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ADDRESSING THE RELATION BETWEEN TREATIES BY MEANS OF 'SAVING CLAUSES'

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ABSTRACT

This paper surveys the role that 'saving clauses' play in systematizing the relationship between treaties. It is divided into two main parts. The first part focuses on treaty clauses aiming at defining the content of a treaty and providing in different ways for the possible application of further rules of international law to particular aspects of the treaty's subject matter. Treaty clauses recognising special rules are specifically considered, as well as provisions allowing for rules supplementing and strengthening the treaty regime. The second part analyzes two models of conflict clauses: subordination and harmonization clauses. While subordination clauses give prevalence to other treaties in case of overlap, harmonization clauses call for their reciprocal coordination. Recent treaty practice regarding saving clauses shows an increasingly holistic approach to the issue of the inter-relationship of treaties. At the same time, their potential has not yet been fully exploited in the interpretation and application of treaties.

Keywords: conflict clauses, interpretation of treaties, fragmentation, relation among rules of international law, law of treaties.

I. INTRODUCTION

In 1953 Wilfred Jenks observed that, in the absence of a world legislature with a general mandate, 'law-making' treaties are tending to develop in a number of historical, functional and regional groups which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of 'municipal law'.[1]

Sixty years on, that process has evolved and resulted in a large increase of treaties on a variety of subjects.[2] The globalization of economic and political relations and the impact of technology and science have led to new areas of common concern, as in the fields of prevention and

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[1] CW Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 BYIL 403.

[2] See M Koskenniemi, 'Fragmentation on international law: difficulties arising from the diversification and expansion of international law' (2006) UN Doc. A/CN.4/L.682, p 10.

regulation of armed conflicts, protection of human rights and the environment, and management of the economic system. States cooperate in the adoption of these treaties in different international organizations and fora.[3] As a result, the body of treaty law tends to divide into a number of separate regimes, mostly independent from each other. This phenomenon, often referred to as 'fragmentation', renders the interplay among the different rules of international law rather complex.

Apart from the superior status accorded to peremptory norms and the 1945 Charter of the United Nations, there are neither hierarchical relations among different treaties nor between treaties and customary rules: they all relate to each other on an equal footing.[4] Norms stemming from different treaties and from customary law may regulate different aspects of the same subject matter and thereby overlap.

In these ways the risk of conflicts has widened. A conflict may result from the mere divergence among different provisions regulating the same subject matter or from the simultaneous application of rules deriving from treaties having divergent political objectives or pursuing competing interests of the same parties.[5]

This challenges the traditional notion of conflict, according to which a conflict exists where a party to two treaties cannot comply simultaneously with its obligations under both treaties. This notion excludes cases where a treaty contains provisions establishing a measure of flexibility, for example, by permitting certain derogations or providing for less stringent requirements than another treaty.[6] In view of the development of the international system, some have advocated a wider concept of conflict, including also incompatibilities among provisions establishing permissions and duties and divergences among parallel obligations (as for example in case of a provision establishing the same requirements but with additional elements).[7] According to this view, a wider notion of conflict would better reflect the possible intent of States parties to detract from existing obligations by establishing permissions, and thereby allow for a more effective and coherent interpretation of the international legal order as a whole.

[3] P Schiff Berman, *The Globalization of International Law* (Ashgate, Aldershot 2005); J Alvarez, *International Organizations as Law-Makers* (OUP, Oxford 2005).

[4] R Villiger, *Customary International Law and Treaties. A Manual on the Theory and Practice of the Interrelation of Sources* (Kluwer, The Hague 1997) 275; Y Dinstein, 'The Interaction between International Customary Law and Treaties' (2006) 322 Recueil des Cours de l'Académie de Droit International 243; W Czapliski and G Danilenko, 'Conflicts of norms in international law' (1990) 21 NYIL 4; BB Jia, 'The relations between Treaties and Custom' (2010) 9 CJIL 81.

[5] For a discussion see: J Pauwelyn, *Conflict of Norms in Public International Law* (CUP, Cambridge 2005) 327; R Wolfrum and N Matz, *Conflicts in international environmental law* (Springer, Berlin 2003) 120.

[6] Jenks, The Conflict of Law-Making Treaties, 426. For this interpretation of the concept of conflict also see: Czapliski and Danilenko, Conflicts of norms in international law, 12-13; Wolfrum and Matz, Conflicts in international environmental law, 4.

[7] E Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 17 EJIL 395; D Pulkowski, *The Law and Politics of International Regime Conflict* (OUP, Oxford 2014) 149.

Minimizing the risk of conflicts and harmonizing different rules of international law is largely a matter for the negotiating States. To this end, they often include clauses addressing the relations between a treaty and other applicable rules of international law.[8] There is a wide variety of such clauses. They are worded in different ways, saying, for example, that a treaty is not incompatible, or does not affect, derogate from or prejudice some other rule or rules of international law. But the wording does not always spell out the intended impact on the treaty regime. Thus the incidence of such clauses is often perceived as ambiguous and may turn out to be controversial. Notwithstanding the variety of possible effects on the interpretation and application of each treaty, all these clauses share the common objective of recognizing and, to a certain extent, safeguarding the application of rules of international law outside the treaty. By reason of this common feature, for the purposes of this article they will be considered as one general category and referred to as 'saving clauses'.

Recent treaty practice indicates that more than one type of saving clause is usually incorporated, supporting the view that the category includes several types of provisions, which impact on the treaty in different ways. While certain provisions simply safeguard the operation of other rules while leaving their incidence on the treaty undetermined – in particular they do not clarify where the saved provisions prevail over the treaty and may derogate from the obligations contained therein – others specify their relationship with the treaty.

In general, saving clauses may be considered to foster the unity and coherence of the international system and to ensure certainty of law and equality of treatment in all situations. This is why their elaboration and inclusion in treaties has been recommended by the International Law Commission (ILC).[9] The Report of the ILC Study Group on the fragmentation of international law has underlined the importance of drafting such clauses with sufficient clarity, so that they are not compromised at the stage of application.[10] Likewise the Institute of International Law recommended the incorporation of specific clauses regulating the relations between a codification treaty and other conventions relating to the same subject matter.[11]

Some authors emphasize the role of saving clauses in the prevention of conflicts between treaties. According to Seyed Ali Sadat-Akhavi, 'such clauses are extremely useful for resolving conflicts between treaties; they indicate in the clearest possible manner how potential conflicts must be

[8] See R Wolfrum and V Röben, *Developments of International Law in Treaty-Making* (Springer, Berlin 2005) and, relating to environmental agreements, Wolfrum and Matz, Conflicts in international environmental law, 120.

[9] ILC Ybk 1964/II, 37, para 10.

[10] Koskenniemi, Fragmentation of international law: difficulties arising from the diversification and expansion of international law, 143, para 282.

[11] See Resolution on *Problems Arising from a Succession of Codification Conventions on a Particular Subject* (Institut de droit international 1995).

dealt with. They introduce elements of simplicity and clarity into the treaty by pointing directly to the treaty which must take priority.'[12] The same view is shared by other authors, even if some underline the need for more detailed clauses and call for greater care in drafting them.[13] Some others are more sceptical, pointing out that such clauses are often unclear and that their effect is not conclusive.[14]

Although the need for further reflection on this widespread but somewhat confusing practice is generally perceived, only a few studies focus on saving clauses.[15] The present article is intended to discuss treaty practice relating to savings clauses, examining the variety of provisions, their different effects on the treaty, and their practical meaning. The objective is to offer a critical appraisal of this method of addressing interactions among rules of international law and suggest possible refinements. To this purpose, the following section contains a brief overview on the typology of savings clauses, based on their objectives. A review of each group of savings clauses is provided in the subsequent sections, while the last section of the paper draws some conclusions as to the meaning and the overall coherence of treaty practice on this issue, potential improvement in their drafting and the clarification of their implications for treaty interpretation.

II. An overview of Saving clauses

Clauses addressing relations among treaties have been mainly studied as a means to avoid conflicts among treaties dealing with the same subject matter.[16] During the codification of the law of treaties, the ILC focused on clauses 'intended to regulate the relation between the provisions of the treaty and those of another treaty relating to the matters with which the treaty deals.'[17] However, treaty practice shows a more wide-ranging use, and a greater variety, of saving clauses.

The analysis of treaty practice regarding the use of saving clauses will be divided into two main parts. The first part will examine saving clauses that aim at defining the scope of application of the treaty: these will be

[12] SA Sadat-Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff, Leiden-Boston 2003) 86.

[13] CJ Borgen, 'Resolving Treaty Conflicts' (2005) 37 George Washington International Law Review 573; Pauwelyn, Conflict of Norms in Public International Law, 327.

[14] See H Aufricht, 'Supersessions of Treaties in International Law' (1952) 37 Cornell Law Quarterly 664.

[15] JB Mus, 'Conflicts between Treaties in International Law' (1998) 45 NILR 208; Pauwelyn, Conflict of Norms in Public International Law, 327; Sadat-Akhavi, Methods of Resolving Conflicts between Treaties, 84.

[16] Ibid, 85.

[17] Commentary on art. 26 of the Vienna Convention on the Law of Treaties, ILC Ybk 1966/II, 37, para 10.

referred to as 'delineation clauses'. Delineation clauses describe the 'bounds' of the treaty and clarify that the treaty does not prejudge States' freedom of action in certain matters related to, but not necessarily covered by the treaty. They characteristically entail States' ability to adopt provisions applicable to particular aspects of the subject matter that would apply in addition to the treaty or that integrate the content of the treaty. There follows an analysis of some basic examples of delineation clauses. Specific attention is then paid to two specific types of delineation clauses: 'clauses recognising special rules' and 'supplementation clauses'.

The impact on the treaty of clauses recognizing special rules can be controversial. By virtue of the principle of speciality they could partially replace the treaty while leaving it applicable as a residual basis, or they could apply in addition to it. Assuming the relation of speciality, these clauses do not address conflict among rules of international law. They merely indicate that certain aspects of the subject matter of the treaty could be regulated by way of according priority by other agreements concluded by the parties to the treaty but, as a rule, they do not exclude the concurrent or residual operation of the treaty. Likewise, supplementation clauses do not concern conflicts among treaties and do not impact on the obligations stemming from the treaty. They merely reserve the right of contracting States to enter into agreements in order to supplement or develop the treaty regime.

Thus delineation clauses, considered as a category, share the permissive function of recognizing States parties' right to respect pre-existent rules or to adopt future provisions that could apply in addition to, or in the place of, certain aspects of the treaty regime.

The second part of the study will focus on treaty provisions that address conflicts among different treaties; that is, 'conflict clauses'. In particular, conflict clauses deal with the risk of overlap and inconsistency of treaties by giving precedence to, or assuming other forms of coordination with, provisions outside the treaty.

This category includes traditional conflict clauses that subordinate treaty obligations to those of other treaties: these are here referred to as 'subordination clauses'. They preserve legal certainty and coherence in the regulation of a subject matter which is covered by a plurality of international instruments mostly by implying a choice between the applicable rules according to a mutually exclusive approach (the '*aut...aut*' model). As a result, they give priority to other treaties in derogation from the *lex posterior* and the *lex specialis* rules and prevent, especially with regard to States which are not parties to all the treaties, any breach arising from non-compliance with all the treaties to which they are parties.

Finally, we will analyse a recent model of conflict clauses that assume a horizontal pattern of interaction by encouraging harmonization among different treaties; these are referred to as 'harmonization clauses'.

III. Delineation Clauses: Clauses defining the scope of application of a treaty

Delineation clauses are saving clauses that define the scope of application of a treaty. They indicate which matters are not covered by the treaty and, therefore, not prejudiced by it. Article 1, paragraph 2 of the 2008 European Convention on the Adoption of Children, for example, states:

> This Convention covers only legal institutions which create a permanent child-parent relationship. [18]

This provision indicates that the treaty regulates only permanent child-parent relationships so that it does not prejudice States' freedom to regulate other forms of parental relationship created by law. It clarifies that the application of pre-existing or future treaties regarding short-term adoption is not precluded by the Convention.

Another example is provided by article 3, paragraph 1 of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property, which reads as follows:

> 1. The present Convention is without prejudice to the privileges and immunities enjoyed by a State under international law in relation to the exercise of the functions of:
>   a. its diplomatic missions, consular posts, special missions, missions to international organizations or delegations to organs of international organizations or to international conferences; and
>   b. persons connected with them.
> 2. The present Convention is without prejudice to privileges and immunities accorded under international law to heads of State *ratione personae*.[19]

According to the ILC commentary on the Convention, while defining that certain immunities are not covered by the Convention, this clause is intended to preserve the provisions established by 'relevant international conventions in force' which remain unaffected by the treaty.[20]

Delineation clauses may have a further implication. They could rule out that a treaty regime is self-contained and point to the applicability of other rules of international law to regulate further consequences arising from the matter governed by the treaty. An example is article 26, paragraph 4 of the 2007 European Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, which states:

> Such liability shall be without prejudice to criminal liability of the natural persons who have committed the offence.[21]

[18] 27 November 2008, CETS No 202.
[19] 2 December 2004, UN doc A/59/49.
[20] Draft articles on Jurisdictional Immunities of States and Their Property, with commentaries, ILC Ybk 1991/II, 21 para 1.
[21] 25 October 2007, CETS No 201.

In this case, the clause refers to rules which may apply in addition to the treaty.

Articles 139, paragraph 2 and 304 of the 1982 International Convention on the Law of the Sea provide further examples by establishing that their provisions on responsibility and liability for damage are 'without prejudice' to the rules of international law.[22] As stressed by the International Tribunal for the Law of the Sea, these clauses might be used to fill a gap in the liability regime established within the Convention, for example, in the case where a failure of a sponsoring State to meet its obligations does not result in material damage. Indeed, as compared with the liability regime of the Convention, customary international law, as codified by the ILC Articles on the Responsibility of States for Wrongful Acts, does not make damage a general requirement for State responsibility. Thus, it may apply in addition to the Convention regime. Furthermore, the Tribunal underlined that article 304, by referring also to the possible development of conventional or customary rules, 'opens the liability regime for deep seabed mining to new developments in international law. Such rules may either be developed in the context of the deep seabed mining regime or in conventional or customary international law.'[23] According to this view, the Convention does not preclude the application of eventual further rules regarding the same subject matter. Hence, such clauses entail the evolutionary character of the regime, which allows for its improvement and integration by virtue of future rules.

These types of clauses are frequently included in articles adopted by the ILC. In this context, they play a systematic function: in particular, they tend to safeguard contiguous areas of international law or develop

[22] Art 139 reads as follows: '1. States Parties shall have the responsibility to ensure that activities in the Area, whether carried out by States Parties, or state enterprises or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in conformity with this Part. The same responsibility applies to international organizations for activities in the Area carried out by such organizations. 2. Without prejudice to the rules of international law and Annex III, article 22, damage caused by the failure of a State Party or international organization to carry out its responsibilities under this Part shall entail liability; States Parties or international organizations acting together shall bear joint and several liability. A State Party shall not however be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance under article 153, paragraph 4, and Annex III, article 4, paragraph 4. 3. States Parties that are members of international organizations shall take appropriate measures to ensure the implementation of this article with respect to such organizations.' Art 304 reads as follows: 'The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law' (10 December 1982, 1833 UNTS 3).

[23] *Responsibilities and Obligations of States Sponsoring Persons and Entities in the Area, Advisory Opinion* (2011) ITLOS Reports, para 211.

new rules. An example of the former, in the 1996 Draft Code of Crimes against the Peace and Security of Mankind, article 4 states:

> The fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.[24]

The purpose of the provision is to define the scope of the Code, by distinguishing between the rules concerning the responsibility of States and those regarding the responsibility of individuals for crimes against the peace and security, in view of excluding that the former would be pre-empted by the latter. This interpretation is confirmed by the ILC commentary, according to which: 'The State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime.'[25] The prosecution of the individual does not preclude the concurrent responsibility of the State.

Such clauses are important in that they provide for coordination among different sets of international rules to ensure effective application of all the guarantees provided by international law in a given context.

Certain provisions point to possible developments of international law.

They refer to topics potentially governed by future rules, particularly in presence of meaningful trends of practice. An example is given by article 30 of the 1978 ILC articles on Most-Favoured-Nation Clauses, titled 'New rules of international law in favour of developing countries', which reads as follow: 'The present articles are without prejudice to the establishment of new rules of international law in favour of developing countries'. As the commentary makes clear, at the time of drafting there was no agreement that would warrant the inclusion of rules in favour of developing countries. However, considering the desirable development of such new rules, the Commission decided to include in the articles this saving clause.[26]

The insertion of delineation clauses may be the result of a political compromise regarding controversial aspects of the codification. Indeed the ILC may choose to leave out certain matters when it lacks a unanimous view and the practice is not developed with the view of conducting a separate study on it. In this case, the clause provides that the *lacuna* does not exclude the existence of international rules on the legal question covered by the clause and should be the prelude to a further codification. In this respect, examples may be provided by article 73 of the Vienna

[24] Draft Code of Crimes against the Peace and Security of Mankind, with commentaries, ILC Ybk 1966/II, 23.

[25] Report of the International Law Commission to the General Assembly, ILC Ybk 1966/II, 23, para 2.

[26] Commentary on art 30 of the Draft Articles on most-favoured-nation clauses, ILC Ybk 1978/II, 72, para 8.

Convention on the Law of Treaties (VCLT) and by article 33, paragraph 2 of the Draft Articles on State Responsibility.[27]

This practice shows that the delineation clauses can play a useful role in clarifying the relation among treaties regarding different subject matters, or particular aspects of the same subject matter, which should be considered reciprocally supportive and complementary. They can also be viewed as encouraging the development of international law in matters related to but not regulated by the treaty.

A. Clauses recognising special rules

Delineation clauses recognizing the existence of special rules of international law can raise issues of interpretation. Given the relation of speciality, the treaties in which they are included may be considered as the general framework that applies residually to those aspects which are not expressly covered by special rules. Theoretically the special regime should not be presumed to replace the treaty. Derogation should be admitted only if, and to the extent that, it is required by the clause. Accordingly, the relation of speciality should entail a pattern of coexistence, instead of mutual exclusion, among treaties. However, practice could be viewed as not always consistent with this interpretation.

This question has been discussed by the ILC when including clauses recognizing special rules in texts for the codification of international law. A significant example is given by article 55 of the Articles on State Responsibility.[28] According to this provision:

> These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law.

The inclusion of this clause and its function were much debated. The clause was drafted by the special rapporteur Riphagen which considered the regime of State responsibility as only one of the many subsystems that make up the international legal order and excluded the existence of a common denominator in the law of international responsibility.[29] Through the adoption of the clause, he assumed that the application of

[27] Art 73 VCLT reads: 'The provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States, or from the international responsibility of a State or from the outbreak of hostilities between States' (23 May 1969, 1155 UNTS 331). According to art 33, paragraph 2 of the Draft Articles on State Responsibility: 'This Part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State' (Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, ILC Ybk 2001/II part 2, 140).

[28] Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 140.

[29] W Riphagen, Third Report on State Responsibility, ILC Ybk 1982/II part I, 24, para 16.

the Draft Articles is to be excluded in case of treaties providing for special rules.

The special rapporteur Arangio-Ruiz moved from a different approach on the relation between the Draft Articles and the special treaty regimes. He considered that the Draft Articles should constitute the general framework that is presumably compatible with the concurrent application of special rules. He held that the clause, by spelling out that the articles 'do not apply' in case of special rules, could have defeated the guarantees of customary international law and prejudged the very purpose of the codification. In particular, the clause would have excluded the application of general international law for the mere reason that a treaty regulates the consequence of a particular wrongful act and regardless of its States parties' will. He assumed that the States parties providing special rules do not intend to exclude in their mutual relations the guarantees deriving from general international law, but to strengthen and make them more effective. Hence, in the absence of an express derogation, the special provisions should apply in addition to the Draft Articles. Also, while States may well derogate from general international law by treaty as it is usually admitted for any rule which is not peremptory, this does not exclude the 'falling back' on general guarantees in case of a treaty regime failure. For this reason, he proposed that the clause be deleted or limited, for example by subordinating the possibility of derogation to its express provision in the treaty.[30]

Instead, the ILC maintained the clause, both on first and second reading,[31] on the assumption that the possible exclusion of general international law is mainly a question of treaty interpretation that the clause cannot prejudge.[32]

Article 55 is open to different constructions. It indicates that States are free to set out in their treaty relations secondary rules of international law and that these rules prevail over general international law. According to the commentary, the clause covers both 'strong forms of *lex specialis*, including what are often referred to as self-contained regimes, as well

[30] G Arangio-Ruiz, Fourth Report on State Responsibility, ILC Ybk 1992/II part I, 42, para 124. For the discussion see: G Fitzmaurice, 'The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points' (1957) 33 BYIL 237; J Crawford, A Pellet and S Olleson (eds.), *The Law of International Responsibility* (Oxford, OUP 2010) 103.

[31] In the draft art 37 adopted on first reading the clause applied only to part two of the Draft Articles, providing: 'The provisions of this part do not apply where and to the extent that the legal consequences of an internationally wrongful act of a State have been determined by other rules of international law relating specifically to that act' ('ILC Draft Articles on State Responsibility' as adopted on first reading, *Official Records of the General Assembly, Fifty-First Session*, Supplement no 10 (1996) UN doc A/51/10). Draft art 55 was instead applied to the whole text, with the support of the Sixth Committee and the States (see the discussion in the Sixth Committee, UN doc. A/CN.4/496/20, and the comments by Germany, UN doc A/CN.4/488, 33, United States, ibid. 84, United Kingdom, ibid 28 and Japan, UN doc A/CN.4/492/12).

[32] See Third Report on State responsibility, (2000) UN doc A/CN.4/507, 110, para 420 and Report of the International Law Commission on the work of its fifty-second session (2000) UN doc A/55/10, 64, para 395.

as weaker forms such as specific treaty provisions on a single point, for example, a specific treaty provision excluding restitution.'[33]

In practice, the extent to which the general rules on responsibility of States are displaced by special provisions remains a question of interpretation. It is mainly from the text of a treaty that one may infer the derogation of the general rules stated in the treaty in favour of special provisions.

However, treaties often do not provide for their relationship with other rules. In the absence of any express determination in the treaty, the question of whether the resort to general rules is possible remains open.[34] For example, treaties often do not regulate the right to take countermeasures so that it is doubtful whether such an omission indicates the States' intention to exclude countermeasures or, on the contrary, to admit them on a residual basis. This may cause legal uncertainty about the relationship between Articles on State Responsibility and the special rules, and raises doubts about the proper formulation of the *lex specialis* clause.

In 2007, the international arbitral tribunal established to judge the case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v the United Mexican States* argued from article 55 that the ILC articles do not govern matters which are covered by special provisions (in that case those in Chapter Eleven of the North Atlantic Free Trade Agreement) and operates in a residual way only.[35] Such interpretation emphasizes a strong effect of exclusion of general law regardless of the treaty wording and challenges the pattern of coexistence and mutual reinforcement of special and general law.

In any case, there is a general understanding that even if the treaty expressly derogates from general law and is labelled as a 'self-contained regime', a fallback on general international law should be possible on a residual basis when it serves the purposes of the special regime.[36]

Similar implications derive from article 64 of the ILC Articles on the Responsibility of the International Organizations,[37] where some of the

[33] Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, 140, para 5.

[34] Ibid, para 3.

[35] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v United Mexican States*, Materials on the Responsibility of States for Internationally Wrongful Acts (ST/LEG/SER B/25 UN Sales No E.12V.12, p 342).

[36] J Crawford, *State Responsibility* (CUP, Cambridge 2013) 105; J Crawford, 'Chance, Order, Change: The Course of International Law' (2013) 365 Recueil des cours 21, 227; B Simma, D Pulkowski, '*Leges Speciales* and Self-Contained Regimes', in J Crawford, A Pellet and S Olleson (eds) *The Law of International Responsibility* (Oxford, OUP 2010) 139; B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 EJIL 489; M Koskenniemi, 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, para 28.

[37] Art 64 states: 'These articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of

special rules may be identified as rules of the organization.[38] Similar considerations apply to article 17 of the ILC Articles on Diplomatic Protection.[39]

This ILC practice shows that clauses recognizing special provisions of international law pursue important objectives. According to their commentaries, the ILC articles apply to those aspects that are not covered by special rules. In the light of this interpretation, the relationship between general and special rules is not one of mutual exclusion but, on the contrary, of coexistence and reciprocal supplementation.

Clauses recognizing special rules of international law are used not only in codification drafts, but also in various treaties. These address, for example, the relations between international human rights and humanitarian law treaties. The practice in this area confirms that such clauses entail the concurrent and residual application of human rights law.[40]

First, the clauses tend to be restrictively interpreted so as to allow derogation from human rights treaties only to the extent strictly required. Article XV of the 1994 Inter-American Convention on Forced Disappearance of Persons is an example. According to this provision:

> This Convention shall not apply to the international armed conflicts governed by the 1949 Geneva Conventions and its Protocol concerning protection of wounded, sick, and shipwrecked members of the armed forces; and prisoners of war and civilians in time of war.[41]

international law may be contained in the rules of the organization applicable to the relations between an international organization and its members' (Draft articles on the Responsibility of International Organizations, with commentaries, ILC Ybk, 2011/II part II, 100).

[38] According to certain authors the rules of the organization could provide for different patterns of responsibility between the organization and States, but possibly also non-member States and international organizations. (See G Hafner, 'Is the Topic of Responsibility of International Organizations Ripe for Codification? Some Critical Remarks', in U Fastenrath and others (eds) *From Bilateralism to Community Interest (Essays in Honour of Judge Bruno Simma)* (OUP, Oxford 2011) 707, 712; J Wouters and J Odermatt, 'Are All International Organizations Created Equal? Reflections on the (2012) ILC's Draft Articles of Responsibility of International Organizations', http://www.globalgovernancestudies.eu; KE Boon, 'The Role of Lex Specialis in the Articles on the Responsibility of International Organizations' Seton Hall Public Law Research Paper No 2230336 (2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2230336.

[39] According to this provision: 'The present draft articles do not apply to the extent that they are inconsistent with special rules of international law, such as treaty provisions for the protection of investments.' As clarified by the Commentary, art 17 reserves priority to other regimes of dispute settlement and to other possible special rules contained in treaties other than those designed for the protection of investments (such as treaties of Friendship, Commerce and Navigation) only 'to the extent that' there is an actual inconsistency with the special rules (Draft Articles on Diplomatic Protection, with Commentaries, ILC Ybk 2006/II part II, 89, para 1). For an analysis of the residual role of diplomatic protection see L Condorelli 'La protection diplomatique et l'évolution de son domaine d'application actuelle' (2003) Rivista di diritto internazionale 5.

[40] A Clapham, 'The Complex Relationship Between the 1949 Geneva Convention and International Human Rights Law', in A Clapham, P Gaeta and M Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (OUP, Oxford forthcoming) 9.

[41] 28 March 1996, OAS Treaty Series n 68, 33 ILM 1429 (1994).

The Inter-American Commission on Human Rights considered that this clause only applies in the context of armed conflicts of an international character and applied the Convention to facts occurring in time of internal armed conflict.[42]

A similar interpretation was adopted by the Central Criminal Court in the *Zardad* case.[43] The relevant clause, article 12 of the 1979 International Convention Against the Taking of Hostages, states:

> In so far as the Geneva Conventions of 1949 for the protection of war victims or the additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the Geneva Conventions of 1949 and the Protocols thereto, including armed conflicts mentioned in article 1, paragraph 4, of Additional Protocol of 1977, in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.[44]

Under this provision, when the Geneva Conventions do not impose an obligation to hand over or prosecute an individual, the 1979 Convention applies. Accordingly, in the *Zardag* case, considering that the Geneva Conventions did not impose such an obligation in respect of acts committed during internal armed conflict, the Court applied the Convention to a charge of hostage-taking.

Secondly, the evolution of drafting technique is also meaningful. Some recent clauses expressly provide for the concurrent application of human rights and humanitarian law treaties. In particular, article 43 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance reads as follows:

> This Convention is without prejudice to the provisions of international humanitarian law, including the obligations of the High Contracting Parties to the four Geneva Conventions of 12 August 1949 and the two Additional Protocols thereto of 8 June 1977, or to the opportunity available to any State Party to authorize the International Committee of the Red Cross to visit places of detention in situations not covered by international humanitarian law.[45]

According to this clause, the 2006 Convention applies concurrently to situations of international armed conflicts governed by international

[42] *José Miguel Gudiel Álavares And Others ('Diario Militar') v Guatemala*, Report No 116/10, Case 12.590, Admissibility and Merits, 22 October 2010, www.oas.org/en/iachr/decisions/court/12.590Eng.

[43] See *R v Zardad (Ruling on the Taking of Hostages Act)* [2007] EWCA (Crim) 279.

[44] 17 December 1979, 1316 UNTS 205.

[45] 20 December 2006, 2715 UNTS.

humanitarian law treaties. This wording reflects the increasing trend in international practice to consider that the protection afforded by the human rights treaties is not extinguished or suspended in time of armed conflicts.[46]

The wording of recent clauses in other fields of international law confirms this conclusion. Article 33, paragraph 1 of the 2014 Convention on the Manipulation of Sports Competitions, provides an interesting example. This clause states:

> This Convention does not affect the rights and obligations of Parties under international multilateral conventions concerning specific subjects. In particular, this Convention does not alter their rights and obligations arising from other agreements previously concluded in respect of the fight against doping and consistent with the subject and purpose of this Convention.[47]

The explanatory report specifies that the clause 'seeks to ensure that the Convention harmoniously coexists with other treaties dealing with matters covered also by this Convention', provided that they are consistent with the object and purpose of this Convention. The coexistence of different treaties regarding specific aspects of the same subject matter implies that the special rules supplement, without automatically excluding, the Convention regime.

However, practice is not uniform. For example, article 31 of the 1972 European Convention on State Immunity provides that:

> Nothing in this Convention shall affect any immunities or privileges enjoyed by a Contracting State in respect of anything done or omitted to be done by, or in relation to, its armed forces when on the territory of another Contracting State.[48]

The explanatory elaborates: 'The Convention is not intended to govern situations which may arise in the event of armed conflict; nor can it be invoked to resolve problems which may arise between allied States as a result of the stationing of forces. These problems are dealt with by special agreements'.[49] Article 31 refers to a special regime of immunity, granted to armed troops stationed in the territory of a Contracting State, as established under multilateral or bilateral agreements.

[46] See art 4 of the 1985 resolution of the Institute of International Law (adopted by 36 vote to none with 2 abstentions), according to which: 'The existence of an armed conflict does not entitle a party unilaterally to terminate or to suspend the operation of treaty provisions relating to the protection of the human person, unless the treaty otherwise provides.' See, also, Draft articles on the effects of armed conflicts on treaties, ILC Ybk 2011/II part II, para 47; *Legality of the Threat or Use of Nuclear Weapon, Advisory Opinion* [1996] ICJ Rep, 226, para 47; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion* [2004] ICJ Rep, 136, paras 104-106.

[47] 18 September 2014, CETS No 215.

[48] 16 May 1972, CETS No 74.

[49] Explanatory Report to the European Convention on State Immunity, para 116.

The content and the effects stemming from the clause were discussed in argument in the case concerning *Jurisdictional Immunities of the State (Germany v Italy)* before the International Court of Justice (ICJ). Italy argued that the clause had been inserted by the drafters of the European Convention to address 'the problem of the relationship between the general rules set forth in the Convention and the special regimes of immunity established by means of bilateral or multilateral treaties, including status of forces agreements'.[50] In other words, the clause aimed at preserving the provisions contained in special agreements concluded between Allies or related to peacekeeping operations.[51] It would be misleading to infer from this clause any indication about other immunities, when the Convention leaves room to any special regime that may have been adopted by the Parties.

On the contrary, Germany argued that article 31 establishes a general exemption of the subject-matter from the scope of application of the Convention, leaving the floor to the general law on State immunity.[52]

The two litigating States invoked the principle of speciality expressed by the clause with opposite aims. According to Germany, it meant that what was left outside the Convention was governed by rules of customary law, namely those affirming State immunity. According to the Italian point of view, the Convention should be considered as the general law, leaving room only to those special treaty provisions which may be in force between the Parties and only to the extent provided for therein. The ICJ inferred from the language of the clause that it was not intended to address only the relationship between the Convention and the various agreements on the status of visiting forces and held that all acts of foreign armed forces are excluded from the scope of this Convention, irrespective of whether they take place in peacetime or in conditions of armed conflict and whether they are covered by special agreements between the parties.[53]

This discussion shows how the application of these clauses may produce uncertain results. If the clause is viewed as having the object of giving prevalence to some more specific rules operating outside the treaty, the treaty should be viewed as derogated from only insofar as those special rules apply and expressly require derogation. If, on the contrary, the clause is merely aimed at defining the scope of application of the treaty, the subject matter covered by the clause would be *a priori* excluded from the treaty regime.

[50] C2011/18 (sitting held on Tuesday 13 September 2011) p 44, para 16.

[51] Ibid.

[52] See the oral pleadings of Professor Gattini at the public sitting held on Thursday 15 September 2011 in the *Jurisdictional Immunities of the State*, CR 2011/20.

[53] *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening), Merits* [2012] ICJ Rep, 552, paras 67-68.

B. Clauses allowing agreements supplementing a treaty regime

By concluding an *inter se* agreement some of the parties to a multilateral treaty can substantially modify the treaty regime, which may impair the interests of the other States and the object and purpose of the treaty. In order to safeguard the integrity of the treaty, article 41 of the 1969 VCLT sets out the conditions for the permissibility of agreements amending a multilateral treaty between certain parties only. According to article 41, States parties can conclude *inter se* agreements if this possibility is provided by the treaty; otherwise, an *inter se* agreement is allowed only if the treaty does not prohibit it and the modification does not affect the other parties' rights and obligations or the object and purpose of the treaty.

However, given the importance of both the integrity of the treaty and the progress of States' cooperation, treaties may contain provisions that allow the parties to conclude bilateral or multilateral agreements to the extent that they 'confirm, supplement, extend or amplify' the treaty regime. These provisions will be referred to as 'supplementation clauses'.

An example is provided by article 73, paragraph 2 of the 1963 Vienna Convention on Consular Relations, according to which:

> Nothing in the present Convention shall preclude States from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof. [54]

Supplementation clauses should be read as implying a prohibition of conflicting *inter se* agreements between the contracting parties, unless otherwise expressed by the treaty. They only permit the adoption of supplementary provisions that do not derogate from or else affect the treaty. This interpretation is supported by the commentary to article 37 of the ILC Articles on the Law of Treaties (now article 41 VCLT), referring to article 20 of the 1908 Berlin Convention for the Protection of Literary Property as an example of a clause prohibiting *inter se* agreements.[55]

The insertion of similar clauses has become more frequent in recent practice: their drafting stresses that States parties are permitted to supplement or strengthen the treaty's object and scope. In the framework of the Council of Europe, for example, supplementation clauses have been almost regularly included in treaties. A recent example is given by article

[54] 24 April 1963, 596 UNTS 291.

[55] Draft articles on the Law of Treaties with commentaries, ILC Ybk 1966/II, 235, para 2. According to art 20 of the 1908 Berlin Convention for the Protection of Literary Property: 'The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable' (13 November 1908, 828 UNTS 221).

33, paragraph 3 of the 2014 Convention on the Manipulation of Sports Competitions, according to which:

> The Parties to the Convention may conclude bilateral or multilateral treaties with one another on the matters dealt with in this Convention in order to supplement or strengthen the provisions thereof or to facilitate the application of the principles embodied therein.[56]

As the explanatory report specifies, this provision allows parties to conclude supplementary *inter se* agreements that are not inconsistent with the Convention.[57]

More complex effects derive from clauses giving priority to other agreements insofar as they contain provisions which are more conducive to the achievement of the object of the treaty. For instance, article 11 of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal states:

> Notwithstanding the provisions of article 4(5), Parties may enter into bilateral, multilateral or regional agreements or arrangements regarding transboundary movements of hazardous wastes or other wastes with Parties or non-Parties provided that such agreements or arrangements do not derogate from the environmentally sound management of hazardous wastes and other wastes as required by this Convention. These agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by this Convention in particular taking into account the interests of developing countries.[58]

This provision allows the conclusion of agreements not only between some of the parties, but also between parties and non-parties to the Basel Convention. For this reason, it has been considered a possible means to harmonize the content of the Convention, particularly of article 4(5) that prohibits the import from and the export to third States of hazardous wastes, with the principles of most-favoured nation and national treatment provided in the 1994 General Agreement on Tariffs and Trade (GATT).[59] In particular, the possible conclusion of bilateral trade agreements between States parties and non-parties has been debated in relation to the adoption of the 1995 decision III/1 (the 'Ban Amendment' to the Basel Convention) that prohibits all transboundary movements from each State included in the new Annex VII to the Convention to States not included in Annex VII of hazardous wastes intended for final disposal or for reuse, recycling and recovery operations.[60] Arguably,

[56] 18 September 2014, CETS No 215.

[57] Council of Europe Convention on the Manipulation of Sports Competitions, *Explanatory Report*, para 231.

[58] 22 March 1989, 1673 UNTS 57.

[59] 14 April 1994, 55 UNTS 194.

[60] J Crawford and P Sands, *The availability of article 11 Agreements in the Context of the Basel's Convention Export Ban on Recyclables* (International Council on Metal and the Environment, 1997); J Krueger, *International Trade and the Basel Convention* (Earthscan Publications, London 1999) 72.

recourse to article 11 allowing the conclusion of bilateral trade agreements with third States avoids the risk of inconsistencies with GATT obligations, reconciling the Basel Convention with prominent trade principles.

Another variation of supplementation clauses is represented by provisions frequently included in treaties which confer rights on individuals. They establish that if an existing or a future agreement grants higher protection to individuals than does the treaty, that agreement shall prevail. The inclusion of such a clause seeks to ensure that the level of protection will not be diminished but can be raised by future agreements. One of the earliest examples of this type of clause is provided by article 20 of the 1886 Bern Convention for the Protection of Literary and Artistic Works, according to which:

> The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.[61]

This clause refers to existing and future treaties and gives priority to them provided that they further the protection guaranteed by the Convention or supplement the Convention regime in the full respect of its rules. The preserved *inter se* agreements are considered to apply as supplementary instruments to the Convention, while modification is only permitted to raise the level of protection granted by the Convention. As far as this condition is fulfilled, such clauses integrate and develop the treaty regime in the relations among the parties to the supplementary agreements.

In most cases, these clauses not only aim at safeguarding the *inter se* agreements, but also any agreement that requires a party to maintain a higher standard of protection of a particular individual right. For example, article 19, paragraph 8 of the 1919 Constitution of the International Labour Organization reads:

> In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable

[61] 9 September 1886, 1869 UNTS 299. See also art 9, paragraph 2 of the 1994 European Convention relating to Questions on Copyright Law and Neighbouring Rights in the Framework of Transfrontier Broadcasting By Satellite, according to which: 'Parties reserve the right to enter into international agreements among themselves in so far as such agreements grant to authors, performers, producers of phonograms or broadcasting organizations at least as extensive protection of their rights as that granted by this Convention or contain other provisions supplementing this Convention or facilitating the application of its provisions. The provisions of existing agreements which satisfy these conditions shall remain applicable' (11 May 1994, CETS No 153).

conditions to the workers concerned than those provided for in the Convention or Recommendation.[62]

A more recent clause is contained in article 1 of the 2009 European Convention on Access to Official Documents. According to this provision:

> The principles set out hereafter should be understood without prejudice to those domestic laws and regulations and to international treaties which recognize a wider right of access to official documents.[63]

The insertion of the clause at the very beginning of the Convention reflects its relevance. As the explanatory report highlights, the Convention is intended to set out minimum standards while the clause, on the one hand, encourages the raising of such standards and, on the other hand, excludes that any lowering of the existing standards in national laws and practices of contracting States could be justified by virtue of the Convention. In particular, the explanatory report indicates that no provision of the Convention can be interpreted as restricting access to documents regulated by other rules of international law, such as those in the 1950 European Convention on Human Rights (ECHR) regarding the publicity of judgements or in the 1998 Aarhus Convention regarding access to environmental information.[64]

Most human rights conventions contain clauses giving priority to other agreements provided that they secure a more favourable treatment to individuals.[65] These clauses imply that the human rights treaties do not intend to establish self-sufficient catalogues of rights. On the contrary, they contribute to the development of the national legal orders by setting out minimum standards that do not preclude the maintenance or the achievement of a higher level of protection.[66] These clauses reflect the evolving nature of the protection of fundamental rights according to the political and economic conditions of the State and favour the development of the protection within national legal systems.

However it is uncertain whether these clauses involve also the evolutionary interpretation of the rules of international law concerning human rights, since their role is strictly linked to the operation of the principle

[62] 1 April 1919, 15 UNTS 40.

[63] 18 June 2009, CETS No 205.

[64] Council of Europe Convention on Access to Official Documents (25 June 1998, 2161 UNTS 447), Explanatory Report, para 6.

[65] See, for example, art 5, paragraph 2 of the International Covenant on Economic, Social and Cultural Rights: 'There shall be no restriction upon or derogation from any fundamental recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes such rights to a lesser extent' (16 December 1966, 993 UNTS 3).

[66] J De Meyer, 'Brèves réflexions à propos de l'article 60 de la Convention européenne de droits de l'homme', in F Matscher, H Petzold (eds) *Protecting Human Rights: The European Dimension – Studies in Honour of Gerard J. Wiarda* (C Heymann, Cologne 1988) 121.

of subsidiarity. One could consider, for example, the variety of interpretations given to article 53 ECHR. This provision reads:

> Nothing in the Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or by virtue of another convention to which one of the said States is a Party.[67]

Some States have argued that the ECHR also covers rights that, albeit not expressed in its texts, were granted by different treaties. The European Commission of Human Rights has rejected these arguments and observed that article 53 does not extend the catalogue of rights protected by the Convention.[68]

However, article 53 could be viewed to allow a form of 'contamination' among different human rights treaties through the evolutionary interpretation of the ECHR. In the *Jersild* case, for example, Denmark argued that article 10 ECHR should be interpreted in accordance with the 1965 UN Convention on the Elimination of All Forms of Racial Discrimination. The European Court of Human Rights (ECtHR) upheld the need to take into consideration certain provisions of that Convention for the interpretation of article 10 but did not mention article 53 to support its view.[69] More generally, while the European Court has sometimes taken inspiration from other treaties to raise the protection of individual rights, it has never founded its interpretation on article 53.

In certain opinions appended to the ECtHR's judgements, the clause has been invoked to criticize the evolutionary interpretation given to certain provisions. In the *Golder* case, Judge Verdross argued that the ECHR clearly distinguishes between those rights which are included within the Court's jurisdiction according to article 1 and those rights that, according to article 53, have their basis in the internal law of the contracting States. In view of this distinction, Judge Verdross disagreed with the inclusion of the right of access to the courts within the scope of article 6, since any right which is not expressly included in the catalogue exceeds the European Court's jurisdiction.[70]

Similarly, in the *RMT* case, Judge Wojtyczek argued that article 53 does not change the scope of the rights guaranteed by the Convention and that a situation where other treaties offer a higher level of guarantees does not imply that the Court should automatically align the scope of protection on the highest standard set up by other rules of international law. In other terms, article 53 does not extend the European Court's jurisdiction.[71]

[67] 4 November 1950, CETS No 005.

[68] See, for example, *MK et al v Greece*, app n 20723-24/92, 22213-18 e 22220-27/93, para 4.

[69] *Jersild v Denmark* (1995) 19 EHRR 1, para 27.

[70] *Golder v United Kingdom, Separate Opinion of Judge Verdross* (1979-80) 1 EHRR 524.

[71] *National Union of Rail, Maritime and Transport Workers v United Kingdom, Concurring Opinion of Judge Wojtyczek* (2015) 60 EHRR 10, 46.

In certain cases, however, the coexistence of different levels of protection could cause conflicts among different human rights instruments. When a treaty grants a minimum standard of protection, it safeguards only agreements granting a higher level of protection of the same right for the same person. Should this be the case, there will be no conflict between provisions of different treaties. However, a conflict arises when the granting of a higher level of protection of the right of one person (for example, freedom of expression) would result in the lowering of the rights of another person (for example, privacy). What is more favourable for one person may turn out to be less favourable for another.

This type of conflict cannot be solved by invoking clauses such as article 53 since such clauses do not permit any derogation from the provisions of the treaty. However, they indirectly recognize the need to balance competing rights. Hence, in this sense, these clauses enhance the 'living' character of human rights treaties. In the perspective of a national legal system, they recognize the evolving nature of the protection of fundamental rights and the particular role of the interpreter in taking inspiration from different international sources in the balancing of individual rights.

IV. Subordination clauses: Clauses dealing with conflict or inconsistency between treaties

Many studies on saving clauses focus on treaty provisions that aim at regulating the succession of treaties by giving priority to other treaties dealing with the same subject.[72] These 'subordination clauses' are essentially conflict clauses addressing the risk of overlap and inconsistency between different treaties.

A reference to subordination clauses is contained in article 30, paragraph 2 of the 1969 VCLT, which states:

> 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.[73]

Article 30 recognizes the prevalence of the States parties' will as expressed in the clause over the *lex posterior derogat legi priori* rule, which governs the succession of incompatible treaties by giving priority to the most recent treaty when all the parties to the older treaty are also parties to the more recent treaty. The clauses referred to in article 30, paragraph 2 VCLT safeguard other treaties concerning the same subject matter, regardless of the time of their adoption. They also may modify

[72] See, for example, Sadat-Akhavi, Methods of Resolving Conflicts between Treaties, 90; Pauwelyn, Conflict of Norms in Public International Law, 325.

[73] 23 May 1969, 1155 UNTS 331.

the operation of the *lex specialis derogat legi generali* rule, since rules resulting from other treaties apply without regard to their possibly more general character.

In treaty practice, subordination clauses safeguard international instruments which could overlap with the treaty's regime and potentially conflict with its provisions, regardless of their subject matter. In particular, they prevent the risk of breach of a treaty when the States parties of the different treaties do not coincide. Furthermore, they are relevant in the relations among the States parties to both treaties, since they could give preference to an earlier treaty in derogation from the *lex posterior* and the *lex specialis* rules.

A. Two models of subordination clauses

Two models of subordination clauses are common in treaty practice. The first model addresses the relations among the contracting parties only. These clauses accord priority to other treaties which are in force between some of the contracting parties. An example is given by article 15 of the 1979 UN Convention against the Taking of Hostages which states:

> The provisions of this Convention shall not affect the application of the Treaties on Asylum, in force at the date of the adoption of this Convention, as between the States which are parties to those Treaties; but a State Party to this Convention may not invoke those Treaties with respect to another State Party to this Convention which is not a Party to those Treaties.[74]

This clause gives prevalence to treaties on asylum in the relationship between the States parties only and does not affect the relations with States that are not parties to the preserved treaties. Similarly (but with reference to treaties dealing with the same subject matter) article 25 of the 1988 UN Convention against Illicit Traffic of Narcotic Drugs and Psychotropic Substances, entitled 'Non-derogation from earlier treaty rights and obligations', states:

> The provisions of this Convention shall not derogate from any rights enjoyed or obligations undertaken by Parties to this Convention under the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.[75]

As explained in the commentary, this clause was inserted to avoid the 1988 Convention being interpreted as implying any modification of obligations which the earlier treaties imposed on the parties. The Convention was not intended to weaken those treaties, but to supplement and reinforce them and to establish their prevalence in case of incompatibility.[76]

[74] 17 December 1979, 1316 UNTS 205.

[75] 20 December 1988, 704 UNTS 219.

[76] Other conventions contain clauses that follow the same pattern. For example, according to art XXIII of the Convention on the International Liability for Damage Caused by Space Objects: '1.

These clauses were also quite frequent in the early practice of the Council of Europe. An example is provided by article 27, paragraph 1 of the 1964 European Convention on the Punishment of Road Traffic Offences:

If two or more Contracting Parties establish their relations on the basis of uniform legislation or on special arrangements for reciprocity, they shall have the option of regulating their mutual relations in the matter solely on the basis of such systems, notwithstanding the provisions of the present Convention.[77]

This type of clause provides that the contracting States are free to choose which treaty to apply in their mutual relations. This choice entails that the contracting States may exclude *inter se* the application of the treaty and apply other treaties 'in lieu of' the treaty.[78]

However, these clauses have become increasingly rare. A reason could be the growing interconnection of international legal relations and the need for uniform legal standards. In the current practice these clauses are replaced by provisions that tend to exclude mutually exclusive approaches and to preserve both treaties, as well as by the insertion of supplementation clauses. An example is provided by article 33, paragraph 4 of the 2014 European Convention on the Manipulation of Sports Competitions. The clause reads as follows:

If two or more Parties have already concluded a treaty on the matters dealt with in this Convention or have otherwise established relations in respect of such matters, they shall also be entitled to apply that treaty or to regulate those relations accordingly. However, when Parties establish relations in respect of the matters dealt with in this Convention other than as provided for therein, they shall do so in a manner that is not inconsistent with the Convention's objectives and principles.[79]

As the explanatory report observes, this provision tends to ensure that the Convention coexists harmoniously with other treaties dealing with the subject matter covered by the Convention.[80] Therefore, the clause rules out a mutually exclusive approach in the reciprocal relationship between certain contracting States only.

The provisions of this Convention shall not affect other international agreements in force in so far as relations between the States Parties to such agreements are concerned. 2. No provision of this Convention shall prevent States from concluding international agreements reaffirming, supplementing or extending its provisions.' (29 March 1972, 24 UNTS 2389).

[77] 30 November 1964, CETS No 52.

[78] See, for example, the wording of art 26, paragraph 4 of the 1959 European Convention on mutual assistance on criminal matters (20 April 1959, CETS No 030) and art 22, paragraph 3 of the 1983 European Convention on transfer of sentenced persons (21 March 1983, CETS No 112).

[79] 18 September 2014, CETS No 215.

[80] Council of Europe Convention on the Manipulation of Sports Competitions, Explanatory Report, para 230.

Similar wording is increasingly common also in treaties concluded at the universal level.[81] Article 2, paragraph 2 of the 2003 World Health Organization Convention on Tobacco Control, for instance, reads as follows:

> The provisions of the Convention and its Protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to the Convention and its Protocols, provided that such agreements are compatible with their obligations under the Convention and its Protocols. The Parties concerned shall communicate such agreements to the Conference of the Parties through the Secretariat.[82]

However, in the context of the treaties concluded within the framework of the Council of Europe the mutually exclusive approach persists by reference to so called 'disconnection clauses'. These clauses exclude *a priori* the application of the treaty in the *inter se* relations between those State parties which are also European Union (EU) members. An example is provided by article 20, paragraph 3 of the 2003 European Convention on Contact concerning Children, according to which:

> In their mutual relations, States parties which are members of the European Community shall apply Community rules and shall therefore not apply the rules arising from this Convention, except in so far as there is no Community rule governing the particular subject concerned. [83]

Disconnection clauses have an extensive exclusionary effect since they operate automatically and with reference to the entire treaty regime, precluding any effort of reconciliation between the treaty and EU obligations. Their sole function is to grant absolute prevalence to EU law. For this reason, their operation has been criticized for violating the integrity of the treaty by imposing a 'double track regime' and for impairing the equality of States parties.[84] Furthermore, the arguments advanced by the European Commission in defence of the disconnection clauses are solely from the European perspective and merely focus on the need to foster the unity, certainty and superior effect of EU law.[85]

[81] See, for example, art 2, paragraph 2 of the 2003 WTO Convention on Tobacco Control that reads as follows: 'The provisions of the Convention and its Protocols shall in no way affect the right of Parties to enter into bilateral or multilateral agreements, including regional or subregional agreements, on issues relevant or additional to the Convention and its Protocols, provided that such agreements are compatible with their obligations under the Convention and its Protocols. The Parties concerned shall communicate such agreements to the Conference of the Parties through the Secretariat.'

[82] 21 May 2013, 2302 UNTS 16.

[83] 15 May 2003, CETS No 192.

[84] AG Kolliopoulos and CP Economides, 'La clause de déconnexion en faveur du droit communautaire: une pratique criticable' (2006) 112 RGDIP 273. See also, J Klabbers, *Treaty Conflict and the European Union* (CUP, Cambridge 2009) 219.

[85] EU Commission doc SEC (2001) 315 of 19 February 2001.

Another model of subordination clauses accords priority to other treaties also in the relationship with those States that are not parties to both treaties. A well-known example is given by article 351 of the Treaty on the Functioning of the European Union (TFEU), which stipulates:

> The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude.[86]

The effect of subordination, entailed by this provision, is only partial and temporary.[87] It does not apply to EU members in their relations with other members, but with third States only. This point was clearly outlined by the Court of Justice of the European Union (CJEU): 'the terms "rights and obligations" in article 234 [now article 351 TFEU] refer, as regards to the "rights", to the rights of third countries and, as regards the "obligations", to the obligations of member States and that, by virtue of the principles of international law, by assuming a new obligation which is incompatible with rights held under a prior treaty a State *ipso facto* gives up the exercise of these rights to the extent necessary for the performance of its new obligations(...)in matters governed by the [European Economic Community] Treaty, that Treaty takes precedence over agreements concluded between member States before its entry into force, including agreements made within the framework of GATT'.[88]

Article 351 TFEU applies only to agreements which were entered into by member States with third States prior to their accession to the European Union.[89] In the *Open Skies* case, the question was raised if later agreements that amend marginally and in non-essential aspects treaties concluded before the accession are also covered by article 351.[90] While several member States upheld this interpretation, the

[86] 13 December 2007, OJ C115/47

[87] P Eeckhout, *External Relations of the European Union. Legal and Constitutional Foundations* (OUP, Oxford 2004) 334.

[88] The European Court of Justice followed its reasoning, stressing: 'the correct application of art 14 does not adversely affect the rights and obligations of member States in relation to third countries which arise from agreements concluded before the entry into force of the EEC treaty. As a result of art 234 different tariffs are applied to member States and third countries, even though they are parties to the same Geneva agreement of 1956. This is the normal effect of the treaty establishing the EEC. The manner in which member States proceed to reduce customs duties amongst themselves cannot be criticized by third countries since the abolition of customs duties is accomplished according to the provisions of the treaty and does not interfere with the rights held by third countries under agreements still in force' (Case 10/61 *Commission of the European Economic Community v Government of the Italian Republic* [1962] ECR 1).

[89] See FE Dowrick, 'Overlapping European Laws' (1978) 27 ICLQ 649.

[90] Cases C-466/98 *Commission v United Kingdom* [2002] ECR I 09427; C-467/98 *Commission v Denmark* [2002] ECR I 09519; C-468/98 *Commission v Sweden* [2002] ECR I 09575; C-469/98

Commission argued they were to be considered as new agreements. The CJEU sidestepped the issue, considering it unnecessary for its final decision.[91]

In order to avail themselves of a derogation from their obligations under EU law, States have to show that they have taken effective steps in view of modifying their previous incompatible treaties. In particular, they should prove to have made every effort to solve the incompatibility, e.g. entering into negotiations in order to amend or terminate prior treaties. Moreover, in case of failure of the negotiations, the denunciation of the previous treaties could be required.[92]

Although article 351 seems to leave some discretion to the member States in the choice of the measures that are most appropriate to eliminate an incompatibility, the CJEU has adopted in its recent jurisprudence a strict view on the matter. In the judgement *Commission of the European Communities v Republic of Austria*, it found that the Republic of Austria had failed to fulfil its obligations under article 351 by not having taken appropriate steps to eliminate incompatibilities concerning the provisions on transfer of capital, contained in previous investment agreements entered into with some third States.[93] The CJEU reached this conclusion even though the Republic of Austria had entered into negotiations with third States in order to introduce in the previous agreements a provision which would reserve certain powers to regional organisations and would, therefore, justify the application of measures restricting movements of capital and payments which might be adopted by the Council of the European Union. According to the CJEU: 'In the first place, the periods of time necessarily involved in any international negotiations which would be required in order to reopen discussion of the agreements at issue are inherently incompatible with the practical effectiveness of those measures. In the second place, the possibility of relying on other mechanisms offered by international law, such as suspension of the agreement, or even denunciation of the agreements at issue or of some of their provisions, is too uncertain in its effects to guarantee that the measures adopted by the Council could be applied effectively.'[94] Given this finding, member States have now little scope for justifying, on the basis of this clause, any derogation from EU law.

Commission v Finland [2002] ECR I 09627; C-471/98 *Commission v Belgium* [2002] ECR I 09681; C-472/98 *Commission v Luxemburg* [2002] ECR I 09741; C-475/98 *Commission v Austria* [2002] ECR I 09797; C-476/98 *Commission v Germany* [2002] ECR I 09855.

[91] CNK Franklin, 'Flexibility vs. Legal Certainty: Article 307 EC and Other Issues in the Aftermath of the Open Sky Cases' (2005) 10 European Foreign Affairs Review 92.

[92] Case C-812/79 *Attorney General v Juan c Burgoa* [1980] ECR 02787, para 6. See also: Case C-62/98 *Commission of the European Communities v Portugal* [2000] ECR 05171, para 49.

[93] C-205/06 *Commission of the European Communities v Republic of Austria* [2009] ECR 01301, para 45.

[94] Ibid, paras 39-41.

Under this perspective, article 351 TFEU is similar to article 82 of the 1947 Chicago Convention on International Civil Aviation. This provision, entitled 'Abrogation of inconsistent arrangements', reads as follows:

> The contracting States accept this Convention as abrogating all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings. A contracting State which, before becoming a member of the Organization has undertaken any obligations toward a non-contracting State or a national of a contracting State or of a non-contracting State inconsistent with the terms of this Convention, shall take immediate steps to procure its release from the obligations.[95]

Both clauses are included in treaties establishing international organizations whose main purpose is to build up an exclusive regime in the pertinent matters, so that any incompatible arrangement has to be eliminated.

The most controversial question about this type of subordination clauses is the extent to which they accord prevalence to other treaties.

This question was debated before the ICJ between the Former Yugoslav Republic of Macedonia (FYROM) and Greece in the case Application of the Interim Accord of 13 September 1995 with reference to the interpretation of article 22 of the Interim Accord.[96] This provision reads:

> This Interim Accord is not directed against any other State or entity and it does not infringe on the rights and duties resulting from bilateral or multilateral agreements already in force that the Parties have concluded with other States or international organizations.[97]

Greece invoked a broad interpretation of the clause according to which both the rights and the duties of a party to the Interim Accord under a prior agreement prevail over the party's obligations in case of conflict. In the course of the oral proceedings the interpretation was narrowed so that prevalence was to be accorded only if the prior agreement required the State to act inconsistently with the Treaty. According to this version, the clause would safeguard only obligations, not also rights, previously assumed by the contracting States. The FYROM, on the contrary, argued that the clause only contains a factual statement that sets out that the Interim Accord does not change the rights and obligations of third States.[98]

The ICJ did not accept the broad interpretation originally advanced by the Respondent. It justified its view by referring to the CJEU's

[95] 4 April 1947, 15 UNTS 295.

[96] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)* [2011] ICJ Rep, 644.

[97] 13 September 1995, 1891 UNTS I-32193.

[98] Ibid, paras 105-107.

construction of article 351 TFEU, according to which the term 'rights' refers to the third States' rights while the term 'obligations' refers to the obligations of the parties. Furthermore, the Court followed the criterion of *effet utile*, noting that the broad interpretation originally proposed by Greece would have rendered meaningless the core obligations of the Interim Accord, contrary to the evident intention of the parties. At the same time, the Court did not uphold the narrow version of the Respondent's view since it excluded that the prior agreement imposed any duty to act inconsistently with the Interim Accord.[99]

However, should a prior agreement require a party to act in violation of a certain provision of the Interim Accord, the prevalence of such a requirement would be essential in order to avoid the infringement of the rights of third States. Indeed, the criterion of *effet utile* should preserve the legal meaning of the clause, excluding its construction as a mere factual statement. At the same time, it is for the interpreter to try to reconcile the treaties in the specific case.

Certain subordination clauses specify that they operate 'in case of conflict'. Their incidence could be reduced on the basis of a narrow interpretation of the notion of conflict.[100] This is, for example, illustrated by a World Trade Organization (WTO) panel's definition of conflict in the *Indonesia-Automobiles* case. Indonesia was said to have violated article III of the GATT by according tax exemptions to certain national products. According to Indonesia, these measures amounted to subsidies permitted by the WTO Agreement on Subsidies and Countervailing Measures.[101] In particular, article 27, paragraph 3, granting to the developing countries the right to maintain such subsidies, prevailed over article III of the GATT by virtue of Annex 1A of the WTO Agreement that gives priority to specific agreements over the GATT in case of conflict. The Panel refused to accept that interpretation on the basis of a strict understanding of the notion of conflict, according to which: 'In international law for a conflict to exist between two treaties . . . provisions must conflict, in the sense that the provisions must impose mutually exclusive obligations. (. . .). Technically speaking, there is conflict when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously.'[102] On this basis article 27, paragraph 3 of the WTO Agreement on Subsidies and Countervailing Measures did not prevail over article III of the GATT.

To summarize, the practice regarding subordination clauses shows that their wording is evolving from the old model that establishes a strict alternative toward a more inclusive model that provides for the coexistence of different treaties. At the same time, the case-law shows

[99] Ibid, paras 108-112.
[100] Pauwelyn, Conflict of Norms in Public International Law, 334.
[101] 15 April 1994, 1867 UNTS 14.
[102] *Indonesia-Certain Measures Affecting the Automobile Industry*, WTO Panel Report, WT/DS54/R (2 July 1998) para 6.49.

that the interpreters are reluctant to give effect to these clauses and recognize the prevalence of other treaties.

B. Clauses requiring harmonization among treaties

In recent international practice, the relations among treaties have been also addressed by clauses that attempt to coordinate different treaties without establishing a priority among them. These clauses require the interpreter to evaluate, on a case by case basis, the various obligations at stake. In certain cases they are included in order to prevent possible incompatibilities between treaties embodying competing goals in order to establish a relationship based on coexistence and synergy among different international instruments.

An example of this practice is provided by article 22 of the 1992 Convention on Biological Diversity, which states:

> The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. [103]

Thus, in the event of a conflict between the Convention and an earlier treaty, the latter would prevail unless 'the exercise of the rights and obligations contained therein would cause a serious damage or threat to biological diversity.' The reference to a 'serious threat' indicates that the clause was designed to address the relation between treaties having different subject matter and to allow the States parties to implement protective measures in derogation of prior agreements if there was risk of a serious threat to biological diversity.

During the negotiations of the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity,[104] the inclusion of a similarly worded clause was debated. While most developing States agreed with this proposal, the United States and the other States constituting the so-called 'Miami Group' (Argentina, Australia, Canada, Chile, Uruguay) pressed for the inclusion of a stricter clause, aimed at safeguarding existing international rights and obligations.[105] Since the Protocol imposes information procedures for the trans-boundary movement of living modified organisms produced through modern biotechnology techniques, these States feared that the implementation of the Protocol would

[103] 5 June 1992, 1760 UNTS 79.
[104] 29 January 2000, 2226 UNTS 208.
[105] The chairman of the Biosafety Working Group included this clause in the text of the Draft Protocol produced during the final days of the penultimate round of negotiations on the Protocol in Cartagena (See 'Report of the Sixth Meeting of the Open-ended Ad-Hoc Working Group on Biosafety', UNEP/CBD/Excop/1/2, art 31 (1999).

result in derogation from their WTO obligations.[106] On the other hand, other Parties (in particular the European Union) took the view that the Protocol should remain silent on the issue of the relationship between the Protocol and other international agreements.[107]

Finally, the solution proposed by the Miami Group was accepted; however, the clause was not inserted in the text of the Protocol. Rather, it was stated in the Preamble that: 'this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements.' But two further clauses were inserted in the preamble, leaving the general meaning ambiguous. These clauses added that the Parties recognized that 'trade and environment agreements should be mutually supportive with a view to achieving sustainable development' and that 'the above recital is not intended to subordinate this Protocol to other international agreements.' While the first clause seems to give priority to an existing agreement over the Protocol, the two additional clauses focus on the need for a reasonable balance between trade and environment and exclude subordination of the Protocol.

Different views have been expressed on this issue. According to one opinion, the different clauses neutralize each other, so that the Protocol is to be considered as having no saving clause, with the consequence that, in the event of a conflict, the Protocol prevails.[108] According to another view, given the unclear wording of the preamble, the issue of the relationship between its standards and any differing standards in trade agreements remains undetermined.[109] Finally, according to yet another view the Protocol preserves the States parties' rights and obligations under pre-existing agreements, while the additional clauses express a mere political view.[110] Arguably, the first two opinions go too far in considering the reciprocal neutralization of the different statements contained in the preamble and essentially fail to give effect to those statements. Also the third view is not convincing, since it gives effect only to one paragraph of the preamble. The preclusion of modification of earlier agreements as stated by the first preambular paragraph should be

[106] See 'Outstanding Issues and Necessary Revision to the Text of the Draft Protocol: Submission by the Miami Group' (2000) UNEP/CBD/exCop/1/3, Annex III para 7.

[107] See 'Package Proposal on the Text of the Draft Protocol: Submission by the European Union' UNEP/CBD/ExCop/1/3, 15 para 3.

[108] See, for instance, Pauwelyn's comment: 'These two preambular paragraphs seem to neutralize each other. In the end, it is difficult to speak of any remaining conflict clause so that it would seem warranted rather to revert to the conflict rules in general international law, such as *lex posterior* or *lex specialis*' (Pauwelyn, Conflict of Norms in Public International Law, 334). The same view was expressed by M Alfonso, 'The Relationship with Other International Agreements: An EU Perspective' in C Bail, E Falkner and H Malquard (eds) *The Cartagena Protocol on Biosafety: Reconciling Trade in Biotechnology with Environment and Development?* (Earthscan, Routledge 2002) 423.

[109] S Safrin, 'Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements' (2002) 96 AJIL 606, 619.

[110] J Wouters and B De Meester, 'The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law' (2008) 42 Journal of World Trade 205.

understood as not implying subordination but, rather, the need for conciliation. Since the two additional clauses call for a reasonable balance among competing interests and values, one should interpret the existing rights and obligations as far as possible consistently with the core environmental standards deriving from the Protocol.

This three-paragraph formula is common to many modern multilateral environmental agreements. It was included for the first time in the preamble of the 1998 Convention on the Prior Informed Consent Procedures for Certain Hazardous Chemicals and Pesticides in International Trade, in the following terms:

> *Recognising* that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,
> *Emphasizing* that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,
> *Understanding* that the above recital is not intended to create a hierarchy between this Convention and other international agreements...[111]

After the adoption of the Cartagena Protocol, a similar preambular formula was included also in the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture. [112] In this wording, the principle of supportiveness is formulated in more general terms as covering a wider range of relations among different agreements relevant to the treaty's subject matter.

The same wording was later exported beyond the framework of environmental treaties. In particular, it may be found in article 20 of the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which contains two similarly worded paragraphs.[113] In one paragraph the States parties recognize that 'without subordinating this Convention to any other treaty' they 'shall foster mutual supportiveness between this Convention and the other treaties to which they are parties.' The other paragraph states that 'Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties.'

This provision constitutes the outcome of negotiations focused on the relationship between the UNESCO Convention and the WTO agreements. The adoption of the Convention was mainly inspired by the fear

[111] 10 September 1998, 2244 UNTS 337.

[112] The clause says: '*Recognising* that this treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to achieving sustainable development, *emphasizing* that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection, *understanding* that the above recital is not intended to create a hierarchy between this Treaty and other international agreements' (3 November 2001, 2400 UNTS 20).

[113] 5 June 1992, 1760 UNTS 79.

that the liberalization of trade would threaten the cultural identity of certain States as well as by the need to avoid a merely commercial approach to cultural products.[114] However, States expressed different views and interests about the means to promote cultural identity.[115] Some States considered that free trade in cultural property would increase the availability of such property at low prices, thus fostering cultural diversity.[116] Other States contended that, according to economic theory, the market for cultural property, due to its peculiar character, calls for regulation in order to avoid the risk of failure and of the related sacrifice of a certain part of cultural products.[117] Accordingly, a different test was proposed by the latter States, to the effect that the Convention would not prejudge rights and obligations deriving from any existing agreements 'except where the exercise of those rights and obligations would cause serious damage or threat to the diversity of cultural expressions.'[118] Had this wording been accepted, the States parties to the Convention would have been able to enact protective measures, based on the need to avoid a serious damage or threat to cultural diversity. In other words, the provision would have allowed derogating from certain provisions of WTO agreements.[119]

The test finally adopted takes a cautious approach. It would be misleading to consider article 20 a subordination clause. It clearly states that the Convention is not subordinated to other treaties and suggests a more complex interpretation of the relations with other treaty provisions, based on the equal legal force of them and the need of reciprocal harmonization.

The stress on the concept of 'mutual supportiveness' in all the clauses considered here reinforces this view. According to a certain interpretation, this concept expresses a shift from a theory of conflictual relationships to one of co-existence and complementarity among competing goals.[120] The principle of mutual supportiveness favours the convergence of different sources of law in the regulation of a matter. It involves the obligation to take into consideration the provisions of the treaty, both

[114] Wouters and De Meester, The UNESCO Convention on Cultural Diversity and WTO Law, 205.

[115] As noted by one author, such a dispute does not involve only the conflicting attitudes between developing and developed States, like for the interactions between trade and environment and human rights, but takes place within the group of most developed Countries (B De Witte, 'Trade in Culture: International Legal Regimes and EU Constitutional Values', in J Scott and G De Burca (eds), *The EU and the WTO: Legal and Constitutional Issues* (Hart Publishing, Oxford 2001) 237.

[116] See 'Comunication from the United States, Audiovisual and Related Services' (2000) WTO Doc S/CSS/W21 para 6.

[117] WM Shao, 'Is There no Business Like Show Business? Free Trade and Cultural Protectionism' (1995) 20 Yale Journal of International Law 119.

[118] M Hahn, 'A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law' (2006) 9 JIEL 525.

[119] Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154.

[120] R Pavoni, 'Mutual Supportiveness as a Principle of Interpretation and Law-Making: A Watershed for the 'WTO-and-Competing-Regimes' Debate?' (2010) 21 EJIL 650.

in the interpretation and application of existing treaties and in the adoption of future agreements reflecting different interests and goals of the same States. Thus, according to this interpretation, these clauses determine effects that transcend the treaty and influence the negotiation, modification, interpretation and implementation of other treaties.

For instance, States may enact measures of implementation of trade agreements which take into consideration the special nature of cultural property, giving rise to a practice that might be relevant under article 31, paragraph 3(b) of the Vienna Convention on the Law of Treaties (VCLT) as evidence of a shared interpretation of those agreements.

Furthermore, harmonization clauses purport to influence the conclusion of future trade agreements, by imposing on the Parties the obligation to take into consideration the special nature of cultural property or some basic requirements for the protection of biological diversity. They suggest, for example, the need for formulating special rules or derogation clauses in trade agreements to balance market interests with competing goals. States have followed this path by taking the decision to amend the 1994 Agreement on Trade Related Intellectual Property rights in order to insert a new article 29 *bis* establishing a supportive relationship between that treaty and the 1992 Convention on Biological Diversity.[121]

Above all, harmonization clauses involve the centrality of interpretation and, in particular, of systemic interpretation. They do not exclude the idea of conflict. Rather they involve a wider and more complex concept of conflict among treaty provisions since they call for coordination and harmonization not only in situation of mutually exclusive obligations, but also in cases where different treaties confer on the same parties, on the one hand, obligations or prohibitions and, on the other hand, permissions or less strict requirements. In this perspective, harmonization clauses express the common desire of the parties to read the relevant treaties as supporting each other. Thus, they attempt to impact on the interpretation of both the treaty containing the clause and the other treaties.

As to the WTO agreements, this solution is made possible because the principle of mutual supportiveness is increasingly considered also a legal standard within the WTO framework. The 1994 WTO Decision on Trade and Environment, for example, affirmed the objective of 'making international trade and environmental policies mutually supportive.'[122] The 2001 Doha Ministerial Conference declared that 'the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development can and must be

[121] 'Draft decision to enhance mutual supportiveness between the TRIPs Agreement and the Convention on Biological Diversity', WTO/TN/C/W/59 (2011).

[122] Decision of 14 April 1994, MTN/TNC/45 (MIN).

mutually supportive.'[123] This approach has been confirmed by the 2013 WTO Bali Ministerial Declaration.[124]

In other words the harmonization clauses requiring mutual supportiveness of treaties may trigger recourse to article 31, paragraph 3(c) VCLT, especially in case the treaty includes concepts of a flexible character that are by themselves open to extensive interpretation. This should be possible whenever the treaty itself, by virtue of the clause, provides for taking into account other treaties and justifies their relevance in the interpretation of the treaty. In fact one may presume from these clauses that the parties to the treaty intend to comply with their obligations of other treaties and to avoid as far as possible their violation.[125] This common intention of the contracting parties expressed at the time of the treaty's conclusion should be taken into consideration at the interpretation stage, in accordance with the general rule of interpretation.[126] In particular, according to the prevailing view, the principle of systemic interpretation should be anchored to the parties' common intention at the time of the conclusion of the treaty.[127] This method does not necessarily preclude some sort of evolutionary reading of the treaty. But should the clause require harmonization with possible future treaties, one could presume from the clause that the parties intended to allow the evolutionary interpretation of the treaty.

For instance, article XIV, paragraph a of the 1994 General Agreement on Trade in Services, which allows for measures necessary to protect public order, could be interpreted according to a wide notion of 'public order' that encompasses various essential national needs, including the preservation of cultural property and biological diversity.[128] In this context, the clauses could be taken to reflect the common understanding of the parties about an extensive meaning of 'public order'.[129]

[123] WT/MIN(01)/DEC/W/1, para 6.

[124] WT/MIN(13)/DEC, para 1.10.

[125] About a presumption against conflicts between treaties see: G Gaja, 'The Protection of General Interests in the International Community' (2014) 364 Recueil des Cours 70.

[126] See on the relationship between the process of systemic interpretation and the general rules of interpretation: E Bjorge, *The Evolutionary Interpretation of Treaties* (OUP, Oxford 2014) 188; P Palchetti, 'Interpreting "Generic Terms": Between Respect for the Parties' Original Intention and the Identification of the Ordinary Meaning', in N Boschiero, T Scovazzi, C Pitea and C Ragni (eds), *International Courts and the Development of International Law* (Springer, The Hague 2013) 91.

[127] This interpretation was recently upheld by the ICJ in the *Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)* [2009] ICJ Rep, 213, para 63. In this judgement, the Court stated: 'It is true that the terms used in a treaty must be interpreted in light of what is determined to have been the parties' common intention, which is, by definition, contemporaneous with the treaty's conclusion.'

[128] 15 April 1994, 1869 UNTS 183.

[129] Similar reasoning was adopted by the WTO Appellate Body in the well-known *United States-Import Prohibitions of certain Shrimp and Shrimp Products*, WT/DS58/AB/R (18 October 1998) para 130. In this case the generic term 'natural resources' in art XX(g) of the GATT was interpreted in the light of treaties regarding the protection of environment or the law of the sea. According to the ICJ, dynamic interpretation is justified by the idea that the utilisation of generic terms in a treaty implies that the parties have intended them to have a flexible and systemic, sometimes also an evolving meaning. In the Advisory Opinion on the *Legal Consequences for States of the Continued*

This view was held by the European Community (now European Union) in the *EC-Biotech Products* case in respect to the 'three paragraph clause' contained in the 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity.[130] The clause was instead interpreted by the counterparties as a 'subordination clause' excluding any impact of the Cartagena Protocol on the WTO agreements. The WTO Appellate Body substantially agreed with the European Community that the provisions of the Cartagena Protocol are 'rules of international law' within the meaning of article 31, paragraph 3(c) VCLT and rejected the interpretation of the clause as a 'subordination clause'.[131] This upholds the idea that the harmonization clauses trigger the recourse to systemic interpretation. At the same time, the Appellate Body narrowly interpreted the test of 'applicability' as requiring that all the States parties of the WTO agreements must have ratified the Cartagena Protocol in order to render it relevant in the interpretation.[132]

Such a narrow construction of the 'applicability' test is controversial. Indeed, as stressed by one author, the requirement of the complete identity of the parties would have 'the ironic effect that the more the membership of a particular multilateral treaty expanded, the more those treaties would be cut off from the rest of international law.'[133]

In other cases WTO panels have applied a wider test, enhancing the need for the other relevant rules to express the common understanding of all members as to the meaning to a certain term or concept.[134]

Also the ECtHR has sometimes relied on other treaties which were not binding on all the contracting States and, occasionally, not even on the respondent State itself, in the interpretation of the ECHR. According to the Court: 'it is not necessary for the respondent State to have ratified the entire collection of instruments that are applicable in respect of the

Presence of South Africa in Namibia (South West Africa), the concept of 'sacred trust' was interpreted 'within the framework of the entire legal system prevailing at the time of the interpretation' ((1971) ICJ Rep, 16, para 53). In the *Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, the Court applied the new norms and standards for the protection of the environment that had been developed as the result of growing scientific insights and awareness of the risk to mankind, and considered them as influencing the human activities run under the treaty ((1997) ICJ Rep, 88, para 140). Similarly, in the *Case concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, the term 'commerce' was taken to imply an evolving meaning according to the legal framework as developed after the conclusion of the treaty (2009) ICJ Rep, 213, para 66).

[130] *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R (29 September 2006) para 7.55.

[131] Ibid, para 7.65.

[132] Ibid, para 7.68.

[133] CA McLachlan 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 ICLQ 282, 314.

[134] In the *United States-Restrictions on Imports of Tuna*, the GATT panel required the identity of the parties (DS29/R para 5.19, 16 June 1994). However, in other cases a wider test was adopted, according to which the other rule relied upon must be accepted or tolerated by all parties to the treaty as expressing the common understanding of all members as to the meaning to a certain term or concept (*United States-Import Prohibitions of certain Shrimp and Shrimp Products*, WT/DS58/AB/R (12 October 1998)).

precise subject matter of the case concerned. It will be sufficient for the Court that the relevant international instruments (...) show, in a precise area, that there is common ground in modern societies.'[135]

The need for a wider understanding of the applicability test was advocated also by a report submitted to the ILC, considering that the condition of coincidence of parties would render ineffective the principle of systemic interpretation in the relations among many multilateral regimes.[136] Arguably, the insertion of harmonization clauses reinforces this claim, especially when the clause refers to treaties that are not binding on all contracting States.

V. Conclusion

The treaty practice examined in this article reveals a progressive enrichment and reinforcement of the role of saving clauses as a means for addressing the relations among different treaties.

The analysis was divided into two main parts. The first part was dedicated to delineation clauses. These provisions, while aiming at defining the content of the treaty, set out States' freedom of action in certain matters related to but not covered by the treaty, and may provide in different ways for the possible application of further rules of international law in these matters. In this light, the clauses entail that different treaties should be interpreted as reciprocally supportive and applied as complementary or supplementary instruments. This favours the concurrent operation of all the guarantees deriving from international law and their possible development.

The concurrent application of different sources of law is due to rationalisation among different topics in case of clauses defining the scope of application of the treaty. In particular, it is due to the relation of speciality between provisions of different treaties in case of clauses recognizing special rules and to the strengthening of the treaty regime in case of supplementation clauses. In particular, the analysis highlights that supplementation clauses are coming to be more often used in practice, and that clauses recognizing special rules are increasingly interpreted so as not to exclude the application of general rules, according to an inclusive (instead of mutually exclusive) approach.

The second part of the study focused on two different models of conflict clauses: subordination and harmonization clauses. While the first model gives prevalence to other treaties in case of overlap, the second

[135] *Demir and Baykara v Turkey* (Grand Chamber) (2009) 48 EHRR 54, para 86. See also C Pitea, 'Interpreting the ECHR in the Light of "Other" International Instruments', in N Boschiero, T Scovazzi, C Pitea and C Ragni (eds), *International Courts and the Development of International Law* (Springer, The Hague 2013) 545.

[136] M Koskenniemi, Fragmentation on international law: difficulties arising from the diversification and expansion of international law, 237, paras 470-471.

model places the different treaties on an equal footing and calls for their reciprocal coordination, according to the principle of mutual supportiveness. The wording of conflict clauses has tended to evolve from older provisions entailing a mutually exclusive approach towards more inclusive clauses that require coexistence and coordination between different treaties.

In spite of the different function of each clause, practice concerning saving clauses reveals the general tendency of conceiving the different treaties as a network of interrelated and mutually supportive rules. Indeed, their use is increasing in modern treaty practice and their drafting is developing with the view of achieving the coexistence and coordination among international instruments covering the same subject matter.

In this perspective, saving clauses reveal an increasingly holistic approach to the legal system. States appear to assume that different sources of law may interact in regulating the matters covered by the treaty and do not conceive the treaty as an isolated, self-referring legal regime. The clauses point to the scope of the treaty regime, postulating its incompleteness and, under certain conditions, the need to fall back on other rules of international law. This implies that general treaties are unavoidably incomplete bodies of law that cannot cover all the legal implications and regulatory needs involved.[137]

From this perspective, such clauses potentially bring into connection various bodies of rules by indicating which treaty rules may be derogated from in order to leave room to other special rules more suited to the matter, and which, instead, have to be applied in addition to, or in harmonization with, other rules of international law. Depending on their wording, they could also favour the evolutionary character of the international legal system, rendering the treaties living instruments open to further development.

Theoretically, this practice sheds light on the structure of the international legal system, challenging both the 'pyramid model' based on the assumption of an intrinsic hierarchical order[138] and the idea of a web of isolated, if not self-contained, treaty regimes. It rather shows a network of provisions of international law, concerning different areas that could be interrelated by mechanisms of coordination and harmonization. In this light, saving clauses favour the frame of a system of law which is not only premised on the 'toile de fond'[139] of customary law, but also on a web of normative connections among treaties.

In practice, saving clauses give the interpreter the pivotal task of bringing the treaty in relation with other rules of international law,

[137] They are planets in the universe of international law, according to the metaphor of Simma and Pulkowski, Of Planets and the Universe: Self-contained Regimes in International Law.

[138] F Ost and M van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Publications Fac. St Louis, Bruxelles 2002).

[139] *Gulf of Maine* (1984) ICJ Rep, 246, para 83.

extending the scope of the international rules relevant in the interpretation of the treaty and revealing in which ways the treaty is to be integrated, derogated from, or balanced with reference to other obligations resting on the parties.

They enhance the interpreter's role also by promoting a wider concept of 'conflict' among treaty provisions. According to this concept, the interpreter should provide for harmonization not only whenever different provisions lay down mutually exclusive obligations, but also in the more tricky relationship between a permissive norm and an obligation (or a prohibition) or in case of divergent provisions regarding the same subject matter.

However, the case law on the interpretation and application of saving clauses is not much developed. Interpreters seem reluctant to rely on saving clauses in order to take into account other treaties relevant to the case. They usually refrain from invoking them even when they resort to other international instruments in the interpretation of the treaty. This is likely due to the unclear and ambiguous wording of most saving clauses. Their drafting should be refined in order to render their meaning more transparent, spelling out the effects entailed by each clause.