapping issues.[74] It must be assumed that states have an overview of treaties within the same main *foci*, whereas conflicts between treaties solely with overlapping issues are more difficult to foresee. For instance, no one would disagree that the main focus of the ECHR is the protection of human rights. This treaty should thus be classified as a human rights treaty. The main focus of the GATT 1994 is trade liberalization. It should thus be classified as a trade treaty. That the ECHR may have trade related effects and that the GATT 1994 may have human rights related effects, should be understood as if they have overlapping issues. The scenario of conflicting provisions of treaties with overlapping issues, but where the treaties as a whole do not relate to the "same subject-matter", should remain outside the scope of the principle of *lex posterior*. In these scenarios, the principle of *lex specialis* may, however, be applicable.[75] It must be added that in particular newer and more integrated treaties may be said to have several *foci* or subject-matters. In cases where at least one of the *foci* overlaps, it should be possible to use the principle of *lex posterior*, even if not all of the *foci* of the treaties overlap. The Agreement on the Application of Sanitary and the Phytosanitary Measures (SPS Agreement)[76] is e.g. a treaty that has at least two *foci* or subject-matters. On the one hand it seeks to specifically regulate trade in certain food products and on the other it seeks to improve the human health, animal health and phytosanitary situation in the Member States.[77]

IV. The Principle of Lex Specialis Must Be Tried First

In most cases, the more special treaty will at the same time be the later treaty. The application of the principles then renders the same results. In some cases it might be, however, that the earlier treaty is also the more special treaty. In these cases, the relationship, or the priority of the principles, must be resolved. In legal theory, some authors are of the opinion that the principle of *lex posterior* should prevail.[78] Others promote the superiority of the principle of *lex specialis*.[79] There can, however, be no clear-cut answer to this question. As the main rationale behind the principles is to determine state intent, the decisive question should be; which principle reflects best the will of the states? It could be argued that the *lex specialis* gen-

74 Compare *Borgen*, Resolving treaty conflicts, 37 GWILR (2005), 573 at 603.

75 Compare the analyses infra in C.III.

76 Adopted on 15 April 1994, entry into force on 1 January 1995 (annex 1A to the WTO-Agreement).

77 Both these *foci* are clearly expressed in the Preamble of the SPS Agreement.

78 See e.g. *Pauwelyn*, Conflicts, supra note 9, at 405-409. See also supra in note 34.

79 See supra in note 34.

erally tends to be a stronger expression of will than the *lex posterior*. This is the rationale behind the thesis; *lex posterior generalis non derogat priori specialis*. The reasoning finds support in Article 30(2) VCLT and in the discussions at the Vienna Conference regarding the term "same subject-matter".[80] However, during the preparation of the VCLT, the opinion was more than anything else, that the intention of the parties should determine the priority between treaties.[81] The thesis *lex posterior generalis non derogat priori specialis* could therefore only be upheld to the extent that the *lex specialis* actually is a stronger expression of intent than the *lex posterior*. This could be secured through demanding a higher degree of specialty for the principle of *lex specialis* to apply, in cases where the provision that appears to be more special at the same time is earlier in time.[82] This procedure demands from a law interpreter that he starts analyzing whether the principle of *lex specialis* is applicable. When the factor of time is taken into account as a component for determining the specialty of an earlier treaty, and if it is concluded that the provision of the earlier treaty is more special, even if the provision of the other treaty is later in time, the thesis *lex posterior generalis non derogat priori specialis* applies. On the contrary, if the principle of *lex specialis* is found to be non-applicable, it should be investigated whether the principle of *lex posterior* is applicable.[83]

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80 See supra in notes 38 and 67 with corresponding text.

81 See e.g. *Mus*, Conflict between treaties in international law, NILR 1998 208-232. *Mus* is, however, of the opinion that the principle of *lex specialis* only is a principle of interpretation and that it is not applicable between conflict of norms. He does therefore not treat the relationship between the principles of *lex specialis* and *lex posterior*.

82 See infra in B.V.2.

83 The analyses above, and the concrete analyses below, see in particular infra in C., is based upon the assumption that it is state intent that should resolve conflicts of law in public international law. Based upon this assumption, the principles of *lex posterior* and *lex specialis*, as expressions of state intent, should then bring good and viable results to public international law. It could, however, be argued that it is not always appropriate to let state intent determine such conflicts. Most norms in public international law are created to regulate affairs between states. Between such norms, it is clearly correct to let state intent resolve conflicts. Some norms, also in public international law, do, however, seek to balance the power between sovereign states and its individuals – or groups of individuals – instead of regulating the rights and obligations between states as such. Human rights treaties are the obvious example. Conflict could, however, arise between a norm that seeks to balance the power between individual and state and between a norm that seeks to regulate the affair between states as such, or even between two norms that both seek to balance the power between individual and state. An example of the former would be a conflict between e.g. a free-trade agreement regulating the rights and obligations of states and a human rights norm protecting a third party – a person or a group – against the state. An example of the latter would occur if e.g. human rights norms, such as the right of privacy and freedom of speech, were regulated differently in human rights conventions. In these cases, based upon the rationale of the general principles of *lex posterior* and *lex specialis* – in order to determine state intent – it could be argued that the principles alone are not sufficient, or even inappropriate, to resolve conflicts. It is not necessarily so that state intent alone should be allowed

V. Specialty as a Criterion for Applying the Principle of Lex Specialis

1. General

The principle of *lex specialis* applies, if all other pre-conditions are fulfilled,[84] when it is possible to determine that one law is more special or more relevant than another, and that the more special law should prevail because of this specialty/relevance. The more special law should prevail when it has a sufficient degree of specialty. The principle of *lex specialis* is a flexible conflict resolution tool. The principle has no automatic field of application.[85] Different elements could and should play a role when deciding if a sufficient degree of specialty is present. A distinction could be made between elements that influence the degree of specialty that is needed in the concrete case (infra in 2.) and more norm-related elements that should be considered when comparing the norms at hand (infra in 4.). In the practice of accentuating and evaluating elements that may play a role, there is need for clarification through both jurisprudential and theoretical efforts.

2. The Degree of Specialty

At least four vital correlations are important when determining the degree of specialty that is needed in the concrete case. Firstly, a rule is never special *in abstracto*, but always in relation to some other rule.[86] Secondly, and in connection to the foregoing, rules are applicable on facts, and there is an interaction between rules and facts. Rules do not operate in isolation, but are meant to offer solutions to one specific set of facts. The function of the principle of *lex specialis* must also be seen from this perspective. The relationship between the rules – based on the foregoing, the rules as applied on the facts of a case – may influence the degree of specialty needed for the principle of *lex specialis* to apply.[87] The closer the proximity of the rules, the lesser the degree of specialty needs to be and *vice versa*.

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to impinge on rights acquired by individuals. On the other hand it could be argued that also e.g. human rights treaties are created by states, and that the rights acquired by individuals flows from the will of states. It does, however, remain that the acquired right of an individual may be altered through using secondary norms such as the principles of *lex posterior* and *lex specialis*. If states want to alter the rights of individuals in public international law, it should at least be demanded that they clearly express this through amendment, modification, invalidation, suspension or termination of the treaty in which the right of the individual is contained and not through secondary norms such as the principles of *lex posterior* and *lex specialis*.

84 See supra in B.I-IV.

85 Compare *Koskenniemi*, lex specialis, supra note 23, in para 97.

86 See e.g. *Study Group Report 2004*, supra note 30, in para. 9.

87 It is in this comparison, that the "subject-matter" of the rules, and the treaties, might be said to play a role, see supra in B.II.

These first two correlations emphasize that the principle of *lex specialis*, as a collision rule, brings no formal hierarchy of norms into public international law. It does only dictate what rule should prevail in the case that several rules are applicable on the same set of facts. The other norm is not amended, modified, invalid, suspended or terminated. It is just not applied on the specific facts of the case because there are other rules that regulate the facts in more detail.[88] When conflict principles are applied on one set of specific facts, it could, however, be said that an informal hierarchy is imposed in public international law.[89]

Thirdly, when the provision of the treaty that seems to be more special is earlier in time than the other treaty, a higher degree of specialty has to be demanded. The time factor is an indication of state intent, and the principle of *lex specialis* should only be allowed to impinge on the principle of *lex posterior* to the extent that it is secured that it actually promotes a stronger expression of intent than the principle of *lex posterior*.[90] On the other hand, when the later treaty also contains the more special provisions, a lower degree of specialty should be demanded.

Fourthly, in public international law, the rules being compared often operate in different systemic environments. Also the systemic environments and not only the proximity of the rules as such, influence the needed degree of specialty. The more independent the environments are, the higher the necessary degree of specialty should be. The main reason for this is that the independency as such is a strong expression of state intent. The stronger and more independent the expressions of state intent are, the higher the degree of specialty in order to justify the use of the principle of *lex specialis* needs to be. Four different systemic environments in which the *lex specialis* may operate could adequately be distinguished between.

Firstly, it may be used to justify an exception from general rules of public international law. An example is foreseen in Article 55 of the ILC Draft Articles of Responsibility of States for Internationally Wrongful Acts, which foresees that

88 See supra in note 43 with corresponding text.

89 See *Study Group Final Report*, supra note 27, in para. 31 and paras. 85-89.

90 When the time factor is taken into account within the flexibility of the principle of *lex specialis*, some of the concerns that demand that two treaties have to relate to the same subject-matter in order for the principle of *lex posterior* to apply is taken away, see supra in B.III. It could be argued that in case the principle of *lex specialis* is not applicable, the conflict has to be resolved, and that the principle of *lex posterior* then has to be used. If not, states could be faced with an absurdum: States are obliged to comply with the law, but cannot comply because the law offers no solution to the conflict, see infra in C.II. However, also the principle of *lex posterior* serves as a principle for determining state intent. It could therefore go against the objective of the principle and give unjustified results, if the principle is applied without securing that state intent in fact is determined. If no other conflict principle is applicable, states must try to peacefully reconcile the conflict in *good faith*. This could be done e.g. through leaving the conflict in the hands of the ICJ, who *ultima ratio* may decide on the case *ex aequo et bono*, see Art. 38(2) Statute ICJ.

states can opt out of the customary rules of state responsibility through rules that are more special. In such cases, the systemic environment of the rules does not demand a particularly high degree of specialty. It is perfectly normal that states deviate from general rules of public international law.

Secondly, it may be used to determine the relationship between two provisions in a single instrument or treaty. The principle would then normally be used as an interpretive tool as provisions in a treaty generally tend to be read in the light and context of other provisions in the same treaty.[91] However, conflict may arise even within a single instrument or treaty. But also in such cases, the systemic environment does not demand a high degree of specialty. Within the same instrument, there can usually only be one expression of state intent, and as long as the conflict is limited to provisions within the instrument as such, the use of the principle of *lex specialis* does not choose between different intents.

Thirdly, it may be used to determine the relationship between provisions in a more integrated environment, which may have several *foci* and may consist of several treaties. Also in these cases the principle of *lex specialis* will normally be used as an interpretive tool. In WTO law for example, different WTO Agreements are part of the same context and could be deemed interpretive tools when reading a specific provision in a specific WTO-Agreement.[92] It could, however, be that even within such a systemic regime, it is not possible to reconcile two provisions through interpretation. In such cases, depending on the independence of the treaties within the regime, there may be good reasons to demand a higher degree of specialty.[93]

Fourthly, the principles may be used to determine the relationship between two or more norms in independent treaties or special regimes. These regimes or treaties may be multilateral, regional or bilateral and may have varying degrees of legal autonomy. It is this category and these hard-cases, that shall be given particular attention in the next section of this article. In the *Swordfish Case*, we are faced with a potential conflict between provisions of two multilateral regimes that both have a high degree of legal autonomy and, at least at first glance, seemingly different foci. In case of conflicts between rules from such regimes, a high degree of specialty should accordingly be demanded.[94] Conflicts between such regimes are

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91 See Art. 31(1) VCLT.

92 See Art. 31(1)-31(3) VCLT.

93 For instance between the GATT 1994 and the SPS Agreement there are good reasons to demand a higher degree of specialty.

94 Some authors generally claim that the principle of *lex specialis* is inapplicable between rules from such regimes, see e.g. *Lindroos*, supra note 72, at 66. However, the principle of *lex specialis* has no general limits. But, as a pragmatic conflict resolution tool, the needed degree of specialty could be higher or lower, depending on the concrete circumstances of the case. In particular between

moreover both politically and legally sensitive. A result in one direction or the other could be seen as giving preference to one set of values/*foci* or also to one of the legal regimes, and could accordingly damage the credibility of the regimes. Such concerns may also be incentives to require a higher degree of specialty.

3. Examples from International Case-Law[95]

In the *Mavrommatis Palestine Concessions Case*,[96] the Permanent Court of International Justice (PCIJ) preliminarily decided that it had partial jurisdiction to rule in a dispute between Greece and Great Britain.[97] First, the court concluded that it had jurisdiction based on Articles 26 and 11 of the Mandate for Palestine conferred on His Britannic Majesty on July 24 1922.[98] Then, it investigated if this jurisdiction was incompatible with Protocol XII, annexed to the Peace Treaty of Lausanne of 24 July 1923.[99] This was necessary since Protocol XII was a "special and more recent agreement" and because of this "all the conditions [...] are fulfilled that might make the clauses of the Protocol overrule those of the Mandate".[100] The court was, however, not able to find concrete provisions in the Protocol that overruled the jurisdiction established on the basis of the Mandate. The interesting feature in this context is why the court found the Protocol to be more special and why it against this background concluded that in cases of incompatible provisions as regards jurisdiction the Protocol had to prevail. The Protocol was more special because it dealt "specifically and in explicit terms" with the decisive facts of the case, namely concessions such as those of Mr. Mavrommatis, whereas "Article 11 of the Mandate deal[t] with them [the concessions] only implicitly".[101]

In the dispute between Hungary and Slovakia concerning the *Gabcíkovo-Nagymaros Project* the ICJ also made use of the principle of *lex specialis*.[102] The dispute was

regimes that are highly independent and autonomous, a high degree of specialty should be demanded.

95 For more examples from international case-law, see e.g. *Koskenniemi*, lex specialis, supra note 23, in paras. 41-57.

96 PCIJ, Judgment, 30 August 1924, Ser. A No. 2.

97 The substantive question; whether the Government of His Britannic Majesty had wrongfully refused to recognize certain concessions acquired by Mr. Mavrommatis (Greek National) in contracts between him and the Ottoman Authorities, was dealt with by the PCIJ in a later case, *The Mavrommatis Jerusalem Concessions Case*, 26 March 1925, Ser. A No. 5.

98 *The Mavrommatis Palestine Concessions Case*, supra note 96, at 29.

99 Ibid. at 29-33.

100 Ibid. at 31.

101 Ibid.

102 ICJ, Judgment, 25 September 1997, General List No. 92.

related to the construction of locks as a joint investment on the border-river Danube between Hungary and Slovakia. Hungary abandoned the project in 1992, mainly due to environmental concerns, and claimed Slovakia was either obliged to do the same, or adapt the program in order take account of the environmental concerns. Slovakia claimed that Hungary was obliged to continue the project as originally agreed upon, and that Hungary was responsible for damages caused by the abandonment. The facts of the case were potentially governed by several international conventions entered into by the parties, in particular a treaty of 26 September 1977 concerning the construction and operation of the Gabcíkovo-Nagymaros System of Locks and the Convention of 1976 on the Regulation of Water Management Issues of Boundary Waters.[103] Also general international law and in particular the rules of State responsibility were applicable. Facing this, the ICJ concluded:

> "That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; *but it is governed, above all, by the applicable rules of the 1977 Treaty as a lex specialis.*"[104]

The ICJ did not elaborate on the reasons for the rules of the 1977 Treaty being more special. It is, however, clear that the decisive criterion was that the 1977 Treaty governed the main facts of the dispute, namely the construction of locks specifically, whereas e.g. the 1976 Convention governed the regulation of water management more generally.

Also more specialized courts with limited jurisdiction have made use of the principle of *lex specialis*, but only to reconcile conflicts between provisions in treaties belonging to their own regimes.[105]

There is, however, no case-law from international courts that has made use of the principle of *lex specialis* or *lex posterior* for that sake, in order to reconcile conflicts between highly independent and autonomous multilateral regimes.

The fact that there is no case-law directly dealing with this category does not indicate that the principles cannot be used. The reasons for the lack of case-law could be many. Firstly, the expansion of multilateral international regimes with a high degree of legal autonomy, and in particular their own dispute settlement bodies, is a relatively new phenomenon in public international law. Secondly, the dispute

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103 Ibid. paras. 70 and 125.

104 Ibid para. 132 (emphasis added). It should also be noted, that the ICJ only made reference to the principle of *lex specialis*, concluded that it was applicable and never mentioned the principle of *lex posterior*, even though the 1977 treaty clearly was later in time than the 1976 Convention.

105 See e.g. *Study Group Final Report*, supra note 27, in paras. 71-75 for references to case-law from the ECHR, the WTO adjudicatory bodies and the ECJ.

settlement bodies in these mechanisms might have jurisdiction and competences formulated in a way that may lead them to exclude conflict principles or use them in a different way than understood in general public international law.[106] Thirdly, the use of conflict principles could be seen as giving preference to a particular regime or dispute settlement mechanism. It cannot be excluded that independent courts may be hesitant to declare such preference for another regime or mechanism. Such reluctance is in most cases unjustified.[107]

4. Elements that Should Be Taken into Account when Assessing a Norm's Specialty

The starting point for this analysis should be: "Which of the two legal provisions at hand cover the factual circumstances more closely and precisely"?[108]

Koskenniemi phrases the question as, which rule has "a more precisely delimited scope of application", and further elaborates that this is when "the description of the scope of application in one provision contains at least one quality that is not singled out in the other".[109]

In this article it is argued that the starting point should be formulated with reference to the factual circumstances. The reference to the "scope of application" and "one quality that is not singled out in the other" could indicate that it is the two norms as such that should be compared, and not the norms as applied on a specific set of facts. Such a comparison does not take into account the important correlation between norms and fact. Pragmatically there is not much difference. It is, however, important to emphasize that it is the result of the provisions as applied on the same set of facts that should be compared. When these two results are at hand, one should ask, what is more precisely regulated?

This starting point emphasizes that the principle of *lex specialis* has no specific legislative definition, but always has to be applied in context and on the background of the correlations mentioned above. Having that in mind, *all aspects of the norm* and its *potential effects* on the facts of the case should be investigated. Of importance are the details of conditions and the details of effects of the two provisions. In the appraisal, one should also attach weight to how clear and explicit these details are expressed. Another important aspect is the *foci* of the norms. Which focus is most present in the central factual question of the case?

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106 Compare infra in C.II.

107 Ibid.

108 *Pauwelyn*, Conflicts, supra note 9, at 405.

109 *Koskenniemi*, lex specialis, supra note 23, para. 22, with reference to *Larenz*, Methodenlehre der Rechtswissenschaft, 1975, at 251-252.

In legal theory it is also claimed that the specialty of a rule may follow from the number of states covered by it.[110] This feature is sometimes discussed under the angle of "Regionalism".[111] The classical example is the relationship between the EC and the WTO, where provisions of the EC-Treaty normally must be seen as *lex specialis* between the EC Member States. The reason for this specialty is, however, not the number of parties *per se*, but the fact that the EC-Treaty is a more integrated treaty that regulates trade in more detail than the WTO-Agreements. Defining specialty purely in terms of the number of states affected is thus misleading. Something else is that e.g. regional treaties regulating the same substantive matter as multilateral treaties generally tend to be more specialized.

VI. Time as Criterion for Applying the Principle of Lex Posterior

If two treaties relate to the "same-subject-matter",[112] and all other pre-conditions are fulfilled,[113] the *lex posterior* principle as expressed in the VCLT Article 30(3) and 30(4) lit. (a) can be applied. The treaties have to be "successive" in the sense that one can be classified as "earlier" and the other as "later".[114] Time is therefore the decisive criterion for the use of the principle of *lex posterior*. Compared to the factor of specialty, the time-factor offers little flexibility and operates almost automatically.[115] It is therefore important to attach one point of time to the treaties. Obvious alternatives are the date of adoption, opening for signature, ratification and the date of the entry into force. For some time it was disputed which point of time to use, but today it seems to be generally accepted that the date of adoption should be used.[116]

However, some treaties are impossible to classify as "earlier" or "later", thus leaving no room for the principle of *lex posterior*. Such treaties are in modern legal theory classified as "continuing" "living" or "dynamic" treaties, which continue to confirm the will of states through e.g. expansion, implementation, amendments, modifications, interpretations and judicial decisions.[117] Most of the new multi-

110 See e.g. *Study Group Report 2004*, supra note 30, para. 9 and *Pauwelyn*, Conflicts, supra note 9, at 390-391.

111 See e.g. *Koskenniemi*, Regionalism, supra note 23.

112 Art. 30(1) VCLT. See supra in section B.III.

113 See supra in B.I-IV.

114 See Articles 30(1) and 30(3) VCLT.

115 This is the most important reason for demanding that two treaties have to relate to the "same subject-matter" in order for the principle of *lex posterior* to apply, see supra in B.III.

116 See e.g. *Sinclair*, The Vienna Convention, supra note 44, at 98 and *Pauwelyn*, Conflicts, supra note 9, at 370-371. Conflict, as defined in section B.II. above, can, however, not be declared before both treaties have entered into force.

117 See e.g. *Pauwelyn*, Conflicts, supra note 9, at 378-380.

lateral and regional conventions and regimes are of this nature. Examples of such modern conventions and regimes with a corresponding legal framework are the WTO, the EEA-Agreement, the European Convention of Human Rights, the European Communities, the NAFTA and the UNCLOS. It would be illogical and against the will of states to attach a single point of time to such treaties. The principle of *lex posterior* can therefore not be used between a "living" treaty and a later treaty of any form, although the later treaty is formally adopted later in time. Between a living treaty and an earlier non-living treaty it is, however, possible to use the principle of *lex posterior*. In such cases, the will of states as expressed through the principle of *lex posterior* indicates that the living treaty has to prevail.

C. The Swordfish Case as a Concrete Example

I. A Brief Introduction to the Swordfish Case[118]

Chile and the European Communities have been engaged in a controversy over highly migratory swordfish (*Xiphias gladius*) stocks in the South Pacific since the early 1990s. Chile, in order to reduce the over-fishing of swordfish, has enacted various decrees laying down conservation and management measures for swordfish. The legal basis for these decrees is Article 165 of the Chilean National Fishery Law.[119] Through these regulations, the unloading and transit of swordfish taken in the high sea bordering Chile's exclusive economic zone (EEZ) is forbidden when catches violate the above-mentioned conservation and management regulations. On these grounds, Spanish vessels have been denied access to Chilean ports. It has not been claimed by the EC that the conservation and management measures have been applied in a discriminatory way.

Bilateral consultations, exchanged notes and experiments with a bilateral scientific and technical commission did not lead to a solution of the controversy. Following these failed attempts to solve the controversy, the EC requested consultations before the WTO in April 2000.[120] The EC claimed a breach of Article

118 For a more detailed summary of the factual background to the *Swordfish Case*, see *Orellana*, The Swordfish Dispute between the EU and Chile at the ITLOS and the WTO, 71 NJIL (2002) 55-81. The most thorough presentation of the procedural and substantial aspects of the *Swordfish Case* is: *Neumann*, Die materielle und prozessuale Koordination völkerrechtlicher Ordnungen: die Problematik paralleler Streitbeilegungsverfahren am Beispiel des Schwertfisch-Falls (hereinafter *Schwertfisch-Fall*), 61 ZaöRV (2001) 529-576.

119 General de Pesca y Acuicultura, consolidated by Supreme Decree 430 of 28 September 1991 and extended by Decree 598 of 15 October 1999.

120 WT/DS193/1 of 26 April 2000, *Chile – Measures Affecting the Transit and Importation of Swordfish* – Request for Consultations by the European Communities. See also Art. 4 DSU.

V GATT 1994, which guarantees freedom of transit, and of Article XI GATT 1994, which foresees the general elimination of quantitative restrictions on imports and exports. Failed consultations led the EC to request a WTO panel to be established in November 2000.[121] Chile, on the other hand, as a response, initiated procedures under UNCLOS, claiming that the closing of Chilean ports was lawful according to UNCLOS and that UNCLOS had the status of *lex specialis* with regard to GATT 1994 concerning its substantive as well as its procedural rules. Initially an arbitral tribunal was instituted in accordance with UNCLOS Article 287(3). However, in December 2000 the parties requested the ITLOS to deal with the case instead of the arbitral tribunal. A special chamber was constituted by order of 20 December 2000.[122]

We are thus faced with the situation that the prohibition of access to Chilean ports could be declared unlawful by a WTO panel, or the WTO Appellate Body, and lawful by the ITLOS chamber, thus giving rise to potentially conflicting jurisprudence.

The parties were able to reach a provisional agreement in March 2001 which suspended the procedures before the WTO panel and the ITLOS chamber until 1 January 2004.[123] This provisional agreement was extended for two more years in December 2003,[124] and for a further two years in December 2005.[125] Currently, both procedures are therefore suspended until 1 January 2008. Both procedures could, however, be revived at any time at the request from one of the parties, thus reopening the possibility of conflicting jurisprudence.[126]

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121 7 November 2000, WTO WT/DS193/2, *Chile – Measures Affecting the Transit and Importation of Swordfish* – Request for the Establishment of a Panel by the European Communities. See also Art. 6 DSU.

122 ITLOS order 2000/3 of 20 December 2000, Case concerning the conservation and sustainable exploitation of swordfish stocks in the south-eastern pacific ocean (*Chile/European Community*), Constitution of chamber.

123 See WTO, WT/DS193/3, 6 April 2001, *Chile – Measures Affecting the Transit and Importation of Swordfish* – Arrangement between the European Communities and Chile – Communication from the European Communities and WT/DS193/3/add.1, 9 April 2001, *Chile – Measures Affecting the Transit and Importation of Swordfish* – Arrangement between the European Communities and Chile – Communication from Chile – Addendum; ITLOS, Order 2001/1, 15 March 2001, Case concerning the conservation and sustainable exploitation of swordfish stocks in the south-eastern pacific ocean (*Chile/European Community*).

124 See WTO, WT/DS193/3/Add.2, 12 November 2003, *Chile – Measures Affecting the Transit and Importation of Swordfish* – Arrangement between the European Communities and Chile – Communication from Chile and the European Communities – Addendum; ITLOS Order 2003/2, 16 December 2003, Case concerning the conservation and sustainable exploitation of swordfish stocks in the south-eastern pacific ocean, (*Chile/European Community*).

125 See WTO, WT/DS193/3/Add.3 of 22 December 2005 and ITLOS Order 2005/1 of 29 December 2005.

126 Ibid.

II. The Applicable Law before the ITLOS and the WTO Adjudicatory Bodies

Regimes of public international law with a high degree of legal autonomy, such as the WTO and the UNCLOS, do not operate in "clinical isolation" from the rest of public international law.[127] They are international regimes that are born into the corpus of public international law, through the rules of public international law, and that continue to function within the framework of public international law to the extent that they do not opt out of the general rules of international law.[128] Theoretically it might be possible for an international regime to opt out of almost all rules of public international law.[129] The regimes of UNCLOS and the WTO have not done this. The question to be answered in this section is whether the UNCLOS or the WTO have opted out from using the principles of *lex posterior* and *lex specialis* as understood in general public international law, in the sense that the ITLOS or the WTO adjudicatory bodies can not make use of them.

As for the WTO, the WTO Agreements do not explicitly confirm its birth and existence in the framework of general public international law. The DSU Article 3.2 second sentence obliges panels and the Appellate Body to "clarify the existing provisions of those agreements [the covered agreements] in accordance with *customary rules of interpretation of public international law*" (emphasis added), but makes no reference to the outstanding framework of general public international law. However, in the panel report *Korea – Measures affecting Government Procurement* it was stated:

> "We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law.[…] However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent there is no

127 *United States – Standards for Reformulated and Conventional Gasoline*, 29 April 1996, WT/DS2/AB/R at 17.

128 See in more detail and with further references, *Pauwelyn*, Conflicts, supra note 9, at 25-40.

129 The terminology "self-contained regime" has in international legal doctrine often been used to classify regimes that have a high degree of legal autonomy, such as the WTO and the UNCLOS, in the sense that they have opted out from general rules of public international law – thus being "self-contained". In my opinion, the terminology "self-contained regime" is simply misleading while it could indicate that the regime exists in clinical isolation from "all other rules" of public international law. Such clinical isolation from all other rules of public international law is virtually impossible to imagine. *Koskenniemi* thus proposes to use the term "special regimes", see *Study Group Final Report*, supra note 27, in paras. 193-194.

> conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the *customary rules of international law apply to the WTO treaties* and to the process of treaty formation under the WTO" (emphasis added).[130]

The panel also explicitly ruled out an *a contrario* interpretation of Article 3.2:

> "We should also note that we can see no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply. The language of Article 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law".[131]

Furthermore, the Appellate Body has, at least indirectly, in the report *United States – Anti dumping Measures on Certain Hot-Rolled Steel Products from Japan*, endorsed this understanding of the relationship of WTO law with general public international law:

> "We observe that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* apply to *any* treaty, in *any* field of public international law, and not just to the WTO agreements. These rules of treaty interpretation impose certain *common disciplines* upon treaty interpreters, irrespective of the content of the treaty provision being examined and *irrespective of the field of international law concerned*." (emphasis added).[132]

Similar to the general rules of interpretation of customary international law, conflict principles such as *lex posterior* and *lex specialis* are a part of the regimes of UNCLOS and WTO if they have not been contracted out of.

In legal theory there is disagreement on the question whether the WTO has opted out from using conflict principles such as the *lex posterior* and *lex specialis* between WTO law and non-WTO law.[133] The authors claiming that the WTO has contracted out of such principles generally base their view on two arguments. Firstly, it is claimed that the repeated reference to "covered agreements" in numerous Articles of the DSU, and most importantly Articles 1, 3, 4, 7, 11 and 19, limit the applicable law that panels and the Appellate Body can apply to the WTO-

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130 Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000, para. 7.96.

131 Ibid. note 753 of the report.

132 AB Report, *United States – Anti dumping measures on Certain Hot-Rolled Steel Products from Japan*, adopted on 23 August 2001, para. 60. See also note 40 in the report.

133 See e.g. *Study Group Final Report*, supra note 27, in paras. 45 and 170, for references to participants in this discussion.

Agreements,[134] and when using conflict principles, the adjudicatory bodies would be forced to apply and enforce other treaties or sources of international law. The main objection to this reasoning is that the applicable law, or terms of reference, of a panel or the Appellate Body, see in particular Article 7 DSU, is given in a positive and not a negative manner. The fact that Article 7, and also the other references to "covered agreements", confirms the relevance of some rules, does not preclude the adjudicatory bodies from using all other Non-WTO rules in particular circumstances.[135] General rules of public international law have to be explicitly contracted of. Secondly, it is claimed that the adjudicatory bodies, when using conflict principles, would "*add to or diminish* the rights and obligations provided in the covered agreements" (emphasis added). The adjudicatory bodies would thus violate Article 3.2 last sentence and Article 19.2 DSU. These Articles consequently compose an *opting out* from the use of conflict principles, at least between the WTO-Agreements and non-WTO law. *Marceau* could be taken as a representative for these authors and phrases it in this form:

> "In case of conflicts, the WTO adjudicating bodies do not appear to have the competence either to reach any formal conclusion that a non-WTO norm has been violated, or to require any positive action pursuant to that treaty or any conclusion that would enforce a non-WTO norm over WTO provisions, as in doing so the WTO adjudicating bodies would effectively add to, diminish or amend the WTO 'covered agreements' ".[136]

Against this reasoning, it has been held that the wording "add to, diminish or amend the WTO covered agreements" must be read in the context of the second sentence of Article 3.2 and that it is consequently merely a confirmation of the limits of the customary rules of interpretation in public international law. It does therefore not compose an opting out from the use of the conflict principles.[137]

The WTO adjudicatory bodies have not given a clear answer to this question.[138] The reasoning of the Panel in *Korea – Measures affecting Government Procurement* and

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134 See e.g. *Marceau*, WTO Dispute Settlement and Human Rights, supra note 44, at 763. That being said, these authors generally do not disagree upon the fact, that e.g. other treaties can be used, in accordance with Art. 31(3) lit. c of the VCLT, as tools when interpreting the WTO-Agreements. See also supra in note 3.

135 See e.g. *Pauwelyn*, How to Win a WTO Dispute Based on Non-WTO Law, 37 JWT (2003) No. 6 997-1030 at 1001 and *Study Group Final Report*, supra note 27, in paras. 185 and 45.

136 *Marceau*, WTO dispute settlement and Human Rights, supra note 44, at 756.

137 See e.g. *Pauwelyn*, How to Win a WTO Dispute Based on Non-WTO Law, supra note 135, at 1003. See also the reasoning of the Panel in *Korea – Measures Affecting Government Procurement*, supra note 130, with corresponding text, which also should be taken as a support for this reasoning.

138 The principle of *lex specialis* has been used by the adjudicatory bodies in a modified form between WTO-Agreements only, see supra in note 105. The principle of *lex posterior* has on some

the Appellate Body in *United States – Anti dumping measures on Certain Hot-Rolled Steel Products from Japan* mentioned above could be said to support the use of conflict principles between WTO law and non-WTO law. On the other hand, the view of *Marceau* and others could be said to have gained some support in the recent Appellate Body report, *Mexico Soft Drinks*.[139]

In the *Mexico Soft Drinks Case* the Appellate Body pronounced, in two *obiter dicta,* that they would have refused to decide if the North American Free Trade Agreement (NAFTA) was violated. Firstly, as a prerequisite for Mexico's defense with reference to the ICJ ruling in the *Chorzow factory*.[140] Secondly, as a prerequisite for Mexico's defense under Article XX(d) GATT 1994.[141] The reasoning behind this potential refusal was that in admitting this line of defense, panels and the Appellate Body would adjudicate a non-WTO dispute, and that this competence was not foreseen in the DSU.[142] However, that panels and the Appellate Body only have jurisdiction to treat WTO-claims – that is to adjudicate disputes that arise under the WTO covered agreements – is uncontroversial.[143] What is controversial is to what extent the applicable law is limited if panels and the Appellate Body decide in disputes in which they have jurisdiction. And, on this point, it could be argued that the Appellate Body explicitly left the door open, when it in states para. 54:

> "Mindful of the precise scope of Mexico's appeal, we express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it."[144]

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occasions been cited but never used, see *Mavroidis*, The WTO Legal System: Sources of Law, 92 AJIL (1998) 398 in note 73 for an earlier overview of cases where Art. 30 has been cited but not used by WTO Panels. However, the principles of *lex posterior* and *lex specialis* have never been used between WTO law and non-WTO law, see supra in B.V.3. On the other hand, they have never excluded the possibility of using the principles. On the contrary, they have confirmed the existence of WTO law as a part of public international law, see e.g. supra in note 130 with corresponding text.

139 AB Report, WT/DS308/AB/R, *Mexico – Taxes on Soft drinks and other Beverages*, adopted on 6 March 2006.

140 Ibid. para. 56.

141 Ibid. para. 78.

142 See particularly in paras. 56 and 78.

143 See Art. 1.1 first sentence DSU.

144 *Pauwelyn* is of the opinion that the question of applicable law was not decided upon in the *Mexico Soft Drinks Case*. See Speaker note from the ICTSD/GIAN-RUIG dialogue on the Mexico Soft Drinks Dispute, 30 May 2006, available at http://www.ictsd.org/dlogue/2006-05-30/2006-05-30-desc.htm (6.9.2007).

In any case, it must be kept in mind that the statements of the Appellate Body were *obiter dicta* which were not directly related to the use of conflict principles such as the *lex posterior* and *lex specialis*.

This extremely important debate, not only for WTO law, but also for the unity of international law as a whole, shall not be investigated much further in this article.[145] Some arguments that have particular relevance for the potential use of conflict principles, such as the *lex specialis* and the *lex posterior*, shall, however, be emphasized. Firstly, the rationale behind the reasoning of the authors claiming that WTO law has opted out from the use of conflict principles, seems to be that by using such principles, a panel or the Appellate Body and not the Member States, would change the WTO-Agreements. However, as mentioned previously, the principles of *lex posterior* and *lex specialis* do not change or amend any agreement. They just let one norm prevail over another, for one set of specific facts. The other norm continues to exist, and could be used on another set of specific facts. Secondly, and in connection to the foregoing, when courts potentially use such principles, and also between norms from two regimes with high legal autonomy, they use the principles as methods for determining the will of states. It would thus in any case not be courts that add to or diminish the rights and obligations provided in the covered agreements, but the states themselves. Thirdly, by using the principles of *lex posterior* or *lex specialis*, the WTO adjudicatory bodies would under no circumstance adjudicate or enforce non-WTO law. When using the principles of *lex posterior* or *lex specialis* in cases of conflicts between WTO law and non-WTO law, the *lex posterior* and *lex specialis* would be used as conflict principles that are inherent in WTO law, because the WTO has not contracted out from the use of these principles.[146] In any case, it is not necessary to fully construe or interpret the content of the non-WTO law. What is necessary is to declare a conflict or incompatibility between WTO law and non-WTO law and in a next phase that the non-WTO law is more special or later in time than the WTO law. The non-WTO law is never adjudicated upon or enforced. Fourthly, every system of law, be it national or international, is based upon certain fundamental principles of the rule of law that secure the predictability, transparency, and rights of the subjects of this law. For instance, any system that bases its decision upon arbitrary reasoning, or worse, on no reasoning at all, is not a system of law. Similarly it could be argued that systems of "law" that refuse to resolve conflicts of law do not merit being

145 The stand of the WTO on this question is most important due to the linkages between trade and other issues, the proven effectiveness of the WTO dispute settlement system and consequently, the willingness of states to use the dispute settlement system.

146 For a similar view, that the rules of state responsibility are inherent in WTO law, see *Meng*, Wirtschaftssanktionen wegen Menschenrechtsverletzungen – Probleme im WTO-Recht, in: Festschrift für Georg Ress zum 70. Geburtstag, Carl Heymanns Verlag (2005) 165 at 189: "*Art. 3.2 hindert sie aber auch nicht daran [the WTO adjudicatory bodies], die Rechtfertigung aus dem allgemeinen Völkerrecht zu entscheiden, denn diese ist quasi dem WTO-Recht von Anfang an inhärent*".

called systems of law. Inherent in any legal system are rules for mitigating contradictions. Otherwise, the subjects might face an absurdum: it is impossible to comply since the rules dictate mutually conflicting behavior.

As for the UNCLOS, the general affiliation to other rules of public international law is confirmed in Article 293 of the UNCLOS which states: "A court or tribunal having jurisdiction under this section shall apply this Convention *and other rules of international law* not incompatible with this Convention" (emphasis added), and furthermore in Article 311(2): "This Convention shall not alter the rights and obligations of States Parties which arise from other agreements compatible with this Convention".[147] Now, one could ask: does the wording "incompatible" and "compatible" exclude the use of the principles of *lex posterior* and *lex specialis*? For similar reasons as those stated above concerning the stand of WTO law, this author thinks not.

In the following, it is presupposed that the WTO adjudicatory bodies and the ITLOS could and should use the principles of *lex specialis* and *lex posterior* as described in section B of this article.

III. The Applicability of the Principle of Lex Specialis

1. Can the Principle of Lex Specialis Make One of the Adjudicatory Bodies Exclusively Competent to Decide Upon the Facts in the Case?

The jurisdiction of the ITLOS is limited to the interpretation and application of claims arising under the UNCLOS,[148] whereas the WTO adjudicatory bodies only have jurisdiction to decide upon claims arising under the WTO covered agreements.[149] Therefore, states cannot use the ITLOS to decide upon and enforce claims arising under the WTO-agreements[150] or the WTO adjudicatory bodies to decide upon or enforce claims arising under the UNCLOS.[151] The jurisdiction of

147 In the *Mox Plant Case*, see infra in notes 152 and 157, the Arbitral Tribunal instituted under annex VII of the UNCLOS, confirmed in order no. 3, 24 June 2003, that also under the regime of UNCLOS there is a cardinal difference between the jurisdiction of the court and the applicable law that can be used in order to solve claims falling under the jurisdiction of the court: "The Tribunal agrees with the United Kingdom that there is a cardinal distinction between the scope of its jurisdiction under Art. 288, paragraph 1, of the Convention, on the one hand, and the law to be applied by the Tribunal under Art. 293 of the Convention, on the other hand", see in para. 19 of the said order.

148 See Art. 288(1) UNCLOS.

149 See Art. 1.1 DSU.

150 See in this context also Art. 23.1 DSU.

151 The only international court with general jurisdiction is the ICJ. However, the jurisdiction of the ICJ is only consensual, see Art. 36 Statute ICJ.

the courts is thus strictly separated. Because of this separation, there can be no conflict between the jurisdiction of the WTO adjudicatory bodies and the jurisdiction of the ITLOS.[152] Accordingly, it is not possible to invoke the principle of *lex specialis* (and *lex posterior* for that sake) to make one of the courts exclusively competent to deal with the case.[153]

Chile seems to be of the opinion that the jurisdiction of the WTO adjudicatory bodies should be excluded, because UNCLOS for the core substantive question of port-access is *lex specialis* compared to GATT 94.[154] There might be good reasons for such a linkage between substantive rules and procedural rules of jurisdiction. If the jurisdiction of the court responsible for enforcing the most general law were excluded, the potential conflicting jurisprudence would be avoided already at this stage. However, the principle of *lex specialis* (and *lex posterior*) as a conflict rule of general public international law demands a conflict between two norms, and between the norms of jurisdiction of the WTO-adjudicatory bodies and the ITLOS there is no conflict of jurisdiction. The jurisdictions may well be said to be competing, but they are not incompatible or in conflict.[155]

The fact that it not possible to use the principle of *lex specialis* in order to make one of the courts exclusively competent to adjudicate in the *Swordfish Case* does, however, not mean that other courts could have or could gain exclusive competence on other grounds.[156] It might be that, in particular, specific forum selection

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152 A conflict would only have been foreseeable if there was some overlap in jurisdiction, e.g. if the WTO adjudicatory bodies also were competent to decide upon claims arising under the UNCLOS. A recent example of conflict of jurisdiction is given in the *Mox Plant Case*. In judgment, 30 May 2006, Case C-459/03, Com. v. Ireland, the ECJ found that the UNCLOS was signed by the EC and subsequently approved by Decision 98/392. The UNCLOS thus formed an integral part of the Community legal order, see particularly in para. 82. The relevant provisions of the case moreover came within the scope of community competence (UNCLOS is in the community legal order a mixed agreement), see para. 120. The ECJ thus found that it had jurisdiction to deal with the dispute relating to the interpretation and application of the relevant provisions of UNCLOS, see in para. 121. A conflict of jurisdiction concerning claims arising under UNCLOS could thus arise between the ECJ and the ITLOS or an Arbitral Tribunal instituted under Annex VII of UNCLOS.

153 That the jurisdiction of the courts is limited does not mean that the applicable law that the courts can use in order to solve the claims for which they have jurisdiction is limited in the same way. These two questions must be kept strictly separated, see supra in C.II.

154 See e.g. *Neumann*, Schwertfisch-Fall, supra note 118, at 535.

155 Of the same opinion, *Neumann*, Schwertfisch-Fall, supra note 118, at 563-564.

156 See e.g. *Shany*, The Competing Jurisdiction of International Courts and Tribunals, Oxford University Press (2004), which is the most thorough and recent presentation on the subject of competing jurisdictions. *Shany* proposes several potential solutions to the problematic of competing jurisdiction. More concretely related to the *Swordfish Case* is *Neumann*, Schwertfisch-Fall, supra note 118. *Neumann* first investigates if Articles 300 and 297(1) lit. b UNCLOS and Art. 23 DSU could be seen as specific forum selection clauses that grant exclusive jurisdiction to one

(or exclusion) clauses, in comparison to the general conflict principle of *lex specialis* as a part of general international law, could gain importance in the future, and be an important tool in order to avoid competing jurisdiction. The before mentioned *Mexico soft drinks Case* could indicate that the Appellate Body may be willing, under given circumstances, to accept foreign forum exclusion clauses.[157]

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of the courts in case of *competing* jurisdiction, see at 552-555. He then investigates if principles such as *litispendens*, "*Verbot des Rechtsmisbrauchs*" and good faith could make one of the courts exclusively competent, see at 558-559. In all cases he is dismissive. *Neumann* also concludes that neither the principle of *lex posterior* nor the principle of *lex specialis* can make one of the courts exclusively competent to treat the case, see at 563-564.

157 See AB Report, *Mexico Soft Drinks Case*, supra note 139, in para 54. Forum exclusion or selection clauses may play an important role both in case of conflicting and competing jurisdiction. NAFTA Art. 2005.6, which was discussed in the *Mexico Soft Drinks Case*, excludes jurisdiction in case of competing jurisdiction between a NAFTA and a WTO Panel. An example of a case where a clause excluding jurisdiction in case of conflicting jurisdiction is the *Mox Plant Case*, see supra notes 147 and 152. Ireland had at an earlier stage – before the case was taken to the ECJ by the UK – submitted the dispute to the ITLOS for a decision of provisional measures after Art. 290(5) and to an Arbitral Tribunal after Annex VII of UNCLOS for finally resolving the dispute concerning the *Mox Plant* in accordance with the substantive rules of UNCLOS. In doing so, Ireland had, in the eyes of the ECJ, violated Articles 292 EC and 193 EA, which are exclusion clauses in case of conflicting jurisdiction, giving exclusive jurisdiction to the ECJ (remember that the ECJ found that the UNCLOS was an integral part of the EC legal order). The said Articles read: "Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein". Interesting in this context is to what extent the ITLOS and potential Arbitral Tribunals are willing to accept such "foreign" forum exclusion clauses, be they aimed at conflicting or competing (or both) jurisdiction. Central in that regard is UNCLOS Art. 282 which provides that: "If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed, through a general, regional or bilateral agreement or otherwise, that such dispute shall, at the request of any party to the dispute, be submitted to a procedure that entails a binding decision, that procedure shall apply *in lieu* of the procedures provided for in this Part, unless the parties to the dispute otherwise agree". In the *Mox Plant Case*, the ITLOS found in order of 3 December 2001 in the case concerning preliminary measures, that the arbitral tribunal *prima facie* would have jurisdiction. In doing so, it concluded that "only the dispute settlement procedures under the Convention are relevant to that dispute", see in para. 52. It did thus not consider that the UNCLOS formed an integral part of the EC internal legal order. The Arbitral Tribunal on the other hand suspended its proceedings with order no. 4 of 14 November 2003 with the reasoning that the question of the UNCLOS' relationship to the internal legal order of the EC had to be clarified by the ECJ, because the jurisdiction of the tribunal was "crucially dependent" upon the resolution of this problem, see the said order in para. 23. This was done with reference to Art. 282 UNCLOS. However, even without an internal clause such as Art. 282, courts should recognize such "foreign" forum exclusion clauses, to the extent that the clause gives a clear expression of both states' intent to exclude the other forum. In case of conflicting jurisdiction, the principles of *lex posterior* and *lex specialis* may prove as tools for the courts to accept such foreign clauses.

2. Is the Principle of Lex Specialis Applicable on the Relevant Substantive Norms of the GATT 1994 and the UNCLOS?

The EC claimed before the WTO that the prohibition to unload swordfish in Chilean ports was inconsistent with Articles V and XI of GATT 1994.[158]

Chile, on the other hand, brought four claims to the ITLOS. Only three of the claims shall be dealt with in this section:

> "(a) whether the European Community has complied with its obligations under the Convention, especially Articles 116 to 119 thereof, to ensure conservation of swordfish, in the fishing activities undertaken by vessels flying the flag of any of its member states in the high seas adjacent to Chile's exclusive economic zone;
>
> (b) whether the European Community has complied with its obligations under the Convention, in particular Article 64 thereof, to co-operate directly with Chile as a coastal state for the conservation of swordfish in the high seas adjacent to Chile's exclusive economic zone as also to report its catches and other information relevant to this fishery to the competent international organization and to the coastal state
>
> (c) in relation to the foregoing, whether the European Community has challenged the sovereign right and duty of Chile, as a coastal state, to prescribe measures within its national jurisdiction for the conservation of swordfish and to ensure their implementation in its ports, in a non-discriminatory manner, as well as the measures themselves, and whether such challenge would be compatible with the Convention".[159]

It is the combination of these three claims that could enable the ITLOS Chamber to rule that Chile is entitled to exercise full sovereignty over its ports under the law of the sea, including the power to exclude foreign fishing vessels.[160]

The question that shall be answered in this section is if a potential substantive conflict between Articles V and XI GATT 1994 and Articles 116-119 or 64 UNCLOS, seen in conjunction with a potential sovereign right and duty of Chile to prescribe measures within its national jurisdiction to implement those rules, may be solved

158 See supra in C.I.

159 ITLOS *Case Concerning the Conservation and Sustainable Exploitation of Swordfish Stocks in the South-Eastern Pacific Ocean*, Order 2000/3, 20 December 2000, Constitution of Chamber. The fourth claim was "whether the obligations arising under Articles 300 and 297, paragraph 1(b), of the Convention, as also the general thrust of the Convention in that regard, have been fulfilled in this case by the European Community". See in more detail on this claim, *Neumann*, Schwertfisch-Fall, supra note 118 at 552-555. See also supra in note 156.

160 See *Orellana*, The Swordfish Dispute, supra note 118, at 65.

through using the principle of *lex specialis* as a general principle of public international law.

Before starting this analysis, it must be emphasized that a potential conflict should, if possible, be avoided through interpreting the rules of GATT 1994 and the rules of UNCLOS harmoniously.[161] In the following, it is presumed, for the sake of analysis, that conflict is not avoided through interpretation.[162]

In this situation, based on the wide definition of conflict argued for above, there is a conflict between the said norms of UNCLOS and GATT 1994. The rules of GATT 1994 positively forbid the closing of ports, whereas the rules of UNCLOS allow the closing of ports. All other preconditions for using the principle of *lex specialis* are furthermore fulfilled.

The next step of the analysis should then be to initially determine the degree of specialty that is needed in order for the principle of *lex specialis* to apply.[163] The said rules of GATT 1994 and UNCLOS have no systemic relationship. They operate in independent regimes with a high degree of legal autonomy. This speaks for demanding a high degree of specialty. The central legal and factual question in the case is the question of access to Chilean ports for Spanish vessels catching swordfish in Chilean waters and waters close by. Looking more concretely at the rules at stake regulating this factual question within the regime of WTO and the UNCLOS, the main purpose of Articles V and XI of the GATT 1994 is to liberate trade between nations. The main purpose of Articles 116-119 and 64 of UNCLOS, seen in conjunction with a potential sovereign right and duty of Chile to prescribe measures within its national jurisdiction to implement those rules, is the conservation of living resources in the sea. This distance between the main purposes or *foci* of the rules also speaks for a high degree of specialty. On the other hand, the purpose of conservation of living resources comes into play as a ground of justi-

161 For an analysis of to what extent it is possible for the ITLOS and the WTO Panel to avoid conflict through interpretation, see *Neumann*, Schwertfisch-Fall, supra note 118, particularly at 536-549.

162 It is thus presumed that the WTO panel finds that Articles V or XI of the GATT 1994 forbid the closing of Chilean ports, because Article V no. 2 states that "there shall be freedom of transit through the territory of each contracting party" and because Article XI prohibits "restrictions" or "prohibitions" on imports and exports between the contracting parties, and because Article XX provides for no justification in both cases. It is furthermore presumed that the ITLOS find that the EC has violated Articles 116-119 and 64 of the UNCLOS, seen in conjunction with a potential sovereign right and duty of Chile to prescribe measures within its national jurisdiction to implement those rules, including closing their ports, when those rules are not followed. In this article, I am not going further into the merits of such an interpretation of the rules of GATT and UNCLOS. *Neumann*, Schwertfisch-Fall, supra note 118, is of the opinion that conflict in the *Swordfish Case* could and should be avoided through interpretation, see at 536-549.

163 See supra in B.V.2.

fication from the violation of Articles V and XI within the system of the WTO.[164] It is unsure to what extent the purpose of trade liberalization can come into play as a ground of justification within the regime of UNCLOS. Clearly, the rules of GATT have no direct influence on the interpretation of Articles 116-119 and 64 UNCLOS.[165] However, when the ITLOS decides upon claim c) from Chile, the purpose of trade liberalization may play a role because the ITLOS may be obliged to apply the principle of proportionality, which is arguably a part of any regime of international law. It could thus be argued that both the regime of UNCLOS and the regime of WTO, to a certain degree, take into account the main purposes of the other regime. This again speaks for demanding a lower degree of specialty. The overall conclusion is, however, that a high degree of specialty is needed for the relevant rules from one of the regimes to prevail over the other through the principle of *lex specialis*.

Now, looking more concretely at the rules, it becomes clear that neither the relevant rules of GATT 1994 nor the rules of UNCLOS regulate the central factual and legal question of the case – the question of port access – directly. Article V and XI GATT 1994 regulate that there shall be freedom of transit and no restrictions and prohibitions on imports and exports. Neither the conditions of the rules nor the effects of the rules regulate the question of port access directly. The question of port access is on the contrary indirectly regulated through general rights and obligations, namely a general rule of freedom of transit and a general elimination of quantitative restrictions that relate to all types of goods and all types of measures. The same applies for the relevant rules of UNCLOS. Neither the conditions nor the effects of the rules regulate the question of port access directly. As for the rules of Articles 116-119 and 64 UNCLOS, seen in conjunction with Chile's claim in lit. c, they provide Chile with a general right to adopt measures for the conservation of all living resources and a general obligation for states to cooperate in the conservation and management of those resources. The consequences of a breach of those rules are also regulated in a general manner, if regulated at all.[166]

Both the conditions and effects of the rules of GATT and UNCLOS are thus general in the sense that the level of detail and clarity of the rules with respect to the

164 See Articles XX lit. b and g GATT 1994. See also *Neumann*, Schwertfisch-Fall, supra note 118, at 541-548. Art. XX allows foreign treaties, and with particular regard to lit. b and g, foreign environmental treaties, influence the interpretation and understanding of Art. XX, see e.g. *US – Shrimp*, supra note 4, in paras. 5.51, 5.53 and 5.57 ff. *In concreto* this means that the GATT 1994 may be read in harmony with the UNCLOS. See also the second paragraph of the preamble to the WTO Agreement, which explicitly states that trade shall be conducted in a way that seeks "both to protect and preserve the environment".

165 See *Neumann*, Schwertfisch-Fall, supra note 118, at 549.

166 It is claim c.), see supra in note 166 with corresponding text, which potentially grant Chile a right to close their ports.

central factual and legal question of the case is low. These features of the norms, as applied on the central factual question of the case, do therefore not indicate that one set of rules is more "special" than the other.

The remaining aspect of the rules that has to be investigated is the *foci* of the norms. To what extent are trade liberalization and the conservation of living resources present in the central factual question of the case? It could be argued that the conservation of living resources and the question of port access are more directly related as specific elements within the law of the sea, whereas trade liberalization and port access have a more distant linkage. The rationale behind trade liberalization in the WTO, and in particular in the context of GATT, is the theory of comparative advantage (*Ricardo/Smith*). The theory of comparative advantage is based upon the theory that every state should do and produce what it does best. This theory cannot be fully applicable to fishing vessels that operate in international waters. The fact is that the Spanish fishing vessels in the *Swordfish Case* are operating far from home and under conditions where nationality more or less is a formality – mere "flags of convenience" – and does not reflect differences in terms of production (comparative advantage). WTO rules are not created to empower states to circumvent national or regional rules by carrying a different flag. On the other side, the question of port access and fishing in international waters has a more direct linkage to the conservation of living resources, as regulated in the UNCLOS. This suggests that the relevant rules of UNCLOS are more "special" than the relevant rules of GATT. However, with the high degree of specialty that is needed in order to apply the principle of *lex specialis* between norms from the regime of UNCLOS and norms from the regime of GATT 1994, this specialty only with regard to *foci* is not enough to render the principle applicable.

It should be emphasized, and this is of high importance, that it is not the independence of the regimes *per se*, that excludes the use of the principle of *lex specialis*, but the fact that the relevant rules of the case do not have a sufficient degree of specialty compared to each other. Such a degree of specialty would have been achieved if the relevant rules of UNCLOS, being the regime with the most special *foci* for the central factual question of the case, had regulated the question of port access more directly, i.e. if conditions and effects of the rules had directly regulated the question of port access.

3. Can the Principle of Lex Specialis Be Used to Solve the Ultima-Ratio Scenario of Conflicting Jurisprudence?

To the extent that the ITLOS and the WTO adjudicatory bodies have used the principle of *lex specialis* correctly on potential conflicts of jurisdiction and norms, the principle does not offer any additional guidance for solving the conflicting jurisprudence. The jurisprudence of the courts is purely an expression of the jurisdiction and the courts' determination of how the substantive norms should be

understood. This means that in the *Swordfish Case*, based on the analyses above, conflicting jurisprudence cannot be solved through the principle of *lex specialis*.

On the other hand, to the extent that the ITLOS or the WTO-panel, in a hypothetical scenario, would have refused to use the principle of *lex specialis,* or if the principle had been used incorrectly, and the principle should have been applied on either jurisdiction or norms, the principle would also have been applicable in the case of conflicting jurisprudence. States could then invoke the principle of *lex specialis* in order to favor one of the decisions. However, neither the WTO nor the regime of UNCLOS has the possibility of remanding or reinstating in cases of conflicting jurisprudence.[167] It is therefore not within the competence of ITLOS or a WTO-panel to use the principle of *lex specialis* to solve such an *ultima-ratio* scenario. States, on the other hand, are obliged to comply with all their contractual obligations peacefully at the same time.[168] As the main subjects of public international law, they should, if they do not choose to peacefully solve the conflict in another way, respect the rule of law and make themselves subject to the result of the *lex specialis* as applied. They should thus succumb to the jurisprudence favored by the principle of *lex specialis*.

This decision could also be left in the hands of the ICJ.[169] The ICJ has general jurisdiction and also has the legal competence and necessary independence to act as a final adjudicator in a case of conflicting jurisprudence.[170] The jurisdiction

167 See e.g. *Trachtmann*, The Domain of WTO Dispute Resolution, 40 Harv. Int'l L.J. 333 (1999) at 333 ff. on the question of remand. The principle of *res judicata* must furthermore be considered a general principle of law in the meaning of Art. 38(1) lit. c Statute ICJ. The same question already decided upon, can therefore not be decided upon again by the adjudicatory bodies. In any case, the *ultima-ratio* scenario of conflicting jurisprudence, must be seen as a separate question of public international law, and not as a question of law arising under the "covered agreements", see Art. 1.1 DSU, or a question of the "interpretation or application of this Convention", see Art. 288(1) UNCLOS. It follows accordingly, that neither the WTO nor the ITLOS would have jurisdiction to explicitly decide upon the question of conflicting jurisprudence. It thus follows from the rules of *res judicata* and the limited jurisdiction of the WTO dispute settlement bodies and ITLOS that a case cannot be resumed because of conflicting jurisprudence.

168 Compare Art. 26 VCLT.

169 It could be argued that Art. 23.1 DSU prevents such a final arbitration by the ICJ. However, the question of conflicting jurisprudence should be seen as a separate question of public international law and not as a question of law arising under the "covered agreements", see the DSU Art. 1.1, and supra in note 167. The UNCLOS positively opens up for submitting the dispute to the ICJ, see Art. 287(1) lit. b. It could even be argued that states are obliged to transfer the matter to the ICJ if they can not peacefully reconcile the conflicting jurisprudence, compare Art. 26 VCLT.

170 To what extent the ICJ should be used as a final adjudicator in cases of conflict in public international law is controversial. For a general overview of the discussion around the proliferation of adjudicatory bodies, also taking into account the role of the ICJ in public international law, see supra in note 12.

and competence of the ICJ to rule on the conflict is, however, dependent upon the consent of both parties.[171]

IV. The Applicability of the Principle of Lex Posterior

The principle of *lex posterior* is not applicable in cases of conflict between provisions in GATT 1994 and UNCLOS. Both the regimes of the WTO and the UNCLOS are dynamic and living instruments in which the present state of legislative intent is continuously confirmed. It is thus not possible to classify one of the treaties as "earlier" or "later" in the meaning of Article 30(3) VCLT.[172] The principle of *lex posterior* can therefore not be used on conflicting jurisdiction, substantive norms or jurisprudence in the *Swordfish Case*.[173]

V. Conclusion

The above has shown that the principles of *lex posterior* and *lex specialis* are only part of the munition courts need in order to overcome conflicts in public international law. In the *Swordfish Case* neither the principle of *lex posterior* nor the principle of *lex specialis* may solve a potential conflict, be it between jurisdiction, norms or jurisprudence. If no other secondary norm applies,[174] the parties must therefore peacefully reconcile the conflict in good faith.[175] This could be done through e.g. negotiations or through leaving the resolution of the conflict in the hands of the ICJ, who *ultima ratio* may decide on the case *ex aequo et bono*.[176]

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171 See Art. 36 Statute ICJ.

172 See supra in B.VI.

173 Leaving the door open for using the principle of *lex posterior* even in such cases, is *Neumann*, Schwertfisch-Fall, supra note 118, at 563-565. He is thus concluding that if all the conditions for using the principle of *lex posterior* are fulfilled, the UNCLOS would have to prevail over the GATT 1994 because the GATT 1994 was adopted in 1994 and the UNCLOS in 1997/1998, see at 564. More concretely related to the *Swordfish Case*, he is, however, concluding that it is not possible for the principle of *lex posterior* to make one of the courts exclusively competent to treat the case because there is no conflict between the jurisdiction of ITLOS and the WTO Panel, see at 564, and compare supra in C.III.1. of this article. *Neumann* moreover concludes that the applicable law before the WTO and the ITLOS is limited, *in concreto* that the WTO and the UNCLOS have opted out of using the general principle of *lex posterior* in WTO and UNCLOS dispute settlement procedures, see at 564-565. I disagree on this conclusion as well, see supra in C.II. *Neumann* does therefore reach the same conclusion as in this article: The principle of *lex posterior* cannot avoid or solve conflicting jurisprudence in the *Swordfish Case*. The reasoning is, however, different.

174 See supra in B.I and particularly in note 37. Se also supra in notes 90 and 156.

175 Compare Art. 26 VCLT.

176 See Art. 38(2) Statute ICJ.